

Warner v Kaplan

2007 NY Slip Op 30456(U)

March 28, 2007

Supreme Court, New York County

Docket Number: 0102920/2006

Judge: Barbara R. Kapnick

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

BARBARA R. KAPNICK
J.S.C.

PRESENT:

PART 12

Index Number : 102920/2006

WARNER, TRACY ALTMAN

vs

KAPLAN, KENNETH F.

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. 102920/06

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

FILED
APR 02 2007
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 3/28/07

BARBARA R. KAPNICK

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

[* 1]

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 12

-----X

TRACY ALTMAN WARNER and ALAN G. KRAUT,
as Co-Executors of the Estate of
GLEN ALTMAN, Deceased,

DECISION/ORDER

Index No. 102920/06
Motion Seq. No. 001

Plaintiff,

-against-

KENNETH F. KAPLAN, DIANE K. KAPLAN
and ROSENBLUTH & ROSENBLUTH, as
Escrowee,

Defendants.

-----X

BARBARA R. KAPNICK, J.:

In this action seeking the return of a \$230,000 contract deposit placed in connection with the sale of a cooperative apartment, defendants Kenneth F. Kaplan and Diane K. Kaplan (the "Kaplans") move for summary judgment dismissing the Complaint, pursuant to CPLR § 3212.

On May 11, 2005, Glen Altman ("Altman") executed a Contract to purchase the Kaplans' cooperative apartment in a building located at 1150 Park Avenue in Manhattan for the sum of \$2,300,000. Pursuant to the Contract, Altman deposited ten percent of the purchase price (\$230,000) with defendant Rosenbluth & Rosenbluth, who were the sellers' attorneys. The parties agreed that this would be an all cash transaction and that the balance of the purchase price was due at the closing, which was scheduled in the Contract of Sale for September 15, 2005.

In paragraph 4.2 of the Contract, Altman specifically represented that she was purchasing the apartment "solely for residential occupancy of the Unit by the Proposed Occupants only and will so represent to the Corporation in connection with Purchaser's application to the Corporation for approval of this transaction by the Corporation."

Pursuant to paragraph 6.1 of the Contract, the sale was subject to the approval of the Cooperative Corporation through its Board of Directors. In order to obtain that approval, Altman filled out an application and submitted personal and financial references and financial information, including a personal financial statement, bank statements and tax returns, to the Board on or about July 27, 2005. She also appeared before the Board for a personal interview on August 11, 2005.

The Kaplans contend that on August 18, 2005, the Cooperative Corporation approved the transfer and assignment of the shares and proprietary lease to Altman in writing and issued its consent. Defendants further allege "[u]pon information and belief, by on or about August 22, 2005, Altman had been advised that the Corporation had consented to the transfer of the Unit."

On September 1, 2005, Altman passed away unexpectedly.

Thereafter, Tracy Altman Warner, Altman's daughter, and Alan G. Kraut were appointed co-executors of Altman's estate (the

"plaintiffs"). The plaintiffs refused to close title under the Contract and, on September 28, 2005, they sent a letter to Rosenbluth & Rosenbluth demanding the return of the contract deposit "with interest as provided for under paragraph '1.18' and '28' of said contract." The Kaplans refused to return the deposit and by letter dated October 6, 2005, instructed Mr. Rosenbluth not to release the escrowed funds.

The plaintiffs then commenced this lawsuit on or about February 28, 2006 claiming that the Contract was void because Altman had not received the required approval from the cooperative's Board of Directors prior to her death, "nor was approval of the sale pursuant to the Contract issued by the Corporation and/or the Managing Agent" subsequent to her death.

The Kaplans now argue that the Complaint must be dismissed because: 1) the Cooperative's Board of Directors consented to the sale on August 18, 2005 and Laurel Rosenbluth, one of the real estate brokers involved in the sale, states in her Affidavit that she promptly advised Altman and Altman's real estate broker's assistant that the Board had approved the sale¹ and 2) paragraph 15.2 of the Contract makes the contract binding on Altman's heirs

¹ In fact, Ms. Rosenbluth specifically stated that "[a]t that time, she asked me to make an appointment for her to return to the apartment so that she could look at some of the Kaplans' personal property to determine what, if any, she wanted to purchase. On August 22, 2005 I went to the apartment with Mrs. Altman and her stepdaughter Pat Falkenberg."

and legal representatives.² The Kaplans contend that plaintiffs' refusal to close constituted a default by the purchaser and that, pursuant to Paragraph 13.1 of the Contract, they exercised their remedy in the event of the buyer's default by terminating the Contract and retaining the \$230,000 contract deposit as liquidated damages.³

In opposition, plaintiffs argue: 1) on information and belief, that the Cooperative's policies and procedures would not have permitted the Kaplans to sell the apartment to Altman's estate and, therefore, Altman's death excused performance of the Contract; 2) that the consent of the Corporation's Board of Directors was not communicated to Altman during her lifetime and 3) that the motion is premature because defendants have not responded to plaintiffs' discovery requests and that plaintiffs have not had an opportunity to examine non-party witnesses.

The Contract of Sale in this case contains two sections which appear to be in conflict under the circumstances presented herein. First, there is paragraph 4.2 in which Altman represented that she would be the sole occupant of the Unit and then there is paragraph

² Paragraph 15.2 of the Contract states that "[t]his contract shall bind and inure to the benefit of the Parties hereto and their respective heirs, personal and legal representatives and successors in interest."

³ Paragraph 13.1 of the Contract provides, in pertinent part: "In the event of a default or misrepresentation by Purchaser, Seller's sole remedy shall be to terminate this Contract and retain the Contract Deposit as liquidated damages"

15.2 which provides that the Contract would bind the parties' heirs and personal and legal representatives.

Plaintiffs also refer to a letter dated November 17, 2005 from defendant Kenneth F. Kaplan to Gumley-Haft, the Managing Agent of the Cooperative Corporation, which plaintiffs apparently received from the Corporation in response to a Subpoena Duces Tecum served upon it by counsel for the Kaplans.

Although a copy of this letter is not annexed to the motion papers, it is quoted by plaintiffs in their Memorandum of Law without contradiction by defendants' counsel in their Reply papers.

The letter apparently states, in relevant part, that

as you are aware, our apartment was to be sold in September, but due to unfortunate circumstances of the death of the buyer, the closing did not take place. The estate of the deceased buyer has not chosen to go forward. Regretfully, the Board did not take the affirmative position of indicating that it would honor the contract and let the estate purchase the apartment, but rather chose what I thought was a 'neutral' position by not taking a position.

Accordingly, based on the papers submitted and the oral argument held on the record on November 29, 2006, it appears to this Court that there are questions of fact as to whether or not the Corporation would have permitted the plaintiffs to close on the apartment, even if they had been ready and willing to do so, which preclude the granting of summary judgment at this time. Plaintiffs, as strangers to the contract, should have an opportunity to conduct discovery of both the parties and the non-party witnesses involved

in the transaction before the Court determines whether the Kaplans are entitled to judgment as a matter of law.

Accordingly, this motion for summary judgment dismissing the Complaint is denied as premature, with leave to renew, if deemed appropriate, when discovery is completed.

Counsel for both parties are directed to appear for a preliminary conference in IA Part 12, 60 Centre Street, Room 341 on May 2, 2007 to set up a discovery schedule.

This constitutes the decision and order of this Court.

Date: March 28, 2007



Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK
J.S.C.

FILED

APR 02 2007

COUNTY CLERK'S OFFICE
NEW YORK