

Price v Lavita

2007 NY Slip Op 30861(U)

April 11, 2007

Supreme Court, Suffolk County

Docket Number: 0002403/2006

Judge: Edward D. Burke

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SUPREME COURT - STATE OF NEW YORK
IAS/TRIAL PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. EDWARD D. BURKE
Acting Justice of Supreme Court

Motion R/D : 03/19/07
Adj. Date : 04/04/07
Mot Seq # : 001 MG
002 XMOTD
CDISPSJ

-----X
WILLIAM H. PRICE, JR.,

- against -

Plaintiff(s),

RONALD J. LAVITA,

Defendant(s).
-----X

WILLIAM PRICE, ESQ.
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RONALD J. LAVITA, ESQ.
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Upon the following papers numbered 1 to 10 read on this motion by the plaintiff for summary judgment and cross-motion by defendant for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1 to 3; Notice of Cross Motion and supporting papers 4 to 6; Answering Affidavits and supporting papers 7 to 8; Replying Affidavits and supporting papers 9 to 10; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#001) by the plaintiff for summary judgment on his complaint and the cross-motion by the defendant for summary judgment dismissing the complaint are decided as follows:

The plaintiff commenced this action for a judgment directing the defendant to specifically perform an escrow agreement executed by the parties to this action and their respective principals on December 7, 2005. Said agreement provides, in relevant part, as follows:

“ESCROW AGREEMENT

AGREEMENT, made this 7th day of December, 2005, by and between Patricia A. Vanderhyde, as Seller, Donna Kramer, as Purchaser, Ronald J. LaVita, as Attorney for Seller, and William H. Price, Jr. as Escrow Agent.

WHEREAS, on the 17th day of November, 2004, Ronald J. LaVita, as Escrow Agent, Patricia A. Vanderhyde, as Seller, and donna Kramer, as Purchaser, entered into an agreement whereby the Escrow Agent would hold \$15,000.00 in escrow toto insure the delivery of a Certificate of Occupancy regarding the one-story dwelling, detached garage,

roofed area at the front of the building, the entry porch, and pool, if necessary, for the premises known as 33 Aloma Road, Rocky Point, New York, a copy of which is annexed as Exhibit A; and

WHEREAS, Seller has not provided said Certificate of Occupancy as aforesaid; and

WHEREAS, Seller has requested an extension of time in order to provide the Certificate of Occupancy as aforesaid; and

WHEREAS, the Purchaser has agree to extend said time,

NOW, THEREFORE, it is agreed as follows:

1. Seller shall have forty-five (45) days from the date a fully executed copy of this Escrow Agreement is delivered to Seller's attorney, Ronald J. LaVita, by facsimile transmission.

2. Ronald J. LaVita shall pay over to William H. Price, Jr., as Escrow Agent, th \$15,000.00 held in escrow, to be held in escrow by said William J. Price, Jr., ans signature between the Seller and the Purchaser of this agreement expressly authorizes the transfer of the escrow from Ronald J. LaVita to William H. Price, Jr.

3. All of the parties agree to cooperate. Without limiting the generality of the foregoing, the Seller shall give 24 hours notice to the Purchaser before entering upon the premises. It is expressly agreed and understood that the Purchaser cannot be available to allow access to the interior of the premises on Tuesdays. The Seller agrees that any and all work done... ..

4. In the event that said Certificate of Occupancy is not delivered to William H. Price, Jr. before the expiration of the forty-five (45) day period, he is authorized and directed to pay over said \$15,000.00 held in escrow to the Purchaser, Donna Kramer, without any further authorization, and upon said delivery, all rights and liabilities between the parties shall cease and be null and void as though each party had executed and delivered to the other a general release.

5. In the event that the said Certificate of Occupancy is delivered to William H. Price, Jr. on or before the expiration of said forty-five (45) day period, said \$15,000.00 held in escrow will be paid over to Ronald J. LaVita, as attorney for Seller, Patricia A. Vanderhyde, and upon said delivery, all rights and liabilities between the parties shall cease and be null and void as though each party had executed and delivered to the other a general release."

The complaint served and filed herein contains a single cause of action, namely, that the defendant be directed to specifically perform his obligation under the terms of the December 7, 2005 escrow agreement by delivering to the plaintiff, the escrow monies totaling \$15,000.00 which the defendant holds in escrow pursuant to the first escrow agreement. The answer served and filed by the defendant contains five (5) affirmative defenses and one (1) counterclaim, the latter charging the plaintiff with abuse of process. For the reasons set forth below, the plaintiff's motion (#001) is granted while the cross-motion (#002) by the defendant is denied.

COPY

The purpose of an escrow agreement is to assure the performance of an outstanding contractual obligation by the deposit of money or other property with a third-party escrowee who agrees to hold same until the occurrence of specified events or satisfaction of some condition whereupon the delivery of the escrow monies and/or property by the escrowee to the promisee is mandated by the terms of the escrow agreement (see, 55 NYJur2d; Escrows). The powers and authority of the escrow agent is limited by the terms of the escrow agreement (*Entertainment & Amusements of Ohio, Inc. v Banes*, 49 Misc2d 316, 267 NYS2d 359). An escrowee has a contractual obligation to comply with the terms of the escrow agreement (*Takayama v Schaefer*, 240 AD2d 31, 669 NYS2d 656), as said escrowee is a trustee for the benefit of the parties to the escrow agreement and to anyone with a beneficial interest in the escrow (*Farago v Burke*, 262 NY 229, 186 NE 683). The escrow agent is thus the agent of all parties to the escrow agreement and, as trustee, must act for their benefit (see, *99 Commercial Street, Inc. v Goldberg*, 811 FSupp 900; see, also, *Farago v Burke, supra*). A duly designated escrow agent may sue to recover possession of the money and/or other property that is the subject of the escrow agreement without the joinder of those with a beneficial interest in the escrow (*Oppenheim v Simon*, 57 AD2d 1006, 394 NYS2d 500).

Upon the application of the foregoing principles to the instant case, the court finds that none of the affirmative defenses asserted in the answer of the defendant are meritorious. The first, failure to state a cognizable claim, is procedurally defective (*Platt v Portnoy*, 220 AD2d 652, 632 NYS2d 659). The second, that the plaintiff is not a real party in interest, is likewise without merit (*Oppenheim v Simon, supra*). The third affirmative defense, i.e., that the defendant is only a stakeholder and is thus not a proper party to be sued individually, does not warrant dismissal of the plaintiff's complaint. Instead, the court hereby amends the caption of this action to reflect the defendant's fiduciary office of escrowee and that his appearance in this action is limited to such capacity. The defendant's remaining affirmative defenses are equally unavailing (*Farago v Burke*, 262 NY 229, 186 NE 683, *supra*; *Takayama v Schaefer*, 240 AD2d 31, 669 NYS2d 656, *supra*). Also dismissed as without merit is the defendant's counterclaim which charges the plaintiff with abuse of process (*Siegel v Smith, Pahnish & Shapiro, P.C.*, 136 AD2d 620, 523 NYS2d 866, *supra*). Plaintiff is thus awarded summary judgment dismissing the defendant's affirmative defenses and counterclaim.

The court further finds that the plaintiff is entitled to summary judgment on its complaint for specific performance of the December 7, 2005 escrow agreement. The defendant, as signatory thereto in his capacity as escrow agent, was duly obligated to transfer the escrow to the plaintiff in accordance with the terms of the December 7, 2005 agreement. Defendant's failure to do so, which is not in dispute, warrants the granting of summary judgment to the plaintiff on his sole cause of action for specific performance of the December 7, 2005 escrow agreement. The defendant, as escrow agent, is thus directed to deliver the \$15,000.00 escrow to the plaintiff within ten (10) days after service of a copy of this the judgment to be entered herein.

In view of the foregoing, the instant motion (#001) by the plaintiff for summary judgment is granted, while the cross-motion (#002) by the defendant for summary judgment dismissing the plaintiff's complaint is denied. The caption of this action is hereby amended to reflect the capacity of the parties as follows:

WILLIAM H. PRICE, JR.,

Plaintiff(s),

- against -

Index No. 002403/2006

RONALD J. LAVITA, as Escrow Agent,

Defendant(s).

Settle Judgment .

Dated: April 11, 2007.


EDWARD D. BURKE, A.J.S.C.