

Grunfeld v Berger

2007 NY Slip Op 32233(U)

July 17, 2007

Supreme Court, New York County

Docket Number: 0600500/2006

Judge: Richard F. Braun

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

PRESENT: HON. RICHARD F. BRAUN
J.S.C.

PART 23

Index Number : 600500/2006

GRUNFELD, JASON, et al.

vs

BERGER, CAROLE, et al.

Sequence Number : 001

OTHER RELIEFS

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INDEX NO.

OTION DATE

OTION SEQ. NO.

OTION CAL. NO.

1/4/07

FILED

JUL 23 2007

NEW YORK COUNTY CLERK

and cross motion for summary judgment

PAPERS NUMBERED

1

2

3

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

Notice of cross motion
Answering Affidavits — Exhibits

Replying Affidavits

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is granted to the extent of awarding plaintiffs summary judgment against defendants in the amount of \$99,999 and defendant Alice B. Newman shall refund that amount to plaintiffs; costs and disbursements against defendant Carole Berger; as to liability against that defendant for reasonable attorney's fees and court costs, which will be assessed at a hearing; and dismissing the counterclaim; and it is further*

ORDERED that the cross motion is granted to the extent of awarding defendants summary judgment dismissing the third cause of action of plaintiffs, and it is further

ORDERED that the Clerk shall enter judgment accordingly.

This constitutes the decision and order of the Court. See separate Opinion. ENTER:

Dated: New York, New York, July 16, 2007

[Signature]
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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 23**

-----X
JASON GRUNFELD and JESSICA GRUNFELD,

Index No. 600500/06

Plaintiffs,

OPINION

-against-

CAROLE BERGER and ALICE B. NEWMAN, ESQ.,
as Escrow Agent,

Defendants.
-----X

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RICHARD F. BRAUN, J.:

This is an action for damages for breach of contract and unjust enrichment, and a declaratory judgment. Defendant Carole Berger (Berger) counterclaimed for damages for breach of contract and defendants for a declaratory judgment. Both sides move for summary judgment.

A party moving for summary judgment must demonstrate his, her, or its entitlement thereto as a matter of law, pursuant to CPLR 3212 (b) (*JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 382 [2005]). To defeat summary judgment, the party opposing the motion must show that there is a material question(s) of fact that requires a trial (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

The cooperative corporation did not consent to plaintiffs' buying the subject apartment. Under paragraph 6.1 of the contract of sale, the purchase was subject to the unconditional consent of the cooperative corporation. Pursuant to paragraph 6.3 of the contract, if such consent was not given, then plaintiffs had the right to cancel the contract and receive a refund of their contract deposit from the escrowee, defendant Alice B. Newman (Newman). If the cooperative corporation's refusal or failure to consent was due to plaintiffs' bad faith, then defendant Berger could keep the contract

deposit as liquidated damages, pursuant to paragraphs 6.4 and 13.1 of the contract.

Plaintiffs have shown that they are entitled to summary judgment. They fulfilled their obligations under the contract of sale. After the cooperative corporation required plaintiffs to reduce their financing from 75% to 50%, plaintiffs cancelled the contract, but the deposit was not returned to them. Plaintiffs thus were entitled to a refund of their deposit; and, pursuant to paragraph 13.3 of the contract, reasonable attorney's fees, disbursements, court costs, and litigation expenses, but not against defendant Newman, as per paragraph 27.3 of the contract.

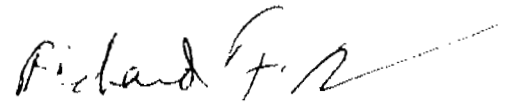
Defendants have not demonstrated that there is any material question of fact that requires a trial. Defendants did not sustain their burden of proof (*see Lindenbaum v Royco Prop. Corp.*, 165 AD2d 254 [1st Dept 1991]) to show that plaintiffs intended to cause the cooperative board to reject plaintiffs' being approved as purchasers of the apartment (*see Corazza v Jacobs*, 277 AD2d 52, 53 [1st Dept 2000]; *Kapur v Stiefel*, 264 AD2d 602, 603 [1st Dept 1999]). Even if plaintiffs' transactional attorney did tell defendant Newman that plaintiffs wanted to get "out of this deal", that was after the cooperative board changed the financing terms from that of the contract, which was unacceptable to plaintiffs.

Generally, a declaratory judgment cause of action should not be dismissed (*Lanza v Wagner*, 11 NY2d 317, 334, *cert denied* 371 US 901 [1962]). However, where, as here, the parties have a sufficient, alternative remedy asserted in another cause of action, such as breach of contract, the declaratory judgment claim is unnecessary, and it is proper to dismiss that cause of action (*Apple Records v Capitol Records*, 137 AD2d 50, 54 [1st Dept 1988]).

Therefore, by this court's July 16, 2007 decision and order, plaintiffs have been awarded summary judgment against defendants in the amount of the \$99,999.00 escrow deposit, which shall

be paid to plaintiffs by defendant Newman; costs and disbursements against defendant Berger; as to liability against that defendant for reasonable attorney's fees and litigation expenses, which must be assessed at a hearing; and dismissing the counterclaims. The cross motion was granted to the extent of awarding defendants summary judgment dismissing plaintiffs' third cause of action.

Dated: New York, New York
July 17, 2007



RICHARD F. BRAUN, J.S.C.

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JUL 23 2007
NEW YORK
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