

Shustik v Hudson St. Assoc., LLC

2007 NY Slip Op 32401(U)

July 30, 2007

Supreme Court, New York County

Docket Number: 0604202/2006

Judge: Walter Tolub

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SCANNED ON 8/3/2007
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **WALTER B. TOLUB** Justice

PART 15

Index Number : 604202/2006
SHUSTIK, SHAI
VS
HUDSON STREET ASSOCIATES
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISIONS

FILED

AUG 03 2007

NEW YORK
COUNTY CLERKS OFFICE

Dated: 7/30/07

WALTER B. TOLUB S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: 1AS PART 15

-----x
SHAI SRUSTIK

Plaintiff,

Index No. 604202/06

Mtn Seq. 002

-against-

HUDSON STREET ASSOCIATES, LLC and KRAMER
LEVIN NAFTALIS & FRANKEL, LLP as Escrow
Agent,

Defendants.
-----x

WALTER B. TOLUB, J.:

By this motion, Defendant Hudson Street Associates, LLC, (hereinafter "Defendant") seeks summary judgment pursuant to CPLR §3212 dismissing Plaintiff's complaint in its entirety and a declaration that Plaintiff is in violation of the Agreement. Defendant also seeks an order directing the Kramer Levin Neftalis & Frankel, LLP, (hereinafter "Escrow Agent or Co-Defendant") to release Plaintiff's down-payment and deposit to Defendant Hudson Street Associates. Plaintiff cross-moves for partial summary judgment pursuant to CPLR §3212 for the release and return of Plaintiff's down-payment. Both Defendant's motion and Plaintiff's cross-motion are denied in their entirety as there remain questions of fact to be determined by a jury.

Facts

On May 5, 2005, Plaintiff contracted to buy a one-bedroom Apartment in a newly constructed building to be owned and

operated as a condominium. Plaintiff made an initial deposit of \$123,500.00 on May 16, 2005 and an additional down-payment of \$58,000.00 to the Escrow Agent on August 12, 2005. The \$181,500.00 remains in an escrow account held by the Co-Defendant.

On September 12, 2006, Defendant notified the Plaintiff that construction of the Apartment was complete and that the closing would take place on October 12, 2006. On October 10, 2006, an inspection of the Apartment was made by the Plaintiff and a pre-closing Punch List was generated by Olga Feliciano, Defendant's assistant. On October 23, 2006, the Plaintiff informed the Defendant that the October 25, 2006 closing date would have to be adjourned because the apartment had "material defects" and was therefore not in the appropriate condition for closing. By letter dated October 25, 2006, Defendant responded stating that "[t]here is no basis for your statement that the Purchaser is cancelling the closing scheduled for today, October 25, 2006 (the 'Closing Date')'. Neither the Contract nor the Offering Plan... provide the purchaser with the right unilaterally cancel closing."

Then, by letter dated October 26, 2006, Defendant sent Plaintiff a letter declaring Plaintiff in default of the Agreement and stated that if a closing date did not take place on or before November 29, 2006, the full escrow down-payment would

be released to the Defendant.

In mid-November 2006, the Plaintiff's attorney was informed by the Defendant's attorney that the repairs to the premises were complete. Plaintiff then sought an inspection of the Apartment on November 28, 2006 and a closing date of December 6, 2006 was set. In a letter dated November 29, 2007, Plaintiff's counsel stated that pursuant to the November 28, 2006 inspection, the premises was unfinished and uninhabitable. Plaintiff's counsel attached a Punch List to the letter and cancelled the December 6, 2007 closing date. A December 7, 2006 closing date was then set.

On December 7, 2006, the Plaintiff had a walk through inspection scheduled for 11:30 AM with one of Defendant's agents. The agent cancelled the inspection at 11:00AM. At 2:30PM the Plaintiff, his attorney, the bank's paralegal, the title closer and the court reporter appeared for the closing at Defendant's office. Plaintiff refused to close stating that the premises was not in habitable condition and that Defendant was not in full compliance with the Agreement and Offering Plan.

On that same day, Plaintiff's attorney commenced this action by Order to Show Cause to prevent the release of the escrowed funds under the Agreement and for breach of contract. The underlying Order to Show Cause and application for a temporary restraining order were resolved by Stipulation and the escrowed funds remain in the possession of the Escrow Agent.

Discussion

As with any motion for summary judgment, success is wholly dependant on whether the proponent of either of the respective motions made a prima facie showing of entitlement as a matter of law, tendering sufficient evidence to eliminate any material issues of fact. (Wolff v. New York City Transit Authority, 21 AD3d 956 [2d Dept. 2005], quoting Winegrad v. New York University Medical Center, 64 NY2d 851 [1985] [internal quotes omitted]). "A party is entitled to summary judgment if the sum total of the undisputed facts establish the elements of a claim or a defense as a matter of law." (Barr, Altman, Lipshie, Gerstman, *New York Civil Practice Before Trial*, [James Publishing 2006] §37:80)). None of the material elements of the claim or defense can be in dispute.

In the instant case, questions of fact exist as to the breach of contract claims made by both Plaintiff and Defendant. The Agreement, Defendant's EX. A Para. 17.3, states that

The closing of title shall occur only after, or concurrently with, compliance with the prerequisites set forth under "Prerequisites to Closing of Title" in Part I of the Plan. As a result, if all other prerequisites not involving the construction of the unit are met, Purchaser shall be obligated to close and complete payment of the full Purchase Price (without any credit against or abatement in the Purchase Price and without any provision for escrow) once a temporary or permanent Certificate of Occupancy is issued for the Unit (notwithstanding any construction items noted on Purchaser's

Inspection Report (as hereinafter defined) remaining for Sponsor to complete and/or correct in accordance with its obligations under the Plan, and notwithstanding the incomplete construction and/or decoration of any other portions of the Building not preventing Purchaser's occupancy of the Unit.

Plaintiff argues that anywhere between twenty-eight and eleven items on his Punch List remain incomplete and that said items are material. Although Defendant attempts to have this court decide, partially based on annexed pictures, whether the remaining items left on Plaintiff's Punch List have been fixed and whether any outstanding items are material breaches, this court is not a construction expert and will not make such determinations. Whether all prerequisites required by the contract have been met is a question of fact. It follows that Defendant's motion and Plaintiff's cross-motion for summary judgment are denied.

It also follows that since, at this time, it is unclear whether either of the parties breached the Agreement, that all monies held in escrow remain in the escrow account until a final determination of these issues has been rendered.

Accordingly it is

ORDERED that Defendant's motion is denied in all respects; and it is further

ORDERED that Plaintiff's cross-motion is denied in its entirety; and it is further

ORDERED that the \$181,500.00 remain in an escrow account held by the Co-Defendant.

Counsel for the parties are directed to appear for a pre-trial conference on October 12, 2007 at 11:00AM in room 335 at 60 Centre Street.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 7/30/07

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HON. WALTER B. TOLUB, J.S.C.