

Java Enters., INC. v Loeb, Block & Partners LLP
2007 NY Slip Op 32598(U)
August 17, 2007
Supreme Court, New York County
Docket Number: 0600914/2005
Judge: Milton A. Tingling
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon Milton A. Tingling
Justice

PART 44

Java Enterprises, INC

INDEX NO. 600 9/14/2005

- v -

Loeb, Block & Partners LLP;
Gartner, Sarah & Gartner Gideon

MOTION DATE _____

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

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

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

Plaintiff, Java Enterprises, INC., (“Java”) moves for summary judgment seeking a declaration that defendants, Gideon and Sarah Gartner (collectively, the “Gartners”) are in default on a real estate contract, an order directing escrow agent Loeb, Block & Partners LLP (“Loeb”) to pay over to Java the down payment made by the Gartners on account of the Contract with interest accrued thereon, and dismissal of the Gartner’s counterclaims against Plaintiff. Defendants oppose Plaintiff’s motion arguing that disputes over material issues of fact as to the seller’s performance of the contract preclude summary judgment. Plaintiff’s motion for summary judgment is granted.

In 2004, Plaintiff owned apartment 72-C located at 146 West 57th Street, New York, NY (the “apartment”). The Gartners owned apartments 72-A, 72-B, and 72-D. On or about August 12, 2004, the Gartners entered into a contract with Plaintiff to purchase

Dated: 8/17/07

J.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):

FILED
AUG 21 2007
COUNTY CLERK'S OFFICE
NEW YORK

72-C for \$1,800,000.00. The down payment of \$180,000.00 was placed into an interest-bearing escrow account with Loeb. The contract provided that Plaintiff would retain the down payment plus accrued interest if the Gartners defaulted and that a closing would be held on or about September 28, 2004, but time was not made of the essence.

The Gartners agreed to take the apartment in the condition it was in on the date of the contract subject to normal use, wear and tear between the date of the contract and the closing. The closing date was mutually postponed until October 7, 2004. Paragraph 44 of the contract entitled the Gartners to make a final inspection of the apartment within 48 hours prior to closing. The Gartners personally inspected the apartment on the morning of the closing and then cancelled the closing. The Gartners allege the apartment was damaged as a result of Plaintiff's removal of its furniture, furnishings, and other personal property which was not included in the sale.

Plaintiff sent a letter on October 7, 2004 seeking specifics as to the alleged damage done to the apartment. After not receiving a response to said letter, Plaintiff sent another letter on October 13, 2004 stating they have inspected the apartment and have found it to be broom clean and in good condition and rescheduled the closing for October 28, 2004 with time now of the essence. In a letter dated October 22, 2004, Loeb wrote they were informed that the purchasers were trying to determine how and when they will be able to close and that Seller withdraws the October 13, 2004 letter by which the time for closing was set for October 28, 2004. The letter further stated that Seller expects a clear written proposal from purchaser or their counsel to be received by Seller's counsel by 3:00pm on October 25, 2004. On November 5, 2004, after receiving no substantive and definitive response, Loeb sent a letter to the Gartners informing them the closing was

rescheduled for December 1, 2004 and time was of the essence. The letter included that if the Gartners failed to appear at set closing, they would be in default of their obligations under the contract, the down payment would be demanded and paid to the seller as liquidated damages and the contract would be deemed cancelled.

In an e-mail dated November 18, 2004, co-defendant, Gideon, stated that he and his wife did not expect to close on December 1, 2004. He also wrote that "when we saw 72-C on closing day (referring to the closing scheduled for October 7, 2004), we realized that the cost of "improving" 72-C to our standards would be substantially more than we had expected." Gideon also recognized that in anticipation of not closing on December 1, 2004 by contract, the Gartners would lose their down payment of \$180,000.00. On December 1, 2004, Plaintiff attended the closing whereas the Gartners failed to appear. Pursuant to the contract, Loeb was permitted to release the escrow only upon the consent of the parties or by order of a court. The Gartners would not consent to the release of the escrow and Loeb notified Plaintiff that it needed to obtain a court order to attain the escrow.

The issue before the court is whether the Gartners were in default of the real estate contract for failing to appear at the December 1, 2004 closing and if so, is Plaintiff entitled to keep the down payment inclusive of accrued interest as liquidated damages.

The burden as summary judgment movant is to establish a prima facie entitlement to judgment as a matter of law by tendering evidence sufficient to eliminate any material factual issues from the case. *Grecco v. Corbis Sygma*, 281 A.D.2d 239 (1st Dept. 2001). Plaintiff has established a prima facie entitlement to summary judgment by showing their entitlement to the down payment under the contract for sale of apartment 72-C.

Where the intention of the parties may be gathered from the four corners of the instrument, interpretation of the contract is a question of law, and no trial is necessary to determine the legal effect of the contract. *Ruttenberg v. Davidge Data Systems Corp.*, 215 A.D.2d 191, 193. The terms of the contract for sale of apartment 72-C are clear and unambiguous regarding defaults and remedies. Specifically, paragraph 13 titled "Defaults and Remedies" states that "if Purchaser defaults hereunder, Seller's sole remedy shall be to retain the down payment as liquidated damages...and the down payment constitutes a fair and reasonable amount of damages under the circumstances and is not a penalty." Both Plaintiff and the Gartners agreed to the amount of \$180,000.00 as being the down payment for the purchase of the apartment and that is would be kept by Plaintiff as liquidated damages in the event the Gartners default on the contract. Whether or not Plaintiff knew of the Gartners intent to combine all four apartments is irrelevant. The only intention relevant to this case is the intention of the parties to be bound by the contract and its unambiguous terms.

Where the parties have by their agreement expressly made time of the essence, failure to perform on the specified date constitutes a default. *Greto v. Barker 33 Associates*, 161 A.D.2d 109 (1st Dept. 1990). Since September 28, 2004 until December 1, 2004, the closing date for apartment 72-C has been rescheduled on four separate occasions where three of the four closing were rescheduled to accommodate the Gartners. Plaintiff sent a letter to the Gartners rescheduling the closing for October 28, 2004 stating that time was of the essence. In response, the Gartners requested more time and Plaintiff again, postponed the closing until December 1, 2004 explicitly stating that time is of the essence. On the date of said closing, Plaintiff attended the closing where the Gartners

failed to appear. The Gartners received notice of the rescheduled closing and that time was of the essence thus their failure to appear constitutes a default.

Not only are the Gartners allegation of damage done to the apartment prior to closing unfounded, they are also overshadowed by Gideon's email anticipating not appearing for the December 1st closing because of financial restrictions. The email stated the cost of renovating the apartment *to the Gartners standard* was too expensive for them, not the cost of *fixing* any alleged damage done to the apartment by Plaintiff.

Pursuant to paragraph 10 of the contract, the Gartners have had the opportunity to inspect the apartment and agreed to accept it as is.

The Gartners submitted a report created by architects (the "report"), Toba and Paik, noting the architect's observations of the apartment upon their inspection of it. The report included an evaluation of the entry bath, kitchen, living room, hallway closet, guest bath, guest bedroom, master closet, master bath, and master bedroom. All nine (9) sub-headings are accompanied by brief description of alleged defects and recommended repairs. Each and every alleged defect is in regards to poor installation, wearing and tearing from use, stains and soils, exposed wiring and replacing the old with the new. No where in the report did it list damage as a result of removal of furniture, furnishings or personal property. The architect's report lists observations that were in plain view of the apartment and did not require effort to observe. The observations were not of the Gartners and considering it was the observations of the architect, the court suggest the apartment was inspected from the perspective of remodeling/renovating the apartment to suit the Gartners intentions of merging all four apartments.

Nonetheless, Plaintiff was not given the opportunity to address any defects and/or damage the Gartners alleged was present in the apartment on the morning of October 7, 2004 because they were never given notice of specific damage(s). In fact, the Gartners never responded to Plaintiffs request to be provided with a list of the damages the Gartners themselves observed. Furthermore the Gartners never mentioned any damages in the e-mail to Plaintiff and the Gartners' attorney never mentioned the architects report in conjunction with the claim of damages. Upon Gideon's own admission of failure to appear for closing due to financial reasons and lack of evidence supporting alleged damages, all allegations against Plaintiff for breach of contract are dismissed with prejudice.

Accordingly, Plaintiffs motion for summary judgment is granted and therefore Plaintiff is entitled to the down payment plus interest as liquidated damages under the contract. The Gartners are in default of the contract and Loeb is hereby ordered to deliver the down payment with interest to Plaintiff. The Gartners' counterclaims against Plaintiff are dismissed with prejudice.

FILED

AUG 21 2007

Dated: 8/17/07

COUNTY OF NEW YORK
 HONORABLE **JUDGE MILTON A. TINGLING**
 Milton A. Tingling