Leitman v Campbell
2007 NY Slip Op 32752(U)
September 4, 2007
Supreme Court, Suffolk County
Docket Number: 0033779/2006
Judge: Thomas F. Whelan
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SHORT FORM ORDER

INDEX No. 33779-06

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 4/23/07
ADJ. DATES 4/27/07
Mot. Seq. # 001 - Mot D; CDISP

---X

SCOTT LEITMAN and KATHY LEITMAN,

Plaintiffs,

-against-

LUCY A. CAMPBELL and JAMES D. REDDY, ESQ. (as Escrow Agent),

Defendants.

---X

LIBERT, ALIZIO & GALFUNT, LLP
Attys. For Plaintiffs
1551 Franklin Ave.
Mineola, NY 11501

JAMES D. REDDY, PC
Atty. For Defendants
873 So. 7th St.
Lindenhurst, NY 11757

Upon the following papers numbered 1 to 8 read on this motion to dismiss ; Notice of Motion/Order to Show Cause and supporting papers 1 - 3 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 4-5 ; Replying Affidavits and supporting papers 6-7 ; Other 8 (memorandum) ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the portion of this motion by defendants seeking an Order (1) dismissing plaintiffs' complaint as to each defendant pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(7) on the grounds that said defendants have a defense based upon documentary evidence; (2) declaring the plaintiffs in default under the contract and permitting the defendant, Lucy A. Campbell, to retain the contract deposit of $50,000 as liqudated damages as per the terms of the contract; (3) permitting James D. Reddy, Esq. to deposit the contract deposit of $50,000 into the court or, in the alternative, retain such sum in the non-interest bearing IOLA Attorney Escrow Account of James D. Reddy, P.C.; and (4) discharging James D. Reddy, Esq. as a stakeholder from all responsibilities and obligations to all parties to this action in accordance with the contract's terms, is granted; and it is further

ORDERED that the portion of this motion by defendants seeking an Order awarding James D. Reddy, Esq., as Escrow Agent, his expenses, costs and disbursements incurred as a stakeholder in this action, is denied; and it is further

ORDERED that within ten (10) days of the date of this Order, James D. Reddy, P.C., as Escrow Agent, shall release to Lucy A. Campbell the sum of $50,000 presently being held in his IOLA Attorney Escrow Account and that upon the release of said sum, he shall thereafter file an affidavit of service with the Clerk of the Court indicating that the funds have been released to Lucy A. Campbell; and it is further

ORDERED that the movant shall serve a copy of this Order with Notice of Entry upon counsel for the plaintiffs within thirty (30) days of the date herein pursuant to CPLR 2103(b)(1),(2) or (3) and thereafter file the affidavit of service with the Clerk of the Court.

This is an action to recover the down payment on a contract for the sale of real property. According to the complaint, on or about September 6, 2006, the plaintiffs entered into a contract to purchase the premises located at 25 Fiddler's Green, Lloyd Neck, New York, owned by defendant, Lucy A. Campbell (hereinafter "Campbell"). Plaintiffs deposited the sum of $50,000 to be held in escrow by defendant, James d. Reddy, Esq. (hereinafter "Reddy"), the seller's attorney. The parties' original contract was for an all cash purchase, however, it was later re-drafted to contain a mortgage contingency clause. When the plaintiffs were unable to obtain a mortgage commitment, they made a demand for the return of their deposit by letter dated October 13, 2006, addressed to the defendant and delivered by facsimile and regular mail. The defendant, however, refused to return the deposit, and this action ensued. Plaintiffs oppose the motion and submit the affidavit of Scott Leitman in opposition.

Both Campbell and Reddy move for an Order to dismiss the complaint on the grounds of documentary evidence pursuant to CPLR 3211(a)(1) based upon the terms of the contract and that the complaint fails to state a cause of action as against the defendants pursuant to CPLR 3211(a)(7). Reddy also moves for an Order seeking to be relieved as a stakeholder pursuant to CPLR 3211(a)(7), or in the alternative, for an Order regarding his continuance as a stakeholder.

Of particular relevance to the present dispute between the parties, is ¶ 8(a) of the contract of sale, a mortgage contingency clause which states in relevant part:

> To the extent a Commitment is conditioned on the sale of Purchaser's current home, payment of any outstanding debt, no material adverse change in Purchaser's financial condition or any other customary conditions, Purchaser accepts the risk that such conditions may not be met; however, a commitment conditioned on the Institutional Lender's approval of an appraisal shall not be deemed a "Commitment" hereunder until an appraisal is approved (and if that does not occur before the Commitment Date, Purchaser may cancel under subparagraph 8(e) unless the Commitment Date is extended). Purchaser's obligations hereunder are conditioned only on issuance of a Commitment. Once a commitment is issued, Purchaser is bound under this contract even if the lender fails or refuses to fund the loan for any reason (*see* defendants' Ex A - preprinted Blumberg Form 125 - Residential Contract of Sale, 11-2000, p 3).

The Appellate Division, Second Department has restated the rules governing a motion to dismiss in ***State of New York v Grecco,*** 21 AD3d 470, 800 NYS2d 214 [2d Dept 2005]). The Court's inquiry is limited to determining whether, taking the allegations of the complaint as true and affording plaintiff the benefit of every reasonable inference, that the plaintiff has stated a cause of action against one or more defendants (*see* ***Parsippany Constr. Co. Inc. v Clark Patterson Assoc., P.C.,*** 41 AD3d 805, 839 NYS2d 179 [2d Dept 2007]; ***Sirlin v Town of New Castle,*** 35 AD3d 713, 826 NYS2d 676 [2d Dept 2006]; ***Dunleavy v Hilton Hall Apts. Co., LLC***, 14 AD3d 479, 789 NYS2d 164 [2d Dept 2005]). In applying the standard, the Court expresses no opinion as to the truth or falsity of the allegations of the complaint or, consequently, as to the conclusions plaintiff argues should be drawn therefrom. On the procedural posture of the action, these issues are not properly before the Court. On such a motion, the Court's sole inquiry is whether the facts alleged in the complaint fit within any cognizable legal theory, not whether there is evidentiary support for the complaint (*see* ***Fast Track Funding Corp. v Perrone,*** 19 AD3d 362, 796 NYS2d 164 [2d Dept 2005]; ***Paterno v CYC, LLC,*** 8 AD3d 544, 778 NYS2d 700 [2d Dept 2004]; ***McGee v City of Rensselaer,*** 174 Misc2d 491, 663 NYS2d 949 [Sup Ct, Rensselaer County 1997]; ***Leon v Martinez,*** 84 NY2d 83, 614 NYS2d 972 [1994]; ***Morone v Morone,*** 50 NY2d 481, 429 NYS2d 592 [1980]; *see also* ***511 West 232nd Owners Corp. v Jennifer Realty Co.,*** 98 NY2d 144, 746 NYS2d 131 [2002]; ***Sokoloff v Harriman Estates Dev. Corp.,*** 96 NY2d 409, 729 NYS2d 425 [2000]).

Thus, a motion to dismiss for failure to state a claim may be granted only if it appears certain that under no possible circumstances would the plaintiff be entitled to relief (*see* ***Lipsky v Commonwealth United Corp.,*** 551 F.2d 887 [2d Cir 1976]). Even if it appears on the face of the pleadings that recovery is very remote, the petition will withstand the motion to dismiss as long the petitioner retains a possibility of success (*see* ***Scheuer v Rhodes,*** 416 U.S 232, 94 S. Ct. 1683, 40 L. Ed 90 [1974]).

Here, there is no question that the plaintiffs were issued a mortgage commitment by an institutional lender. Plaintiffs argue that the mortgage commitment tendered to them was not a "firm" mortgage commitment, that it was a conditional commitment and did not satisfy the mortgage contingency clause of the contract of sale (*see* ***Kessel, Rothstein & Roth v Gallagher,*** 155 AD2d 587, 547 NYS2d 653 [2d Dept 1989]; ***Weaver v Hizen,*** 147 AD2d 634, 538 NYS2d 40 [2d Dept 1989]). Thus, according to plaintiffs, when the institutional lender revoked its mortgage commitment, the plaintiffs, as per the contract, properly cancelled same.

The Court has carefully reviewed the contract of sale and has not found any limiting language that the parties had inserted indicating that the contract would be "subject to and conditioned upon the Purchaser obtaining a firm written commitment from a reputable bank or other lending institution licensed to do business in the State of New York" (***1550 Fifth Ave. Bay Shore, LLC v 1550 Fifth Ave., LLC,*** 297 AD2d 781, 782, 748 NYS2d 601 [2d Dept 2002]). Contrary to plaintiffs' contention, the mortgage commitment with loan # 006854425 was, in fact, a firm commitment, since the term "mortgage commitment" in its ordinary dictionary reading is a formal written communication setting forth the terms and conditions of the mortgage loan (*see* ***Carpenito v Balirtt,*** 145 AD2d 458, 535 NYS2d 100 [2d Dept 1988]; *app dism* 74 NY2d 793, 545 NYS2d 109 [1989]; Black's Law Dictionary, 8th ed. [2004]). The term "firm commitment" means that the lending institution has given an option to the buyer to take a mortgage and that commitment is no less firm because the buyer had the option to reject it (*see* ***Livoti v Mallon,*** 81 AD2d 533, 438 NYS2d 81 [1st Dept 1981]; *app den* 54 NY2d 601, 422 NYS2d 1027 [1981]).

It is a well settled tenet of contract law that the parties are free to allocate the risks that might effect a party's performance (*see* ***Comprehensive Bldg. Contrs. v Pollard Excavating, Inc.,*** 251 AD2d 951, 674 NYS2d 869 [3d Dept 1998]; ***Kel Kim Corp. v Central Mkt., Inc.,*** 70 NY2d 900, 446 NYS2d 921 [1981]). Here, the standard residential contract of sale allocated to the plaintiffs that once they received the mortgage commitment, the risk of financing falling through prior to the closing foreclosed the right to cancel. Although plaintiffs were free to change the terms of the contract of sale during the period of negotiations prior to signing the contract of sale, which would eliminate any attendant risks, they did not do so.

"The interpretation of a contract is a matter of law for the court" (***1550 Fifth Ave. Bay Shore, LLC v 1550 Fifth Ave., LLC,*** 297 AD2d 781 *supra* at 783, *citations omitted*; *see also* ***W.A. Wilson Enter., Inc. v Agway, Inc.,*** 55 NY2d 659, 446 NYS2d 928 [1981]). The contract of sale is very clear and states in ¶ 8(a) that "Once a commitment is issued, Purchaser is bound under this contract even if the lender fails or refuses to fund the loan for any reason." This plain fact is further preceded by a warning in the section of the contract entitled "NOTES ON MORTGAGE COMMITMENT CONTINGENCY CLAUSE for RESIDENTIAL CONTRACT OF SALE."

It is well established that when the meaning of a contract is plain and clear, it is entitled to be enforced according to its terms (*see* ***Blumenkrantz v May,*** 293 AD2d 850, 740 NYS2d 497 [3d Dept 2002]). "Where the language of a contract is unambiguous, its interpretation is a matter of law and effect must be given to the intent of the parties as expressed by the expressed language of the parties" (***1550 Fifth Ave. Bay Shore, LLC v 1550 Fifth Ave., LLC,*** 297 AD2d 781 *supra* at 783, *citation omitted*; *see also* ***W.W.W. Assocs., Inc. v Giancontieri,*** 77 NY2d 157, 565 NYS2d 440 [1990]). "Clear, complete writings should generally be enforced according to their terms" (***Automotive Mgt. Group, Ltd. v SRB Mgt. Co., Inc.,*** 239 AD2d 450, 451, 658 NYS2d 54 [2d Dept 1997], *citations omitted*). "The November 2000 revision of the Blumberg "standard form" residential contract of sale includes language making it clear that once a commitment is issued, the purchaser is bound to perform the contract even if the lender fails or refuses to fund the loan for any reason" (*see* *When a Mortgage Commitment Is Issued But Later Revoked, Who Keeps the Down Payment*, by Eric W. Penzer, 76-SEP N.Y. St. B.J. 35 at p 5; *see also* 159 PLI/NY 73, pp 65-81, 103).

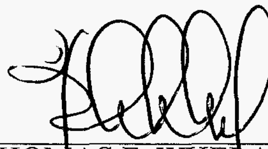
Under CPLR 3211(a)(1), a motion to dismiss "may be appropriately granted only where the documentary evidence utterly refutes the plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (***Goshen v Mutual Life Ins. Co. of NY,*** 98 NY2d 314, 326, 746 NYS2d 858 [2002] *citation omitted*]; *see also* ***J&J, LLC v Fillmore Agency, Inc.,*** 303 AD2d 486, 755 NYS2d 887 [2d Dept 2003]; ***Trade Source v Westchester Wood Works,*** 290 AD2d 437, 736 NYS2d 605 [2d Dept 2002]; ***Arnov Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, LLP,*** 96 NY2d 300, 727

NYS2d 688 [2001]) and the documents relied on must resolve all factual issues as a matter of law (*see* ***Teitler v Max J. Pollack & Sons,*** 288 AD2d 302, 733 NYS2d 882 [2d Dept 2001]; ***Weiss v Cuddy & Feder,*** 200 AD2d 665, 606 NYS2d 766 [2d Dept 1994]). Plaintiffs have failed to raise a triable issue in opposition to the documentary evidence submitted by defendants regarding the mortgage contingency clause of ¶ 8 contained in the contract of sale (*see* affd. Scott Leitman, 3/7/07; *cf.* ***Rovello v Orofino,*** 40 NY2d 633, 389 NYS2d 314 [1976]). Therefore, plaintiffs' complaint against Campbell and Reddy is dismissed pursuant to the provisions of CPLR 3211(1) (*see* ***Bronxville Knolls, Inc. v Webster Town Ctr. Partnership,*** 221 AD2d 248, 634 NYS2d 62 [1st Dept 1995]).

Under the liberal standards enumerated herein and upon a review of all of the documents presented in support of and in opposition to the motion, the Court cannot find that the complaint sets forth any cognizable legal theories to sustain a cause of action for breach of contract (*see* ***Doria v Mascci,*** 230 AD2d 764, 646 NYS2d 363 [2d Dept 1996], *lv app den* 89 NY2d 811, 657 NYS2d 204 [1997]). A breach of contract action accrues only when a party to a contract fails to perform an obligation (*see* ***Ely-Cruiksank Co. v Bank of Montreal,*** 81 NY2d 399, 599 NYS2d 501 [1993]). Plaintiff's have failed to establish that the defendants were under any obligation to perform under the contract of sale after the commitment was rescinded by the institutional lender (*see* ***Lawrence v Miller,*** 86 NY 131 [1881]). Therefore, the defendants' motion is granted and the complaint is dismissed. Within ten (10) days of the date herein, the escrow agent shall release to the defendant, the sum of $50,000 now being held in his escrow account.

Accordingly, the motion is granted as herein indicated. This constitutes the Order and decision of the Court.

DATED: 9/4/07



THOMAS F. WHELAN, J.S.C.