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

Charles Edward Ramos 53

PRESENT: _____ PART _____

Justice

Index Number : 603995/2006
KASS, LORYN
VS
GRAIS, DAVID J.
Sequence Number : 002
REARGUMENT/RECONSIDERATION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

FILED
SEP 19 2007
NEW YORK
COUNTY CLERK'S OFFICE

accompanying memorandum decision and order. is decided in accordance with

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

Dated: 9/4/07

J.S.C.
CHARLES E. RAMOS

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:COMMERCIAL DIVISION
----------X
LAURYN KASS,

Plaintiff,

-against-

DAVID J. GRAIS, RUTH M. WHALEY AND DEWEY BALLANTINE LLP,

Defendants.
----------X

Index No. 603995/06

Charles Edward Ramos, J.S.C.:

Defendants David J. Grais, Ruth M. Whaley (the "Sellers"), and Dewey Ballantine LLP ("Dewey"), the escrow agent, move pursuant to CPLR 2221(d) for leave to reargue this Court's February 26, 2007 decision denying defendants' motion for summary judgment. Plaintiff Lauryn Kass (the "Purchaser") cross-moves pursuant to CPLR 2221 for leave to renew or reargue her summary judgment cross motion which was also denied by the February decision. Both motions for reargument are granted and upon reconsideration, the Court denies both motions again.

Background

This action involves a residential contract of sale between Grais and Whaley as sellers and Kass as purchaser of property located at 1 Mohican Trail, Scarsdale, New York, 10583 (the "Property"). Dewey is the escrow agent designated to hold the down payment; Grais is a partner at Dewey.

On August 3, 2006, the Purchaser made an offer to purchase the property by hand-delivering the contract, executed by Kass, to the Sellers along with a check. The contract provides:

28(e) This contract shall not be binding or effective until

duly executed and delivered by Seller and Purchaser. The Purchaser's cover letter enclosing the contract and check states:

> Enclosed please find three signed contracts and a check for the contract deposit in the amount of $494,750.00 made payable to you as escrow agent. The contracts have been modified pursuant to our discussions. Please return two fully executed contracts to me as quickly as possible. Title Work has already been ordered [...].

The check was signed by Kass, made payable to the order of Dewey, and dated July 28, 2006.

The Sellers signed the contract. Page one of the contract states "Contract of Sale made as of July 2006," but July 2006 was crossed out by the Sellers and August 7, 2006 was inserted. On August 4, 2006, Dewey, as escrow agent and real estate counsel for the Sellers, signed the contract in acknowledgment of the receipt of the down payment and mailed by Federal Express a copy of the fully-executed contract to the Purchaser. According to Federal Express, the package was delivered on August 7 at 10:03 am.

On August 7, 2006, counsel for the Purchaser faxed a letter at approximately 9:45 a.m. to Dewey cancelling the signed contract indicating that payment had been stopped on the down payment check "due to uncertainties in [Kass's] husband's business and other financial issues."

On August 8, 2006, Dewey filed a summary judgment motion in lieu of complaint (Index No. 602769/06) seeking damages for breach of contract in the amount of the deposit of $494,750. The Purchaser filed an action (Index No. 603995/06) on November 16,

2006 against Dewey and the Sellers for declaratory judgments. On November 22, 2006, the Sellers filed a motion for summary judgment in the Purchaser's action. On December 4, 2006, the Purchaser cross moved for summary judgement.[1] Defendants argued that the contract was in full force and effect when Kass rescinded the contract and retracted her offer thus, breaching the contract. Defendants relied on the mailbox rule arguing that when defendants deposited the contract in Federal Express, "delivery" under the contract was complete. Kass, on the other hand, claimed that she withdrew her offer to purchase the house prior to the Sellers' acceptance becoming effective and before the contract was valid and enforceable. Relying on defendants post-dating the contract to August 7, 2006, the language of the contemplated contract as well as the cover letter, the Purchaser contended that the intention of the parties was that there would be no acceptance, and thus no binding contract, until the fully executed contract was received by the Purchaser.

Defendants' motion was denied because defendants failed to prove as a matter of law that the mailbox rule applied to the Sellers' delivery of the executed contract by Federal Express. The Purchaser's motion for summary judgment was denied because the Court could not conclude as a matter of law that the parties intended that the contract be effective when received by the Purchaser, thus discovery was imperative.

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[1] The actions were consolidated by order dated February 20, 2007 under index number 603995/06.

In this motion to reargue, defendants argue that this Court misapprehended the law in that the mailbox rule is not based on the offeree's loss of control of his acceptance, but rather on the act of mailing as an overt expression of the offeree's intent to accept. Defendants further assert that mail can be recalled through Federal Express in the same manner as regular U.S. Postal service and thus the mailbox rule should apply to this case.

Kass contends that the Sellers posited the "mailbox rule" theory for the first time at argument and disputes defendants' theory on the ability to recall mail through Federal Express. Further plaintiff argues that the contract is post-dated and thus, that the mailbox rule does not apply. Finally, Kass argues that the contract explicitly states that any notice or communication delivered in person or by overnight courier shall be deemed given when delivered; thus, the Purchaser's offer was withdrawn prior to the delivery of the Sellers' acceptance and the contract is of no force and effect.

Discussion

A motion for leave to reargue affords the moving party an opportunity to show that the court overlooked or misapprehended the facts or the law, thus mistakenly arriving at its earlier decision. *William P. Pahl Equipment Corp. v Kassis*, 182 AD2d 22 (1st Dept), appeal denied, 80 NY2d 1005 (1992). It is not to be used, however, as the means by which an unsuccessful party is permitted to argue again the same issues previously decided (*Pro*

Brokerage v Home Ins. Co., 99 AD2d 971 [1st Dept], appeal dismissed without op, 64 NY2d 646 [1984]), or to provide an unsuccessful party with a second opportunity to present new or different arguments from those originally asserted. *Gellert & Rodner v Gem Community Mgt.*, 20 AD3d 388 (2nd Dep't, 2005).

The motions to renew are granted to the extent that they allege that the Court erred with regard to the mailbox rule and for considering arguments about the difference between regular U.S. mail and Federal Express made at argument, but not in the papers. CPLR 2221 d(2).

The mailbox rule provides "when one person by letter or telegram makes an offer to another and the other person accepts such offer, either by post or telegraph, the contract springs into existence at the time of such mailing or sending, because of implied authority in the carrier of the message to receive the reply." *Wester v Casein Co., of Am.*, 206 NY 506, 513 (1912). While the parties may dictate that acceptance is effective only upon receipt by the offeror of that acceptance, that intention must be expressly stated. *Buchbinder Tunick & Co. v Manhattan Nat'l Life Ins. Co.*, 219 AD2d 463, 466 (1st Dep't, 1995). Here, the contract provides that "This contract shall not be binding or effective until duly executed and delivered by Seller and purchaser." However, the parties failed to define the term "delivered" or to specify that the Purchaser's receipt of the contract was required for it to be effective. Likewise, the parties failed to specify that the Sellers must respond in the

same manner as the Purchaser; that is delivery by hand. UCC §2-206 provides that any medium of acceptance that is reasonable under the circumstances is valid. Therefore, the question is whether the Purchaser's faxed revocation constitutes a breach of contract because the contract was effective at that moment.

Under the mailbox rule, the contract would have come into existence when the Sellers dispatched the signed contract to Federal Express on August 4, 2007. The Purchaser's speedier faxed revocation could not overcome the Sellers' acceptance. *See Morton's of Chicago/Great Neck LLC v Crab House, Inc.*, 297 AD2d 33 (2d Dept 2002)(binding agreement to terminate a lease existed when Morton's mailed its acceptance of Crab House's offer to terminate the lease the day before Crab House faxed its revocation of its offer to terminate the lease), appeal denied, 99 NY2d 651 (2003).

However, the Sellers modified the contract after the Purchaser's initial offer by inserting August 7, 2006 as the effective date of the contract.

> To establish a legal contract through the medium of correspondence, it must be made to appear that there was not only a plain, unequivocal offer, but that the acceptance of such an offer was equally plain and free from ambiguity. There must have been a meeting of the minds of the contracting parties in respect to every material detail of the contract, and if the precise thing offered was not accepted, or if the acceptance was in any manner qualified by conditions or reservations, no valid contract is made, but such a modified or qualified acceptance must be treated as a rejection of the offer.

Watts v Thomas Carter & Sons, Inc., 207 AD 656 (1924). While this slight variance would not, in the commercial context,

operate as a rejection of the original offer constituting a counteroffer, UCC §2-207, here it causes the Court to pause and ask what were the Sellers thinking when they changed the date. The mailbox rule normally provides a bright line rule to resolve the contract's ambiguity regarding "delivery." However, here where the parties failed to define the term "delivery" and the parties did not agree to a date for the contract, the Seller's act of inserting a date different than the date they signed the contract or leaving the date in tact as "July 2006," compounded the ambiguity regarding delivery. One rationale for the mailbox rule is to counteract the perceived unfair advantage that offerors have in their ability to revoke the offer before the offeree accepts the offer. "The mailbox rule counteracts this advantage by terminating this unfair power to revoke at the earliest possible time and upon the occurrence of an event which is fully in the control of the vulnerable offeree - the dispatch of the acceptance." *Fasciano, Internet Electronic Mail: A Last Bastion for the Mailbox Rule*, 25 Hofstra L. Rev. 971 (1997). Here, it was the offeree who changed that date from the earliest possible date to the latest date, and coincidentally the date of the Purchaser's receipt. Was this done to extract a few more days to market the house at a higher price? Discovery is required to make that determination. Under these circumstances, the Court cannot interpret the contract as a matter of law. Accordingly, the Court has no choice but to inquire into the intent of the parties.

Likewise, Section 25 of the Contract does not resolve the matter. The Purchaser cannot argue that the contract is both binding and not binding at the same time. Moreover, the section relied upon is equally ambiguous. Section 25 of the contract provides that "[a]ny notice or other communication [...] delivered in person or by overnight courier shall be deemed given when delivered." The term "delivered" is not defined.

Accordingly, it is

ORDERED that both parties' motions for leave to reargue are granted; and it is further

ORDERED that plaintiff's cross-motion for summary judgment is denied; and it is further

ORDERED that defendants' motion for summary judgment is denied; and it is further

ORDERED, that the parties are directed to expedite discovery and shall appear for a discovery conference no later than September 28, 2007. Plaintiff is directed to call the Part Clerk at 646-386-3304 to arrange a mutually convenient date for a conference.

Dated: September 4, 2007

J.S.C.

CHARLES E. RAMOS

Counsel are hereby directed to obtain an accurate copy of this Court's opinion from the record room and not to rely on decisions obtained from the internet which have been altered in the scanning process.