

Nuzzi v Gallagher

2008 NY Slip Op 30517(U)

February 25, 2008

Supreme Court, Suffolk County

Docket Number: 0001724/2007

Judge: Jeffrey Arlen Spinner

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 21 - SUFFOLK COUNTY

PRESENT:

Hon. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

MOTION DATE 5/22/07
ADJ. DATE 1/9/08
Mot. Seq. #002 - MG; CASEDISP

-----X	
ROBERT NUZZI and THERESA NUZZI,	:
	:
Plaintiffs,	:
	:
- against -	:
	:
MICHAEL P. GALLAGHER, VALERIE	:
GALLAGHER and KEVIN M. SULLIVAN,	:
ESQUIRE (as Escrow Stakeholder),	:
	:
Defendants.	:
-----X	

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Upor. the following papers numbered 1 to 21 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-9; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 10-19; Replying Affidavits and supporting papers 20-21; Other defendants' memorandum of law; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by defendants for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is granted.

This is an action, *inter alia*, to recover the sum of \$44,250.00 paid by the plaintiffs as a deposit on a contract for the sale of real property. The plaintiffs also seek reimbursement in the amount of \$663.00, representing their costs for the examination of title.

On September 29, 2006, Robert Nuzzi and Theresa Nuzzi ("the plaintiffs"), as purchasers, and Michael P. Gallagher and Valerie Gallagher ("the defendants"), as sellers, entered into a contract for sale of residential property located at 40 Douglas Avenue, Northport, New York. Pursuant to paragraph 3 of the contract, the plaintiffs paid the sum of \$44,250.00 as a deposit to be held by the defendants' attorney/escrowee, Kevin M. Sullivan, Esq. Paragraph 8, entitled "Mortgage Commitment Contingency," provides, in part, as follows:

- (a) The obligation of Purchaser to purchase under this contract is conditioned upon issuance, on or before 45 days after a fully executed copy of this contract is given to Purchaser or Purchaser's attorney * * * (the "Commitment Date"), of a written commitment from an Institutional Lender pursuant to which such Institutional Lender agrees to make a first mortgage loan, other than a VA, FHA or other governmentally insured loan, to Purchaser, at Purchaser's sole cost and expense, of \$417,000.00 for a term of at least 30 years (or such lesser sum or shorter term as Purchaser shall be willing to accept) at the prevailing fixed or adjustable rate of interest and on other customary commitment terms (the "Commitment").

* * *

- (e) If no Commitment is issued by an Institutional Lender on or before the Commitment Date, then, unless Purchaser has accepted a written commitment from an Institutional Lender that does not conform to the terms set forth in subparagraph 8(a), Purchaser may cancel this contract by giving Notice to Seller within 5 business days after the Commitment Date, provided that such Notice includes the name and address of the Institutional Lender(s) to whom application was made and that Purchaser has complied with all its obligations under this paragraph 8.
- (f) If this contract is canceled by Purchaser pursuant to subparagraphs 8(d) or (e), neither party shall thereafter have any further rights against, or obligations or liabilities to, the other by reason of this contract, except that the Downpayment shall be promptly refunded to Purchaser * * *.
- (g) If Purchaser fails to give timely Notice of cancellation or if Purchaser accepts a written commitment from an Institutional Lender that does not conform to the terms set forth in subparagraph 8(a), then Purchaser shall be deemed to have waived Purchaser's right to cancel this contract and to receive a refund of the Downpayment by reason of the contingency contained in this paragraph 8.

* * *

- (j) For purposes of subparagraph 8(a), Purchaser shall be deemed to have been given a fully executed copy of this contract on the third business day following the date of ordinary or regular mailing, postage prepaid.

Subparagraph 21(c) provides, in part, that

- (c) If this contract is cancelled pursuant to its terms, other than as a result of Purchaser's default, this contract shall terminate and come to an end, and neither party shall have any further rights, obligations or liabilities against or to the other

hereunder or otherwise, except that (i) Seller shall promptly refund or cause the Escrowee to refund the Downpayment to Purchaser and, unless cancelled by reason of Purchaser's default or pursuant to paragraph 8, to reimburse Purchaser for the net cost of examination of title, including any appropriate additional charges related thereto * * *.

Under paragraph 15, closing was to take place "on or about" November 25, 2006. Subparagraph 23(a) states that in the event of the plaintiffs' default, "Seller's sole remedy shall be to receive and retain the Downpayment as liquidated damages." Subparagraph 28(b) of the contract provides, in part, that "[n]either this contract nor any provision thereof may be waived, changed or cancelled except in writing."

Mr. Sullivan promptly mailed a fully executed copy of the contract to the plaintiffs' attorney, Edward J. Yule, Esq., under cover of a letter dated September 29, 2006.¹ It appears that the next written communication between the parties was a letter dated November 15, 2006 from Mr. Yule to Mr. Sullivan, the full text of which follows:

With reference to the [subject] real estate transaction, please be advised that as soon as we receive the Commitment Letter from our client's lending institution, I will immediately forward same to your office.

Thank you for your patience. Should you have any questions please do not hesitate to contact this office.

Thereafter, by letter dated December 18, 2006, Mr. Sullivan advised that he had set a "time of the essence" closing date for January 5, 2007, and that the plaintiffs' failure to appear at the closing ready, willing, and able to purchase the premises would be deemed a breach of the contract, entitling the defendants to retain the contract deposit. By letter dated December 27, 2006 enclosing the lender's statement of denial, Mr. Yule advised that his clients had been unable to obtain financing and requested the return of the deposit. Mr. Sullivan rejected that request by letter dated December 28, 2006, deeming the plaintiffs' right to cancel the contract waived under subparagraph 8(g). The plaintiffs failed to appear at the closing on January 5, 2007. This action followed.

The defendants now move for summary judgment, alleging that they never agreed to extend the 45-day commitment period and, therefore, that the plaintiffs forfeited the deposit by failing to timely notify the defendants of their inability to obtain mortgage financing and, subsequently, by failing to

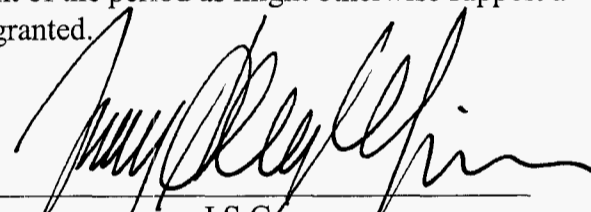
¹ According to Mr. Sullivan, the mailing was made on September 30, which was a Saturday. Whether the mailing was made on September 29 or September 30, and pursuant to subparagraph 8(j), the plaintiffs would be deemed to have been given a copy of the contract on Wednesday, October 4 (the third business day following the date of the mailing), the Commitment Date would be Saturday, November 18 (45 days thereafter), and the plaintiffs would have until Monday, November 27 (five business days after the Commitment Date, with Thanksgiving as an intervening day) to cancel the contract pursuant to subparagraph 8(e).

attend the scheduled closing. The plaintiffs counter, in part, that there is a question of fact whether there was a valid oral waiver or extension of the 45-day commitment period and, hence, whether the plaintiffs timely exercised their right to cancel the contract on December 27, 2006.

While General Obligations Law § 15-301 provides that a written agreement which includes a proscription against oral modification, as here, cannot be changed by an oral executory agreement, the statute “contemplates modification of an executory term of performance (*see Rose v Spa Realty Assoc.*, 42 NY2d 338); it is not concerned with an oral waiver of a condition subsequent, such as a contingency date in a contract for the sale of real property” (*Avendanio v Marcantonio*, 75 AD2d 796, 797, 427 NYS2d 512, 513 [1980]; *see also, Nassau Trust Co. v Montrose Concrete Prods. Corp.*, 56 NY2d 175, 451 NYS2d 663 [1982]). Thus, a contingency date, such as the time by which a purchaser must obtain a mortgage commitment, may be orally waived even if the contract requires all modifications to be in writing (*Dellicarri v Hirschfeld*, 210 AD2d 584, 619 NYS2d 816 [1994]).

The defendants, however, established their prima facie entitlement to judgment as a matter of law by demonstrating, through the affidavit of Mr. Sullivan, that no oral or written waiver or modification of the mortgage contingency clause was ever agreed upon. The plaintiffs, in opposition, failed to raise a triable issue of fact. Although the affidavit of Mr. Yule provides that the November 15, 2006 letter “was prompted by a prior telephone conference between the attorneys wherein an indefinite adjournment of the initial 45-day mortgage commitment period was agreed to pending further notice,” it does not appear that Mr. Yule himself participated in this conference or that he has personal knowledge of the event. As such, the Court finds his assertion insufficient to withstand summary judgment, particularly inasmuch as the November 15 letter neither references the purported conference which “prompted” it nor confirms the claimed oral waiver. Nor does it appear that the defendants were aware of any mistaken belief on the part of the plaintiffs concerning an extension or adjournment of the period as might otherwise support a claim for equitable rescission. Accordingly, the motion is granted.

Dated: FEB 25 2008


 J.S.C.
HON. JEFFREY ARLEN SPINNER

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