

**Alonge v Khomari**

2008 NY Slip Op 30931(U)

March 25, 2008

Supreme Court, Nassau County

Docket Number: 1631-07/

Judge: Antonio I. Brandveen

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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

Present: ANTONIO I. BRANDVEEN

J. S. C.

ATHENA ALONGE,

Plaintiff,

TRIAL / IAS PART 32  
NASSAU COUNTY

- against -

Index No. 1631/07

ROBERT KHOMARI,

Defendant.

Motion Sequence No. 001, 002

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits . . . . .	<u>1, 2</u>
Answering Affidavits . . . . .	<u>3</u>
Replying Affidavits . . . . .	<u>4</u>
Briefs: Plaintiff's / Petitioner's . . . . .	_____
Defendant's / Respondent's . . . . .	_____

The defendant moves for an order granting summary judgment. The plaintiff opposes the defense motion, and cross moves for an order granting summary judgment. The defendant opposes the plaintiff cross motion. The underlying action is for a breach of contract, loss tenant revenue, and a declaratory judgment in the purchase of residential real estate.

The defense attorney states, in detail, in a supporting affirmation dated September 28, 2007, to the defense motion, the defendant is entitled to judgment requiring the immediate return of the down payment because the plaintiff failed to comply with the contract between the parties. The defense attorney points out the defendant served an

answer with counterclaims to the plaintiff's complaint. The defense attorney asserts the only admissible and relevant evidence consists of three documents, namely the contract of sale, the plaintiff's law day letter declaring time to be of the essence, and the certificate of completion obtained by the plaintiff following the closing date. The defense attorney contends the contract clearly states the parties terms and conditions, and the contract cannot be alter by the Court. The defense attorney alleges the contract drafted by the plaintiff was breached when the premises were not vacant, the certificate of completion for a structure built plaintiff without the required government permit prior to the execution of the contract, and the property was not delivered on the law day set by the plaintiff. The defense attorney states the defendant insisted upon enforcing his rights, and the contract was duly terminated, so the plaintiff's causes of action should be dismissed, and the down payment returned to the defendant.

The plaintiff's attorney states, in a supporting affirmation dated November 20, 2007, to the cross motion, and in opposition to the defense motion, the 82 year old plaintiff should be awarded summary judgment, the \$75,000.00 contract down payment together with accrued interest, and dismiss the defendant's counterclaim, or in the alternative grant the plaintiff's motion to disqualify the defense counsel pursuant to DR § 5-102 (a) and (b), and 22 NYCRR § 1200.21 (a) and (b). The plaintiff's attorney contends there are no triable issues of fact in dispute. The plaintiff's attorney asserts the defendant, a real estate speculator, is unable to establish he tendered the necessary funds

at the closing, so the defense motion for summary judgment should be denied. The plaintiff's attorney indicates, in detail, the purported facts of the underlying matter. The plaintiff's attorney asserts the defendant breached the contract, and refused to close. The plaintiff's attorney insists the defendant was not ready, willing and able to close on August 7, 2006, and the defendant breached the covenant of good faith and fair dealing implicit in the contract. The plaintiff's attorney avers the defense counsel should be disqualified from serving as the defendant's attorney because the defense counsel may be a witness in the litigation in violation of DR § 5-102 (a) and (b), and 22 NYCRR § 1200.21 (a) and (b). The plaintiff's attorney claims defense counsel was intimately involved in the transactions in issue, including the flow of information to the defendant and others. The plaintiff's attorney maintains there is no evidence demonstrating the defendant would suffer prejudice or substantial hardship should the defense counsel be disqualified, and in fact, may discover alternative legal theories. The plaintiff's attorney points to the sworn statements of the plaintiff and Anthony J. Piacentini, Esq., each dated November 20, 2007, to support the plaintiff's assertions.

The defense attorney states, in an affirmation dated November 26, 2007, in support of the defense motion, and in opposition to the plaintiff's cross motion, the plaintiff's counsel does not contest nor controvert any factual allegation in the defense moving papers nor argue there is any ambiguity to the contract drafted by his predecessor and executed by the plaintiff. The defense attorney notes he had a single general conversation

with Piacentini about options and potential courses of action available to the defendant, including but not limited to a possible settlement without consummating the transaction prior to the unilaterally set closing date. The defense attorney points out, unless the conditions precedent to the closing were met, the defendant was not obligated to close under the contract terms and conditions. The defense attorney insists he will not be called as a witness on any issue because there is no actual dispute here, and the plaintiff bears the burden of demonstrating specifically the potential testimony and substantial likelihood of prejudice.

The plaintiff's attorney states, in a reply affirmation dated January 8, 2007, the defense attorney concedes no tender of funds was made by the defendant at the August 7, 2006 closing, but merely offers speculation which is no substitute for a sworn statement based on personal knowledge. The plaintiff's attorney reiterates the assertions of the defendant's unreadiness, unwillingness and inability to close on August 7, 2006, and the defendant's breach of the covenant of good faith and fair dealing.

This Court has carefully reviewed and considered all of the parties' papers submitted on the motion and cross motion. Under CPLR 3212(b), a motion for summary judgment "shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." "The motion

shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." Summary judgment is a drastic remedy that is awarded only when it is clear that no triable issue of fact exists (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 325; *Andre v. Pomeroy*, 35 N.Y.2d 361). Summary judgment is the procedural equivalent of a trial (*Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 A.D. 2d 572). Thus the burden falls upon the moving party to demonstrate that, on the facts, it is entitled to judgment as a matter of law (*see, Whelen v. G.T.E. Sylvania Inc.*, 182 A.D. 2d 446). The court's role is issue finding rather than issue determination (*see, e.g., Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395; *Gervasio v. Di Napoli*, 134 A.D.2d 235, 236; *Assing v. United Rubber Supply Co.*, 126 A.D.2d 590). Nevertheless, "the court must evaluate whether the alleged factual issues presented are genuine or unsubstantiated" (*Gervasio v. Di Napoli, supra*, 134 A.D.2d at 236, quoting from *Assing v. United Rubber Supply Co., supra*; *see, Columbus Trust Co. v. Campolo*, 110 A.D.2d 616, *aff'd* 66 N.Y.2d 701). If the issue claimed to exist is not genuine, and, therefore, there is nothing to be resolved at the trial, the case should be summarily decided (*see, Andre v. Pomeroy*, 35 N.Y.2d at 364; *Assing v. United Rubber Supply Co., supra*). This Court determines, upon all the papers and proof submitted here, there is a triable issue of fact which must be resolved at a trial. This Court also holds the defense counsel should not be disqualified at this time from serving as the defendant's attorney. The plaintiff has not met the burden with respect to showing a violation of DR § 5-102 (a) and (b), and 22

NYCRR § 1200.21 (a) and (b).

Accordingly, the motion and cross motion are denied.

So ordered.

Dated: **March 25, 2008**

ENTER:



FINAL DISPOSITION

NON FINAL DISPOSITION XXX

HON. ANTONIO I. BRANDVEEN

**ENTERED**

MAR 28 2008

COURT CLERK OF  
NASSAU COUNTY