

**Caruso v Maio**

2008 NY Slip Op 31188(U)

April 2, 2008

Supreme Court, Suffolk County

Docket Number: 0027266/2007

Judge: Emily Pines

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Short Form Order

Index Number: 27266-2007

**Supreme Court - State of New York  
I.A.S. Term, Part 23, Suffolk County**

**Present:**

**HON. EMILY PINES**  
J. S. C.

**Original Motion Date:** 01-18-2008  
**Motion Submit Date:** 02-07-2008  
**Motion Sequence No.:** 001 MG

\_\_\_\_\_ X  
**SUE ANN CARUSO formerly known as  
SUE ANN GRODNER,**

Attorney for Plaintiff  
Teresa D. Phin, Esq.  
87 West Suffolk Avenue  
Central Islip, New York 11722

**Plaintiff,****-against-**

**MICHAEL MAIO and DONNA DeJESU, now  
known as DONNA MAIO,**

Attorney for Defendant  
Gathman, & Bennett, LLP  
John C. Bennett, Esq.  
191 New York Avenue  
Suite 202  
Huntington, New York 11743

**Defendants.**

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**ORDERED**, that the motion (motion sequence number 001) by defendants for an Order releasing certain funds held in escrow pursuant to an Escrow Agreement dated September 18, 2007 is granted; and it is further

**ORDERED**, that counsel are directed to appear for a preliminary conference on May 15, 2008 at 9:30 a.m. at D.C.M., Room 203A, Griffing Avenue Annex, Riverhead, New York.

This is an action by plaintiff to recover an \$80,000.00 down payment paid on a real estate contract for the purchase of property located at 16 Overland Place, Huntington, New York (the "subject premises"). Plaintiff commenced the action by the filing of a Summons and Verified Complaint on August 29, 2007 and issue was joined by defendants' service of a Verified Answer dated October 11, 2007. Simultaneously with the commencement of the action, plaintiff filed a Notice of Pendency on the subject premises. Thereafter, on or about September 18, 2007, the parties entered into an Escrow Agreement, wherein they agreed that the sum of \$80,000.00 would be held in escrow by defendants' counsel in exchange for which the Notice of Pendency would be canceled. Based on the Escrow Agreement, the parties also executed a "Consent to Cancel the Notice of Pendency".

Defendants now move for an Order, *inter alia*, releasing the \$80,000.00 held in escrow.

### **THE FACTS**

On or about November 1, 2005, plaintiff entered into a contract with defendants for the purchase of the subject premises for \$552,050.00 and paid a down payment of \$80,000.00. The contract provided for a closing date of on or about April 1, 2007 and also contained a mortgage contingency clause that plaintiff obtain a mortgage in the amount of \$472,050.00 by February 28, 2007. Pursuant to ¶3 of the Rider to the contract, in the event plaintiff failed to obtain the mortgage commitment by February 28, 2007, either party could cancel the contract. However, plaintiff was not entitled to a refund of the down payment. The contract, at ¶28, also contained a merger clause, to wit, that all prior understandings, agreements, representations and warranties were contained within the agreement.

Simultaneous with the execution of the contract, the parties executed a lease agreement which provided that plaintiff would lease the subject premises from defendants for an eighteen (18) month period commencing November 1, 2005. The annual rent was calculated based on amounts of interest due on two outstanding notes on the subject premises, the real property taxes, and homeowner's insurance premiums; that is, plaintiff was responsible for payment of these items as rent.

On or about May 15, 2007, defendants' counsel sent a letter to plaintiff setting a closing date for the subject premises as June 1, 2007 and indicated "TIME BEING OF THE ESSENCE". He sent a follow up letter on May 30, 2007, again indicating the closing was being set on June 1, 2007, yet plaintiff failed to appear at the closing. On or about August 24, 2007, defendants wrote to plaintiff and advised that they had entered into a contract with a third-party for the purchase and sale of the subject premises. Plaintiff then commenced the instant action and filed the Notice of Pendency.

### **THE COMPLAINT and ESCROW AGREEMENT**

The Complaint sets forth three (3) causes of action. In the first cause of action, plaintiff alleges she was fraudulently induced into entering the contract by false representations by defendant that the deposit was refundable. Moreover, plaintiff alleges defendants forced her to enter into the contract before she had the opportunity to discuss the contract with her attorney. Plaintiff alleges that at the time of the execution of the contract, she did not know the down payment was non-refundable. On the first cause of action, plaintiff seeks damages in the sum of \$80,000.00 on rescission of the contract. In the second cause of action, plaintiff alleges she suffers from a bi-polar condition, was in a manic state when she executed the contract and was thus incompetent and could

not understand the consequences of the contract and lease. She alleges she was mentally incompetent and thus the contract is void and of no force and effect. On the second cause of action she also seeks damages in the amount of \$80,000.00.

In the third cause of action, plaintiff alleges she performed all the conditions of the contract but was denied a mortgage and should be entitled to a return of her down payment. As to the third cause of action, plaintiff seeks that “a lien be imposed on the real property which is the subject to this action; that the premises which is the subject of this action be sold to satisfy the lien for the sum due the plaintiff upon the failure of the defendants to pay said sum; that a judgment be granted in the amount of EIGHTY THOUSAND and 00/100 (\$80,000.00) DOLLARS, plus other undetermined damages, together with interest from the 10<sup>th</sup> day of February, 2007, and the costs and disbursements of this action”.

As set forth above, on or about September 18, 2007, the parties entered into an agreement wherein defendants agreed to hold the sum of \$80,000.00 in escrow in exchange for the release of the Notice of Pendency filed on the subject premises. The Escrow Agreement provided that the Escrow Agent shall hold the escrowed funds until the earlier of:

1. A court decision or judgment declaring that the Notice of Pendency was improper or valid, or
2. A determination by court decision in favor of Maio or Caruso in the action filed under Index Number 07-2726.
3. Settlement of the action filed by Caruso against Maio at any time.

Defendants now move for an Order directing the release of the escrow funds.

#### **DEFENDANTS' MOTION**

Defendants seek the release of the escrow funds on the ground that the Notice of Pendency was improperly filed by plaintiff. Specifically, defendants argue the within action does not effect title to, possession, use or enjoyment of real property and thus does not merit a Notice of Pendency under CPLR §6501. Defendants assert that a review of the pleadings demonstrates clearly that plaintiff is not seeking specific performance of the real estate contract, and further, plaintiff was aware defendants entered into a subsequent contract with a third party to purchase the subject premises. In that regard, defendants note that the Notice of Pendency was filed after they entered into a contract with the third party, and thus the third-party would not be on notice of the later filed

Notice of Pendency. Defendants urge the Court to recognize that plaintiff's action seeks only money damages or a refund of a down payment, an action that does not effect title to real property and thus, is not subject to the filing of a Notice of Pendency.

In opposition to the motion, plaintiff's counsel argues that the first cause of action sounds in fraud in inducement and as a result, the filing of the notice of pendency was proper. Moreover, plaintiff asserts that the third cause of action seeks to impress a vendee's lien against the subject premises and to foreclose said lien. Plaintiff argues that such an action to foreclose a vendee's lien supports the filing of a *lis pendens*.

### DISCUSSION

CPLR §6501 states:

A notice of pendency may be filed in any action in a court of the state or of the United States in which the judgment demanded *would affect the title to, or the possession, use or enjoyment of, real property*, except in a summary proceeding brought to recover the possession of real property. The pendency of such an action is constructive notice, from the time of filing of the notice only, to a purchaser from, or incumbrancer against, any defendant named in a notice of pendency indexed in a block index against a block in which property affected is situated or any defendant against whose name a notice of pendency is indexed. A person whose conveyance or incumbrance is recorded after the filing of the notice is bound by all proceedings taken in the action after such filing to the same extent as a party.

(Emphasis added). As aptly stated by the Chief Judge of the Court of Appeals, "A notice of pendency, commonly known as a '*lis pendens*,' can be a potent shield to protect litigants claiming an interest in real property. The powerful impact that this device has on the alienability of property, when conjoined with the facility with which it may be obtained, calls for its narrow application to only those lawsuits directly affecting title to, or the possession, use or enjoyment of, real property." **530 Realty Corp. v. O & Y Equity Corp.**, 64 N.Y.2d 313, 486 N.Y.S.2d 877, 476 N.E.2d 276 (1984). In considering a motion to cancel a notice of pendency, the court is limited to reviewing the pleading to determine whether the action falls within the scope of CPLR §6501. *Id.* But, the prayers for relief are not alone determinative, the court must examine the complaint in its entirety. **Henrietta Piping, Inc., v. Antetomaso & Micca Group, LLC**, 11 Misc.3d 909, 816 N.Y.S.2d 663 (Sup. Ct. Monroe Co. 2006)(internal citations omitted).

It is well settled that an action seeking a return of a down payment and related damages is not one in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property. **Weidell v. Kaba Realty, LLC**, 36 A.D.3d 796, 826 N.Y.S.2d 912 (2d

Dept. 2007); *Woodpoint Plaza Condominium v. Woodpoint Plaza, LLC.*, 43 A.D.3d 971, 841 N.Y.S.2d 471 (2d Dept. 2007); *Shkolnik v. Krutoy*, 32 A.D.3d 536, 819 N.Y.S.2d 839 (2d Dept. 2006); *Rajic v. Sarokin*, 214 A.D.2d 663, 625 N.Y.S.2d 94 (2d Dept. 1995); *Tsiporin v. Ziegel*, 203 A.D.2d 451, 610 N.Y.S.2d 603 (2d Dept. 1994).

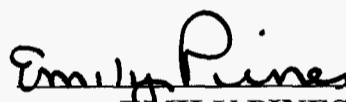
Application of the above principles to the case at bar illustrates why defendants' motion for an Order releasing the \$80,000.00 held in escrow must be granted. Plaintiff's Complaint, although divided into three (3) separate causes of action, essentially seeks the same relief, to wit, refund of her \$80,000.00 down payment. While the first cause of action alleges fraud in the inducement, it does not seek specific performance or the imposition of a constructive trust.<sup>1</sup> Rather, plaintiff merely seeks money damages in the form of a return of her down payment. Likewise for the second and third causes of action. Boiled to its essence, the Complaint seeks money damages for breach of contract, rescission and refund of the down payment. Such allegations are insufficient to sustain the filing of a Notice of Pendency. Although the prayer for relief on the third cause of action seeks to impress and foreclose a lien, such is not dispositive. A review of the pleadings demonstrates plaintiff is seeking only money damages, and such claims do not affect the title to or possession of the subject premises. Thus, the Notice of Pendency was improperly filed.

Based on the foregoing, defendants' motion for an Order releasing the escrow funds in the sum of \$80,000.00 to defendants is granted in its entirety.

Counsel are directed to appear for a preliminary conference on May 15, 2008 at 9:30 a.m. Supreme Court One Court Street, Differentiated Case Management, Room 203A, Griffing Avenue Annex, Riverhead, New York.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: April 2, 2008  
Riverhead, New York

  
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EMILY PINES  
J. S. C.

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<sup>1</sup>The Court notes that plaintiff's claim in this regard may ultimately fail as the merger clause contained within the contract may bar the admission of extrinsic evidence regarding the terms of the agreement. *See, Sorenson v. Bridge Capital Corp.*, 30 A.D.3d 1144, 817 N.Y.S.2d 229 (1<sup>st</sup> Dept. 2006).