

Howard v Kushner

2008 NY Slip Op 31522(U)

May 30, 2008

Supreme Court, New York County

Docket Number: 0116445/2007

Judge: Marilyn Shafer

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

PRESENT: HON. MARILYN SHAFER, JSC
Justice

PART 8

Alexis Howard

INDEX NO. 116443/07

- v -

PAUL KUSHNER

MOTION DATE _____

MOTION SEQ. NO. 1

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion + x motion

decided pursuant to attached
deem

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

FILED

JUN 04 2008

COUNTY CLERK'S OFFICE
NEW YORK

MARILYN SHAFER
J.S.C.

Dated: 5/30/08

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

PRESENT: HON. MARILYN SHAFER PART 8
Justice

ALEXIS HOWARD,

INDEX NO. 116445/07

Plaintiff,

MOTION DATE

-against-

MOTION SEQ. NO. 001

PAUL KUSHNER,

MOTION CAL. NO.

Defendant.

The following papers, numbered 1 to 7, were read on these cross-motions for summary judgment.

	<u>PAPERS NUMBERED</u>
Order to Show Cause – Exhibits	1
Notice of Cross-Motion, Affirmation – Exhibits	2,3
Notice of Cross-Motion, Affirmation — Exhibits	4,5
Affirmation in Reply — Exhibits	6
Affirmation In Reply — Exhibits	7

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Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that the cross-motions for summary judgment are denied.

This dispute concerns funds escrowed as a down payment in a failed real estate transaction. For the reasons set forth below, the parties' cross-motions for summary judgment are denied.

Background

The following facts are undisputed and reflected in documents. On August 27, 2007 the plaintiff, an unemployed single mother with a combined income, from child support and an allowance, of \$75,000 per year, entered into a contract to purchase a cooperative apartment for \$3,650,000.00. A down payment of \$365,000.00 was placed in escrow. (¶ 1.12) The sale was subject to the approval of the cooperative corporation (¶ 6.1) and was deemed cancelled in the event the corporation denied purchaser's application for any reason other than purchaser's bad faith. (¶ 6.2.3) In the event the corporation denied the purchaser's application, the down payment would be returned to the purchaser. (¶ 6.3) In the event of default by the purchaser, the seller would retain the down payment as liquidated damages. (¶ 13.1) The contract contemplated an all cash deal with no financing contingency. It contained, however, the following contingency:

Purchaser acknowledges that the approval of the corporation to this transaction is expressly contingent upon Nelson Doubleday [plaintiff's step father] personally and unconditionally guaranteeing payment of all charges due the corporation in connection with ownership of the apartment, including, but not limited to, maintenance, assessments, late fees and attorneys fees. Nelson Doubleday shall be required to sign a guaranty reasonable (sic) acceptable to the corporation at or prior to closing. (Second Rider, ¶ 7 (g))¹

On Friday, November 9, 2007, an e-mail from the corporation's transfer agent to the seller's broker advised that the purchaser would be required, in addition to providing a guaranty, to place one year's maintenance in escrow for five years. It proposed an interview date of November 19. Purchaser's attorney responded, in an e-mail dated Monday, November 12, that she would not consent to placing any amount of money in escrow for any period of time and that

¹ The printed contract referenced "Nelson Doubleday & Sandra Pine Doubleday." The parties have submitted non-uniform copies in which either one or both of the references to Sandra Pine Doubleday is crossed out. This is apparently not an issue.

there was, therefore, no reason to schedule an interview. He sent a notice of cancellation to the seller's attorney requesting release of the down payment. He stated that the contract did not require the posting of collateral and the request was unreasonable.

Seller's attorney rejected the notice of cancellation. He termed purchaser's refusal to appear at in interview anticipatory repudiation of the contract and an act of bad faith. He advised that the seller was willing to fund the required escrow and urged the purchaser to attend the interview on Nov. 19.

Apparently she did not attend the interview because, on Nov. 20, the seller hand delivered a letter to his attorney, the purchaser, and the purchaser's attorney stating that purchaser's failure to attend the interview was a default under the contract triggering release of the down payment to him.

Purchaser's attorney objected, by letter, to the release of the funds. He claimed that the Board had been informed on numerous occasions, orally and in writing, that the purchaser was not obligated, under the contract, to post an escrow. "Accordingly there was no reason for an interview as such requirement is a 'condition precedent' to her being approved by the Board."

Upon Seller's refusal to release the down payment, purchaser initiated the instant action, by Order to Show Cause, seeking a preliminary injunction: (1) enjoining disbursement of the down payment; (2) enjoining seller from selling the subject apartment; and (3) staying purchaser's obligations under the contract. This Court granted a temporary restraining order for the first prong only of the relief sought.

Seller cross-moved for summary judgement on its counterclaims: release of the down payment and attorney's fees. Seller argues the escrow requirement was not only reasonable,

given purchaser's finances, but actually contemplated in the personal guaranty requirement. Moreover, since the seller was willing to fund the escrow, and to allow unused funds to be refunded to the purchaser, it could no longer be viewed as a modification to the contract which would entitle purchaser to cancel the contract.

Purchaser cross-moved for summary judgment in her favor, granting the relief sought in her complaint: release of the down payment, attorney's fees, and dismissal of the counterclaims. Purchaser argues that the reasonableness of the escrow requirement is not the issue. Coop boards are empowered to impose any reasonable requirement and an escrow requirement is not unusual. The issue is that the purchaser and her guarantor never agreed to post money.

Discussion

In order to obtain summary judgment, a movant must establish his or her cause of action sufficiently to warrant the court, as a matter of law, in directing judgment in his or her favor. The proof must be in admissible form and the party seeking to defeat summary judgment must also provide evidence in admissible form sufficient to show the existence of disputed material facts sufficient to warrant a trial. (*Zuckerman v City of New York*, 49 NY2d 557 [1980]) Purchaser seeks rescission of the contract of sale and return of her deposit. Seller claims the funds were forfeited by purchaser's breach of the contract of sale. The issue to be determined on both motions is whether the failure of the transaction was attributable to bad faith on the purchaser's part. (*Kapur v Stiefel*, 264 AD2d 602 [1st Dept 1999]) A prospective purchaser may not recover his down payment where he wrongfully fails to go to closing. (*Maxton Bldrs v LoGalboI*, 68 NY2d 373 [1986])

The contract was “expressly contingent” upon the unconditional personal guarantee of Nelson Doubleday, who was “required to sign a guaranty reasonable (sic) acceptable to the corporation at or prior to closing.” The Doubleday guarantee contingency is legally indistinguishable from a financing contingency and the same legal analysis applies. A mortgage contingency clause is construed to create a condition precedent to the contract of sale. (*Creighton v Milbauer*, 191 AD2d 162 [1st Dept 1993]) As long as purchasers exert a genuine effort to secure mortgage financing and act in good faith, they are entitled to recover their down payment if the mortgage is in fact not approved. (*Lunning v 10 Bleecker St Owners Corp*, 160 AD2d 178 [1990]). However, where liability under a contract depends upon a condition precedent, one cannot avoid liability by making the performance of the contract impossible, or by preventing it. The burden of proof rests upon the party seeking to enforce the agreement. (*Lindenbaum v Royco Property Corporation*, 165 AD2d 254 [1st Dept 1991])

There is no indication that purchaser refused to obtain Doubleday’s personal guaranty, or that the financial information provided was not acceptable to the Corporation. Purchaser refused to comply with the Corporation’s requirement that they put a year’s worth of maintenance payments in escrow. Seller argues that this refusal constitutes a breach of contract.

Seller argues the contract did not provide an exclusive method for effectuating the guarantee. The language “guaranteeing payment of all charges” anticipates *inter alia* signing a personal guaranty, signing a letter of credit, posting monies in escrow, or a variety of other actions. An escrow requirement is not unusual and, in this case, not unreasonable given purchaser’s financial situation.

Seller cites no case approving such a linguistic stretch. The language of the contract

unambiguously does provide an exclusive method of effectuating the guaranty -- a personal guaranty executed by Doubleday. The Corporation's demand for the added security of an escrow was a rejection of purchaser's offer and a counteroffer which purchaser was under no obligation to accept. (*Albert & Kimmel v Herman*, 276 AD2d 413 [1st Dept 2000])[Buyer justified in refusing to proceed with closing on ground she never agreed to corporation's added conditions]) Insofar as the reasonableness of the request is concerned, there is no indication that purchaser misrepresented her situation prior to entering the contract. Seller was free to tailor the contract to meet his needs and to include *inter alia* reference to other methods of guaranty. (*Grace v Nappa*, 46 NY2d 560 [1979]) Since the contract did not reference other methods of guaranty, purchaser was under no obligation to accept the Corporation's counter-offer. There was, then, no final agreement between purchaser and the Corporation as to the specific conditions under which its approval would have been granted. (*Abely v Hayden*, 155 AD2d 254 [1st Dept 1989]; *Moss v Brower*, 213 AD2d 215 [1st Dept 1995]) Purchaser has established her *prime facie* case that she submitted her application in good faith and justifiably refused to comply with a condition for which she had no obligation.

In the alternative, seller argues his willingness to fund the escrow removes it as a condition precedent to closing. This Court finds that, on this issue, seller has succeeded in raising a triable issue of fact. Purchaser's only articulated basis for refusing to proceed was the unwillingness to post an escrow. While this basis is sufficient as a matter of law, a question of fact exists as to whether that condition could have been modified or even removed. On this basis, purchaser has failed to eliminate any material question of fact so as to warrant summary disposition of her claim for rescission. (*Alper v Seavey*, 9 AD3d 263 [1st Dept 2004])

Accordingly, it is

ORDERED that the plaintiff's motion for summary judgment is denied; and it is further
ORDERED that the defendant's motion for summary judgment is denied; it is further
ORDERED that the matter be set down for a hearing on the issue of whether the
purchaser has failed to eliminate any material question of fact so as to warrant summary
disposition of her claim for rescission in light of seller's offer to satisfy the escrow requirement.

This reflects the decision and order of this Court.

Dated: 5/29/08

ANDREW S. SHAFER
J.S.C. J.P.C.

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