

**Tiedemann v Bloom**

2008 NY Slip Op 32040(U)

July 15, 2008

Supreme Court, Nassau County

Docket Number: 3462-06/

Judge: Daniel R. Palmieri

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**SHORT FORM ORDER**

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU**

**Present:**

**HON. DANIEL PALMIERI  
Acting Justice Supreme Court**

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**GEORGE TIEDEMANN and JUSTINE TIEDEMANN,**

**TRIAL TERM PART: 48**

**Plaintiff,**

**INDEX NO.: 013462/06**

**-against-**

**MOTION DATE: 6-12-08  
SUBMIT DATE: 7-3-08  
SEQ. NUMBER - 001 &  
002**

**SIDNEY BLOOM, SUSAN BLOOM and  
PEARLMAN, APAT & FUTTERMAN,**

**Defendants.**

-----x

**The following papers have been read on this motion:**

**Notice of Motion, dated 5-9-08.....1**  
**Notice of Cross Motion, dated 6-3-08.....2**  
**Reply Affirmation in Support of Cross Motion,  
dated 7-2-08.....3**  
**Reply Affirmation and Opposition to Cross Motion,  
dated 7-2-08.....4**

The motion by defendants for summary judgment pursuant to CPLR §3212 is granted.

The complaint is dismissed and judgment is granted in favor of defendants on their first counterclaim in the amount of the contract down payment of \$29,625.00, as liquidated damages with interest from June 7, 2006. As to all other counterclaims, the motion is denied.

The cross motion by plaintiffs is denied.

This is an action by plaintiffs contract vendees of a residence in Plainview, New York against the defendants contract vendors (and their attorney escrowee) for the return of their contract down payment and other related relief.

The defendant sellers have counterclaimed for breach contract (and related relief) seeking a forfeiture of the contract down payment. That remedy is stated in the contract to be the sellers' sole and exclusive remedy in the event of a wilful default by the plaintiff purchaser.

This dispute is whether the plaintiffs should be permitted to cancel the contract based on their inability to satisfy the mortgage contingency provision of the contract, which requires the plaintiff to obtain a "firm" written commitment for a specified amount or, upon plaintiffs "wilful" failure to fulfill their obligations under the mortgage contingency, face the loss of their down payment as liquidated damages. The plaintiffs had six months earlier obtained a preapproval of a combined loan of \$550,000.00 against an unspecified home with a sales price of \$650,000, but neither side has submitted the loan closing conditions mentioned in the letter. In any event, the subject contract contained mortgage commitment contingency clauses for a mortgage of \$492,500.00.

After submitting their loan application for the subject transaction, the plaintiffs amended their application to reduce their cash assets by \$20,000. This resulted in a denial of their application based on "Insufficient Cash Assets". None of plaintiffs' loan applications have been submitted, hence, other than what has been submitted, this Court has not knowledge of what was presented to the prospective lender.

At her examination before trial, plaintiffs' real estate broker, on the sale of plaintiffs' existing home, testified that plaintiffs home was withdrawn from the sales market before plaintiffs' loan application for the new home was denied, and that she was told by plaintiffs that they wanted to get out of the contract. Plaintiffs' mortgage broker testified that he was instructed to reduce the cash assets available to plaintiffs by \$20,000.00, because a death in the family required plaintiffs to use their asset money and plaintiff Justine Tiedemann testified at her EBT that their financial condition had not changed, could not explain why her attorney sent a letter cancelling the contract due to "unexpected financial issues" some two weeks prior to the issuance of the mortgage denial or what was meant by "unexpected financial issues." On these motions, Janine Tiedemann avers, without elaboration or documentation of any kind, that the \$20,000.00 was to have been taken from her husband's "pension account" but her husband learned that it "was in fact not available as a liquid asset". This excuse is not further explained and the reason for omitting this explanation from her EBT is not addressed. Absent from plaintiffs' submission is any evidence from George Tiedemann or plaintiffs' attorney who wrote the letter purporting to cancel the contract.

It is well settled that summary judgment is a drastic remedy which should not be granted where there is any doubt about the existence of a triable issue of fact. *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957); *Bhatti v. Roche*, 140 AD2d 660 (2d Dept. 1988). It is nevertheless an appropriate tool to weed out meritless claims. *Lewis v. Desmond*, 187 AD2d 797 (3d Dept. 1992); *Gray v. Bankers Trust Co. of Albany, N. A.*, 82 AD2d 168 (3d Dept. 1981). Even where there are some issues in dispute in the case which

have not been resolved, the existence of such issues will not defeat a summary judgment motion if, when the facts are construed in the nonmoving party's favor, the moving party would still be entitled to relief *Brooks v. Blue Cross of Northeastern New York, Inc.*, 190 AD2d 894 (3d Dept.1993).

Generally speaking, to obtain summary judgment it is necessary that the movant establish its claim or defense by the tender of evidentiary proof in admissible form sufficient to warrant the court, as a matter of law, in directing judgment in its favor (CPLR 3212 [b]), which may include deposition transcripts and other proof annexed to an attorney's affirmation. *Olan v Farrell Lines*, 64 NY2d 1092 (1985). Absent a sufficient showing, the court should deny the motion, irrespective of the strength of the opposing papers. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985).

If a sufficient *prima facie* showing is made, however, the burden then shifts to the non-moving party. To defeat the motion for summary judgment the opposing party must come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. CPLR 3212 (b); *see also GTF Marketing, Inc. v. Colonial Aluminum Sales, Inc.*, 66 NY2d 965 (1985); *Zuckerman v. City of New York*, 49 NY2d 557 (1980). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion. *Mgrditchian v. Donato*, 141 AD2d 513 (2d Dept. 1988). Conclusory allegations are insufficient (*Zuckerman v. City of New York, supra*), and the defending party must do more than merely parrot the language of the complaint or bill of particulars. There must be

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evidentiary proof in support of the allegations. *Fleet Credit Corp. v. Harvey Hutter & Co., Inc.*, 207 A.D.2d 380 (2d Dept. 1994); *Toth v. Carver Street Associates*, 191 AD2d 631 (2d Dept. 1993). If a party defends a motion by resort to CPLR 3212(f), that is, the party has a defense sufficient to defeat the motion but that the facts cannot yet be stated, that party must be able to make some showing that such facts do in fact exist; mere hope that discovery may reveal those facts is insufficient. *Companion Life Ins. Co. v All State Abstract Co.*, 35 AD3d 519 (2d Dept. 2006). Nor can mere speculation serve to defeat the motion. *Pluhar v Town of Southhampton*, 29 AD3d 975 (2d Dept. 2006); *Cicccone v Bedford Cent. School Dist.*, 21 AD3d 437 (2d Dept. 2005).

However, the court must draw all reasonable inferences in favor of the nonmoving party. *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 (2d Dept. 2003); *Rizzo v. Lincoln Diner Corp.*, 215 AD2d 546 (2d Dept. 1995). The role of the court in deciding a motion for summary judgment is not to resolve issues of fact or to determine matters of credibility, but simply to determine whether such issues of fact requiring a trial exist. *Dyckman v. Barrett*, 187 AD2d 553 (2d Dept. 1992); *Barr v County of Albany*, 50 NY2d 247, 254 (1980); *James v. Albank*, 307 AD2d 1024 (2d Dept. 2003); *Heller v. Hicks Nurseries, Inc.*, 198 AD2d 330 (2d Dept. 1993).

The Court need not, however, ignore the fact that an allegation is patently false or that an issue sought to be raised is merely feigned. See *Village Bank v Wild Oaks Holding, Inc.*, 196 AD2d 812 (2d Dept. 1993); *Barclays Bank of N.Y. v Sokol*, 128 AD2d 492 (2d Dept. 1987), such as when the affidavit in opposition clearly contradicts earlier deposition

testimony. *Central Irrigation Supply v Putnam Country Club Assocs., LLC*, 27 AD3d 684 (2d Dept. 2006).

In this case, plaintiffs have failed to explain the apparent contradictions between her EBT testimony and her current affidavit and the Court is permitted to treat her latest offering as feigned and insufficient to create any issues of fact. *Telfeyan v. City of New York*, 40 AD3d 372 (1<sup>st</sup> Dept. 2007); *Nieves v. JHH Transport, LLC*, 40 AD3d 1060 (2d Dept. 2007).

Although plaintiffs contend that the contract required the issuance of a firm commitment and the commitment obtained prior to the contract of sale should not be considered as being firm (*see Miranda v. Jay Construction Corp*, 2 AD3d 420 [2d Dept. 2003], *Munson v. Germerican Assoc.*, 224 AD2d 670 [2d Dept. 1996] and *Carpenito v. Balint*, 145 AD2d 458 [2d Dept. 1988]) such contention is an unnecessary diversion and need not be decided on this motion because the issue here is whether the plaintiffs made a good faith effort to comply with the contract's conditional commitment clause.

It is quite clear that neither party regarded the earlier preapproval as a "firm" commitment because they specifically conditioned the contract upon obtaining a new commitment for the subject transaction, and the preapproval is not at all mentioned in the contract.

A contract vendee favored with a mortgage contingency condition is required to exert a genuine effort to secure mortgage financing and act in good faith, and when such a condition is not fulfilled through no fault of a purchaser who acts in good faith, performance is excused. *Garber v. Giordano*, 16 AD3d 454, 455 (2d Dept. 2005); *citing, Sciales v. Foulke*, 217 AD2d 693 (2d Dept. 1995) and *Lunning v. 10 Bleeker St. Owners Corp.*, 160

AD2d 178 (1<sup>st</sup> Dept. 1990). The insufficiently explained action of plaintiffs in amending their mortgage application in such a manner as to cause their denial, on the evidence submitted, leads to the conclusion that the mortgage was not denied through no fault or lack of effort on the part of plaintiffs. *Garber v. Giordano, supra*.

Defendants have made a *prima facie* showing of entitlement to summary judgment by submitting facts in evidentiary form which lead to the conclusion that plaintiffs did not make a good faith attempt to obtain a firm mortgage commitment.

In opposition and on their cross motion, plaintiffs have failed to make a *prima facie* showing that despite their good faith and through no fault of their own, they were unable to obtain a firm mortgage commitment in accordance with the mortgage contingency clause and in opposition to defendants' motion, they have failed to offer evidence to rebut the *prima facie* showing of defendants that they failed to use exercise due diligence in pursuing a good faith effort to obtain a mortgage in compliance with the contract. *Cf Astrada v. Archer*, 51 AD3d 954 (2d Dept. 2008).

The conclusion is inescapable that plaintiffs breached their duty, contractual or implied, to act in good faith to secure a mortgage commitment. *Binks v. Farooq*, 178 AD2d 999 (4<sup>th</sup> Dept. 1991).

Based on the foregoing, the evidence of breach by plaintiffs of their contractual obligation to make efforts to obtain a mortgage commitment has not been rebutted, and plaintiffs have failed to demonstrate the existence of any triable issues of fact. Where as here, the contract contains a clause permitting the retention of the contract down payment, courts will enforce such a provision. *Texter v. Trotta*, 48 AD3d 455 (2d Dept. 2008); *Rivera*

v. *Konkol*, 48 AD3d 347 (1<sup>st</sup> Dept. 2008). Hence, defendants are awarded summary judgment on their counterclaim for retention of the contract down payment and upon entry of judgment herein, the defendant Pearlman, Apat & Futterman as escrow agent, is authorized and directed to turn over the contract down payment and any interest accrued thereon to the Bloom defendants.

The defendants have not directed the Court to any provision in the contract or evidence in support thereof to justify any consideration of their counterclaims for other than forfeiture of the contract down payment.

The complaint and all other counterclaims are dismissed.

This shall constitute the Decision and Order of this Court.

Submit Judgment.

ENTER

DATED: July 15, 2008



HON. DANIEL PALMIERI  
Acting Supreme Court Justice

**TO: Ronald A. Lenowitz, Esq.  
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**ENTERED**

JUL 17 2008

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**