

**179 E. 94 LLC v Choon Weol Kim**

2008 NY Slip Op 32586(U)

September 23, 2008

Supreme Court, New York County

Docket Number: 0601674/2008

Judge: Jane S. Solomon

Republished from New York State Unified Court  
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

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

PRESENT: Sam S. Solomon  
Justice

PART 55

Index Number : 601674/2008

179 EAST 94 LLC

vs.

KIM, CHOON WEOL

SEQUENCE NUMBER : # 001

SUMMARY JUDGMENT IN LIEU OF COMPLAINT

INDEX NO. 601674-08

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

\_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

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

Answering Affidavits – Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*upon the annexed Decision & Order, the Clerk is directed to enter judgment in favor of plaintiff & against defendant for \$150,000 plus interest from 12/21/07 together with costs & disbursements as taxed.*

**FILED**

SEP 24 2008

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 9/24/08

Sam S. Solomon

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

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

-----X  
179 EAST 94 LLC,  
:

Plaintiff

INDEX NO. 601674/08

-against-

CHOON WEOL KIM,  
:

Defendant

-----X

JANE S. SOLOMON, J.

**FILED**  
SEP 24 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

DECISION AND ORDER

Plaintiff 179 East 94 LLC ("Plaintiff") moves for summary judgment in lieu of complaint (CPLR § 3213) against Defendant Choon Weol Kim ("Defendant") seeking the recovery of the amount of a downpayment check that was tendered by Defendant, but which was returned as unpaid after Defendant stopped payment on the check. Plaintiff's motion is granted as set forth below.

Defendant contracted with Plaintiff to purchase Plaintiff's real property located at 179 East 94<sup>th</sup> Street. The contract obligated the Defendant to tender a downpayment in the amount of \$150,000 upon execution of the contract. On December 17, 2007, the contract was executed by the parties and the downpayment check was tendered. The very next day, upon a change of mind, Defendant stopped payment on the check and contends that Plaintiff was informed that Defendant did not wish to proceed. The check was returned as unpaid.

\* 3 ]

Plaintiff moved pursuant to CPLR § 3213 for an order awarding Plaintiff summary judgment against Defendant in the amount of the unpaid check plus interest, costs, and disbursements. Plaintiff contends that: (a) CPLR § 3213 is applicable because its motion is based on an instrument for the payment of money only - the unpaid check; (b) Defendant wrongfully stopped payment on the check; (c) Defendant has no valid defense.

Defendant principally argues that Defendant was entitled to stop payment on the check because: (a) Defendant mistakenly believed that the sale of a business at the property was to be included in the transaction; (b) Defendant's first language is Korean; (c) Defendant is not sophisticated in real estate investments. Defendant also contends that Plaintiff cannot avail itself of the procedure set forth in CPLR § 3213 and that, although Defendant's and Ba Ram Kim's names are printed on the check, the funds in the account did not belong to Defendant.

"When an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint." CPLR § 3213. "The purpose of CPLR § 3213 is to provide a speedy and effective means of securing a judgment on claims that are presumptively meritorious." See J.D. Structures, Inc. v. Waldbaum, 282 A.D.2d

\* 4 ]  
434, 436 (2<sup>nd</sup> Dept. 2001) (citing Interman Indus. Products, Ltd. v. R.S.M. Electron Power, Inc., 37 N.Y.2d 151, 154 (1975)).

It is well settled that "[a] check is an instrument for the payment of money only." First Inter-County Bank of N.Y. v. DeFilippis, 160 A.D.2d 288, 289 (1<sup>st</sup> Dept. 1990). Furthermore, "[a]ny defenses to the underlying transaction between the parties which serves as a basis to stop payment [on a check does] not alter the character of [a check as an instrument] for the payment of money only or prevent the use of the CPLR 3213 procedure." K.S. Finance Corp. v. A.R.B. Inc., 12 Misc.3d 1038, 1039 (New York City Civil Court 2006) (citing First Inter-County Bank of N.Y., supra); see also Kirkwood v. Nakharkin, 169 A.D.2d 693 (1<sup>st</sup> Dept. 1991).

Clearly, the \$150,000 downpayment check which forms the basis for this action is "an instrument for the payment of money only." Accordingly, Plaintiff properly brought the instant motion pursuant to CPLR § 3213. Further, Plaintiff has set forth a prima facie case as to liability and Defendant does not raise a triable issue of fact in opposition. See First Interstate Credit Alliance, Inc. v. Sokol, 179 A.D.2d 583 (1<sup>st</sup> Dept. 1992); First Inter-County Bank of N.Y., supra; K.S. Finance Corp., supra.

Plaintiff has established that it was wrongful to stop payment on the check under the terms of the duly executed real estate sales contract between the parties See Gillette v. Meyers,

42 A.D.3d 654, 655 (3<sup>rd</sup> Dept. 2007); Korabel v. Natoli, 210 A.D.2d 620, 621 (3<sup>rd</sup> Dept. 1994).

Paragraph thirteen of the first rider to the contract clearly provides:

If the payment made on account of the purchase price at the time of the execution of this agreement is by check, and if said check fails due collection, the Seller, at its option, may declare this contract null, void and of no force and effect, and may pursue his remedies against the Purchaser upon said check or in any other manner permitted by law, such remedies being cumulative.

Moreover, Paragraph fifteen of the first rider to the contract states:

In the event the Purchaser shall default in the performance of the terms of the contract herein, this contract shall be considered cancelled and of no further force and effect and the Purchaser, in recognition of the substantial detriment, damage and expense which Seller shall suffer in the event of Purchaser's default and the difficulty of computing such detriment, damage and expense, shall forfeit to the Seller and the Seller shall be entitled to retain, the amount of any moneys paid in advance or deposited hereunder as liquidated damages with respect to such default and same shall be the exclusive property and sole remedy of the Seller.

Despite these provisions, Defendant maintains that Defendant was entitled to stop payment on the downpayment check. First, it is argued that Defendant believed the contract was for the purchase of a business as well as the real property that formed the basis of the contract. This argument is belied by the second rider to the contract, executed by Defendant, which contains an express option to purchase the business for \$350,000. It is next argued that Defendant's first language is Korean and that the

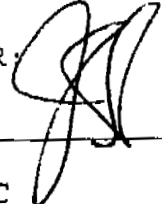
Defendant is not sophisticated in real estate transactions. Even if true, neither fact would excuse Defendant from the provisions of the executed contract. Further, Defendant was represented by counsel in the transaction.

Lastly, Defendant contends that it had a right to cancel the contract based on the mortgage contingency provision. However, under that provision Defendant was required to make a good faith attempt to secure financing from a lender within a forty-five day period following the execution of the contract. Defendant did not make such an attempt and chose to abandon the deal the very day after the contract was signed. Under such circumstances, a mortgage contingency provision is not applicable. See Sciales v. Froulk, 217 A.D.2d 693, 694 (2<sup>nd</sup> Dept. 1995).

For the reasons stated above, Plaintiff is entitled to summary judgment against Defendant in the amount of \$150,000. This constitutes the decision and order of this Court.

Dated: September 23, 2008

**FILED**  
SEP 24 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

ENTER:   
\_\_\_\_\_  
J.S.C

**JANE S. BOLANDER**