

Gneco v 610 West Realty LLC

2008 NY Slip Op 32606(U)

September 25, 2008

Supreme Court, New York County

Docket Number: 0107660/2008

Judge: Walter B. Tolub

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

PRESENT:

WALTER B. TOLUB

PART 15

Justice

Index Number : 107660/2008

GNECO, JOSE

vs.

610 WEST REALTY LLC

SEQUENCE NUMBER : # 001

VACATE

INDEX NO.

107660-08

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

DECLINED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

SEP 29 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated:

9/25/08

WALTER B. TOLUB

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: IAS PART 15

-----x
JOSE GNECO, DOMINGA GNECO and SHEENA
RALISTA GNECO,

Plaintiffs,

-against-

610 WEST REALTY LLC,

Defendant.

Index No.107660/08
Mtn Seq.001

FILED
SEP 29 2008
COUNTY CLERK'S OFFICE
NEW YORK

-----x
WALTER B. TOLUB, J.:

This is Defendant's motion to cancel the Notice of Pendency filed by Plaintiffs and for an order requiring Plaintiffs to post a bond as security for costs.

Facts

Defendant 610 West Realty LLC (610 West) is a limited liability company organized in the State of New York. 610 West promulgated a plan for condominium ownership (Plan) for Riverbridge Court Condominium, located at 603 West 148th Street and 608 West 149th Street, New York, New York.

On or about April 18, 2006, 610 West, as seller and Plaintiffs, as purchasers, entered into a purchase agreement (Agreement) in which Plaintiffs agreed to purchase unit 8C at the Riverbridge Condominium. A closing date was set and Plaintiffs made a down payment of \$70,969 which was placed in escrow along with interest accrued and accruing. Plaintiffs claim that they decided not to purchase the apartment because, on the closing

[* 5]
dale, the apartment had as many as 13 itemized deficiencies.

Plaintiffs argue that the apartment's deficiencies constitute a material breach under the Agreement. Plaintiffs commenced the underlying action, not for specific performance, but for the return of their security deposit and filed a purchaser's lien on the property. By this motion Defendant seeks to cancel the Notice of Pendency and seeks an order requiring the Plaintiffs to post a security for costs.

Discussion

CPLR §6515 provides that:

In any action other than to foreclose a mortgage or for partition or dower, the court, upon motion of any person aggrieved, may direct any county clerk to cancel a notice of pendency, upon such terms as are just, whether or not the judgment demanded would affect specific real property, if the moving party shall give an undertaking in an amount to be fixed by the court, and if:

1. The court finds that adequate relief can be secured to the plaintiff by the giving of such an undertaking; or

2. In such action, the plaintiff fails to give an undertaking, in an amount to be fixed by the court, that the plaintiff will indemnify the moving party for the damages he may incur if the notice is not cancelled.
(CPLR §6515)

A notice of Pendency is the only provisional remedy which a plaintiff may employ without posting an undertaking to indemnify the defendant in the event that plaintiff loses the action. This of course lends itself to possible abuse at the hand of

plaintiffs who may seek to tie up the defendant's property during a lawsuit (McKinney's Consolidated Laws of New York Annotated, §6515 [C6515:1], p. 481). Upon the recommendation of the Judicial Conference, this section was amended to provide that in any real property action (except to foreclose a mortgage or for partition or dower), the court may compel the plaintiff to post an undertaking to indemnify the defendant. Similarly, the statute also provides that the court may require the Defendant to post an undertaking to obtain such relief (Id.).

Here, the court may either require Plaintiffs to post an undertaking and keep the Notice of Pendency intact or the court may require the Defendant to post an undertaking and cancel the Notice of Pendency. Since Defendant has offered to post a bond and since Plaintiffs have no objection to Defendant posting an undertaking, the Defendant shall submit \$70,969.00 plus any accrued interest as an undertaking and, upon such posting, the Notice of Pendency shall be vacated.

Additionally, Defendants seek an order requiring the Plaintiffs to post security for costs pursuant to CPLR §8501. CPLR §8501(a) provides that the court ". . .shall order security for costs to be given by the plaintiffs where none of them is a domestic corporation, a foreign corporation licensed to do business in the state or a resident of the state when the motion is made." The language in the statute makes security for costs

mandatory where an individual plaintiff is not a resident of the state. It follows that Plaintiffs are directed to post a security in the amount and manner directed below.

Accordingly, it is

ORDERED that Defendant shall post a bond in the amount of the security deposit made by Plaintiffs plus all accrued interest from the date of the deposit; and it is further

ORDERED that upon said posting of the bond, the Notice of Pendency shall be cancelled; and it is further

ORDERED that within 30 days from the date of service of a copy of this order with notice of entry, the Plaintiffs pay to the court the sum of \$500.00 to be applied to the payment of costs, if any, awarded against the Plaintiffs; and it is further

ORDERED that, within 30 days from the date of service of a copy of this order with notice of entry, plaintiff shall serve upon the attorneys for the defendant a written notice of the payment or of the filing of such undertaking; and it is further


ORDERED that all further proceedings, except to review this

order, are stayed 30 days from the date of service of a copy of this order with notice of entry.

Counsel for the parties are to appear in room 335 at 60 Centre Street at 11:00am on November 7, 2008 for a Preliminary Conference.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 9/28/08



HON. WALTER B. TOLUB, J.S.C.

FILED
SEP 29 2008
COUNTY CLERK'S OFFICE
NEW YORK