

Schur v Watner

2008 NY Slip Op 32810(U)

October 7, 2008

Supreme Court, New York County

Docket Number: 603049/07

Judge: Shirley Werner Kornreich

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

PRESENT: HON. SHIRLEY WERNER KORNREICH

PART 54

Justice

Index Number : 603049/2007

SCHUR, MICHAEL

VS.

WATNER, DAVID B.

SEQUENCE NUMBER : # 001

DISMISS COMPLAINT

INDEX NO. 603049-07

MOTION DATE 7/10/08

MOTION SEQ. NO. #001

MOTION CAL. NO. _____

are read on this motion to/for Dismiss

PAPERS NUMBERED
1
2
3

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

FILED

OCT 09 2008

COUNTY CLERK'S OFFICE

NEW YORK

[Signature]

HON. SHIRLEY WERNER KORNREICH

J.S.C.

Dated: 10/7/08

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

----- X
MICHAEL SCHUR,

Plaintiff,

Index No.: 603049/07

-against-

DECISION
and ORDER

DAVID B. WATNER and VIVIENNE L. WATNER,

Defendants.

----- X
KORNREICH, SHIRLEY WERNER, J.:

FILED
OCT 09 2008
COUNTY CLERK'S OFFICE
NEW YORK

This action arises out of a contract to sell plaintiff's cooperative apartment located at 201 West 16th Street, Unit 5B, New York, New York 10011. Defendants now move to dismiss the complaint against them for failure to state a cause of action. Plaintiff opposes.

I. Background

In May of 2006, the parties entered into a written contract where defendants agreed to purchase from the plaintiff for \$650,000, his cooperative apartment located at 201 West 16th Street, Unit 5B, New York, New York 10011 (Premises). Upon signing the contract, defendants agreed to tender plaintiff's counsel, as escrowee, a deposit of \$65,000 to be held in escrow until the closing. In pertinent part, the agreement also stated:

13.1 In the event of a default or misrepresentation by Purchaser, Sellers solo and exclusive remedies shall be to cancel this Contract, retain the Contract Deposit as liquidated damages and, if applicable, Seller may enforce the indemnity in ¶13.3 as to brokerage commission or sue under ¶13.4. Purchaser prefers to limit Purchaser's exposure for actual damages to the amount of the Contract Deposit, which Purchaser agrees constitutes a fair and reasonable amount of compensation for Seller's damages under the circumstances and is not a penalty. The principles of real property law shall apply to this liquidated damages provision.

13.4 In the event any instrument for the payment of the Contract Deposit fails of

collection, Seller shall have the right to sue on the uncollected instrument. In addition, such failure of collection shall be a default under this Contract, provided Seller gives Purchaser Notice of such failure of collection and, within 3 business days after Notice is given, Escrowee does not receive from Purchaser an unendorsed good certified check, bank check or immediately available funds in the amount of the uncollected funds. Failure to cure such default shall entitle Seller to the remedies set forth in ¶13.1 and to retain all sums as may be collected and/or recovered.

The agreement to sell the Premises was executed and signed by the parties on May 23, 2006. That same day, defendants issued a check for \$65,000 to plaintiff's counsel to be held in escrow. Between May 23 and June 16, 2006, the parties executed several other documents in lieu of the closing including a disclosure of information regarding lead paint and a stock purchase application and questionnaire. During this time, defendants also sent Tudor Realty Group (Tudor), the co-op boards managing agent, two checks for \$250 each towards completing the transaction.

On or about June 29, 2006, plaintiff's counsel discovered that defendants' \$65,000 check had bounced. Plaintiff's counsel then contacted defendants' counsel to attempt to resolve the situation. In a letter dated July 11, 2006, defendants' counsel stated, *inter alia*, that he had communicated with his clients regarding the bounced check, that at the time the check was written there were sufficient funds in the account to cover the check, but that his clients advised him that they would "not be replacing the contract down-payment." Plaintiff's Exhibit C. That same day, plaintiff's counsel sent defendant's counsel a letter providing written notice that the check had bounced and indicating that defendants had defaulted under the contract. Plaintiff's Exhibit D. Defendants failed to cure their default and refused to close on the sale. Thus, on July 17, 2006, Tudor sent plaintiff a letter indicating that the co-op board would not approve the sale. Consequently, on or about May 15, 2007, plaintiff commenced the instant action alleging causes of action for breach of contract and fraud. Defendants answered the complaint on or about

October 15, 2007.

II. *Conclusions of Law*

On a motion to dismiss for a failure to state a cause of action, the pleading is to be given a liberal construction. *McRedmond v. Sutton Place Restaurant and Bar, Inc.*, 48 A.D.3d 258 (1st Dept 2008). The court must accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference and only determine whether the facts as alleged fit within any cognizable legal theory. *Id.* quoting *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994).

Here, defendants' motion to dismiss is denied. Defendants initially argue that they were not in default under the contract when their check was dishonored because their time to cure had not lapsed. Plaintiff's counsel sent defendants counsel notice of the default on Tuesday July 11, 2006. Pursuant to the contract, defendants would have had to cure the default within three business days. This time to cure would expire at the close of business on Friday July 14, 2006. Consequently, Tudor's letter dated Monday, July 17, 2006 informing plaintiff of the board's decision followed the cure time. In addition, defendants counsel's letter dated July 11, 2006 states that he had discussed the matter with his clients and that defendants had no intention of "replacing the contract down-payment."

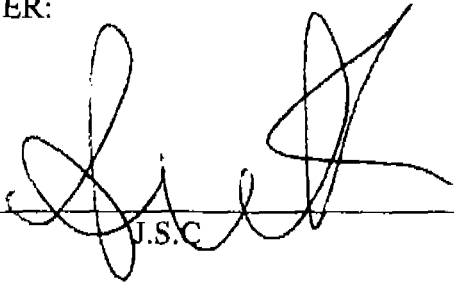
Defendants further argue that Mr. Schur cannot demonstrate that he suffered any damages arising out of their alleged default. Paragraphs 13.1 and 13.4 of the agreement, however, clearly give Mr. Schur the right to sue in order to enforce payment of the \$65,000 deposit as damages in the event of default or any misrepresentation by the defendants. In pertinent part, paragraph 13.1 states "In the event of a default or misrepresentation by Purchaser, Sellers solo and exclusive remedies shall be to cancel this Contract, retain the Contract Deposit as liquidated damages and, if applicable, Seller may enforce the indemnity in ¶13.3 as to brokerage commission or sue under

¶13.4.” Consequently, this argument fails. Regarding plaintiff’s fraud claim, in the complaint, Mr. Schur lists 13 alleged misrepresentations made by the defendants surrounding the negotiation and execution of the contract to sell the Premises. In support of their motion, defendants fail to address any of these allegations. Accordingly, it is

ORDERED that defendants motion to dismiss is denied; and it is further

ORDERED that all parties are to appear before the Court for a preliminary conference, as scheduled at 9:30 a.m. on November 20, 2008 at 111 Centre Street, Room 1227, New York, NY 10013.

ENTER:



J.S.C.

Date: October 7, 2008
New York, New York

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