

Kass v Grais

2008 NY Slip Op 32885(U)

October 8, 2008

Supreme Court, New York County

Docket Number: 603995/06

Judge: Charles E. Ramos

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

PRESENT: CHARLES E. RAMOS
Justice

PART 53

Kass

INDEX NO.

603995/06

MOTION DATE

- v -

Grais

MOTION SEQ. NO.

3

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

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Motion is decided in accordance with accompanying Memorandum Decision.

Dated: 10/8/08

HON. CHARLES E. RAMOS

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:COMMERCIAL DIVISION

-----X
LORYN KASS,

Plaintiff,

-against-

Index No.
603995/06

DAVID J. GRAIS, RUTH M. WHALEY AND
DEWEY BALLANTINE LLP,

Defendants.

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appear in person at the Judgment Clerk's Desk (Room
141B).

Charles Edward Ramos, J.S.C.:

Plaintiff Loryn Kass (the Purchaser) moves for summary
judgment pursuant to CPLR 3212.

Defendants David J. Grais, Ruth M. Whaley, and Dewey
Ballantine LLP (together, Defendants) cross-move for summary
judgment (CPLR 3212).

Background

For a full recitation of the factual background in this
action, see this Court's decision, dated September 4, 2007.
Otherwise, only facts relevant to the disposition of this motion
will be recited herein.

This action arises out of the Purchaser's attempt to
withdraw her offer to purchase a home, allegedly prior to the
acceptance of her offer becoming fully enforceable and effective
by faxing a letter to defendant Dewey Ballantine LLP (Dewey),
escrow agent and counsel for defendants David J. Grais, Ruth M.
Whaley (the Sellers) (together with Dewey, the Defendants)
cancelling the contract (Contract). The fax was transmitted on
August 7, 2006, at approximately 9:45 a.m.

On August 4, 2007, the Sellers, who received the Contract

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from the Purchaser by hand delivery, signed the Contract and mailed back the fully executed Contract to the Purchaser by Federal Express. The Contract was delivered by Federal Express to the Purchaser on August 7 at approximately 10:03 a.m. Although page one of the Contract states that it was made "as of July 2006," July 2006 was crossed out by the Sellers, and the date "August 7, 2006" was inserted instead.

When the Sellers claimed that the Purchaser had breached the Contract, the Purchaser commenced this declaratory judgment action.

This Court previously denied a motion and cross-motion for summary judgment. Subsequently, both parties moved for leave to reargue the Court's decision. Reargument was granted, and upon reconsideration, both motions were denied again, on the ground that Defendants failed to demonstrate as a matter of law that the mailbox rule applied to the Sellers' delivery of the executed contract by Federal Express, and that the Purchaser did not demonstrate that the parties intended that the Contract be effective when actually received by the Purchaser (September 4, 2007 Decision). The parties were ordered to conduct discovery on certain issues, including the intent of the Sellers in postdating the Contract.

Discussion

The Purchaser moves for summary judgment on the grounds that the withdrawal of her offer to purchase the property before she received the fully executed Contract from the Sellers, and before

the Sellers attempted to deposit her down payment check, coupled with the Sellers postdating of the Contract on the same date that Federal Express was scheduled to deliver the Contract to the Purchaser, occurred prior to the Sellers' acceptance becoming effective.

The Sellers cross-move for summary judgment on the ground that the default mailbox rule applies because the Sellers and the Purchaser were unaware that the Contract had been postdated. Thus, the postdating of the Contract could not have expressed any intent on the part of the parties to contract around the mailbox rule, because no party was aware of the date.

For the reasons set forth below, the Purchaser's motion for summary judgment is granted, and the Defendants' cross-motion is denied.

1. Terms of the Contract

The Contract contains a provision that addresses the mode of delivery of notices between the parties, and establishes that the parties intended that the receipt rule, that provides that acceptances are deemed delivered upon receipt, to apply. The Contract states that any notice or communication may be delivered by overnight carrier "with receipt acknowledged," and that "any notice or other communication ... delivered in person or by overnight courier shall be deemed given when delivered" (Contract, § 25). By inserting the phrase "shall be deemed given when delivered," coupled with the phrase "with receipt acknowledged," it is evident that the parties intended delivery

by overnight courier to be deemed effective when actually received, as opposed to when dispatched. Therefore, under section 25 of the Contract, the Sellers' acceptance, in the form of the fully executed Contract, was deemed delivered at the time that it was received by the Purchaser at 10:03 a.m., approximately 20 minutes after the Purchaser withdrew her offer.

2. Postdating of the Contract

Further, the postdating of the Contract demonstrates that the parties did not intend to be bound until the Contract was received by the Purchaser from Federal Express. Although the parties testified that they did not recall why the Contract was postdated, the Sellers do not contend that they challenged or otherwise objected to the postdating of the Contract at the time of execution. Further, section 25 of the Contract expressly states that when utilizing an overnight courier, delivery is deemed effective "when delivered," and "with receipt acknowledged." Consequently, the Sellers should be held to the Contracts' terms, including the postdating of the "made as of" date and when delivery is deemed effective when utilizing an overnight courier service (*Greenfield v Phillies Records, Inc.*, 98 NY 2d 562, 569 [2002]).

Otherwise, the postdating of a check made payable to a particular individual or entity is analogous to the postdating of a contract. With respect to a postdated check, it "is payable on or at any time after the day of its date, being in effect the same as if it had not been issued until that date" (*Montano v*

[* 6]

Springfield Gardens Nat. Bank, 207 Misc 840, 842 [App Term, 2d Dept, 1955]). Consequently, a postdated check is of no effect until the date set forth on the check (*Id.*). The check's issuer may change his or her mind and stop payment at any time prior to that date (*Id.*). Like a postdated check, a postdated contract manifests the intent of the parties not to be bound until the precise date set forth in the contract.

Federal Express delivered the fully executed Contract to the Purchaser at approximately 10:03 a.m., nearly 20 minutes after the Sellers' counsel received the Purchaser's withdrawal of her offer. Consequently, under the terms of the Contract, the Purchaser communicated the withdrawal of her offer prior to delivery of the Contract by Federal Express.

3. The Applicability of the Mailbox Rule

In regards to the mailbox rule, the Sellers argue that because it is unclear whether the parties intended to contract around the mailbox rule, the default rule, which is the mailbox rule, should apply. However, the mailbox rule is the default rule only with respect to acceptances delivered by the U.S. Postal Service. The Sellers cite to no case law, nor do they persuasively argue, that the mailbox rule applies with respect to acceptances delivered by overnight courier services, where the Contract states that delivery is deemed effective when delivered.

Moreover, there is a fundamental difference in the manner of delivery between the U.S. Postal Service and Federal Express. When an individual attempts to deliver an acceptance by the U.S.

Postal Service, the sender loses control over its delivery as soon as the letter is dropped in the mailbox. Consequently, the mailbox rule logically extends to delivery by the U.S. Postal Service, whereby transmittal of an article of mail is presumed delivered once it is dropped in the mail.

The receipt rule governs more modern methods of communications. The court is persuaded that delivery by Federal Express is governed by the receipt rule. When delivery is transmitted via Federal Express, delivery may be revoked at any point prior to delivery. Therefore, it is logical to presume that the article is not deemed delivered until it is actually in the hands of the recipient.

For these reasons, the rationale underpinning the mailbox rule is not applicable to the delivery of the Contract by Federal Express, and the Sellers' acceptance, in the form of the fully executed Contract, was transmitted upon receipt by the Purchaser. Because the Purchaser withdrew her offer before the postdated Contract was delivered by Federal Express, the Purchaser effectively canceled the Contract, and the Purchaser is entitled to a declaration to that effect.

Accordingly, it is

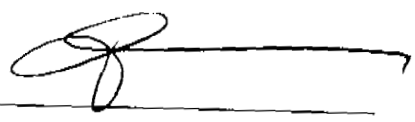
ORDERED that plaintiff's motion for summary judgment is granted; and it is further

ORDERED that defendants' cross-motion for summary judgment is denied; and it is further

ORDERED the Clerk of the Court is directed to enter judgment

in favor of the plaintiff against the defendants, together with costs and disbursements; and it is further ORDERED and ADJUDGED that the plaintiff effectively canceled the Contract, which is of no force and effect.

Dated: October 8, 2008



J.S.C.

HON. CHARLES E. RAMOS

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