

Schramm v Solow

2008 NY Slip Op 33735(U)

August 1, 2008

Supreme Court, Suffolk County

Docket Number: 7585-2008

Judge: Melvyn Tanenbaum

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

make a first mortgage loan, other than a VA, FHA or other governmentally insured loan, to Purchaser, at Purchaser's sole cost and expense, of "combined 1st & 2nd" \$540,000.00 for a term of 30 years...."

Plaintiff "SCHRAMM" claims that this condition could not be satisfied as she was unable to obtain a firm mortgage loan commitment for \$540,000.00 and that defendant "SOLOW" has refused to return the \$30,600.00 down payment. Plaintiff's breach of contract complaint seeks the return of the down payment together with an award for counsel fees and reimbursement for title related charges including title examination and survey inspection.

Defendant's motion seeks an order dismissing plaintiff's complaint claiming that no viable cause of action is asserted against the seller. In support defendant submits an attorney's affirmation and claims that based upon the documentary evidence presented plaintiff's complaint must be dismissed since the evidence proves that "SCHRAMM" received a loan commitment but failed to cooperate with the mortgage lender. Defendant claims that plaintiff was issued a conforming commitment but failed to provide the lender with required financial documents including bank statements to verify that she had sufficient funds to close. It is defendant's position that plaintiff is not entitled to a refund of the down payment since "SCHRAMM" defaulted under the contract's terms by failing to act in good faith with the lender once a commitment had been issued. Defendant also claims that the second and third causes of action seeking recovery of attorneys fees and title fee reimbursements must be dismissed since plaintiff canceled the contract on the basis that she could not obtain a mortgage commitment. Defendant contends that pursuant to Contract paragraph 8(f) the purchaser is only entitled to a refund of the down payment if the contract is canceled by the purchaser.

In opposition plaintiff "SCHRAMM" submits an affidavit together with an affirmation from the attorney who represented plaintiff during the transaction and an attorney's affirmation. Plaintiff claims that although she received two conditional commitments, she never received a firm mortgage commitment for \$540,000.00, the amount required under the terms of the contract. Plaintiff asserts that after informing the seller's attorney that she could not satisfy the mortgage contingency clause, she was entitled the return of the downpayment. Plaintiff claims that defendant "SOLOW" breached the contract by refusing to return her down payment and no basis exists to dismiss the complaint. Plaintiff also claims that the Contract (paragraph 23(b)) grants the purchaser additional remedies for the seller's default and asserts that she is entitled to consequential damages for associated title fees and counsel fees based upon the seller's breach.

To succeed on a motion pursuant to CPLR §3211(a)(1), the documentary evidence upon which defendant's motion is predicated must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claims (SIDDIQUI v. NATIONWIDE, 255 AD2d 30, 687 NYS2d 457 (3rd Dept., 1999); FERNANDEZ v. CIGNA, 188 AD2d 700, 590 NYS2d 925 (3rd Dept., 1992)).

Schramm v. Solow
Index # 28578-2006

The issue before the Court on a motion to dismiss for failure to state a cause of action is not whether the cause of action can be proved, but whether one has been stated (STAKULS v. STATE, 42 NY 2d 272, 397 NYS 2d 740 (1977)). A pleading does not state a cause of action when it fails to allege wrongdoing by a defendant upon which relief can be granted (HEX BLDG. CORP. v. LEPECK CONSTRUCTION, 104 AD 2d 231, 482 NYS 2d 510 (2nd Dept., 1984)). The Court must accept the facts alleged as true and determine whether they fit any cognizable legal theory (CPLR Sec. 3211(a)(7); MARONE v. MARONE, 50 NY 2d 481, 429 NYS 2d 592 (1980); KLONDIKE GOLD INC. v. RICHMOND ASSOCIATES, 103 AD 2d 821, 478 NYS 2d 55 (2nd Dept., 1984)).

The elements that must be alleged for a viable breach of contract claim are: 1) formation of a contract between plaintiff and defendant; 2) performance by plaintiff; 3) defendant's failure to perform; and 4) resulting damage (See 2 N.Y. PJI §4:1 438 (2003); FURIA v. FURIA, 116 AD2d 694, 498 NYS2d 12 (2d Dept., 1986); LEDAIN v. ONTARIO, 192 Misc 2d 247, 746 NYSA2d 760 (NY Sup Ct 2002).

Paragraph 8(f) of the Contract provides:

"If this contract is canceled by Purchaser pursuant to subparagraphs 8(d) or (e), neither party shall thereafter have any further rights against, or obligations or liabilities to, the other by reason of this contract, except that the downpayment shall be promptly refunded to Purchaser and except as set forth in paragraph 27 (representations as to brokers)"

A review of plaintiff's first cause of action alleging defendant/seller's breach of contract in failing to promptly refund the down payment reveals that a viable claim has been asserted against the defendant "SOLOW". Defendant's motion for an order dismissing the first cause of action must therefore be denied.

With respect to the remaining causes of action seeking an equitable lien (second cause of action) and an award of attorney's fees (third cause of action), paragraph 23(b) of the Contract provides:

23(b). If Seller defaults hereunder, Purchaser shall have such remedies as Purchaser shall be entitled to at law or in equity, including, but not limited to, specific performance.

When read in the light most favorable to the plaintiff, "SCHRAMM's" equitable lien claim sets forth a viable cause of action based upon the seller's alleged malicious default and failure to promptly refund the down payment as required under the contract. No valid claim for an award of counsel fees exists however since such damages are not recoverable absent a specific provision in the parties agreement. Defendant's motion to dismiss the complaint is granted solely to the extent that the third cause of action set forth in the complaint shall be dismissed. Accordingly it is

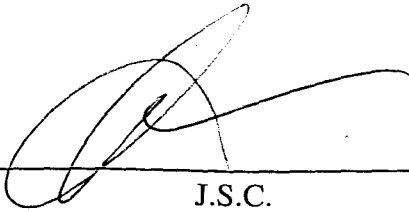
ORDERED that defendant's motion for an order pursuant to CPLR Section 3211(a)(1)&(7) is granted solely to the extent that the third cause of action set forth in the complaint is hereby dismissed. All other requests for relief are denied, and it is further

Page 4

Schramm v. Solow
Index # 28578-2006

ORDERED that a preliminary conference shall be held on September 2, 2008 at 9:30 a.m. at the Supreme Court Trial Term Part XIII, 400 Carleton Avenue, Central Islip, New York to resolve all outstanding discovery issues. No appearance shall be required if the parties enter into a preliminary conference disclosure and discovery schedule and submit same to the Court prior to September 2, 2008. A copy of the form is attached to this order for the parties use and convenience. All discovery proceedings must be completed on or before April 2, 2009.

Dated: August 1, 2008



J.S.C.