

Richardson v Wenzel
2009 NY Slip Op 30057(U)
January 12, 2009
Supreme Court, New York County
Docket Number: 100705/08
Judge: Barbara R. Kapnick
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

BARBARA R. KAPNICK

PRESENT:

PART 12

Index Number : 100705/2008

RICHARDSON, MICHAEL

VS.

WENZEL, ABBY B.

SEQUENCE NUMBER : 002

DISMISS ACTION

INDEX NO.

100705/08

MOTION DATE

MOTION SEQ. NO.

002

MOTION CAL. NO.

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

*and cross-motion are decided
in accordance with the
accompanying memorandum decision.*

FILED
JAN 14 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated:

1/12/09

BARBARA R. KAPNICK 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: IA PART 12

-----X

MICHAEL RICHARDSON AND PATRICIA
RICHARDSON,

Plaintiffs,

ABBY M. WENZEL AND SCOTT SEGAL, ESQ.,

Defendants.

-----X

BARBARA R. KAPNICK, J.:

DECISION/ORDER
Index No. 100705/08
Motions Seq. Nos.
002 and 003

This action arises out of a contract of sale entered into between plaintiffs Michael Richardson and Patricia Richardson and defendant Abby M. Wenzel on or about November 13, 2007, pursuant to which defendant Wenzel agreed to sell her cooperative apartment - Apt. 10A - located at 242 East 19th Street, New York, New York, to the plaintiffs for the sum of \$1,350,000.00.

The contract required plaintiffs to forward a downpayment of \$135,000.00, which was to be held by defendant Wenzel's attorney, defendant Scott Segal, Esq., in an escrow account in Hudson Valley Bank.

The Contract further provided, in relevant parts, as follows:

1.20 Financing Options (* * *)

1.20.1 Purchaser may apply for financing in connection with this sale and Purchaser's obligation to purchase under this Contract is contingent upon issuance of a Loan Commitment Letter by the Loan Commitment Date (¶ 18.1.2).

1.21 If ¶ 1.20.1 or 1.20.2 applies, the "Financing Terms" for ¶ 18 are:

a loan of \$1,000,000 for a term of 30 years or such lesser amount or shorter term as applied for or acceptable to Purchaser; and the "Loan Commitment Date" for ¶ 18 is 20 calendar days after the Delivery Date.

1.22 The "Delivery Date" of this Contract is the date on which a fully executed counterpart of this Contract is deemed given to and received by Purchaser or Purchaser's Attorney as provided in ¶ 17.3.

* * *

17 Notices and Contract Delivery

17.1 Any notice or demand ("Notice") shall be in writing [emphasis supplied] and delivered either by hand, overnight delivery or certified or registered mail, return receipt requested, to the Party and simultaneously, in like manner, to such Party's Attorney, if any, and to Escrowee at their respective addresses or to such other address as shall hereafter be designated by Notice given pursuant to this ¶ 17.

17.3 The Contract or each Notice shall be deemed given and received:

- 17.3.1 on the day delivered by hand;
- 17.3.2 on the business day following the date sent by overnight delivery; [emphasis supplied]
- 17.3.3 on the 5th business day following the date sent by certified or registered mail; or
- 17.3.4 as to the Contract only, 3 business days following the date of ordinary mailing.

* * *

18.2 Purchaser, directly or through a mortgage broker registered pursuant to Article 12-D of the Banking Law, shall diligently and in good faith:

18.2.1 apply only to an institutional Lender for a loan on the Financing Terms (see ¶ 1.21) on the form required by the Institutional Lender containing truthful and complete information, and submit such

application together with such documents as the Institutional Lender requires, and pay the applicable fees and charges of the Institutional Lender, all of

which shall be performed within 5 business days after the Delivery Date;

18.2.2 promptly submit to the Institutional Lender such further references, data and documents requested by the Institutional Lender; and

18.2.3 accept a Loan Commitment Letter meeting the Financing Terms and comply with all requirements of such Loan Commitment Letter (or any other loan commitment letter accepted by Purchaser) and of the Institutional Lender in order to close the loan; and

18.2.4 furnish Seller with a copy of the Loan Commitment Letter promptly after Purchaser's receipt thereof.

18.2.5 Purchaser is not required to apply to more than one Institutional Lender.

18.3 If ¶ 1.20.1 applies, then

18.3.1 provided Purchaser has complied with all applicable provisions of ¶ 18.2 and this ¶ 18.3, Purchaser may cancel this Contract as set forth below, if:

18.3.1.1 any Institutional Lender denies Purchaser's application in writing prior to the Loan Commitment Date (see ¶ 1.21); or

18.3.1.2 a Loan Commitment Letter is not issued by the Institutional Lender on or before the Loan Commitment Date; ... [emphasis supplied]

* * *

18.3.2 Purchaser shall deliver Notice of cancellation to Seller within 5 business days after the Loan Commitment Date if cancellation is pursuant to ¶ 18.3.1.1 or 18.3.1.2...

18.3.3 If cancellation is pursuant to ¶ 18.3.1.1, then Purchaser shall deliver to Seller, together with Purchaser's Notice, a copy of the Institutional Lender's written denial of Purchaser's loan application...

* * *

18.3.5 Failure by either Purchaser or Seller to deliver Notice of cancellation as required by this ¶ 18.3 shall constitute a waiver of the right to cancel under this ¶ 18.3.

18.3.6 If this Contract is canceled by Purchaser pursuant to this ¶ 18.3, then thereafter neither Party shall have any further rights against, or obligations or liabilities to, the other by reason of this Contract, except as set forth in ¶ 12 [relating to the payment of brokers' commissions] ...

* * *

27.1 ... If the Closing does not occur and either Party gives Notice to Escrowee demanding payment of the Contract Deposit, Escrowee shall give prompt Notice to the other party of such demand. If Escrowee does not receive a Notice of objection to the proposed payment from such other Party within 10 business days after the giving of Escrowee's Notice, Escrowee is hereby authorized and directed to make such payment to the demanding party. If Escrowee does receive such a Notice of objection within said period, or if for any reason Escrowee in good faith elects not to make such payment, Escrowee may continue to hold the Contract Deposit until otherwise directed by a joint Notice by the Parties or a final, non-appealable judgment, order or decree of a court of competent jurisdiction [emphasis supplied]...

* * *

27.3 Escrowee will serve without compensation. Escrowee is acting solely as a stakeholder at the Parties' request and for their convenience. Escrowee shall not be liable to either Party for any act or omission unless it involves bad faith, willful disregard of this Contract or gross negligence [emphasis supplied]. In the event of any dispute, Seller and Purchaser shall jointly and severally (with right of contribution) defend (by attorneys selected by Escrowee), indemnify and hold harmless Escrowee from and against any claim, judgment, loss, liability, cost and expense incurred in connection with the performance of Escrowee's acts or omissions not involving bad faith, willful disregard of this Contract or gross negligence. This indemnity includes, without limitation, reasonable attorneys' fees either paid to retain attorneys or representing the fair value of legal services rendered by Escrowee to itself and disbursements, court costs and litigation expenses.

Two original executed copies of the Contract of Sale were forwarded by Mr. Segal to plaintiffs' closing attorney, Jim Alleva, Esq. of Scatenato and Alleva, P.C. by letter dated November 12, 2007, sent via Federal Express.

Plaintiffs claim to have duly applied for a mortgage of \$1,000,000.00 for 30 years to Astoria Federal Savings and Loan Association ("Astoria") even before the Contract of Sale was signed. By "Statement of Credit Denial, Termination or Change" (the "Notice of Denial") dated December 3, 2007, Astoria notified plaintiffs that the request had been denied because the amount sought by plaintiffs exceeded its guidelines.

By letter dated December 6, 2007, plaintiffs' mortgage broker, Jeffrey Appel, Senior Vice President of Preferred Empire Mortgage Company, notified Jim Alleva that

as of this date we have received one offer for financing the premises. The Offer is from Astoria Federal Bank ... approves a maximum loan of \$930,825. Though we have additional applications pending, we do not anticipate that there will be any approval at the \$1,000,000 requested.

Also by letter dated December 6, 2007, Mr. Alleva then notified defendant Segal that his clients had "been unable to procure a commitment from an institutional lender for the purchase" of the unit, and had "elected to cancel this transaction and

request the immediate return of their contract deposit, plus interest." Mr. Alleva requested that Segal forward a check payable to plaintiffs "as quickly as possible."

Alleva sent a follow-up letter dated December 10, 2007 to Segal, acknowledging receipt of a voicemail message on or about December 7, 2007 informing him that defendant Wenzel had decided not to return the contract deposit and expected plaintiffs to continue with their purchase of the unit. Mr. Alleva reiterated his clients' position that they had exercised their right to cancel the Contract pursuant to its terms and again demanded the immediate return of their contract deposit, with interest.

By letter dated December 14, 2007 to plaintiffs' litigation counsel, C. Jaye Berger, defendant Wenzel's litigation counsel, Lani A. Adler of Wolf, Block disputed plaintiffs' rights under the circumstances to cancel the Contract, claiming that "reputable third parties involved with this transaction" had stated that plaintiffs had received commitments in the aggregate amount of \$1 million in financing.

Plaintiffs thereafter commenced this action seeking to recover the \$135,000.00 contract deposit, along with interest, costs, attorneys' fees, and punitive damages based on their alleged

breach of the Contract against both defendants (first cause of action), and against defendant Segal, claiming that he failed and refused in bad faith to turn over the downpayment, in breach of the escrow provision of the Contract (second cause of action).

Defendant Segal contends that he has acted, as Escrowee, in good faith in keeping with the express terms of the Contract, and has asserted a counterclaim against plaintiffs for indemnification pursuant to paragraph 27.3 of the Contract, seeking to recover the attorneys' fees he has incurred in defending this action.

Defendant Wenzel now moves, under motion sequence number 002, for an order pursuant to CPLR § 3211(a)(1) dismissing the Complaint in its entirety upon the ground that she has defenses founded upon documentary evidence, which establish that plaintiffs' claims for a refund of their downpayment and for damages as a result of the escrow agent's alleged bad faith in refusing to refund their downpayment pending resolution of the parties' dispute are precluded by their failure to cancel the parties' contract in conformity with the express provisions of the agreement.

Defendant Segal moves, under motion sequence number 003, for an order: (i) pursuant to CPLR § 3215 granting a default judgment as against plaintiffs on the ground that they have failed to timely

serve a Reply to his Counterclaim for indemnification; and (ii) pursuant to CPLR § 3212 granting summary judgment dismissing plaintiffs' Complaint against him.

Plaintiffs oppose the motion and cross-move for an order pursuant to CPLR § 3025 allowing plaintiffs to amend their Complaint to specifically allege additional facts in relation to Segal's purported bad faith, and to specifically allege that Ms. Wenzel did not object within 10 business days of December 6, 2007 to plaintiffs' request for a refund of the downpayment, as required pursuant to paragraph 27.1 of the Contract.

Defendant Wenzel contends that the "Delivery Date" of the Contract (as defined in paragraph 1.22) is the "business day following the date sent by overnight delivery" (see, paragraph 17.3.2), i.e., November 13, 2007. The "Loan Commitment Date", which paragraph 1.21 defines as "20 calendar days after the Delivery Date", was, therefore, December 3, 2007.

The mortgage application was purportedly denied by the Notice of Denial dated December 3, 2007, i.e. the Loan Commitment Date.

Thus, defendant Wenzel argues that plaintiffs did not comply with the terms of paragraph 18.3.1.1, which would have permitted

plaintiffs to cancel the Contract if any Institutional Lender denied their application in writing prior to the Loan Commitment Date, not on the Loan Commitment Date.

Defendant Wenzel further argues that Mr. Alleva's letter dated December 6, 2007 purporting to cancel the Contract was untimely, and that the purported Notice of Cancellation was also invalid because a copy of the December 3, 2007 Notice of Denial was not attached, as allegedly required by paragraph 18.3.3 of the Contract where "cancellation is pursuant to paragraph 18.3.1.1."

Plaintiffs, on the other hand, contend that the December 6, 2007 Notice of Cancellation was timely pursuant to 18.3.1.2 which also permits the cancellation of the Contract if "a Loan Commitment Letter is not issued by the Institutional Lender on or before the Loan Commitment Date". Here, plaintiffs did not receive a Loan Commitment Letter on or before December 3, 2007. Thus, plaintiffs contend that they were merely required pursuant to paragraph 18.3.2 to "deliver Notice of cancellation to Seller within 5 business days after the Loan Commitment Date". They argue that they complied with this requirement by sending the December 6, 2007 Notice of Cancellation within 5 business days after the Loan Commitment Date. Plaintiffs further argue that there was no requirement under paragraph 18.3.3 that a copy of the Institutional Lender's written

denial of Purchaser's loan application be delivered to the purchaser since that provision applies only where cancellation is pursuant to paragraph 18.3.1.¹

Defendant Wenzel argues in reply that plaintiffs should not in opposition to defendant's motion be permitted to assert a new theory, i.e., that plaintiffs cancelled the Contract pursuant to paragraph 18.3.1.2, rather than pursuant to paragraph 18.3.1.1, as plaintiffs had previously claimed. Moreover, defendant Wenzel denies that paragraph 18.3.1.2 was intended to address a situation, such as here, where plaintiffs received a denial of their loan application on the terms they sought.²

Based on the papers submitted and the oral argument held on the record on June 18, 2008, this Court finds that the plaintiffs could cancel the Contract under either paragraph 18.3.1.1 or 18.3.1.2 and that paragraph 18.3.1.2 is applicable here. Further this Court finds that plaintiffs have complied with the plain meaning of paragraphs 18.3.1.2 and 18.3.2 of the Contract. The

¹ In any event, plaintiffs contend that there is a factual dispute as to whether or not the two page Notice of Denial was annexed.

² According to defendant, Wenzel, such an interpretation would render either paragraph 18.3.1.1 or 18.3.1.2 gratuitous and meaningless

motion by defendant Wenzel to dismiss the Complaint against her is, therefore, denied.


That portion of defendant Segal's motion seeking to dismiss plaintiffs' Complaint against him is granted, as this Court finds that neither the Complaint nor plaintiffs' proposed Amended Complaint alleges any act or omission on the part of defendant Segal which rises to the level of "bad faith, willful disregard of [the] Contract or gross negligence" within the meaning of paragraph 27.3. Mr. Segal was permitted under paragraph 27.1 to elect, in good faith, "for any reason" to continue to hold the Contract Deposit until otherwise directed jointly by the parties or "a final, non-appealable judgment, order or decree of a court of competent jurisdiction." Here, Mr. Segal elected to continue to hold the Contract Deposit only after receiving Ms. Adler's December 14, 2007 letter disputing plaintiffs' right to terminate the Contract.

That portion of the plaintiffs' cross-motion seeking to allege additional facts in relation to Segal's purported bad faith is, therefore, denied. That portion of the cross-motion seeking to amend the Complaint in relation to defendant Wenzel is, however, granted, since leave to amend is to be "freely given upon such terms as may be just." See, CPLR § 3025(b).

That portion of defendant Segal's motion seeking a default judgment against the plaintiffs on his counterclaim for indemnification is denied, in the interests of justice, since plaintiffs have since served a Reply to the Counterclaim. Defendant Segal cannot demonstrate any prejudice caused by the minimal delay.

This constitutes the decision and order of this Court.

Dated: January 12, 2009



BARBARA R. KAPNICK
J.S.C.

BARBARA R. KAPNICK
J.S.C.

FILED

JAN 14 2009

COUNTY CLERK'S OFFICE
NEW YORK