SUPREME COURT - STATE OF NEW YORK

Present:
HON. ARTHUR M. DIAMOND
Justice Supreme Court

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LEONARD GOBETZ

Plaintiff,

-against-

MYRA SENCER AND ILYA KAGAN

Defendant.

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TRIAL PART: 19
NASSAU COUNTY

INDEX NO: 4167/08

MOTION SEQ. NO: 3

SUBMIT DATE: 2/6/09

The following papers having been read on this motion:

Notice of Motion..... 1
Cross-Motion..... 2
Memorandum of Law..... 3
Opposition 4

The Motion (seq. No. 3) by the plaintiff for an order granting plaintiff summary judgment and directing Myra Sencer, P.C. to release the $20,000.00 deposit she retains to plaintiff, and dismissing the counterclaims set forth by defendants in their answer is granted to the extent set forth herein. The balance of plaintiff's application awarding plaintiff interest on the deposit from January 4, 2008 is denied.

The Cross motion (seq. No. 4) by the defendants for an order pursuant to CPLR §3212 granting summary judgment against Leonard Gobetz, the plaintiff herein and a declaration that defendant Ilya Kagan is entitled to the down payment at issue in this matter is denied.

The application for indemnification for expenses incurred in the defense of this action and for attorneys fees is granted.

In the underlying action the plaintiff buyer seeks the return of a $20,000 deposit paid on contract toward the purchase of the subject premises.

Paragraph 16(b) of the contract states

> The delivery by Seller to Purchaser of a valid and subsisting Certificate of Occupancy or other required certificate of compliance or evidence that none was required, covering the building(s) and all other improvements located on the property authorizing their use as a one family dwelling at the date of Closing.

A title report search showed that the defendant seller lacked a certificate of completion for (1) a "bump-out" on the Premises and (2) a wooden deck on the back of the house. The defendant was able to procure a certificate of completion to "maintain rear kitchen bump-out." However, it is not disputed that the defendant seller was unable to deliver a certificate of completion for the wooden deck. The seller proposed removing the wooden deck so a certificate of completion for the wooden deck would not be required. Apparently, the buyer objected to the seller's proposal of removing the wooden deck. There is no basis in law or fact to support the defendant seller's claim that pursuant to paragraph 21(b) of the contract, the seller had the right to remove the wooden deck, obviating the need for a certificate of occupancy. Defendant seller's reliance on paragraph 21 Title Examination: Seller's Inability to Convey : Limitations on Liability is misplaced. Paragraphs 21(a) and (b) refer to defects in title. Failing to deliver a certificate of occupancy is not a defect in title.

In construing the terms of a contract, the judicial function is to give effect to the parties' intentions (*see generally, Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569; *R/S Associates v New York Job Development Authority*, 98 NY2d 29, 32; *W.W.W. Assocs. v Giancontieri*, 77 NY2d 157, 162). "[R]eal estate contracts are probably the best examples of arm's length transactions. Except in cases where there is a real risk of overreaching, there should be no need for the courts to relieve the parties of the consequences of their contract. If parties are dissatisfied with [this rule] the time to say so is at the bargaining table" (*Maxton Builders v LoGalbo*, 68 NY2d 373, 382; *Ittleson*

v Barnett, 304 AD2d 526). "It is axiomatic that a contract is to be interpreted so as to give effect to the intention of the parties as expressed in the unequivocal language employed" (*Breed v Insurance Co. of North America*, 46 NY2d 351, 355). Accordingly, "[w]hen sophisticated and counseled business persons set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms" (*Reiss v Financial Performance Corp.*, 97 NY2d 195, 198; *R/S Associates v New York Job Development Authority*, *supra*, at 32; *W.W.W. Assocs. v Giancontieri*, *supra* at 162.

The contract required the seller to either produce a certificate of occupancy for the premises as it existed at the time of closing, or proof that no such certificate was needed. The seller did neither as to the wooden deck.

The fact that a buyer's title company may agree to insure that the title to the premises was marketable does not relieve the seller from his obligation to comply with the contract requirement that the seller produce a certificate of completion for the wooden deck. In *Voorheesville Rod and Gun Club, Inc. v E.W. Tompkins Company*, (82 NY2d 564, 571-572), the New York Court of Appeals stated ". . . marketability of title is concerned with impairments on title to a property, i.e., the right to unencumbered ownership and possession, not with legal public regulation of the use of the property.(*See Lincoln Trust Co. v Williams Bldg. Corp.*, 229 NY 313, 318, *supra*; 5A Warren's Weed, *op cit.*, Marketability of Title, § 1.01, 2.01, with § 8.07). Accordingly, a zoning ordinance, existing at the time of the contract, which regulates only the use of the property, generally is not an encumbrance making the title unmarketable. (*See Lincoln Trust, supra*, at 318; *Anderson v Steinway & Sons*, 178 A.D. 507, 518, *aff'd.* 221 NY 639; *Pamerqua Realty Corp. v Dollars Serv. Corp.*, 93 AD2d 249, 251; 3 Warren's Weed, *op cit.*, Marketability of Title, § 8.07; 1 Rasch, New York Law and Practice of Real Property § 22.61 (2d ed);" *see also Logan v Barretto*, 251 AD2d 552).

There is nothing in the contract that required the buyer to accept an abatement of the purchase price in lieu of the certificate of completion for the wooden deck. Only the buyer at his sole option

had the right to accept title without the certificate of occupancy and he refused to do so. (*See Knight v McClean*, 148 AD2d 421). Seller breached a condition precedent to the closing of title and the buyer is entitled to the return of the down payment. *(Salamone v Kaba Realty LLC*, 46 AD3d 659). Plaintiff established his *prima facie* entitlement to judgment as a matter of law. The defendants failed to raise a triable issue of fact. (*See Alvarez v Prospect Hospital*, 68 NY2d 320). The seller's liability under the contract is to return the buyer's down payment.

Since the down payment was placed in an IOLA account the application by the plaintiff for interest is denied.

The Court will next address defendant Sencer's claim for indemnification for expenses incurred in the defense of this action and for attorney's fees. Plaintiff's claim against Myra G. Sencer, P.C., the escrow agent, for conversion is baseless. There is no evidence that the escrowed funds have been dispersed, misapplied or missing. There is no evidence to refute Ms. Sencer's statement that "the down payment is sitting in escrow, awaiting an agreement between the parties or an order of this court, as required by the Contract." (Sencer affirmation ¶ 50).

In *Breed, Abbot & Morgan v Hulko*, (74 NY2d 686), the court of Appeals stated at p. 687

> The narrow question before us is whether, under the circumstances presented, defendant agreed to indemnify plaintiff for its legal expenses incurred resisting defendant's claims (*see Matter of A.G. Ship Maintenance Corp. v Lezak*, 69 NY2d 1, 5). We conclude that defendant did so agree, for the reason stated in the opinion of the late Justice Leonard H. Sandler that if this agreement did not include plaintiff law firm's "legal expenses incurred in defending against an action by one of the parties alleging misconduct by the escrowee which resulted in a determination in favor of the escrowee, it is difficult, if not impossible, to ascertain for what it was that the parties

had agreed to indemnify the escrowee."

The naming of the escrow agent as a party is proper, aggressively pursuing a baseless and frivolous claim for conversion is not, and gives rise to the escrow agent's claims for reimbursement and indemnification. The escrow agent is entitled to defend itself and if she incurs expenses doing so, is entitled to indemnification. *(See Corazza v Jacobs*, 277 AD2d 52). Had the plaintiff merely named the escrow agent as a stakeholder, and at the commencement of this action requested that the down payment be paid into Court, or an interest bearing account, the escrow agent would not be entitled to indemnification. Once the plaintiff chose to pursue a claim for conversion that turned out to be baseless, the escrow agent is entitled to indemnification for that part of the costs of the defense of the entire action attributed to the defense of the claim against the defendant escrow agent for conversion.

A hearing is necessary on the issue of expenses and attorney's fees incurred by the escrowee to defend the frivolous cause of action sounding in conversion.

Subject to the discretion of the Justice there presiding and provided the defendant's attorney shall have served a copy of a Note of Issue and this Order on the Calendar Clerk and plaintiff's attorney at least 10 days prior thereto, a hearing on the issue of indemnification by the plaintiff to the escrowee for expenses and attorneys fees for that portion of the costs of the defense of the entire action attributed to the defense of the claim against the defendant escrow agent for conversion shall be held in the Calendar Control Part on March 26, 2009 at 9:30 AM.

The escrowee shall not release any funds to the plaintiff until the amount of expenses and attorneys fees are determined at which time they shall be deducted from the $20,000 being held in escrow, and the balance paid to the plaintiff.

This decision is the order of the Court.

This constitutes the decision and order of this Court.

DATED: February 27, 2009

ENTER

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J. S.C.

To:

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