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

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54

Index Number : 603049/2007

SCHUR, MICHAEL

VS.

WATNER, DAVID B.

SEQUENCE NUMBER : 002

PARTIAL SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 2/19/09

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | 1 |
| Answering Affidavits — Exhibits | 2 |
| Replying Affidavits | 3 |

**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.**

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

Dated: 4/13/09

JUSTICE SHIRLEY WERNER KORNREICH
J.S.C.

Check one: X FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

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MICHAEL SCHUR,

Plaintiff,

-against-

DAVID B. WATNER and VIVIENNE L. WATNER,

Defendants.

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Index No.: 603049/07

DECISION and ORDER

KORNREICH, SHIRLEY WERNER, J.:

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. Plaintiff now moves for partial summary judgment on his first cause of action for breach of contract on the ground that no material issues of fact exist. Defendants oppose.

*I. Background*

In support of his motion, plaintiff Michael Schur avers the following. In May of 2006, the parties entered into a written contract (Agreement) in which 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 Agreement, defendants agreed to tender plaintiff's counsel, as escrowee, a deposit of $65,000 to be held until the closing. Agreement at ¶¶ 1.16, 1.24, 2.2. 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 check # 1465 for $65,000 from their Wachovia account to plaintiff's counsel to be held in escrow. On or about June 29, 2006, plaintiff's counsel discovered that defendants' $65,000 check had bounced. Plaintiff's counsel then contacted defendants' counsel via telephone 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." That same day, plaintiff's counsel sent defendants' counsel a letter providing written notice that the check had bounced and indicating that defendants had defaulted under the contract. Defendants failed to cure their default and refused to close on the sale. On July 17, 2006, the co-op board sent plaintiff a letter indicating that it would not approve the sale.

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. In a Decision and Order dated October 7, 2008, the court denied defendants motion to dismiss (October Decision). In the October Decision, the court held, *inter alia*, that:

> 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, [the co-op board'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.

*II. Conclusions of Law*

It is well established that summary judgment may be granted only when it is clear that no triable issues of fact exist. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 325 (1986). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980); *Friends of Animals, Inc. v. Associated Fur Mfts., Inc.*, 46 N.Y.2d 1065, 1067 (1979). A failure to make such a showing requires a denial of the summary judgment motion, regardless of the sufficiency of the opposing papers. *Ayotte v. Gervasio*, 81 N.Y.2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of a material issue of fact. *Alvarez, supra*, 68 N.Y.2d at 324; *Zuckerman, supra*, 49 N.Y.2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in a light most favorable to the party opposing the motion. *Martin v. Briggs*, 235 A.D.2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgement motion. *Zuckerman, supra*, 49 N.Y.2d at 562. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be

denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231 (1978).

To establish liability for breach of contract, a plaintiff must show: (1) the existence of an agreement; (2) performance of the agreement by the plaintiff; (3) breach by the defendant; and (4) damages. *Oppman v. IRMC Holdings, Inc.*, 14 Misc 3d 1219A, 2007 NY Slip Op 50093U, *5 (Sup Ct, New York County 2007) citing *Noise In the Attic Prods., Inc. v. London Records*, 10 A.D.3d 303 (1st Dept 2004); *Furia v. Furia*, 116 A.D.2d 694 (2d Dept 1986).

Here, plaintiff has met his burden. An agreement existed, plaintiff performed under it, defendants did not and the damages are set forth in the contract.

Defendants, however, have not come forward with evidence raising an issue of triable fact. In opposition, defendants offer the affirmation of their attorney Michael Resko, Esq. It is well settled that "the opposing affidavit should indicate that it is being made by one having personal knowledge of the facts." *Marinelli v. Shifrin*, 260 A.D.2d 227, 228-29 (1st Dept 1999) quoting *Capelin Assocs. v. Globe Mfg. Corp.*, 34 NY2d 338, 342 (1974). It is equally well-settled that an attorneys' affirmation is of no probative value in opposing a motion for summary judgment. *Marinelli*, 260 A.D.2d at 228-29 citing *Hasbrouck v. City of Gloversville*, 102 A.D.2d 905 (3d Dept 1984), *affd* 63 NY2d 916 (1984); *Farragut Gardens No. 5 v. Milrot*, 23 A.D.2d 889 (2d Dept 1965). Thus, plaintiff has proved a prima facie case on his breach of contract cause of action.

In addition, a search of the record reveals that plaintiff's fraud claim must be dismissed. A fraud claim which merely restates a breach of contract claim may not be asserted. *Orix Credit Alliance, Inc. v. R.E. Hable Co.*, 256 A.D.2d 114, 115 (1st Dept 1998). To properly state a fraud claim concerning a contract, a party "must allege misrepresentations of present facts (rather than

merely of future intent) that were collateral to the contract and which induced the allegedly defrauded party to enter the contract." *Id.* citing *Deerfield Communications Corp. v. Chesebrough-Ponds, Inc.*, 68 N.Y.2d 954, 956 (1986). Allegations that a party entered into an agreement with no intention of performing under it are not sufficient. *Id.* citing *New York Univ. v. Continental Ins. Co.*, 87 N.Y.2d 308, 318 (1995). Here, the fraud claim is predicated upon the exact same facts as those underlying the breach of contact claim. The alleged misrepresentations cannot be considered collateral to the Agreement since they are directly related to specific provisions of the Agreement and occurred after its execution. *Id.* citing *Alamo Contract Bldrs. v. CTF Hotel*, 242 A.D.2d 643, 644 (2d Dept 1997); *see also J.E. Morgan Knitting Mills, Inc. v. Reeves Bros., Inc.*, 243 A.D.2d 422, 423 (1st Dept 1997) (plaintiff's fraud claim properly dismissed as duplicative or breach of contract claim where alleged fraud not collateral to agreement and based upon same facts as those underlying breach of contact claim); *Lenox Hill Hosp. v. Am. Intl. Group Inc.*, 21 Misc 3d 1123A, 2008 NY Slip Op 52154U, *5 citing *Richbell Info. Servs., Inc. v. Jupiter Partners, L.P.*, 309 A.D.2d 288, 305 (1st Dept 2003).

Nor are punitive damages appropriate here. Punitive damages cannot be recovered on an ordinary breach of contract claim as their purpose is to remedy public wrongs not vindicate private rights. *Rocanova v. Equitable Life Assur. Soc'y*, 83 N.Y.2d 603 (1994); *Silverman v. 145 Tenants Corp.*, 248 A.D.2d 261, (1st Dept 1998); *Morano v. Oral Research Labs., Inc.*, 191 A.D.2d 258, 261 (1st Dept 1993) (punitive damages cannot be granted for failure to perform obligations under a private contract); *Hoyt v. Kingsford*, 185 A.D.2d 770 (1st Dept 1992). Accordingly, it is

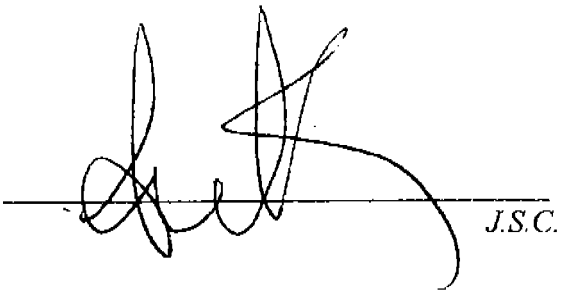
ORDERED that the motion is granted to the extent of granting partial summary judgment in favor of the plaintiff and against defendants David B. Watner and Vivienne L. Watner as follows:

1. Plaintiff is granted judgment on the first cause of action in the amount of $65,000, together with interest from May 23, 2006 at the statutory rate, until the entry of judgment, as calculated by the Clerk of the Court, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of appropriate bill of costs, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the second cause of action is dismissed; and it further

ORDERED that the Clerk is directed to enter judgment accordingly.

ENTER



J.S.C.

DATE: April 13, 2009
New York, NY