

308 W. 138th St., LLC v Baker

2009 NY Slip Op 32375(U)

October 14, 2009

Supreme Court, New York County

Docket Number: 108426/08

Judge: Jane S. Solomon

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

PRESENT.

JANE S. SOLOMON

Justice

PART 55

Index Number: 108426/2008

08 WEST 138TH STREET, LLC

S. BAKER, SHEILA

SEQUENCE NUMBER: # 001

SUMMARY JUDGMENT

INDEX NO. 108426-08

MOTION DATE 6/1/09

MOTION SEQ. NO. #001

MOTION CAL. NO.

were read on this motion to/for

PAPERS NUMBERED

1-5

6-7

8

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 is decided in accordance with the enclosed memorandum decision and order.

M.B. — Preliminary conference scheduled for Nov. 16, 2009 at noon.

FILED

OCT 16 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10-14-09

JANE S. SOLOMON J.S.C.

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):

FSUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

-----x
308 WEST 138TH STREET, LLC and KAREN GEAR, DECISION and ORDER

Plaintiffs,

Index No. 108426/08

-against-

SHEILA BAKER,

Defendant

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NEW YORK

Jane S. Solomon, J.:

Plaintiffs move for summary judgment in this lawsuit arising from a failed real estate transaction in Harlem. The motion is denied for the reasons below.

Plaintiff Karen Gear (Gear) is a dentist. She formed plaintiff 308 West 138th Street, LLC (308 West) as a single purpose entity to purchase a building on 138th Street to house her dental office and to generate rental income. Gear is the sole officer and member of 308 West. Defendant Sheila Baker (Baker) owned the 138th Street building, which she offered for sale to 308 West pursuant to a contract (Contract, Notice of Motion, Ex. 1). The contract price was \$1,825,000. Gear gave Baker a five percent down payment in the amount of \$91,250 (Ex. 2).

The Contract had a mortgage commitment contingency clause that permitted 308 West to withdraw from the Contract if it gave notice, within a specified time, that it was unable to obtain a written commitment from an institutional lender to make

J.S.S.

a first mortgage loan in the amount of \$1,642,500 for a 30 year term (Contract, paragraph 18[a]). If an institutional lender did not issue a mortgage commitment by the "Commitment Date," then 308 West could cancel the Contract by giving Baker notice within five days after the Commitment Date. The Contract defines "Commitment Date" as 45 days after the executed contract was delivered to 308 West or its attorney, plus three business days if mailed. Also, the parties could cancel the Contract if the appraisal by 308 West's lender was less than the purchase price (Contract Rider, paragraph 17). In either case, Baker was obligated to refund the down payment. If 308 West failed to give timely notice of its right to cancel under the mortgage contingency clause, it is deemed to have waived its right to cancel the Contract and to receive a refund of the down payment by reason of the contingency (Contract, paragraph 18[g]). The Contract also provided that Baker would secure an amended certificate of occupancy to reflect the existing use as a one family residence with commercial space (Contract Rider, paragraph 16).

In the event that 308 West defaulted in the performance of its obligations under the Contract, Baker's sole remedy was to retain the down payment as liquidated damages (Contract, paragraph 13.04).

Plaintiffs claim that they executed the Contract on

December 20th, 2007. A copy was delivered by mail, so the date from which the Commitment Date is calculated is three business days later, i.e., December 26, 2007. Forty-five days later is February 9, 2008, which plaintiffs claim is the Commitment Date under the Contract. As explained below, 308 West never obtained a mortgage commitment from a lender.

Before executing the Contract, 308 West applied for a mortgage to fund 50% of the purchase price. Gear intended that, after obtaining this commitment, she would apply for a second mortgage from the Small Business Administration to fund 40% of the purchase, and to pay the rest in cash.

The lender required a satisfactory appraisal before committing to a mortgage. It hired an appraiser who prepared an appraisal report in January 2008, valuing the property at \$1,830,000 based on comparable sales of similar properties. The lender asked the appraiser to revise his opinion with an analysis of expected rental income.

Beginning in January 2008, plaintiffs had orally notified Baker that the lender had requested a new appraisal, and attempted to negotiate a lower purchase price. Baker refused to agree to a lower price. On or about March 4, 2008, plaintiffs learned that the appraiser projected rental income lower than they had expected, and the lender refused to commit to a mortgage based on the purchase price in the Contract. By a letter dated

March 7, 2008, 308 West's lawyer requested a return of the down payment. By a letter dated March 19, 2008, the attorney notified Baker that 308 West was cancelling the Contract based on paragraph 17 to the Rider because the appraisal was less than the purchase price, and under paragraph 16 to the Rider, because Baker had not provided an amended certificate of occupancy.

By a letter dated March 27, 2008, 308 West sent a demand for a "time of the essence" closing date on April 7, 2008. Plaintiffs claim that Baker did not appear on April 7, although it is clear that 308 West was not ready, willing and able to close on that date.

Plaintiffs allege three causes of action: (1) Fraud and deceit, premised on Baker's failure to obtain an amended certificate of occupancy and to cure certain Department of Buildings violations; (2) breach of contract; and (3) an accounting and restitution, including disgorgement of the down payment. Baker counter-claimed for breach of contract, alleging that she is entitled to retain the down payment as liquidated damages, and for specific performance.

Plaintiffs move for summary judgment on the breach of contract claim. The gist of their argument is that 308 West made a good-faith effort to obtain financing, and that its failure to provide timely notice that it intended to cancel the Contract under the mortgage contingency clause should be disregarded as

"hypertechnical" (Aff. of Jayne M. Dennis Knibb, Esq., paragraph 14). Plaintiffs further argue that the parties' course of conduct gave Baker sufficient notice that 308 West had no intention of going through with the purchase. Plaintiffs also contend that the revised appraisal of March 4, 2008, is an appraisal for less than the purchase price that entitles 308 West to cancel the Contract (Contract Rider paragraph 17).

Plaintiffs admit that the first written notice from 308 West that it wanted to cancel the Contract under the mortgage contingency clause was at least 33 days after the Commitment Date. Baker argues that by failing to give timely notice of its failure to obtain financing, 308 West waived its right to cancel the Contract under paragraph 18. With respect to her alleged failures to amend the certificate of occupancy and cure violations, the Contract does not give 308 West the right to cancel, but may have entitled it to set-offs at the closing had one occurred (Contract, paragraph 7.01). Baker also contends that 308 West's "time of the essence" demand to close was a sham, because it had no financing and plaintiffs now admit that it had no intention of actually closing. She also argues that Rider paragraph 17 does not allow 308 West to cancel the contract because the lender's appraisal of January 2008 valued the property at greater than the contract price, and the subsequent revision relied upon by the lender in refusing to fully fund the

mortgage does not give a lower valuation (it is, in fact, silent on the appraised value as derived from the rental income).

A motion for summary judgment shall be granted if the moving party establishes its entitlement to judgment as a matter of law (CPLR 3212[b]). Here, plaintiffs have not met their burden for summary judgment. The parties agreed to a mortgage commitment contingency subject to a time limit, which 308 West admittedly exceeded. When a purchase is conditioned upon the purchaser obtaining a mortgage commitment, but is unable to do so through no fault of his own, performance is excused so long as the purchaser acted in good faith (*Lunning v 10 Bleecker Street Owners Corp.*, 160 AD2d 178 [1st Dept 1990]). In this case, however, the sale was not contingent upon 308 West obtaining a mortgage. Rather, 308 West could cancel the Contract if it was unable to obtain a mortgage commitment, and there is no evidence that 308 West was unable to provide that notice within 5 days of the Commitment Date as required. That both parties engaged in negotiation after the Commitment Date passed, without arriving at a new agreement, is not indicative of an intention to cancel or amend the Contract.

Moreover, plaintiffs have not established that the March 4, 2008 revision to the appraisal triggered a new right to cancel under paragraph 17 to the Contract Rider. The only appraisal putting a value on the property is the January 2008

appraisal which valued the property at greater than the purchase price. It is not clear from paragraph 17 that the parties intended this provision to apply to situations where the lender's appraiser revises his data without changing his opinion of the ultimate valuation, or where an appraisal is revised after the Commitment Date. Accordingly, it hereby is

ORDERED that plaintiffs' motion for summary judgment is denied; and it further is

ORDERED that counsel shall appear in Part 55 for a preliminary conference on November 16, 2009 at noon.

Dated: October 14, 2009

ENTER:



J.S.C.

JANE S. SOLOMON

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