

Borowich v Rosenthal
2009 NY Slip Op 32488(U)
October 13, 2009
Supreme Court, New York County
Docket Number: 602063/08
Judge: Joan A. Madden
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: Hon. Joan A. M. ...
Justice

PART 11

Index Number : 602063/2008
BOROWICH, ABBA E.
vs.
ROSENTHAL, LARRY
SEQUENCE NUMBER : # 001
SUMMARY JUDGMENT

INDEX NO. 602063-08
MOTION DATE _____
MOTION SEQ. NO. #001
MOTION CAL. NO. _____

were read on 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 is decided in accordance with the annexed memorandum Decision + order.

FILED
OCT 26 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: October 13, 2009

[Signature]
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):

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK, PART 11

-----X
 ABBA E. BOROWICH,

Index No. 602063/08

Plaintiff,

- against -

LARRY ROSENTHAL and LAWYERS TITLE
 INSURANCE CORPORATION,

Defendants.

-----X
 JOAN A. MADDEN, J.:

Plaintiff Abba Borowich ("Plaintiff") moves for an order, (1) pursuant to CPLR 3212, for summary judgment against Defendant Larry Rosenthal ("Defendant") in the sum of \$125,000 plus interest at the statutory rate of 9% a year from June 2, 2008, plus attorneys' fees and the costs and disbursements of this action, for the breach of their contract for a sale of real estate; (2) declaring that Plaintiff is entitled to retain the \$125,000 earnest-money deposit plus interest under the terms of the contract; and (3) for other relief as the Court deems just and proper. Defendant opposes the motion and requests that the court search the record to grant summary judgment in his favor.

Background

Since August, 1986, Plaintiff and Defendant, who are both health professionals, owned contiguous office condominiums located at 30 East 76th Street, New York, New York, 10021. (Borowich Affid. ¶¶ 1, 4). By mid-November, 2007, Plaintiff and Defendant had agreed that Plaintiff would sell his office condominium, Commercial Unit #5A, to Defendant for \$1.25 million, with a 10% deposit. (Borowich Affid. ¶ 6). Shortly thereafter, Plaintiff's real-estate lawyer, David Blattner ("Blattner"), sent Defendant the proposed contract ("the Agreement"),

(id.), and by mid-December, 2007, Defendant's lawyers were preparing a rider to the Agreement, (Blattner Affid. ¶ 6).

On January 2, 2008, the parties executed the Agreement and Rider, stipulating that Defendant would purchase the office condominium from Plaintiff "on a date mutually agreed upon . . . but in no event later than June 2, 2008." (Borowich Affid. Ex. C ¶ 18, see Blattner Affid. ¶ 6). The Agreement stated that "[t]ime is of the essence regarding the dates set forth in this Contract." (Borowich Affid. Ex. C ¶ 43). It also required Plaintiff to provide to Defendant, at closing, with an owner's standard-coverage owner's policy of title insurance insuring marketable title in the condominium, (id. at ¶ 16) and to provide the Defendant a condominium association disclosure packet, (id. at ¶ 10). The Rider directed Plaintiff to pay, at closing, any charges payable to the condominium association, (id. at Rider ¶ 4), and directed Plaintiff to cure any fines affecting the condominium, (id. at Rider ¶ 8(d)). The Rider further noted that the condominium's Board of Managers did not have a right of first refusal (Id. at ¶ 2(n)).

Paragraph 7 of the Agreement concerns the parties' rights regarding the \$125,000 deposit. It provides that:

If (1) Seller (Plaintiff) does not approve this Agreement; or (2) Seller approves this Agreement but fails to furnish marketable title; or (3) Seller fails to complete this transaction in accordance with this Agreement, or perform any other acts herein provided; or (4) any condition which Buyer (Defendant) has made an express contingency to this Agreement (and has not otherwise waived) fails though no fault of Buyer, then all earnest money shall be promptly refunded to Buyer. However, acceptance by Buyer of the refund shall not constitute a waiver of other legal remedies available to Buyer. If Seller signs this Agreement and title is marketable; and (1) Buyer has misrepresented Buyer's financial status; or (2) Buyer's bank does not pay, when presented, any check given as earnest money; or (3) Buyer fails to redeem, when due, any note given as earnest money; or (4) Buyer fails to

complete this transaction in accordance with this Agreement or to perform any other act herein provided, then all earnest money paid or agreed to be paid shall be paid to Seller as liquidated damages or as otherwise allowed by law, and this transaction shall be terminated. It is the intention of the parties that Seller's sole remedy against the Buyer for the Buyer's failure to close this transaction shall be limited to the amount of earnest money paid or agreed to be paid herein.

On January 9, 2008, the Lawyers Title Insurance Corporation ("LTIC"), which Plaintiff had retained to act as the title company, escrow agent and closing agent (Blattner Affid. ¶ 4), sent both parties a full title abstract, (*id.* at ¶ 8). The abstract's Schedule B noted, *inter alia*, that the condominium building was a landmark, and that LTIC would require an estoppel certificate from the Board of Managers stating that the Board had received payment for any common charges levied against Plaintiff's office condominium, and a letter stating that the Board of Managers had waived its right of first refusal. (Borowich Affid. Ex. I).

On May 5, 2008, Blattner emailed and called Defendant's office to remind him that the Agreement set June 2, 2008, as the closing date, and instructed him to let LTIC know of any expenses that Defendant needed to pay at closing. (Borowich Affid. Ex. K). On May 13, 2008, Blattner again contacted Defendant's office to remind him that they were less than three weeks away from closing. The following day, Defendant's executive secretary directed Blattner to contact Defendant's lead attorney, David Jaroslawicz ("Jaroslawicz"). (Borowich Affid. Ex. L). Blattner then phoned and emailed Jaroslawicz, reminding him of the closing date, providing the closing agent's information, and asking him to reply as soon as possible. (Borowich Affid. Ex. M). Jaroslawicz did not respond. (Blattner Affid. ¶ 12). Blattner contacted Jaroslawicz on May 19, 2008, with a draft Closing Statement, but again received no response. (Borowich Affid. Ex. N, O, Blattner Affid. ¶ 16). On May 21, 2008, Blattner faxed Jaroslawicz a letter reminding him

that the closing date was approaching, that the closing date was material, and that he had contacted the condominium association about the status of Defendant's application for the Waiver of the Right of First Refusal and was told that Defendant had not made the application or even contacted the association (Borowich Affid. Ex. P).

On May 22, 2008, Blattner emailed Jaroslawicz once again, asking him to reply as quickly as possible, and attached the closing documents. (Borowich Affid. Ex. Q). Jaroslawicz answered later that day, providing the opening observation that "[t]he problem with email is that it is abused to harass people," and denying that the Agreement was a time-of-the-essence contract. (Id.). Jaroslawicz then stated he would attempt to reach Defendant and would later inform Blattner "as to what would be a reasonable date for the purchaser and purchaser's counsel to close." (Id.). Blattner responded by citing the Agreement's Paragraphs 43, which made time of the essence, and 18, which set the closing date as June 2. (Id.). Blattner noted that Plaintiff had one remaining tenant who needed to know whether to vacate, and asked Jaroslawicz to make a proposal if Defendant needed an extension to close. (Id.).

Also in advance of closing, but on an unspecified date, Blattner contacted the condominium board regarding the estoppel certificate which would contain any charges levied against the office. (Blattner Reply Affid. ¶ 4). The Board replied that Defendant would need to fill out an application which required information he alone would have, such as his social security number and taxpayer identification, before the Board would issue the certificate. (Id.). Although the defendant had not indicated any problems with the Board, defendant failed to complete the application (id. at ¶ 9), despite Blattner's attempt to address this issue with him, (id. at ¶ 7).

Neither Defendant nor Jaroslawicz ever contacted the closing agent, LTIC, to make arrangements for closing; LTIC's representative emailed Blattner on May 15, 2008, (Borowich Affid. Ex. O), and on May 28, 2008, (Borowich Affid. Ex. R), indicating that they had not heard from Defendant or Jaroslawicz and asking if they had confirmed the closing date.

On June 2, 2008, Plaintiff told Blattner that Defendant had informed him in a conversation that day that Defendant was unable to complete the closing. (Blattner Affid. ¶ 22, Borowich Affid. ¶ 15). Blattner faxed Jaroslawicz a letter saying that Defendant had contacted Plaintiff and had told the Plaintiff that he was having trouble finalizing financing, and that the lack of communication harmed Plaintiff, as he had already closed his practice and had all but one of his tenants leave. (Borowich Affid. Ex. S). As Plaintiff had indicated to Blattner that Defendant told him that he needed another two weeks to close, Blattner attached a proposed Amendment to the Agreement as an offer to extend the closing date to June 20, 2008, in exchange for requiring Defendant to pay the condominium's maintenance costs starting June 1, 2008. (Id.). Jaroslawicz replied that day, characterizing Blattner's attempts at communication "offensive," (Borowich Affid. Ex. T), asking for a closing the week of June 16, 2008, and noting that Blattner never provided him any documentation showing that the condominium board approved the sale or showing that Plaintiff did not owe the board any charges, (Borowich Affid. Ex. U).

On June 2, 2008, Blattner responded to Jaroslawicz that he had contacted the condominium regarding its approval and was told that the Defendant had to complete and make the application for such approval and to provide a copy of the contract and amendments, (Borowich Affid. Ex. V). Blattner also stated that the Defendant needed to pay a move in/move

out deposit and an application fee and that the estoppel certificate would be provided by the condominium once the application was submitted and prior to closing. (Id.).

Following some miscellaneous communications, on June 3, 2008, Jaroslawicz wrote Blattner to say that the Amendment was unacceptable, to reiterate that Defendant wanted a closing date on the week of June 16, 2008, and to request again any documentation that no charges were due the condominium board and that the board approved the sale (Borowich Affid. Ex. X). In response, Plaintiff declared a default, but indicated that he would still entertain an offer to extend the closing date. (Borowich Affid. Ex. Y). Blattner wrote Jaroslawicz attaching a copy of his default letter to Defendant. (Borowich Affid. Ex. Z, cf. Blattner Reply Affid. ¶¶ 4, 5). Both parties made claim to the earnest money deposit held in escrow, (Borowich Affid. Ex. BB), and this litigation ensued.

Plaintiff argues that Defendant's failure to close on or before the closing date places him in material breach of the Agreement, which made time of the essence, and therefore under Paragraph 7 of the Agreement, he is entitled to the contract deposit, notwithstanding Defendant's eighteen Affirmative Defenses, which Plaintiff characterizes as frivolous. Plaintiff denies the claim that he failed to fulfill his obligations under the Agreement, and asserts that Defendant's complaints on or after the closing date that Plaintiff failed to provide appropriate documentation regarding the condominium's approval of the sale and that there were no charges due are insufficient to raise an issue of fact since the record shows that any missing information was the result of Defendant's breach of his obligations under the Agreement.

In opposition, Defendant urges that the time-of-the essence paragraph applies to the Seller as well as Buyer, and Plaintiff was not prepared to close on June 2, 2008, as he failed to obtain the necessary documentation from the Board, including the estoppel certificate and a letter waiving the right of first refusal and thus was unable to provide marketable title or owner's

title insurance. In addition, Defendant argues that Plaintiff did not provide him with the information disclosure packet as required by Paragraph 10 of the Agreement and had not paid any applicable fees to the Board as Paragraph 4 of the Rider stipulated. Defendant additionally denies that any basis exists to award interest or attorney's fees.¹

In support of his opposition, Defendant submits the affidavit of Andrew W. Albstein, Esq., who is a lawyer specializing in real estate law, who opines as to the interpretation of various provisions of the Agreement and Rider and as to whether Plaintiff complied with his obligations under these documents such that he would be entitled to recover the contract deposit. Defendant also relies on his own affidavit in which he states that he proceeded in "good faith" and that he requested the deposit back when he "realized that [Plaintiff] and his lawyer were not proceeding in good faith and trying to change the terms of the contract by having me inappropriately deal with the condominium association of which I was an officer, and to pay seller's fees..." (Defendant Affidavit at 3). Notably, Defendant does not state that he was prepared to tender performance on the closing date.

In reply, Plaintiff argues that Albstein affidavit must be disregarded as expert opinions as to legal conclusions impermissibly encroach on the judicial function.² Plaintiff further argues

¹Defendant also argues that the court should not credit Blattner's statements since he is not licensed to practice law in New York. This argument is unavailing since Blattner's statements concern facts of which he has personal knowledge and not the interpretation of New York law which is an issue for the court in any event. Notably, in connection with this action, Plaintiff is represented by New York counsel and not Blattner.

² Plaintiff also argues that Defendant's opposition papers should be stricken as untimely. However, the court does not reach this argument since as set forth below, even considering Defendant's opposition papers, the court finds that Plaintiff is entitled to summary judgment.

that no information disclosure packet was necessary since Defendant was a tenant and an officer of the condominium and was familiar with its procedures and points out that the record shows that Defendant never requested the disclosure packet. Plaintiff also asserts that he was not obligated to pay the condominium fees or to provide title insurance until the closing, which Defendant prevented from taking place. In addition, Plaintiff argues that any failure to obtain an estoppel certificate and the approval of the condominium to waive the right of first refusal, which was required by the title company, was excusable since Defendant frustrated his performance of these obligations by his refusal to complete an application with the condominium.

Discussion

On a motion for summary judgment, the proponent “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986).

“It is the primary rule of construction of contracts that when the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving practical interpretation to the language employed and [to] the parties’ reasonable expectations.” Slamow v. Delcol, 174 A.D.2d 725, 726 (2d Dep’t 1991), aff’d, 79 N.Y.2d 1016 (1992).

For real estate contracts, “[o]rdinarily, the law will allow the vendor and vendee a reasonable time to perform their respective obligations, regardless of whether they specify a particular date for the closing of title.” Grace v. Nappa, 46 N.Y.2d 560, 565 (1979), see also Cohen v. Kranz, 12 N.Y.2d 242, 246 (1962) (allowing the seller “a reasonable time beyond [the closing date] to make his title good” since his title’s defects were all curable and time was not of the essence) (internal citations omitted). Where the parties have agreed to make the closing date a time of the essence, however, “each party must tender performance on [the closing date] unless the time for performance is extended by mutual agreement.” Grace, 46 N.Y.2d at 565, accord Mosdos Oraysa, Inc. v. Sausto, 13 A.D.3d 838, 840 (N.Y. 2004). Absent such a mutual agreement, “performance on the specified date is a material element of the contract, and failure to perform on that date constitutes, therefore, a material breach of the contract.” New Colony Homes, Inc. v. Long Island Prop. Group, L.L.C., 21 A.D.3d 1072, 1073 (2d Dep’t 2005), accord Friedman v. O’Brien, 287 A.D.2d 311, 312 (1st Dep’t 2001).

Here, paragraphs 18 and 43 of the Agreement made performance by June 2, 2008 a material element of the contract and thus Plaintiff has made a prima facie showing entitling him to summary judgment on his claim for the contract deposit by tendering evidence that Defendant was not ready, willing, and able to close on or before that date.

The court rejects Defendant’s argument that although he was unable to perform on June 2, 2008, that Plaintiff is not entitled to recover the deposit since Plaintiff was in breach of the Agreement as he was not ready to close on that date. As a preliminary matter, Defendant’s reliance on the affidavit Andrew W. Albstein, Esq. to provide an alleged “expert opinion” in support of his interpretation of the parties’ obligations is misplaced. The affidavit is impermissible and will not be considered since it encroaches on the court’s authority and responsibility. Colon v. Rent-A-Car Center, Inc., 276 A.D.2d 58, 61 (1st Dept 2000)(noting that

“expert witnesses should not be called to offer legal opinions as to legal obligations of parties under contracts”).

Here, Plaintiff cannot be held responsible for any failure to perform under the Agreement since the record shows that Defendant’s failure to cooperate prevented Plaintiff’s performance. “In the case of every contract there is an implied undertaking on the part of each party that he will not intentionally and purposely do anything to prevent the other party from carrying out the agreement on his part.” Syracuse Orthopedic Specialists, P.C. v. Hootnick, 42 A.D.3d 890, 892 (4th Dep’t 2007) (quoting Patterson v. Meyerhofer, 204 N.Y. 96, 100 (N.Y. 1912)) (alterations in the original); see also, HGCD Retail Services, LLC v. 44-45 Broadway Realty Co., 37 A.D.3d 43, 53 (1st Dep’t 2006). Moreover, when, as here, a party to a contract prevents or frustrates the performance of another party under the contract, the other party cannot be held liable for any breach. Water Street Dev. Corp. v. City of New York, 220 A.D.2d 289, 290 (1st Dep’t 1995), lv denied, 88 N.Y.2d 809 (1996).

Thus, Defendant cannot hold Plaintiff responsible for any failure to provide marketable title or title insurance on the closing date since the record shows that Defendant’s failure to complete the application with the condominium prevented Plaintiff from obtaining the estoppel certificate and the condominium’s approval with respect to the waiver of its right of first refusal as required by LTIC for marketable title. Furthermore, as to Defendant’s argument that Plaintiff failed to pay condominium fees, this resulted from Defendant’s failure to complete the application, as the estoppel certificate would have identified any fees Plaintiff would have needed to pay. Under these circumstances, Defendant cannot hold Plaintiff in breach for these provisions. See, e.g., Water Street Dev. Corp., 220 A.D.2d at 290. Moreover, Defendant’s belated attempt to excuse his lack of cooperation by asserting that he, and presumably his

attorney, were not permitted to deal with the condominium with respect to such ministerial matters as completing an application form based on his status as an officer of the condominium is without support in fact or law.

Furthermore, under the parties' Agreement, Plaintiff was not required to provide title insurance or to pay outstanding fees to the condominium until the closing date. As Defendant never tendered performance, Plaintiff cannot be held in default for failing to provide marketable title. See Roman v. Watson, 297 A.D.2d 319, 319 (2d Dep't 2002) ("It is well settled that in order for a seller of real property to be found in default for failure to provide insurable or marketable title, the purchaser must first tender performance and demand good title.") (internal quotation marks and citations omitted)

Next, Plaintiff's failure to provide any condominium disclosure packet as required under Paragraph 10 of the Agreement does not raise a triable issue of fact as to whether Plaintiff was in breach of the Agreement. While Paragraph 10 permits Defendant to cancel the Agreement and seek the return of the deposit in the event that Plaintiff failed to provide the disclosure packet, the record shows that Defendant never exercised this right. Accordingly, this requirement was waived, and cannot be used as an excuse for failing to perform under the Agreement. Oak Bee Corp v. N.E. Blankman, Co., Inc., 154 A.D.2d 3, 6 (2d Dept), appeal denied, (1990)(noting that "the party for whose benefit a condition is inserted in the agreement may waive the condition").

Finally, Plaintiff is entitled to prejudgment interest on a breach of contract action (CPLR 5001) as well as interest from the date of the decision until the date of entry of final judgment (CPLR 5002); Lindenbaum v. Royco Property Corp., 165 A.D.2d 254, 261 (1st Dept 1991). However, there is no contractual or statutory basis for awarding Plaintiff attorneys' fees, and his request for such fees is denied.

Conclusion

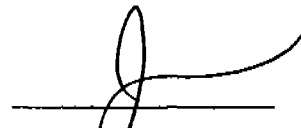
In view of the above, it is

ORDERED that Plaintiff's motion for summary judgment is granted; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff Abba E.

Borowich and against defendant Larry Rosenthal in the amount of \$125,000, plus interest at the statutory rate from July 1, 2008, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.³

DATED: October 13, 2009



J.S.C.

FILED
OCT 26 2009
COUNTY CLERK'S OFFICE
NEW YORK

³Plaintiff also seeks a declaration that he is entitled to the \$125,000 contract deposit held by defendant Lawyers Title Insurance Corporation, plus any interest earned thereon under the terms of the parties' contract. While the release of the money in escrow to Plaintiff would provide an alternative remedy to a judgment against defendant Rosenthal, it is unclear from the record whether the deposit is being held by defendant Lawyers Title Insurance Corporation pursuant to Paragraph 7 of the Rider or by LandAmerica Financial Group, the entity named as the escrow agent in the party's Escrow Agreement (Borowich Affid. Ex. A), and therefore the court declines to direct that Lawyers Title Insurance Corporation turn over the deposit to Plaintiff. That being said, however, the parties are free to resolve the matter by notifying the escrow agent holding the deposit to release it and any interest accruing thereon to Plaintiff.