

Telemaque v Aleksa

2010 NY Slip Op 30292(U)

February 8, 2010

Supreme Court, New York County

Docket Number: 109670/06

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 : 109670/2006

TELEMAQUE, ADRIENNE

VS.

ALEKSA, TATIANA

SEQUENCE NUMBER : 002

RENEWAL

INDEX NO. _____

MOTION DATE 12/21/09

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — 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 and order.

FILED

FEB 11 2010

NEW YORK COUNTY CLERK'S OFFICE

Dated: 2/8/10

[Signature]

JANE S. SOLOMON 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: I.A.S. PART 55

-----X
ADRIENNE TELEMAQUE,

Plaintiff,

-against-

Index No. 109670/06

TATIANA ALEKSA and ANDREY ZHUKOV-
KHOVANSKIY,

DECISION AND ORDER

Defendants and Third-Party Plaintiffs,

-against-

GREEN TURTLE REALTY CORP.,

Third-Party Defendants.

FILED
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-----X
JANE SOLOMON, J.:

Plaintiff moves, pursuant to CPLR 2221, to renew and reargue this court's Decision and Order, dated August 14, 2009, which, inter alia, granted summary judgment to the defendants and dismissed the third-party claims.

Plaintiff, Adrienne Telemaque, the seller of a cooperative apartment, commenced the within action in July 2006, seeking to retain the defendant/buyers' down payment as liquidated damages for their alleged breach of the parties' Contract of Sale regarding Telemaque's apartment. On a motion for summary judgment, this court found that the conditions of the Contract of Sale had not been met and that defendants were entitled to the return of their down payment plus interest as of April 2006.

Telemaque now seeks to renew on the following grounds: (1) plaintiff offered to return the entire down payment to the defendant/buyers, but they refused because they wanted to

continue their third-party action against the Cooperative Board; (2) the down payment in issue was stolen by plaintiff's closing attorney, so plaintiff could not return it; and (3) the parties had agreed to put the escrow deposit in an account which did not give interest at the statutory interest rate of nine percent, and accordingly, the award of interest should be reduced.

In support of her motion to reargue, Telemaque argues that the defendant/buyers are not entitled to the down payment because they did not comply with the cancellation provisions of the Contract of Sale.

A motion to renew under CPLR 2221 is intended to alert the court to new or additional facts which, although in existence at the time of the original motion, were unknown to the party seeking renewal, and therefore not brought to the court's attention (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22 [1st Dept], *lv dismissed in part, denied in part* 80 NY2d 1005 [1992]; *Foley v Roche*, 68 AD2d 558 [1st Dept 1979]).

A motion for leave to reargue, "addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law" (*Foley v Roche*, 68 AD2d at 567).

As to that part of plaintiff's motion to reargue, plaintiff asserts that this court was unaware that the defendant/buyers had failed to comply with the cancellation provisions of the Contract of Sale. The Contract of Sale provides, in paragraph 6.3, as follows: "Either party, after learning of the Corporation's decision, shall promptly advise the other party thereof If such consent is refused at any time, either Party may cancel this Contract by Notice" (Ciarlo Aff., Ex. G). On the prior motion, defendant/buyers submitted a letter, dated April 5, 2006, wherein the defendant/buyers canceled the Contract of Sale. That letter stated as follows:

Dear Mr. Berman:

As we advised your office, we have received a letter from Green Turtle Realty Corp. which denied our clients' application to purchase the above referenced unit. A copy of said letter is annexed hereto.

Please note that said letter refers to an amended application. In fact, there was only one application filed. Nevertheless, in light of said letter and pursuant to paragraph 6.3 of the Contract of Sale dated November 11, 2005, the Purchasers hereby cancel said contract.

Please return the contract deposit of \$101,799.00 to our office upon receipt of this correspondence.

Very truly yours,

MAX D. LEIFER, P.C.

Rivkin Aff. Ex. B).

Upon receiving notification of the buyer's cancellation of the Contract of Sale,

Telemaque wrote the following letter to her attorney:

Dear Mr. Berman:

I received a copy of the letter from the Purchaser's attorney which purports to cancel the contract and request the return of the contract deposit in the [sic] \$101,799.00.

This letter will serve as notice that I object to the release of the escrow deposit to the Purchaser.

In addition, in light of Purchaser's default, this letter will further serve as notice that I demand that the escrow deposit be immediately released to me.

Thank you.

Sincerely,

Adrienne Telemaque

(Rivkin Aff., Ex. D).

After Telemaque refused to return the down payment, the defendant/buyers sought to initiate a claim against the Cooperative Board. Given the submission of these documents on the prior motion, plaintiff has failed to establish that this court overlooked the defendant/buyer's failure to cancel the Contract.

As to that part of the motion to renew, plaintiff alleges that several times after the commencement of this action, her attorney offered to return the down payment to the defendant/buyers, but that they would not accept it because they wanted to continue their third-party complaint against the Cooperative Board. In order to be effective, a tender must be unconditional (*Tanger v Ferrer*, 49 AD3d 286 [1st Dept 2008]). Telemaque's offer to return the down payment was conditional and therefore merely an offer of settlement, and not a bona fide tender.

As to plaintiff's argument that she could not give the funds back, because they were stolen by her attorney, the parties have informed the court that both parties filed the necessary papers to establish a claim with The Lawyers Fund for Client Protection and that the Fund has agreed to reimburse either party for the theft. At any time during this litigation, the plaintiff could have relinquished her claim to the funds.

Finally, plaintiff asserts that an award of interest unfairly penalizes her, because she did not have the use of the funds during the pendency of this action. CPLR 5001 (a) provides that "[i]nterest shall be recovered upon a sum awarded because of a breach of performance of a contract, or because of an act or omission depriving or otherwise interfering with title to, or

possession or enjoyment of, property.” The statute mandates a pre-judgment award of interest for breach of contract (*Brushton-Moria Cent. School Dist. v Thomas Assoc.*, 91 NY2d 256, 262 [1998]; *Solow v Wellner*, 86 NY2d 582, 589-590 [1995]). Plaintiff cites *Manufacturer’s & Traders Trust Co. v Reliance Ins. Co.* (8 NY3d 583 [2007]) for the proposition that interest on an award is meant to compensate a party for the use of his money over time. However, *Manufacturer’s & Trader’s Trust Co.* involved an interpleader action with the parties asserting competing claims to funds held by the Clerk of the Court. The Court of Appeals found that the mandate of CPLR 5001 (a) did not apply. The Court specifically noted that “no claim was asserted, and no judgment awarded, against O’Brien for breach of contract. Nor was there a judgment, or any basis for a judgment against O’Brien or Cives for interference with the Joint Venture’s possession or enjoyment of property” (8 NY3d at 589).

Accordingly, based upon the foregoing, it is

ORDERED that the motion by plaintiff Adrienne Telemaque to renew and/or reargue is denied.

Dated: February 8, 2010

ENTER:

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NEW YORK
COUNTY CLERK'S OFFICE

J.S.C.

JANE S. SOLOMON