

**Westreich v Bosler**

2010 NY Slip Op 30639(U)

March 25, 2010

Supreme Court, New York County

Docket Number: 102906/2009

Judge: Jane S. Solomon

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

JANE S. SOLOMON

PART 55

Index Number : 102906/2009

Justice

WESTREICH, LESLIE M.

INDEX NO. 102906-09

BOSLER, GEORGE G.

MOTION DATE

SEQUENCE NUMBER : # 001

MOTION SEQ. NO. #001

DISMISS

MOTION CAL. NO.

were read on this motion to/for

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1-3

Answering Affidavits — Exhibits

4-5

Replying Affidavits

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided by the annexed Memorandum Decision + Order

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

FILED  
MAR 26 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 3/25/10

JANE S. SOLOMON J.S.C.

Check one: FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 55

-----X  
LESLIE M. WESTREICH AND SHIRA S.  
WESTREICH,

Plaintiffs,

-against-

GEORGE G. BOSLER AND JAN LEVIEN,

Defendants.

Index No.: 102906/2009  
DECISION AND ORDER

**FILED**  
MAR 26 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

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JANE S. SOLOMON, J.:

Plaintiffs Leslie M. Westreich and Shira S. Westreich (Purchasers) sue Defendants George G. Bosler (Bosler or Seller) and Jan Levien (Levien), Seller's attorney and escrow agent, for damages resulting from a breach of a real estate contract of sale. Defendants counterclaimed for breach of contract; fraudulent misrepresentation; indemnification for Levien; and for sanctions against Sellers for filing a frivolous claim. Purchasers move to dismiss the counterclaims pursuant to CPLR 3211(a)(1) and 3211(a)(7). The motion is decided as follows.

FACTS

Seller is the owner of Unit 3K at 210 West 90<sup>th</sup> Street, in Manhattan (the Unit). In October 2008, Purchasers entered into a contract with Seller to purchase the Unit for \$900,000. The closing date was scheduled for January 15, 2009. Purchaser's contract deposit of \$90,000 (the Contract Deposit) was placed in an escrow account, held by Levien (who also represents Seller in this action).

The relevant paragraphs of the contract read as follows:

"1.24 The Contract Deposit shall be held in [a non-]IOLA escrow account. If the account is a non-IOLA account then interest shall be paid to the Party entitled to the Contract Deposit. . . .

13.1 In the event of a default or misrepresentation by Purchaser, Seller's sole and exclusive remedies shall be to cancel this Contract, retain the Contract Deposit as liquidated damages . . . .

17.1 Any notice or demand ('Notice') shall be in writing and delivered either by hand, overnight delivery or certified or registered mail, return receipt requested, to the Party and simultaneously, in like manner, to such Party's Attorney, if any, and to Escrowee . . . ." (Contract of Sale, Motion, Ex. 4).

Paragraph 27 of the contract governs the escrow.

Paragraph 27.1 governs the escrowee's duties with regard to the deposit, and requires that after giving notice of a demand for payment, escrowee must wait for ten days to receive a notice of rejection from the other party, and if one is received, the escrowee may not release the deposit. Paragraph 27.3 states that the escrowee shall be indemnified equally by the parties in connection with the performance of Escrowee's acts or omissions not involving bad faith, willful disregard of the contract or gross negligence (Id.)

Finally, the rider to the contract states that:

"The Seller shall have no right to adjourn the scheduled closing date of January 15, 2009. Purchasers shall have the right to reasonably adjourn the closing date . . . provided that Purchasers give Seller reasonable notice of their intention to do so" (Id).

By letter dated January 2, 2009, sent to both Bosler and Levien via certified mail, return receipt requested, Purchasers gave notice of their intent to adjourn the closing date. They did not specify a new closing date (Affirmation in Opposition, Ex. B). Levien responded, by letter dated January 6, 2009, that Bosler had not received the January 2 letter, but that "[w]e, of course, consent to your request to postpone for one thirty [30] day period" (Id., Ex. C). Levien then set the new closing date as February 16, 2009.

By letter dated January 9, 2009, Purchasers construed the January 6 letter as Seller's attempt to adjourn the closing. They claimed that the letter was ineffective because only Purchasers had such a right. Notwithstanding this objection, Purchasers agreed to Seller's "request to an adjournment to the 16<sup>th</sup> of February" (Id. Ex. D). February 16, however, was a holiday, and Levien, telephonically, requested a change to either February 13 or 17. Having received no return call, Levien, by letter dated February 11, 2009, rescheduled the closing to February 17, stating "[b]e advised that you are hereby notified that, in the event you do not close, I shall release the escrow funds to my client" (Id. Ex. E). On February 17, 2009, the closing did not occur, and Levien informed Purchasers "in light of your default, the contract is rescinded and the escrow deposit

will be released to Mr. Bosler" (Id. Ex. F). By letter dated February 25, 2009, Purchasers objected to the release of the deposit and tried to obtain a response from Levien that she had not released the Contract Deposit. Levien did not respond. Purchasers then brought this action.

#### DISCUSSION

##### **A. Counterclaim for Breach of Contract**

Bosler alleges that Purchasers breached the contract by failing to close, and are liable for damages of \$500,000. Purchasers contend that this counterclaim should be dismissed because the contract limits Bosler's claim to the amount of the deposit.

Purchasers do not cite to any case law which would establish that the existence of a liquidated damages clause is grounds to dismiss a claim for breach of contract. Rather, they cite to cases that hold that liquidated damages clauses specifically limit the amount recoverable for a breach of contract (see, *Richter v. Novo Corp.*, 43 AD2d 1, 3 [1<sup>st</sup> dept, 1973]). The existence of such a clause does not invalidate the breach of contract counterclaim, it merely limits damages. Accordingly, Purchasers' motion is granted to the extent that the first counterclaim is deemed amended to assert Bosler's claim for the return of the Contract Deposit.

## B. Counterclaim for Fraud

Bosler alleges that Purchasers "knew at the time they induced defendant Bosler to take his apartment off the . . . market that they neer [sic] intended to close at the agreed upon sale price despite having entered into a contract for same" (Answer, ¶18).

Purchasers correctly argue that general allegations that a party entered into a contract with the intention not to perform it are insufficient to support a claim for fraud (see *New York University v. Continental Ins. Co.*, 87 NY2d 308, 318 [1995]). Similarly, such a claim is also duplicative of a breach of contract claim, when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract (*Manas v. VMS Associates, LLC*, 53 AD3d 451, 453 [1st Dept, 2008]).

The argument that Purchasers' alleged misrepresentations "were not collateral or extraneous to the contract" is unavailing as, in a fraudulent inducement claim, the alleged misrepresentation "should be one of then-present fact, which would be *extraneous to the contract and involve a duty separate from or in addition to that imposed by the contract*, and not merely a misrepresented intent to perform" (*The Hawthorne Group, LLC v. RRE Ventures*, 7 AD3d 320, 323-24 [1<sup>st</sup> Dept, 2004] [emphasis added]; see also, *Coppola v. Applied Electric Corp.* 288

AD2d 41 [1st Dept, 2001]). Accordingly, Purchasers' motion to dismiss the second counterclaim is granted.

**C. Counterclaim for Indemnification**

Based on Levien's letter threatening to release the deposit to Bosler, and her failure to respond to their inquiries as described above, Purchasers allege that Levien breached paragraph 27.1 of the contract by releasing it. In the Answer, while denying paragraphs 17 and 21 of the Complaint about the letter, Levien does not assert that she continued to retain the money, and she counterclaims for indemnification, for \$5,000 in attorney's fees incurred in defending herself, and for damages of at least \$25,000. Only in opposing this motion, it appears, does Levien provide proof that she has not released the deposit (Attorney Distribution Account Deposit Summary, attached to Levien's Affirmation in Opposition, Ex. H).

Purchasers respond that any expense Levien incurred was the direct result of her failure, in bad faith, to respond to them, and was a violation of her professional obligations. The undisputed circumstances indicating that Levien did not adhere to the escrow provisions of the contract defeat her claim.

(Notably, pro se defendants generally cannot be compensated for their own time.) As a result, the motion to dismiss the third counterclaim is granted.

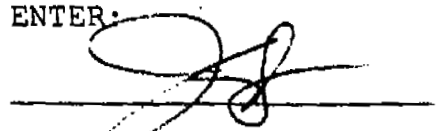
**D. Counterclaim for Sanctions**

New York does not recognize a separate cause of action for sanctions (*Greco v. Christoffersen*, 70 AD3d 769 [2nd Dept, 2010]). "Attorney's fees and sanctions are permitted by 22 NYCRR 130-1.1(d) and CPLR 8303-a to penalize specific frivolous conduct. The court in its discretion may award attorney's fees and sanctions. A party is not entitled to such relief as a matter of right, and it may not be pleaded as a distinct cause of action" (*Murphy v. Smith*, 4 Misc3d 1029(A) [Sup Ct, New York County, 2004] [Internal quotation marks omitted]). Accordingly, Purchasers' motion to dismiss the fourth counterclaim is granted, and it hereby is

**ORDERED** that the motion to dismiss the counterclaims is granted to the extent that the first counterclaim is construed as a claim for the return of the Contract Deposit, and the second, third and fourth counterclaims are dismissed.

Dated: March 25, 2010

ENTER:



J.S.C.  
JANE S. SOLOMON  
**FILED**  
MAR 26 2010  
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