Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JAMES J. GOLIA IA Part 33
Justice

MRS. OCTAVIA LEGRAND

- against -

MRS. CLARA CRAWFORD

Index Number 13487 2006

Motion Date December 17, 2009

Motion Cal. Number 23

Motion Seq. No. 2

The following papers numbered 1 to 8 read on this motion by plaintiff pursuant to CPLR 3212 for summary judgment, pursuant to CPLR 3126 to dismiss defendant's counterclaim and/or bar defendant from introducing any evidence relating to damages allegedly sustained as a result of plaintiff's actions, entering a default judgment against defendant or, in the alternative, compelling defendant to provide responses to plaintiff's discovery demands by a date certain, and to extend the deadline by which plaintiff must file a note of issue.

| | Papers Numbered |
|---|---|
| Notice of Motion - Affidavits - Exhibits..... | 1-4 |
| Answering Affidavits - Exhibits..... | 5-8 |

Upon the foregoing papers it is ordered that the motion is determined as follows:

This is an action for the release of $25,000.00 of escrowed funds that are allegedly being held for want of a final Certificate of Occupancy (CO). Plaintiff seller and defendant purchaser entered into a contract of sale, in September, 2001, for real property located at 130-42 230th Street, Laurelton, New York (the premises). Defendant purchaser's obligation to purchase the premises was subject to a number of conditions precedent. One of the

conditions precedent was "[t]he delivery by Seller to Purchaser of a valid and subsisting Certificate of Occupancy or other required certificate of compliance, or evidence that none was required, covering the building(s) and all of the other improvements located on the property authorizing their use as a one family dwelling at the date of Closing - if not so Seller may cancel contract."

On or about December 21, 2001, plaintiff was in desperate need of funds and requested defendant allow the release of $6,000.00 from the $10,000.00 down payment in advance of the closing and without the final CO. An agreement was entered into that would allow for the release of that $6,000.00 (the Escrow Agreement).

According to the Escrow Agreement, defendant "agreed to release $6,000.00 from the escrow" held by David M. Glick, plaintiff seller's attorney, upon the following conditions:

> "Approximately $5,000.00 to be held in escrow by the bank at the time of the closing for the outstanding certificate of occupancy issue;
>
> "An additional $20,000.00 to be held in escrow by you until the final completion, sign-offs and legalization of the premises have been obtained;
>
> "Closing to take place on or about January 30, 2001 [*sic*]."

Martin Safren, the architect, sent defendant's counsel a letter, dated December 21, 2001, stating that he had been hired by plaintiff to obtain a CO, that his professional fee would be $4,000.00, that an additional $1,000.00 "or so" would be required to make "minor construction modifications to the dwelling interior to meet code requirements," and that there would be an additional fee "to retain a licensed electrician to obtain a C.O. sign-off for any electrical work undertaken in connection with the 1986 alteration (this requirement was enacted around 1990, after the work was completed)," if necessary.

The closing took place on February 1, 2002. A final CO had still not been obtained as plaintiff promised in the Contract of Sale and in the Escrow Agreement. Instead, plaintiff and defendant executed an "Incomplete Repairs Agreement," dated February 1, 2002 (the Repairs Agreement). According to the Repairs Agreement, defendant and her husband gave $5,000.00 to JP Morgan Chase Bank (the Company) to insure the obtainment of a CO "and/or legalization of Alteration 1023/1986" (the repairs) and agreed "to allow access to the [premises] for the purpose of having the necessary work completed, and/or have an inspection made between the hours of 8:00 A.M. to 6:00 P.M., Monday through Saturday." The Repairs Agreement further provided that the repairs were to be completed no later than May 1, 2002, and that "[i]n the event the repairs are not completed to the satisfaction of the

Company within the permitted time period, the Company shall have the right to apply the escrow funds against the outstanding principal balance due under the loan." The second escrow, of $20,000.00, provided for by the Escrow Agreement is not mentioned in the Repairs Agreement, and no additional agreement is alleged or evidenced.

Issue was joined via service of defendant's answer, asserting as affirmative defenses that the stakeholders in possession of the escrowed amounts, and not plaintiff, are the proper parties in interest, and that plaintiff "forfeited any right to obtain the escrow" by her failure to obtain a CO in a timely fashion pursuant to the Escrow Agreement. Defendant also counterclaimed for $50,000.00 in damages for plaintiff's breach of the "escrow agreements." Plaintiff moves for summary judgment and/or dismissal of defendant's counterclaim and/or barring defendant from introducing any evidence of damages sustained as a result of plaintiff's alleged breach of contract.

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

In opposition to the motion, defendant submitted a "Certificate and Occupancy Report" for the premises, dated November 23, 2001 (the Report), and plaintiff's deposition testimony. Defendant states in her opposition papers that plaintiff made significant alterations to the premises as reflected by an open permit from 1986.

Plaintiff testified that the first time she engaged someone to obtain a CO was December 21, 2001; that under the Repairs Agreement plaintiff was given until May 1, 2002, to obtain the CO; that defendant moved into the premises on August 1, 2002; that in 2002 defendant made the following repairs/improvements/alterations to the premises: enlarged the bathroom door to accommodate a wheelchair, and installed a temporary wiry mesh lift up to the front door; that in 2003 defendant made the following repairs/improvements/alterations: installed an electric ramp; that on October 22, 2004, defendant executed an agreement to have a permanent lift installed; that defendant did not obtain a permit to install the temporary lift, permanent lift.

Evidently the CO was not obtained by May 1, 2002. By letter to Mr. Glick dated July 26, 2004, Mr. Safren stated that he still could not obtain the CO because "the new owner

made significant modifications to the house that preclude a successful inspection and subject it to potential violation of Section 27-147 of the NYC Building Code (work without a permit)." Mr. Safren's letter further stated that the modifications and improvements made by defendant all required additional filing with the Department of Buildings, which had as of yet not been done, and that "[a]ny improvement or modification that is subsequently filed must be completely finalized and closed out so as not to impede issuance of the C.O. Unless this is done, it will not be possible to proceed."

By letter to defendant purchaser's attorney Lamont R. Bailey, dated August 10, 2004, Mr. Glick attached and referenced Mr. Safren's letter of July 26, 2004, and requested authorization to release the escrow he was holding for plaintiff. The request was repeated by letter dated August 24, 2004, in which Mr. Glick repeated that the CO could not be obtained because of the improvements that defendant made to the premises, that if he did not hear from Mr. Bailey in three business he was releasing the "entire escrow" to plaintiff, and that he was releasing $5,000.00 of escrow to plaintiff who was "in desperate need of survival money."

Mr. Bailey responded to Mr. Glick by letter dated August 24, 2004, stating that defendant did not authorize the release of any escrow to plaintiff, and that if plaintiff had pursued the CO diligently the subsequent improvements that defendant made to the premises would not have been a factor.

Defendant testified that the improvements she made to the premises began after May 1, 2002, and it is undisputed that defendant's improvements and alterations to the premises occurred after May 1, 2002. Plaintiff submits neither evidence nor explanation as to why the CO could not be obtained before May 1, 2002, as she agreed to do in the Repairs Agreement. Since plaintiff has failed to demonstrate that she performed her obligations under the Repairs Agreement, she may not be awarded summary judgment on her claims (*see* CPLR 3212 [b]).

Defendant's bill of particulars in support of her counterclaim for money damages states that she has "expended approximately $7,350.00 to legalize the existing structure and will be required to spend an estimated $35,183.15 to obtain a Certificate of Occupancy." According to the Compliance Conference Order dated June 23, 2009, defendant had 45 days to furnish responses to those portions of the demand dealing with sums of money expended by defendant directly to obtain the CO, including receipts, bills, and other expenses. It was further ordered that "any failure to comply strictly with the terms of this order shall be grounds for the striking of pleadings or other relief pursuant to CPLR 3126." Plaintiff asserts in her motion papers that the 45 days has elapsed and that defendant has still not furnished

proof of expenditures to obtain the CO. Plaintiff is therefore entitled to have the counterclaim stricken (*see* CPLR 3126).

In light of the foregoing, the remaining issues of the parties need not be addressed.

Accordingly, plaintiff's motion is granted solely to the extent of dismissing defendant's counterclaim. Plaintiff's motion is denied in all other respects.

Dated: April 8, 2010

J.S.C.