

Champion v Blue Water Advisors, Inc.

2010 NY Slip Op 30848(U)

April 9, 2010

Supreme Court, New York County

Docket Number: 109708/09

Judge: Doris Ling-Cohan

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

PRESENT. *Hon. Doris Ling-Cohan*

PART 36

Index Number : 109708/2009

CHAMPION, WILLIAM

vs

BLUE WATER ADVISORS

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

| | PAPERS NUMBERED |
|---|-----------------|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | <u>1, 2, 4</u> |
| Answering Affidavits — Exhibits _____ | <u>5</u> |
| Replying Affidavits <u>Memos</u> | <u>6, 7</u> |

Cross-Motion: Yes No 3, 4

Upon the foregoing papers, it is ordered that this motion & cross-motion for summary judgment are decided in accordance with the attached memorandum decision.

UNFILED JUDGMENT
This judgment is not to be filed by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 9/9/10  J.S.C.

JUSTICE DORIS LING-COHAN

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: IAS PART 36

-----X
WILLIAM CHAMPION and MARIANNE CHAMPION,

Plaintiffs, Index No.: 109708/09
- against - Motion Seq. No.: 001

BLUE WATER ADVISORS, INC. a/k/a BLUE WATER
ADVISORS LLC, and GIDDINS & CLAMAN LLP
a/k/a GIDDINS, CLAMAN LLP a/k/a
CLAMAN LLP, a/k/a GIDDINS CLAMAN
&
LANGS, LLP,

This judgment is not enforceable until the clerk of the court has entered the judgment and notice of entry has been served on the parties. The party who is to receive the money must appear in person at the clerk's office to receive the money.

-----X
Doris Ling-Cohan, J.:

In this real property action, plaintiffs William and Marianne Champion move, pursuant to CPLR 3212, for an order granting summary judgment in their favor, and dismissing defendant Blue Water Advisor Inc. a/k/a Blue Water Advisors LLC's (Blue Water) counterclaims against them. Blue Water opposes plaintiffs' motion and cross-moves, pursuant to CPLR 3212, for an order granting it summary judgment on its counterclaims, and for an order directing the escrow agent and co-defendant Giddins and Claman, LLP a/k/a Giddins, Claman LLP a/k/a Giddins Claman LLP, a/k/a Giddins Claman & Langs LLP (Giddins & Claman) to distribute the escrowed down payment deposit in the amount of \$550,000.00 to Blue Water.

For the following reasons, plaintiff's motion is granted and Blue Water's cross motion is denied.

Background

In September 2008, plaintiff entered into a contract of sale with Blue Water for the purchase of a condominium apartment, Unit 10B, (contract) in the building located at 56-62 Cooper Square, New York, New York (see contract, Affidavit of Robert Frankel, Esq., Ex. A). Pursuant to the terms of the contract, defendant Giddins & Claman, former attorneys for Blue Water, is holding plaintiffs' down payment of \$550,000.00 in escrow (*id.*).

In connection with the sale, by letter dated April 30, 2009, Blue Water set a closing date of May 26, 2009, the last date permitted under the contract. (Affidavit of Robert Frankel, Esq., Ex. B) By letter dated May 1, 2009, plaintiffs confirmed the closing date and designated same to be "time is of the essence". Blue Water rejected the time of the essence designation (see May 13, 2009 letter from Blue Water). Thereafter on May 15, 2009, plaintiffs rejected Blue Water's letter.

On May 22, 2009, the parties entered into a "time of the essence" agreement wherein June 2, 2009 was set as the closing date, and June 9, 2009 was designated as the "time of the essence" closing date (see May 22, 2009 Agreement, Frankel Aff., Ex. C).

Plaintiffs confirmed that they were ready, willing and able to close on June 2, 2009, and again on the time of the essence

date, June 9, 2009. On June 9, 2009, plaintiffs' counsel appeared by power of attorney at the office of Giddins & Claman at 4:00 P.M., claiming to be ready, willing and able to close on the purchase of the apartment (see transcript of the June 9, 2009 closing, Frankel Aff., Ex. E).

Plaintiffs' counsel appeared at the June 9th closing with a check made payable to Blue Water for \$4,950,000, representing the balance of the purchase price owed, along with all of the other necessary documents required of plaintiffs to close. According to Blue Water, its counsel advised plaintiffs' counsel that Blue Water was not prepared to close on June 9, 2009, and requested a 24- to 48-hour adjournment. Plaintiffs' counsel refused.

By letters dated June 10, 2009 and June 22, 2009, plaintiffs held Blue Water in default of the contract and the time of the essence agreement, and demanded the return of their \$550,000.00 down payment, plus any accrued interest. Blue Water refuses to return the monies. At all times since June 10, 2009, plaintiffs have refused to attend any scheduled closings.

On July 9, 2009, plaintiffs filed this action seeking return of the down payment.

On July 13, 2009, Blue Water's current counsel sent a letter to plaintiffs' counsel, setting a "time of the essence" closing date of August 15, 2009. Plaintiffs' counsel sent a letter rejecting the time of essence closing designation. On August 15,

2009, plaintiff did not appear for closing. Blue Water declared plaintiffs in default.

On September 25, 2009, Blue Water served its answer with counterclaims for breach of contract and for a declaratory judgment regarding the same due to plaintiffs' failure to appear for the August 15, 2009 closing date.

Discussion

In order to grant summary judgment, the movant must proffer admissible evidence to make a prima facie showing of entitlement to judgment as a matter of law by producing sufficient evidence to show the absence of any material issue of fact (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Once the moving party has made this showing, the burden is on the opposing party to demonstrate "evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Zuckerman*, 49 NY2d at 562). "If there is any doubt as to the existence of a triable issue, the motion should be denied" (*Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

In order to establish a prima facie case on a breach of contract claim, plaintiff must show proof of a contract, performance by one party on the contract, a breach by the other

party and damages as a result (*Flomenbaum v New York Univ.*, 71 AD3d 80 [1st Dept 2009]). Where the plain language of the contract establishes obligations on the other party that have not been met, summary judgment is warranted (See *Bartfield v RMTS Assocs., LLC*, 283 AD2d 240 [1st Dept 2001]).

Here, there is no dispute that the parties had a contract. The contract provides the following with respect to the closing:

4. **Closing of Title:** The closing documents ... shall be delivered, and payment of the balance of the Purchase Price shall be made, at the closing of title ("**Closing**"), to be held at 10:00 AM on that day which is at least twenty five (25) calendar days after Seller [Blue Water] gives Purchaser [plaintiffs] written notice of Closing (which notice must be given not later than May 1, 2009 or Purchaser shall have the right to cancel this Contract provided that Purchaser gives Seller written notice of such cancellation not later than **May 15**, 2009) at the offices of Giddins Claman LLP"

(see contract, ¶ 4).

Further, pursuant to Paragraph 13 of the contract:

Defaults and Remedies: (a) If Purchaser defaults hereunder, Seller's sole remedy shall be to retain the Downpayment [sic] as liquidated damages.

...

(b) If Seller defaults hereunder, Purchaser shall have such remedies as Purchaser shall be entitled to at law or in equity, including but not limited to, specific performance."

In the absence of a contractual provision making time of the essence, one party may subsequently give notice to that effect

(*Stefanelli v Vitale*, 223 AD2d 361 [1st Dept 1996]). The notice must be clear, distinct and unequivocal and must fix a reasonable time within which to perform (*id.*).

"[O]nce time is of the essence, it is of the essence for both parties" (*Stefanelli*, 223 AD2d at 362) and "each party must tender performance on the law day unless the time for performance is extended by mutual agreement" (*Milad v Marcisak*, 307 AD2d 281, 281-282 [2d Dept 2003]).

Here, after plaintiffs notified defendants that they were ready, willing and able to close on the initial closing date, and Blue Water advised that it was refusing the time of the essence date, the parties entered into a mutual Time of the Essence Agreement on May 22, 2009, setting June 2, 2009 as the closing date, and June 9, 2009 as the time of the essence closing date.

Plaintiffs have established that they were ready, willing and able to close on the June 2, 2009 date, and plaintiffs' counsel had all the necessary papers, including a \$4,950,000.00 cashiers' check for the closing. Plaintiffs were also ready on the time of the essence date of June 9, 2009. Blue Water defaulted on its contractual obligations by failing to appear at the closing on the scheduled date of June 9, 2009, pursuant to the Time of the Essence Agreement and the contract of sale (see *Milad*, 307 AD2d 281).

The court has considered Blue Water's contentions and finds

them without merit. While Blue Water argues that August 15, 2009 was the "time of the essence" closing date, such date was unilaterally set by Blue Water, without plaintiffs' consent, and therefore plaintiff cannot be said to have defaulted in appearing on such date.

Thus, plaintiffs are entitled to the return of their down payment as outlined in the contract (see contract, ¶ 13 [b]). As such, the court orders Giddins & Claman to return the escrowed funds with interest to plaintiffs. Plaintiffs' claim for attorneys' fees is denied, as plaintiffs failed to refer to an agreement between the parties, statute or court rule, which would entitle them to the recovery of legal fees. (See *Hooper Assoc., Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 492 1989]).

Conclusion

Accordingly, it is

ORDERED that the motion by plaintiffs William Champion and Marianne Champion for summary judgment is granted; and it further

ADJUDGED and DECLARED that plaintiffs are entitled to the return of the down payment totaling \$550,000.00 with any interest thereon; and it is further

ORDERED that defendant Giddins and Claman, LLP a/k/a Giddins, Claman LLP a/k/a Giddins Claman LLP, a/k/a Giddins

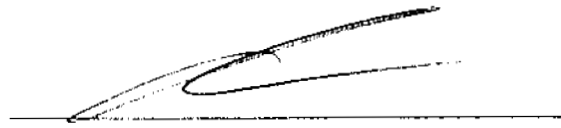
Claman & Langs LLP return the funds maintained in escrow with interest to plaintiffs; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiffs and against defendant Blue Water Advisors Inc. a/k/a Blue Water Advisors LLC in the amount of \$550,000.00, together with interest as prayed for at the statutory rate from June 9, 2009, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the cross motion by defendant Blue Water Advisors, Inc. is denied; and it is further

ORDERED that within 30 days of entry of this order, plaintiffs shall serve a copy upon defendants, with notice of entry.

Dated: April 9, 2010



Hon. Doris Ling-Cohan, J.S.C.

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This judgment may be enforced by writ of execution and notice of entry of judgment shall be given to the obligor, or to the obligor's agent, or to the person in possession of the judgment (see Rule 141B).