

**Appel v Rajput**

2010 NY Slip Op 30853(U)

April 7, 2010

Supreme Court, New York County

Docket Number: 117107/09

Judge: Joan M. Kenney

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

PRESENT: JOAN M. KENNEY  
J.S.C. Justice

PART 8

Index Number : 117107/2009  
APPEL, RONIT D.  
vs.  
RAJPUT, BHAGWAN  
SEQUENCE NUMBER : 001  
DISMISS

INDEX NO. 117107/09  
MOTION DATE 2/11/10  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

In this motion to ~~for~~ dismiss counterclaim

notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED  
1-5  
6-24  
25-35

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.**

**FILED**  
APR 12 2010  
NEW YORK COUNTY CLERK'S OFFICE

Dated: April 7, 2010

*Joan M. Kenney*  
**JOAN M. KENNEY** 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: IAS Part 8

-----X

Ronit D. Appel,

Plaintiff,

-against-

Bhagwan Rajput, et al.,

Defendants.

-----X

**KENNEY, JOAN M., J.**

**DECISION AND ORDER**  
Index Number.: 117107/09  
Motion Cal.: 2/11 /10  
Motion Seq. No. 001

**FILED**  
APR 12 2010  
COUNTY CLERK'S OFFICE  
NEW YORK

Recitation, as required by CPLR 2219(a), of the papers considered in view of this motion to dismiss defendant's counterclaim.

**Papers**

Notice of Motion, Affirmation, Exhibits and Memorandum of Law  
Opposition to Notice of Motion and Memorandum of Law  
Reply Affirmation and Memorandum of Law

**Numbered**  
1-5  
6-24  
..25-35

Upon the foregoing cited papers, the Decision and Order of this Motion is as follows:

Plaintiff seeks an Order, pursuant to CPLR 3211(a)(1) and (a)(7), dismissing defendant, Bhgwan Rajput's counterclaim for breach of contract.

**FACTUAL & PROCEDURAL BACKGROUND**

On November 25, 2009 plaintiff, Ronit D. Appel (the purchaser) and defendant, Bhagwan Rajput (the seller) executed a contract of sale for the purchase of a co-operative apartment (the contract) known as 230 West End Avenue, Unit 3E, New York, New York (the premises). Pursuant to the terms of the contract, the seller deposited \$51,750.00 towards the purchase price (the contract deposit). The purchase price for the premises was \$517,500.00.

After executing the contract, the purchaser received the co-operative board application (the board application). Upon review of the board application, the purchaser realized that she could not meet board's financial requirements. The purchaser immediately contacted the seller and the seller's attorneys, informing them of her inability to meet the financial requirements of the board. Despite numerous requests, the contract deposit was never returned to the purchaser. Thereafter, the purchaser commenced this action seeking a declaration that the contract was cancelled and an Order directing the return of her contract deposit, amongst other reliefs sought.

The seller generally denied the allegations in the complaint, asserted several affirmative

defenses and a counterclaim alleging that the seller was entitled to keep the contract deposit because the purchaser breached the contract. It is the seller's contention that in the event the purchaser breached the terms of the contract, the seller was entitled to retain the contract deposit as liquidated damages, pursuant to paragraph 13 of the contract. Paragraph 13 of the contract, states in pertinent part:

**"13. Defaults, Remedies and Indemnities**

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 ... ." (The liquidated damages clause).

The purchaser now seeks an Order, pursuant to CPLR 3211(a)(7) and 3211(a)(1), dismissing the seller's counterclaim.

### **ARGUMENTS**

The purchaser argues that the counterclaim must be dismissed because it fails to state a cause of action and/or the purchaser has a defense to the counterclaim founded upon documentary evidence; namely, a series of e-mails establishing that the contract was cancelled.

The seller contends that a counterclaim for breach of contract has properly been asserted.

### **DISCUSSION**

The purchaser's argument that the seller's counterclaim must be dismissed for failure to state a cause of action, pursuant to CPLR 3211(a)(7), is denied. The counterclaim states, in some recognizable form, a cause of action for breach of contract (see, *World Wide Adjustment Bureau et al., v Edward S. Gordon Company, Inc., et al.*, 111 AD2d 98 [1st Dept, 1985]). (*Joel v. Weber*, 166 Ad2d 130, [1st Dept, 1991]). Specifically, the counterclaim alleges that the purchaser failed to provide written proof, as demanded by the seller's attorneys, that the purchaser did not meet the financial requirements of the co-operative board and applied for a loan. It is the seller's contention that the contract remained in full force and effect, unless cancelled by both parties. Seller adds that

a mutual cancellation of the contract never took place and therefore the purchaser unilaterally cancelled the contract. In assessing the sufficiency of the complaint, this court must also consider the allegations made in both the complaint and the accompanying affidavit, submitted in opposition to the motion, as true and resolve all inferences which reasonably flow therefrom, in favor of the plaintiff (*Joel v. Weber*, 166 Ad2d 130, [1st Dept, 1991]).

The purchaser's argument that the counterclaim must be dismissed, pursuant to CPLR 3211(a)(1), because she has a defense founded upon documentary evidence, is granted.

Paragraph 27 of the contract states, in pertinent part:

"27.1 The Contract Deposit .... If the Closing does not occur and either parties gives Notice to the Escrowee demanding payment of the Contract Deposit, Escrowee shall give prompt Notice to the other Party of such demand. If Escrowee does not receive a Notice of objection to the proposed payment from such other Party within 10 business days after the giving of Escrowee's Notice, Escrowee is hereby authorized and directed to make such payment to the demanding party. ... if for any reason Escrowee in good faith elects not to make such payment, Escrowee may continue to hold the Contract Deposit until otherwise directed by a joint Notice by the Parties or a final, non-applicable judgment, order or decree of a court of competent jurisdiction. ...."

There can be no dispute that the purchaser requested the return of the contract deposit from defendant, Weidenbaum & Harari, LLP, the seller's attorneys and the appointed holder of the contract deposit (the Escrowee). In fact, the seller concedes that the parties exchanged various e-mails regarding this very request for the return of the contract deposit (see Exhibits "F-K" and Exhibit "L-O" of the papers in opposition).

It is the purchaser's contention that the seller never issued a "Notice of Objection" pursuant to paragraph 27 of the contract and therefore the Escrowee was obligated to return the contract deposit. The Escrowee and the seller never came forward with any affirmative statement, or documentary evidence, to demonstrate that the seller had indeed rendered such a "Notice of Objection" to the Escrowee pursuant to paragraph 27 of the contract. Nevertheless, it appears by

the language of the contract itself, that the Escrowee could still retain the contract deposit for any reason, so long as there was a good faith basis for doing so, irregardless of the receipt of a "Notice of Objection." This Court finds, however, that no basis existed for retaining the contract deposit where the client/seller, by his own admission, was prepared to cancel the contract.

Through a series of e-mails between the parties, dated December 2, 2009, the seller provided the purchaser with two options that could assist in addressing any financial requirements set forth in the board application. The seller suggested that the purchaser could: (1) obtain a monetary "gift" from her parents to bring down the loan amount; or (2) deposit with the co-operative management 1-2 years worth of maintenance (collectively, the financial options). The seller went on to advise that the purchaser should "think about" these financial options "[o]therwise we will cancel the contract and return your deposit" (see, e-mail document annexed to the seller's own papers in opposition, as Exhibit "M").

In a follow-up e-mail, the purchaser made it clear that the financial options were not feasible for her and she again requested the return of her deposit (see, Exhibit "H" to reply papers). Several days later, the seller's attorneys wrote a letter to the purchaser indicating that the request for the contract deposit was denied, but if the purchaser provided "proof" that she could not meet the board's financial requirements, and that she applied for a loan, then upon review of the sufficiency of said "proof" the Escrowee would discuss cancellation with the seller and the "possibility" of returning the purchaser's contract deposit (the denial letter; see also, Exhibit "N" to papers in opposition).

The series of e-mails between the parties in this case is evidence a definitive intent by the seller to cancel the contract in the event the purchaser opted not to exercise the two financial options posed by the seller (see also, *Langer v Dadabhoy*, 44 AD3d 425 [2007]; and *Oui Cater, Inc v Lantern Group, Inc.*, 2010 NY Slip Op 02418 [App Div, 1<sup>st</sup> Dept, 2010]). There can be no other interpretation of the seller's statement that the contract would be cancelled and the contract deposit

returned as noted in the seller's e-mail to the purchaser, (Exhibit "M" to the papers in opposition).<sup>1</sup> The financial options were merely suggestions for the purchaser's consideration in the event she wanted to still go forward with the purchase of the premises. The financial options were not posed as a condition precedent to the seller's consideration to cancel the contract and return the contract deposit. Additionally, there simply was no contractual provision cited in the denial letter authorizing the Escrowee to demand "proof" that the purchaser could not meet the board's financial requirements - especially when such "proof" and its sufficiency, or lack thereof, was solely within the discretion of the co-operative board (see, paragraph 6 of the contract). In fact, the denial letter appears misplaced and contradicts the Escrowee's prior representation to the purchaser that the seller himself would contact the purchaser directly regarding his decision to return the contract deposit or not (see, e-mail dated December 2, 2009 annexed as Exhibit "F" to the reply papers). As represented by the Escrowee/seller's attorneys, the seller eventually did contact the purchaser proposing the financial options, but ultimately agreeing to "cancel the contract and return [the] deposit" (see again, Exhibit "M" to papers in opposition). The seller's argument that the contract was not cancelled because the purchaser wrote a follow-up e-mail requesting the return the contract deposit *again*, is completely without merit.

Lastly, it should be noted that in order for seller to have kept the contract deposit as liquidated damages, the seller would have to first cancel the contract (see, the liquidated damages clause; paragraph 13 of the contract). As such, the seller cannot argue that the contract was unilaterally cancelled by the purchaser. Notably, the seller's attorneys' request for "proof" of finances was not a contract term and therefore, the purchasers failure to provide said proof could not have been a breach of the contract. The counterclaim, as stated in the responsive pleadings, makes no reference to any provision(s) of the contract that the purchaser allegedly breached.

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<sup>1</sup>The parties did not dispute the authenticity of the e-mails.

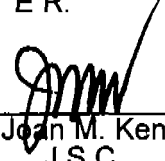
Accordingly, it is

ORDERED, that plaintiff's motion is granted; and it is further

ORDERED, that the Clerk of the Court shall enter judgment in favor of plaintiff and against defendant, Bhagwan Rajput, dismissing defendant Bhagwan Rajput's counterclaim against plaintiff for breach of contract.

DATED:

ENTER:

  
\_\_\_\_\_  
Hon. Joan M. Kenney  
J.S.C.

**FILED**  
APR 12 2010  
NEW YORK  
COUNTY CLERK'S OFFICE