

Rivera v Becker

2011 NY Slip Op 30204(U)

January 20, 2011

Sup Ct, New York County

Docket Number: 111181/2009

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

WILLIAM RIVERA III,

Plaintiff,

- v -

ESTATE of MARY BECKER, GARY BECKER, ESQ.
and CARL BECKER, ESQ., in their capacity as
administrators of the Estate of Mary
Becker, GARY BECKER, Esq. and CARL BECKER,
ESQ., Individually and GIDDENS & CLAMAN,
LPP, as escrowee,

Defendants.

Index No.: 111181/2009

Motion Date: 03/09/10

Motion Seq. No.: 01

Motion Cal. No.: _____

FILED

JAN 28 2011

NEW YORK
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The following papers, numbered 1 to 5 were read on this motion to dismiss based on documentary evidence.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

PAPERS NUMBERED
1
2, 3
4 - 8

Cross-Motion: Yes No

Upon the foregoing papers,

The court shall grant plaintiff's motion for summary judgment and return of the escrow deposit in this action based upon a contract of sale for a cooperative apartment because the evidence submitted on the motion clearly establishes plaintiff's right to such relief.

As is relevant here, the Paragraph 19 of the contract of

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING

sale contained a financing contingency that provided that "Purchaser may cancel this Contract and recover the Contract Deposit . . . if . . . Purchaser fails through no fault of the purchaser to obtain from an 'Institutional Lender' . . . a 'Loan Commitment Letter' . . . for financing." Paragraph 19.5.2 stated that "a 'Loan Commitment Letter' is a written offer to make the Loan with or without recourse, and whether or not conditional upon any factor other than an appraisal satisfactory to the Institutional Lender. An offer to make the Loan which is conditional on obtaining a satisfactory appraisal shall only become a Loan Commitment Letter upon such condition being met."

It is undisputed that the plaintiff received a "Commitment Letter" from Wells Fargo Bank, N.A., dated April 15, 2009, and that among the numerous conditions set forth therein was to "provide an original appraisal supporting a value of \$266,000.00. Minimum Appraisal Type: Fannie Mae." By letter dated April 30, 2009, plaintiff's transactional counsel notified defendant Scott Claman of the Wells Fargo commitment letter stating "note that this commitment letter is not binding as it is subject to a satisfactory appraisal" and sought an extension of the contingency period to May 11, 2009. Scott Claman countersigned the letter thus agreeing to the extension. By notice dated May 6, 2009, Wells Fargo disapproved plaintiff's application for the sole reason that "Value or type of collateral insufficient."

Contrary to defendants' assertions the plaintiff has established prima facie compliance with the contractual conditions precedent for return of the deposit. The Wells Fargo "Commitment Letter" contained an appraisal contingency and therefore by the express terms of the contract of sale does not constitute a "Loan Commitment Letter" under the agreement. The financing contingency only required the plaintiff to apply to an institutional lender for a mortgage and in this case Wells Fargo not only accepted the application but gave preliminary approval to plaintiff. The bank's sole reason for denying the application, that the value of the collateral was insufficient, fails to raise any issue as to plaintiff's good faith in complying with the financing contingency. See Buonocore v Dubois 16 AD3d 359 (1st Dept 2005) citing Lunning v 10 Bleecker St. Owners Corp., 160 AD2d 178 (1st Dept 1990) ("When a condition of a mortgage loan commitment is not fulfilled through no fault of the purchasers, their performance is excused, as long as they acted in good faith"); Markovitz v Kachian, 28 AD3d 358, 2006 (1st Dept 2006). The contract of sale by its terms further provides that it is the lender that solely determines whether an appraisal is "satisfactory" for purposes of determining whether a "Loan Commitment Letter" has been issued as defined in the agreement.

As plaintiff has established its entitlement to judgment through the documents submitted with its motion and the defendants' have failed to raise any triable issue of fact in their opposition or their cross-motion, the court shall direct the return of the escrow deposit.

The court shall grant defendants' cross-motion for summary judgment only the extent of dismissing the plaintiff's third cause of action for "Attorney Misconduct" and plaintiff's fourth cause of action for attorney's fees as no contractual or legal support is provided for either claim.

Accordingly, it is hereby

ORDERED that the plaintiff's motion for summary judgment is GRANTED as to plaintiff's first cause of action against defendants and it is hereby DECLARED that plaintiff is entitled to return of the escrow deposit; and it is further

ORDERED that defendant GIDDENS CLAMAN, LLP, as escrow agent are directed to return to plaintiff the amount held in escrow of \$26,600.00 upon service of this order with notice of entry upon the escrow agent; and it is further

ORDERED that defendants' cross-motion is GRANTED only to the extent that summary judgment dismissing plaintiff's third and fourth causes of action is GRANTED and the those causes of action are hereby dismissed, and the balance of defendants' cross-motion is otherwise denied.

This is the decision and order of the court.

Dated: January 20, 2011

ENTER:

Debra A. James
DEBRA A. JAMES J.S.C.

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