

Tinna v 3212 Broadway, LLC

2011 NY Slip Op 30222(U)

January 13, 2011

Sup Ct, Nassau County

Docket Number: 0623/08

Judge: Stephen A. Bucaria

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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

DR. AVTAR SINGH TINNA and SHAN MAAN
EQUITIES, LLC,

Plaintiffs,

-against-

3212 BROADWAY, LLC and MALEWSKI,
MALEWSKI & BOCCIO, LLP,

Defendants.

TRIAL/IAS, PART 2
NASSAU COUNTY

INDEX No. 0623/08

MOTION DATE: Dec. 3, 2010
Motion Sequence # 003, 004

The following papers read on this motion:

- Notice of Motion..... XX
- Affirmation in Opposition..... XX
- Affirmation in further Support..... X
- Reply Affirmation..... X

Motion by defendant 3212 Broadway, LLC (“Broadway”) for summary judgment on its counterclaim against plaintiff for breach of contract and summary judgment dismissing plaintiff’s complaint is **denied**.

Motion by plaintiffs for summary judgment in their favor and against defendant Broadway, including an order directing the Queens County Clerk to turn over to them the monies deposited there by defendant Malewski, Malewski, & Boccio LLP (“Malewski”) is also **denied**.

Background

The background of this action is set forth in this Court's Order dated August 5, 2008, (Exhibit F to Broadway's moving papers), which is incorporated herein. Plaintiffs/purchasers seek the return of their down payment in the amount of \$200,000 after they cancelled the contract dated May 18, 2007 (Exhibit E to Broadway's moving papers), to purchase Broadway's property for \$3,650,000. The cancellation was by letter dated July 9, 2007 from plaintiffs' former attorney, Robert Chicco, to Broadway's former attorney, Malewski (Exhibit K to Broadway's moving papers). Broadway/seller continued to seek a closing, ultimately making time of the essence. Plaintiffs refused to attend the closing. Broadway now seeks summary judgment awarding it the down payment due to plaintiffs' alleged breach of the contract. Plaintiffs cross move for summary judgment, including an order directing the Clerk of Queens County to turn over the \$200,000 down payment, which was deposited by Malewski.

Procedural Status

In 2008, the Court denied plaintiffs' motion for summary judgment as premature, and granted Broadway's request for an order disqualifying Forchelli, Curto, Schwartz, Mineo, Carlino & Cohn, LLP from representing plaintiffs in this action. Now, following discovery, both sides move for summary judgment.

Summary Judgment Principles

Summary judgment is the procedural equivalent of a trial (*S.J. Capelin Assoc., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]). The function of the court in deciding a motion for summary judgment is to determine if triable issues of fact exist (*Matter of Suffolk Cty Dept. of Social Services on behalf of Michael V. v James M.*, 83 NY2d 178, 182 [1994]). The proponent must make a *prima facie* showing of entitlement to judgment as a matter of law (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 82 [2003]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once a *prima facie* case has been made, the party opposing the motion must come forward with proof in evidentiary form establishing the existence of triable issues of fact or an acceptable excuse for its failure to do so (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Summary judgment shall not be defeated by mere conclusions or unsubstantiated allegations (*Id.*).

Contract Interpretation and Good Faith

“A written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms” (*IDT Corp. v Tyco Group*, 13 NY3d 209, 214 [2009], quoting *MHR Captial Partners LP v Presstek, Inc.*, 12 NY3d 640, 645 [2009] quoting *Greenfield v Philles Records Inc.*, 98 NY2d 562, 569 [2002]). This rule is particularly important in the context of real property transactions, where commercial certainty is a paramount concern and where contracts are negotiated at arm’s length by counseled business people (*Vermont Teddy Bear Co., Inc. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]; *Hall v Paez*, 77 AD3d 620 [2nd Dept. 2010]). Courts may not by construction add or excise contract terms, nor distort the meaning of the terms used (*Vermont Teddy Bear Co., Inc.*; *Willsey v Gjuraj*, 65 AD3d 1228 [2nd Dept. 2009]).

Implicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance (*Dalton v Educational Testing Service*, 87 NY2d 384, 389 [1995]; *Van Valkenburgh, Nooger & Neville, Inc. v Hayden Publishing Co.*, 30 NY2d 34, 45 [1972]). This embraces a pledge that “neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract” (*Dalton* quoting *Kirke La Shelle Co. v Paul Armstrong Co.*, 263 NY 79, 87 [1933]).

Discussion

In this case, the contract provides that the down payment may be retained by the seller as liquidated damages in the event of plaintiffs’ default (see Contract at par. 48). The contract further provides as follows:

The contract is subject to Purchaser obtaining from an institutional lender within twenty-eight (28) days of the date of delivery of a fully executed copy of this contract an unconditional commitment for a mortgage loan in the amount of \$2,200,000.00. In the event Purchaser is unable to obtain such commitment, either party may on five (5) days written notice cancel this contract, in which event the down payment shall be refunded to the Purchaser, and neither party shall thereafter have any claim or liability as to the other.

Second Rider to Contract of Sale at Paragraph 4. The initial question presented is whether plaintiffs' cancellation of the contract by means of its letter dated July 9, 2007, was timely.

Broadway argues that the "five days written notice" requirement must be read in conjunction with the twenty-eight day unconditional commitment requirement. Under this construction, plaintiffs' time to cancel the contract based on paragraph 4 of the Second Rider would have expired on June 20, 2007, weeks before the notice of cancellation.

Plaintiffs argue that the "five days written notice" requirement does not set any limitation as to when notice of cancellation of the contract has to be given, citing 1550 Fifth Avenue Bay Shore, LLC v 1550 Fifth Avenue LLC (297 AD2d 781 [2nd Dept. 2002], lv app den 99 NY2d 505 [2003]), wherein a seller's cancellation "on five days written notice" well-exceeded the 45-day period for the purchaser to obtain an unconditional commitment. The Court upheld the seller's cancellation and dismissed the complaint against it.

This Court has already found that paragraph four of the Second Rider is clear and unambiguous (see Order dated August 5, 2008, at p.8). Moreover, the plain meaning of the words "on five days written notice," without any qualifying language, means that the opportunity for cancellation by either side in the event of plaintiffs' inability to obtain an unconditional commitment was open-ended. This Court can reach no other conclusion based upon the precise words used and 1550 Fifth Avenue Bay Shore, LLC. (cf. Chavez v Eli Homes, Inc., 7 AD3d 657 [2nd Dept. 2004](seller failed to cancel contract by giving notice "within five business days after Commitment Date."))

To the extent that Broadway relies upon Perrino v Hogan, (175 AD2d 478 [3rd Dept. 1991]), its reliance is misplaced as the contract therein expressly provided for waiver of the mortgage contingency clause by the purchasers, unless prior to a certain date they notified the sellers of their inability to obtain mortgage approval. The date certain in Perrino for the written notice is exactly what the mortgage contingency clause in this case lacks.

Based on the foregoing, this Court concludes that plaintiffs' cancellation on July 9, 2007 was timely. However, this conclusion does not resolve the parties' claims.

From the beginning, Broadway has challenged plaintiffs' good faith in meeting the conditions specified in paragraph four of the Second Rider (Answer and Counterclaim, paragraphs 20-26). In the prior order, this Court found a question of fact regarding whether plaintiffs' mortgage application to NYCB was in good faith (Order dated August 5, 2008,

at p.8). On this record, questions remain regarding NYCB's tenancy requirement. The commitment "changes/corrections" requested by plaintiffs' former attorneys regarding the tenancy requirement, and the handwritten notes thereon, have not been adequately explained (See Letter dated June 22, 2007 to NYCB Vice President Adams, Exhibit J to Broadway's moving papers.)


On the other hand, it is unclear how any bank could make the loan, as the existing Certificate of Occupancy (Exhibit H to plaintiffs' moving papers) provided for only a two-family dwelling and a store, rather than the nine tenants described in paragraph 2 of the Second Rider. Broadway addresses this question by stating that it offered plaintiffs "the necessary financing" and would "not raise the lack of leases as an issue," but that plaintiffs declined (Avdoulos affidavit in opposition, par. 6). Plaintiffs deny that such an offer was made. On this record, neither side has made out a *prima facie* case for summary judgment.

Levine v Trattner (130 AD2d 462 [2nd Dept. 1987]) is inapposite as the evidence there of lack of good faith was so blatant that summary judgment was warranted. There the purchaser conceded that he did not apply for a mortgage commitment for two and one-half months after the execution of the contract.

The parties' remaining contentions do not warrant discussion.

For the reasons set forth above, both motions for summary judgment must be **denied**.

Dated JAN 13 2011



J.S.C.

ENTERED

JAN 19 2011

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**