

Embrack v Beach 85th Corp.

2011 NY Slip Op 31167(U)

April 15, 2011

Supreme Court, Queens County

Docket Number: 2731/2004

Judge: Robert J. McDonald

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

- - - - - x

KENNETH A. EMBRACK, Index No.: 2731/2004
Plaintiff, Motion Date: 02/17/11
- against - Motion No.: 12
BEACH 85TH CORP. and CAMBRIDGE Motion Seq.: 1
HOME CAPITAL, LLC,

Defendants.

- - - - - x

The following papers numbered 1 to 7 were read on this motion by the defendant CAMBRIDGE HOME CAPITAL, LLC, for an order pursuant to CPLR 3212 granting summary judgment dismissing the plaintiff's complaint which alleges breach of contract and which seeks the return of escrow in the amount of \$10,000:

	<u>Papers</u> <u>Numbered</u>
Order to Show Cause-Affidavits-Exhibits.....	1 - 3
Affirmation in Opposition-Affidavits-Exhibits.....	4 - 5
Reply affirmation.....	6 - 7

This is an action commenced by the filing of a summons and complaint on February 5, 2004, in which the plaintiff alleges that the defendant breached an escrow agreement and seeks specific performance, an accounting and return of the monies held in escrow.

This action arises out of the purchase by the plaintiff of newly constructed residential property located at 344 Beach 86th Street, Far Rockaway, New York. The residence was purchased by the plaintiff from the developer, Beach 85th Corp. The closing took place on June 27, 2002. The contract of sale required Beach 85th Corp. to transfer the premises free from all violations of law or municipal ordinances such that the City of New York would issue a Certificate of Occupancy ("C/O"). However, at the time of the closing as further work was required on the residence, there was no final C/O issued for the premises by the City of New York. According to the complaint, "in order to induce plaintiff and plaintiff's mortgage company, defendant Cambridge Home Capital, LLC to close title on the premises without the Certificate of Occupancy having been issued, Beach 85th Corp. entered into an agreement intended to survive the closing of title whereby Beach 85th Corp. agreed to perform any and all additional work necessary to obtain the certificate of occupancy for the premises and to pay all costs associated with doing so. The work was to be completed within 60 days. In addition, at the time of the closing, an escrow agreement was entered into with Cambridge Home Capital, LLC ("Cambridge") whereby Cambridge would hold \$10,000 of the purchase price in escrow to insure that a proper C/O was issued in a timely fashion. The escrow agreement further provided that in the event that defendant Beach 85th Corp. did not obtain

the C/O in a timely fashion, defendant Cambridge had the right to utilize the \$10,000 escrow proceeds to obtain the C/O.

Plaintiff claims that to date neither Beach 85th Corp. nor Cambridge has obtained the C/O for the premises and Cambridge continues to hold the escrow in the amount of \$10,000. Consequently, plaintiff seeks an order requiring the defendants to perform under the agreement and take all steps necessary to obtain the C/O. Plaintiff also seeks damages of \$20,000 for breach of contract and seeks an order directing Cambridge to account for and release the \$10,000 being held in escrow to the plaintiff so that plaintiff may take the necessary steps to obtain the C/O himself.

Issue was joined by the service of an answer with cross-claim by Cambridge dated May 17, 2004. Cambridge now moves by notice of motion for an order granting summary judgment dismissing the action against it. The movant attaches a copy of the "Escrow Agreement" dated June 27, 2002 which states as follows:

"The 'Lender,' Cambridge Home Capital LLC, hereby agrees to close title on the above referenced transaction so long as the sum of \$10,000 is deposited in escrow by the "Seller," to insure that a proper certificate of occupancy for a two family dwelling is procured in a timely fashion.

The "Seller," shall have sixty(60) days in which to obtain the necessary documentation. If the appropriate paperwork is not acquired within the time frame listed above, then the "seller" shall forfeit said escrow monies and the lender shall have the right to utilize the escrow proceeds in order to legalize the subject premises. However, the Seller "may apply for a one time thirty (30) day extension which the "lender" may grant for an additional fee."

This agreement is signed by the plaintiff, Beach 85th Corp. and Cambridge.

In his affirmation in support of the motion, Craig Hyman, managing member of Cambridge states that the agreement executed at closing was entered into for purposes of protecting Cambridge as the lender, as it provided the financing on a home that did not have a C/O. Thus, Cambridge contends the agreement was to induce the seller, Beach 85th Corp. to obtain the C/O. Hyman states that if Beach 85th had obtained the C/O then the \$10,000 would have been turned over to Beach 85th Corp. as the \$10,000 was part of the purchase price. Hyman contends that in no event does the agreement contemplate that the money was to be turned over to the plaintiff. Hyman claims that the \$10,000 constitutes liquidated damages as the funds were designed to protect Cambridge in the event that Beach 85th Corp. did not obtain the C/O. Counsel contends that as Beach 85th Corp. never obtained the C/O, the monies deposited were forfeited. Thus, Cambridge contends that there are no triable issue of fact as the agreement does not provide for the turnover of the \$10,000 to the plaintiff and the plaintiff's remedy is to seek redress from Beach 85th Corp., the entity with whom it contracted.

In opposition, the plaintiff submits a "Survival Agreement" dated June 27, 2002, executed by Beach 85th Corp. and the plaintiff whereby the seller represented that a C/O would be issued within 60 days and that the seller would perform any and

all additional work required in order to obtain the C/O. The seller was to pay all costs associated with procuring the C/O. The agreement also states that if the seller does not obtain the C/O then the Bank shall obtain said Certificate of Occupancy. Cambridge, however, was not a signatory to this agreement. Plaintiff contends that because neither Cambridge nor Beach 85th obtained the C/O, the plaintiff was required to hire his own architect to finalize the requirements for obtaining the C/O and to hire a plumber to perform additional necessary work. Plaintiff contends that he was required to expend an additional \$23,350 for work necessary to satisfy the code requirements. Plaintiff contends that he should be partially compensated for the costs of obtaining the C/O by receiving the \$10,000 that was held in escrow for purposes of ensuring that the certificate was obtained.

Plaintiff's counsel contends that under the "Survival Agreement" if Beach 85th did not complete the work necessary for the C/O, then Cambridge was to obtain the C/O. Counsel contends that there is no question that Beach 85th Corp. is not entitled to the escrow proceeds and that there is a question of fact as to whether Cambridge breached the Escrow Agreement as well as the Survival Agreement by not acquiring the C/O and by holding the money that was to be used for that purpose. Plaintiff claims that as he expended monies to procure the C/O, there is a question of fact as to whether he is entitled to be reimbursed from the

escrow funds which were to be utilized to pay for costs associated with obtaining the C/O.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form in support of its position (see Zuckerman v. City of New York, 49 NY2d 557[1980]).

When the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving practical interpretation to the language employed and the parties' reasonable expectations (see W.W.W. Assocs. v Giancontieri, 77 NY2d 157 [1990]; Matter of Carracino, 78 AD3d 1049 [2d Dept. 2010]; Slamow v Del Col, 174 AD2d 725 [2d Dept. 1991], affd 79 NY2d 1016).

Here, Cambridge demonstrated its prima facie entitlement to judgment as a matter of law by submitting the escrow agreement. Under the terms of the escrow agreement it is clear that Cambridge accepted the sum of \$10,000 to be held in escrow to induce it to close on property that did not have a certificate of occupancy and to protect itself from the risk of carrying a mortgage on property that didn't have a C/O (see Plaza Homes, LLC v Cambridge Home Capital, (CV 15699/07, Queens Co. Civil Court, unpublished). Under its terms, if Beach 85th had obtained the C/O

then the escrow would be returned to them as the \$10,000 came from the seller's share of the proceeds. However, the terms of the escrow agreement also provide that if Beach 85th did not obtain the C/O within the applicable time, then "the "seller" (Beach 85th) shall forfeit said escrow monies and the lender (Cambridge) shall have the right to utilize the escrow proceeds in order to legalize the subject premises." Thus, it is clear that the intent of the parties was that upon Beach 85th's failure to obtain the C/O, the escrow was forfeited to Cambridge who had the right to use it to obtain a C/O. As stated by the Court in Tummings v McClaire, (Queens Co. Sup. Ct. Index No. 2861/04, unpublished), in which the same escrow agreement was utilized, "the agreement merely obligated Cambridge to close on the transaction by providing the funds for the purchase to the buyer and gave Cambridge the right, but not the obligation to legalize the premises." Thus, the agreement does not create a duty to the plaintiff on the part of Cambridge to make the required repairs or to return the escrow to the plaintiff. Nowhere in the document is Cambridge required to return the escrow funds to the plaintiff upon a failure of Cambridge to obtain the C/O.

Therefore, this court finds that Cambridge has made a prima facie case demonstrating that they did not breach the terms of the agreement and that they are entitled to retain the escrow funds.

In opposition, the plaintiff has failed to raise a triable issue of fact. Under the contract of sale and under the terms of the survival agreement, Beach 85th was required to make the repairs necessary to obtain the C/O. The plaintiff has not shown any language in the escrow agreement which required Cambridge to obtain a C/O or which requires Cambridge to pay the escrow proceeds to the plaintiff in the event a C/O was not obtained. Further, Cambridge was not a signatory to the Survival Agreement and is therefore not bound by its terms.

Accordingly, based upon the foregoing, it is hereby

ORDERED, that the defendant's motion for summary judgment is granted and the plaintiff's complaint is dismissed as to defendant Cambridge Capital, LLC only.

Dated: April 15, 2011
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.