

**Platil v Corbett**

2011 NY Slip Op 31533(U)

May 31, 2011

Sup Ct, Suffolk County

Docket Number: 09-15084

Judge: John J.J. Jones Jr

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 10 - SUFFOLK COUNTY

**COPY**

**PRESENT:**

Hon. JOHN J.J. JONES, JR.  
Justice of the Supreme Court

MOTION DATE 2/8/11  
ADJ. DATE 3/9/11  
Mot. Seq. #003 - MotD  
Mot. Seq. #004 - XMotD

-----X

LAUREN PLATIL, f/k/a LAUREN PINSENT, :  
as assignee of JAN PLATIL, :  
 :  
Plaintiff, :  
 :  
-against- :  
 :  
MICHAEAL J. CORBETT, LARA GOLLINS, and :  
DAVIS & HIRSCH, LLP, :  
 :  
Defendants. :  
-----X

CARTIER, BERNSTEIN, AUERBACH &  
DAZZO  
Attorney for Plaintiff & Third-Party Defendant  
100 Austin Street, Building 2  
Patchogue, New York 11772

DAVIS & HERSH, LLP  
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Plaintiffs  
1345 Motor Parkway  
Islandia, New York 11749

MICHAEL J. CORBETT and LARA GOLLINS, :  
 :  
Third-Party Plaintiffs, :  
 :  
-against- :  
 :  
JAN PLATIL, :  
 :  
Third-Party Defendant. :  
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Upon the following papers numbered 1 to 31 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-14; Notice of Cross Motion and supporting papers 15-31; Answering Affidavits and supporting papers \_\_\_\_\_; Replying Affidavits and supporting papers \_\_\_\_\_; Other \_\_\_\_\_; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

**ORDERED** that the motion by the plaintiff for an order pursuant to CPLR 3212 granting summary judgment in her favor and against the defendants in the amount of \$15,000.00, together with interest from January 9, 2009, is granted to the extent of granting partial summary judgment in her favor on her second cause of action against defendants Michael J. Corbett and Lara Gollins in the principal amount of \$11,535.00, together with interest from January 9, 2009, and is otherwise denied; and it is further

**ORDERED** that the cross motion by the defendants for an order (i) pursuant to CPLR 3211 and

3212 granting summary judgment dismissing the plaintiff's complaint, and (ii) pursuant to CPLR 3025 (b) allowing the defendants to amend their pleadings to include a cause of action for fraud against the plaintiff and the third-party defendant, is granted to the extent of granting the defendants leave to amend their answer in the form annexed to the moving papers, and is otherwise denied; and it is further

**ORDERED** that the amended answer shall be deemed served upon service of a copy of this order with notice of its entry upon Lauren Platil and Jan Platil, who shall serve their reply within 30 days after the date of such service.

On or about July 25, 2008, Jan Platil, as purchaser, and Michael J. Corbett and Lara Gollins, as seller, entered into a contract of sale with respect to the property located at 2627 Ocean Avenue, Seaford, New York, for a purchase price of \$525,000.00. Upon execution of the contract, the purchaser delivered a deposit in the amount of \$15,000.00, to be held in escrow by the seller's attorney, Davis & Hersh, LLP. It appears that the parties concurrently executed an amendment to the contract whereby Jan Platil assigned all of his right, title, and interest in the contract to Lauren Platil, his wife, and Lauren Platil accepted the assignment and agreed to assume the purchaser's obligations thereunder.

Paragraph 3 of the rider to the parties' contract is a mortgage contingency provision which states, in part, that

This contract is subject to the Purchaser obtaining a commitment for a conventional mortgage loan in the amount of \$465,000.00 for a term of 30 years with interest at the prevailing rate at the time of closing.

The Purchaser shall make a diligent, truthful and proper application to the lending institution for said mortgage and, without delay, furnish such verifications of bank accounts or employment or any other instruments or information as may be required by said lending institution in the processing of the Purchaser's application. Failure to do so will be a breach of this contract.

\* \* \*

The Purchaser shall have 45 days from the date Purchaser receives a fully executed contract to obtain a firm commitment regarding said mortgage. Purchaser shall accept such commitment when issued and shall comply with all requirements of such commitment. Purchaser shall furnish Seller's attorney with a copy of such commitment promptly after receipt thereof. If the Purchaser fails to obtain such commitment on or before the 45 day period set forth above, the Seller shall have the option to cancel this contract or agree to extend the time for an additional period. In the event that (a) the Seller elects to extend said time period and the Purchaser does not obtain a firm mortgage commitment within the extended time period or (b) the Seller elects not to extend the time period, the Seller shall return the deposit paid hereunder and upon the return of the deposit by the Seller to the Purchaser, this contract shall cease and terminate without further liability on the part of either party to the other.

Paragraph 6 of the contract states that in the event closing does not occur and either party objects in writing to the proposed payment of the escrow funds, the seller's attorney shall continue to hold the funds unless otherwise directed by the parties or by the non-appealable order or judgment of a court. Paragraph 20 of the rider to the contract provides that the seller's attorney is authorized to release the down payment from escrow, as liquidated damages, in the event that the purchaser willfully defaults under the terms of the contract. Paragraph 24 of the rider to the contract provides that any inconsistencies between the rider and the printed provisions of the contract shall be resolved in favor of the rider.

Following the signing of the contract, Jan Platil, who is a citizen of the Czech Republic, applied to RBC Bank for a mortgage loan. By letter dated October 7, 2008, he was advised that RBC was unable to approve his application due to "ineligible residency status." A second application was promptly made to Emigrant Mortgage Company by Lauren Platil. On October 16, the parties executed a letter agreement pursuant to which the purchaser agreed to pay to the seller the sum of \$6,000.00, over and above the purchase price, plus \$77.00 per day from October 16 through the date of closing, in exchange for the seller's agreement to extend the purchaser's time to close the transaction through the end of November. Receipt of the \$6,000.00 payment was acknowledged in writing by the seller's attorney on October 20, 2008. By letter dated November 24, 2008, Lauren Platil was advised that, although she was approved for a mortgage loan in the amount of \$191,250.00, Emigrant was unable to approve her application for the full amount requested because of "insufficient credit" and because the "value of [the] collateral, as reviewed," was "lower than the appraised value."<sup>1</sup> The purchaser's attorney promptly wrote to the seller's attorney to advise that Lauren Platil's loan application had been rejected and to request a refund of the contract deposit. Rather than refund the deposit, the seller's attorney wrote to the purchaser's attorney offering to extend the purchaser's time to close upon payment of certain amounts for the seller's continuing expenses and costs, setting December 22, 2008 as a "time of the essence" closing date, and threatening to release the escrow funds to the seller if the purchaser did not accept this offer by December 1. It does not appear that the purchaser accepted the offer; additionally, on more than one occasion, the purchaser's attorney requested in writing that the escrow funds not be released. Notwithstanding these requests, the seller's attorney released the escrow funds to the seller on or about January 9, 2009. This action followed.

The plaintiff pleads two causes of action in her complaint: the first, against Davis & Hersh for improperly releasing the plaintiff's \$15,000.00 contract deposit from escrow in the face of her attorney's written objection, in violation of paragraph 6 of the contract, and the second, against Michael J. Corbett and Lara Gollins, for wrongfully declaring the plaintiff in willful default of the contract and improperly retaining the contract deposit. The defendants' answer sets forth a single counterclaim, against the plaintiff and against Jan Platil as additional counterclaim defendant, seeking extra-contractual damages for breach of contract. It does not appear on this record whether the defendants filed and served a

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<sup>1</sup> According to Lauren Platil, she and her husband had previously deposited the sum of \$213,000.00 in their attorney's escrow account, to be used, presumably, toward the purchase price. Consequently, the loan for which she applied was in the amount of only \$315,000.00, or 60% of the purchase price. The defendants do not cite the plaintiff's failure to apply for a mortgage loan in the amount of \$465,000.00, as required by paragraph 3 of the rider, as a breach of the contract.

summons and answer on Jan Platil or whether he served a reply thereto (*see* CPLR 3019 [d]). The defendants' third-party complaint similarly sets forth a single cause of action, against Jan Platil as third-party defendant, seeking extra-contractual damages for breach of contract. Jan Platil's answer to the third-party complaint does not contain any jurisdictional objections.

The plaintiff now moves for summary judgment in her favor for the relief demanded in the complaint, claiming that because she satisfied her obligation to make a diligent, truthful, and proper application for a mortgage loan, she is entitled to a return of the contract deposit. The defendants cross-move for summary judgment, *inter alia*, alleging that the plaintiff materially breached the parties' contract, thus entitling Michael J. Corbett and Lara Gollins to retain the contract deposit.

Both the motion and the cross motion are denied to the extent they are for summary judgment relative to the plaintiff's first cause of action against Davis & Hersh, LLP as escrowee. Paragraph 6 of the contract provides that the escrowee "shall not be liable to either party for any act or omission on its part unless taken or suffered in bad faith or in willful disregard of this contract or involving gross negligence." Paragraph 19 of the rider to the contract similarly provides that the escrowee "shall not be liable for any action taken or omitted by it in good faith," and "shall not be liable for any error of judgment or for any mistake of fact or law except its own gross negligence or willful misconduct." Pursuant to paragraph 24 of the rider, any inconsistency between paragraph 6 of the contract—requiring the escrowee to hold the deposit in the event of a written objection—and paragraph 20 of the rider—authorizing the escrowee to release the deposit from escrow upon the purchaser's willful default—must be resolved in favor of the rider. The parties are presumed to have agreed, therefore, that the escrowee would not incur liability for releasing the contract deposit, even if it received a written objection, so long as it believed in good faith that the purchaser had willfully defaulted under the terms of the contract. The Court is constrained to find, however, that questions of fact remain, sufficient to defeat summary judgment, as to the escrowee's bad faith, gross negligence or willful misconduct.

As to the plaintiff's second cause of action, the Court finds that she established her prima facie entitlement to judgment as a matter of law by demonstrating that she and her husband diligently attempted to obtain a mortgage loan within the time contemplated by the contract and, subsequently, within the extension period agreed on by the parties, but that they were unable, through no fault of their own, to obtain a conforming mortgage commitment (*see e.g. Astrada v Archer*, 51 AD3d 954, 858 NYS2d 796 [2008]) and, consequently, that the seller was obligated under the terms of the contract to refund the contract deposit without the need for any further action on the plaintiff's part.

The defendants, in opposition, claim that the plaintiff breached the contract and thereby forfeited her right to the contract deposit. Specifically, the defendants argue that the plaintiff breached the contract no fewer than four times: (1) by failing to close on or before September 24, 2008, a "time of the essence" closing date set by letter dated September 10, 2008, (2) by failing to close on or before October 10, 2008, a "time of the essence" closing date set by letter dated September 30, 2008, (3) by failing to close on or before November 30, 2008, as required by the parties' October 16 agreement, and (4) by failing to close on or before December 22, 2008, a "time of the essence" closing date set by letter dated November 24, 2008.

The defendants' argument is rejected. Initially, the Court notes that any efforts the defendants made to set a "time of the essence" closing date prior to October 16 were mooted by the October 16 agreement in which the defendants agreed to extend the plaintiffs' time to close the transaction. As for the November 30 closing date, it does not appear that the defendants even attempted to make time of the essence; the Court is dubious, in any event, as to the legal effect of a seller's unilateral attempt to convert a contract of sale contingent on a purchaser's ability to obtain a mortgage commitment to a firm contract making time of the essence (*see Vickery v Parrinello*, 2002 NY Slip Op 50244[U] [Civ Ct, Richmond County 2002]). The defendants' final attempt to make time of the essence with respect to the December 22 closing date was likewise without force and effect, as the contract had already expired by its terms upon the plaintiff's failure to obtain a firm commitment before the end of November.

The defendants further assert the plaintiff should be deemed to have waived the protection of the mortgage contingency clause. The defendants argue that the plaintiff's attorney represented to the defendants, both orally and in writing, on or about September 11, 2008 that the plaintiff had, in fact, obtained a firm commitment,<sup>2</sup> thereby precluding the defendants from exercising their option to cancel the contract and from finding an alternate purchaser.

This argument is rejected as well. Even assuming that such representations were made, they would not serve to invalidate the mortgage contingency provision, which is designed to protect the purchaser from being obligated to close a transaction in the event mortgage financing cannot be obtained (*see Creighton v Milbauer*, 191 AD2d 162, 594 NYS2d 185 [1993]). Based on the record presented, one of two possibilities exists: either the plaintiff obtained a commitment which was subsequently revoked, or she never obtained a commitment. Either way, she could not be compelled, under the terms of the contract, to proceed to closing absent proof that the failure of the transaction was attributable to bad faith on her part (*see Kapur v Stiefel*, 264 AD2d 602, 695 NYS2d 330 [1999]; *Creighton v Milbauer*, *supra*). That the defendants may have a cause of action to recover damages for fraud based on the alleged misrepresentation is, of course, a separate matter.

Since the defendants failed to raise a triable issue of fact relative to the plaintiff's right to recover the contract deposit, the plaintiff is entitled to summary judgment on her second cause of action in the principal sum of \$11,535.00, *i.e.*, the amount of the deposit net of 45 payments of \$77.00 per day required under the parties' October 16 agreement, and the corresponding branch of the defendants' cross motion is denied.

The remaining branch of the cross motion, which is for leave to amend the defendants' answer and third-party complaint to add a cause of action for fraud, is granted in part. Leave to amend a pleading pursuant to CPLR 3025 (b) should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit, or unless prejudice or surprise to the opposing party results directly from the delay in seeking leave to amend (*e.g. Giunta's Meat Farms v Pina Constr.*

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<sup>2</sup> The seller's attorney states in his supporting affirmation that the plaintiff presented a two-page printed document entitled "RBC Bank (USA) Audit Underwriting Status Sheet" relating to Jan Platil's mortgage loan application, asserted in writing that it was a firm commitment, and orally represented that the document "was a firm commitment and the only thing offered by this foreign bank as a commitment."

*Corp.*, 80 AD3d 558, 914 NYS2d 641 [2011]). While the Court perceives no reason to deny the amendment, it is noted that the liability sought to be imposed on Jan Platil as a third-party defendant does not arise from and is not conditioned upon the liability asserted against the defendants in the main action (*see* CPLR 1007; ***BBIG Realty Corp. v Ginsberg***, 111 AD2d 91, 489 NYS2d 224 [1985]). Accordingly, impleader does not lie, and the Court, on its own motion, hereby dismisses the third-party action. A counterclaim, by contrast, need not be related to the plaintiff's claim in any way (*see* CPLR 3019 [a]). Since it is apparent that jurisdiction was obtained over Jan Platil in the context of the third-party action, the Court will treat service of the third-party summons as the summons service required by CPLR 3019 (d), deem the defendants' answer properly served upon him, and allow the requested amendment of the answer.

In view of the dismissal of the third-party action, the caption is amended to read as follows:

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 LAUREN PLATIL, f/k/a LAUREN PINSENT, as :  
 Assignee of JAN PLATIL, :  
 :  
 Plaintiff, :  
 :  
 -against- :  
 :  
 MICHAEL J. CORBETT, LARA GOLLINS, and :  
 DAVIS & HERSH, LLP, :  
 :  
 Defendants, :  
 :  
 -and- :  
 :  
 JAN PLATIL, :  
 :  
 Additional Defendant on :  
 the Counterclaims. :  
 -----X

The Court directs that the cause of action as to which summary judgment was granted is hereby severed and that the parties' remaining claims shall continue (*see* CPLR 3212 [e] [1]).

Dated: 31 May 2011 

       FINAL DISPOSITION      X   NON-FINAL DISPOSITION