

Matter of Grubard v Cuomo

2011 NY Slip Op 32544(U)

September 23, 2011

Supreme Court, New York County

Docket Number: 103537/11

Judge: Carol E. Huff

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

PRESENT: CAROL E. HUFF
Justice

PART 32

GRUBARD, ALYSON

INDEX NO. 103537/11

MOTION DATE _____

- v -
ANDREW COOMO, ETAL

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

UNFILED JUDGMENT

Cross-Motion: Yes No

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Upon the foregoing papers, it is ordered that this ~~matter~~ appear

Motion is decided in accordance

with accompanying memorandum decision

Dated: SEP 23 2011

[Signature]
CAROL E. HUFF

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____ FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32

-----X

In the Matter of ALYSON GRUBARD, : Index No. 103537/11
Petitioner, :
- against - :

Andrew Cuomo, in his capacity as THE ATTORNEY :
GENERAL OF THE STATE OF NEW YORK, :
304 West 114, LLC, NEW YORK REAL ESTATE :
PARTNERS, LLC, :

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
and notice of entry cannot be served based hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
1415).

For a Judgment Pursuant to Article 78 of the Civil Practice
Law and Rules.

-----X

CAROL E. HUFF, J.:

In this Article 78 proceeding, petitioner challenges the respondent's January 24, 2011, Determination, which found that she had forfeited her right to recover her down payment made pursuant to the contract of sale for the purchase of a condominium apartment located at 304 West 114th Street, Unit 2A, New York, New York. Petitioner asserts that she did not receive adequate notice of her right of rescission, and that the Offering Plan provided an open-ended time period for rescission.

As detailed in the Determination, on April 14, 2008, petitioner and the building's sponsor entered into a Purchase Agreement for Unit 2A, pursuant to which petitioner put a \$41,500 down payment into an escrow account. According to the Offering Plan and petitioner's Purchase Agreement, petitioner would have the right of rescission under three relevant circumstances: First, under the Offering Plan, "in the event that the commencement of the first year of

condominium operation is delayed beyond June 1, 2008” (Condominium Offering Plan at, 13, Note); second, also under the Offering Plan, “[i]f the closing is delayed twelve months or more [beyond January 2008]” (Offering Plan at 21); and third, under the Purchase Agreement, “[i]n the event any amendment to the Plan . . . materially alters the Plan in a manner which affects Purchaser” (Purchase Agreement, ¶ 21).

Two of these rescission provisions provide for a fifteen-day window; the Timely Closing Provision does not specify any time period.

The first notice of a triggering event (amendment of the Offering Plan) was sent to purchasers as a result of the Attorney General’s February 25, 2009, acceptance of the sponsor’s First Amendment to the Plan for filing. The Offering Plan Amendment changed the date of the commencement of condominium operations and revised the budget, and it provided that purchasers had a fifteen-day right of rescission. On February 26, 2009, a sponsor employee executed an affidavit stating that he had sent a copy of the Offering Plan Amendment to eleven purchasers.

Petitioner was the only purchaser who did not receive this mailing. No explanation has been provided, and the Determination does not address the fact. At the time of the mailing, petitioner was actively negotiating with the sponsor about purchasing a different apartment in the building because of her dissatisfaction with Unit 2A.

Instead, petitioner was sent a package on March 11, 2009, by FedEx (an acceptable method under the Offering Plan). No affidavit of mailing was executed in connection with this mailing. Petitioner denies that the package contained a copy of the Offering Plan Amendment.

According to the Determination:

Purchaser does not deny receipt of the package, but instead claims that it did not include the Amendment to the Plan. The cover letter from the package that Sponsor provided specifically notes that the package includes an amendment to the plan. Likewise, the amendment to the [Purchase] Agreement notes that Purchaser was served with the Plan Amendment and its offer of rescission. Purchaser has not provided a different cover letter, nor has she claimed she did not receive the [Purchase] Agreement amendment or that her copy did not specifically note the Amendment to the Plan and its rescission offer. Therefore, she had at least constructive notice of the rescission offer.

Determination at 8.

The second of two paragraphs in the cover letter, which petitioner does not deny receiving but which, she states, she also does not recall reading, states:

Enclosed please find four copies of an Amendment to the Purchase Agreement (which are also subject to review and approval by the Sponsor) and a First Amendment to the Offering Plan. If you wish to proceed with the purchase of Unit 5B, please sign and return four copies of the Amendment to the Purchase Agreement to us at your earliest convenience, but in no event later than March 25th, as of which date, the Sponsor's offer for 5B shall be deemed of no further force or effect. You should provide copies of the enclosures to your attorney for his review before you sign anything.

Letter dated March 11, 2009, from Gollenbach Eiseman Assor Bell & Peskoe LLP to petitioner, Determination Ex. F (emphasis added).

Page one of the Purchase Agreement Amendment, which petitioner does admit receiving, states:

Pursuant to the First Amendment to the Plan, a copy of which has been delivered to Purchaser, Purchaser has been offered the right to rescind the Purchase Agreement and receive a refund of her Down Payment, which right Purchaser would consider exercising, but for the opportunity to purchase New Unit.

Purchase Agreement Amendment, Determination Ex. G, at 1 (emphasis added).

Upon petitioner's request, the sponsor states that it emailed petitioner's attorney a copy of the Purchase Agreement Amendment on March 18, but the attorney states he never received

it. He admits receiving an emailed copy on March 24. According to the Determination, relying on the FedEx receipt dated March 12, petitioner's right to rescind extended to March 27. Petitioner did not attempt to exercise her right until April 23, after negotiations for the purchase of Unit 5B fell through.

Absent a factual determination as to whether petitioner actually received a copy of the Amended Offering Plan in the March 11 FedEx package, one issue is whether the cover letter in that mailing and the language in the Purchase Agreement Amendment provided petitioner sufficient notice that her right to rescind had been triggered. Another issue is whether the lack of a specified time period for rescission under the Timely Closing Provision should be found to mean that petitioner had unlimited time to exercise her right to rescind. Petitioner also contends that an affidavit should have been sworn to with respect to the March 11 package.

The Court does not reach these issues de novo, but reviews respondent's conclusions in the Determination under a standard that requires only a reasonable basis for them. Respondent's office is specifically charged with determining disputes over down payments put into escrow in connection with new condominium offerings. See 13 NYCRR § 20.3(o)(3)(viii)(a). Its Determination will be upheld unless it is shown that it "was affected by an error of law . . . or was arbitrary and capricious or an abuse of discretion." CPLR 7803(3). The test is whether the determination is "without sound basis in reason and is generally taken without regard to the facts." Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, 34 NY2d 222, 231 (1974). An administrative agency such as respondent, "acting pursuant to its authority and within the orbit of its expertise, is entitled to deference, and even if different conclusions could be reached as a result of conflicting evidence, a court may not

[* 6]

substitute its judgment for that of the agency when the agency's determination is supported by the record.” Partnership 92 LP & Bld. Mgt. Co. v State of N.Y. Div. of Hous. & Community Renewal, 46 AD3d 425, 429 (1st Dept 2007), aff’d 11 NY3d 859 (2008).

With respect to the March 11 FedEx package, petitioner does not deny receiving the cover letter that should have alerted her to the existence of an Amended Plan, and admits receiving the Purchase Agreement Amendment which specifically references her right of rescission on page one. Her attorney admits receiving the same document on March 24. It is not an “error of law” or “arbitrary and capricious” for respondent to conclude that petitioner and/or her attorney received sufficient notice that a triggering event had occurred.

As for the Timely Closing Provision failing to specify a rescission time period, considered in context, respondent reasonably concludes that it is not feasible that the sponsor intended no limit to the right. A fifteen-day period is consistent with the two provisions that do provide for a time period, as well as with the regulatory prescribed minimum period. See 13 NYCRR § 20.5(a)(5).

Finally, in light of the facts that there is a receipt showing delivery of the FedEx package on March 11, and that petitioner admits having received it, respondent reasonably concludes that the lack of an affidavit is not dispositive.

Accordingly, it is

ADJUDGED that the petition is denied and the proceeding is dismissed.

Dated:

SEP 23 2011

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).


CAROL E. HUFF
J.S.C.