

Chowdry v Lewis

2013 NY Slip Op 31809(U)

June 10, 2013

Supreme Court, Queens County

Docket Number: 14620/12

Judge: Augustus C. Agate

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SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IAS PART 24
Justice

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MAHMUD CHOWDRY and SHAKH AHMED,

Index No: 14620/12

Plaintiffs,

Motion

-against-

Dated: March 11, 2013

RICHARD LEWIS and SCOTT W. STRAM,

m# 2

Defendants.

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The following papers numbered 1 - 8 read on this motion by plaintiffs for an order (i) dismissing the counterclaim of defendant Scott W. Stram and (ii) striking the affirmative defenses set forth in the Answer of defendant Scott W. Stram; and cross motion by defendant Scott W. Stram for (i) summary judgment dismissing the complaint insofar as asserted against him and (ii) for summary judgment on his counterclaim.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1 - 4
Notice of Cross Motion - Affidavits - Exhibits.....	5 - 8

Upon the foregoing papers it is ordered that this motion by plaintiffs and cross motion by defendant Scott W. Stram are decided as follows:

This action arises out of a contract to purchase real property located at 30-18 80th Street, Jackson Heights, New York on February 6, 2012. Pursuant to the contract, plaintiffs agreed to purchase the property owned by defendant Richard Lewis for the sum of \$608,500.00. Defendant Scott W. Stram was the attorney for Lewis and also acted as the escrow agent herein. Under the terms of the contract, plaintiffs provided defendant Stram with a \$30,000.00 down payment, as attorney, which he has held in escrow. Paragraph 8 of the contract contained a Mortgage Commitment Contingency Clause, which provided that plaintiffs' obligation to purchase under the contract was conditioned upon the issuance, within 45 days, of a written commitment letter from

an Institutional Lender. The complaint alleges that plaintiffs were unable to obtain a mortgage from a lender and requested a return of their down payment. The complaint further alleges that defendant Lewis refused to return the down payment and, thus, breached the contract. In his Answer, defendant Stram asserts various affirmative defenses and also interposes a counterclaim. The "wherefore" clause of the counterclaim requests, *inter alia*, a judgment declaring that defendant Stram may pay into court the down payment of \$30,000.00 less defendant Stram's attorneys' fees, costs and disbursements, which shall be retained by him pursuant to the terms of the contract.

Plaintiffs move to strike all the affirmative defenses set forth in defendant Stram's Answer. Plaintiffs also seek to dismiss the counterclaim on the ground that it does not provide notice of the nature of the action. Plaintiffs also seek to dismiss the counterclaim on the ground that defendant Stram was sued in his capacity as an escrow agent and cannot bring a counterclaim in a separate capacity. Defendant Stram cross moves for summary judgment dismissing the complaint as against him and for summary judgment on his counterclaim.

The branch of plaintiffs' motion to dismiss the counterclaim of defendant Stram on the ground that it does not provide notice of the nature of the counterclaim is denied. Contrary to plaintiffs' assertions, the counterclaim is quite detailed and provides all the essential facts of the case. In addition, the counterclaim requests specific relief. Indeed, defendant Stram requests that he be permitted to pay the down payment, less attorneys' fees, into court. There clearly is sufficient notice to the plaintiff as to the basis of defendant Stram's counterclaim. To support their argument, plaintiffs cite CPLR 3018(d). However, no such section exists. CPLR 3018(a) requires a party to deny those statements he knows to be untrue and to specify those statements as to the truth of which he lacks knowledge or information sufficient to form a belief. Further, CPLR 3018(b) provides examples of various affirmative defenses and notes that these defenses must be pleaded if they are likely to take an adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading. There is nothing in these two sections which discuss notice of the nature of a counterclaim. Plaintiffs' reference to CPLR 305 is similarly not on point. While CPLR 305(b) provides that if a complaint is not served with a summons, the summons shall have attached thereto a notice stating the nature of the action and the relief sought, this section does not pertain to counterclaims.

Plaintiffs' argument that the counterclaim cannot be maintained because defendant Stram interposed it in a different capacity from that in which he is being sued is also without merit. It is clear from the complaint that defendant Stram is being sued in his capacity as escrow agent. A simple reading of the counterclaim indicates that defendant Stram has not interposed it in a different capacity. Indeed, the counterclaim specifically asks that defendant Stram be permitted to deposit the funds that he is holding as escrow agent into court. Stram's request in the counterclaim for attorneys' fees pertains to his role as escrow agent, and paragraph 6(b) of the contract provides for the recovery of attorneys' fees by the escrow agent.

Plaintiffs also move to dismiss the affirmative defenses set forth in defendant Stram's Answer. Pursuant to CPLR 3211(b), a party may move to dismiss one or more defenses on the ground that the defense has no merit. In reviewing a motion to dismiss an affirmative defense, the court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every favorable inference. (*Greco v Christoffersen*, 70 AD3d 769, 771 [2d Dept 2010]; *Fireman's Fund Ins. Co. v Farrell*, 57 AD3d 721, 723 [2d Dept 2008]; *Warwick v Cruz*, 270 AD2d 255, 255 [2d Dept 2000].) Further, if there is any doubt as to the availability of a defense, it should not be dismissed. (*Fireman's Fund Ins. Co. v Farrell*, 57 AD3d at 723; *Becker v Elm A.C. Corp.*, 143 AD3d 965, 966 [2d Dept 1988].)

The first affirmative defense alleges that plaintiffs fail to state a cause of action on which relief can be granted as against both defendants. However, defendant Stram, who has interposed his own Answer, cannot assert an affirmative defense on behalf of co-defendant Lewis. With respect to defendant Stram, no motion lies under CPLR 3211(b) to strike the defense of failure to state a cause of action, "as this amounts to an endeavor by the plaintiff to test the sufficiency of his or her own claim." (*Mazzei v Kyriacou*, 98 AD3d 1088, 1089 [2d Dept 2012][quoting *Butler v Catinella*, 58 AD3d 145, 150 [2d Dept 2008].)

The second affirmative defense, which asserts that plaintiffs have not suffered any damages caused by either defendant, and the third affirmative defense, which asserts that plaintiffs have commenced this action in bad faith, are stricken. These affirmative defenses merely plead conclusions of law without any supporting facts. (*Moran Enters., Inc. v Hurst*, 96 AD3d 914, 917 [2d Dept 2012].)

The fourth affirmative defense, which alleges lack of personal jurisdiction, is also stricken. In his affidavit, defendant Stram avers that plaintiff has not served him with process in this action and a traverse hearing must be held. Such conclusory averment is insufficient to raise an issue of fact as to the validity of service of process. (*Deutsche Bank Natl. Trust Co. v Dixon*, 93 AD3d 630, 630 [2d Dept 2012]; *U.S. Natl. Bank Assn. v Melton*, 90 AD3d 742, 743 [2d Dept 2011].)

The fifth affirmative defense, which alleges that the court lacks subject matter jurisdiction, is stricken. The Supreme Court is a court of general jurisdiction and is competent to entertain all causes of action unless its jurisdiction has been specifically proscribed. (*Thrasher v U.S. Liab. Ins. Co.*, 19 NY2d 159, 166 [1967].) Thus, there is no basis for this affirmative defense.

The branch of the cross motion by Stram for summary judgment dismissing the complaint as against him is granted. The complaint against defendant Stram alleges that he has refused to disburse the escrowed deposit to the plaintiffs and, thus, is liable to the plaintiffs. Paragraph 6(b) of the subject real estate contract provides, however, 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 on the part of the Escrowee." Here, there is no evidence whatsoever of any bad faith, willful disregard of the contract or gross negligence by defendant Stram. (see *Appel v Giddins*, 89 AD3d 543, 543 [1st Dept 2011].) Indeed, Stram requests permission to deposit the \$30,000.00 escrow funds into court and allow the parties to the contract to litigate the right to the escrow funds.

The branch of the cross motion by defendant Stram for summary judgment on that part of the counterclaim which seeks permission to deposit the \$30,000.00 escrow funds into court is granted. As noted above, defendant Stram, in the counterclaim, requests permission to deposit these funds into court and then be discharged from all liability to either party. Under the circumstances herein, there is no reason to require defendant Stram to continue to hold the funds. It appears to be better practice to allow the funds to be deposited into court and have the parties herein litigate the right to such funds. (see *Fischbein, Badillo, Wagner v Tova Realty Co.*, 193 AD2d 442, 444 [1st Dept 1993].)

The branch of the cross motion by defendant Stram for summary judgment on that part of the counterclaim which seeks recovery of attorneys' fees, costs and disbursements is granted. In addition to the language quoted above, paragraph 6(b) of the subject real estate contract provides that "Seller and Purchaser jointly and severally (with right of contribution) agree to defend ... indemnify and hold Escrowee harmless from and against all costs, claims and expenses (including reasonable attorneys' fees) incurred in connection with the performance of Escrowee's duties hereunder..." Thus, pursuant to the clear terms of the contract, defendant Stram, as escrowee, is entitled to his attorneys' fees herein. (see CPLR 1006[f]; *Appel v Giddins*, 89 AD3d at 543.)

Accordingly, the branch of the motion by plaintiffs for an order dismissing the counterclaim of defendant Scott W. Stram is denied.

The branch of the motion by plaintiffs for an order striking the affirmative defenses set forth in the Answer of defendant Scott W. Stram is granted to the extent that the second, third, fourth and fifth affirmative defenses in the Answer of defendant Scott W. Stram are stricken.

The branch of the motion by plaintiffs to strike the first affirmative defense in the Answer of defendant Scott W. Stram is granted solely to the extent that the first affirmative defense is stricken only as it pertains to defendant Richard Lewis. The branch of the motion to strike the affirmative defense is denied inasmuch as it pertains to defendant Scott W. Stram.

The branch of the cross motion by defendant Scott W. Stram for summary judgment dismissing the complaint insofar as asserted against him is granted, and the complaint against defendant Scott W. Stram is dismissed, and the action is severed and continued against the remaining defendant.

The branch of the cross motion by defendant Scott W. Stram for summary judgment on that portion of his counterclaim which seeks permission to deposit the \$30,000.00 escrow funds into court is granted. Upon the deposit by the defendant Scott W. Stram of the \$30,000.00 escrow deposit into court, said defendant shall be discharged from all liability in this matter.

The branch of the cross motion by defendant Scott W. Stram on his counterclaim for attorneys' fees, costs and disbursements is granted solely on the issue of liability. The amount of the attorneys' fees, costs and disbursements shall be determined at the time of the trial of this matter.

Dated: June 10, 2013

AUGUSTUS C. AGATE, J.S.C.