| **Matter of Jenkins v Hobbs** |
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| 2014 NY Slip Op 30767(U) |
| March 3, 2014 |
| Sup Ct, Nassau County |
| Docket Number: 1541/12 |
| Judge: F. Dana Winslow |
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[* 1]

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 3
NASSAU COUNTY

In the Matter of the Application of
HORTON JENKINS and KIM JENKINS,

Plaintiffs,

-against-

MOTION SEQ. NO.: 001, 002
MOTION DATE: 10/29/13

MARK A. HOBBS and KAREN WEBSTER HOBBS,

INDEX NO.: 1541/12

Defendants.

The following papers having been read on the motion (numbered 1-5):

Notice of Motion Seq. 001.....1
Notice of Motion Seq. 002.....2
Memorandum of Law.....3
Motion in Opposition to Summary Judgment.....4
Reply Affirmation.....5

Defendant, Mark A. Hobbs, moves pursuant to CPLR §3212 for an order granting summary judgment dismissing the plaintiffs' complaint, as well as for an order pursuant to 22 NYCRR §130-1.1 assessing sanctions against the plaintiffs (Sequence #001).

Defendant, Karen Webster Hobbs, moves pursuant to CPLR §3212 for an order granting summary judgment dismissing the plaintiffs' complaint, together with an order either assessing sanctions against the plaintiffs or awarding the defendant counsel fees as demanded in her counterclaim (Sequence #002).

The defendants were the owners of the real property located at 233 East Dean Street, Freeport, New York [hereinafter the subject premises] (*see* Premisler Affirmation in Support at Exh. C at ¶2). On or about June 15, 2010, a Residential Contract of Sale was executed by the parties whereby the plaintiffs agreed to purchase the subject premises from the defendants for the sum of $384,000 [hereinafter the Contract] (*id.* at Exh. A; Exh. B at pp. 25,32; Exh. C at ¶4). In

connection therewith, the plaintiffs tendered a down payment in the amount of $3000 (*id.* at Exh. A; Exh. B; Exh. C at ¶8; Exh. H at p.19). The Rider to the Contract contained a mortgage contingency clause which stated, in part, that "[t]his Contract is subject to and contingent upon the Purchaser obtaining a mortgage loan not to exceed the sum of FOUR HUNDRED FIVE THOUSAND ($405,000) * * *" and that "[i]n the event that without fault on the part of the Purchaser, a firm commitment is denied or not received within Forty Five (45) days from the date of contract, then in that event, either party hereto shall have the option of canceling this Contract by written notice to the attorney for the other party" (*id.* at Exh. A at ¶46).

Thereafter, on or about September 24, 2010, which is approximately one hundred days after the date of the Contract, the Contract was purportedly cancelled due to the failure of the plaintiffs to timely obtain a firm mortgage commitment (*id.* at Exh. B at pp.48-53; Exh. H at p. 43). While the facts surrounding the cancellation of the Contract are nebulous at best and there is a complete absence of documentary evidence establishing precisely how and when this cancellation occurred, the parties are in agreement that the Contract was, in fact, cancelled (*id.*). Subsequently, in February 2011, the $3000 down payment was returned to the plaintiffs (*id.* at Exh. B at pp. 63-64).

On February 6, 2012, approximately one year and eight months following the date of the Contract, the plaintiffs commenced the underlying action alleging that notwithstanding having procured a mortgage commitment, the defendants breached the Contract by failing to go through with the sale of the subject premises (*id.* at Exh. B at p. 54). The plaintiffs owners further allege that the defendants buyers demanded an additional $15,000 above the original Contract price before they would agree to close on the subject premises and when the plaintiffs refused to tender said amount the defendants breached the Contract by refusing to finalize the sale of the property (*id.* Exh. C at ¶¶14,15,20). The applications respectively interposed by the defendants thereafter ensued and are determined as set forth below.

In support of the application interposed by defendant, Karen Webster Hobbs,[1] counsel asserts that the Contract was rightfully cancelled due to the plaintiffs' failure to timely obtain a mortgage commitment within 45 days of the

[1] In addition to separately moving for sanctions, counsel for defendant, Mark A. Hobbs, joins in that portion of Ms. Hobb's summary judgment application which seeks dismissal of the plaintiffs' complaint and adopts those arguments set forth by her attorney with respect thereto (*see* Davis Affirmation at ¶¶2-5).

Contract having been executed on June 15, 2010 and as such the underlying complaint must be dismissed (*see* Defendant's Memorandum of Law at pp. 4,9). Counsel further argues that given the cancellation of the Contract, the defendants' sole responsibility was to return the down payment and inasmuch as said sum has already been remitted to the Plaintiffs, summary judgment in favor of the defendants is warranted (*id.*)

With particular respect to the issue of sanctions, counsel for Karen Webster Hobbs asserts that given the frivolous nature of the underlying action, this Court should either assess sanctions against the plaintiffs or grant summary judgment on the defendant's counterclaim and award counsel fees incurred for defending the plaintiffs' baseless lawsuit (*see* Premisler Affirmation at ¶4; Defendant's Memorandum of Law at p. 2). In separately seeking sanctions, counsel for Mark Hobbs similarly maintains that as the within action is both baseless and frivolous, this Court should impose sanctions against the plaintiffs in accordance with 22 NYCRR §130-1.1 (*see* Davis Affirmation at ¶¶6-9).

The applications interposed by the defendants are opposed by the plaintiffs, who are proceeding *pro se* (*see* Plaintiffs' Motion in Opposition to Summary Judgment)[2].

The Court has reviewed the submissions of the parties and upon said review finds that the defendants have demonstrated entitlement to summary judgment dismissing the complaint (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). In opposition, the plaintiffs have failed to raise a triable issue of fact (*id.*). As noted above, the plaintiffs' underlying action is predicated upon breach of contract. "The elements of a cause of action to recover damages for breach of contract are (1) the existence of a contract, (2) the plaintiff's performance under the contract, (3) the defendant's breach of the contract, and (4) resulting damages" (*Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804,806 [2 Dept 2011]; *JP Morgan Chase v J.H. Elec. of N.Y., Inc.*, 69 AD3d 802 [2d Dept 2010]). Here, the record establishes that the plaintiffs did not perform under the Contract by failing to timely obtain the requisite financing as set forth therein and upon which said Contract was contingent (*id.*).

Additionally, where, as here, "a contract for the sale of real property does not contain a specific declaration that time is of the essence, one party may

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[2] The Court notes that the plaintiffs' "Motion in Opposition to Summary Judgment" is unsigned and is not in proper form (CPLR §2106).

unilaterally notify the other that time is of the essence provided that the notice is clear, distinct, unequivocal, fixes a reasonable time in which to perform, and informs the other party that a failure to perform will result in default" (*Charchan v Wilkins*,231 AD2d 668,669 [2 Dept 1996]; *Decatur (2004) Realty, LLC v Cruz*,73 AD3d 970,971 [2 Dept 2010]). In the instant matter, while the plaintiffs allege the defendants breached the Contract by failing to go though with the sale, the record is devoid of any evidence establishing that the plaintiffs informed the defendants they were ready and willing to close on the property and that they were electing to declare time to be of the essence (*id.*). Moreover, there is no indication the plaintiffs notified the defendants that in the event they failed to close on the subject premises they would be in default, and not the prospective buyers.

Finally, even assuming the defendants were in breach of the Contract, the plaintiffs did not sustain damages as a result thereof (*Palmetto Partners, L.P. v AJW Qualified Partners, LLC, supra*). The Contract at issue herein expressly provides, in relevant part, that "[i]f this contract is cancelled pursuant to its terms, other than as a result of the Purchaser's default, this contract shall come to an end, and neither party shall have any further rights, obligations or liabilities against or to the other hereunder or otherwise, except that: (i) Seller shall promptly refund or cause the Escrowee to refund the Downpayment to Purchaser * * *."[3] Here, the $3000 down payment originally tendered by the plaintiffs was returned to them in February 2011 (*id.*).

The Court now addresses the matter of sanctions. "The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part (22 NYCRR §130-1.1[a]). This section further states that "[i]n addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, * * *." (*id.*). "For purposes of this Part, conduct is frivolous if:

> (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;

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[3] *see* Premisler Affirmation at Exh. A at ¶21(c).

(2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or

(3) it asserts material factual statements that are false" (22 NYCRR §130-1.1 [c]).

Having reviewed the record and guided by the foregoing authority, the Court, in its discretion, declines to either award counsel fees or assess sanctions against the plaintiffs.

Accordingly, it is

ORDERED, that the branch of the application interposed by defendant, Mark A. Hobbs, which seeks an order granting summary judgment dismissing the plaintiffs' complaint, is hereby **granted** (Sequence #001); and it is further

ORDERED, that the branch of the application interposed by defendant, Mark A. Hobbs, which seeks an order pursuant to 22 NYCRR §130-1.1 assessing sanctions against the plaintiffs, is hereby **denied** (Sequence #001); and it is further

ORDERED, that the branch of the application interposed by defendant, Karen Webster Hobbs, which seeks an order granting summary judgment dismissing the plaintiffs' complaint, is hereby **granted** (Sequence #002); and it is further

ORDERED, that the branch of the application interposed by defendant, Karen Webster Hobbs, which seeks an order either assessing sanctions against the plaintiffs or awarding the defendant counsel fees as demanded in her counterclaim, is hereby **denied** (Sequence #002).

All applications not specifically addressed are **denied**.

This constitutes the Order of the Court.

Dated: March 3, 2014

J.S.C.