

Boxwood Funding, LLC v Mehmat
2014 NY Slip Op 33436(U)
December 24, 2014
Supreme Court, New York County
Docket Number: 156138/2013
Judge: Debra A. James
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

BOXWOOD FUNDING, LLC,
Plaintiff,

Index No.: 156138/2013

- v -

Motion Date: 05/16/14

BADISSE DAVID MEHMAT,
Defendants.

Motion Seq. No.: 01

Motion Cal. No.: _____

The following papers, numbered 1 to 3 were read on this motion for summary judgment.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
Notice of Cross Motion/Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

PAPERS NUMBERED	
_____	1
_____	2
_____	3

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion for summary judgment shall be denied.

In this action, plaintiff Boxer Funding, LLC seeks an order awarding damages for the balance of the fee against defendant Mehmet that it alleges it earned and that defendant owes pursuant to a letter of loan commitment agreement dated June 11, 2013 entered into between non party Riverdale Funding, LLC and defendant (commitment agreement).

The loan transaction never closed and non party Riverdale Funding, LLC never funded the loan, which, under the

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SETTLE/SUBMIT ORDER/JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING

commitment agreement, was to be secured by a second mortgage on 26 Bond Street, New York, New York, real estate owned by defendant, and a first lien on all personal property and fixtures of the defendant used or usable or incidental to the use and operation of 26 Bond Street.

Plaintiff Boxer Funding LLC now moves for summary judgment in the amount of \$46,000, the balance of the fee on the \$800,000 loan commitment. Defendant opposes the motion and cross moves for summary judgment dismissing the complaint.

The Court of Appeals has held that pursuant to CPLR §3212:

[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial.

Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986) (citations omitted).

Plaintiff Boxer Funding LLC contends that by the plain terms of the commitment agreement it is owed \$46,000, which is the balance of the full amount of the commitment fee of \$48,000, \$2,000 of which defendant paid upon execution of the commitment agreement. It argues that such fee was earned upon signing, notwithstanding the fact that the balance was to be paid at the

closing. Essentially, plaintiff Boxer Funding LLC argues that by the clear terms of the commitment agreement, the full commitment fee is due and non-refundable.

Plaintiff includes in its supporting papers a copy of the Answer in which in which defendant alleges affirmative defenses, including "Boxwood (whatever that is) is an improper party/plaintiff."

Defendant submits only his attorney's affirmation in opposition to the motion. Defendant, by his attorney, argues that he is entitled to summary judgment dismissing the action as a matter of law because the balance of the commitment fee was not due until the closing, and as the closing was conditioned on certain contingencies that never occurred, no further commitment fee is due. According to defendant, one of the conditions of the commitment that never materialized, through no fault of defendant, was the execution and delivery of estoppel certificates by all tenants of 26 Bond Street.

Citing Rochester Home Equity v Guenette, 6 AD3d 1119 (4th Dept 2004), defendant offers as further grounds for dismissal the fact that there was never any "meeting of the minds" as there was no acceptance of plaintiff's offer under the loan commitment, since under paragraph 15 of the commitment, the commitment was not binding until payment of the commitment fee.

Even assuming arguendo that the commitment fee was non refundable [TBS Enters v Dime Sav Bank of New York, 45 NY2d 859 (1978)], plaintiff Boxer Funding LLC has not established its

prima facie entitlement to recover under the commitment agreement. In his answer, defendant raised the affirmative defense of plaintiff Boxer Funding, LLC's standing to enforce the commitment agreement [Bank of NY v Silverberg, 86 AD3d 274, 279 (1st Dept 2011)]. The factual allegations of the complaint refer to Riverdale Funding, LLC only as the lender under the commitment agreement, and make no reference with respect to plaintiff Boxer Funding LLC. Though the affidavit of Joseph Hughis, State of Tennessee, County of Washington, states that "I am the Vice President of Riverdale Funding, LLC, the predecessor in interest to Boxwood Funding, LLC", and that "On or about July 3, 2003, Riverdale assigned the commitment and any causes of action thereunder to Boxwood Funding, LLC" and that "The assignment is annexed as Exhibit B", no such assignment is attached to plaintiff's supporting papers. A search of the electronic court files reveals that no such attachment has been filed.

Accordingly it is

ORDERED that plaintiff's motion for summary judgment on the complaint is denied; and it is further

ORDERED that the defendant's cross motion for summary judgment is denied; and it is further

ORDERED that the parties shall appear in IAS Part 59,
71 Thomas Street, Room 103, New York, New York, for a preliminary
discovery conference on February 24, 2015, 9:30 A.M.

This is the decision and order of the court.

Dated: December 24, 2014

ENTER:

Debra A. James
DEBRA A. JAMES J.S.C.