

**Kweku v Thomas**

2014 NY Slip Op 33813(U)

December 19, 2014

Supreme Court, Westchester County

Docket Number: 70108/2013

Judge: William J. Giacomo

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER  
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.

-----X  
KENNETH G. KWEKU,

Plaintiff,

-against-

Index No. 70108/2013  
**DECISION & ORDER**

REGINALD THOMAS and JOHN A JASILLA, ESQ.,

Defendants.  
-----X

The following papers numbered 1 to 6 were read on plaintiff's motion to renew and reargue the decision and order of this Court dated June 30, 2014 which denied his motion for summary judgment.

PAPERS NUMBERED

Notice of Motion/Affirmation/Exhibits	1-3
Affirmation in Opposition/Exhibit	4-5
Reply Affirmation	6

Factual & Procedural Background

On September 5, 2013, plaintiff and defendant Thomas entered into a contract of sale for a home located in New Rochelle owned by Thomas. The contract contained a mortgage contingency clause. Plaintiff was to obtain a mortgage in the amount of \$625,950. The mortgage contingency expired 45 days after the execution of the contract

of sale. At the time the contract was executed, plaintiff tendered \$30,000 as a down payment which was deposited into defendant John A. Jasilla, Esq.'s escrow account.

Prior to entering into the contract of sale plaintiff obtained a pre-approval letter in the proposed mortgage amount of \$625,500.

Two days after signing the contract, plaintiff applied for a mortgage with The Federal Savings Bank. On October 15, 2013, that mortgage application was denied due to plaintiff's poor credit.

On October 5, 2013, prior to learning that his first application was denied, plaintiff applied for a mortgage with Marine Funding Inc.

On October 16, 2013, plaintiff's attorney requested an extension of the mortgage contingency period set to expire on October 18, 2013. Thomas granted the extension to November 1, 2013.

Plaintiff then learned that his mortgage application to Marine Funding Inc. was denied also due to his poor credit as well as other reasons.

On October 24, 2013, plaintiff applied for a mortgage with Wells Fargo Bank. That application was also denied.

On November 15, 2013, plaintiff's attorney informed Thomas that plaintiff could not obtain financing and was exercising his client's right under the contract to cancel the contract. He also demanded the return of plaintiff's down payment.

On December 9, 2013, Jasilla sent plaintiff's attorney a letter indicating that a closing was scheduled for January 22, 2014. The letter also noted that Thomas would not return plaintiff's down payment because plaintiff acted in bad faith since he should have known that his poor credit would not allow him to obtain financing.

On December 14, 2013 plaintiff commenced this action seeking the return of his down payment. Issue was joined on January 28, 2014.

By decision and order dated June 30, 2014, this Court denied plaintiff's motion for summary judgment on the ground that he only asked for an extension of the mortgage contingency until November 1, 2013. However, plaintiff did not inform defendant of his inability to obtain financing and request to cancel the contract until November 15, 2013, two weeks after the expiration of the mortgage contingency.

Plaintiff now moves for leave to renew and reargue the June 30, 2014 decision and order. In support of this motion plaintiff submits to the Court a letter dated November 1, 2014 which states the following:

Please be advised that our client has not received a mortgage commitment pursuant to the terms of the contract of sale. We are therefore, requesting an extension of time for our clients to obtain financing to November 29, 2013 and that the closing date be extended accordingly.

Please discuss our request with your client and if acceptable sign this letter and fax it back to our office as soon as possible

If your client is not willing to extend our client's time to obtain financing, please return the contract downpayment as soon as possible. Upon our receipt of the contract downpayment the contract of sale shall be deemed null and void.

Plaintiff also submits a copy of an email it received from defendant's counsel on November 4, 2013, which states that in order to consider the purchaser's second request to extend the commitment date to the end of business this calendar month, seller required purchaser to submit several documents to him for review including, the mortgage

application, loan rejection letters, and the name of lenders to which plaintiff applied for a loan.

On November 14, 2013, plaintiff informed defendant that its loan application was declined and on November 15, 2013, plaintiff provided defendant with a copy of the Declination Letters received by plaintiff.

Plaintiff also submits an email from defendant's attorney dated November 18, 2013 which states that in order process plaintiff's request for a refund of his downpayment certain documentation must be provided.

On November 22, 2013, purchaser supplied defendant with copies of his loan applications and again requested the return of his downpayment.

The November 13, 14, and 18, 2013 letters were not provided to the Court in support of the prior motion.

Plaintiff argues that based upon these newly submitted documents, he did request an extension of time past the November 1, 2013 deadline to November 29, 2013. Further, he claims defendant stated that he was willing to consider an extension and at no time did he indicate that he objected to the cancellation of the contract as set forth in the November 1, 2013 letter. Accordingly, plaintiff argues that the June 30, 2014 decision should be reconsidered.

In opposition, defendant argues that the motion should not be granted since the November 1, 2013 letter and the November 4, 2013 email were available to plaintiff at the time of the original motion. Therefore, renewal and reargument should be denied.

Defendant also argues that even if renewal is granted the result must be the same since the purchaser's request for an extension of a mortgage contingency clause without

document is defective. Thus, the mortgage contingency was waived on November 1, 2013 and plaintiff was required to proceed with the purchase whether or not he had obtained financing.

### Discussion

A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination" (CPLR 2221[e] [2] ). To prevail on a motion to renew, the motion "must be (1) based upon new facts not offered on the prior motion that would change the prior determination, and (2) set forth a reasonable justification for the failure to present such facts on the prior motion" ( *Matter of Nelson v. Allstate Ins. Co.*, 73 A.D.3d 929, 929, 901 N.Y.S.2d 329; see *Deutsche Bank Trust Co. v. Ghaness*, 100 A.D.3d 585, 585–586, 953 N.Y.S.2d 301). The new or additional facts presented "either must have not been known to the party seeking renewal or may, in the Supreme Court's discretion, be based on facts known to the party seeking renewal at the time of the original motion" ( *Deutsche Bank Trust Co. v. Ghaness*, 100 A.D.3d at 586, 953 N.Y.S.2d 301; see *Rowe v. NYCPD*, 85 A.D.3d 1001, 1003, 926 N.Y.S.2d 121).

Here, plaintiff argues that the November 1, 2013 letter was not submitted because the arguments of defendant in opposition to its original motion was not that plaintiff did not timely cancel the contract, but that plaintiff acted in bad faith in applying for loans when he knew he had bad credit.

Based upon plaintiff's explanation for its failure to submit the November 1, 2013 letter and the fact that the letter as well as the additional emails were available and known to both plaintiff and defendant at the time of the original motion, the Court grants plaintiff leave to renew his motion for summary judgment.

Upon renewal and reargument, the motion is GRANTED. In his letter of November 1, 2013 plaintiff expressly stated that if defendant did not grant an extension to the mortgage contingency, plaintiff was canceling the contract. In reply, defendant did not deny or grant plaintiff's request for an extension but rather indicated that it needed more information. It is important to note that at no time does defendant argue that the November 1, 2013 termination of the contract was untimely. Rather, defendant argues that plaintiff acted in bad faith with regard to his loan applications. Further, there is no dispute that plaintiff submitted his loan declinations to plaintiff upon receipt. Thus, the Court finds that plaintiff's cancellation of the contract on November 1, 2013 was timely.

Moreover, the Court notes that there is no evidence that plaintiff acted in bad faith when he submitted his mortgage applications. Notably, while plaintiff may have known he had credit issues there is no proof that he hid those issues from The Federal Savings Bank who issued him a Pre-Purchase Loan Approval Certificate. There is no evidence that plaintiff knew his credit issues would be a problem. Further, there is no proof that when plaintiff submitted his loan application he hid his credit issues.

Accordingly, upon renewal and reargument, plaintiff's motion for summary judgment on his complaint seeking the refund of his down payment is GRANTED.

Dated: White Plains, New York  
December 19, 2014

  
HON. WILLIAM J. GIACOMO, J.S.C.