

Kweku v Thomas

2015 NY Slip Op 32644(U)

May 29, 2015

Supreme Court, Westchester County

Docket Number: 70108/13

Judge: William J. Giacomo

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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.

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.

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KENNETH G. KWEKU,

Plaintiff,

- against -

DECISION & ORDER

REGINALD THOMAS and JOHN A. JASILLI, ESQ.,

Index No. 70108/13

Defendants.

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The following papers, numbered 1 to 6 were read on defendant John A. Jasilli, Esq.'s motion for an award of attorneys fees as escrowee, an order directing that the down payment Jasilli is currently holding be deposited with the Court, and a stay of entry of judgment in this case.

Papers Numbered

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

Factual and Procedural Background

This action arises out of a contract for the sale of real estate. On September 5, 2013, plaintiff and defendant Reginald 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. Jasilli, Esq.'s escrow account. Jasilli also represented Thomas as seller in the transaction.

The instant action was commenced by the filing of a summons and verified complaint on December 16, 2013. On or about January 28, 2014 defendant, Jasilli, filed and served an answer with counterclaims on behalf of the defendant/seller Reginald Thomas.

By Decision and Order dated and entered June 30, 2014, this Court awarded summary judgment to defendant/seller upon plaintiff/purchaser's motion for summary judgment.

By Decision and Order dated and entered December 19, 2014, this Court granted plaintiff's motion to renew/reargue his prior motion and awarded summary judgment to him. Upon renewal the Court found that defendant seller was in breach of the contract of sale for failing to return the down payment under the contract. The Court then awarded judgment to plaintiff/purchaser in the amount of \$30,000 and directed the defendant/seller and defendant/escrow agent to refund the down payment.

On February 16, 2015 defendant, John A. Jasilli, Esq., acting as Escrowee and representing himself, filed this motion seeking an order awarding him, as Escrowee, his reasonable legal fees, costs and expenses and apportioning such award as among the parties to the contract and directing contribution as between them. He also seeks an order directing that the Escrowee deduct and pay over the legal fees, costs and expenses awarded from the corpus of the down payment held in escrow herein. Jasilli further requests an order, pursuant to CPLR §2601, directing the payment into Court of the down payment, or the net thereof, after deducting any award made under his request for attorneys fees as well as an order, pursuant to the interests of justice, that this Court stay the making or entry of any final judgment pending the determination of this motion.

Discussion

The Court will address the claims in the order it deems most logical.

Stay Entry of Final Judgment

Jasilli's request to stay the entry of judgment is **DENIED**. On March 26, 2015, the Court signed the Judgment presented by plaintiff/purchaser's attorney which Judgment was filed and entered on March 27, 2015. Thus, this request is moot.

Award of Legal Fees

Defendant Jasilli argues that he filed this motion solely in his capacity as escrowee/stakeholder and not as attorney for defendant/seller Reginald Thomas. He seeks an award of attorney fees pursuant to the terms of the contract of sale contained in Paragraph 6(a) thereof which reads as follows, in relevant part:

[Upon notice of a dispute] Escrowee shall continue to hold the deposit until otherwise directed by Notice from the parties to this contract or a final, non-appealable judgment, order or decree of a court. However, Escrowee shall have the right at any time to deposit the Downpayment and interest thereon with the clerk of a court in the county in which the Premises are located and shall give Notice of such deposit to Seller and Purchaser. Upon such deposit or other disbursement in accordance with the terms of this paragraph, Escrowee shall be relieved and discharged of all further obligations and responsibilities hereunder.

Paragraph 6(b) provides in relevant part:

Seller and Purchaser jointly and severally (with right of contribution) agree to defend (by attorneys selected by Escrowee), indemnify and hold the 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 . . .

Jasilli argues that he elected to appear *pro se* to defend himself as Escrowee/stakeholder and, therefore, is entitled to an award of attorneys fees pursuant to

the contract.

In this case, however, the record reveals that since the commencement of this litigation defendant Jasilli has acted not as a stakeholder but as the attorney for the defendant/seller. Notably, his answer to the complaint, as escrow agent, asserts affirmative defenses only available to the seller. Further, Jasilli submits various emails between himself and plaintiff's attorney in which he refers to Thomas as his client and clearly advocates on Thomas's behalf. Jasilli also submitted papers in opposition to plaintiff's motion for summary judgment on behalf of the defendant/seller. Furthermore, Jasilli's motion also seeks a stay of this Court's December 19, 2014 Decision and Order which was in favor of the plaintiff/purchaser and against the defendant/seller pending an appeal. Thus, although claiming to represent only himself as escrow agent, Jasilli is clearly advocating on behalf of the defendant /seller against whom the March 27, 2015 judgment was entered. Accordingly, counsel has crossed the line in this case from merely serving as a stakeholder to the attorney representing the interests of the defendant/seller.

In any event, paragraph 6(b) of the contract of sale between the purchaser and the seller herein requires this Court to make a determination as to the allocation between purchaser and seller of any legal fees awarded. To do so, the Court must take into consideration arguments advanced on behalf of the defendant/seller. However, the defendant/seller is not a party to this motion nor has he been served with the motion papers requesting legal fees. Thus, seller as a necessary party to the proceedings has not been given due notice and an opportunity to be heard. (See CPLR § 2103 [e][“Each paper served on any party shall be served on every other party who has appeared . . .”]).

Moreover, in view of the contractual provision that “*Seller and Purchaser jointly and*

severally (with right of contribution) agree to defend (by attorneys selected by Escrowee), indemnify and hold the Escrowee harmless from and against all costs, claims and expenses (including reasonable attorneys' fees) . . . " it appears that Seller Reginald Thomas's interests are now adverse to that of Escrowee/Stakeholder John Jasilli. Notably, this conflict is implicitly acknowledged by Jasilli's failure to serve Thomas with notice of the instant motion.

The New York Rules of Professional Conduct 22 NYCRR § 1200.0 rule 1.7(a) provides:

Rule 1.7: Conflict of interest: current clients.

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:

(1) the representation will involve the lawyer in representing differing interests; or

(2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

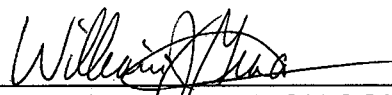
Here, it appears that Jasilli's interests as stakeholder seeking an award of attorney's fees are adverse to that of his client. In the absence of a written consent by Reginald Thomas, the Court finds the motion to be improper until Reginald Thomas has an opportunity to be heard on the issue of the apparent conflict of interest and the attorney's fees matter. (*See Christie v. Kramer*, 37 Misc.3d 1224(A), 964 N.Y.S.2d 58 [Sup Ct Kings County 2012]). "The judiciary has the ability to question any 'impropriety [which] appears on the record and the issue may be raised *sua sponte*' " (*Booth v. Continental Ins. Co.*, 167 Misc.2d 429, 435 [Sup Ct Westchester County 1995] *citing Porter v. Huber*, 68

F Supp 132 [WD Wash 1946]; see *Erie County Water Auth. v. Western N.Y. Water Co.*, 304 N.Y. 342, 351, 353 [1952]).

Accordingly, defendant Jasilli's request for an award of legal fees and an apportion of such award, if any, is **DENIED**. The request to stay entry of the judgment is also denied as moot.

The above constitutes the Decision and Order of this Court.

Dated: White Plains, New York
May 29, 2015



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

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