

Gonzalez v Char & Herzberg, LLP
2017 NY Slip Op 30473(U)
March 13, 2017
Civil Court of the City of New York, Bronx County
Docket Number: CV 11413-16/BX
Judge: Sabrina B. Kraus
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX: PART 14

FERNANDO GONZALEZ &
TENISHA GONZALEZ

Plaintiffs,

-against-

DECISION & ORDER
Index No.: CV 11413-16/BX

HON. SABRINA B. KRAUS

CHAR & HERZBERG, LLP

Defendant,

X

BACKGROUND

FERNANDO GONZALEZ and **TENISHA GONZALEZ** (Plaintiffs) commenced this action seeking a return of \$20,000 deposited as a down payment and held in escrow by **CHAR & HERZBERG, LLP** (Defendant) pursuant to a contract of sale for real property.

PROCEDURAL HISTORY

The summons and endorsed complaint are dated November 1, 2016. Plaintiffs allege that a process server attempted to serve Defendant at their office address and that service of process was rejected by the Defendant on multiple occasions. Plaintiffs thereafter served Defendant by delivery to the Secretary of State on December 28, 2016, and did an additional mailing prior to inquest on January 19, 2017.

The action was originally scheduled for inquest on February 24, 2017. It was adjourned to March 10, 2017 and then adjourned again to March 13, 2017, when the inquest took place. At the conclusion of the Inquest, the court reserved decision.

FINDINGS OF FACT

Plaintiffs entered into a contract of sale (Ex 6) with the Howard Scheiner, as Executor of the Estate of Murray Scheiner on July 15, 2016 for the purchase of 2308 Seymour Avenue, Bronx, NY 10469 (Subject Premises). Plaintiffs delivered a \$20,000 down payment, with an executed copy of the contract pursuant to a letter from their attorney dated July 18, 2016 (Ex 5).

Paragraph 6 of the contract provides in pertinent part:

If for any reason Closing does not occur and either party gives Notice (as defined in paragraph 25) to Escrowee demanding payment of the downpayment, Escrowee shall give prompt notice to the other party of such demand. If Escrowee does not receive Notice of objection from such other party to the proposed payment within 20 business days after the giving of such Notice, Escrowee is hereby authorized and directed to make such payment. If Escrowee does not receive such Notice of objection within such (20) day period or if for any other reason Escrowee in good faith shall elect not to make such payment, Escrowee shall continue to hold such amount until otherwise directed by Notice from the parties to this contract or a final, nonappealable judgment, order or decree of a court.

Paragraph 8(a) of the contract provides for a mortgage commitment contingency and conditions Plaintiffs' obligation to purchase on issuance of a written commitment within 45 days, from an Institutional Lender for \$495,000 for a term of at least 30 years. It further provides "(t)o the extent a Commitment is conditioned on the sale of Purchaser's current home, payment of any outstanding debt, no material adverse change in Purchaser's financial condition or any other customary conditions that may not be met, Purchaser accepts the risk that such conditions may not be met;".

Paragraph 8(e) provides "(i)f no Commitment is issued by an Institutional Lender on or before the Commitment Date, then, ... Purchaser may cancel this contract by giving Notice to Seller within 5 business days after the Commitment Date ...". Finally, paragraph 8(f) provides

that if Purchaser cancels the contract in accordance with said terms the downpayment shall be promptly returned to the Plaintiffs.

Plaintiffs received a Mortgage Loan Commitment from loanDepot.com, LLC dated August 29, 2016 (Ex 4). The document listed conditions that had to be met prior to closing and at closing, including that Plaintiffs had to have a contract of sale executed for their current home prior to the closing.

Plaintiffs submitted a “Statement of Credit Denial, Termination or Change” dated September 1 , 2016 (Exs 3 & 5) which provided that Plaintiffs application was denied, because the institution did not”.. Grant Credit to Any Applicant on the terms and conditions ...” requested and that Plaintiffs were unable to meet the condition for sale of their current residence prior to closing.

On September 2, 2016, Plaintiffs’ counsel notified Defendant that Plaintiffs’ mortgage application had been denied, and requested return of their security deposit (Ex 7). Defendant responded pursuant to a letter dated September 9, 2016, stating the cancellation provision was only contingent upon a commitment letter which had been issued, and advising that they intended to proceed with the scheduled closing on or about September 10, 2016 (Ex 1). Plaintiffs’ counsel responded on September 9 that no “firm” commitment has ever been issued and the commitment that was issued had conditions which could not be met. Plaintiffs’ counsel again requested return of the funds or stated legal action would be instituted against Defendant as escrow agent (Ex 8).

Further correspondence between counsel ensued. Defendant alleged that the conditions in the original commitment letter could have easily been met, and that Plaintiffs “bad faith” actions resulted in the denial (Ex 9). Defendant set a closing date pursuant to a Time Is of the

Essence demand for October 21, 2016 (Ex 11) and stated that failure to close would result in retention of the down payment for breach of contract.

Plaintiffs assert that the Subject Premises was ultimately sold to a different buyer in January of 2017 and provided a printout from an internet site purporting to confirm same (Ex 13).

DISCUSSION

Where, as here, a mortgage commitment letter is revoked after issuance Plaintiffs' right to return of the escrowed down payment turns on whether the commitment revocation and consequent failure of the transaction was attributable to bad faith on the part of the Plaintiffs (*Kapur v Stiefel* 264 AD2d 602). There is no evidence of any bad faith on the part of Plaintiffs in the underlying record at inquest.

Based on the foregoing judgment is entered against Defendant in the amount of \$20,000.00 plus interest from September 2, 2016, and costs.

This constitutes the decision and order of this court.

Dated: March 13, 2017
Bronx, NY

Hon. Sabrina B. Kraus
JCC

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