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Index No.: 3235-15

SUPREME COURT - STATE OF NEW YORK
I.A.S. Part 39 - SUFFOLK COUNTY

PRESENT:
Hon. **DENISE F. MOLIA,**
Justice

MITCHELL J. MEZYNIESKI, JR., and KATHLEEN L. MEZYNIESKI,

Plaintiffs,

- against -

ANDREW REYNIAK, 35 TOWN LINE ROAD, LLC, TWOMEY LATHAM SHEA KELLEY DUBIN & QUARTARARO, LLP,

Defendants.

CASE DISPOSED: YES
MOTION R/D: 5/12/16
SUBMISSION DATE: 12/16/16
MOTION SEQUENCE NO.: 001 MD
002 XMG

ATTORNEY FOR PLAINTIFF
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ATTORNEYS FOR DEFENDANT
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Upon the following papers filed and considered relative to this matter:

Notice of Motion dated April 18, 2016; Affidavit in Support dated April 18, 2016; Exhibit A annexed thereto; Notice of Cross Motion dated June 8, 2016; Affidavit dated June 8, 2016; Exhibits A through P annexed thereto; Affirmation in Opposition dated July 21, 2016; Exhibit A annexed thereto; Reply Affirmation; and upon due deliberation; it is

ORDERED, that the motion by plaintiffs, pursuant to CPLR 3212(e), for an Order directing the entry of partial summary judgment in favor of plaintiffs and against the defendants in the sum of $50,000.00 to be released from the escrow funds held by the defendants, is denied; and it is further

ORDERED, that the cross motion by defendants, pursuant to CPLR 3212, for an Order directing the entry of summary judgment in favor of defendants and against the plaintiffs, is granted; and it is further

ORDERED, that within ten (10) days from receipt of a copy of this Order with notice of entry, the plaintiff shall return to defendants' counsel, the check in the amount of $55,000.00 previously delivered to plaintiffs' counsel by defendants' counsel on or about January 5, 2015.

RST

On or about August 25, 2014, the defendant/purchaser Andrew Reyniak entered into a contract of sale ("contract") to purchase residential real property located at 35 Town Line Road, Wainscott, New York, from the plaintiffs/sellers, at a sale price of $2,300,000.00. On or about September 29, 2014, the contract was assigned to defendant 35 Town Line Road, LLC, who was represented by the law firm Twomey Latham Shea Kelley Dubin & Quartatato, LLP ("Twomey Latham").

The contract provided at paragraph 8 of the "Second Rider to Contract of Sale", that prior to closing, the sellers would furnish the purchasers with an updated Certificate of Occupancy ("CO") covering all structures existing on the premises. On or about September 25, 2014, the defendants furnished plaintiffs with an updated survey, dated September 8, 2014, with which to obtain the updated CO. Thereafter, the plaintiffs determined that they had never obtained a CO for a swimming pool on the premises. It appears that even though the plaintiffs had previously obtained variance relief for a pool, the pool was constructed too close to the property line in a non-conforming location and in non-compliance with the variance relief and a CO had not been issued by the Town of East Hampton. As a consequence, the parties concluded that a variance was required in order to obtain a CO for the pool.

The parties agreed to proceed to closing, and as an accommodation to the sellers, the purchasers agreed to the establishment of an escrow fund to be held by Twomey Latham to allow sellers to obtain the necessary variance relief and issuance of a CO. In the event such relief was not obtained and a valid CO not issued by January 31, 2015, the defendants would be compensated through a reduction in the purchase price. The Escrow Agreement provided in pertinent part:

> "NOW, THEREFORE, in consideration of the mutual covenants contained herein, the parties agree as follows:
>
> 1. The Escrow Agent shall retain the sum of One Hundred Fifty Thousand ($150,000) Dollars in escrow from the proceeds of the sale until the Seller has obtained an area variance so that the above-described swimming pool can remain in its current location.
>
> 2. The Seller shall have until January 31, 2015 to secure said variance.
>
> 3. In the event the variance is not granted by said date, the Seller agrees to reduce the contract sales price by the sum of One Hundred Thousand (100,000.00) Dollars, and the Escrow Agent is hereby authorized to release to the Purchaser the aforesaid sum.
>
> 4. In the event the variance is granted by January 31, 2015, the contract sale price shall be as originally set forth in the contract, and the Escrow Agent shall pay to the Seller the full $150,000 being held in escrow pursuant to the terms hereof.
>
> Escrow Agent may, but shall not be obligated to, file a suit in interpleader

> for declaratory judgment for the purpose of having the respective rights of such claimants adjudicated, or may deposit with a court of competent jurisdiction the Escrow Amount. In the event the Escrow Agent commences such litigation or is named as a defendant, the Seller and Purchaser, jointly and severally, agree to pay all reasonable costs, expenses and attorneys' fees incurred by Escrow Agent in connection therewith. In the event that Escrow Agent shall deposit the Escrow Amount with such court, Escrow Agent shall be fully released and discharged from any and all duties and obligations hereunder and any litigation against it shall be discontinued."

The plaintiffs were unable to obtain either the variance or CO by January 31, 2015, but contend that they are entitled to the return of the entire escrow amount of $150,000.00. The defendants maintain that the plaintiffs are only entitled to the return of $50,000.00 from the funds held in escrow. The parties unsuccessfully attempted to settle the matter, and in contemplation thereof, the defendants forward a check in the amount of $55,000.00 to the plaintiffs. The plaintiffs did not deposit the proffered check, and it is still held by the plaintiffs' attorney.

It is undisputed that the plaintiffs failed to obtain or even apply for the variance relief as contemplated by the Escrow Agreement by January 31, 2015, and have failed to obtain a CO for all structures existing on the premises. As an excuse, plaintiffs' counsel contends that in addition to the variance relief required for the pool, plaintiffs also discovered the need to obtain a building permit and CO for a shed addition to a structure for which approval had not been obtained at the time of construction. On this basis, the plaintiffs decided that there had been a mutual mistake of fact which would provide for rescission of the Escrow Agreement. Plaintiffs then commenced the instant action recovery of all funds retained pursuant to the Escrow Account, as well as a rescission of the Escrow Agreement.

Now, the plaintiffs have moved for partial summary judgment seeking a return of $50,000.00, pending the ultimate resolution of this litigation. The defendants have cross moved for summary judgment on their First Counterclaim asserted in the Answer, to enforce the terms of the Escrow Agreement and award them the full amount held in escrow.

It is noted that the motion by plaintiffs failed to provide a copy of the pleadings as required by CPLR 3212(b), and therefore should be denied as procedurally defective (see, Washington Realty Owners LLC v. 261 Washington Street, LLC, 105 A.D.3d 675, 817 N.Y.S.2d 146). Even if the motion were to be considered on the merits, the plaintiffs are essentially attempting to enforce and recover funds from the very agreement for which they are seeking rescission. However, the principle of judicial estoppel precludes plaintiffs from a asserting a claim for judgment for $50,000.00 based on an agreement which they contend has, or should be rescinded (see, Hartsdale Fire District v. East Land Construction Inc., 65 A.D.3d 1345, 886 N.Y.S.2d 454; Mohen v. Mooney, 205 A.D.2d 670, 614 N.Y.S.2d 737). The plaintiff's motion for partial summary judgment is denied.

On the other hand, the defendants have demonstrated their entitlement to summary judgment to enforce the terms of the subject Escrow Agreement. Said agreement was negotiated and signed by all parties, or by their attorneys on behalf of their clients. The agreement clearly

provides that to facilitate the closing of title, the amount of $150,000.00 would be set aside in an escrow account until plaintiffs had obtained variance relief for the non-conforming pool on the subject property, or alternatively, the date of January 31, 2015 came and passed without the granting of such variance relief. The record reflects that the variance in question was never obtained, nor did plaintiffs ever file an application for the necessary relief. Plaintiff failed to provide a reasonable excuse for why a variance application for the pool was never filed. Accordingly, under the stated terms of the agreement, the defendants are entitled to receive $100,000.00 of the monies being held in escrow. The subject agreement further provides that the escrow agent defendant shall be entitled to attorney's fees in the defense of this action, and that issue shall be determined at a future hearing.

The plaintiffs have alleged that the escrow agreement must be rescinded based upon a "mutual mistake". They assert that the mutual mistake derives from the fact that, in the process of preparing to apply for a variance for the pool, they were notified by the Town of East Hampton that there was a shed addition to a structure on the site that required a CO. However, no proof has been submitted to demonstrate that a variance was required for the shed. Nor is there any indication that plaintiffs took any steps to apply for a building permit or CO for said structure. A "mutual mistake of fact exists if a mutual mistake exists at the time the agreement is entered into and must be substantial." Brauer v. Central Trust Co., 77 A.D.2d 239, 433 N.Y.S.2d 304.

At his deposition, Mitchell Mezynieski testified that he was a builder and was aware that any addition to his on the subject property required a building permit and issuance of a CO to be legalized. He further testified that he was aware of the shed addition on his property, which was also reflected on the survey sent to him in September 2014. Since the purchase/sale contract required the production of a CO for all structures on the property, the plaintiffs were certainly aware that the shed addition was to be included. Plaintiffs' contention that the task in obtaining a CO was more complicated than originally anticipated is unavailing and belied by the plaintiffs' admitted experience in construction and the permit process. Even in situations where a party bears the risk of a condition or problem, but moves forward with a deal although he or she has only limited knowledge of the problem, the right to rescind an agreement is waived (Copland v. Nathaniel, 164 Misc.2d 507, 624 N.Y.S.2d 514).

In any event, a possible mistake by plaintiffs concerning the legality of the shed would not have been substantial. Even if the shed was shown to have required variance relief, plaintiffs have not demonstrated why that relief could not have also been sought in the application for the pool variance. Instead, plaintiff elected to completely avoid their obligations under the agreement and opted not to file an application for any relief whatsoever. Under these circumstances, there is no evidence to suggest there was a mutual mistake between the parties, or that the mistake claimed by plaintiff was substantial in nature.

Plaintiffs' assertion that defendants delayed the process by taking two weeks to return an authorization to permit the plaintiffs to file a variance application is without merit, inasmuch as plaintiffs made no attempt to file a variance application at any time after the closing of title. Similarly, plaintiffs' contention that permitting defendants to retain the escrow deposit would result in a windfall to them is without merit. Defendants closed title and paid more than $2,000,000.00 to the plaintiffs in reliance upon the escrow agreement. The parties consciously

determined that plaintiffs' failure to deliver a variance and CO on or before January 31, 2015, would result in the lowering of the purchase price by $100,000.00. Both parties bargained for and agreed to that term, and the amount to be recouped by defendants does not constitute a windfall.

Accordingly, the defendants have demonstrated their entitlement to summary judgment on the First Counterclaim for enforcement of the Escrow Agreement, and awarding them the amount of $100,000.00 from the monies on deposit in the escrow fund. In addition, inasmuch as the Escrow Agreement also entitles the escrow agent to recover attorney's fees in the defense of this action in its capacity of escrow agent, a hearing shall be held to determine the amount of attorneys' fees, if any, to be awarded to the escrow agent, Twomey Latham.

The parties shall contact Chambers to schedule a conference on the issue of attorneys' fees prior to the scheduling of a hearing.

The foregoing constitutes the Order of this Court.

Dated: April 13, 2017

Hon. Denise F. Molia

HON. DENISE F. MOLIA A.J.S.C.