

Bloom v Westreich
2018 NY Slip Op 31063(U)
May 25, 2018
Supreme Court, New York County
Docket Number: 656656/2017
Judge: David B. Cohen
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAVID BENJAMIN COHEN
Justice

PART 58

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JENNIFER BLOOM, BRADLEY BLOOM

INDEX NO. 656656/2017

Plaintiff,

MOTION DATE 1/31/2018

- v -

MOTION SEQ. NO. 001 and 002

ADAM WESTREICH, DAYNA WESTREICH,

Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 98, 99 and 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 100, 101

were read on the applications for Summary Judgment.

Upon the foregoing documents, it is

The following facts are undisputed. On or about July 24, 2017, plaintiffs and defendants entered into a contract (the "Contract") for the sale of 426 shares of 545 Tenants Corp. (the "Corporation"), and the proprietary lease associated with Apartment 8B for the property located at 545 West End Avenue, New York, New York. Pursuant to Section 6.1 of the Contract, the sale of the Apartment was "subject to the unconditional consent of the Corporation." Section 6.3 of the Contract provides that "[i]f the Corporation has not made a decision on or before the Scheduled Closing Date, the Closing shall be adjourned for 30 business days for the purpose of obtaining such consent." The initial closing date was September 10, 2017 and was adjourned to October 20, 2017. Section 6.3 of the Contract also provided "[i]f such consent is refused at any

time, either Party may cancel this Contract by Notice. In the event of cancellation pursuant to this ¶ 6.3, the Escrowee shall refund the Contract Deposit to Purchaser.” On September 27, 2017, plaintiffs received an “official response” from the managing agent stating that the Board of the Corporation has advised that “the sale is conditionally approved subject to the buyers having a guarantor for this purchase. Receipt of a guarantee and financials of the guarantor must satisfy the board for an approval.” Plaintiffs immediately rejected this condition. On October 2, 2017, plaintiffs received a second notification of Board approval, this time with a different condition relating to escrow. On October 3, 2017, plaintiffs rejected the new condition and sent an email terminating of the Contract pursuant to section 6.3. Following receipt of the email the cancellation email, on October 16, 2017, plaintiffs received an email of an unconditional consent to the purchase. Plaintiffs objected to this unconditional consent after termination and demanded the return of its Contract deposit. After defendants refused to return the Contract deposit, plaintiff commenced this action seeking a declaratory judgment that following receipt of the two conditional consents, they were entitled to cancel the Contract and return of the security deposit. Defendants answered and alleged counterclaims including breach of contract and anticipatory repudiation. Both parties moved for summary judgment.

Summary judgment is a drastic remedy that should not be granted where there exists a triable issue of fact (*Integrated Logistics Consultants v. Fidata Corp.*, 131 AD2d 338 [1st Dept 1987]; *Ratner v. Elovitz*, 198 AD2d 184 [1st Dept 1993]). On a summary judgment motion, the court must view all evidence in a light most favorable to the non-moving party (*Rodriguez v. Parkchester South Condominium Inc.*, 178 AD2d 231 [1st Dept 1991]). The moving party must show that as a matter of law it is entitled to judgment [*Alvarez v. Prospect Hosp.*, 68 NY2d 320 324 [1986]]. The 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 eliminate any material issues of fact from the case (*Winegrad v New York Univ. Med. C'tr.*, 64 NY2d 851 [1985]). After the moving party has demonstrated its *prima facie* entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial (*Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

Here, both sides agreed in the Contract that the sale was subject to the Corporation's Board of Directors consent. Thus, plaintiffs agreed to submit documents and to an interview with the Board and otherwise cooperate in good faith to obtain said consent. There is no allegation that plaintiffs did not comply with their side of the deal. On the other hand, defendants agreed that the Board consent would be without condition and "if at any time" such unconditional consent was refused, plaintiffs would be entitled to cancel the contract and return of the Contract deposit. On two separate occasions, the Board did not give its unconditional consent and plaintiffs then exercised their contractual right to terminate the Contract. To the extent that defendants argue that they cured by later offering obtaining an unconditional consent from the Board, that consent was only obtained after plaintiffs had already terminated the Contract, which they were permitted to do "at any time" after the conditional consent was offered. Although defendants argue that they were permitted to offer conditional consents up until the closing date or until they used the word refused, said reading of the Contract is not within the plain meaning of section 6.3. Plaintiffs' motion for sanction based upon allegedly frivolous litigation is denied. Accordingly, it is therefore

ORDERED that plaintiffs' motion for summary judgment is granted; and it is further

ORDERED that defendants' motion for summary judgment is denied; and it is further

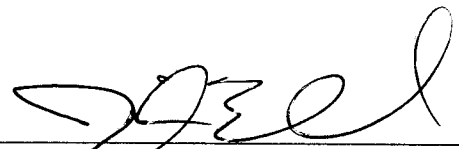
DECLARED that plaintiffs were entitled to cancel the Contract; and it is further

DECLARED that plaintiffs are entitled to return of the Contract deposit; and it is further ORDERED that defendants shall cause the Contract deposit to be returned to plaintiffs within 15 days of this Order, along with interest accrued at the statutory rate of 9% from October 11, 2017; and it is further

ORDERED that should defendant fail to comply with any of the above Order paragraphs, upon letter from plaintiffs' attorneys and affidavit of non-compliance, the Clerk may enter judgment against defendants for any deficient amount.

This constitutes the decision and order of the Court.

5/25/2018
DATE


DAVID BENJAMIN COHEN, J.S.C.
HON. DAVID B. COHEN
J.S.C.

CHECK ONE:

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CASE DISPOSED
GRANTED
SETTLE ORDER
DO NOT POST

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DENIED

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NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

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OTHER

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REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: