

Sanjana v King
2018 NY Slip Op 31172(U)
June 8, 2018
Supreme Court, New York County
Docket Number: 153650/2017
Judge: Arlene P. Bluth
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NYSCEF DOC. NO. 43.

RECEIVED NYSCEF: 06/11/2018

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32**

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JUJO U. SANJANA and JUDY U. BOND

Plaintiffs,

-against-

**JAMES KING, KAREN KING and
LEWIS JOHS AVALLONE AVILES LLP,**

Defendants.
----- X

**Index No. 153650/2017
Motion Seq: 001**

DECISION & ORDER

HON. ARLENE P. BLUTH

The motion by plaintiffs for summary judgment is denied and the cross-motion by defendants for summary judgment dismissing the complaint is granted.

Background

This case arises out a failed real estate transaction. Plaintiffs attempted to purchase a condominium owned by defendants James and Karen King located at 524 East 72nd Street in Manhattan. Plaintiffs and the Kings entered into a contract of sale for the condo on January 26, 2017 and plaintiffs submitted a downpayment of \$110,000. The contract contained a mortgage contingency clause which provided that: "The obligations of Purchaser hereunder are conditioned upon issuance on or before thirty (30) days from the date hereof (the "Commitment Date") of a written commitment from an Institutional Lender pursuant to which such Institutional Lender agrees to make a loan other than a VA, FHA or other governmentally insured loan to Purchaser,

at Purchaser's sole cost and expense, of \$800,000 or such lesser sum as Purchaser shall be willing to accept" (NYSCEF Doc. No. 22, ¶ 23).

The contract also required that "If such commitment is not issued on or before the Commitment Date, then, unless Purchaser has accepted a commitment that does not comply with the requirements set forth above, Purchaser may cancel this Contract by giving Notice to the Seller within 5 business days after the Commitment Date, in which case this Contract shall be deemed cancelled and thereafter neither party shall have any further rights against, or obligations or liabilities to, the other by reason of this Contract except that the Downpayment shall be promptly refunded to Purchaser . . . *If Purchaser fails to give Notice of cancellation or if Purchaser shall accept a commitment that does not comply with the terms set forth above, then Purchaser shall be deemed to have waived the Purchaser's right to cancel this Contract and to receive a refund of the Downpayment by reason of the contingency contain in this para. 23*" (*id.* [emphasis added]).

On February 15, 2017, plaintiffs were conditionally approved for a mortgage by Quicken Loans. This approval identified numerous conditions that had to be satisfied before the mortgage would be approved and plaintiffs were asked to provide information, such as the condo's bylaws and master deed.

On March 10, 2017 (after the time to cancel the contract had passed), Quicken Loans declined to provide plaintiffs with financing on the ground that the premises were an unacceptable property type. The lender chose not to follow through with the mortgage because the condo's HOA did not contribute at least 10% of their monthly dues to a reserve account. Plaintiffs claim that they informed the Kings that their mortgage approval was revoked on March

14, 2017.

Plaintiffs' attorney sent a letter to the Kings' attorney on March 29, 2017 stating that "my clients never received a commitment. They received a conditional commitment which was revoked" and demanding a return of the downpayment (NYSCEF Doc. No. 14). The Kings' attorney sent a letter to plaintiffs' counsel on April 3, 2017 that refused to return the downpayment because plaintiffs failed to give notice of cancellation within 5 days of February 25, 2017 (the Commitment Date) (NYSCEF Doc. No. 16). The Kings' attorney noted that "the Sellers intend to proceed with a TIME OF THE ESSENCE closing which will be held in our office on April 10, 2017 at 10:00 a.m." (*id.*). Plaintiff then commenced the instant action seeking a return of the downpayment.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City*

of New York, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *aff'd* 99 NY2d 647, 760 NYS2d 96 [2003]).

"A mortgage contingency clause is construed to create a condition precedent to the contract of sale. The purchaser is entitled to return of the down payment where the mortgage contingency clause unequivocally provides for its return upon the purchaser's inability to obtain a mortgage commitment within the contingency period. However, when the lender revokes the mortgage commitment after the contingency period has elapsed, the contractual provision relating to failure to obtain an initial commitment is inoperable, and the question becomes whether the lender's revocation was attributable to bad faith on the part of the purchaser" (*Blair v O'Donnell*, 85 AD3d 954, 955, 925 NYS2d 639 [2d Dept 2011] [internal quotations and citations omitted]).

Plaintiffs move for summary judgment on the ground that a mortgage contingency clause is simply a condition precedent to the contract of sale and that where a purchaser is unable to obtain a mortgage, the purchaser is entitled to a return of the downpayment.

In opposition and in support of their cross-motion, defendants claim that the instant motion by plaintiffs is premature. Defendants insist that they need discovery to assess whether plaintiffs acted in bad faith in trying to cancel the contract. Defendants also contend that they are

entitled to summary judgment because plaintiffs had an obligation under the contract to obtain a firm commitment as opposed to a contingent approval. Defendants claim that plaintiffs waived the mortgage contingency clause by failing to cancel the contract or, at the very least, request an extension until Quicken Loans' contingent approval was finalized.

The critical question, then, is whether the conditional approval letter from Quicken Loans satisfied the requirement that plaintiffs receive a written commitment from an institutional lender. If the letter was a commitment, then the Court must analyze whether the revocation of that commitment was caused by plaintiffs' bad faith. But there is no need to evaluate plaintiffs' bad faith if a commitment was never obtained.

Any consideration of whether the conditional approval constitutes a commitment must begin with the definition of a mortgage commitment. "According the term mortgage commitment its ordinary dictionary meaning, a formal written communication setting forth the terms and conditions of the mortgage loan was required to satisfy the mortgage contingency clause" (*Carpenito v Balint*, 145 AD2d 458, 459, 535 NYS2d 100 [2d Dept 1988] [citing Black's Law Dictionary]).

At least one Court has held under similar circumstances that a conditional mortgage commitment letter is not a mortgage commitment (*see Eves v Bureau*, 13 AD3d 1004, 1005, 788 NYS2d 311 [3d Dept 2004] [finding that a seller properly exercised the right to cancel a contract of sale where plaintiff had four weeks to get a mortgage commitment and only obtained a conditional mortgage commitment in that time period]).

The initial letter from Quicken Loans granting the conditional approval identified 18 separate items plaintiff was required to send in and emphasized that "Once we receive the items

from you and the third parties, we will conduct a final review of the loan documents. As soon as we complete the review and issue a final approval, we will contact you to coordinate closing” (NYSCEF Doc. No. 11). And the letter from Quicken Loans denying financing states that “We are unable to offer you financing at this time” (NYSCEF Doc. No. 12).

Under these circumstances, the Court finds that plaintiffs never obtained a mortgage commitment pursuant to the contract. Plaintiffs only received a letter from a lender offering preliminary approval and detailing the steps that were required in order to receive a commitment. There is no logical way to construe the initial letter from Quicken Loans as a written commitment pursuant to the contract. In fact, plaintiffs’ attorney wrote in his March 29, 2017 letter to the Kings’ attorney that plaintiffs “never received a commitment” (NYSCEF Doc. No. 14).

To view a conditional approval as a commitment would require the Court to ignore the significance of the mortgage contingency provision, which created a deadline to move the sale along. Plaintiffs cannot obtain a de facto extension of that deadline because they chose to wait for Quicken Loans’ decision rather than seek a mortgage from a different lender or seek an extension from defendants. Because the Court finds that plaintiff never obtained a mortgage commitment, it need not consider the issue of the revocation and plaintiffs’ purported bad faith. Obviously, if there was no mortgage commitment, then it could not be revoked because of plaintiff’s bad faith.

This finding— that plaintiffs did not get a commitment— is critical because the contract gave plaintiffs the right to get back the downpayment if they cancelled the contract within 5 days after the Commitment Date. It is undisputed that plaintiffs did not cancel or ask for an extension while they awaited final approval from Quicken Loans. Instead, plaintiffs did nothing until

Quicken Loans concluded that it could not provide financing to plaintiffs. Therefore, the Court grants defendants' cross-motion for summary judgment dismissing the complaint because plaintiffs did not get a mortgage commitment or timely cancel the contract.

While losing the entire downpayment might be a harsh outcome, this Court cannot rewrite a term of a contract signed by the parties. The parties agreed that plaintiffs would not be obligated to purchase and would get their downpayment back if they failed to get a mortgage commitment as long as they gave the sellers notice within five days of the commitment date. Otherwise, if plaintiffs did not timely exercise their option to cancel, then plaintiffs waived the contingency and were obligated to purchase with or without a mortgage. It is undisputed that they did not exercise their right to cancel. Plaintiffs chose to take a risk that Quicken Loans would agree to finance their purchase of the apartment. When the purchasers failed to close, the contract gives the sellers the right to keep the downpayment.

The cases cited by plaintiffs do not require this Court to order defendants to return the downpayment. There is no indication in *Blair* (cited above) that the mortgage commitment was a "conditional approval" similar to the one from Quicken Loans or that the contract of sale contained a provision that the buyer risked waiving the downpayment if he or she did not timely cancel the contract under the mortgage contingency clause.

Of course, as a general matter, it makes sense to allow a buyer to get back the downpayment where a lender revokes financing *after* making a commitment. But that is not what happened here. Quicken Loans only offered a conditional approval (far from a commitment) and then decided not to approve the mortgage upon review of the relevant documentation. Although plaintiffs eventually tried to cancel the contract after Quicken Loans

revoked the conditional approval, that occurred long after the deadline (5 days after the Commitment Date). The fact is that plaintiffs had the option to cancel the contract or ask for an extension when it became obvious that Quicken Loans had not issued a final approval by the deadline. There is nothing in the record to suggest that plaintiffs made an effort to do anything by this deadline.

Summary

It is important to remember that plaintiffs and the Kings had entered into a contract of sale for the apartment. That contract took the apartment off the market and set deadlines to complete the transaction. One deadline gave plaintiffs four weeks to get a mortgage commitment. In those four weeks, plaintiffs only obtained a conditional approval from Quicken Loans. Even though a final decision from Quick Loans was outstanding, plaintiffs did not cancel the contract or seek an extension as the Commitment Date approached. Instead, plaintiffs did nothing and the Commitment Date passed without any communication from plaintiffs to the Kings.

The Court cannot ignore the fact that plaintiffs did not comply with a clear provision of the contract. The Court cannot effectively grant plaintiffs an extension of the mortgage contingency clause or rewrite that provision because it has a harsh outcome. For some reason, plaintiffs ignored a deadline and now ask this Court to overlook that fact. But this Court cannot ignore a clear and unequivocal contract provision because a lender ultimately concluded that it would not provide financing to plaintiffs. Plaintiffs signed a contract stating that they would waive their downpayment if they did not get a mortgage commitment or timely cancel the contract within a certain time period—plaintiffs failed to comply.

NYSCEF DOC. NO. 43

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Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment is denied, defendant's cross-motion for summary judgment dismissing the complaint is granted and the clerk is directed to enter judgment accordingly.

This is the Decision and Order of the Court.

Dated: June 8, 2018
New York, New York



ARLENE P. BLUTH, JSC

HON. ARLENE P. BLUTH
J.S.C.