

Kiaton LLC v Chan
2018 NY Slip Op 31702(U)
July 13, 2018
Supreme Court, New York County
Docket Number: 656305/2017
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED

PART

IAS MOTION 2

Justice

-----X

INDEX NO. 656305/2017

KIATON LLC,

Plaintiff,

MOTION SEQ. NO. 001

- v -

CHARLENE CHAN, IAN MILLER, and PAMELA WEST,

Defendants.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32
were read on this motion to/for VACATE LIEN/CONSOLIDATE

Upon the foregoing documents, it is hereby ordered that the motion is decided as follows.

In this action seeking declaratory relief as well as damages for breach of contract, defendants Charlene H. Chan (“Chan”), Ian J. Miller (“Miller”), and Pamela West (“West”) move, by order to show cause, to 1) cancel a notice of pendency filed by plaintiff Kiaton, LLC (“Kiaton”) due to its alleged failure to comply with CPLR 6501 and/or 6514(b); and 2) consolidate this action with an action commenced in this Court styled *Ian J. Miller and Charlene Chan v Kiaton, LLC*, under New York County Index Number 158771/17 (“the Miller/Chan action”). After oral argument, and after a review of the parties’ papers and the relevant statutes and case law, the motion is granted in part.

FACTUAL AND PROCEDURAL BACKGROUND:

This action arises from the failure of the parties to consummate a real estate transaction. Pursuant to a contract of sale, plaintiff agreed to purchase Unit 5A of the Maison East Condominium, located at 1438 Third Avenue in Manhattan (“the unit”) from defendants Miller and Chan. Doc. 18.¹ Defendant West, an attorney, was the escrowee under the contract. Doc. 12, at pars. 2, 6. Kiaton made a contract deposit of \$99,000 in connection with the transaction pursuant to paragraph 1.17.1 of the contract of sale. Doc. 18. Paragraph 12 of the contract of sale provided as follows:

12. Purchaser’s Lien: The Contract Deposit and all other sums paid on account of this Contract * * * are hereby made a lien upon the Unit, but such lien shall not continue after default by [Kiaton]...”

Doc. 18, at par. 12.

The second rider to the contract of sale provided that Chan and Miller “acknowledge[d] that the [c]losing must take place on or before August 4, 2017.” Doc. 18, Second Rider to Contract of Sale, at par. 9. In the event the closing did not take place by that date, Kiaton was to “have the right to cancel [the contract of sale], and [Chan and Miller] were to return [Kiaton’s] deposit within three (3) business days.” Id. On August 4, 2017, Kiaton appeared at the closing ready, willing and able to close but the closing could not proceed due to certain violations and issues relating to the certificate of occupancy. Doc. 12, at par. 18. When the sale failed to transpire, Kiaton sent West a letter by overnight mail on August 7, 2017 advising her that it was exercising its right to cancel the contract of sale. Doc. 12, at pars. 2, 20; Ex. C to Doc. 12. However, West failed to return the contract deposit within 3 days, as required by the contract of sale. Doc. 12, at par. 22; Doc. 18, second rider to contract of sale, at par. 9 (b).

¹ All references are to the documents filed with NYSCEF in this action.

The Miller/Chan action was commenced by filing a summons and verified complaint on October 2, 2017. NYSCEF Docs. 1 and 2, filed under Index No. 158771/17. In their complaint, Miller and Chan alleged that Kiaton breached the contract of sale and that, as a result, they were entitled to costs and attorneys' fees. Id.

On October 10, 2017, Kiaton filed a notice of pendency against the unit, Chan and Miller. Doc. 5. The same day, Kiaton commenced the captioned action against Chan, Miller, and West by filing a summons and verified complaint. Doc. 12. As a first cause of action, Kiaton alleged that it is entitled to a declaration that: 1) it has a valid vendee's lien in the amount of the contract deposit, plus reasonable expenses; 2) the contract of sale was cancelled and terminated by Kiaton no later than August 8, 2017 and thus Kiaton is entitled to the return of its contract deposit; and 3) defendants must return the contract deposit to Kiaton. Doc. 12, at par. 30. As a second cause of action, Kiaton alleged that defendants breached the contract of sale by failing to refund its contract deposit within three days after it terminated the contract of sale, and that it is thus entitled to damages of \$99,000, plus interest, costs and disbursements. Doc. 12, at pars. 32-35.

Chan, Miller and West joined issue by their verified answer filed November 2, 2017. Doc. 81.

By order to show cause dated November 3, 2017, defendants moved for the relief sought herein. Kiaton opposes only that branch of the application seeking to vacate the notice of pendency.

LEGAL CONCLUSIONS:**Motion to Vacate Lis Pendens**

Defendants argue that the Kiaton's notice of pendency must be vacated because its complaint seeks money damages and does not relate to the possession, use or enjoyment of real property.

[A] notice of pendency is authorized to be filed in an action seeking a judgment that would affect the title to, or possession, use, or enjoyment of, real property (CPLR 6501; *see 5303 Realty Corp. v O & Y Equity Corp.*, 64 NY2d 313 [1984]; *Nastasi v Nastasi*, 26 AD3d 32, 805 NYS2d 585 [2d Dept 2005]). While an action merely seeking the return of a purchaser's down payment is not ordinarily an appropriate ground for the imposition of a notice of pendency (*see Tsiporin v Ziegel*, 203 AD2d 451 [2d Dept 1994]) * * * the parties' agreement specifically provides for the imposition of a lien against the subject premises for any sums paid under the contract [of sale]. [Doc. 18, at par. 12]. Thus, the portion of defendants' [application] seeking the cancellation of the notice of pendency is denied.

Yarde v Artoglou, 2012 NY Slip Op 32793(U), *6 (Sup Ct, Suffolk County 2012).

Motion to Consolidate

Defendants seek to consolidate the captioned action with the Chan/Miller action and Kiaton agrees that the cases should be consolidated. This Court, in its discretion (*see Suarez v Home Dynamix, LLC* 148 AD3d 429 [1st Dept 2017]; *Geneva Temps, Inc. v New World Communities, Inc.*, 24 AD3d 332 [1st Dept 2005]), declines to permit a true consolidation of the two actions since it will result in Chan and Miller as both plaintiffs and defendants in the consolidated action. "If one party would find [his or] herself on both sides of the versus sign if the cases were merged, then joint trial is probably preferable to consolidation just to avoid confusing the jury." Siegel, NY Prac § 127 at 257, n. 2 (6th ed 2018) citing *Padilla v Greyhound Lines, Inc.*, 29 AD2d 495 (1st Dept

1968); *see also Geneva Temps*, 24 AD3d at 335 (consolidation denied to avoid confusion where a party would have been both a plaintiff and defendant). This Court further notes that the proposed caption in what defendants' counsel asks to be the consolidated action (Doc. 10, at p. 7) is without any legal or factual basis. The proposed caption names Miller and Chan as plaintiffs and Kiaton as defendant. *Id.* It then names Kiaton as a third-party plaintiff and Chan, Miller, and West as third-party defendants. *Id.* However, there is no third-party complaint by Kiaton and there is no basis for converting Kiaton's claims into third-party claims against defendants.

Nevertheless, given that the two actions involve common questions of law and fact, i.e., whether Kiaton properly cancelled the contract of sale and whether it is entitled to the return of its contract deposit, and that the same evidence will be required in both actions, as well as the fact that the parties agree that the cases should be heard together, this Court grants that branch of the motion seeking consolidation but only to the extent of ordering joint discovery and trial. *Geneva Temps*, 24 AD3d at 335 (citations omitted).

In light of the foregoing, it is hereby:

ORDERED that that the branch of defendants' application seeking to vacate the notice of pendency filed by plaintiff is denied; and it is further

ORDERED that the branch of defendants' motion seeking consolidation of the captioned action with the matter styled *Ian J. Miller and Charlene Chan v Kiaton, LLC*, pending under New York County Index Number 158771/17, is granted to the extent that the actions are consolidated for joint discovery and trial; and it is further

ORDERED that the above-captioned action and the matter of *Ian J. Miller and Charlene Chan v Kiaton, LLC*, pending under New York County Index Number 158771/17, shall proceed under separate captions and index numbers; and it is further

ORDERED that the Clerk is directed to transfer the matter of *Ian J. Miller and Charlene Chan v Kiaton, LLC*, pending under New York County Index Number 158771/17, to the Part 2 inventory for joint discovery and trial with the captioned action; and it is further

ORDERED that, within 20 days after this order is uploaded to NYSCEF, counsel for defendants shall serve a copy of this order, with notice of entry, on counsel for plaintiff, as well as on the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), in accordance with the e-filing protocol, and the Clerks shall mark their records to reflect the consolidation for the purpose of joint discovery and trial; and it is further

ORDERED that a preliminary conference will be held in the above-captioned action, as well as in the matter of *Ian J. Miller and Charlene Chan v Kiaton, LLC*, pending under New York County Index Number 158771/17, on November 27, 2018 at 2:15 p.m. at 80 Centre Street, Room 280; and it is further

ORDERED that this constitutes the decision and order of the court.

7/13/2018

DATE

CHECK ONE:

☐ CASE DISPOSED

☐ GRANTED

☐ SETTLE ORDER

☐ INCLUDES TRANSFER/REASSIGN

☐ DENIED

☒ NON-FINAL DISPOSITION

☒ GRANTED IN PART

☐ SUBMIT ORDER

☐ FIDUCIARY APPOINTMENT

☐ OTHER

☐ REFERENCE

APPLICATION:

CHECK IF APPROPRIATE:



KATHRYN E. FREED, J.S.C.