

Turofsky v Sukoff
2018 NY Slip Op 32747(U)
October 15, 2018
Supreme Court, Kings County
Docket Number: 523288/17
Judge: Dawn M. Jimenez-Salta
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At an IAS Part 88 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 15th day of October, 2018.

P R E S E N T:

HON. DAWN JIMENEZ-SALTA

Justice.

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BENJAMIN TUROFSKY,

Plaintiff,

- against -

Index No. 523288/17

MOT Seqs #1 + #2

LIBBY SUKOFF, H. ROTH AND PARTNERS, LLC,
JAMES CAFFREY AND BAMUNDO, ZWAL &
SCHERMERHORN, LLP, AS ESCROWEE,

Defendant.

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The following papers numbered 1 through 11 read herein:

Papers Numbered:

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____

1-3 4-8
5-8 9-11
9-11

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Upon the foregoing papers in this breach of contract action, plaintiff Benjamin Turofsky (Turofsky) moves for an order, pursuant to CPLR 3212, granting him summary judgment on the first, third¹ and fifth causes of action in the complaint against defendant Libby Sukoff (Sukoff), entitling him to recover his \$25,000 down payment.

¹ Although Turofsky's notice of motion states that he is only moving on the first and fifth causes of action, his moving papers seek summary judgment on the first, *third* and fifth causes of action. In the absence of any prejudice to defendants, the motion will include the third cause of action, pursuant to CPLR 2001.

Defendants, Sukoff, H. Roth and Partners, LLC (H. Roth), James Caffrey (Caffrey) and Bamundo, Zwal & Schermerhorn, LLP, as escrowee (BZ&S), cross-move for an order: (1) granting them summary judgment dismissing the complaint and granting them judgment on their counterclaims, pursuant to CPLR 3212; (2) vacating the Vendee's Liens filed by Turofsky; and (3) directing Turofsky to reimburse them for their counsel fees.

Background

The H. Roth and Sukoff Contracts

By a December 23, 2016 Residential Contract of Sale, H. Roth agreed to sell the residential property at 2585 Ocean Avenue in Brooklyn (H. Roth Property) to Turofsky for \$900,000 (H. Roth Contract). Caffrey executed the H. Roth Contract on behalf of H. Roth. Turofsky, pursuant to the H. Roth Contract, made a \$25,000 down payment payable to BZ&S as "Escrow Agent."

By a December 23, 2016 Residential Contract of Sale, Edward and Libby Sukoff agreed to sell their neighboring residential property at 2589 Ocean Avenue in Brooklyn (Sukoff Property) to Turofsky for \$900,000 (Sukoff Contract).² Turofsky, pursuant to the Sukoff Contract, made a \$25,000 down payment payable to BZ&S as "Escrow Agent."

Paragraphs 29 of the rider to the Sukoff Contract and paragraph 30 of the rider to the H. Roth Contract both provide that the Contract is "contingent upon the closing" of the other Contract and that the Sukoff and H. Roth Contracts "shall close simultaneously . . ."

² Edward Sukoff subsequently died on June 9, 2017, and defendant Libby Sukoff allegedly "succeeded to his interest as joint tenant by the entirety" (complaint at ¶ 7).

Paragraph 30 of the rider to the Sukoff Contract and paragraph 31 of the rider to the H. Roth Contract both provide that the Contracts are also contingent upon Turofsky obtaining preliminary approval to rezone the Sukoff and H. Roth Properties:

*“The closing shall occur on or before July 1, 2018. *This sale is contingent upon purchaser receiving preliminary approval of his application to amend the zoning classification of the properties, which purchaser shall diligently pursue. If said application is not deemed viable by June 15, 2017, then either party may cancel [the] contract and the downpayment shall be returned. If the purchaser proceeds with the contract then downpayment shall not be refundable” (emphasis added).*

Thus, the parties had the right to cancel the Sukoff and H. Roth Contracts by June 15, 2017 if Turofsky’s rezoning application was “not deemed viable.”

Regarding disputes concerning the down payments, paragraph 16 of the rider to the Sukoff Contract and paragraph 17 of the rider to the H. Roth Contract both provide, in relevant part, that:

“If a dispute arises as to when the Escrow Agent is obligated to disburse the Down-Payment or as to whom the same is to be disbursed, the Escrow Agent shall not be obligated to disburse the escrow amount but in such event may hold same in escrow as provided herein. The Purchaser must, within ninety (90) days of giving notice of such dispute, commence litigation against the Seller to resolve the dispute. Seller’s attorney is authorized to accept service of the Summons and Complaint within said time[] period so that the litigation may be commenced. If [the] Summons and Complaint is not received by Seller’s attorney within said time period, then the Escrow Agent shall be authorized to release the escrow funds to the Seller without any further notice” (emphasis added).

Paragraph 32 of the rider to the H. Roth Contract further provides that:

“The Purchaser shall payoff the existing note/mortgage of Seventy Five Thousand (\$75,000) Dollars between Peter Bacarella & Tina Bacarella and William R. Santo, as Trustee of Frank J. Santo, PC profit sharing trust dated October 31, 2016, by July 1, 2017, unless Purchaser cancels this contract prior to June 15, 2017, this money will be deducted from the purchase price at closing. If purchaser cancels this contract after July 1, 2017, once the note/mortgage set forth herein is paid off, the Purchaser shall forfeit the Seventy Five Thousand (\$75,000) Dollars paid to satisfy said note/mortgage” (emphasis added).

Paragraph 20 of the riders to both the Sukoff and H. Roth Contracts provide that “[i]f litigation is commenced in connection with this contract of sale, the losing party shall pay all court costs and reasonable attorneys’ fees of the prevailing party.”

Defendants’ Termination Notice

After the June 15, 2017 deadline for the rezoning application and the mortgage payoff, Caffrey, on behalf of Sukoff and H. Roth, sent an August 22, 2017 notice to Turofsky’s attorney advising that “[y]our client has not performed his agreed upon obligations under the contracts of sale . . . and as a result is now in default” (Termination Notice). The Termination Notice further advised that Sukoff and H. Roth were cancelling their Contracts and retaining Turofsky’s \$25,000 down payments as liquidated damages.

Turofsky’s counsel, in response, sent Caffrey an August 30, 2017 letter advising that “your actions and letter wrongfully terminating the Sukoff contract constitutes an anticipatory breach of such contract” and demanded the immediate return of Turofsky’s down payment.

Turofsky's counsel further advised that "[a]bsent the immediate refund and return of the downpayments, my client will have no choice but to immediately file a vendee's lien on both properties, and to commence litigation to foreclose upon such liens."

Turofsky, on December 3, 2017, filed vendee's liens against both Properties.

Turofsky's Breach of Contract Action

Turofsky, on December 3, 2017 (*103 days after* defendants' Termination Notice), commenced this action against Sukoff, H Roth and BZ&S seeking the return of his down payments based on the following causes of action: (1) breach of contract against Sukoff; (2) breach of contract against H. Roth and Caffrey; (3) unjust enrichment against Sukoff; (4) unjust enrichment against H. Roth and Caffrey; (5) foreclosure of the vendee lien filed against the Sukoff Property; (6) foreclosure of the vendee lien filed against the H. Roth Property; and (7) gross negligence and bad faith against Caffrey and BZ&S.³

Sukoff and H. Roth, on February 26, 2018, collectively answered the complaint, admitted several of the allegations therein,⁴ and asserted three counterclaims against Turofsky. The first and second counterclaims allege that Turofsky breached the Sukoff and H. Roth Contracts, respectively, by "fail[ing] to diligently pursue an application to amend the zoning classification of the premises . . ." and failing to "exercise [his] option to cancel the contract by June 15, 2017" in accordance with the terms of the Sukoff and H. Roth Contracts

³ By a February 22, 2018 stipulation, Turofsky voluntarily discontinued this action as against Caffrey and BZ&S. Consequently, Turofsky's seventh cause of action was withdrawn.

⁴ In the answer, defendants admitted paragraphs 3-6, 8, 9, 12, 14, 16, 19-21, 24, 26, 41 and 61-65 of the complaint.

(answer at ¶¶ 8-10 and 24-26). The third counterclaim alleges that Turofsky breached paragraph 32 of the rider to the H. Roth Contract by failing to pay off the \$75,000 mortgage encumbering the H. Roth Property (*id.* at ¶¶ 39-41). Turofsky, on May 9, 2018, filed his reply to defendants' counterclaims.

The Summary Judgment Motion and Cross Motion

Turofsky, on May 9, 2018, moved for summary judgment on his first, third and fifth causes of action asserted against Sukoff, and for a declaration that he is entitled to the return of his \$25,000 down payment. Turofsky contends that “the Complaint, combined with the admissions contained in the Answer, removes all questions of fact from this action and makes it ripe and ready for disposition by summary judgment.”

Turofsky argues that he is entitled to summary judgment because “Sukoff’s notice of termination in August 2017 anticipatorily terminated a contract that was not scheduled to close until July 2018” and that “[t]here was no contingency in the Sukoff Contract . . . other than his obligation to close before July 2018 simultaneously with the H. Roth Contract.” Turofsky submitted an affidavit in which he attests that “[a]fter executing the contracts of sale and making the \$25,000 down payments under each contract, [he] began diligently pursuing the rezoning of the properties” and “retained the services of a law firm which specializes in such rezonings. . .” Turofsky further attests that “[b]ased on the Sukoff’s termination of the Sukoff contract [he] was deprived of [his] ability to seek the rezoning and

close on both transactions.” Other than his affidavit, Turofsky submits no evidence that he diligently pursued the rezoning of the Sukoff and H. Roth Properties.

Defendants oppose Turofsky’s summary judgment motion and cross-move for summary judgment dismissing the complaint and granting them judgment on their counterclaims, vacating the vendee’s liens filed against the Sukoff and H. Roth Properties and directing Turofsky to reimburse them for their counsel fees. Defendants assert that Turofsky breached both the Sukoff and H. Roth Contracts by failing to exercise due diligence in applying for preliminary approval of a rezoning application, and that “[h]is self-serving statement that he exercised due diligence on seeking rezoning . . . is not supported by any evidence . . .” Defendants contend that “[t]he verified answers and counterclaims of Sukoff and H Roth alone demonstrate[] issues of fact sufficient to preclude summary judgment in favor of the Plaintiff.” In addition, defendants argue that Turofsky breached the H. Roth Contract by failing to pay the mortgage encumbering the H. Roth Property by July 1, 2017, as required under paragraph 32 of the rider to the H Roth Contract. According to defendants, this breach “rendered its compliance with [the] Sukoff [Contract’s] simultaneous closing provision impossible, which is a second default on the Sukoff contract.”

Defendants submitted affidavits from Sukoff and Peter Bacarella (Bacarella), the managing agent of the H. Roth Property, both of whom attest that Turofsky offered to purchase both the Sukoff and H. Roth Properties with the intention of combining the lots and building upon them. To combine the lots, Turofsky was required to have the residential

zoning changed from R41 to R7A. According to Bacarella, Turofsky failed to pay off the \$75,000 mortgage on the H. Roth Property by the July 1, 2017 deadline. In addition, Bacarella attests that Turofsky requested an extension of the July 1, 2017 deadline for him to cancel the Sukoff and H. Roth Contracts because he was waiting for a response from the Community Board regarding his rezoning application. Bacarella attests that he contacted the office of City Planning and learned that Turofsky had not made a formal application for a zoning change as of July 17, 2017. When Turofsky advised Bacarella that he was scheduled to meet with the Community Board in August 2017, Bacarella confirmed that the Community Board had no public meetings scheduled in July or August. Upon learning that Turofsky had failed to timely file his application seeking rezoning approval from the Community Board, Bacarella directed his counsel to issue the Termination Notice.

Defendants further note that their Termination Notice was served on Turofsky's counsel on August 22, 2017 and, pursuant to the terms of the Sukoff and H. Roth Contracts, Turofsky had ninety days from the date of the Termination Notice (until November 20, 2017) to commence litigation for any disputes regarding the down payments. They contend that "[d]efendants are entitled to receive both down payments as a result of the [p]laintiff's failure to commence litigation by November 20, 2017." Finally, defendants argue that the vendee's liens should be vacated and, under the terms of the Sukoff and H. Roth Contracts, they are entitled to reimbursement of their counsel fees.

Turofsky, in further support of his summary judgment motion and in opposition to defendants' cross motion, submits the affidavit of Adam Rothkrug, Esq. (Rothkrug), his zoning counsel, to demonstrate what efforts he made regarding the rezoning application. Rothkrug attests that he attended a May 26, 2017 "scoping meeting" with the Brooklyn Office of the Department of City Planning, at which time he received "comments and suggestions" regarding the rezoning proposal. Rothkrug further attests that the Office of City Planning "provided very favorable feedback and advised that the rezoning application was deemed appropriate for filing" on May 31, 2017.

Rothkrug attests that, in June 2017, he requested a pre-application meeting with the Land Use Committee of local Community Board 15 and, subsequently, on August 8, 2017, he "made a presentation [of] the rezoning application to the chairperson of the Board and its Zoning and Land Use Committee." Rothkrug submits two letters to Community Board 15, dated July 10, 2017 and July 18, 2018, both requesting "an opportunity to meet with you to discuss a possible zoning map amendment . . ." Turofsky submits an affidavit in which he attests that he sought an extension of the July 1, 2017 deadline to cancel the Contracts if the rezoning application was not viable because "there was a delay in the scheduling of the meeting with the local Community Board."

Discussion

Summary judgment is a drastic remedy and should be granted only when it is clear that no triable issues of fact exist (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). The moving party bears the burden of prima facie showing its entitlement to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of any material issue of fact (*see* CPLR 3212 [b]; *Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]). Failing to make that showing requires denying the motion, regardless of the adequacy of the opposing papers (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 502 [2012]; *Ayotte v Gervasio*, 81 NY2d 1062 [1993]). Making a prima facie showing then shifts the burden to the opposing party to produce sufficient evidentiary proof to establish the existence of material factual issues (*see Alvarez*, 68 NY2d at 324; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Accordingly, issue-finding rather than issue-determination is the key in deciding a summary judgment motion (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404, [1957], *rearg denied* 3 NY2d 941 [1957]). “The court’s function on a motion for summary judgment is to determine whether material factual issues exist, not resolve such issues” (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2010] [internal quotation marks omitted]).

Here, defendants are entitled to summary judgment dismissing the complaint and granting them a judgment on their three counterclaims for breach of the Sukoff and H. Roth Contracts.

The Sukoff and H. Roth Contracts both provide that “[t]his sale is contingent upon purchaser receiving preliminary approval of its application to amend the zoning classification of the propert[ies] . . .” The Contracts further provide that either party may cancel the Contracts “[i]f said application is not deemed viable by June 15, 2017 . . .” Thus, Turofsky, at a minimum, was required to file his rezoning application with the Community Board prior to the June 15, 2017 deadline set forth in the Contracts. The record evidence proves that Turofsky took some preliminary steps towards his rezoning application, yet failed to file any formal rezoning application on or before the June 15, 2017 deadline. Turofsky thus breached both the Sukoff and H. Roth Contracts, and defendants justifiably terminated the Contracts in the Termination Notice, based on Turofsky’s failure to timely file a rezoning application. For this reason, defendants are entitled to summary judgment on their first and second counterclaims.

While the same Contract provision states that “the downpayment shall be returned” if the Contracts are cancelled based on Turofsky’s failure to diligently pursue a zoning reclassification, Turofsky failed to timely commence litigation challenging the forfeiture of his down payments. Both the Sukoff and H. Roth Contracts unambiguously provide that disputes regarding the disbursement of Turofsky’s down payments must be commenced “within ninety (90) days of giving notice of such dispute . . .” The Sukoff and H Roth Contracts further provide that Turofsky’s failure to timely commence such litigation authorizes the Escrow Agent “to release the escrow funds to the Seller[s] . . .” Turofsky does

not dispute that he failed to commence this litigation within 90 days after he received the August 22, 2017 Termination Notice, in which Caffrey unequivocally advised Turofsky's counsel that **"THE SELLERS SHALL RETAIN THE CONTRACT DEPOSITS AS LIQUIDATED DAMAGES STEMMING FROM YOUR CLIENT'S DEFAULT."** Instead, Turofsky belatedly commenced this action on December 3, 2017, more than 90 days after he received the August 22, 2017 Termination Notice. Consequently, under the plain terms of the Contracts, Sukoff and H. Roth are entitled to retain the \$25,000 down payments.

Regarding the third counterclaim, Turofsky fails to address, much less dispute, that he breached the H. Roth Contract by failing to pay off the \$75,000 note/mortgage on or before the July 1, 2017 deadline, as required by paragraph 32 of the rider to the H. Roth Contract. Consequently, defendants are entitled to summary judgment on their third counterclaim.

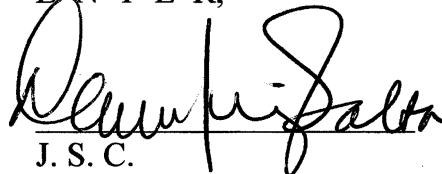
Finally, inasmuch as paragraph 20 of the riders to both the Sukoff and H. Roth Contracts entitle a prevailing party to reimbursement of reasonable attorney's fees, the matter is hereby referred to a special referee to hear and report on the amount of reasonable legal fees incurred by defendants in this litigation with a date to be fixed by the Clerk of the Part. Accordingly, it is

ORDERED that Turofsky's motion seeking summary judgment on his first, third and fifth causes of action asserted against Sukoff is denied; and it is further

ORDERED that defendants' cross motion for summary judgment dismissing the complaint, vacating the vendee's liens filed against the Sukoff and H. Roth Properties and awarding them reasonable attorneys' fees is granted.

This constitutes the decision and order of the court.

E N T E R,


J. S. C.

Hon. Dawn Jimenez-Salta

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