

Steinberg v Mesorah Publ. Ltd.
2019 NY Slip Op 31420(U)
May 7, 2019
Supreme Court, Kings County
Docket Number: 503757/19
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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DAVID STEINBERG,

Plaintiff,

Decision and order

- against -

Index No. 503757/19

MESORAH PUBLICATIONS LTD.,
& SEFERCRAFT INC.,

ms # 1

Defendants,

May 7, 2019

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PRESENT: HON. LEON RUCHELSMAN

The defendant has moved seeking to dismiss the complaint pursuant to CPLR §3211 on the grounds the plaintiff cannot maintain the action. The plaintiff opposes the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

On November 16, 2018 the plaintiff and defendants entered into a contract whereby the plaintiff agreed to purchase from the defendants property located at 222 44th Street in Kings County. Pursuant to the agreement the plaintiff tendered a down payment of \$100,000 and those funds were deposited with an escrow agent. The closing was scheduled for December 31, 2018 time being of the essence. On December 12, 2018 the plaintiff informed the defendant he did not wish to proceed with the contract and was seeking to assign his interests under the contract to a third party. The following day an Agreement of

Assumption of Contract was signed wherein the plaintiff assigned his rights to a third party, non party Dawliben Holdings LLC. The defendant consented to the assignment. Pursuant to that agreement the parties agreed that the plaintiff acting as assignor assigned "all interest it has under the contract and Assignee hereby Assumes all obligations of Purchaser under that contract" (see, Agreement, § 1). The agreement further released the assignor from any and all obligations under the contract. Dawliben Holdings did not close as required under the contract and has waived any right it may have in the deposit. The plaintiff sought a return of his deposit and when that was refused this action was commenced.

The plaintiff asserts that he is entitled to a return of the \$100,000 deposit since he is the owner of those funds and it should be returned to him. The defendants have moved seeking to dismiss the lawsuit on the grounds the plaintiff has no standing to assert any claim for those funds. Specifically, the defendants argue the plaintiff assigned his rights under the contract and thus does not maintain any claims under the contract.

Conclusions of Law

"[A] motion to dismiss made pursuant to CPLR §3211[a][7] will fail if, taking all facts alleged as true and according

them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law" (see, e.g. AG Capital Funding Partners, LP v. State St. Bank and Trust Co., 5 NY3d 582, 808 NYS2d 573 [2005], Leon v. Martinez, 84 NY2d 83, 614 NYS2d 972, [1994], Hayes v. Wilson, 25 AD3d 586, 807 NYS2d 567 [2d Dept., 2006], Marchionni v. Drexler, 22 AD3d 814, 803 NYS2d 196 [2d Dept., 2005]). Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR §3211 motion to dismiss (see, EBC I, Inc. v. Goldman Sachs & Co., 5 NY3d 11, 799 NYS2d 170 [2005]).

The question that must be resolved is whether the assignment by plaintiff also assigned his rights or ownership over the deposited funds in escrow. The plaintiff asserts no such assignment of the escrow funds took place and consequently the funds belong to him. That argument is untenable. It is true the assignment did not mention the deposit, however, it was necessarily included within the "all interest it has under the contract" provision contained in the assignment agreement. This is true for two reasons. First, the underlying contract of sale stated that "the Balance of the Purchase Price, less the Deposit...shall be paid by Purchaser, at closing" (see,

Agreement of Purchase and Sale, § 2.2.3). If the assignment did not include the deposit then clearly Dawliben Holdings LLC did not receive all of Steinberg's interest because they would be required to pay their own \$100,000 equivalent to the deposit to satisfy the express terms of the contract. Likewise, pursuant to the assignment, which as noted the defendants consented to, the defendants could not demand Dawliben Holdings LLC pay the \$100,000 again on the grounds the original \$100,000 being held in escrow was really the plaintiff's and it would be returned. Second, to the extent the plaintiff concedes the deposit was included within the assignment and only inures back to him because he did not commit any breach or any default, such argument is rejected. The assignment was not conditional and was not contingent upon the closing taking place. The assignment simply assigned all of plaintiff's interests in the contract and necessarily included any rights with respect to the down payment. Thus, for example, it cannot seriously be argued that Dawliben Holdings LLC was required to pay the down payment amount again. Consequently, upon a failure of Dawliben Holdings LLC to close there can be no legal argument that the plaintiff is entitled to a return of the down payment.

The plaintiff maintains that since he did not default, the release that is part of the assignment does not apply and he is

entitled to the down payment. However, that argument fails to appreciate the total effect of the assignment which also included any rights to the down payment. Thus, upon a default the seller is entitled to keep the down payment as damages (Agreement, § 9). The plaintiff argues that he was not "under an obligation to do so" which triggers a forfeiture of the down payment (id). That may be true since the contract was assigned, however, a default did in fact occur and allowing any recovery of the down payment would in effect nullify the assignment, something for which there is no basis.

Therefore, based on the foregoing, the plaintiff is not entitled to a return of the down payment. Consequently, the motion seeking to dismiss the complaint is granted.

So ordered.

ENTER:

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KINGS COUNTY CLERK
FILED




DATED: May 7, 2019
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC