

Okere v Brois

2019 NY Slip Op 34179(U)

January 2, 2019

Supreme Court, Westchester County

Docket Number: 62735/2018

Judge: Lawrence H. Ecker

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER**

-----X
HENRY C. OKERE and KAREN PORTER,

Plaintiffs,

-against-

THEODORE BROIS and HELENE BROIS,

Defendants.
-----X

**INDEX NO. 62735/2018
DECISION/ORDER
Mot. Seqs. 1, 2
Submit Date: 11/21/18**

ECKER, J.

The following papers numbered 1 through 19 were read on the motion of HENRY C. OKERE and KAREN PORTER ("plaintiffs")[Mot. Seq. 1], made pursuant to CPLR 3212, for an order granting summary judgment on the complaint, and the cross-motion of THEODORE BROIS and HELENE BROIS ("defendants") [Mot. Seq. 2], made pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion, Affidavit, Exhibits A-C and supporting papers	1-4 ¹
Notice of Cross-Motion, Affirmation, Affidavits (3),	5-14
Affidavit in Opposition and in Reply Affidavit, Exhibits A-C	15-18
Affirmation in Reply	19

Upon the foregoing papers, the court determines as follows:

Plaintiffs allege that they are entitled to enforce a contract for the sale of a residential premises located in Armonk, New York. Defendants enter into an agreement, dated May 21, 2018, with Concierge Auction, LLC. ("Concierge") to conduct an auction of said property. Defendants allege that they pre-executed a contract of sale in advance of the auction date ("the Contract").

¹ Plaintiff is required to use numbered, external exhibit tabs, fully itemized, without repetition of the same exhibit number within the same motion sequences.

On June 28, 2018, the auction was conducted and plaintiffs were high bidders with a high bid of \$1,605,000. Plaintiffs allege that a deposit of \$100,000 was wired to a bank account on June 28, 2018, and that they executed and returned the Contract to defendants' attorney on June 29, 2018. Plaintiffs claim that they wired another \$92,600 to the bank account on July 2, 2018. In addition, also on July 2, 2018, plaintiffs wired Concierge \$175,000 as its share of the sale proceeds as auctioneer. Plaintiffs allege that, thereafter, they received a fully executed Contract from defendants which designated a closing date of July 27, 2018.

Plaintiffs allege that they were unable to contact defendants thereafter and the closing date passed without a closing. On July 30, 2018, plaintiffs served a "time is of the essence" letter on defendants, setting a new closing date of August 15, 2018. On August 9, 2018, defendants' attorney responded denying the existence of a contract of a sale and rejecting the "time is of the essence" letter.

For their part, defendants allege that they pre-executed the Contract as standard auction procedure and, therefore, plaintiffs' allegation that, after the auction, defendants' provided a new, fully executed copy of the Contract is inaccurate. In addition, defendants deny receiving an executed copy of the Contract from plaintiffs.

In any event, defendants allege that on June 29, 2018, the day after the auction, defendants revoked the sell of the property. Defendants assert that they attempted to contact their attorney, but were unsuccessful because, they learned later, the attorney had suffered a heart attack. Defendants then contacted Concierge, and informed Concierge that they wished to revoke the sale. Defendants argue that since Concierge was the facilitator of the auction and the preparer of the Contract, that notification to Concierge was sufficient to revoke the sale.

As such, defendants assert, the offer of sale was revoked before plaintiffs returned the executed Contract, and, consequently, there is no binding contract of sale. In addition, defendants allege that the down payments made by plaintiffs were not directed to the proper recipient, namely defendants' attorney. Defendants also contend that any effort on plaintiffs' part to make "time of the essence" was unavailing because there was no agreement, the time within which defendants were to tender title was too short, and there was no showing that plaintiffs were ready, willing and able to perform.

By notice of motion dated October 31, 2018, plaintiffs seek, pursuant to CPLR 3212, an order granting summary judgment on the complaint. In support of the motion, plaintiffs submit the affidavit of Okere, confirmations of wire transfers, and other supporting papers. Defendants cross-move, pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint and submit an attorney affirmation, Helen and Theodore Brios' affidavits, the affidavit of Erik Kukk, Esq. (defendants' attorney on the contract of sale), and

various exhibits. In reply, plaintiffs submit a further Okere affidavit, an attorney's affirmation in reply and additional exhibits. [NYSCEF Nos. 11-33].²

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it should be granted only where the moving party "has tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact." *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]. To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented. Issue finding, rather than issue determination, is the key to the procedure. *Matter of Suffolk Co. Dept. of Social Services v James M.*, 83 NY2d 178 [1994]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]. In making this determination, the court must view the evidence in the light most favorable to the party opposing the motion, and must give that party the benefit of every inference which can be drawn from the evidence. *Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]; *Nash v Port Washington Union Free School District*, 83 AD3d 136, 146 [2d Dept 2011]; *Pearson v Dix McBride, LLC*, 63 AD3d 895 [2d Dept 2009]. Every available inference must be drawn in the non-moving party's favor. *De Lourdes Torres v Jones*, 26 NY3d 742, 763 [2016].

In addition, it is well settled that a party should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment, inasmuch as discovery may result in disclosure of evidence relevant to the causes of action asserted in the complaint. *Brea v Salvatore*, 130 AD3d 956 [2d Dept 2015]; *Bank of America v Hillside Cycles, Inc.*, 89 AD3d 653 [2d Dept 2011]. CPLR 3212(f) permits a party opposing summary judgment to obtain further discovery when it appears the facts supporting the position of the opposing party exist but cannot be stated. *Betz v NYC Premier Properties, Inc.*, 38 AD3d 815 [2d Dept 2007]; *Juseinoski v New York Hosp. Med. Ctr. Of Queens*, 29 AD3d 636, 637 [2d Dept 2006].

Although not argued by any party, the court notes that no discovery has occurred in this case. The court finds that, under the circumstances and based on the numerous submissions from each party, there are multiple factual issues and credibility issues that militate against the granting of summary judgment to either side at this juncture. The resolution of these factual questions requires the conduct of pre-trial disclosure prior to any determination on a motion for summary. Accordingly, it is hereby

ORDERED that the motion of plaintiffs HENRY C. OKERE and KAREN PORTER [Mot. Seq. 1], made pursuant to CPLR 3212, for an order granting summary judgment on the complaint, as against defendants THEODORE BROIS and HELENE BROIS, is denied without prejudice to renewal after discovery is completed; and it is further

²In addition, the court has been advised that an action has been commenced by defendants against Concierge, pursuant to which defendants seek to stay the arbitration proceeding that is called for in the contract between those parties.

ORDERED that motion of defendants THEODORE BROIS and HELENE BROIS [Mot. Seq. 2], made pursuant to CPLR 3212, for an order granting summary judgment dismissal of the complaint, as against plaintiffs HENRY C. OKERE and KAREN PORTER, is denied without prejudice to renewal after discovery is completed; and it is further

ORDERED that the parties shall appear at the Preliminary Conference Part of the Court, Room 813, on February 25, 2019, at 9:30 a.m.

The foregoing constitutes the Decision/Order of the court.

Dated: White Plains, New York
January 2, 2019

ENTER,



HON. LAWRENCE H. ECKER, J.S.C.

Appearances

Richard Blancato, Esq.
Attorney for Plaintiff
Via NYSCEF

James Marsico, PLLC
Attorney for Defendants
Via NYSCEF