

Xiaomao Wang v Wang
2020 NY Slip Op 34091(U)
December 7, 2020
Supreme Court, Kings County
Docket Number: 512339/2020
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

XIAOMAO WANG and LI WANG,

Plaintiffs,

-against-

**LISA LIFANG WANG
and RINA MILOS, as Escrowee,**

Defendants.

DECISION / ORDER

Index No. 512339/2020

Motion Seq. No. 1, 2

Date Submitted: 11/5/20

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendants' motion to cancel the notice of pendency and plaintiffs' cross motion for summary judgment

Papers	NYSCEF Doc.
Notice of Motion, Affirmation and Exhibits Annexed.....	<u>5-14</u>
Notice of Cross Motion, Affirmation and Exhibits Annexed.....	<u>22-32</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>34-35</u>
Reply Affirmation.....	<u>38</u>

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

Plaintiffs entered into a contract to purchase the real property located at 210 Sunnyside Ave, Brooklyn, NY 11207. The contract was executed on January 10, 2020. Plaintiffs Xiaomao Wang and Li Wang agreed to buy this property, a three-family multiple dwelling, from defendant Lisa Wang (Seller) for \$1,120,000.00. Defendant Rina Milos, Esq., sellers' attorney, was named as escrow agent. The down payment tendered was \$56,000.00. The closing did not take place as anticipated, and both sides now claim entitlement to the down payment. Plaintiffs allege two causes of action: breach of contract and unjust enrichment. They seek recovery of their \$56,000 contract deposit, plus interest, as well as an order directing defendant Milos to release the deposited funds. On July 13,

2020, the plaintiffs filed a notice of pendency against the property, and they commenced this action the next day. Defendants answered the complaint and asserted several counterclaims. Plaintiffs replied to the counterclaims.

The defendants move to cancel the notice of pendency (MS #1), pursuant to CPLR § 6514. The defendants argue that since the plaintiffs' complaint has not alleged any interest in the property, the notice of pendency must be canceled.

The plaintiffs oppose defendants' motion and argue that the defendants' motion to cancel the notice of pendency must be denied, since page 5 of the contract provides that "[a]ll money paid on account of this contract . . . are hereby made liens on the and collectable out of the premises. Such liens shall not continue after default in performance of the contract by Purchaser". The plaintiffs contend that since they cancelled the contract rather than defaulted in its performance, the deposit money became a lien on the property, which they seek to foreclose on. The plaintiffs argue that the notice of pendency should not be canceled.

CPLR 6514 governs motions to cancel notices of pendency. A court may exercise its inherent power to cancel a notice of pendency when its filing does not comply with CPLR §6501. Per §6501, a notice of pendency may be filed in any action seeking a judgment that would affect the title to, or possession, use, or enjoyment of, real property (*5303 Realty Corp. v O & Y Equity Corp.*, 64 NY2d 313, 320 [1984]). To determine whether a notice of pendency may be cancelled, a court must review the pleading and ascertain whether the action falls within the scope of § 6501. *Id.* In making this determination, the court is limited to the face of the pleading and may not investigate the underlying transaction. *Id.* at 321.

The defendants are correct here, and their motion is granted. The complaint is solely for the return of the down-payment, which is in escrow, and plaintiffs are thus not entitled to encumber the property and prevent defendant from selling it. The branch of the motion which seeks counsel fees, costs and disbursements is denied.

The plaintiffs cross-move (MS #2) for an order dismissing the defendants' affirmative defenses and counterclaims and granting them summary judgment. The plaintiffs argue that they were entitled to cancel the contract after being denied the mortgage, since the lender's denial was "through no fault of the purchaser," as provided for by paragraph 6 of the second rider to the contract.

Defendant seller claims the defendant is entitled to keep the down-payment as liquidated damages, as "pursuant to rider 8 of the contract, the plaintiffs/purchasers represented they would have sufficient funds and assets to complete the transaction including payment of all closing costs, as well as the balance of the purchase price over and above the mortgage. The plaintiffs/purchasers did not have their own funds to complete the transaction resulting the lending bank denied the commitment."

Plaintiffs claim they are both in the insurance business and are paid on commission, and that they cannot work during the Pandemic, so they have no income, which is not their fault. They urge the court to direct that their deposit be refunded.

The contract of sale is E-File Doc. #10. The pre-printed form is for the sale of a residential property and is not edited in any way that involves this action. The first Rider to the contract follows. It requires (Par. 3) the entire property to be delivered vacant and free of all tenancies and represents that it is a legal three-family property. The mortgage contingency is located at Paragraphs 6, 7 and 8. These paragraphs contain the language

that must be interpreted in order to decide plaintiff's motion for summary judgment. They provide as follows:

6. MORTGAGE CONTINGENCY: This contract is conditioned upon the purchase procuring a commitment for a conventional mortgage loan in the sum of **\$840,000.00**, at the prevailing rate of interest on date of closing, and payable in monthly installments over a period of 15/30 years. In the event the purchase falls to procure a commitment for a mortgage as aforesaid within 60 days from the date hereof, then and in the event, the seller hereto is hereby given the right to cancel this contract, and upon return of the deposit herein paid, any and all liability on the part of either party to the other under this contract shall terminate.

7. If Purchaser shall be unable, after diligent efforts, to obtain said commitment within said period, then either party, by written notice to the other, may cancel this contract, unless the Seller shall elect to extend the Purchaser's time for obtaining such commitment for an additional period not exceeding 30 days, in which case such notice of cancellation may be given after expiration of such extended period, if said commitment shall not then have been obtained.

8. Purchaser represents, that to the best of Purchaser's knowledge, (a) Purchaser's income is sufficient to obtain the mortgage herein; (b) There are no outstanding tax judgments or tax liens against the Purchaser; (c) Purchaser has assets in an amount sufficient to complete the transactions, including payment of all closing costs, as well as the balance of the purchase price over and above the mortgage provided for herein. Purchaser understands that Seller is entering into this agreement in reliance upon the aforesaid representations, and that any breach thereof shall be a material breach and willful default hereunder.

There is a Second Rider to the Contract of Sale. The first paragraph states that if there is an inconsistency between this Second Rider and the earlier parts of the contract, the Second Rider shall govern. The Second Rider then states, as applicable to this motion:

6. If Purchaser's institutional lender, through no fault of Purchaser, fails or refuse to fund the loan it has committed to make pursuant to the written loan commitment letter, Purchaser may cancel this contract by giving prompt notice to Seller, provided Purchaser has complied with Purchaser's obligations hereunder. In such event, this contract shall be deemed canceled 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 down payment shall be promptly refunded to Purchaser.

It is clear that the outcome of the motion will turn on the facts presented. Plaintiffs provide the loan commitment at Doc. 29. It is from Summit Mortgage Bankers Inc. in Flushing, NY. It is dated February 12, 2020 and is for **\$784,000.00** in financing. It was obtained within the 60 days required by the contract but is not for the amount of mortgage financing set forth in the mortgage contingency clause, \$840,000.00. The lender was offering \$56,000 less than the amount the Purchasers presumably applied to borrow. Paragraph 5 states that the interest rate will be determined at closing, but they cannot raise it more than 1% over 4.125%. Paragraph 6 states, however, "Should the rate of interest exceed the rate for which you qualify, this commitment shall be void. The maximum qualifying rate of interest is 4.125%. This seems to mean that if the rate goes up above 4.125%, the purchasers would not qualify, and the commitment would be canceled. The commitment then says to refer to the Addendum for the conditions. There is a long list annexed, including the usual, such as title report and insurance. It lists, as relevant herein:

ADDENDUM TO NEW YORK COMMITMENT- Other conditions: Conditions that have to be satisfied before scheduling a closing (Prior to Closing – PTC):

PTC - Asset EMD - Provide bank statement showing withdrawal transaction of EMD \$56,000. All large deposit must be sourced and documented;

PTC - Assets - Assets totaling of \$451,151 including reserve of \$63,126 must be verified with most recent 2 months' bank statements. All large deposits must be sourced;

PTC - AUS Findings - Provide revised DU/LP showing accurate income and assets;

PTC - LOE Credit Inquires - Receipt and satisfactory review of letter of explanation from borrower for the inquires in last 4 months listed on the credit report and confirmation they did not result in any new debts;

PTC - LOE No Additional Debts - A letter from borrowers indicating no additional debts resulting in repayment obligations will be opened between the date of the initial credit report and the date of the loan closing;

PTC - Tax Transcripts - Receipt and satisfactory review year - 2018, 2019 tax transcripts (1040 & W2) from the IRS;

PTC - Verbal VOE - Summit Mortgage Banker to complete verbal verification of employment;

PTC - 2019 1040 - Obtain 2019 1040 to show income is consistent with original application; Income might be recalculated; Additional condition may be applied;

PTC - 2018 K-1 - Obtain 2018 K-1 from EZ Moto Inc to show it doesn't belong to borrower; Additional condition may be applied;

Plaintiffs next provide, at Doc. 30, the lender's denial letter, which states that the loan was denied due to "insufficient assets to close the transaction". It is signed by the lender and dated April 3, 2020. Plaintiffs provided this document to Seller's attorney, who then sent them a Time is of The Essence letter, (Doc. 31) dated April 7, 2020, requiring the closing to take place on April 30, 2020 at her law office. The court notes that this letter was sent in the middle of the COVID-19 Pandemic, when just about every office and bank was shut down in New York City. The letter states that "Purchasers made representations in paragraph #8 of the rider that the Purchasers have assets in an amount sufficient to complete the transaction including payment of all closing costs, as well as balance. Any breach shall be constituted breach of contract."

Plaintiffs' lawyer for the transaction then wrote back to Ms. Milos, by letter dated April 10, 2020 (Doc. 32), which says, in pertinent part "Pursuant to Paragraph 6 of the 2nd Rider, Purchaser has the right to cancel the contract if the Purchaser's lender fails or refuse to fund the loan it has committed. Upon Purchaser's cancellation under paragraph 6 of the 2nd Rider, down payment shall be promptly refunded to Purchaser. Notice is hereby given that Purchaser hereby elects to cancel the contract pursuant to Paragraph 6 of the 2nd Rider to Contract of Sale. Further, demand for the full refund of the down payment in the sum of \$56,000.00 to Purchaser is hereby given. Your time is of the essence letter is hereby rejected in its entirety."

The return of plaintiffs' deposit was not sent by Ms. Milos, and this action was commenced once the court was opened to the filing of new actions.

Plaintiff Xiaomao Wang provides an affidavit in support of plaintiffs' motion for summary judgment which states "After we received a commitment letter from my lender, we diligent sought to provide the lender with the required documentation and sought to remove the conditions imposed by the lender. My life insurance business was thereafter affected by COVID-19 and the shutdown pursuant the order of Governor Cuomo closed my business. My lender thereafter refused to fund the loan for the purchase of the property."

Discussion

Where a contract for the sale of real property contains a mortgage contingency clause, as long as purchasers exert a genuine effort to secure mortgage financing and act in good faith, they are entitled to recover their down payment if the mortgage is not in fact approved through no fault of their own (*Jian Chen v McKenna*, 181 AD3d 577, 577 [2d Dept 2020]).

The Court finds that plaintiffs have not made a prima facie case for summary judgment. They have failed to explain the discrepancy between the amount of the mortgage financing in the mortgage contingency clause and the amount in the commitment letter. They have failed to provide any copies of bank or investment statements to demonstrate that they had the unfinanced portion of the purchase price. If the issue was solely that they lost they jobs due to the Pandemic, something more than a self-serving statement is necessary. Plaintiffs have not provided any documentation that they lost their jobs. Because defendant is claiming that plaintiffs misrepresented their ability to close the transaction from the date the contract was first entered into, the plaintiffs needed to provide some evidence that, if their lender had not canceled their loan commitment, they would have been ready, willing and able to close. Otherwise, the court cannot conclude

that the commitment was canceled due to the COVID-19 Pandemic and not due to plaintiffs' fault. To be clear, although plaintiffs timely applied for a mortgage loan, the plaintiffs have failed to eliminate all triable issues of fact as to whether both of them made diligent, good-faith efforts to secure mortgage financing and that they had the unfinanced portion of the purchase price so that if the loan was approved, they could have closed (see *Jian Chen v McKenna*, 181 AD3d 577, 578 [2d Dept 2020]; *Dazzo v Kilcullen*, 127 AD3d 1126, 1128, 7 N.Y.S.3d 552; *Hsieh v Pravder*, 106 AD3d 694, 695, 964 N.Y.S.2d 243).

However, the branch of plaintiffs' motion for an order dismissing the defendant's counterclaims is granted. There is no basis to sue for the full purchase price as liquidated damages, nor is there a basis in law to sue for the rental income defendant claims she has lost. If this was a concern, as she agreed to deliver the property vacant, it should have been in the contract as a form of delay damages. The branch of plaintiffs' motion to strike the defendants' affirmative defenses is also granted. Each of the items listed either puts forth information which is not an affirmative defense or raises an affirmative defense that is inapplicable here.

In conclusion, MS #1 is granted, and the Notice of Pendency is vacated. MS #2 is granted to the extent that the defendants' affirmative defenses are hereby stricken, and their counterclaims are dismissed, but plaintiffs' motion for summary judgment is denied.

Accordingly, it is

ORDERED, that the County Clerk of Kings County is directed, upon payment of the proper fees, if any, to cancel and discharge a certain Notice of Pendency filed in this action on the 14th day of July, 2020, against property known as Block 3898, Lot 11, and also known as 210 Sunnyside Avenue, Brooklyn, New York, and said Clerk is hereby directed

to enter upon the margin of the record of the same a Notice of Cancellation referring to this Order.

This shall constitute the decision and order of the court.

Dated: December 7, 2020

ENTER:

A handwritten signature in black ink, appearing to be 'ds' or 'Debra Silber', written over a horizontal line.

Hon. Debra Silber, J.S.C.