

London 64 LLC v Friedman
2021 NY Slip Op 31739(U)
May 20, 2021
Supreme Court, New York County
Docket Number: 652988/2020
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 14

Justice

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LONDON 64 LLC,

Plaintiff,

- v -

RONG FRIEDMAN, EDGAR FRIEDMAN

Defendant.

-----X

INDEX NO. 652988/2020

MOTION DATE 05/14/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54

were read on this motion to/for JUDGMENT - SUMMARY.

The motion by plaintiff for summary judgment is granted.

Background

Plaintiff claims that defendants entered into a contract of sale dated February 10, 2020. Plaintiff's attorney retained the \$820,000 down payment from defendants as escrow. The closing was supposed to take place on May 15, 2020 and plaintiff contends that defendants told plaintiff they were not able to close. After discussions about plaintiff potentially providing financing to defendants fell through, the parties entered into an amendment to the contract. The closing was moved to May 28, 2020 and the parties agreed it was a "time of the essence closing date." Plaintiff claims that defendants did not close and now want to keep the down payment and seek legal fees pursuant to the contract. It also demands that the Court dismiss defendants' affirmative defense and counterclaims.

In opposition, defendants ask the Court to grant them summary judgment (although they do not cross-move). They claim that the closing documents purportedly executed by plaintiff's attorney were done improperly and are a nullity. Defendants also question why the owner is listed as an individual in the transfer tax documents but the contract of sale names plaintiff as the owner. They point out that plaintiff did not comply with newly-enacted rules requiring a party moving for summary judgment to submit a statement of material facts. Defendants also question whether the May 28, 2020 date was a time of the essence closing date and that this is an issue of fact that compels the Court to deny the motion

In reply, plaintiff emphasizes that time was of the essence. The individual who defendants claim was the owner (Margot London) explains that she held a prior life estate in the building, which was terminated when the property was transferred from a trust to plaintiff in January 2017 (NYSCEF Doc. No. 44 at 2). She observes that the deed prepared for closing expressly states that she joined in the deed to quitclaim any life estate that she might have (*id.* at 3). Ms. London notes that the only reason this became an issue is due to objections raised by defendants and their title company.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light

most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court’s task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d’Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

As an initial matter, the Court will overlook plaintiff’s failure to include a statement of material facts as required by recently-enacted trial court rules. Those rules just became effective and the Court observes that neither plaintiff nor defendants included a certificate of conformance with the word limit (also required under the new rules).

Here, plaintiff met its burden for summary judgment by submitting the affidavit of a member of plaintiff (NYSCEF Doc. No. 13). Benjamin London explains that time was of the essence and points to the contract, which provided a May 15, 2020 closing date and stated, “time being of the essence against purchaser provided” (NYSCEF Doc. No. 15, ¶ 15). And the amendment specifically changed the “TOE [Time of the Essence] Closing date from May 15, 2020 to May 28, 2020” (NYSCEF Doc. No. 16).

Defendants did not raise an issue of fact in opposition. For some reason, defendants did not submit an affidavit from either defendant and instead rely solely on an affirmation from their

attorney. Accordingly, because defendants did not submit evidence from someone with personal knowledge, they did not raise a material issue of fact. Counsel for defendants cannot adequately rebut that it was a time of the essence closing, especially given the fact that the documents assert time was of the essence.

Moreover, plaintiff explained the issue with Margot London and her life estate—the Court is satisfied that plaintiff is the owner of the property.

Plaintiff is entitled to keep the down payment as defendants did not close and defendants' affirmative defenses and counterclaims are severed and dismissed. To the extent that defendants sought summary judgment, that request is denied as they did not cross-move for that relief.

Accordingly, it is hereby

ORDERED that the motion by plaintiff for summary judgment is granted, defendants' affirmative defenses and counterclaims are severed and dismissed, and plaintiff is entitled to retain the down payment as liquidated damages, and the Clerk is directed to enter judgment accordingly upon presentation of proper papers therefor; and it is further

ORDERED that the issue of reasonable legal fees to be awarded to plaintiff shall be determined at a remote hearing to be scheduled by the clerk of this part.

5/20/2021
DATE

CHECK ONE:

☒

CASE DISPOSED

☒

GRANTED

☐

DENIED

APPLICATION:

☐

SETTLE ORDER

CHECK IF APPROPRIATE:

☐

INCLUDES TRANSFER/REASSIGN

☐

NON-FINAL DISPOSITION

☐

GRANTED IN PART

☐

OTHER

☐

SUBMIT ORDER

☐

FIDUCIARY APPOINTMENT

☐

REFERENCE


ARLENE P. BLUTH, J.S.C.