

Gins20pine LLC v Tosikova

2021 NY Slip Op 32292(U)

October 28, 2021

Supreme Court, New York County

Docket Number: Index No. 652694/2020

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. DEBRA JAMES

PART 59

Justice

-----X

GINS20PINE LLC,

Plaintiff,

- v -

OKSANA TOSIKOVA and SERGE BEKIROV,

Defendants.

-----X

INDEX NO. 652694/2020

MOTION DATE 09/24/2021

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 72, 73, 74, 75, 76, 77, 78, 79

were read on this motion to/for

REARGUMENT/RECONSIDERATION

ORDER

Upon the foregoing documents, it is

ORDERED that the motion of defendants for leave to reargue, in part, their motion for summary judgment on the complaint is granted; and it is further

ORDERED that, upon reargument, the Court vacates its prior decision and order, dated July 29, 2021, to the extent that such decision and order did not award pre-judgment interest, costs and disbursements, and did not award reasonable attorneys' fees to defendants, and reissues such decision and order, as follows; and it is further

ORDERED that plaintiff's cross motion to amend the complaint is denied; and it is further

ORDERED that defendants' motion for summary judgment on their counterclaim is granted, and the Clerk of the Court is directed to enter judgment in favor of defendants and against plaintiff GINS20PINE LLC; and it is further

ORDERED and ADJUDGED that the Clerk is directed to enter judgment against plaintiff GINS20PINE LLC and in favor of defendants for interest at the statutory rate on \$170,000 from April 1, 2020, until entry of judgment, as calculated by the Clerk, in the amount of \$_____, together with costs and disbursements, as taxed by the Clerk; and it is further

ORDERED and ADJUDGED that within twenty (20) days of service of a copy of this order with notice of entry upon plaintiff by posting on NYSCEF, and by overnight courier upon non-party The Law Offices of Katz and Matz P.C. (Escrow Agent) at its offices at 1350 Avenue of the Americas, 3rd Floor, New York, New York, the Escrow Agent is directed to release the Downpayment in the amount of \$170,000 held in the IOLA account of the Escrow Agent (Signature Bank Acct No. _____) pursuant to paragraph 16 of the Contract of Sale dated February 26, 2020 to defendants; and it is further

ADJUDGED that upon release of such funds to defendants, the Escrow Agent shall be discharged of all liability with respect to such funds to the extent of payment made as herein provided; and it is further

ORDERED that the portion of the defendants' motion for summary judgment on their counterclaim for recovery of reasonable attorney's fees is granted, and the issue of reasonable attorneys' fees and legal disbursements that defendants may recover against the plaintiff GINS20Pine LLC is severed and referred to a Special Referee to hear and report; and it is further

ORDERED that counsel for the defendants shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,¹ upon the Special Referee Clerk in the General Clerk's Office (Room 119), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date; and it is further

ORDERED that such service upon the Special Referee Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

DECISION

This court agrees with defendants that plaintiff's proposed amendment, which proposed claim sounds in fraudulent inducement, lacks merit. Plaintiff's new evidence is in the form of the

¹Available on the Court's website at www.nycourts.gov/supctmanh under the "References" link on the navigation bar.

"feeling" of the defendants' mortgage broker that the lender, which issued the pre-approval letter for financing to defendants, would ultimately not approve defendants' mortgage finance application, unless the underwriter granted exceptions, which "feeling" such broker reduced into writing. Such mortgage broker's hunch, that he committed to a written note, does not tend to show that defendants never intended to comply with their obligations as Purchaser under the Contract of Sale, which defendants signed slightly more than two weeks later. See Aerolineas Galagos, S.A. v Sundoner Alexandria, LLC, 74 AD3d 652 (1st Dept. 2010). Likewise, as the proposed claim seeks the same damages, i.e., retention of the Downpayment, it is duplicative of the breach of contract cause of action and is insufficiently pled. See Mosaic Caribe, Ltd v AllSettled Group, Inc., 117 AD3d 421, 422-423 (1st Dept 2014).

At the heart of this case is the Contract of Sale (Contract) for Condominium Unit 1713 (Unit), in the building known as The 20 Pine Street Condominium, located at 20 Pine Street, New York, New York, between plaintiff (Seller) and defendants (Purchaser). The Contract states in pertinent part:

16. Downpayment in Escrow: (a) Seller's attorney [Katz & Matz, P.C., 1360 Avenue of the Americas, 3rd Floor, New York, New York 10019] ("Escrowee") shall hold the Downpayment in escrow in a segregated bank account at the depository identified at the end of this Contract until Closing or sooner termination of this Contract and shall pay over or apply the Downpayment in

accordance with the terms of this para. 16. Escrowee shall hold the Downpayment in a(n)non-interest-bearing account for the benefit of the parties. If interest is held for the benefit of the parties, it shall be paid to the party entitled to the Downpayment and the party receiving the interest shall pay any income taxes thereon. If interest is not held for the benefit of the parties, the Downpayment shall be placed in an IOLA account or as otherwise permitted or required by law. The Social Security or Federal Identification numbers of the parties shall be furnished to Escrowee upon request. At Closing, the Downpayment shall be paid by Escrowee to Seller. If for any reason Closing does not occur and either party gives Notice (as defined in paragraph 14) to Escrowee demanding payment of the Downpayment, Escrowee shall give prompt Notice to the other party of such demand. If Escrowee does not receive Notice of objection from such other party to the proposed payment within 10 business days after the giving of such Notice, Escrowee is hereby authorized and directed to make such payment. If Escrowee does received such Notice of objection within such 10-day period or if for any other reason Escrowee in good faith shall elect not to make such payment, Escrowee shall continue to hold such amount until otherwise directed by Notice from the parties to this Contract or a final, nonappealable judgment, order or decree of a court. However, Escrowee shall have the right at any time to deposit the Downpayment with the clerk of a court in the county in which the Unit is located and shall give Notice of such deposit to Seller and Purchaser. Upon such deposit or other disbursement in accordance with the terms of this para. 16, Escrowee shall be relieved and discharged of all further obligations and responsibilities hereunder.

(b) The parties acknowledge that Escrowee is acting solely as a stakeholder at their request and for their convenience and that Escrowee shall not be liable to either party for any act or omission on its part unless taken or suffered in bad faith or in willful disregard of this Contract or involving gross negligence on the part of Escrowee. Seller and Purchaser jointly and severally (with right of contribution) agree to defend (by attorneys selected by Escrowee), indemnify and hold Escrowee harmless from and against all costs, claims and expenses (including reasonable attorneys' fees)

incurred in connection with the performance of Escrowee's duties hereunder, except with respect to actions or omissions taken or suffered by Escrowee in bad faith or in willful disregard of this Contract or involving gross negligence on the part of the Escrowee.

* * *

22. Mortgage Commitment Contingency. (*Delete paragraph if inapplicable*) (a) The obligation of Purchaser to purchase under this Contract is conditioned upon issuance, on or before 30 days after a fully executed copy of this Contract is given to Purchaser or Purchaser's attorney in the manner set forth in paragraph 14 or subparagraph 22(k) (the "Commitment Date"), of a written commitment from an Institutional Lender pursuant to which such Institutional Lender agrees to make a first mortgage loan, other than a VA, FHA or other governmentally insured loan, to Purchaser, at Purchaser's sole cost and expense, of \$ \$1,000,000.00 for a term of at least 30 years (or such lesser sum or shorter term as Purchaser shall be willing to accept) at the prevailing fixed or adjustable rate of interest and on other customary commitment terms (the "Commitment"). To the extent a Commitment is conditioned on the sale of Purchaser's current home, payment of any outstanding debt, no material adverse change in Purchaser's financial condition or any other customary conditions, Purchaser accepts the risk that such conditions may not be met; however, a commitment conditioned on the Institutional Lender's approval of an appraisal shall not be deemed a "Commitment" hereunder until an appraisal is approved (and if that does not occur before the Commitment Date, Purchaser may cancel under subparagraph 22(e) unless the Commitment Date is extended). Purchaser's obligations hereunder are conditioned only on issuance of a Commitment. Once a Commitment is issued, Purchaser is bound under this Contract even if the lender fails or refuses to fund the loan for any reason.

(b) Purchaser shall (i) make prompt application to one or, at Purchaser's election, more than one Institutional Lender for such mortgage loan, (ii) furnish accurate and complete information regarding Purchaser and members of Purchaser's family, as required, (iii) pay all fees, points and charges required in connection with such application and loan, (iv) pursue such application with diligence, and (v) cooperate in good faith with such

Institutional Lender(s) to obtain a Commitment. Purchaser shall accept a Commitment meeting the terms set forth in subparagraph 22(a) and shall comply with all requirements of such Commitment (or any other commitment accepted by Purchaser). Purchaser shall furnish Seller with a copy of the Commitment promptly after receipt thereof.

(c) *(Delete this paragraph if inapplicable)* Prompt submission by Purchaser of an application to a mortgage broker registered pursuant to Article 12-D of the New York Banking Law ("Mortgage Broker") shall constitute full compliance with the terms and conditions set forth in subparagraph 22(b)(i), provided that such Mortgage Broker promptly submits such application to such Institutional Lender(s), Purchaser shall cooperate in good faith with such Mortgage Broker to obtain a Commitment from such Institutional Lender(s).

(d) If all Institutional Lenders to whom applications were made deny such applications in writing prior to the Commitment Dates, Purchaser may cancel this Contract by giving Notice thereof to Seller, with a copy of such denials, provided that Purchaser has complied with all its obligations under this paragraph 22.

(e) If no Commitment is issued by the Institutional Lender on or before the Commitment Date, then, unless Purchaser has accepted a written commitment from an Institutional Lender that does not conform to the terms set forth in subparagraph 22(a), Purchaser may cancel this Contract by giving Notice to Seller within 5 business days after the Commitment Date, provided that such Notice includes the name and address of the Institutional Lender(s) to whom application was made and that Purchaser has complied with all its obligations under this paragraph 22.

(f) If this Contract is canceled by Purchaser pursuant to subparagraphs 22(d) or (c), neither party shall thereafter have any further rights against, or obligations or liabilities to, the other by reason of this Contract, except that the Downpayment shall be promptly refunded to Purchaser and except as set forth in paragraph 21.

(g) If Purchaser fails to give timely Notice of cancellation or if Purchaser accepts a written commitment from an Institutional Lender that does not conform to the terms set forth in subparagraph 22(a), then Purchaser shall be deemed to have waived Purchaser's right to cancel this Contract and to receive a refund of the Downpayment by reason of the contingency contained in this paragraph 22.

(h) If Seller has not received a copy of a commitment from an Institutional Lender accepted by Purchaser by the Commitment Date, Seller may cancel this Contract by giving Notice to Purchaser within 5 business days after the Commitment Date, which cancellation shall become effective unless Purchaser delivers a copy of such Commitment to Seller within 10 business days after the Commitment Date. After such cancellation neither party shall have any further rights against, or obligations or liabilities to, the other by reason of this Contract, except that the Downpayment shall be promptly refunded to Purchaser (provided Purchaser has complied with all of its obligations under this paragraph 22) and except as set forth in paragraph 21.

As to defendants' cross motion for summary judgment on their counterclaim for breach of contract and return of the Downpayment, the argument of the plaintiffs that there is an issue of fact with respect to whether defendants breached their implicit duty of good faith and fair dealing "by entering into a Contract of Sale they could not afford only to seek to renegotiate the price of the Unit based on false pretenses" fails to persuade this court.

In support of their argument, plaintiff proffers defendants' attempt to renegotiate the price of the Unit under the Contract when "no appraisal of the property had yet been scheduled by Wells Fargo". Plaintiff also cites the disapproval letter dated April 1, 2020, from Wells Fargo Bank, the lender to

Purchaser (Declination Letter), which declined the application for the following reasons:

- Amounts owed are too high relative to our income (We look at the amounts you owe and compare it to your income)
- Not enough combined assets to close this loan.

Plaintiff also contends that defendants "entered into a Contract of Sale they could not afford", when they failed to heed the "feeling" of their own mortgage broker that, notwithstanding the pre-approval letter, the lender ultimately would not approve the loan.

The application of such evidence to raise an issue of fact as to the defendants' lack of good faith would render entirely meaningless the Mortgage Contingency and other express provisions of the Contract. Of no moment was defendants' attempt to renegotiate the price of the Unit before an appraisal was conducted, as under the Contract, the question of an appraisal is pertinent only had defendants received the Commitment.

Likewise of no significance is plaintiff's assertion that defendants acted in bad faith as "they were not prepared to agree to". . . "[sell] their \$500,000 cooperative apartment in Brooklyn". As conceded by plaintiff, under the Contract, the obligation of defendants to purchase was expressly not subject to the sale of any real property defendants owned. In addition, contrary to plaintiff's assertion, each defendant, one as co-borrower, did

apply for the mortgage loan as required under the Contract. It is insignificant that the Declination Letter was addressed to defendant borrower only, and not also to defendant co-borrower.

Thus, the action at bar is distinguishable on its facts from Creighton v Milbauer, 191 AD2d 162 (1st Dept 1993), wherein the court held there was a question of fact, whether, in bad faith, the purchaser failed to exercise good faith in applying for the financing, when she documented neither her income nor her employment status.

The facts herein are also distinguishable from those of Blask v Miller, 186 AD2d 958 (3d Dept 1962). In Blask (supra, 186 AD2d at 959), the evidence was that "[mortgage] terms were indeed available at several lending institutions", while plaintiff at bar makes no such assertion. In addition, the contract of sale in Blask was contingent upon "a satisfactory report obtained by the [p]urchaser that the premises are structurally sound", which raised an issue of fact whether the report of structural unsoundness obtained by the Blask purchaser met "an objective standard of reasonableness" (supra, 186 AD2d 958, 960). The Contract at bar contains no such contingency. Also distinguishable from the facts at bar are those of Blinks v Farooq, 178 AD2d 999 (4th Dept. 1991), where, unlike the case at bar, the defendant-purchaser "never applied for a mortgage commitment".

This court finding no issue of fact as to any bad faith on the part of defendants, or otherwise, defendants are entitled to judgment on their counterclaim.

The court grants defendants' motion for reargument. Upon reargument, this court finds that in its prior decision and order, it did indeed overlook paragraph 19 of the Rider to the Contract of Sale, wherein defendants, as prevailing parties, were entitled to recover reasonable attorneys' fees incurred in litigation. Thus, the court vacates that part of its decision and order that implicitly denied defendants such an award of attorneys fees' and holds that defendants are entitled to recover from plaintiff reasonable attorneys' incurred in this action. See Sykes v RFD Third Ave. I Assoc., LLC, 39 AD3d 279, 279-280 (1st Dept. 2007).

Likewise, defendants are correct that this court overlooked Contract of Sale, ¶ 13, which as to the defendants, purchasers thereunder, did not specify the Downpayment an exclusive remedy in the event of a default by plaintiff. Thus, defendants are entitled to an award for pre-judgment interest. See Park Union Condominium v 910 Union Street, LLC, 196 AD3d 427 (1st Dept. 2021).

Debra A. James
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10/28/2021 DATE		DEBRA JAMES, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED <input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED <input type="checkbox"/> SETTLE ORDER <input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION <input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER <input type="checkbox"/> SUBMIT ORDER <input type="checkbox"/> FIDUCIARY APPOINTMENT <input checked="" type="checkbox"/> REFERENCE
APPLICATION: CHECK IF APPROPRIATE:		