

Toledo v Peritore
2021 NY Slip Op 32575(U)
December 3, 2021
Supreme Court, New York County
Docket Number: Index No. 160991/2019
Judge: Shawn T. Kelly
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 57

-----X
JOSELMA TOLEDO

Plaintiff,

- v -

JOSEPH PERITORE,

Defendant.

INDEX NO. 160991/2019

MOTION DATE 08/23/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

-----X
HON. SHAWN KELLY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 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

were read on this motion to/for

DISM ACTION/INCONVENIENT FORUM

In this matter involving a real estate purchase contract, Defendant moves for summary judgment on Plaintiff's complaint and Defendant's first counterclaim. Plaintiff cross-moves for summary judgment and for an order releasing Plaintiff's down payment of \$42,323.80 with interest from October 10, 2019, cancelling the contract of sale of a cooperative apartment between the parties, impressing a lien against the cooperative apartment until Plaintiff is paid the down payment together with costs, and for an order pursuant to CPLR §§3124 and 3126(2) compelling Defendant to provide outstanding discovery, or in the alternative, pursuant to CPLR §3126(3) striking Defendant's answer for failure and refusal to comply with the Notice for Discovery and Inspection.

Factual Allegations

This is a dispute over a deposit paid by Plaintiff, a prospective co-op purchaser, to the Defendant, the owner of the apartment at 535 West 52nd Street, Apt. 9D, New York, New York (herein the "Unit"). On June 10, 2019, the parties entered into a purchase agreement (herein the

“Purchase Agreement”) whereby Plaintiff sought to purchase the Unit for \$422,238.00. (NYSCEF Doc. No. 13). Plaintiff paid a deposit to the escrow agent, Defendant’s attorney, pursuant to the terms of the Purchase Agreement in the amount of \$42,323.80. On or about June 22, 2019, Plaintiff received a mortgage loan commitment from Citizens Bank, N.A. (herein the “Loan Commitment”). (NYSCEF Doc. No. 14). The Loan Commitment is unsigned and states, “Please sign, date and return Lender's copy of this Commitment, along with any required fees and items requested, to the Lender at the following address, within 10 days of the date listed above, or at the option of Lender, this Commitment shall become null and void”. (*Id.*). The Loan Commitment further states, “This commitment is subject to compliance with the conditions herein. This commitment will expire on 08/09/2019.” (*Id.*).

Plaintiff submits a Statement of Credit Denial, Termination or Change from Citizens Bank, dated October 10, 2019 (NYSCEF Doc. No. 25). The document states that the mortgage loan is denied due to failure to verify employment, insufficient income, and excessive obligations (*Id.*). Plaintiff’s affidavit states that she was terminated from her employment in September 2019 (NYSCEF Doc. No. 23).

On October 11, 2019, Defendant’s counsel sent Plaintiff’s counsel a letter rescheduling a closing date of November 12, 2019 and declaring time to be of the essence with respect to such closing. (NYSCEF Doc. No. 16). On October 17, 2019, Plaintiff’s attorney sent a letter to Defendant’s counsel rejecting Defendant’s “time is of the essence” letter and stating that the Plaintiff’s loan commitment was denied. (NYSCEF Doc. No. 17). Plaintiff contends that the escrow agent refused to return the deposit and on November 12, 2019, the closing date set forth in Defendant’s “time is of the essence” letter, Plaintiff filed the summons and complaint.

The main contention is whether the July 9, 2019 Loan Commitment was conditional, as asserted by Plaintiff, or firm, as argued by Defendant. Plaintiff contends that as the Loan Commitment was never signed by her and contained several conditions, it was not firm. Defendant ignores these arguments and states that the Loan Commitment was standard and sufficient to satisfy the Purchase Agreement.

Analysis

“The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion’s opponent to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact” (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; see also *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). The evidence presented in a summary judgment motion must be examined in the “light most favorable to the party opposing the motion” (*Udoh v Inwood Gardens, Inc.*, 70 AD3d 563 1st Dept 2010]) and bare allegations or conclusory assertions are insufficient to create genuine issues of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

There are significant material questions of fact that preclude both parties from establishing a *prima facie* entitlement to summary judgment. There are credibility concerns that cannot be resolved on summary judgment (see *Alvarez v New York City Hous. Auth.*, 295 AD2d 225, 226, 744 NYS2d 25 [1st Dept 2002]).

Accordingly, it is hereby

ORDERED that Defendant's motion for summary judgment is denied; and it is further

ORDERED that Plaintiff's cross motion for summary judgment is denied.

12/3/2021

DATE



SHAWN T. KELLY, J.S.C.

CHECK ONE:

☐

CASE DISPOSED

☒

NON-FINAL DISPOSITION

☐

GRANTED

☒

DENIED

☐

GRANTED IN PART

☐

OTHER

APPLICATION:

☐

SETTLE ORDER

☐

SUBMIT ORDER

CHECK IF APPROPRIATE:

☐

INCLUDES TRANSFER/REASSIGN

☐

FIDUCIARY APPOINTMENT

☐

REFERENCE