

Gibb v Dozortsev

2021 NY Slip Op 32821(U)

December 30, 2021

Supreme Court, New York County

Docket Number: Index No. 153537/2020

Judge: Louis L. Nock

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

PRESENT: HON. LOUIS L. NOCK **PART** **38M**

Justice

-----X

SERENA GIBB and THOMAS GIBB,

Plaintiffs,

- v -

EUGENE DOZORTSEV and ALEXANDRA MAYZLER,

Defendants.

-----X

INDEX NO. 153537/2020

MOTION DATE 07/14/2020

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 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, 37, 38, 39, 40, 41, 42, 43, 44, and 46

were read on this motion to QUASH SUBPOENA, FIX CONDITIONS.

LOUIS L. NOCK, J.

Upon the foregoing documents, it is ordered that the motion by defendants to quash subpoenas is determined as follows.

Brief Summary of the Case and Subpoena Practice:

The action alleges that defendants entered into an agreement on February 25, 2020, to purchase the plaintiffs' condominium at a price of \$2,840,000. Defendants put down \$284,000 on the contract, presently held in escrow by plaintiffs' closing attorneys. The contract of sale has a mortgage contingency provision which obligated defendants to apply for a mortgage loan in the principal sum of \$2,272,000. On February 20, 2020, defendant Dozortsev procured a pre-approval letter from First Republic Bank for a loan amount up to \$3,500,000 based on a purchase price of \$5,000,000. The complaint describes this as the inducement for plaintiffs to enter into the contract of sale five days later, on February 25, 2020.

However, on March 20, 2020, First Republic Bank declined the loan application of defendant Dozortsev on the stated ground of “Income Insufficient for Amount of Credit Requested.” Based on that declination of credit, defendants, through their closing counsel, wrote to the escrow agent on March 21, 2020, canceling the contract of sale and requesting release of the downpayment money to defendants. Plaintiff’s litigation attorneys objected to such release by letter dated March 30, 2020.

The complaint alleges, first, that defendant Mayzler is in breach of the contract of sale by not ever applying for the mortgage loan. The complaint then alleges – notably – that defendant Dozortsev conspired with First Republic Bank, due to his long-standing business relationship with it, to manufacture a bogus declination letter purely in order to squelch out of the purchase deal with plaintiffs, or to force a renegotiation of the purchase price.

The complaint seeks a judgment releasing the escrowed downpayment (\$284,000) to them, asserting causes of action sounding in default of defendants’ obligations under the contract of sale, a mirror-image declaration to that effect, and attorneys’ fees in an amount of \$25,000 pursuant to the contract of sale’s prevailing party provision.

Plaintiffs served subpoenas on real estate broker Brian Meier and on First Republic Bank and its loan officer, Jeffrey Bruce. Defendants have moved to quash those subpoenas insofar as they seek any information unrelated to “income,” as opposed to overall assets and financial status, given the fact that insufficient “income” was the sole ground upon which the mortgage loan application of defendant Dozortsev was declined. They also assert that subpoenas to the bank and its loan officer (Jeffrey Bruce) are duplicative. They also assert that the subpoenas are premature since an outstanding discovery demand to defendants seeking the same information has already been served on defendants. They finally assert that income information –

concededly relevant – should be branded as confidential by the court through its protective order authority.

From the outset, the court hereby issues a protective order with regard to any documents ruled herein to be discoverable pursuant to the subpoenas, in concurrence with defendants' point that the information is more appropriately limited to "Attorneys' Eyes Only."

Moreover, the court rejects the narrow view taken by defendants in their insistence that only information relevant to "income" is discoverable here. The reason for the court's opinion is because the overarching theory of the complaint is that a conspiracy existed between defendants and First Republic Bank which accounted for the ultimate decision by the bank to issue a declination letter sounding in insufficiency of income. But plaintiffs are entitled to probe whether all the circumstances underlying this loan – both in its pre-approval stage and its final application stage – are indicative of an evolving scheme resulting in what looked like, on its face, a declination based on insufficiency of income. Given the broad nature of pre-trial disclosure in this state under CPLR Article 45, this court is loathe to restrict the disclosure in the drastic manner suggested by defendants.

Analysis of the Subpoenas:

The Jeffrey Bruce and First Republic Bank Subpoenas:

Following are the documents requested by plaintiffs in the Jeffrey Bruce Subpoena and the First Republic Subpoena, and the court's rulings in connection therewith.

Request 1: Copies of First Republic Bank's pre-approval letter dated February 20, 2020 (the "Pre-approval Letter") addressed to defendant Eugene Dozortsev and all prior drafts of such letter.

Ruling: Otherwise appropriate; but quashed insofar as the documents sought are already in Plaintiffs' possession, custody or control and/or the request is premature as it seeks the

production of documents that can be obtained from Defendants, and have already been demanded from Defendants pursuant to a Notice for Discovery and Inspection.

Request 2: Copies of all documents (including without limitation correspondence, notes of meetings and notes of telephone calls) considered or reviewed by First Republic Bank in issuing the Pre-approval Letter.

Ruling: Not quashed. The information is relevant because at one point there was pre-approval, indicating a sufficiency of creditworthy criteria.

Request 3: Copies of all documents provided by defendants or on behalf of the defendants to First Republic Bank in connection with the issuance of the Pre-approval Letter.

Ruling: Otherwise appropriate; but quashed insofar as the request is premature as it seeks the production of documents that can be obtained from Defendants, and have already been demanded from Defendants pursuant to a Notice for Discovery and Inspection.

Request 4: All documents, including First Republic Bank's internal communications, notes and memoranda, concerning, relating to or referring to the Pre-approval Letter.

Ruling: Not quashed. See Ruling 2.

Request 5: The Uniform Residential Loan Application(s) or any such other loan application completed by defendants or on behalf of the defendants in connection with the purchase of the Condominium Unit 3 (the "Premises") in the condominium building known as and located at 355 East 19th Street, New York, New York.

Ruling: Otherwise appropriate; but quashed insofar as it seeks the production of documents that can be obtained from Defendants, and have already been demanded from Defendants pursuant to a Notice for Discovery and Inspection.

Request 6: Copies of all documents provided by defendants or on behalf of the defendants (including, but not limited to, letters, emails, text messages, spreadsheets, reports, databases, applications, appraisals, inspections, bank statements, brokerage statements, financial statements, tax returns, pay stubs) in connection with the Uniform Residential Loan Application to purchase of the Premises.

Ruling: Not quashed. The request includes subject documents provided by others “on behalf of the defendants.” The material requested is relevant, as it relates to the overall information reviewed by the bank which either did, or did not, lead it to its declination of the loan application. The theory of this action – which plaintiff must prove – is that the declination was not based on the actual status of defendant Dozortsev’s ability to satisfy the applied-for loan obligations as they come due; but rather, on a nefarious ground designed to facilitate defendants’ attempt to cancel a legally binding contract of sale.

Request 7: Copies of all documents provided by defendants or on behalf of the defendants (including, but not limited to, letters, emails, text messages, spreadsheets, reports, databases, applications, appraisals, inspections, bank statements, brokerage statements, financial statements, tax returns, pay stubs) in connection with any loan to purchase Condominium Unit 3 (the "Premises") in the condominium building known as and located at 355 East 19th Street, New York, New York (the "Condominium").

Ruling: Not quashed. See Ruling 6.

Request 8: A copy of First Republic Bank's Statement of Credit Denial, Termination or Change dated March 20, 2020 ("Denial Letter") addressed to defendant Eugene Dozortsev and all prior drafts of such letter.

Ruling: Quashed. The final letter is possessed by defendants and is in plaintiff’s possession and also discoverable from defendants directly. As for “prior drafts,” the court finds such a request to be neither relevant to the subject matter of this action nor reasonably calculated to lead to the discovery of relevant evidence given the fact that the intention of the bank was to decline. The theory of this case lies not in that letter; but in the many other documents considered by the bank, and in those submitted by the defendants, which may uncover circumstances which render the declination illogical absent some nefarious intent designed to assist defendants in manufacturing a backdrop for cancellation of a legally binding contract of sale.

Request 10: Copies of documents provided by defendants or on behalf of the defendants (including, but not limited to, letters, emails, text messages, spreadsheets, reports, databases, applications, appraisals, inspections, bank statements, brokerage statements, financial statements,

tax returns, pay stubs) to First Republic Bank in connection with the issuance of the Denial Letter.

Ruling: Not quashed. The request seeks documents provided by others “on behalf of the defendants.” The material requested is relevant, as it relates to the overall information reviewed by the bank which either did, or did not, lead it to its declination of the loan application. The theory of this action – which plaintiff must prove – is that the declination was not based on the actual status of defendant Dozortsev’s ability to satisfy the applied-for loan obligations as they come due; but rather, on a nefarious ground designed to facilitate defendants’ attempt to cancel a legally binding contract of sale.

Request 11: All documents, including First Republic Bank's internal communications, notes and memoranda, concerning, relating to or referring to the Denial Letter.

Ruling: Not quashed.

Request 12: All documents constituting, concerning, relating to or referring to any communications, whether written or oral, between First Republic Bank and the defendants, including without limitation correspondence, notes of meetings and notes of telephone calls, relating to or referring the loan application to purchase Premises.

Ruling: Not quashed.

Request 13: All documents constituting, concerning, relating to or referring to any communications, whether written or oral, between First Republic Bank and any third parties including without limitation correspondence, notes of meetings and notes of telephone calls, relating to or referring the loan application to purchase the Premises.

Ruling: Not quashed.

The Brian Meier Subpoena:

Following are the documents requested by plaintiffs in the Brian Meier Subpoena, and the court’s rulings in connection therewith.

Request 1: Copies of all loan pre-approval letters provided by the defendants or on behalf of the defendants.

Ruling: Not quashed. The request seeks letters provided by others “on behalf of the defendants.”

Request 2: Copies of all documents provided by defendants or on behalf of the defendants in connection with the defendants' offer to purchase Condominium Unit 3 (the "Premises") in the condominium building known as and located at 355 East 19th Street, New York, New York.

Ruling: Not quashed. The request seeks letters provided by others “on behalf of the defendants.”

Request 3: All documents, including Meier Estates & Ventures' internal communications, notes and memoranda, concerning, relating to or referring to defendants' offer to purchase the Premises.

Ruling: Not quashed.

Request 4: The defendants' purchase application (the "Purchase Application") submitted to the Condo Board.

Ruling: Otherwise appropriate; but quashed insofar as it seeks the production of documents that can be obtained from Defendants, and have already been demanded from Defendants pursuant to a Notice for Discovery and Inspection.

Request 5: Copies of all documents provided by defendants or on behalf of the defendants (including, but not limited to, letters, emails, text messages, spreadsheets, reports, databases, applications, appraisals, inspections, bank statements, brokerage statements, financial statements, tax returns, pay stubs) in connection with the Purchase Application.

Ruling: Not quashed. The request includes subject documents provided by others “on behalf of the defendants.” The material requested is relevant, as it relates to the overall information that may have been reviewed by the bank which either did, or did not, lead it to its declination of the loan application. The theory of this action – which plaintiff must prove – is that the declination was not based on the actual status of defendant Dozortsev’s ability to satisfy the applied-for loan obligations as they come due; but rather, on a nefarious ground designed to facilitate defendants’ attempt to cancel a legally binding contract of sale.

Request 6: Copies of all documents provided by defendants or on behalf of the defendants (including, but not limited to, letters, emails, text messages, spreadsheets, reports, databases, applications, appraisals, inspections, bank statements, brokerage statements, financial statements, tax returns, pay stubs) in connection with the denial of their loan application to First Republic Bank.

Ruling: Not quashed. The request seeks documents provided by others “on behalf of the defendants.” The material requested is relevant, as it relates to the overall information reviewed by the bank which either did, or did not, lead it to its declination of the loan application. The theory of this action – which plaintiff must prove – is that the declination was not based on the actual status of defendant Dozortsev’s ability to satisfy the applied-for loan obligations as they come due; but rather, on a nefarious ground designed to facilitate defendants’ attempt to cancel a legally binding contract of sale.

Request 7: All documents constituting, concerning, relating to or referring to any communications, whether written or oral, between Meier Estates & Ventures and the defendants, including without limitation correspondence, notes of meetings and notes of telephone calls, relating to or referring the denial of the defendants' loan application to First Republic Bank.

Ruling: Not quashed. The material requested is relevant, as it relates to the overall information reviewed by the bank which either did, or did not, lead it to its declination of the loan application. The theory of this action – which plaintiff must prove – is that the declination was not based on the actual status of defendant Dozortsev’s ability to satisfy the applied-for loan obligations as they come due; but rather, on a nefarious ground designed to facilitate defendants’ attempt to cancel a legally binding contract of sale.

Request 8: All documents constituting, concerning, relating to or referring to any communications, whether written or oral, between Meier Estates & Ventures and First Republic Bank including without limitation correspondence, notes of meetings and notes of telephone calls, relating to or referring to the denial of the defendants' loan application to First Republic Bank.

Ruling: Not quashed. See Ruling 7.

The Jeffrey Bruce Subpoena and First Republic Bank Subpoena are Duplicative:

The court agrees with defendants’ point that these two subpoenas are burdensome as duplicative, since Jeffrey Bruce is the First Republic loan officer who was responsible for this loan. Accordingly, the court quashes the Jeffrey Bruce Subpoena as a matter of form, requiring

substantive compliance by First Republic Bank with its subpoena in this matter to the extent ruled upon in the rulings hereinabove.

ACCORDINGLY, it is

ORDERED that defendants' motion to quash subpoenas is granted to the extent set forth hereinabove; and it is further

ORDERED that defendants' motion for a protective order is granted to the extent that any production of documents made in response to the subpoenas shall be made for "Attorneys' Eyes Only."

This will constitute the decision and order of the court.

ENTER:



<u>12/30/2021</u>			<u>LOUIS NOCK, J.S.C.</u>
DATE			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE
	<input type="checkbox"/> DENIED		