

**Krasnow v Catania**

2021 NY Slip Op 34041(U)

March 30, 2021

Supreme Court, Nassau County

Docket Number: Index No. 602409/2020

Judge: Steven M. Jaeger

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This opinion is uncorrected and not selected for official publication.



Realty Group, LLC. On or about November 22, 2019, the parties executed a letter of intent outlining the basic terms and conditions to be set forth in a formal purchase and sales Agreement. (A copy of the Letter of Intent is annexed to Defendant's Affirmation in Support as Exhibit "B")

Defendant's attorney in his affirmation, argues that the documentary evidence upon which Plaintiffs rely establishes that there was no contract but an agreement to agree. Counsel posits that Plaintiffs' causes of action for breach of contract must fail because the letter of intent was not binding upon either party and required only that the parties pursue drafting a purchase and sales agreement. Further, as it relates to Plaintiffs' causes of action sounding in tort, Defendant's counsel argues that those causes of action must be dismissed as they cannot be maintained solely on an alleged breach of contract and not on any legal duty extraneous to the contract and therefore cannot be maintained.

In opposition, Plaintiffs' counsel argues inter alia that the letter of intent was binding to the extent that it states that "Seller agrees to cease all negotiations regarding the sale of the Property with any parties other than buyer concurrently with the execution of the Contract." (See copy of the Letter of Intent annexed to Defendant's affirmation in support as **Exhibit "B"**) Plaintiffs' counsel contends that Defendant breached the contract when he failed to pursue a purchase and sales agreement with Plaintiffs and negotiated for the sale of the property with someone other than Plaintiffs. Additionally, Plaintiffs' counsel states that any question of ambiguity in the contract should be held against the drafter,

Defendant's agent herein. He further argues that ambiguity is a question of law to be resolved by the court, not determined in a motion to dismiss.

Defendant reiterates his arguments in his reply affirmation.

An application predicated upon CPLR § 3211 (a)(1) will be granted only upon a showing that “the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law” (*Yue Fung USA Enterprises, Inc. v. Novelty Crystal Corp.*, 105 A.D.3d 840,841 [2d Dept. 2013]; *Kappa Development Corp. v. Queens College Point Holdings, LLC*, 95 A.D.3d 1178 [2d Dept. 2012]; *Summer v. Severance*, 85 A.D.3d 1011 [2d Dept. 2011]). Moreover, “[a] motion to dismiss based on documentary evidence may be granted only where such documentary evidence utterly refutes the plaintiff’s factual allegations, resolves all factual issues as a matter of law, and conclusively disposes of the claims at issue” (*Yue Fung USA Enterprises, Inc. v. Novelty Crystal Corp.*, *supra* at 841 [internal citations omitted]). “ ‘[J]udicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case’ ” (*Cives Corp. v. George A. Fuller Co., Inc.*, 97 A.D.3d 713,714 [2d Dept. 2012] quoting *Fontanetta v. Doe*, 73 A.D.3d 78, 84-84 [2d Dept. 2012] [internal quotations omitted]). However, “[n]either affidavits, deposition testimony, nor letters are considered documentary evidence within the intendment of CPLR § 3211 (a) (1)” (*Granada Condominium III Assn. v. Palomino*, 78 A.D.3d 996 [2d Dept. 2010] [internal quotations omitted]; *Cives Corp. v. George A. Fuller Co., Inc.*, *supra*).

In the instant matter, the document in question states in relevant part:

This document serves as a summary of terms and conditions (Term Sheet) from Irwin Kransnow (Member) (“Purchaser”), in which Purchaser has expressed their interest in acquiring the subject property. This Term Sheet sets forth the basic terms under which Purchaser would be interested in entering into a Purchase & Sale Agreement (PSA). Please be advised that this letter is not contractually binding, and is only an expression of the basic terms and conditions to be incorporated into a formally written PSA.

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Timing: Immediately after the acceptance of this LOI, the parties hereto will diligently pursue the drafting a formal Contract. The Contract will include all terms and conditions typical of a transaction of this type. Seller agrees to cease all negotiations regarding the sale of the Property with any parties other than buyer concurrently with the execution of the Contract.

It is inherent in a contract, particularly one for the sale of real property that the seller would cease negotiations with persons other than the potential buyer upon execution of a purchase and sales agreement. Indeed, there is no need to expressly state that at the execution of the purchase and sales agreement, the seller would cease negotiations with the buyer. The letter of intent specifically states that “the contract would include all terms and conditions typical of a transaction of this type.” (see letter annexed to Defendant’s Affidavit as **Exhibit “B”**) An agreement to cease negotiations with third-parties is necessarily inherent to a contract and is “not a term or condition typical to a purchase and sales agreement” that must be expressly stated. That it is expressly stated in the letter of intent suggests that the parties intended that Seller/Defendant would not continue to negotiate with other potential purchasers pending the execution of the contract.

Here, the documentary evidence upon which the Defendant relies does not “utterly refutes the plaintiff’s factual allegations, resolves all factual issues as a matter of law, and conclusively disposes of the claims at issue” (*Yue Fung USA Enterprises, Inc. v. Novelty Crystal Corp.*, *supra* at 841 [internal citations omitted]).

Accordingly, it is hereby

**ORDERED**, that the motion by the Defendant which seeks an order pursuant to CPLR § 3211 (a) (1) and (7) dismissing the Plaintiff’s complaint, is **DENIED**; and it is further

**ORDERED**, that the Defendant shall serve an answer within twenty (20) days of the date of this Order; and it is further

**ORDERED**, that the Plaintiff’s counsel shall serve a copy of this Order upon the Defendant’s counsel, pursuant to CPLR § 2103 (b) 1, 2, 3 or 6, within seven (7) days of the date of this Order. **PROOF OF SERVICE MUST BE FILED WITH THE COUNTY CLERK.**

This constitutes the Decision and Order of the Court.

All applications not specifically addressed are **DENIED**.

DATED: Mineola, New York  
March 30, 2021

*Steven M. Jaeger*

Hon. Steven M. Jaeger  
Acting Justice of the Supreme Court

**ENTERED**

**Apr 05 2021**

NASSAU COUNTY  
COUNTY CLERK’S OFFICE