Licht v Rosenberg
2022 NY Slip Op 31240(U)
April 12, 2022
Supreme Court, New York County
Docket Number: Index No. 652594/2020
Judge: Louis Nock
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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LAURIE LICHT, MARK SMITH, and ANDREW SMITH,

Plaintiffs,

- v -

DANIEL ROSENBERG, IRINA ROSENBERG, and LAW OFFICES OF NATHANIEL MULLER, P.C.,

Defendants.

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INDEX NO. 652594/2020

MOTION DATE 11/13/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 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, and 49

were read on this motion for SUMMARY JUDGMENT.

LOUIS L. NOCK, J.

Upon the foregoing documents, it is ordered that plaintiffs' motion for summary judgment is determined as follows.

BACKGROUND

Defendants DANIEL B. ROSENBERG and IRINA ROSENBERG a/k/a IRINA GABICHVADE (the "Sellers"), are the owners of 154 shares of 40 E. 9th St. Owners Corp. and the proprietary lease associated with Unit 5A (the "Unit") of the property located at 40 East 9th Street, New York, New York 10003 (the "Premises"). On or about February 28, 2020, the Plaintiffs, LAURIE LICHT, MARK SMITH, and ANDREW SMITH (the "Purchasers"), and Sellers entered into a contract for the purchase and sale of the Unit of the Cooperative located at 40 East 96th Street, New York, New York 10003 (the "Contract" [NYSCEF Doc. No. 2]). Pursuant to the Contract, Purchasers delivered $175,000.00 as a contract deposit (the "Contract Deposit"), which was paid to Seller's Attorney, as Escrowee, by wire transfer on February 28,

2020. Purchasers tendered $175,000.00 for the Contract Deposit, and Escrowee confirmed receipt of the Contract Deposit into Seller Attorney's escrow account at Citibank, N.A., (the "Escrow Account") (*see*, NYSCEF Doc. No. 3)

Paragraph 6.1 of the Contract of Sale provides that the "sale is subject to the unconditional consent of the Corporation." Purchasers prepared and submitted a comprehensive board application (the "Board Application") (NYSCEF Doc. No. 4) and, as requested, attended an interview before the Corporation's Board of Directors, which was held on May 11, 2020, (the "Board Interview"). The Contract of Sale and Board Application are entirely consistent, with both naming all three Plaintiffs herein as the sole purchasers and applicants.

On May 20, 2020, the Corporation issued a decision on the Purchasers' Board Application which was communicated to Purchasers' real estate agent by e-mail from an employee at the managing agent's office, Hoffman Management, named Gordon Noah (NYSCEF Doc. No. 5). The e-mail stated that "the Board will approve the application subject to the son [Andrew Smith] as the sole holder of shares with the parents [Laurie Licht and Mark Smith] as guarantors. Please let me know if they wish to move forward." Upon receipt of the such conditional approval issued by the Corporation's Board of Directors, the Purchasers elected to terminate the Contract in accordance with paragraph 6.3 of the Contract of Sale and requested the return of the Contract Deposit (*see*, NYSCEF Doc. No. 6). Per paragraph 6.3 of the Contract of Sale: "Either Party, after learning of the Corporation's decision, shall promptly advise the other Party thereof. . . . If such consent is refused at any time, either Party may cancel this Contract by Notice. In the event of cancellation pursuant to this ¶ 6.3, the Escrowee shall refund the Contract Deposit to Purchaser." Purchasers have demanded the return of their Contract Deposit, which Sellers and Escrowee have refused to do.

This action was commenced by summons and complaint filed June 25, 2020, asserting causes of action against Sellers for breach of the Contract of Sale and for related declaratory relief, and causes of action against Escrowee – defendant Law Offices of Nathaniel Muller, P.C. – for related declaratory relief. All causes of action are imbued with the purpose of obtaining a return of the Contract Deposit in accordance with the Contract of Sale on account of the absence of unconditional approval to the sale by the Cooperative Corporation's Board.

An answer with counterclaims was filed by Sellers on August 4, 2020 (NYSCEF Doc. No. 11). The counterclaims seek, in effect, a declaration that they are entitled to receive and keep the Contract Deposit, and for $65,000 in attorneys' fees, and for punitive damages in an amount of $50,000.

Escrowee filed an answer on August 4, 2020 (NYSCEF Doc. No. 16), which seeks an order allowing it to deposit the Contract Deposit with the County Clerk and asserting a counterclaim for legal fees.

Purchasers now move for summary judgment on the complaint. The motion is opposed by Sellers. Escrowee opposes the motion only to the extent that it seeks interest on the escrowed Contract Deposit.

DISCUSSION

"To obtain summary judgment it is necessary that the movant establish his cause or defense sufficiently to warrant the court as a matter of law in directing judgment; in is favor, and he must do so by tender of evidentiary proof in admissible form" (*Zuckerman v City of N.Y.*, 49 NY2d 557, 562 [1980]). To defeat summary judgment, "the opposing party must assemble and lay bare its affirmative proof to demonstrate that genuine triable issues of fact exist." (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772, 773 [1st Dept 1983], *affd* 62 NY2d 686 [1984]).

"Similarly, the issues must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*id.*). Mere conclusions or unsubstantiated allegations will not defeat the moving party's right to summary judgment (*Zuckerman, supra*).

Summary judgment is appropriate here because there is no credible dispute that the Corporation's approval was expressly conditional upon the use of a guarantor. Paragraph 6.1 of the Contract clearly states that "[t]his sale is subject to the unconditional consent of the Corporation." Paragraph 6.3 further provides that: “Either Party, after learning of the Corporation's decision, shall promptly advise the other Party thereof. If the corporation has not made a decision on or before the Scheduled closing date, the Closing shall be adjourned for 30 business days for the purpose of obtaining such consent. If such consent is not given by such adjourned date, either Party may cancel this contract by Notice, provided that the Corporation's consent is not issued before such Notice of cancellation is given. If such consent is refused at any time, either Party may cancel this contract by Notice. In the event of cancellations pursuant to this ¶ 6.3, the Escrowee shall refund the contract Deposit to Purchaser." (*Id.*)

A contract is to be construed in accordance with the parties' intent, which is generally discerned from the four comers of the document itself. Consequently, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms (*Obstfeld v Thermo Niton Analyzers, LLC*, 112 AD3d 895, 897 [2d Dept 2013] [citing *MHR Capital Partners LP v Presstek Inc.*, 12 NY3d 640, 645 [2009]).

Binding First Department precedent instructs that a contract for the sale of a cooperative apartment may be terminated upon the co-op board's conditional approval of the sale (*see, e.g., Lovelace v Krauss*, 60 AD3d 579, 579-80 [1st Dept] [affirming motion court's declaration that contract of sale had been cancelled and directing escrowee to return plaintiff's deposit where only

a conditional approval was granted to the purchaser of a co-op apartment], *lv denied* 12 NY3d 714 [2009]). The Appellate Division noted that "[c]o-op board approval was required as a condition precedent to defendants' sale of these premises to plaintiff," and "where there was still an area of disagreement to be resolved, there was no unconditional approval of the Board" (*id.*). As is the case here, "[t]he plain language of the contract permitted either party to cancel if unconditional approval was not obtained" (*id.*; *see also, Albert & Kimmel v Herman*, 276 AD2d 413, 413-14 [1st Dept 2000] (affirming return of escrowed money to purchaser where buyer declined to meet conditions requested by co-op board]).

Here, the Board voted and granted conditional approval, requiring a personal guarantor of plaintiff Andrew Smith's obligations (*see*, NYSCEF Doc. No. 5), and were clearly material. That condition to Board approval constituted a refusal to provide “unconditional consent" pursuant to section 6.1 of the Contract of Sale, giving rise to the plaintiffs’ unequivocal right to terminate the Contract of Sale "at any time" (*id.*). The plaintiffs promptly provided formal notice of cancellation to Sellers and Escrowee (NYSCEF Doc. No. 23). Consistent with the plain terms of the Contract of Sale, the plaintiffs properly exercised their right to terminate and are entitled to return of their Contract Deposit (*see also, Moran v Erk*, 11 NY3d 452, 456 [2008] [“We do not ordinarily read implied limitations into unambiguously worded contractual provisions designed to protect contracting parties]).

Sellers, in opposition, point to the Board Application, which contains an answer by Purchasers to question 7 thereof, asking whether any part of the purchase price will be borrowed. Said plaintiff answered “Yes, a $300,000 mortgage will be taken by Andrew Smith. The remaining $1,450,000 will be paid in cash from Andrew Smith’s bank accounts.” (NYSCEF Doc. No. 21.) Sellers also point to a letter from Andrew Smith to the Board, dated April 5, 2020,

stating that he would "be responsible for the mortgage and maintenance payments . . . ." (NYSCEF Doc. No. 39.) However, the Contract of Sale does not contain any term of sale, or condition of sale, requiring a guaranty by any of the Purchasers. Nor is the Board Application or any other extrinsic document referenced in, or incorporated into, the Contract of Sale. Where the Contract of Sale found it useful or necessary to make extrinsic reference, or to incorporate a separate document, it was perfectly able to do so as it did concerning its Riders (contained in NYSCEF Doc. No. 2) which are "Attached to and Forming a Part of Contract of Sale" (the "Purchaser's Rider") and which make it clear that in the event of "any inconsistency or conflict between the terms of the printed portion of the Contract, Seller's Rider, and this Rider (collectively referred to as this 'Contract'), the terms and provisions of this Rider shall govern and be binding" (*id.*). Considering that all three plaintiffs are designated in the Contract of Sale, and in all other relevant documents (i.e., both Riders, and the Board Application), as the Purchaser, and, indisputably, all three plaintiffs would be the shareholders of the Cooperative shares underlying the Contract of Sale (*see*, Contract of Sale and Board Application), the unambiguous clause in the Contract of Sale making "[t]his sale subject to the unconditional consent of the Corporation" (Contract of Sale ¶ 6.1) applied equally to all three plaintiffs. The Corporation's May 2020 insistence that the deal be different than that set forth in the February 2020 Contract of Sale (to wit: "the Board will approve the application subject to the son as the sole shareholder of shares with the parents as guarantors") is, most decidedly, a condition which is inconsistent with the Contract of Sale. Purchasers had every right to cancel the Contract of Sale at that point and seek restitution of their Contract Deposit. Therefore, plaintiffs are entitled to summary judgment on their complaint, seeking restitution out of escrow of their Contract Deposit, to the extent set forth hereinbelow, and defendants' counterclaims are dismissed.

As for plaintiff's request for a sanction against defendants, it is denied. Although this court has recognized plaintiffs' substantive position in this lawsuit to be imbued with merit, defendants' point of view in opposition does not rise to the level of "frivolous conduct" (22 NYCRR § 130-1.1).

Escrowee's opposition to the motion for summary judgment is limited to that part of the motion that seeks interest on the Contract Deposit. Escrowee has also asked for an order requiring plaintiffs to cover its legal costs in defending this matter. The Contract of Sale, at paragraph 1.24, specifically states that the parties agree that the contract deposit will be held in a non-interest bearing IOLA account. Therefore, no interest is due on the Contract Deposit.

Escrowee's counterclaim seeks an award of the reasonable value of its efforts expended in defending plaintiffs' claim against it for release from escrow, to plaintiffs, of the Contract Deposit. That counterclaim finds its grounding in a thoroughly unambiguous provision in the Contract of Sale stating:

> Escrowee will serve without compensation. Escrowee is acting solely as a stakeholder at the Parties' request and for their convenience. Escrowee shall not be liable to either Party for any act or omission unless it involves bad faith, willful disregard of this Contract or gross negligence. **In the event of any dispute, Seller and Purchaser shall jointly and severally (with right of contribution) defend (by attorneys elected by Escrowee), indemnify and hold harmless Escrowee from and against any claim, judgment, loss, liability, cost and expenses incurred in connection with the performance of Escrowee's acts or omissions not involving bad faith, willful disregard of this Contract or gross negligence**. This indemnity includes, without limitation, reasonable attorneys' fees either paid to retain attorneys or representing the fair value of legal services rendered by Escrowee to itself and disbursements, court costs and litigation expenses.

(NYSCEF Doc. No. 2 ¶ 27.3 [emphasis added].)

The Appellate Division, First Department, in the highly instructive case of *Breed, Abbott & Morgan v Hulko* (139 AD2d 71 [1st Dept 1988], *affirmed* 74 NY2d 686 [1989]), dealt with the question whether escrowee indemnification clauses in real estate sales contracts were exclusively

limited to third party actions against the escrowee or, as in the present case, an action brought by one of the parties (in this case, the Purchasers). After noting an argument that such a clause only "relates to actions by third parties, and that somehow a different rule applies where the promise to indemnify is sought to be applied to recover legal expenses incurred in defending against an action brought by the promisor itself[,]" that court stated that "[n]o plausible reason for such a distinction has been presented. Indeed, it is a curious notion that a broad indemnification clause will be interpreted to embrace counsel fees . . . where the action is brought by third parties, but will not be so interpreted where the action is brought by the promisor." (*Id.*, at 74-75.)

According to the foregoing appellate sentiment, Escrowee's counterclaim herein, seeking an award from plaintiffs of the reasonable value of its efforts in defending this action, possesses theoretical merit. However, the analysis does not end there. The Appellate Division in that case made clear that the party which should bear the responsibility of such an indemnification clause must "sens[ibly be]" the unsuccessful party in the action (*id.*, at 76).[1] Naturally, in view of the within disposition granting Purchasers' motion for summary judgment and dismissing Sellers' counterclaims, Purchasers should not be the parties responsible for the escrow indemnification clause pertinent to this case. Therefore, Escrowee's counterclaim seeking the reasonable value of its efforts herein from Purchasers is dismissed.[2]

[1] The appellate articulation was: "We should have supposed that common sense and familiar, universally accepted indemnification principles would make it undisputably clear that as between the two parties to the transaction, the ultimate responsibility for indemnification of litigation expenses would rest on the party whose unjustified lawsuit gave rise to those expenses." (139 AD2d at 77.) As noted earlier in this decision, this court has not found defendants' unsuccessful position to rise to the level of "frivolous conduct" within the meaning of the sanction regulation (22 NYCRR § 130-1.1). Thus, this court's application of the foregoing appellate articulation to the outcome of this matter, in which defendants did not ultimately succeed, should not be construed to imply anything beyond the ultimate finding herein that defendants' position was incorrect.

[2] The court takes note of the fact that Escrowee has not asserted a cross-claim against Sellers – its co-defendants – in this action. Thus, nothing has been presented by Escrowee to this court which could possibly result in an order granting its requested fee relief as against Sellers.

Accordingly, it is

ORDERED and ADJUDGED that plaintiffs motion for summary judgment on their complaint is granted to the extent that defendant Office of Nathaniel Muller, P.C., shall release from escrow, to counsel for the plaintiffs, the sum of $175,000.00 escrowed in connection with the contract of sale that is the subject of this action, no later than ten business days from the date of filing hereof; and it is further

ORDERED that the part of plaintiffs' motion seeking a sanction is denied; and it is further

ORDERED that the defendants' counterclaims are dismissed.

This will constitute the decision and order of the court.

ENTER:

4/12/2022
DATE

LOUIS NOCK, J.S.C.

CHECK ONE:	X	**CASE DISPOSED**			**NON-FINAL DISPOSITION**		
		GRANTED		**DENIED**	X	**GRANTED IN PART**	**OTHER**
APPLICATION:		**SETTLE ORDER**				**SUBMIT ORDER**	
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**				**FIDUCIARY APPOINTMENT**	**REFERENCE**