

Kim v 2349 Creston Realty Corp.

2022 NY Slip Op 32209(U)

January 20, 2022

Supreme Court, Bronx County

Docket Number: Index No. 22617/2020

Judge: Laura G. Douglas

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
PART 6

Index No. 22617/2020

DR. BACK K. KIM,

Plaintiff,

DECISION/ORDER

-against-

Present:
Hon. Laura G. Douglas
J.S.C.

2349 CRESTON REALTY CORP. and
JAIME RAMIREZ, as Escrow Agent ,

Defendants.

Recitation, as required by Rule 2219(a) of the C.P.L.R., of the papers considered in the review of this motion for summary judgment and cross-motion for summary judgment (Seq. No. 1):

Papers

Numbered

Plaintiff’s Notice of Motion, Affirmation of Jason J. Rebhun, Esq. dated August 3, 2020 in Support of Motion, Exhibits (“1” through “10”), Affidavit of Dr. Back K. Kim dated June 26, 2020 in Support of Motion, Affidavit of Lana Choy, Esq. dated July 10, 2020 in Support of Motion..... 1

Defendants’ Notice of Cross-Motion, Affirmation of Jaime Ramirez, Esq. dated October 20, 2020 in Support of Cross-Motion and in Opposition to Motion, Exhibits (“A” through “I”), Affidavit of Alba Gutierrez dated October 20, 2020 in Support of Cross-Motion and in Opposition to Motion, and Affirmation of Robert J. Howard, Esq. dated October 20, 2020 in Support of Cross-Motion and in Opposition to Motion..... 2

Memorandum of Law by Robert J. Howard, Esq. dated October 20, 2020 in Support of Cross-Motion and in Opposition to Motion..... 3

Affirmation of Jason J. Rebhun, Esq. dated November 6, 2020 in Reply and in Opposition to Cross-Motion..... 4

Memorandum of Law by Robert J. Howard, Esq. dated November 19, 2020 in Reply..... 5

This motion and cross-motion are consolidated for purposes of Decision/Order and, upon the foregoing papers and after due deliberation, the Decision/Order on this motion and cross-motion is as follows:

The plaintiff (“Kim”) seeks summary judgment on his verified complaint and dismissal of the defendants’ counterclaims. The defendants (collectively, “Creston Realty”) cross-move for summary judgment dismissing Kim’s complaint, “declaring [Kim] to be in default of the subject contract and declaring that Defendant Creston is entitled to payment of the contract down payment in escrow in the amount of \$105,000 as liquidated damages”, granting defendant Jaime Ramirez partial summary judgment as to liability on the second and third counterclaims for contractual indemnity and directing further proceedings on damages pursuant to CPLR 3212(c) and (d). The motion is granted solely as ordered below and is denied in all other respects. The cross-motion is denied in its entirety.

This action arises out of an aborted real estate transaction in which Kim was to purchase certain commercial property from defendant 2349 Creston Realty Corp. The parties’ contract of sale is dated February 23, 2019. The commercial property included a laundromat on the first floor. The issue is whether Creston Realty is entitled to retain Kim’s down payment. Kim contends that the contract was contingent on the property satisfactorily passing certain environmental reviews, which it did not, and that Creston Realty subsequently sold the subject property to another buyer. Creston Realty argues that the environmental testing was part of the contract’s mortgage contingency clauses and Kim failed to properly and timely cancel the contract under those provisions, thereby forfeiting his deposit.

The following facts appear to be undisputed:

1. Defendant Jaime Ramirez, served as attorney for the seller and escrow agent; and
2. Kim deposited the sum of \$105,000.00 as a down payment in Ramirez’ escrow account, where it remains; and
3. The contract provided for a closing date of March 1, 2019, which was extended **for**
4. 2349 Creston Realty Corp. sold the subject premises to a different purchaser on or about October 23, 2019; and
5. Despite this subsequent sale, Creston Realty has refused to return Kim’s down payment.

Kim contends that closing was contingent upon Creston Realty’s ability to convey insurable title, which included that the property would clear two phases of environmental reporting in accordance with section W of the contract’s Rider. In pertinent part, that section reads as follows:

W. Additional comments on purchase agreement and Rider:

1. Subject to the return of the lender’s Environmental Phase I and Environmental Phase II reports with no environmentally hazardous conditions and/or issues

affecting the premises.

It appears that the environmental reports found “unsound levels of various hazardous substances”. Since the environmental reports did not come back clean, Kim’s mortgage lender would not commit to funding the purchase. Kim claims that this created a defect in title which served as a permissible basis for the contract’s cancellation and the return of Kim’s deposit. Kim contends that the negative environmental reports presented independent grounds to terminate the contract under section W of the Rider, regardless of whether a mortgage commitment had been secured. Kim notes that the language of section W is separate and distinct from the mortgage commitment language set forth in the contract and Rider, rendering a failure to pass a defect in title. That is, Kim’s cause of action for breach of contract is not based upon the contract’s mortgage contingency clause.

Creston Realty does not challenge the adverse findings in the environmental reports, but argues that the controversy is rooted in the mortgage contingency clause and that Kim failed to terminate the contract in a timely manner as set forth in paragraph 7(g) of the contract - that is, by March 30, 2019 – or to extend the closing date. Therefore, Kim breached the contract and forfeited his down payment by refusing to close. In pertinent part, paragraph 7(g) of the contract reads as follows:

“[A] commitment conditioned on the Institutional Lender’s approval of an appraisal AND OR PHASE I ENVIRONMENTAL REPORT 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 paragraph 7(e) unless the Commitment Date is extended).”

Ramirez avers that Kim’s attorney informed him that Kim intended to continue to operate as a laundromat and would be financing the purchase with a mortgage, so required a mortgage contingency clause. Ramirez notes that the parties discussed that the nature of the laundromat business would bring environmental hurdles to mortgage financing – “As is usual and customary in the commercial real estate market, the parties agreed that Kim’s concerns regarding the environmental condition of the Premises would be addressed within the context of the mortgage contingency clause” (*see* Ramirez Affirmation, ¶ 9). Ramirez describes this clause as a “conditional, limited, and optional right to cancel the contract” in the event that Kim was “unable to obtain a qualifying mortgage “commitment” from a lending institution within a contractually stipulated time, terms, and amount” on account of any environmental

concerns raised by Kim's mortgage lender (*see* Ramirez Affirmation, ¶ 10). Ramirez concedes that Creston Realty "ceded to Kim's demand that any "Commitment" issued by an Institutional Lender which reserves to the lender the right to review either a Phase I or Phase II environmental survey would not be deemed to be a qualifying "Commitment" under the mortgage contingency clause" (*see* Ramirez Affirmation, ¶ 13). However, Ramirez also notes that paragraph 7(e) limited Kim's time to cancel the Contract on account of his failure to secure a qualifying commitment to five business days following the commitment date, regardless of whether a non-qualifying conditional commitment was issued.

Kim counters that this deadline cannot be accurate, since the environmental testing was not completed until April, making it impossible to comply. In addition, Kim argues that any deadline to cancel began to run from the date that Kim's counsel received the fully executed contract, not from the date of the contract, as set forth in the superseding Rider. Kim's counsel submits an affidavit averring that she received the fully executed copy of the contract on February 26, 2019. Finally, Kim notes that section S of the Rider gave Kim 45 days, not 30 days, to obtain a mortgage commitment. That gave him until April 13, 2019.

Kim's attorney notified Ramirez via e-mail on April 12, 2019 that the premises had failed the environmental testing, specifically stating that the contract was contingent upon these results. Kim's counsel sent a second email to Ramirez on April 24, 2019 advising that the contract was cancelled and asking how the seller wished to proceed. Therefore, Kim contends that even if his claim were brought under the mortgage contingency clause, he timely exercised his right to terminate the contract on these grounds.

After what appear to have been proposals on proceeding with a sale despite the failed environmental testing, Kim demanded the return of his down payment in a letter dated July 2, 2019. Creston Realty argues that it this letter that untimely terminated the contract, while Kim argues that the contract had been previously terminated once the premises failed the environmental testing. Ramirez responded to Kim's demand for the return of his down payment in an e-mail dated November 12, 2019 by stating "Please give me until Friday. Will do all to resolve." Ramirez later replied that Creston Realty would not consent to his release of the down payment.

The contract and Rider unequivocally make the presence of any environmentally hazardous conditions in the two environmental reports a reason for Kim to cancel the contract without waiving his down payment. The Rider clearly sets forth the environmental reporting requirements in a section ("W") separate and apart from the mortgage contingency clause, which is set forth in section "S"

immediately preceding section W. Section S reads as follows:

S. Mortgage Contingent provision:

The obligations of purchaser hereunder are conditioned upon the issuance on or before 45 days hereof of a written commitment from any Institutional Lender to which such Institutional Lender agrees to make a loan at the purchaser's sole cost and expense of \$1,680,000.00 or such lesser sum as purchaser shall be willing to accept, at the prevailing fixed rate of interest or initial adjustment rate for a term of at least 15 years and on other customary commitment terms, whether or not conditioned upon any factors other than an appraisal satisfactory to the Institutional Lender, secured by a first mortgage on the premises.

Purchaser may cancel the contract if the Institutional Lender fails to close the loan as provided for in the commitment letter due to property appraisal, including appraisal conditions, and any judgments, liens or violations of record of Seller other than default of the purchaser in meeting their obligations under the terms of the commitment letter.

While this section did not explicitly require the mortgage lender's approval of an environmental report(s), section 7 of the contract did allow for this.

Since there are other reasons that a funding commitment could not be secured apart from the results of the environmental testing (such as an unsatisfactory appraisal), section W must be read as an independent contingency accruing to Kim's benefit. In fact, section W is titled "[a]dditional comments on purchase agreement and Rider", with no mention of it bearing any relation to the mortgage contingency clause. It is the "purchase agreement" itself and not the mortgage commitment that is "subject to" a clean environmental test. This interpretation is consistent with the objections stated by Kim's counsel in correspondence dated April 24, 2019 - that there exist "major environmental issues" that not only would make it extremely difficult for any lender to finance the purchase, but would require "a possible major cleanup". The added hurdle of environmental remediation, separate and apart from its impact on the ability to secure mortgage financing, was a distinct consideration upon which the agreement was conditioned. It is not unusual for a contract for the sale of real property to hinge on the absence of potentially costly environmental hazards (*see Chana & Devorah Realty, Inc. v. Degliuomini*, 25 Misc3d 1209 [S Ct Kings Cty 2009]).

Moreover, section W requires the two reports to contain "no environmentally hazardous

conditions and/or issues affecting the premises". In contrast, the mortgage contingency provisions in section 7 of the contract defer to the mortgage lender, which may have decided to fund the purchase despite the presence of certain environmental hazards. Were the mortgage contingency clause the only path to cancellation triggered by a negative report(s), Kim would be at the mercy of the mortgage lender to proceed, regardless of his ability to incur the costs and effects of the hazards, or give up his deposit. This supports the reading of section W as an independent grounds for termination available to Kim. Finally, this reading of section W as separate and distinct from the mortgage contingency clause is supported by the fact that section W contains no deadline for either the environmental reporting or for notification to Creston Realty that the reports had revealed environmental hazards. In contrast, the operation of the mortgage contingency provisions set forth a detailed schedule of operations. That the environmental reporting was to be made by the lender is inconsequential, since such third-party reports are frequently utilized as the basis for termination, such as a property value appraisal satisfactory to the mortgage lender as set forth even in this contract (*see* section S of Rider).

The language and structure of the contract and Rider make clear that the presence of environmentally hazardous conditions on the property would give Kim a reason to cancel the agreement without penalty, regardless of whether the mortgage lender was willing to finance the purchase of such a property. Section W of the Rider protected Kim from being compelled to proceed with the purchase of a property that might incur unknown and extraordinary costs of remediation, a risk admittedly acknowledged by Creston Realty at the outset of the proposed transaction. For these reasons, Kim is entitled to the return of his down payment, along with accrued interest and attorney's fees.

Creston Realty's counterclaims seek judgment on the grounds that Kim breached the contract by failing to timely cancel it following his inability to secure a commitment for mortgage financing, thereby waiving his right to the return of his down payment, that Ramirez should be indemnified for the costs incurred as a defendant in this action, and that Kim's breach triggered a \$150.00 fee for the preparation of the contract. Since the Court finds that Kim had grounds to terminate the contract and did so in a reasonable manner entitling him to the return of his down payment, the counterclaims are dismissed.

Under these circumstances, it cannot be said that Ramirez is directly liable for acting with willfully disregard or gross negligence (*see* Contract, ¶ 5) in refusing to return Kim's down payment. Similarly, Kim has not made a *prima facie* showing of entitlement to enhanced damages under GBL § 349, since there is no evidence that Creston Realty was misleading or deceptive in its behavior. Rather, as Kim himself puts it, this case simply involves a legitimate legal issue based upon an interpretation of

the contract language (*see* Rebhun Affirmation, ¶ 41).

Accordingly, it is hereby

ORDERED that summary judgment is granted to the plaintiff against defendant 2349 Creston Realty Corp. on the plaintiff's first cause of action; and it is further

ORDERED that summary judgment is granted to the plaintiff against defendant Jamie Ramirez, Esq. on the plaintiff's second cause of action only to the extent that Ramirez shall pay over the down payment amount of \$105,000.00 to the plaintiff, along with any accrued interest; and it is further

ORDERED that the plaintiff's third and fourth causes of action as set forth in his complaint are dismissed; and it is further

ORDERED that the defendants' counterclaims as asserted in their Answer are dismissed; and it is further

ORDERED that the plaintiff's request for attorney's fees is granted; and it is further

ORDERED that the plaintiff settle an order on notice together with his affidavit and documentation supporting the amount of fees actually paid together with an affidavit from plaintiff's counsel as to reasonable attorneys' fees, including an itemization of the hourly rate for the legal services, the specific services rendered, and the time spent on such services

The foregoing constitutes the Decision/Order of this Court.

DATED: January 20, 2022
Bronx, New York



HON. LAURA G. DOUGLAS
J.S.C.