

Lee v Hootnick

2022 NY Slip Op 32961(U)

September 1, 2022

Supreme Court, New York County

Docket Number: Index No. 652973/2020

Judge: Louis L. Nock

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LOUIS L. NOCK PART 38M

Justice

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MARGARET LEE and MICHAEL DEES,
Plaintiffs,

- v -

MARK HOOTNICK and DR. JAIME KNOPMAN,
Defendants.

INDEX NO. 652973/2020 (653156/2020)
MOTION DATE 03/02/2022
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, and 90

were read on this motion for SUMMARY JUDGMENT.

Upon the foregoing documents, it is ORDERED that so much of the motion seeking summary judgment compelling release of defendants' down-payment in this unconsummated condominium sale is granted for the reasons set forth in plaintiff's moving and reply papers (NYSCEF Doc. Nos. 68, 87), in which the court concurs. As more specifically set forth therein, the record establishes that the plaintiffs properly declared that time was of the essence to close on the condominium apartment on July 8, 2020, and defendants failed to appear and proceed on the duly scheduled closing date. In light of defendants' failure to close, pursuant to paragraph 13 of the contract of sale, plaintiffs are entitled to retain the down payment as liquidated damages (NYSCEF Doc. No. 11 ¶ 13). "[A] vendee who defaults on a real estate contract without lawful excuse, cannot recover the down payment" (Maxton Builders, Inc. v Lo Galbo, 68 NY2d 373, 378 [1986]). Plaintiff provides no lawful excuse for its failure to close, and the closing date chosen by defendants was reasonable under the circumstances (Ben Zev v Merman, 73 NY2d 781, 783 [1988]).

Defendants' invocation of frustration of purpose and impossibility of performance as defenses are unavailing. Assuming, *arguendo*, that the Condominium Board's access restrictions indeed prevented access to the point of frustrating the ability of the parties to consummate the transaction, which is a point of debatable accuracy, the parties do not dispute that any such restrictions were largely removed by June 21, 2020, two-and-a-half weeks prior to closing. Frustration of purpose and impossibility of performance are not occasioned by temporary restrictions on the parties' ability to perform (*see, Gap, Inc. v 44-45 Broadway Leasing Co. LLC*, 206 AD3d 503, 504 [1st Dept 2022]; *Knickerbocker Retail LLC v Bruckner Forever Young Social Adult Day Care Inc.*, 204 AD3d 536, 537 [1st Dept 2022]). Defendants' unpleaded claim that they were denied access to the apartment between March 16, 2020, and the closing date is raised for the first time in opposition to the motion (*see, e.g., Mazurek v Schoppmann*, 159 AD3d 814, 815 [2d Dept 2018] ["A court should not consider the merits of a new theory of recovery, raised for the first time in opposition to a motion for summary judgment, that was not pleaded"]). Moreover, it is insufficient to raise a triable issue of fact, as it is unsupported by documentary evidence, and the assertions of defendants' prior counsel, John Lewin, Esq., are vague and conclusory as to when, and how often, defendants requested access and were denied (*see, e.g., Greenberg v Coronet Properties Co.*, 167 AD2d 291, 292 [1st Dept 1990]). Defendants further fail to sufficiently support any of their other affirmative defenses to create an issue of fact requiring trial;

Accordingly, it is

ORDERED that so much of the motion seeking summary judgment compelling release of defendants' down payment to plaintiffs in this unconsummated condominium sale is granted, and

such release shall be directed to plaintiffs' counsel herein as set forth hereinbelow; and it is further

ORDERED that so much of the motion seeking summary judgment dismissing the counterclaims is granted for the reasons set forth in plaintiffs' moving and reply papers (NYSCEF Doc. Nos. 68, 87), in which the court concurs. Defendants allege counterclaims for breach of contract, foreclosure of a lien created by the parties' contract, and a declaratory judgment regarding frustration of purpose and impossibility of performance. As set forth above, the record discloses no triable issue of fact regarding plaintiffs' alleged breach of the contract, and frustration of purpose and impossibility of performance are not available to defendants. Moreover, as defendants have been found in breach of the contract, the lien in defendants' favor is terminated (NYSCEF Doc. No. 43 ¶ 15); and it is further

ORDERED that so much of the motion seeking summary judgment dismissing the complaint in *Mark Hootnick and Jaime Knopman v Margaret Lee and Michael Dees*, Index No. 653156/2020 (the "Purchaser's Action"), presently pending before the court and joined together with the instant action for purposes of discovery and joint trial pursuant to a so-ordered stipulation (NYSCEF Doc. No. 24 [Index No. 653156/2020]) is granted. Defendants herein, plaintiffs in the Purchaser's Action, allege causes of action in the Purchaser's Action that are identical to the counterclaims asserted herein, and so, for the reasons set forth above, plaintiffs herein (defendants in the Purchaser's Action) are entitled to summary judgment dismissing the Purchaser's Action; and it is further

ORDERED that so much of the motion as seeks cancellation of the notice of pendency filed by defendants herein in the Purchaser's Action is granted pursuant to CPLR 6514 [a]. As the Purchaser's Action has been dismissed, as set forth above, the notice of pendency is subject

to mandatory cancellation (*Freidus v Sardelli*, 192 AD2d 578, 580 [2d Dept 1993]); and it is further

ORDERED that so much of the motion as seeks to recover prejudgment interest and attorneys' fees is denied. The contract provides that in the event of defendants' default, plaintiffs' sole remedy shall be "to retain the down payment as liquidated damages" (NYSCEF Doc. No. 43 ¶ 13). Such contractual language bars an award of the prejudgment interest provided for in CPLR 5001 (*J. D'Addario & Co., Inc. v Embassy Indus., Inc.*, 20 NY3d 113, 118-19 [2012]). Regarding attorneys' fees, it is settled law that "[e]ach litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise" (*Peter v Nantkwest, Inc.*, 140 S Ct 365, 370 [2019]). Here, plaintiffs cite no statute or provision of the contract entitling them to recover attorneys' fees; and it is further

ADJUDGED and DECLARED that plaintiffs are entitled to recover the down payment as set forth in their first cause of action; and it is further

ORDERED that nonparty M. Nader Ahari, Esq., currently holding the down payment in escrow, is directed to disburse the down payment to plaintiffs' counsel, Kenneth L. Small, Esq., within ten days of the filing hereof; and it is further

ORDERED that the Clerk of the Court is directed to enter Judgment in favor of plaintiffs and against defendants, dismissing the counterclaims and defendants' affirmative defenses, with costs and disbursements to plaintiffs as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in *Mark Hootnick and Jaime Knopman v Margaret Lee and Michael Dees*, Index No. 653156/2020 in favor of

defendants therein, Margaret Lee and Michael Dees, and against plaintiffs therein, Mark Hootnick and Jaime Knopman, dismissing the complaint; and it is further

ORDERED that the Clerk of New York County is directed to cancel the notice of pendency filed in *Mark Hootnick and Jaime Knopman v Margaret Lee and Michael Dees*, Index No. 653156/2020 and indexed to the premises located at Block 1580, Lot 1019, within New York County.

This constitutes the decision and order of the court.

<u>9/1/2022</u> DATE		<u>LOUIS L. NOCK, J.S.C.</u>
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<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