

Rossman v Schwanz

2023 NY Slip Op 30890(U)

March 24, 2023

Supreme Court, New York County

Docket Number: Index No. 154033/2020

Judge: Debra A. James

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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. DEBRA A. JAMES

PART 59

Justice

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JONATHAN A. ROSSMAN,

Plaintiff,

- v -

DORIS SCHWANZ and PEGGY O'DEA, as Administratrixes
of the Estate of Walter Sommer,

Defendants.

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INDEX NO. 154033/2020

MOTION DATE 03/24/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

Upon the foregoing documents, it is

ORDERED that the cross-motion of defendants, pursuant to CPLR 3212, for an award of summary judgment entitling them to retain the plaintiff's \$109,000 down payment, as liquidated damages, is denied; and it is further

ORDERED that the motion of plaintiff, pursuant to CPLR 3212, for summary judgment, for an order directing the release by the Escrowee of the down payment in the amount of \$109,000 to plaintiff, and to dismiss the counterclaims interposed against plaintiff, is granted; and it is further

ORDERED that the counterclaims against plaintiff are dismissed; and it is further

ORDERED that the contract deposit in the amount of \$109,000 in the IOLA account of Koutsoudakis & Iakovou Law Group, LLC, as designated Escrowee, shall be transferred to plaintiff, within twenty (20) days of service of a copy of this order with notice of entry; and it is further

ORDERED that the plaintiff shall be awarded costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

DECISION

Defendants have failed to demonstrate that plaintiff clearly and unequivocally repudiated the cooperative apartment contract of sale. Notwithstanding plaintiff's "closing apologies for the withdrawal of my purchase order" stated in the final paragraph of his electronic message dated March 20, 2020 (NYSCEF Document Number 3), the first paragraph of such message, which states that "It is with great sadness that I write to you to request to withdraw the offer to purchase" (underlining added), is neither a clear nor an unequivocal expression of plaintiff's intent not to follow through with the purchase and/or closing. See Peierls, Buhler & Co, Inc v Newburger, 202 AD 471 (1st Dept 1922).

Moreover, the e-mail exchanges of March 25, 2020 between the broker for the plaintiff and the managing agent of the

cooperative board, on which the broker for the defendant sellers was copied (NYSCEF Document Number 12), demonstrate a bona fide retraction of any repudiation by plaintiff, by way of plaintiff's intent to continue to perform his obligations under the terms of the contract of sale, specifically his continuation of his application for board approval of the purchase. See Contract ¶¶ 6.2.1 and 6.2.3 (NYSCEF Document Number 8). In such message from his broker, plaintiff did not withdraw such application, but merely rejected the board's request to amend the contract terms to increase the amount of the contract deposit. Likewise, by electronic message dated April 16, 2020 (NYSCEF Document Number 16), plaintiff retracted any purported repudiation, expressing his intention to follow through with the purchase, when he rejected the board's request, made that same day, to amend the contract to require that he place one year's worth of maintenance payments in escrow. Nor have defendants demonstrated any material change in their position before the April 16, 2020 exchange of e-mails. See *Bernstein v Navani*, 131 AD3d 401 (1st Dept 2015).

Finally, defendants can offer no evidence demonstrating that they were "ready, willing, and able to perform" at the time of plaintiff's alleged repudiation, given the contractual

condition precedent that required board approval of the sale, which condition had not yet been met. See Pesa v Yoma Development Group, Inc., 18 NY3d 527, 532-533 (2012).

Debra A. James

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3/24/2023

DATE

DEBRA A. JAMES, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

APPLICATION:

SETTLE ORDER

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

SUBMIT ORDER

FIDUCIARY APPOINTMENT

REFERENCE