

Schmuelian v Bichoupan
2023 NY Slip Op 35312(U)
June 15, 2023
Supreme Court, Nassau County
Docket Number: Index No. 613830/2022
Judge: Lisa A. Cairo
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT: HON. LISA A. CAIRO, J.S.C.

-----X
**MOSHE SCHMUELIAN and SORAYA
SCHMUELIAN,**

Plaintiffs,

-against-

**ROBERT BICHOU PAN AS TRUSTEE OF THE
NEAMAT BICHOU PAN AND REBECCA
BICHOU PAN IRREVOCABLE TRUST,**

Defendant.

-----X
**ROBERT BICHOU PAN AS TRUSTEE OF THE
NEAMAT BICHOU PAN AND REBECCA
BICHOU PAN IRREVOCABLE TRUST**

Third Party Plaintiff,

-against-

**NAIDICH WURMAN LLP, KENNETH H. WURMAN,
ESQ., MOSHE SCHMUELIAN, and SORAYA
SCHMUELIAN,**

Third Party Defendants.

TRIAL/IAS PART 26

**DECISION AND ORDER
ON MOTION**

INDEX No. 613830/2022

Motion Seq. No. 1, 2

XXX

The following papers were read on these motions

DOCS NUMBERED

Notice of Motion, Affidavits, Affirmations, Exhibits, Memos.....	11-29
Notice of Cross Motion and Opposition Papers.....	31-47
Reply Papers.....	49-54

Relief Requested

The Plaintiffs/Third Party Defendants Moshe Schmuclian and Soraya Schmuclian (hereinafter referred to as Plaintiffs) and the Defendant/Third-Party Plaintiff Robert Bichoupan, as trustee of the Neamat Bichoupan and Rebecca Bichoupan Irrevocable Trust (hereinafter referred to as Defendant), respective motions for summary judgment pursuant to CPLR 3212 are determined as hereinafter provided.

Background

On February 3, 2022 the parties entered into a residential contract of sale with the Defendant as purchaser and the Plaintiffs as sellers for the premises located at 4 Cypress Avenue, Great Neck (the "Premises"). Pursuant to the contract, the purchase price was \$1,750,000 and the closing date was to be held on or about February 28, 2022. As is customary, prior to the scheduled closing date a title report was ordered by Defendant. The title report revealed three outstanding Village of Kings Point (the "Village") building permits.

The outstanding building permits relate to an underground liquid propane tank, a cesspool, and a hot water heater with gas oven line. On March 8, 2022 and March 15, 2022, respectively, the Plaintiffs' counsel, Kenneth H. Wurman, Esq., inquired as to whether Defendant would "close next week with an escrow to ensure that the open permits are closed" and thereafter declared that the Plaintiffs were "willing to put \$35,000.00 in escrow to ensure that the open permits are closed". On March 23, 2022, Mr. Wurman sent Defendant a proposed escrow agreement. The closing was held on April 11, 2022 at which time the final agreed upon escrow agreement (the "Escrow Agreement") was executed requiring the Plaintiffs to deposit \$35,000.00 with Mr. Wurman, as escrow agent.

The escrow agreement explicitly required the Plaintiffs to obtain certificates of completion for the outstanding building permits from the Village within 90 days of the closing date. If the Plaintiffs had begun to pursue their obligations in good faith during the 90 day period, a 30 day extension would be granted. In the event the Plaintiffs failed to obtain certificates of completion within 120 days from the closing date, all sums held in escrow were to be released to Defendant. The certificate of completion for the removal of the 120-gallon underground liquid propane tank, was timely received on or about June 28, 2022. On July 11, 2022 and August 26, 2022, Defendant requested release of the monies being held in escrow in accordance with the terms of the Escrow Agreement. On August 31, 2022, Mr. Wurman responded, "[n]o problem- working on this today." Defendant's final, unsuccessful demand for release of the \$35,000.00 occurred on September 8, 2022.

On October 13, 2022 the Plaintiffs filed this action. Their complaint purports to plead two independent declaratory judgment causes of action seeking a declaration that they are entitled to the escrow funds because of their ultimate success in obtaining the certificates of completion, as well as an additional cause of action to permanently enjoin the escrow agent's release of the monies and for an unspecified amount of legal fees and costs.

Issue was joined on November 21, 2022. Defendant's verified answer included six alleged

counterclaims: to wit, breach of the escrow agreement, breach of the contract of sale, breach of the covenant of good faith and fair dealing, fraudulent inducement, a claim for legal fees and for an order directing the immediate release of the escrow funds. In addition, on November 29, 2022, Defendant commenced a third-party action including the escrow agent as a third-party defendant and asserting claims of breach of fiduciary duty, breach of the escrow agreement, declaratory judgment and sanctions. The Plaintiffs' verified answer to the third-party complaint was served on December 13, 2022.

Discussion

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Upon a prima facie showing, "the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." (*Alvarez*, 68 N.Y.2d at 324). Significantly, "[t]he facts must be viewed in the light most favorable to the non-moving party [but] bald, conclusory assertions or speculation and a shadowy semblance of an issue are insufficient to defeat summary judgment." (*Stonehill Capital Management, LLC v. Bank of the West*, 28 NY3d 439 [2016] [internal quotations omitted]; see also *Fairlane Financial Corp. v. Longspagh*, 144 AD3d 858 [2d Dept 2016]; *Phillip v. D&D Carting Co., Inc.*, 136 AD3d 18 [2d Dept 2015]).

Contracts made upon an agreement to obtain permits for use and occupancy have been held enforceable as a form of liquidated damages, provided that the liquidated amount is not grossly disproportionate to foreseeable actual damages. (*70 West 45th Street Holding, LLC v. Waterscape Resort, LLC*, 136 AD3d 576 [1st Dept 2016]). "Liquidated damages constitute the compensation which, the parties have agreed, should be paid in order to satisfy any loss or injury flowing from a breach of their contract. (*Wirth & Hamid Fair Booking v. Wirth*, 265 NY 214, 224 [1934]). "In effect, a liquidated damages provision is an estimate, made by the parties at the time they entered into their agreement, of the extent of the injury that would be sustained as a result of the breach of the agreement." (*Truck Rent-A-Center, Inc. v. Puritan Farms 2nd, Inc.*, 41 NY2d 420, 423-424 [1977]; 2B NY PJ3d 4:20, at 238-239 [2019]).

Here, the Plaintiffs acknowledge by the affidavit of Moshe Schmuclian, inter alia, that two of the certificates of completion were not obtained until on or about September 2, 2022, but attribute it to pre-closing work the Defendant performed at the Premises. The Defendant's work is alleged to have substantially delayed the Plaintiffs' obtaining the Village's approval of the remaining two permits because of removal of smoke and carbon monoxide detectors. Plaintiffs provide a letter from the Village's Building Inspector which provides in part that the Building Inspector visited the Premises on June 7, 2022 to conduct a final inspection and that Plaintiff Moshe Schmuclian was advised regarding the necessity of installation of additional smoke and carbon monoxide alarms. While Plaintiffs argue that Defendant caused the existing smoke and carbon monoxide alarms to be removed, they fail to establish that the Defendant was advised of the need for the installation of the additional smoke and carbon monoxide alarms for the outstanding certificates of completion to be issued. Concerning this issue, Defendant submits affidavits indicating that the smoke detectors and carbon monoxide detectors were missing from

the Premises at the time of closing. Defendant further argues that Plaintiffs failed to request an extension past the original 90 days period allotted in the escrow agreement. In short, Defendant argues that the Plaintiffs attempts to create a feigned issue of fact.

The Defendant's motion seeking dismissal of the complaint and for judgment as to his first counterclaim alleging breach of the Escrow Agreement and sixth counterclaim requesting release of the escrow funds; along with the first and second causes of action of the third-party complaint are granted. Plaintiffs' admission of delay coupled with the Defendant's documentary evidence, i.e., the Escrow Agreement and the parties e-mail communications and other correspondence, are sufficient to establish the prima facie entitlement to judgment as a matter of law as to the breach of the Escrow Agreement. Regarding the amount sought for liquidated damages, the court finds that the agreement is clear on its face and only contemplates return of excess funds to the Plaintiffs in the event the Defendant undertook to "obtain any required Certificate(s) and/or proof of closure of the Open Permits." The Escrow Agreement does not require the Defendant to undertake to obtain the approvals once the 120 days period has expired. As the Plaintiffs retained the obligation, the last sentence of paragraph four of the Escrow Agreement, providing that "[s]hould Seller not obtain the certificates and approvals required herein within 120 days hereof or any extensions thereof all sums held in escrow shall be released to Purchasers without further consent being required," controls.

Defendant's remaining counterclaims and third-party claims are, at best, duplicative. The underlying contract of sale was fully performed and even assuming, arguendo, that the fourth counterclaim (fraud) is adequately pleaded (see CPLR 3016[b]), "the courts of this state have consistently held that a cause of action for fraud does not arise when the only alleged fraud relates to a breach of contract." (*Melissakis v. Proto Constr. & Dev. Corp.*, 294 AD3d 342 [2d Dept 2022]; see *Spellman v. Columbia Manicure Mfg. Co.*, 111 AD2d 320 [2d Dept 1985]).

Plaintiffs' complaint suffers similar deficiencies. A "plaintiff may not seek a declaratory judgment when other remedies are available, such as, a breach of contract action." (*Singer Asset Fin. Co., LLC v. Melvin*, 33 AD3d 355, 358 [1st Dept 2006]). Moreover, "New York does not recognize an independent cause of action to recover punitive damages." (*Stein v. Doukas*, 98 AD3d 1024, 1026 [2d Dept 2012]). However, Mr. Wurman, as escrow agent, has a fiduciary duty to both parties and is therefore obligated to promptly release the \$35,000.00 deposit to the purchaser, pursuant to the agreement. (See *Zi Kuo Zhang v. Lau*, 210 AD3d 829 [2d Dept 2022]; *Sasidharan v. Piverger*, 145 AD3d 814, 815 [2d Dept 2016]). Further, Plaintiffs' unsubstantiated claims as to the Defendant's alleged responsibility for delaying issuance of the two certificates of completion are inadequate to create a triable issue of fact or demonstrate that the agreement creates an unenforceable penalty. (See *Markham Gardens v. 211 9th*, 143 AD3d 949 [2d Dept 2016]).

For the foregoing reasons, it is hereby

ORDERED, that the Plaintiffs' motion for summary judgment (Motion 2) is **denied** in its entirety; and it is further

ORDERED, that Defendant's motion (Motion 1) for summary judgment dismissing the complaint and for judgment as to the first and sixth counterclaims and the first and second causes

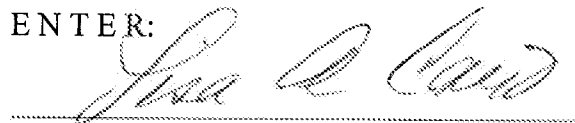
of action of the third-party complaint are **granted**; and the motion is otherwise **denied**; and it is further

ORDERED, that Kenneth H. Wurman, Esq., as escrow agent, shall disburse the \$35,000.00 held in escrow to Defendant within ten days of notice of entry of this Decision and Order.

This constitutes the decision and order of this court. All applications not specifically addressed herein are denied.

Dated: Mineola, NY
June 15, 2023

ENTER:



HON. LISA A. CAIRO, J. S. C.

ENTERED

Jun 16 2023

NASSAU COUNTY
COUNTY CLERK'S OFFICE