Globus v Meltzer
2024 NY Slip Op 32672(U)
June 24, 2024
Supreme Court, New York County
Docket Number: Index No. 656258/2020
Judge: Verna L. Saunders
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. VERNA L. SAUNDERS, JSC** **PART 36**
Justice

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INDEX NO. 656258/2020

MOTION SEQ. NO. 002

SAMUEL T. GLOBUS and HOLLY E. ENSIGN-BARSTOW,
Plaintiffs,

- v -

CRAIG F. MELTZER, LINDA B. MELTZER, and RABIN PANERO & HERRICK LLP, nominal defendant.
Defendants.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 25, 26, 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

were read on this motion to/for **SUMMARY JUDGMENT** .

In this residential real estate action, plaintiffs Samuel T. Globus and Holly E. Ensign-Barstow move for summary judgment on the amended complaint and to dismiss defendants' counterclaim. Defendants Craig F. Meltzer and Linda B. Meltzer cross-move for summary judgment on the counterclaim and to dismiss the amended complaint. For the following reasons, the motion is granted, and the cross-motion is denied.

Defendants are the owners of unit 32B in a residential co-operative apartment building located at 60 East End Avenue in New York County (the "building") (NYSCEF Doc. No. 4 ¶ 6, *amended complaint*). Plaintiffs currently reside in apartment 3 in the building. (*Id.*, ¶¶ 1-2).

On March 11, 2020, plaintiffs executed a contract with defendants for the purchase of apartment 32B. (NYSCEF Doc. Nos. 4 ¶ 10; 28, *contract*). The portions of the contract that are relevant to this action provide as follows:

> "1. CERTAIN DEFINITIONS AND INFORMATION
>
> ***
>
> 1.20.1 Purchaser may apply for financing in connection with this sale and *Purchaser's obligation to purchase under this Contract is contingent upon issuance of a Loan Commitment Letter by the Loan Commitment Date* (¶18.1.2).
>
> ***
>
> 1.21 If ¶ 1.20.1 or 1.20.2 applies, the 'Financing Terms' for ¶ 18 are: a loan of $1,452,000,00 for a term of 30 years *or such lesser amount or shorter term as applied for or acceptable to Purchaser*; and the 'Loan Commitment Date' for ¶ 18 is *35 calendar days after the Delivery Date*.
>
> ***
>
> **8.** FINANCING CONDITIONS
>
> ***

18.1.2 A 'Loan Commitment Letter' is *a written offer from an Institutional Lender to make a loan on the Financing Terms* (see ¶ 1.21) at prevailing fixed or adjustable interest rates and on other customary terms generally being offered by Institutional Lenders making cooperative share loans. An offer to make a loan conditional upon obtaining an appraisal satisfactory to the Institutional Lender shall not become a Loan Commitment Letter unless and until such condition is met. An offer conditional upon any factor concerning Purchaser (e.g. sale of current home, payment of outstanding debt, no material adverse change in Purchaser's financial condition, etc.) is a Loan Commitment Letter whether or not such condition is met. *Purchaser accepts the risk that, and cannot cancel this Contract if, any condition concerning Purchaser is not met*."

***

18.3 If ¶ 1.20.1 applies, then

18.3.1 provided Purchaser has complied with all applicable provisions of ¶ 18.2 and this ¶ 18.3, *Purchaser may cancel this Contract as set forth below, if*:

18.3.1.1 *any Institutional Lender denies Purchaser's application in writing prior to the Loan Commitment Date* (see ¶ 1.21); or

18.3.1.2 *a Loan Commitment Letter is not issued by the Institutional Lender on or before the Loan Commitment Date*;

***

18.3.2 *Purchaser shall deliver Notice of cancellation to Seller within 5 business days* after the Loan Commitment Date if cancellation is pursuant to 118.3.1.1 or 18.3.1.2 . . .

***

18.3.6 If this Contract is canceled by Purchaser pursuant to this ¶ 18.3, then thereafter neither Party shall have any rights against, or obligations or liabilities to, the other by reason of this Contract, *except that the Contract Deposit shall be promptly refunded to Purchaser* . . ." (NYSCEF Doc. No. 28) (emphasis added).

Plaintiffs assert that, upon executing the contract on March 11, 2020, they also tendered a deposit of $242,000.00 to nominal defendant Rabin Panero & Herrick ("RPH"), which is currently holding the funds in an escrow account. (NYSCEF Doc. 4 ¶ 11). Plaintiffs further assert that, on the same day, they applied to non-party lender JP Morgan Chase ("JPM") for a co-op share mortgage. (*Id.*, ¶ 21). Plaintiffs state that JPM denied their application in a letter dated April 9, 2020. (*Id.*, ¶ 22; NYSCEF Doc. 29, *April 9 rejection letter*). Plaintiffs further state that their attorney thereafter sent defendants' counsel written notice to cancel the contract in a letter dated April 15, 2020. (NYSCEF Doc. Nos. 4, ¶ 25; 34, *cancellation notice*.)

In addition, plaintiffs assert that JPM sent them an "unsolicited offer for a different loan" in a letter dated April 9, 2020 – which was separate from the denial letter that JPM sent them on the same day. (NYSCEF Doc. Nos. 4, ¶ 23; 31, *April 9 unsolicited offer*). Plaintiffs aver that the terms of that unsolicited offer were unacceptable to them, but that they continued to negotiate with JPM in an effort to agree upon acceptable terms and/or to reverse JPM's denial. (NYSCEF Doc. No. 4, ¶ 24). Plaintiffs also aver that the discussions were not fruitful, and that JPM issued them a

denial of the unsolicited offer in a letter dated April 20, 2020. (*Id.*, ¶ 24; NYSCEF Doc. No. 34 [notice of motion, exhibit S]).

Plaintiffs finally assert that, despite their having complied with all of the requirements set forth in the contract, defendants have refused to return their $242,000.00 deposit, which RPH still holds in escrow. (NYSCEF Doc. No. 26, ¶ 23, *Globus aff*).

Plaintiffs initially commenced this action on November 13, 2020, but later served an amended complaint, dated November 23, 2020, that sets forth causes of action for: 1) breach of contract; and 2) a declaratory judgment. (NYSCEF Doc. No. 4). On December 16, 2020, defendants served an answer with a counterclaim for breach of contract by plaintiffs. (NYSCEF Doc. No. 6, *answer*). Discovery ensued, after which plaintiffs and defendants interposed summary judgment motions on February 24, 2023 and April 13, 2023, respectively. (NYSCEF Doc. Nos. 25-38; 40-50). With the submission of plaintiffs' opposition/reply papers, both motions are now fully submitted (Mot. Seq. 002). (NYSCEF Doc. No. 52).

A party moving for summary judgment bears the burden of proof, by competent, admissible evidence, that no material and triable issues of fact exist. (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Sokolow, Dunaud, Mercadier & Carreras v Lacher,* 299 AD2d 64, 70 [1st Dept 2002].) Once that showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. (see *e.g.*, *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 [1st Dept 2003]).

As noted, plaintiffs now seek summary judgment on the amended complaint and to dismiss defendants' counterclaim, while defendants seek summary judgment to dismiss the amended complaint and on their counterclaim.

The first cause of action is for breach of contract, the elements of which "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages." (*Markov v Katt*, 176 AD3d 401, 401-402 [1st Dept 2019]; quoting *Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). New York law provides that "'on a motion for summary judgment, the construction of an unambiguous contract is a question of law for the court to pass on, and . . . circumstances extrinsic to the agreement or varying interpretations of the contract provisions will not be considered, where ... the intention of the parties can be gathered from the instrument itself.'" (*Maysek & Moran v Warburg & Co.*, 284 AD2d 203, 204 [1st Dept 2001], quoting *Lake Constr. & Dev. Corp. v City of New York*, 211 AD2d 514, 515 [1st Dept 1995]).

Here, the documentary evidence discloses that the parties executed the contract on March 11, 2020, and that defendants later refused to return plaintiffs' deposit after due demand. (NYSCEF Doc. Nos. 34; 41, ¶¶ 11, 46, *Meltzer aff*). This evidence, which defendants do not contest, thus establishes that plaintiffs have made a *prima facie* showing of the "binding contract" and "damages" elements of their breach of contract claim.

Plaintiffs also assert that the documentary evidence also establishes the "performance" and "breach" elements of their claim. (NYSCEF Doc. No. 26 at 12-14, *plaintiffs' mem of law*. They note that the portions of sections 1 and 18 of the contract reproduced above provided that plaintiffs' performance was "contingent upon issuance of a Loan Commitment Letter by the Loan Commitment Date," and that they could cancel the contract if "[an] Institutional Lender denie[d] [their loan] application in writing prior to the Loan Commitment Date" provided that they "deliver[ed] Notice of cancellation to Seller within 5 business days after the Loan Commitment Date." (*Id.*; NYSCEF Doc. No. 28). The contract defines the term the "Loan Commitment Date" as the day which falls "35 calendar days after the Delivery Date," which it in turn defines as "the date on which a fully executed counterpart of this Contract is deemed given to and received by Purchaser or Purchaser's Attorney." (*Id.*, NYSCEF Doc. No. 28). Because the "delivery date" herein was March 11, 2020 (the day on which the parties jointly executed the contract), it is apparent that the ensuing "loan commitment date" fell 35 calendar days later on April 15, 2020. JPM's written denial of plaintiffs' loan application is dated April 9, 2020, which fell before the "loan commitment date," and plaintiffs' notice of cancellation to defendants is dated April 15, 2020, which fell within "5 business days" thereafter (taking into account the intervening weekend of April 11-12, 2020). (*Id.*, NYSCEF Doc. Nos. 29, 34). Further, section 1.21 of the contract specified that the "Financing Terms" of any co-op share loan that plaintiffs might apply for would be "a loan of $1,452,000.00 for a term of 30 years or such lesser amount or shorter term as applied for or acceptable to Purchaser." (NYSCEF Doc. No. 28). JPM's April 9, 2020 letter denied plaintiffs' application for a loan on those terms for the reason of "excessive obligations in relation to income." (NYSCEF Doc. No. 29). JPM financial advisor Rozaliya Tsaneva ("Tsaneva") testified that plaintiffs had provided all of the documents that JPM requested produced in connection with their loan application. (NYSCEF Doc. No. 30, at 16, 18-19). Finally, section 18.2.5 of the contract provided that plaintiffs were "not required to apply to more than one Institutional Lender." (NYSCEF Doc. No. 28). Therefore, the court concludes that the foregoing documents establish that plaintiffs have made a *prima facie* showing of the "performance" element of their breach of contract claim by demonstrating that they have fulfilled all of the criteria that would entitle them to cancel the instant contract and to have their deposit returned. Defendants' admitted refusals to honor plaintiffs' contract cancellation or to direct RPH to return plaintiffs' $242,000.00 deposit constitutes *prima facie* proof of the "damages" element of plaintiffs' breach of contract claim. (NYSCEF Doc. No. 41, ¶ 47, *Meltzer aff*). As a result, in the absence of any triable issues of fact, the court concludes that plaintiffs are entitled to summary judgment on that cause of action and to a money judgment for the amount of the deposit.

Defendants nevertheless raise four arguments in opposition to plaintiffs' claim. The first is that "the Contract is clear and unambiguous and required Plaintiffs to accept the loan offered by JPM in the Approval Letter." (NYSCEF Doc. No. 50 at 9, *defendants' mem of law*). The "approval letter" defendants refer to is not JPM's April 9, 2020 denial letter, but the separate, contemporaneous letter from JPM that plaintiffs refer to as an "unsolicited offer." (NYSCEF Doc. No. 31). Reading the two letters in conjunction, the court believes that JPM's first April 9, 2020 communication constitutes an unequivocal denial of plaintiffs' co-op share loan application, and that under New York law the second letter should be deemed to constitute a rejection and counteroffer since it contained a proposed change in the loan's financing terms. (See *e.g.*, *Hands-On-Mgt, Inc. v C.D.O. Realty Corp.*, 306 AD2d 187 [1st Dept 2003]). As Tsaneva explained at her deposition, plaintiffs originally applied for a 30-year "10/1 interest only mortgage" for

$1,452,000.00, under which, for the first 10 years, the borrower pays only interest on the loan at a fixed rate and no principal and, during the ensuing 20 years, the borrower pays both the principal and the interest at a rate that fluctuates with the market (an adjustable rate mortgage, or ARM). (NYSCEF Doc. No. 30 at 20-21). She further explained that JPM's second April 9, 2020, letter constituted a counteroffer for a 30-year "amortizing loan" for $1,452,000.00, under which plaintiffs would have been obligated to pay both the amortized principal and interest at an adjustable rate over the entire 30-year term of the loan. (*Id.*, at 28-34). That distinction is borne out by the text of JPM's second April 9, 2020, letter. (*Id.*, NYSCEF Doc. No. 31). Tsaneva further acknowledged that plaintiffs' projected payments under the original loan terms would have been approximately $2,873.75 per month, whereas their payments under an amortizing loan would have been approximately $5,458.09 per month and stated that they had declined the amortizing loan because the monthly payments would have been too high. (NYSCEF Doc. No. 30 at 23, 29, 34-35). Plaintiffs acknowledge this. (NYSCEF Doc. No. 26, ¶ 16, *Globus aff*). Defendants are incorrect to assert that plaintiffs were required to accept the amortizing loan proposed in JPM's counteroffer. Section 1.21 of the contract specifically provides that any changes to a loan's "financing terms" must be "acceptable to Purchaser." (NYSCEF Doc. No. 28). Although section 18.2.4 of the contract provides that that the purchaser must "furnish Seller with a copy of the Loan Notice promptly after Purchaser's receipt thereof," plaintiffs did not receive a loan approval letter from JPM on April 9, 2020, but merely a rejection and counteroffer. The court notes that, in the context of mortgage foreclosures, the term "good faith" set forth in CPLR 3408 has been interpreted to require only that a borrower and lender participate diligently in the negotiation process, and that appellate precedent has declined to find evidence of "bad faith" based on a party's decision to propose/decline or accept/reject a given offer that was made during negotiations. (See *e.g.*, *Citibank, N.A. v Barclay*, 124 AD3d 174, 176-177 [1st Dept 2014], citing *U.S. Bank N.A. v Sarmiento*, 121 AD3d 187, 204 [2d Dept 2014]). Here, all that can be reasonably concluded is that plaintiffs diligently pursued loan financing with JPM by reviewing the terms of the bank's counteroffer with Tsaneva after their application had been rejected. The court cannot apprehend or infer any bad faith on plaintiffs' part from their decision not to accept that counteroffer. Therefore, the court rejects defendants' first opposition argument.

Defendants' remaining three arguments each allege bad faith by plaintiffs. The court notes that, in the context of mortgage/loan applications, New York law places the burden of proof on the party alleging bad faith. (See *e.g.*, *Tuli v Cabgram Devs., LLC*, 202 AD3d 424, 425 [1st Dept 2022]; citing *Lunning v 10 Bleecker St. Owners Corp.*, 160 AD2d 178, 178 [1st Dept 1990]).

First, defendants argue that "the real reason Plaintiffs attempted to cancel the Contract was due to the Pandemic, not due to their inability to obtain a loan." (NYSCEF Doc. No. 50 at 10, *defendants' mem of law*). They specifically assert that the April 15, 2020, cancellation letter provided that plaintiffs "would be interested in revisiting this purchase should the current pandemic be resolved within the next couple of months." (*Id*). It did not. Instead, the final paragraph of that letter read "[p]lease note the Purchaser *may* be interested in revisiting this purchase should the current pandemic be resolved within the next couple of months." (NYSCEF Doc. No. 34) (emphasis added). However, the preceding paragraph of the letter clearly stated that plaintiffs' reason for cancelling the contract was that JPM had not issued a loan commitment letter by the loan commitment date. (*Id*). This is in and of itself sufficient proof of the reason for plaintiffs' loan rejection. (See *e.g.*, *Markovitz v Kachian*, 28 AD3d 358 [1st Dept 2006]).

Defendants' opposition argument is therefore merely a speculation based on a misquotation. The cancellation letter cannot be reasonably read to infer pandemic-related bad faith on plaintiffs' part. Therefore, the court rejects defendants' first "bad faith" argument as baseless.

Next, defendants argue that the April 15, 2020, cancellation letter "stated that Plaintiffs were cancelling the Contract because they 'have yet to receive a Loan Commitment Letter from their Lender' . . . [h]owever, Plaintiffs had already received the Approval Letter five days earlier, on April 9, 2020." (*See* NYSCEF Doc. No. 50 at 10, *defendants' mem of law*). The court has already determined that JPM's first April 15, 2020, letter constituted a valid, effective loan denial, and that its second letter constituted a mere counteroffer. Defendants second "bad faith" argument is therefore based on a mischaracterization. Defendants also assert that "even if the Court were to deem the JPM's [second] April 9, 2020, letter as a denial . . . it contradicts Plaintiffs' statement in the Cancellation Notice that they have yet to receive a Loan Commitment Letter. (NYSCEF Doc. No. 50 at 10, *defendants' mem of law*). This statement simply makes no sense. Therefore, the court also rejects defendants' second "bad faith" argument as baseless.

Finally, defendants argue that "there were several instances of Plaintiffs providing contradictory and what turned out to be incorrect information to Defendants." (NYSCEF Doc. No. 50 at 10-11, *defendants' mem of law*). Defendants specifically claim that: 1) plaintiffs had previously advised them that they were rejected because the value of their assets decreased, but this was not reflected in the denial letter; and 2) plaintiffs had previously advised them that part of the reason why their loan application was not approved was that Globus had just begun working at a new company, but that application had stated that he had been working at the same company for the last six years. (*Id*). Neither of these allegations is sufficient to raise an issue of fact as to bad faith by plaintiffs. Whatever speculations plaintiffs may have shared regarding JPM's denial of their loan application are of no moment since the April 9, 2020, denial letter plainly lists both plaintiffs' "excessive obligations in relation to income" as the bank's sole reason for that denial. This was borne out by Tsaneva's deposition testimony. (NYSCEF Doc. No. 30). Defendants' present no evidence to contradict her testimony or to support their speculative assertions. Therefore, the court rejects defendants' third "bad faith" argument as unsupported.

Having thus rejected all of defendants' opposition arguments, the court grants so much of plaintiffs' motion as seeks summary judgment on their first cause of action.

Plaintiffs' second cause of action is for a declaratory judgment, which CPLR 3001 provides is a discretionary remedy which may be granted "as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." (See *e.g., Jenkins v State of N.Y., Div. of Hous. & Community Renewal*, 264 AD2d 681 [1st Dept 1999]). Here, plaintiffs specifically request a declaration that they are "entitled to the Contract Deposit in accordance with Section 18.3.6 of the Contract, and an order directing nominal Defendant RPH to release the Contract Deposit to [them]." (NYSCEF Doc. No. 4, ¶ 40). The court has already determined that plaintiffs are entitled to that relief for the reasons stated in the preceding portion of this decision and has rejected all of defendants' opposition arguments. Defendants' cross-motion raises no further arguments specifically directed against plaintiffs' request for declaratory relief. Therefore, the court grants so much of plaintiffs' motion as seeks summary judgment on their second cause of action.

Defendants' counterclaim also seeks declaratory relief in the form of an order (a) finding that plaintiffs breached the contract and (b) directing RP&H to deliver the $242,000.00 contract deposit to them. (NYSCEF Doc. No. 6 ¶ 37, *answer*). However, the court has already determined that defendants are not entitled to such relief for the reasons set forth above. Therefore, the court denies defendants' cross-motion for those same reasons. Accordingly, for the foregoing reasons it is hereby

ORDERED that the branch of the motion, pursuant to CPLR 3212, of plaintiffs Samuel T. Globus and Holly E. Ensign-Barstow (Mot. Seq. 002) that seeks summary judgment in plaintiffs favor on the first cause of action in the amended complaint for breach of contract is granted and the Clerk of the Court is directed to enter judgment in favor of plaintiffs and against defendants, jointly and severally, in the amount of $242,000.00, together with interest at the rate of 9% per annum from the date of April 15, 2020 until the date of the decision and order on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the branch of the motion, pursuant to CPLR 3212, of plaintiffs Samuel T. Globus and Holly E. Ensign-Barstow (Mot. Seq. 002) that seeks summary judgment in plaintiffs favor on the second cause of action in the amended complaint for a declaratory judgment with respect to the subject matter of that cause of action is granted; and it is further

ADJUDGED and **DECLARED** that plaintiff is entitled to entitled to the Contract Deposit in accordance with Section 18.3.6 of the Contract, and nominal Defendant RPH shall release the Contract Deposit to plaintiffs within thirty (30) days after service of this decision and order upon them; and it is further

ORDERED that the branch of the motion, pursuant to CPLR 3212, of plaintiffs Samuel T. Globus and Holly E. Ensign-Barstow (Mot. Seq. 002) that seeks summary judgment dismissing the counterclaim set forth in defendants' answer is granted to the extent that such counterclaim is dismissed; and it is further

ORDERED that the cross-motion, pursuant to CPLR 3212, of defendants Craig F. Meltzer and Linda B. Meltzer (Mot. Seq. 002) is denied; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiffs shall serve a copy of this decision and order, with notice of entry, upon all parties.

June 24, 2024

HON. VERNA L. SAUNDERS, JSC

CHECK ONE:	[X] **CASE DISPOSED**		[ ] **NON-FINAL DISPOSITION**	
	[X] **GRANTED**	[ ] **DENIED**	[ ] **GRANTED IN PART**	[ ] **OTHER**