

Apple Bank for Sav. v Prime Rok Real Estate, LLC

2025 NY Slip Op 30774(U)

March 6, 2025

Supreme Court, New York County

Docket Number: Index No. 653140/2023

Judge: Lyle E. Frank

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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. LYLE E. FRANK **PART** **11M**

Justice

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APPLE BANK FOR SAVINGS,

Plaintiff,

INDEX NO. 653140/2023

MOTION DATE 06/13/2024

MOTION SEQ. NO. 002

- v -

PRIME ROK REAL ESTATE, LLC,626 PELHAM
OPERATING LLC,STERN TANNENBAUM & BELL LLP

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 81, 82, 83, 84, 85, 86, 87, 88, 89, 90

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

In this real property dispute, defendants, Prime Rok Real Estate LLC and 626 Pelham Operating LLC (collectively, “Prime defendants”) move for summary judgment on its counterclaims, pursuant CPLR § 3212, declaring plaintiff in default and breach of the contract of sale and seeking return of the downpayment.¹ Plaintiff, Apple Bank For Savings (“Apple Bank”), oppose and cross-moves for summary judgment pursuant to CPLR § 3212, denying defendants’ motion for summary judgment, and granting summary judgment in favor of plaintiff.

Background

Plaintiff commenced this action against defendants, alleging that their failure to attend two time of the essence closings constituted a default under the parties’ purchase and sale agreement, and that plaintiff was thereby entitled to the deposit.

This court, on January 16, 2024, granted defendants Prime defendants’ motion for summary judgment on their claim that they are entitled to the return of their deposit based on

¹ The Court would like to thank Mary Wang, Esq. for her assistance in this matter.

counsel for plaintiff's unauthorized practice of law. On appeal, the First Department modified the Order, denying defendants' motion, and otherwise affirming.

The appellate court held that defendants were not entitled to summary judgment because

“defendants failed to establish prima facie entitlement to summary judgment on their claim for the deposit, as they failed to show that they demanded good title from plaintiff, informed it of specific defects in title prior to the closing, or provided it with reasonable time to cure the exceptions noted by the title insurer (*see Hu v Leff*, 158 AD3d 419, 420 [1st Dept 2018]; *Latipac Corp. v BHM Realty LLC*, 148 AD3d 466, 466 [1st Dept 2017]; *Roman v Watson*, 297 AD2d 319 [2d Dept 2002], *lv denied* 99 NY2d 505 [2003]). Moreover, plaintiff established that it made immediate and diligent efforts to obtain documentation showing that it was authorized to execute the sale by its shareholders, and ultimately found another title insurer that determined that its proof was sufficient to provide insurable authorization for the sale of the property (*see Laba v Carey*, 29 NY2d 302, 307-308 [1971])”

(*Apple Bank for Sav. v Prime Rok Real Est., LLC*, 228 AD3d 420, 421-422 [1st Dept 2024]).

Nor was plaintiff entitled to summary judgment because

“issues of fact as to whether the exception noted by defendants' title insurer was a “Permitted Encumbrance” under the purchase and sale agreement (*see 2626 Bway LLC 3 v Broadway Metro Assoc., LP*, 85 AD3d 456, 457 [1st Dept 2011]; *NYC 4900 Holdings LLC v Sternhell*, 189 AD3d 505 [1st Dept 2020]). The title insurer engaged by plaintiff after the initial closing date did not expressly state that it was willing, without special premium, to omit the issue as an exception to coverage”

(*id.* at 422).

Standard

A party moving for summary judgment under CPLR 3212 “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]). The motion must “demonstrate the absence of genuine issues of material fact on every relevant issue raised by the pleadings, including any affirmative defenses” (*Aimatop Rest. v Liberty Mut. Fire Ins. Co.*, 74 AD2d 516, 517 [1st Dept 1980]). The “facts must be viewed in the light most favorable to the non-moving party” (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). Once the moving party has met this prima facie burden, the burden shifts to the non-moving party to furnish evidence in admissible form sufficient to raise a material issue of fact (*Alvarez*, 68 NY2d at 324). The moving party’s “[f]ailure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers” (*id.*).

Discussion

The law of the case doctrine applies “only to legal determinations that were necessarily resolved on the merits in a prior decision” (*Brownrigg v New York City Hous. Auth.*, 29 AD3d 721, 722 [2d Dept 2006]; *see Ramanathan v Aharon*, 109 AD3d 529, 530 [2d Dept 2013]) and “to the same questions presented in the same case” (*Erickson v Cross Ready Mix, Inc.*, 98 AD3d 717, 717 [2d Dept 2012] [internal quotation marks omitted]; *see Ramanathan*, 109 AD3d at 530). The doctrine “forecloses reexamination of [an issue previously determined] absent a showing of newly discovered evidence or a change in the law” (*Kaygreen Realty Co., LLC v IG Second Generation Partners, L.P.*, 116 AD3d 667, 669 [2d Dept 2014]). Here, the First Department examined both plaintiff and moving defendants’ entitlement to summary judgment as a matter of law and found that both sides failed to fulfill their respective burdens.

Specifically, as to Prime defendants, the First Department held that “defendants failed to show that they demanded good title from plaintiff, informed it of specific defects in title prior to the closing, or provided it with reasonable time to cure the exceptions noted by the title insurer”

(*Apple Bank for Sav.*, 228 AD3d at 421). Plaintiff is correct that pursuant to the law of the case doctrine, defendants' instant motion, which presents no new evidence or changes in law, requires that this trial court be bound by the appellate court's ruling that moving defendants are not entitled to summary judgment.

On the other hand, plaintiff submits the affidavit of Joseph DeCiutiis ("DeCiutiis"), Senior Vice President of Stewart Title Insurance Company wherein he resolves the issue of fact "as to whether the exception noted by defendants' title insurer was a "Permitted Encumbrance" under the purchase and sale agreement" (*id.* at 422). The affidavit of DeCiutiis states in relevant part:

"3. My May 31, 2023 email stated: 'Stewart Title Insurance Company has reviewed the annexed Secretary's Certificate for purposes of ascertaining whether it provides insurable authorization for the sale of the captioned premises and we have determined that it does.'

4. By so stating, I intended to convey, and I hereby confirm, that Stewart Title Insurance Company, a title insurance company licensed to do business in New York, was as of May 31, 2023, and is currently, willing, without special premium to accept the aforementioned Secretary's Certificate as insurable authorization for the sale of the premises referenced therein by Apple Bank for Savings and we would not raise this as an exception to coverage"

(DeCiutiis aff, NYSCEF Doc No. 88 ¶¶ 3-4). Moving defendants argue that it is improper to consider the DeCiutiis Affirmation because it retroactively "omits" the title issues raised by the defendant's title company. However, defendants cite to no authority or case law that would indicate curing a question of fact after appeal and remand is improper. Rather, what the DeCiutiis Affirmation accomplishes is to answer the single question of fact that prevented the Appellate Division from granting summary judgment to plaintiff.

Accordingly, having resolved the issue of fact as framed by the Appellate Division, First Department, Apple Bank is entitled to summary judgment. Prime defendants' motion is denied

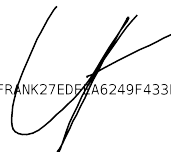
pursuant to the law of the case doctrine and plaintiff’s cross-motion for summary judgment is rendered academic².

Based on the foregoing, it is hereby

ADJUDGED that defendant’s motion for summary is judgment is denied; and it is further

ADJUDGED that plaintiff’s cross motion for summary judgment is granted; and it is further

ORDERED that defendant Stern Tannenbaum & Bell LLP release the subject down payment to plaintiff Apple Bank For Savings not more than 30 days following service of this Order with Notice of Entry.


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3/6/2025
DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	<input type="checkbox"/> FIDUCIARY APPOINTMENT
				<input type="checkbox"/> REFERENCE

² Prime defendants oppose the cross-motion, arguing that it was not served with a copy of the May 30, 2023 Time of the Essence Notice (May 30, 2023 TOE Letter, NYSCEF Doc No. 49), in violation of the Notice provision of the Contract of Sale that requires that all notices must be made upon the Buyer, in writing delivered by hand, registered or certified mail, or by overnight mail (NYSCEF Doc. 2, ¶ 23 at 13-14). Instead, Apple Bank only sent the notice to Prime Rok’s title company, Chase Abstract, Prime Rok’s transactional attorney, D. Paul Martin, and Prime Rok’s litigation counsel, Claude Castro- excluding Prime Rok itself.

However, in matters where defendant does not claim prejudice or that it never received actual notice, as is the case here, “minimal deviations” may be permitted (*Suarez v Ingalls*, 282 AD2d 599, 600, [2d Dept 2001] [“Strict compliance with the contract notice provisions was not required because the plaintiff does not claim that she did not receive actual notice, or was prejudiced by the deviation”]; *Baker v Norman*, 226 AD2d 301, 304 [1st Dept 1996]) [“minimal deviation”]).