Durand v Bruce Dr. Inc.
2025 NY Slip Op 35449(U)
January 7, 2025
Supreme Court, Nassau County
Docket Number: Index No. 616519/2022
Judge: Philippe Solages, Jr.

At Part 31 of the Supreme Court of the State of New York, held in and for the County of Nassau, at the Courthouse at 100 Supreme Court Drive, Mineola, New York on the 7 day of January 2025.

P R E S E N T:

HON. PHILIPPE SOLAGES, JR.,
ACTING JUSTICE OF SUPREME COURT

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DEBORAH DURAND and MICHAEL DURAND,

Plaintiffs,

DECISION & ORDER

-against-

Index No. 616519/2022

BRUCE DRIVE INC., and NIGHTINGALE LAW, P.C., as Stakeholder,

Defendants.

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The following e-filed documents, listed by NYSCEF document number, were considered in the review of these motions:

Motion Seq. No. 003: 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 121, 122

Motion Seq. No. 004: 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122

Upon the foregoing e-filed documents, the application interposed by the defendant, Bruce Drive, Inc. [hereinafter BDI], for an order granting summary judgment dismissing the underlying complaint, together with related declaratory relief and an award of counsel fees (Sequence #003), and the cross motion interposed by the plaintiffs, Deborah and Michael Durand [hereinafter the Plaintiffs], for an order pursuant to CPLR 3212 granting summary judgment in their favor on the complaint, together with related declaratory relief and for an award of counsel fees (Sequence #004), are consolidated for disposition and determined as set forth below.

On September 23, 2022, a contract was executed whereby the Plaintiffs agreed to purchase from BDI the property situated at 47 Wisconsin Street, Long Beach, New York for $1,150,000 [hereinafter the Agreement] (NYSCEF Doc No. 101). In connection therewith, the Plaintiffs tendered a down payment of $115,000 presently being held in escrow by defendant, Nightingale Law, P.C. [hereinafter Nightingale] (*id.*; NYSCEF Doc No. 34).

Pursuant to the Agreement, "[t]he obligation of . . . [the Plaintiffs] to purchase under this contract . . . [was] conditioned upon issuance, on or before 30 days after a fully executed copy of this contract . . . [was] given to . . . [Plaintiffs or Plaintiffs'] attorney in the manner set forth in paragraph 25 or subparagraph 8(j) (the "Commitment Date"), of a written commitment from an Institutional Lender pursuant to which such Institutional Lender agree[d] to make a first mortgage loan, other than a VA, FHA or other governmentally insured loan, to . . . [Plaintiffs], at . . . [Plaintiffs'] sole cost and expense, of $450,000.00 for a term of at least 30 years . . . or such lesser sum or shorter term as . . . [the Plaintiffs] shall be willing to accept . . ." [hereinafter the Mortgage Contingency Clause] (NYSCEF Doc No. 101 at ¶8 [a]). The Agreement further provides that "[i]f no Commitment is issued by an Institutional Lender on or before the Commitment Date, then, unless . . . [Plaintiffs have] accepted a written commitment from an Institutional Lender that does not conform to the terms set forth in subparagraph 8(a), . . . [Plaintiffs] may cancel this contract by giving Notice to Seller within 5 business days after the Commitment Date" [hereinafter the Cancellation Clause] (*id.* at ¶8 [e]).

On or about September 29, 2022, the Plaintiffs applied for a mortgage with Embrace Home Loans, Inc. [hereinafter Embrace] (NYSCEF Doc Nos. 103, 104). On October 19, 2022, the Plaintiffs received a "Mortgage Commitment Letter" whereby Embrace offered to extend a loan not in the requested amount of $450,000 but rather a restructured sum of $375,000 [hereinafter the Restructured Mortgage Commitment] (NYSCEF Doc No. 17 at p. 56). The Plaintiffs maintain that they never accepted the Restructured Mortgage Commitment and via emails dated, October 22 and October 25, 2022, requested a formal denial letter from Embrace referable to the originally requested mortgage of $450,000 (NYSCEF Doc No. 33). On October 26, 2022, Embrace issued a denial of the Plaintiffs' Application as to the $450,000 loan citing "[i]nsufficient Income for Amount Requested" as the basis thereof [hereinafter the Denial] (NYSCEF Doc No. 34). On October 27, 2022, Plaintiffs' counsel provided Nightingale with a copy of the Denial requesting cancellation of the Agreement and return of the down payment pursuant to the Mortgage Contingency Clause and the Cancellation Clause (*id.*).

The Plaintiffs assert that, to date, BDI has failed to return the down payment notwithstanding proof of their failure to procure a mortgage as required under the Agreement (NYSCEF Doc No. 1). On or about November 23, 2022, the Plaintiffs commenced the underlying action seeking damages premised upon breach of contract, unjust enrichment, together with counsel fees, as well as for a judgment declaring the Agreement to be "null and void" upon return of the down payment (*id.* at ¶¶11-45). Issue was joined upon service of BDI's answer, which included counterclaims sounding in breach of contract and declaratory relief adjudging, inter alia, that it properly terminated the Agreement and that Nightingale may release the down payment thereto (NYSCEF Doc No. 6 at ¶¶68-72). The parties now move for the relief recited above, including their respective motions for summary judgment.

A party moving for summary judgment bears the initial burden of demonstrating prima facie entitlement to judgment as a matter of law by proffering proof, in admissible form, which establishes the absence of material issues of fact (*Zuckerman v City of New*

York, 49 NY2d 557, 562 [1980]). However, once the proponent of the motion establishes a prima facie showing, the burden shifts to the opposing party to come forth with admissible proof to establish triable issues of fact, the existence of which precludes summary judgment and necessitates a trial of the action (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). "Mere conclusory assertions, devoid of evidentiary facts, are insufficient for this purpose, as is reliance upon surmise, conjecture, or speculation" (*Morgan v New York Tel.*, 220 AD2d 728, 729 [2d Dept 1995]).

In moving herein, BDI asserts that notwithstanding having received the Restructured Mortgage Commitment, the Plaintiffs, in bad faith, "not only concealed" same "but went . . . so far as to specifically direct Embrace to generate" the Denial, which was "false" so as to trigger the provisions of the Mortgage Contingency Clause thus permitting the Plaintiffs to "back out of the purchase and avoid having their Downpayment kept by . . . [BDI] as liquidated damages" (NYSCEF Doc No. 95 at pp. 11-14). In opposing the application and in support of their cross motion, the Plaintiffs counter that they never received a mortgage commitment for $450,000 as expressly contemplated by the Agreement and timely notified BDI with respect thereto on October 27, 2022, within five days following the Commitment Date of October 23, 2022 (NYSCEF Doc Nos. 34, 98, 99, 100, 108).

In the instant matter, the Court has reviewed the record and finds that the Plaintiffs have demonstrated prima facie entitlement to summary judgment on their complaint (*Zuckerman v City of New York, supra* at 562).[1] Here, Gosia Lengiewicz, an assistant to Embrace's Loan Officer, unequivocally testified that the requested $450,000 mortgage was never procured by the Plaintiffs and that the Restructured Mortgage Commitment was not accepted thereby (NYSCEF Doc No. 93 at pp. 76, 78). Moreover, the record establishes that by letter dated, October 27, 2022, Plaintiffs' counsel timely provided the Denial issued by Embrace to BDI. In opposition, BDI has failed to either meet its own initial burden or raise a triable issue of fact regarding the Plaintiffs' prima facie showing (*Zuckerman v City of New York, supra* at 562; *Alvarez v Prospect Hospital*, *supra* at 324). Here, BDI has failed to proffer any evidence establishing the Plaintiffs either obtained the $450,000 mortgage as contemplated by the Agreement or accepted the Restructured Mortgage Commitment in the event of which they would be without the recourse as contained in the Cancellation Clause. Accordingly, summary judgment in favor of the Plaintiffs is warranted (*id.*).

Based upon the foregoing, it is hereby

ORDERED, that BDI's application for an order granting summary judgment dismissing the underlying complaint, together with related declaratory relief and an award of counsel fees is DENIED (Sequence #003); and it is further

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[1] To the extent BDI contends that Plaintiffs' cross motion should be denied as untimely, the Court disagrees. "[A]n untimely motion or cross motion for summary judgment may be considered by the court where, as here, a timely motion for summary judgment was made on nearly identical grounds" (*Grande v Peteroy*, 39 AD3d 590, 591-592 [2d Dept 2007]).

ORDERED, that the Plaintiffs' cross motion for an order pursuant to CPLR § 3212 granting summary judgment in their favor on the complaint, together with related declaratory relief, is GRANTED and this Court declares that BDI breached the Agreement and that the Plaintiffs are entitled to the return of their down payment subsequent to which the Agreement is cancelled (Sequence #004); and it is further

ORDERED, that the branch of the Plaintiffs' cross motion for an award of counsel fees as permitted by the Agreement is GRANTED (Sequence #004); and it is further

ORDERED, that Nightingale is directed to return the down payment to Plaintiffs' counsel within seven days of the date of this Order (Sequence #004); and it is further

ORDERED, that Plaintiffs' counsel is directed to submit an affirmation of services, together with a proposed judgment on notice (Sequence #004).

The foregoing constitutes the Decision and Order of the Court.

All applications not specifically addressed are Denied.

ENTER:

HON. PHILIPPE SOLAGES, JR.
A.J.S.C.

ENTERED
Jan 10 2025
NASSAU COUNTY
COUNTY CLERK'S OFFICE