

Kim v Abramhov

2012 NY Slip Op 33625(U)

March 24, 2012

Supreme Court, Queens County

Docket Number: 20357/11

Judge: Janice A. Taylor

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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IAS Part 15
Justice

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EDWARD KIM and CINDY MAK,

Index No.:20357/11

Plaintiff(s),

Motion Date:12/20/11

- against -

Motion Cal. No.: 18

Motion Seq. No: 1

DAVID ABRAMHOV, TOVA ABRAMHOV a/k/a TOVA
ROSSMAN AND DAVID A. LINN, ESQ.,

Defendant(s).

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The following papers numbered 1 - 4 read on this motion by the plaintiffs for an order granting summary judgment on the complaint and granting summary judgment and dismissing the defendants counterclaims.

Papers
Numbered

Notice of Motion-Affirmation-Exhibits-Service..... 1 - 4

Upon the foregoing papers it is **ORDERED** that the motion is decided as follows:

This is an action for breach of contract. According to the complaint, plaintiffs and defendants David Abramhov and Tova Abramhov a/k/a Tova Rossman ("the defendants Abramhov") entered into a contract wherein plaintiffs sought to purchase a cooperative apartment located at 70-31 108th Street, Apartment 2J, Forest Hills, New York. It is further uncontested that the sellers/defendants Abramhov were represented by defendant David A. Linn, Esq. ("Linn") in this transaction. This action was commenced on August 29, 2011 by the filing of a summons and complaint. Defendants joined issue by service of an undated answer with counterclaims. On or about November 4, 2011, plaintiffs served a reply to the counterclaims.

In their complaint, plaintiffs allege that, pursuant to the contract of sale, they submitted a downpayment of \$29,000.00 to the sellers/defendants Abramhov and that this amount was deposited into defendant Linn's escrow account. Plaintiffs aver that the cooperative's Board of Directors did not grant an unconditional

approval of the proposed sale, and that, pursuant to the terms of the contract, the defendants must return the downpayment.

Plaintiffs now move, pursuant to CPLR §3212, for summary judgment on their first, second and third causes of action. Plaintiff's first cause of action seeks a declaratory judgment and return of the subject downpayment. Plaintiffs' second cause of action alleges breach of contract and seeks damages for the defendants' delay in returning the plaintiffs' downpayment. Finally, plaintiffs' third cause of action seeks an award of costs and fees for expenses incurred from the commencement of the instant action.

CPLR §3212(b) requires that for a court to grant summary judgment the court must determine if the movant's papers justify holding, as a matter of law, that the cause of action or defense has no merit. The evidence submitted in support of the movant must be viewed in the light most favorable to the non-movant (See, *Grivas v. Grivas*, 113 A.D.2d 264, 269 [2d Dept. 1985]; *Airco Alloys Division, Airco Inc. v. Niagara Mohawk Power Corp.*, 76 A.D.2d 68 [4th Dept. 1980]; *Parvi v. Kingston*, 41 N.Y.2d 553, 557 [1977]).

It is well-settled that 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 eliminate any material issue of fact from the case (See, *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 404 [1957]). In support of this motion, plaintiff submits the pleadings, copies of correspondence between the parties' attorneys and from the cooperative's managing agent, the affidavit of plaintiff Cindy Mak and a copy of the relevant contract of sale.

First Cause of Action

Plaintiffs' first cause of action seeks a declaratory judgment that plaintiffs are entitled to a return of their \$29,000 downpayment and an order directing defendant David A. Linn, Esq. to deliver said check to the plaintiffs. In support of their motion, plaintiffs rely on sections 6.1 and 27.1 of the subject contract.

Section 6.1 of the subject contract reads as follows:

6. Required Consent and References

6.1 This sale is subject to the unconditional consent of the Corporation.

Section 27.1 of the subject contract reads as follows:

27. Escrow Terms

27.1 The Contract Deposit shall be

deposited by Escrowee in an escrow account as set forth in paragraph 1.24 and the proceeds held and disbursed in accordance with the terms of this Contract. At Closing, the Contract Deposit shall be paid by Escrowee to Seller. If the Closing does not occur and either Party give Notice to Escrowee demanding payment of the Contract Deposit, Escrowee shall give prompt Notice to the other Party of such demand.

It is uncontested that, on or about June 23, 2011, the cooperative's Board of Directors notified the plaintiffs that their application was "conditionally approved" and required them to remit an additional sum of \$13,216.32 at the closing. By letter dated June 29, 2011, plaintiffs notified defendant David A. Linn, Esq. that they intended to cancel the contract. This letter also demanded a return of the downpayment. Plaintiffs contend that sections 6.1 and 27.1 of the contract require sellers/defendants Abramhov to refund their entire downpayment. As the plaintiffs have demonstrated the absence of material issues regarding the facts alleged in the first cause of action, the burden now shifts to the defendants to demonstrate the existence of a triable issue of fact (see, *Gaddy v. Eyler*, 79 N.Y.2d 955 [1992]).

The defendants submit no opposition to the instant motion. Accordingly, that portion of the instant motion which seeks summary judgment on the first cause of action contained in the complaint is granted.

Second Cause of Action

Plaintiffs seek summary judgment on their second cause of action for breach of contract and an award for damages caused by the defendants' delay in returning their downpayment. However, the movants have failed to submit any proof of any injury caused by the delay. Accordingly, that portion of the instant motion which seeks summary judgment on the plaintiffs' second cause of action is denied.

Third Cause of Action

Plaintiffs' third cause of action seeks costs, fees and sanctions against each of the defendants. That portion of the instant motion which seeks summary judgment on plaintiffs' third cause of action is granted to the extent to plaintiffs are granted a judgment for the costs and fees expended for the commencement and prosecution of this litigation. Plaintiffs' request for sanctions against the defendants is denied.

Defendants' Counterclaims

Plaintiffs also move for summary judgment and dismissal of the defendants' counterclaims. In their counterclaims, defendants assert that plaintiffs breached the implied covenant of good faith and fair dealing by cancelling the subject contract. Specifically, the defendants assert that, in an effort to go forward with the sale, the parties agreed that the defendants Abramhov would pay half of the additional amount requested by the Board of Directors. Defendants also assert that plaintiffs' former counsel sought to have the contract mutually cancelled and agreed that plaintiffs' would pay a sum to the defendant Abramhov and that the plaintiffs reneged on these agreements, waived their right to cancel the contract and commenced the instant action in bad faith. In support of the instant motion, plaintiff Cindy Mak states that no agreements were ever made to modify the contract, that plaintiffs never agreed to pay any portion of the amount requested by the Board of Directors and did not waive their contractual rights. As previously stated, defendants submit no opposition to the instant motion. Accordingly, that portion of the instant motion which seeks summary judgment and dismissal of defendants' counterclaims is granted. It is,

ORDERED, that plaintiffs are granted summary judgment on their first cause of action and granted summary judgment on their third cause of action to the extent that plaintiffs are awarded costs and fees expended for the commencement and prosecution of this litigation. It is further,

ORDERED, that the portion of the instant motion which seeks summary judgment on the counterclaims is also granted. The defendants' counterclaims are hereby dismissed. It is further,

ORDERED, that defendant David A. Linn, Esq. is directed to return plaintiffs \$29,000.00 downpayment to plaintiffs' attorney within ten (10) days of the date of service of this order with notice of entry. It is further,

ORDERED, that plaintiffs' are directed to submit an itemized invoice for the amount of costs and fees expended for the commencement and prosecution of this litigation within thirty (30) days of the date herein.

Dated: February 24, 2012

JANICE A. TAYLOR, J.S.C.