

Bisk v Cooper Sq. Realty, Inc.
2012 NY Slip Op 31116(U)
April 19, 2012
Supreme Court, New York County
Docket Number: 108860/2007
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: Hon Joan A. Madon
Justice

PART 11

Index Number : 108860/2007
BISK, LAUREN
vs.
COOPER SQUARE REALTY
SEQUENCE NUMBER : 005
ORDER TO PAY MONIES INTO COURT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, It is ordered that this motion is denied in accordance with the
attached Memorandum Decision & Order

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED

APR 26 2012

NEW YORK
COUNTY CLERK'S OFFICE
_____, J.S.C.

Dated: April 19, 2012

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
LAUREN BISK,

Plaintiff,

INDEX NO. 108860/2007

-against-

COOPER SQUARE REALTY, INC., BOULEVARD
HOUSING CORP., NORTH FORK BANK,
JONATHAN MOGIL, and EDWARD VINCENT,

FILED

APR 26 2012

Defendants

-----X
JOAN A. MADDEN, J.:

NEW YORK
COUNTY CLERK'S OFFICE

Howard Koh, Esq. of Meister Seelig and Fein ("MSF"), as former counsel for plaintiff Lauren Bisk ("Bisk") in this action, moves for an order permitting MSF to deposit into court \$14,000 that it is holding in escrow in connection with the settlement of this action or, in the alternative, to pay the funds to either Bisk or to Travelers Bond and Financial Products ("Travelers") Bisk, appearing *pro se*, seeks an order releasing \$10,000 of the escrowed funds to her as liquidated damages or, in the alternative, reserving her right to rescind her settlement with defendants. Defendant Boulevard Housing Corp. ("Boulevard") opposes Bisk's requests for relief, and defendant Cooper Square Realty, Inc ("Cooper Square") cross moves to compel MSF to release the \$14,000 to its insurer, Travelers.

This is an action for damages brought by Bisk against Boulevard, the owner of the cooperative corporation in which she was a shareholder and tenant, Cooper Square, the coop's managing agent, and others. This action and a related action commenced by Boulevard against Bisk in the Civil Court of the City of New York were settled in May 2011. The dispute now before the court concerns the disposition of certain monies held in MSF's escrow account in connection with the settlement. The settlement agreement between the parties, which was

placed on the record in court on May 13, 2011, provided that defendants Boulevard and Cooper Square would deposit \$325,000 into Mr. Koh's escrow account within 45 days. Bisk consented to the settlement agreement on the record.

On June 16, 2011, the parties executed a Release and Settlement Agreement memorializing the agreed-upon settlement terms (hereinafter "the Settlement Agreement"). The Settlement Agreement provides that Boulevard and Cooper Square will pay a total of \$325,000 by check to Mr. Koh, as counsel for Bisk, on or before June 27, 2011 (Settlement Agreement, ¶ 2). The Settlement Agreement further specifies that Boulevard will pay \$200,000 of the settlement amount with the source and amounts of the checks to be paid as follows: (i) \$100,000 from Boulevard, (ii) \$43,000 from Chartis Domestic Claims, Inc., (iii) \$43,000 from Travelers, Executive Liability Claims, and (iv) \$14,000 from Travelers, General Liability Claims, and that Cooper Square will pay \$125,000 of the settlement amount with the source and amounts of the checks to be paid as follows: (i) \$2,000 from Cooper Square, (ii) \$52,890 from Chartis Domestic Claims, Inc., (iii) \$52,890 from Travelers, Executive Liability Claims, and (iv) \$17,220 from Travelers, General Liability Claims.

While the Settlement Agreement delineates the payment of the \$325,000 and provides that such monies must be paid by June 27, 2011, it does not provide that time is of the essence or for liquidated damages in the event payment is late.

With respect to Boulevard's \$200,000 portion of the settlement, on June 24, 2011, MSF received payments of \$100,000, \$43,000, and \$43,000 from Boulevard, Chartis Domestic Claims, Inc, and Travelers Executive Claims, respectively. On June 27, 2011, \$14,000 was received from Travelers, General Liability Claims.

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As for Cooper Square's \$125,000 portion of the settlement on June 27, 2011, MSF received a payment of \$54,890. The parties dispute whether the \$31,220 payment from Travelers, General Liability Claims was paid on June 27, 2011 or June 28, 2011. On June 29, 2011, or two days after the agreed upon date, MSF received a check from Travelers Executive Liability Claims in the amount of \$52,890.29. Bisk received a disbursement from MSF's escrow account of \$143,000, on June 24, 2011, and another disbursement of \$182,000 on July 7, 2011, for a total of \$325,000, or the full settlement amount. However, following the disbursement of \$325,000 to Bisk, there remained \$14,000 in the MSF escrow account, which is the subject of the instant motion.

Bisk asserts that \$10,000 of the \$14,000 should be paid to her as liquidated damages since two of the payments of \$31,220, and \$52,890 were received one and two days late, respectively. Bisk argues that based on emails exchanged between the parties before the settlement agreement, the defendants were aware that "time was of the essence."

In support of its cross motion to compel the payment of the \$14,000 to its insurer, Travelers, Cooper Square submits the affidavit of Diane Paladino, a Senior Technical Specialist at Travelers. Paladino states that Travelers is an insurance carrier for Boulevard and Cooper Square as an additional insured under Boulevard's policy with Travelers, General Liability Claims. She explains that as Boulevard and Cooper Square are co-insureds in this action, different claim handlers were assigned to their claims, and that she was assigned to handle Cooper Square. Paladino notes that under the Settlement Agreement, Travelers, General Liability Claims was to pay \$14,000 on behalf of Boulevard and \$17,220 on behalf of Cooper Square. However, Paladino states that "on or about June 22, 2011, I caused to be issued

Travelers' check number 891A ..., in the amount of \$31,220 to Bisk [which] represents Travelers' portion of the settlement on behalf of both Boulevard and Cooper Square." (Paladino Aff. ¶ 6). She further states that as there was "another claims handler assigned to Boulevard, who I have learned issued a separate check on behalf of Boulevard, I should have issued a check of only \$17,220, representing Traveler's portion on behalf of Cooper Square [and that] [t]his was a mere clerical error [and] an inadvertent overpayment of settlement funds." (Id., ¶ 7, 8).

Cooper Square also argues that the check from Travelers, General Liability Claims for \$31,220, which was the source of the overpayment arrived on June 27, 2012, and that June 28, 2012 was the date it was posted to MSF's escrow account. In addition, Cooper Square asserts that check for \$52,890, which was received two days late, was from the other Travelers' Insurance policy, the Executive Liability Claims, and the short delay does not provide a basis for retaining any portion of the \$14,000 overpayment. Cooper Square also asserts the delay with respect to the check for \$52,890 was the result of the check being made payable to Cooper Square as opposed to MSF, and that MSF was kept informed of the situation, and did not indicate that Bisk would expect an increase in the settlement based on the short delay.

Boulevard also opposes Bisk's request for relief, noting that it paid the settlement on time and asserting that the two-day delay in payment does not constitute a material breach of the Settlement Agreement warranting its rescission.

The court finds that Bisk is not entitled to retain any portion of the \$14,000 overpayment which the record shows was made as the result of an inadvertent error by Travelers, and therefore should be returned to Travelers. See In the Matter of Schiano, 128 AD2d 214 (4th Dept), appeal denied, 70 NY2d 614 (1987)(disciplining attorney for failing to return second check erroneously

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sent by the insurance company).

Moreover, there is no basis for awarding Bisk liquidated damages based on the delay in payment of certain settlement monies. "Liquidated damages constitute the compensation which the parties have agreed must be paid in satisfaction of the loss or injury which will follow from a breach of contract." Equitable Lumber Corp. v. IPA Land Development Corp., 38 NY2d 516, 522 (1976)(citation and quotation omitted). Here, there is no agreement between the parties that would arguably provide a basis for awarding Bisk liquidated damages based on the two-day delay. While Bisk relies on emails exchanged between her counsel and counsel for Boulevard before the action was settled as evidence of an intent that she be awarded damages if defendants failed to pay on time, this intent was not indicated in the settlement made on the record or memorialized in the Settlement Agreement between the parties. Indeed, it appears that the emails relied on by Bisk were not even exchanged with Cooper Square, the party against which Bisk seeks to enforce her purported right to liquidated damages. Moreover, the Settlement Agreement specifically provides that it "supercedes any and all other agreements, understandings, and negotiations or discussions, oral or in writing, expressed or implied between or among the parties" (Settlement Agreement, ¶ 10). Accordingly, Bisk's request for liquidated damages is denied, and Cooper Square's cross motion for the return of the \$14,000 overpayment to Travelers is granted.

Furthermore, Bisk's alternative request that the Settlement Agreement be rescinded based on the two-day delay in payment of a portion of the settlement amount is denied. "As a general rule, rescission of a contract is permitted 'for such a breach as substantially defeats its purpose. It is not permitted for a slight, casual, or technical breach, but ... only for such as are material and

willful, or, it not willful, so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract' RR Chester, LLC v. Arlington Bldg. Corp., 22 AD3d 652, 654 (2d Dept 2005), quoting Callanan v. Powers., 199 N.Y. 268, 284 (1910); see also, Donovan v. Ficus Investments, Inc., 20 Misc3d 1139(a) (Sup Ct. NY Co. 2008). In this connection, "[d]elay in performance of a contract where time is not of the essence is not a material breach on which to base the equitable remedy of rescission" Singh v. Carrington, 18 AD3d 855, 857 (2d Dept 2005)(internal quotations and citations omitted).

Here, the two-day delay in payment was a technical or slight breach that did not in any way defeat the purpose of the settlement agreement and which, the record shows, was not wilful. Finally, although the emails relied on by Bisk show that Bisk's attorney proposed that time be made of the essence as to payment under an earlier version of the Settlement Agreement, such proposal was not part of the Settlement Agreement and thus is not a basis for rescinding it.

In view of the above, it is

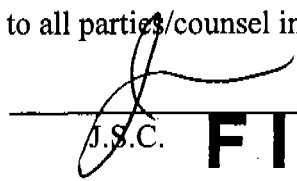
ORDERED that the motion is granted to the extent of directed that within 15 days of the date of this decision and order, Meister Seelig and Fein shall pay the \$14,000 that it is holding in the escrow account to Travelers Bond and Financial Products; and it is further

ORDERED that the cross motion by Cooper Square is granted; and it is further

ORDERED that the request by Dr. Bisk to retain a portion of the \$14,000 as liquidated damages or to rescind the Settlement Agreement is denied.

A copy of this order is being mailed by my chambers to all parties/counsel in this matter.

DATED: ~~March 27, 2012~~
April 19, 2012


 J.S.C. **FILED**

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