

Boccaro v Beinart

2017 NY Slip Op 30557(U)

March 20, 2017

Supreme Court, New York County

Docket Number: 653083/2014

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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Philippe Boccara,

Plaintiff

Index No.
653083/2014

**DECISION and
ORDER**

- against -

Mot. Seq. #003

Joan S. Beinart as Trustee of the Joan S. Beinart Personal
Qualified Residence Trust, and Jonathan Fisher as
Escrowee

Defendant

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HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff Philippe Boccara (“Boccara”) commences this motion for summary judgment against defendants Joan S. Beinart (“Beinart”) and Jonathan Fisher (“Fisher”) seeking a declaratory judgment and for breach of contract in the amount of \$200,000. On or about March 27, 2014, Boccara entered into a contract with Beinart and Fisher (collectively “Defendants”). Beinart entered the contract in her capacity as trustee of the Joan S. Beinart Personal Qualified Residence Trust and Fisher entered in his capacity as escrowee. Under this contract, Beinart agreed to sell to Boccara 1,595 shares of 40 East 80th Apartment Corporation (the “corporation”) and the proprietary lease associated with Unit 7A located at 40 East 80th Street. Boccara agreed to pay a contract deposit (the “Contract Deposit”) of \$200,000.00 at the time that the contract was signed and \$1,800,000.00 at the closing. (plaintiff’s exhibit 3 at 1) Because the sale was subject to the unconditional consent of the corporation, Boccara also agreed to submit an application containing data and documents on the sale for the corporation’s review. (plaintiff’s exhibit 3 at 3) Boccara alleges that he submitted this application and the corporation refused consent twice. After the corporation’s second refusal, Boccara in accordance with the contract’s terms, provided Defendants with a notice of cancellation and demanded the return of the Contract Deposit. He alleges that

Defendants wrongly withheld the Contract Deposit and therefore breached the contract. Defendant's allege that Fisher did not return the Contract Deposit because Boccara acted in bad faith. Beinart alleges that Boccara failed to include the proof of funds in his application to the corporation in an effort to sink the transaction. Fisher, the escrowee and attorney for Beinart, also argues that this action should be dismissed against him personally as escrowee because the contract prohibits him from being held liable. Defendants request that Plaintiff's motion be denied and that this case proceeds to trial.

In support, Boccara submits the affidavit of Philippe Boccara, the attorney affirmation of Herve N. Linder, the attorney affirmation of Kenneth Katz, the Summons and Complaint, the Answer, the contract of sale, a rider to the contract of sale; a second rider to the contract of sale; the amendment to the contract of sale, various correspondences; the notice of cancellation of the contract and a demand for return of the contract deposit, Jonathan Fisher's letter to Kenneth Katz stating that he is not returning the Contract Deposit, Boccara's First Notice of Discovery and Inspection among other things, and a portion of Jonathan Fisher's deposition among other things. In opposition, Defendants submit the affidavit of Jonathan Fisher, Jonathan Fisher's emails sent to Kenneth Katz requesting additional documents for the application; various emails among other things stating that Boccara has not and needs to submit proof of funds. In reply, Boccara submits the affirmation of Kenneth Katz.

Boccara asserts that he submitted his application to the corporation on May 21, 2014. On July 31, 2014, the corporation denied Boccara's application. On August 18, 2014, the parties executed an amended contract that increased Unit 7A's purchase price by \$150,000. Like the original, the amended contract stated that closing would occur promptly after the corporation consents. However, if such consent were refused at any time, either Party could cancel the contract by notice and the escrowee would refund the Contract Deposit to Boccara. (plaintiff's exhibit 3 at 3) On August 18, 2014, Plaintiff also submitted his new application and on August 20, 2014, the corporation denied it. On September 19, 2014, Plaintiff served Defendants with a notice, cancelled the contract and demanded the return of his Contract Deposit in the amount of \$200,000. Beinart objected and per the terms of the contract, Fisher did not return the Contract Deposit. Beinart asserts that Boccara failed to close the transaction in good faith and she suffered financial consequences as a result. Beinart makes these bad faith allegations because Boccara allegedly knew the corporation would refuse consent on the sale if he did not submit the requested information.

The relevant provisions of the contract in this case are as follows,

“6.2 Purchaser shall in good faith:

6.2.1 submit to the Corporation . . . an application with respect to this sale on the form required by the Corporation, containing such data and together with such documents as the Corporation requires, and pay the applicable fees and charges that the Corporation imposes upon Purchaser. All of the foregoing shall be submitted within 10 business days after the Delivery Date . . . ; . . .

6.2.3 promptly submit to the Corporation such further references, data and documents reasonably requested by the Corporation . . .

6.3 . . . If such consent is refused at anytime, either Party may cancel this Contract by Notice. In the event of cancellation pursuant to this ¶ 6.3, the Escrowee shall refund the Contract Deposit to Purchaser.

6.4 If such consent is refused, or not given, due to Purchaser’s bad faith conduct. Purchaser shall be in default and ¶ 13.1 shall govern . . .

13.1 In the event of a default or misrepresentation by Purchaser, Seller’s sole and exclusive remedies shall be to cancel this Contract, retain the Contract Deposit as liquidated damages . . .

24.1 The Parties shall each cooperate with the other, the Corporation . . . and obtain, execute and deliver such documents as are reasonably necessary to consummate this sale.

27.1 . . . If the Closing does not occur and either Party

gives Notice to Escrowee demanding payment of the Contract Deposit, Escrowee shall give prompt Notice to the other Party of such demand. If Escrowee does not receive a Notice of objection to the proposed payment from such other Party within 10 business days after the giving of Escrowee's Notice, Escrowee is hereby authorized and directed to make such payment to the demanding party . . .

Escrowee shall have the right at any time to deposit the Contract Deposit and the interest thereon, if any, with the clerk of a court in the county as set forth in ¶ 22 and shall give Notice of such deposit to each Party. Upon disposition of the Contract Deposit and interest thereon, if any, in accordance with this ¶ 27, Escrowee shall be released and discharged of all escrow obligations and liabilities.

27.3 . . . Escrowee shall not be liable to either Party for any act or omission unless it involves bad faith, willful disregard of this Contract or gross negligence."

(defendant's exhibit 3)

To obtain summary judgement, the movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgement in its favor (CPLR 3212 [b]). This standard requires the movant to make a *prima facie* showing of entitlement to judgement as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact. (*Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [1985]; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]; *Silverman v. Perlbiner*, 307 A.D.2d 230, 762 N.Y.S.2d 386 [1st Dept 2003]; *Thomas v. Holzberg*, 300 A.D.2d 10, 11, 751 N.Y.S.2d 433, 434 [1st Dept 2002]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions." (CPLR § 3212[b]) A party can prove a *prima facie* entitlement to summary judgement through the affirmation of its attorney based

upon documentary evidence (*Zuckerman, supra; Prudential Securities Inc. v. Rovello*, 262 A.D.2d 172, 692 N.Y.S.2d 67 [1st Dept 1999]).

Should the movant make a *prima facie* showing of entitlement to summary judgement, the burden shifts to the non-moving party to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (*see Vermette v. Kenworth Truck Co.*, 68 N.Y.2d 714, 717 [1986]; *Zuckerman*, 49 N.Y.2d at 560, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718; *Forrest v. Jewish Guild for the Blind*, 309 A.D.2d 546, 765 N.Y.S.2d 326 [1st Dept 2003]). The non-moving party must set forth evidentiary proof in admissible form in support of its claim that material triable issues of fact exist. (*Zuckerman, supra* at 562)

“When parties set down their agreement in a clear, complete document, their writing should . . . be enforced according to its terms.” (*Bailey v Fish & Neave*, 837 N.Y.2.2d 600, 603 [2007]) In *Kapur v Stiefel*, where a plaintiff purchaser of a cooperative apartment sued the vendors for return of his escrowed down payment, the First Department held that the “plaintiff purchaser’s right to the return of his escrowed down payment turns . . . upon whether the . . . failure of the transaction was attributable to bad faith on plaintiff’s part.” (*Kapur v Stiefel*, 264 A.D.2d 602, 603 [1st Dept 1999]) The First Department further stated that such an issue was not “properly resolved as a matter of summary adjudication since the record raise[d] questions of fact as to whether the termination of plaintiff’s employment . . . was a circumstance of plaintiff’s making intended to bring about the failure of the subject real estate transaction.” (*Id.*)

Boccara makes a *prima facie* showing of entitlement to summary judgment. He provides the contract that states if the corporation refuses consent of the sale “at anytime, either Party may cancel this Contract by Notice. In the event of cancellation . . . the Escrowee shall refund the Contract Deposit to Purchaser.” The parties agree that the corporation refused consent twice. Boccara further provides the notice of cancellation of the contract and a demand for return of the contract deposit. Boccara also includes Fisher’s letter stating that he is not returning the Contract Deposit.

The burden shifts to Beinart and Fisher to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action. The contract

provides that Boccara and Beinart shall each cooperate with the other, the Corporation and obtain, execute and deliver such documents as are reasonably necessary to consummate this sale. If the corporation refuses consent due to Boccara's bad faith conduct, Boccara shall be in default and Beinart shall retain the Contract Deposit as liquidated damages. Defendants argue that Boccara, in bad faith, did not provide the corporation with the documents it requested such as the proof of funds. Defendant's support this argument by providing Fisher's emails sent to Kenneth Katz requesting additional documents for the application and various emails stating that Boccara has not submitted the proof of funds. Like the plaintiff purchaser in *Kapur v Stiefel*, Bocara's right to the return of his escrowed down payment turns upon whether the failure of the transaction was attributable to bad faith on Bocara's part. This issue cannot be resolved on summary adjudication because the record raises questions of fact as to whether Boccara's failure to produce the proof of funds was a circumstance of Boccara's making designed to bring about the collapse of the subject real estate transaction.

Finally, Fisher argues in opposition that the action against him personally as the Escrow Agent must be dismissed because it is contrary to the terms of the contract. The contract provides that the Escrowee shall not be liable to either Party for any act or omission unless it involves bad faith, willful disregard of this contract or gross negligence. The contract further provides that Fisher is to retain the Contract Deposit if one party demands its return but the other objects. Because further development of the record is needed, it is premature to dismiss the action against Fisher personally as Escrowee. However, Fisher, in accordance with 27.1 of the contract, may deposit the Contract Deposit and interest with the clerk of this court thereby discharging and releasing himself of all escrow obligations and liabilities.

Wherefore, it is hereby,

ORDERED that Plaintiff Philippe Boccara's motion for Summary Judgment pursuant to CPLR 3212 is denied; and it is further

ORDERED that the parties are directed to appear for a compliance conference on April 25, 2017 at 9:30 in Part 15.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

DATED: March 20, 2017



EILEEN A. RAKOWER, J.S.C.