

**Abagyan v Levine**

2018 NY Slip Op 33364(U)

December 28, 2018

Supreme Court, New York County

Docket Number: 150523/2018

Judge: Barbara Jaffe

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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. BARBARA JAFFE PART IAS MOTION 12EFM

Justice

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INDEX NO. 150523/2018

GERMAN ABAGYAN, NELYA ABAGYAN,

MOTION DATE \_\_\_\_\_

Plaintiffs,

MOTION SEQ. NO. 001

- v -

JEFFREY LEVINE, CARMINA BERNARDO,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 37, 39

were read on this motion for summary judgment

Defendants move pursuant to CPLR 3212 for an order summarily dismissing the complaint. Plaintiffs oppose.

I. BACKGROUND

On October 4, 2017, plaintiffs entered into a contract with defendants to purchase a cooperative apartment unit. (NYSCEF 10). As required by the contract, plaintiffs placed \$52,000 in escrow. Pursuant to sections 6.4 and 13.1 of the contract, defendants are entitled to retain the deposit if the board's "consent is refused, or not given, due to Purchaser's bad faith conduct."

(*Id.*).

By letter dated October 13, 2017, nonparty lender's counsel advised that a loan commitment letter had been obtained. (NYSCEF 17). Consequently, pursuant to the contract, the application to the board was due on or before October 17, 2017. By email dated October 27, 2017, the broker advised defendants and their attorney, *inter alia*, that "the board package" had

been submitted to the management company (NYSCEF 17), and by letter dated November 3, 2017, the managing agent forwarded the application to the board. The minutes of the board of directors meeting of November 29, 2017 reflect that plaintiffs' application was under consideration pending clarification of some information from the management company. (NYSCEF 19).

By letter dated December 1, 2017, the broker advised the board of managers of several typographical errors and mistakes in plaintiffs' application, which he claimed resulted solely from his misinterpretation of their financial information. (NYSCEF 18). In a letter to the board dated either December 8 or 11, 2017, the broker asked the board to consider additional clarifications of plaintiffs' application "to address any concerns" with it. (NYSCEF 20).

By letter dated December 19, 2017, the board denied plaintiffs' application. (NYSCEF 11). Defense counsel advised plaintiffs' counsel, by letter dated December 21, 2017, that in light of the material misrepresentations of plaintiffs' finances and inconsistencies in their application, she deemed the application the product of bad faith and a default under the contract, and that in the absence of an agreement within the next ten business days, the full contract deposit would be released to defendants as liquidated damages. (NYSCEF 12).

On January 18, 2018, plaintiffs initiated this case, asserting a breach of contract and demanding the return of the deposit. (NYSCEF 2).

II. CONTENTIONS

A. Defendants (NYSCEF 7-21)

Defendants contend that they are entitled to retain the deposit due to plaintiffs' failure to submit a timely and complete application to the co-op board, which they assert was not submitted until October 27, 2017. Moreover, they claim, the income and asset information, to the

extent it was furnished, was inaccurate or misleading, and after being confronted with the inaccuracies, plaintiffs submitted a new application on December 11, 2017, containing information that differs from that submitted with the first application.

Given plaintiff's submission of an untimely application containing misleading and inaccurate information, followed up by an entirely different second application, defendants maintain that plaintiffs acted in bad faith. They also submit the affidavit of defendant Levine who confirms the untimeliness and inaccuracy of plaintiffs' application, alleges that it was submitted in bad faith, and contends that upon receipt of the second application, the board turned down plaintiffs' application. (NYSCEF 8).

#### B. Plaintiffs (NYSCEF 23-35)

Plaintiffs ask that the motion be denied as premature, as the parties have not engaged in discovery, and there exist factual issues such as whether the application contains misrepresentations, the reason for the board's denial of the application, whether the application is untimely, and whether they acted in bad faith. Nevertheless, they assert that defendants fail to meet their burden of showing a willful default on the contract and that defendants' affidavits are self-serving and conclusory. They observe that the board never objected to any of their submissions as untimely, and otherwise allege that they submitted their application on October 5, 2017, and submitted additional materials in response to the board's request for additional information "in connection with" their application. (NYSCEF 23). Plaintiffs also deny any misrepresentations and contend that any representations made by the broker are not binding on them as he was defendants' agent. (*Id.*).

Plaintiffs maintain that defendants are acting in bad faith by refusing to return the deposit. In support, they submit an email from the broker stating that he is not and was not plaintiffs' agent. (NYSCEF 35).

### C. Reply (NYSCEF 37, 39)

Defendants deny the existence of any factual issues, as the board's denial does not constitute the basis for their motion for summary judgment. Rather, they argue that plaintiffs' failure to apply to the board timely, accurately, and completely warrants dismissal of the action, and observe that plaintiffs do not deny that their application contains misrepresentations, as evidenced by the second, materially different, application and the broker's statements. They moreover, maintain that plaintiffs were aware that they misrepresented facts on their application and admit that they submitted an incomplete application by stating that they had provided information "in several stages." Although defendants' damages are approximately the amount of the contract deposit, their actual damages are irrelevant given the contract to which plaintiffs agreed and to which they should be held bound.

### III. ANALYSIS

To prevail on a motion for summary judgment, the movant must establish, *prima facie*, its entitlement to judgment as a matter of law, providing sufficient evidence to demonstrate the absence of any triable issues of fact. (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]). If this burden is met, the opponent must offer evidence in admissible form demonstrating the existence of factual issues that require a trial; "conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." (*Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 [2016], quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 [1988]). In evaluating the motion, the evidence must be viewed in the "light most

favorable to the opponent of the motion and [the court] must give that party the benefit of every favorable inference.” (*O’Brien v Port Authority of New York and New Jersey*, 29 NY3d 27, 37 [2017]). Whether plaintiffs acted in bad faith constitutes a question of fact. (*Pernet v Peabody Eng’g Corp.*, 20 AD2d 781, 782 [1<sup>st</sup> Dept 1964]).

When neither party does anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of their contract, the parties are said to act in good faith. (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002], quoting *Dalton v Educ. Testing Serv.*, 87 NY2d 384, 389 [1995]). By parity of reasoning, bad faith is conduct that tends to destroy or injure the other party’s right to receive the fruits of their contract.

#### A. Timeliness

Defendants demonstrate only that plaintiffs submitted their application to the management agent on or before October 27, which does not prove that it was not submitted timely. Moreover, it is undisputed that the board considered the application and succeeding submissions without objection. Consequently, defendants do not establish, *prima facie*, that the application was untimely submitted. To the extent that they rely on the purported second application, defendants do not submit it, and again, there is no evidence that the board rejected it as untimely.

#### B. Misrepresentations

Although defendants demonstrate, *prima facie*, that the application contains incorrect information, on the record as it stands now, pre-discovery, there is an insufficient factual basis on which to conclude that plaintiffs acted in bad faith. Levine’s opinion on that score is self-serving and conclusory (*see Medina v Sielaff*, 182 AD2d 424, 427 [1<sup>st</sup> Dept 1992] [merely stating belief of bad faith is insufficient]), and plaintiffs sufficiently show that discovery may reveal evidence

that they acted in good faith (see *Bailey v New York City Transit Auth.*, 270 AD2d 156, 157 [1<sup>st</sup> Dept 2000] [summary judgment may be denied if opposition shows essential facts may emerge upon further discovery]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion for summary judgment is denied.

12/28/2018  
DATE

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BARBARA JAFFE, J.S.C.  
**HON. BARBARA JAFFE**

CHECK ONE:

CASE DISPOSED  
GRANTED  
SETTLE ORDER

DENIED

APPLICATION:

CHECK IF APPROPRIATE:

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER

REFERENCE