

Chan v Shew Foo Chin

2006 NY Slip Op 30669(U)

October 13, 2006

Supreme Court, New York County

Docket Number: 106692/2005

Judge: Walter B. Tolub

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PRESENT: **WALTER B. TOLUB**

PART 15

Index Number : 106692/2005

CHAN, MIRIAM

vs

CHIN, SHEW FOO

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 5.12.06

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...

Answering Affidavits - Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying memorandum decision

FILED

OCT 23 2006

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10/18/06

WALTER B. TOLUB

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

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

-----x
MIRIAM CHAN, PLATINUM QUEENS, LLC and
79 TOWER, LLC

Plaintiffs,

Index No. 106692/05
Mtn Seq. 002

-against-

SHEW FOO CHIN, SUSAN CHIN and RAYMOND
W.M. CHIN a/k/a RAYMOND CHIN

Defendants.

FILED
OCT 23 2006
NEW YORK
COUNTY CLERK'S OFFICE

-----x
WALTER B. TOLUB, J.:

By this motion, plaintiff Miriam Chan moves for summary judgment (CPLR 3212) on her first two causes of action against defendant Shew Foo Chin. Plaintiff Chan additionally moves for an order dismissing the affirmative defenses of defendants Shew Foo Chin and Susan Chin.

This somewhat complicated action arises in connection with a failed sale of real property located at 79 Eldridge Street in Manhattan.¹ Defendant Shew Foo Chin is the present owner of the property. Susan Chin is the wife of Shew Foo Chin, and Raymond W.M. Chin, also known as Raymond Chin (no relation to Mr. and Mrs. Chin), is the attorney who represented Shew Foo Chin with respect to the subject property transaction.

Plaintiffs allege that on or about July 24, 2002, July 31,

¹ This is not the first case before this court involving this property, its present owners, and their attorney (see, Ying-Qi Yang v. Shew Foo Chin (New York County, Index No. 108026/05)).

2002, December 18, 2002 and July 17, 2003, plaintiff Miriam Chan, individually and as a managing member of Platinum Queens, LLC (Platinum), entered into a series of written agreements with defendant Shew Foo Chin to purchase the subject property. Ms. Chan dealt with Shew Foo Chin's agent and wife, defendant Susan Chin, and defendant Raymond Chin, as Shew Foo Chin's attorney. The total purchase price of the property is alleged to have initially been \$350,000. The parties did not execute a formal contract of sale for the subject property.

The initial purchase price of the property, as well as the initial payment made by plaintiffs, is the subject of a letter dated July, 24, 2002 from Miriam Chan to Shew Foo Chin, care of Raymond chin, Esq. The letter, in pertinent part, reads as follows:

Confirming our agreement, enclosed please find a check made payable to Raymond Chin, Esq. As attorney as contract deposit for the purchase of 79 Eldridge Street, New York, New York. Your attorney shall deposit said check which is made on account of the purchase of the 79 Eldridge Street, New York, New York premises for a purchase price of \$350,000.00. Further, please be advised hat [sic] I have also delivered a check in the amount of \$30,000 made payable to you as an additional contract deposit for the purchase of the 79 Eldridge Street premises. Please be further advised that the contract deposits shall not be held in escrow and may b e used by seller's [sic] prior to closing.

Please forward to the undersigned the formal contract of sale containing the following terms:

Premises: 79 Eldridge Street, New York, New York, 10002
Purchaser: Miriam Chan as nominee for an entity to be formed and not individually
Purchase Price: \$350,000.00
Paid on Contract: \$150,000.00 (\$30,000.00 to be paid directly to seller)
Closing date: Sept. 17, 2002
Condition of Premises: to be delivered vacant and broom clean and free and clear of all violations and fines.
Title: insurable title without any additional premium.

(Notice of Motion, Exhibit I).

It appears that in furtherance of this document, on July 24, 2002 two checks were issued by Platinum Queens, LLC and signed by Ms Chan. One check was written to "Raymond Chin, As Attorney" in the amount of \$120,000. The second check was written to "Susan Chin and Raymond Chin as Attorney" in the amount of \$30,000. Both checks, which bear notations indicating that they were for the purchase of 79 Eldridge Street, were indorsed by Raymond Chin and deposited (Notice of Motion Exhibit I). A third check was issued in the amount of \$80,000 by 79 Tower LLC and signed by Ms. Chan, to Susan Chin and Shew Foo Chin on October 18, 2002. Again, the check was indorsed, this time by Shew Foo Chin (Notice of Motion, Exhibit I).

On July 31, 2002, it appears that defendants Shew Foo

Chin and Susan Chin raised the purchase price of the property by \$700,000 to a new price of \$1,050,000. This price increase, although unexplained, is reflected in a letter from Ms. Chan to Shew F. Chin dated July 31, 2002 (Motion, Exhibit I) and further suggests that Ms. Chan signed checks that were issued to defendants for an additional \$120,000 on May 24, 2003 and an additional \$100,000 on July 17, 2003.² In total, by July 17, 2003 plaintiffs claim to have tendered defendants nearly \$450,000 towards the purchase of the subject property, which was never completed.³ Additionally, 79 Tower LLC commenced an action to quiet title in 2003.⁴

Plaintiff commenced the instant action in May, 2005. Comprised of eight causes of action, plaintiff's complaint seeks specific performance of the contract (first and second causes of action), a declaratory judgment (third cause of action) and asserts causes of action for breach of contract and monies had and received (fourth through eighth causes of

²Neither of these cancelled checks were submitted by the parties.

³This court would be remiss if it did not also indicate that it appears that defendants attempted to sell the same parcel of property in 2005 for \$500,000. This action is also presently before this court (see, Ying-Oi Yang v. Shew Foo Chin, New York County Index No. 108026/2005)

⁴79 Tower, LLC and Shew Foo Chin v. Matthew Metz, Raymond Chin, Lee & Cheng, P.C., Victor Cheng and Simon Lee (New York County, Index No. 120666/2003)

action). Plaintiff Miriam Chan presently moves for summary judgment on the first two causes of action in the complaint for specific performance.

A motion for summary judgment limits the role of this court to finding issues, and not resolving them (Sillman v. Twentieth Century Fox Film Corp., 3 NY2d 395 [1957]; Winegrad v. New York University Medical Center, 64 NY2d 851, 853 [1985]). See also, Barr, Altman, Lipshie and Gerstman; New York Civil Practice Before Trial, [James Publishing 2005] §37:91-92). Therefore, in order to succeed, the moving party must demonstrate entitlement to summary judgment as a matter of law (see, Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]). If the opposing party produces evidentiary proof in admissible form that is sufficient to establish the existence of material issues of fact requiring trial, then summary judgment will be denied (Id.).

As a preliminary matter, this court rejects the argument advanced by defendants Shew Foo Chin and Susan Chin that claims Ms. Chan lacks standing to bring this action. Ms. Chan, signed a document claiming to purchase the subject property "as nominee for an entity to be formed and not individually" (Notice of Motion, Exhibit I". This not only has been held to be an acceptable business practice, but also allows Ms. Chan to bring this action (see, College Management

Co., Inc. v. Belcher Oil Co. of New York, 159 A.D.2d 339 [1st Dept. 1990] (an agent may bring an action upon a contract "(1) when the contract was made in the agent's name; (2) when the agent has pledged his personal credit, whether the principal was disclosed or undisclosed; or (3) when the defendant has acknowledged that the plaintiff possesses a general agency authorizing him to act in all matters" (Id. at 340). See also Riley v. Maran, 82 Misc.2d 702 [Sup. Ct. NY Co. 1974]).

As a secondary matter, this court declines to address the opposition papers submitted by defendant Raymond Chin, and denies the relief sought therein. Not only did Mr. Chin not make an appropriate cross-motion for the relief sought, but his opposition papers are duplicative of his earlier motion to dismiss. Since Mr. Chin's motion to dismiss was already addressed and subsequently denied, this court sees no reason to revisit these arguments.

The remaining objections to the instant motion made by defendants Shew Foo Chin and Susan Chin are made on two grounds: (1) defendants have been unable to complete enough discovery so as to properly defend this pre-note of issue motion for summary judgment and (2) no contract exists.

Denial of a summary judgment motion is only appropriate where it is demonstrated by the non-moving party's affidavit that further discovery would likely produce facts necessary to

preclude an award of summary judgment (Denkensohn v. Davenport, 130 AD2d 860 [3rd Dept. 1997]) and where the non-moving party demonstrates prior good faith attempts to acquire the outstanding discovery (Guarino v. Mohawk Containers Co., Inc., 59 NY2d 753 [1983] or that no meaningful discovery had been made prior to the bringing of the summary judgment motion (see, Silinsky v. State-Wide Insurance Company, 30 AD2d 1 [2nd Dept. 1968]).

The problem however, is that while the affidavit in opposition submitted by counsel for defendants Shew Foo Chin and Susan Chin indicates the need for discovery, it does not demonstrate that the discovery would result in the production of evidence necessary to defeat a motion for summary judgment, especially, since any evidence defeating plaintiffs' claim that a contract exists for the sale of the subject property would most likely already be in defendants' possession.

Nonetheless, summary judgment on the first two causes of action are denied as to both parties as premature with leave to renew upon the conclusion of discovery. While neither the absence of a boilerplate contract or an agreement reduced to a single writing concerning the sale of property indicate either that the Statute of Frauds is not satisfied or that a valid contract does not exist (see, General Obligations Law 5-703; Nausch v AON Corp., 2 AD3d 101 [1st Dept. 2002]), the


submissions of the parties generate more questions than answers. Accordingly, it is

ORDERED that the motion made by plaintiff Miriam Chan for summary judgment on the first two causes of action is denied with leave to renew upon the conclusion of discovery.

Counsel for the parties are directed to appear for a Compliance Conference in this matter in IA Part 15, Room 335, 60 Centre Street, New York, New York at 11:00 a.m. on December 15, 2006.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 10/18/06



HON. WALTER B. TOLUB, J.S.C.

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