[* 1]

COPY

SHORT FORM ORDER

INDEX No. 10-16838
CAL No. 12-00961EQ

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 47 - SUFFOLK COUNTY

PRESENT:

Hon. JERRY GARGUILO
Justice of the Supreme Court

MOTION DATE 9-26-12
ADJ. DATE 11-28-12
Mot. Seq. # 001 - MD
002 -XMD

---X

RENE CASTELLA,

Plaintiff,

- against -

PEGGY A. SEIDMAN and MARK S. NEEDLEMAN, As Escrow Agent,

Defendants.

---X

JOHN G. GRIFFIN, ESQ.
Attorney for Plaintiff
46 Route 25A, Suite 8
East Setauket, New York 11733

JEFFREY I. BAUM, ESQ.
Attorney for Defendants
666 Old Country Road, Suite 304
Garden City, New York 11530

Upon the following papers numbered 1 to 36 read on this motion and cross motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1 - 28; Notice of Cross Motion and supporting papers 29 - 32; Answering Affidavits and supporting papers __; Replying Affidavits and supporting papers 33 - 36; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by plaintiff Rene Castella for an order granting summary judgment in his favor on the complaint and dismissing the counterclaim is denied; and it is

ORDERED that the cross motion by defendant Peggy Seidman for summary judgment in her favor on the counterclaim is denied.

On December 29, 2004, plaintiff Rene Castella and Maroula Castella sold residential property known as 9 Johns Road, Strongs Neck (Setauket), New York to defendant Peggy Seidman for the sum of $860,000. The contract of sale provides, in relevant part, that the Castellas, as sellers, will deliver " a valid and subsisting certificate of occupancy or other required certificate of compliance . . . covering the building(s) and all of the improvements located on the property." However, at the time of closing, the Castellas had filed for, but had not yet obtained, a certificate of occupancy from the Town of Brookhaven for a second-story addition, a front deck, a second-story balcony and alternations to the first

floor of the subject residence. Wanting to proceed with the sale despite the lack of a certificate of occupancy for the additions and alterations, the parties entered into an agreement whereby $30,000 of the purchase price would be held in the escrow account of the attorney representing the Castellas in the transaction, defendant Mark Neddleman, Esq., "to insure that all certificates of compliance/occupancy covering all structures requiring the same are received by [Seidman] after closing at no cost to [Seidman]."

Meanwhile, on December 23, 2004, the Town of Brookhaven Building Division granted a request to re-open a permit application from 1993 for the additions and alternations at issue, and issued plaintiff a temporary building permit that expired one year later. On February 23, 2005, an electrical inspection of the premises conducted by plaintiff's contractor revealed that three electrical receptacles needed to be repaired. The repairs were completed, and in August 2005 an electrical inspection company certified that the electrical system in the residence was in compliance with the New York State Building Code and the local requirements. On October 17, 2005, an inspection of the premises was conducted by Town of Brookhaven Building Inspector William Bahnsen, who determined that a four-foot handrail and three smoke detectors needed to be installed before a certificate of occupancy would be issued for the additions and alternations. According to plaintiff, the extensive delay in obtaining a Town inspection was due to Seidman's refusal to grant access to the residence. Two days after the October 17 inspection, Seidman, through CKG Permit Service, Inc., was granted a building permit to construct a one-story addition to the residence. The Town allegedly issued Seidman additional building permits for the subject premises in 2005, 2006 and 2007.

Following extensive renovations to the premises, a certificate of occupancy for the alterations and additions, as well as for the new one-story addition, was issued to Seidman on January 24, 2008. By correspondence to Seidman's counsel dated October 24, 2008, November 19, 2008 and November 13, 2009, Needleman requested permission to release the funds held in his escrow account to plaintiff. To date, Seidman has not made a claim against the escrow fund, and has refused to authorize disbursement of the escrowed funds to plaintiff.

Consequently, in May 2010, plaintiff commenced this action against Seidman seeking damages in the sum of $30,000 for breach of the escrow agreement. The complaint asserts Seidman breached the escrow agreement by performing extensive renovation work at the premises that prevented the issuance of a certificate of occupancy until January 2008, and by refusing to authorize the release of the funds after the issuance of the certificate of occupancy. Seidman's answer denies the allegations in the complaint and interposes a counterclaim for breach of contract. More particularly, the counterclaim alleges that plaintiff breached the escrow agreement and that, pursuant to the terms of such agreement, Seidman is entitled to liquidated damages in the sum of $30,000.

Plaintiff now moves for an order granting summary judgment in his favor on the counterclaim and the complaint. Plaintiff argues the counterclaim must be dismissed, as there was no provision in the escrow agreement for liquidated damages. He further argues Seidman breached the contract's implied covenant of good faith by refusing to allow access to the residence to complete the work necessary to obtain the certificate of occupancy, and by performing extensive renovations under separate building permits, making it impossible for him to get a certificate of occupancy under the 2004 building permit.

In support, plaintiff submits, among other things, copies of the pleadings, the contract of sale, the escrow agreement, the building permits issued to him in August 1993 and December 2004, the building permit issued to Seidman in October 2005, and the certificate of occupancy for the premises issued in January 2008. He also submits an affidavit of Needleman and his own affidavit. Seidman opposes the motion and cross-moves for summary judgment in her favor on the counterclaim. In opposition, she submits her own affidavit and excerpts of plaintiff's deposition testimony.

Seidman's cross motion for summary judgment is denied. CPLR 3212(a) provides that if no date for making a summary judgment motion has been set by the court, such a motion "shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown." Absent a showing of good cause for the delay in filing a summary judgment motion, a court lacks the authority to consider even a meritorious, non-prejudicial application for such relief (*see* ***Miceli v State Farm Mut. Auto. Ins. Co.***, 3 NY3d 725, 786 NYS2d 379 [2004]; ***Brill v City of New York***, 2 NY3d 648, 781 NYS2d 261 [2004]). Although the statutory 120-day period for making a summary judgment motion in this case expired on September 11, 2012, Seidman did not make her cross motion until October 11, 2012. As there is no explanation in the cross-moving papers for Seidman's delay in seeking summary judgment, the cross motion must be denied as untimely (*see* ***Miceli v State Farm Mut. Auto. Ins. Co.***, 3 NY3d 725, 786 NYS2d 379; ***Brill v City of New York***, 2 NY3d 648, 781 NYS2d 261; ***Bicounty Brokerage Corp. v Burlington Ins. Co.***, 101 AD3d 778, 957 NYS2d 161 [2d Dept 2012]; ***Castillo v Valente***, 85 AD3d 1080, 926 NYS2d 304 [2d Dept 2011]; ***Teitelbaum v Crown Hgts. Assn. for the Betterment***, 84 AD3d 935, 922 NYS2d 544 [2d Dept 2011]).

As to plaintiff's summary judgment motion, to recover damages for a breach of contract, a plaintiff must show the existence of a contract with the defendant, the plaintiff's performance under the terms of the contract, the defendant's breach of the contract, and damages resulting from such breach (*see* ***Brualdi v IBERIA, Lineas Aereas de España, S.A.***, 79 AD3d 959, 913 NYS2d 753 [2d Dept 2010]; ***JP Morgan Chase v J.H. Elec. of N.Y., Inc.***, 69 AD3d 802, 893 NYS2d 237 [2d Dept 2010]). The nature of the obligations undertaken in a contract is to be construed in accordance with the parties' intent (*see generally* ***Greenfield v Phillies Records***, 98 NY2d 562, 569, 750 NYS2d 565 [2002]), and "the best evidence of what parties to a written agreement intend is what they say in their writing" (*see* ***Slamow v Del Col***, 79 NY2d 1016, 1018, 584 NYS2d 424 [1992]). Further, when the terms of a written contract are clear and unambiguous, the contract should be enforced in accordance with the plain meaning of its terms (*see* ***Consedine v Portville Cent. School Dist.***, 12 NY3d 286, 879 NYS2d 806 [2009]; ***Greenfield v Philles Records***, 98 NY2d 562, 750 NYS2d 565; ***W.W.W. Assoc. v Giancontieri***, 77 NY2d 157, 565 NYS2d 440 [1990]). "A contract is unambiguous if the language it uses has 'a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion'" (***Greenfield v Philles Records***, 98 NY2d 562, 569, 750 NYS2d 565, quoting ***Breed v Insurance Co. of N. Am.***, 46 NY2d 351, 355, 413 NYS2d 352 [1978]). Conversely, ambiguity is present in a contract if the language used renders it susceptible to more than one reasonable interpretation (*see* ***Brad H. v City of New York***, 17 NY3d 180, 928 NYS2d 221 [2011]; ***Evans v Famous Music Corp.***, 1 NY3d 452, 775 NYS2d 757 [2004]).

As it is a question of law whether or not a contract is ambiguous (***W.W.W. Assoc. v Giancontieri***, 77 NY2d 157, 162, 565 NYS2d 440), a court must first determine whether the agreement at issue on its face is reasonably susceptible to more than one interpretation (*see* ***Chimart Assocs. v Paul***, 66 NY2d 570, 498 NYS2d 344 [1986]). The aim of a court interpreting a contract is to arrive at a construction that gives fair meaning to all of its terms and provisions, and to reach a "practical interpretation of the expressions of the parties so that their reasonable expectations will be realized" (***Joseph v Creek & Pines, Ltd.***, 217 AD2d 534, 535, 629 NYS2d 75 [2d Dept], *lv dismissed* 86 NY2d 885, 635 NYS2d 950 [1995], *lv denied* 89 NY2d 804, 653 NYS2d 543 [1996]; *see* ***G3-Purves St., LLC v Thomson Purves, LLC***, 101 AD3d 37, 953 NYS2d 109 [2d Dept 2012]; ***Eitan Ventures, LLC v Peeled, Inc.***, 94 AD3d 614, 943 NYS2d 449 [1st Dept 2012]; ***Zuchowski v Zuchowski***, 85 AD3d 777, 925 NYS2d 541 [2d Dept 2011]; ***Gutierrez v State of New York***, 58 AD3d 805, 871 NYS2d 729 [2d Dept 2009]). It is a cardinal rule of construction that a court should not interpret a contract in such a way as would leave one of its provisions substantially without force or effect (***Corhill Corp. v S.D. Plants, Inc.***, 9 NY2d 595, 599, 217 NYS2d 1 [1961]; *see* ***Beal Sav. Bank v Sommer***, 8 NY3d 318, 834 NYS2d 44 [2007]; ***Zullo v Varley***, 57 AD3d 536, 868 NYS2d 290 [2d Dept 2008]; ***Petracca v Petracca***, 302 AD2d 576, 756 NYS2d 587 [2d Dept 2003]).

Moreover, in every contract there is an implied obligation of good faith and fair dealing (***Dalton v Educational Testing Serv.***, 87 NY2d 384, 389, 639 NYS2d 977 [1995]; ***Rowe v Great Atl. & Pac. Tea Co.***, 46 NY2d 62, 68, 412 NYS2d 827 [1978]; ***Legend Autorama, Ltd. v Audi of Am., Inc.***, 100 AD3d 714, 954 NYS2d 141 [2d Dept 2012]; ***Jaffe v Paramount Communications***, 222 AD2d 17, 644 NYS2d 43 [1st Dept 1996]). As part of such duty, each party to the contract pledges not to "do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract" (***Kirke La Shelle Co. v Paul Armstrong Co.***, 263 NY 79, 87, 188 NE 163 [1933]). Thus, the obligation of good faith is breached when a party to a contract acts in manner that, while not expressly forbidden under the terms of the contract, would deprive the other party of the right to receive the benefits of the agreement (*see* ***Legend Autorama, Ltd. v Audi of Am., Inc.***, 100 AD3d 714, 954 NYS2d 141; ***Aventine Inv. Mgt. v Canadian Imperial Bank of Commerce***, 265 AD2d 513, 697 NYS2d 128 [1999]).

As indicated above, the parties' escrow agreement states that "[w]hereas Seller has filed for a certificate of compliance for the second story addition, alterations to the first floor, existing front deck and 2nd story balcony located on the premises," and the parties' contract of sale obligates Seller to produce certificates of occupancy or their equivalents for all structures on the premises, the sum of $30,000 would be deposited with Needleman, as escrow agent, to insure that Seidman received a certificate of occupancy for such additions and alternations after the closing date. It states, in relevant part, that "Seller agrees to use [his] best efforts to obtain the outstanding certificate within one hundred eighty (180) days from this date." The escrow agreement also states as follows:

> In the event that the Certificate is not obtained within one hundred eighty (180) days from the date of closing, then the Purchaser shall have the right to procure same and the cost of same shall be paid from the escrow fund. The escrow fund shall not be the limit of Seller's liability hereunder.

Furthermore, under the signature lines for the sellers, purchaser and escrow agent is a handwritten statement that the "Seller referred to herein is Renee [sic] Castella," and that "Mr. Castella shall be responsible for securing the needed c/o with all associated costs." It also appears to state "[u]pon completion this escrow shall be refunded to Mr. Castella." An unidentified signature is present under the handwritten portion of the contract.

Plaintiff's motion for summary judgment dismissing the counterclaim and granting judgment in his favor on the complaint is denied. Here, despite an agreement between the parties that contemplated a 180-day period for obtaining a certificate of occupancy for the additions and alterations to the residence that were the subject of the 1993 building permit, the certificate of occupancy for such work was obtained by Seidman, not plaintiff, more than four years after the transfer of title. Although plaintiff asserts that he was unable to meet his obligation under the escrow agreement due to Seidman's own conduct, his submissions raise an issue as to whether he breached the agreement by failing to use his "best efforts" to obtain the certificate within the 180-day period after the closing (*see* ***D'Agnese v Spinelli***, 290 AD2d 528, 737 NYS2d 301 [2d Dept 2002]; *cf.* ***Just-Irv Sales v Air-Tite Bus. Ctr.***, 237 AD2d 793, 655 NYS2d 131 [3d Dept 1997]). Further, no evidence was presented substantiating plaintiff's allegation that Seidman acted in bad faith by refusing to grant access to the premises, thereby preventing the Town Building Division from performing an inspection of the residence until October 2005, and by conducting extensive renovations before plaintiff could secure the certificate of occupancy required under the terms of the contract of sale (*see* ***Fineman Family LLC v Third Ave. N. LLC***, 90 AD3d 549, 936 NYS2d 132 [1st Dept 2011]). Finally, while the language in the escrow agreement does not support Seidman's claim that she is entitled to liquidated damages of $30,000, dismissal of the counterclaim is denied, as issues exist as to the parties' respective obligations under such agreement (*see* ***Created Gemstones v Union Carbide Corp.***, 47 NY2d 250, 417 NYS2d 905 [1979]). Accordingly, plaintiff's motion for summary judgment in his favor is denied.

Dated: 5/30/13

J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**