

**Danna v Smyser**

2013 NY Slip Op 32657(U)

October 22, 2013

Supreme Court, New York County

Docket Number: 153561/13

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. EILEEN A. RAKOWER

PRESENT:

PART 15

Justice

Index Number : 153561/2013
GAY DANNA & KUDMAN TRACHTEN
vs
HUGH SMYSER AND ROBIN FORMAN
Sequence Number : 001
SUMMARY JUDGMENT

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) 1, 2, 3

Answering Affidavits — Exhibits No(s) 4, 6

Replying Affidavits No(s) 7

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 10/22/2013

[Signature] J.S.C.
HON. EILEEN A. RAKOWER

- 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 15

-----X  
GAY DANNA and KUDMAN TRACHTEN  
ALOE LLP,

Plaintiffs,

- against -

HUGH SMYSER and ROBIN FORMAN,

Defendants.  
-----X

Index No.  
153561/13

**DECISION  
and ORDER**

Mot. Seq. 001

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

This action arises out of a Contract of Sale entered into on June 8, 2012 between defendants Hugh Smyser (“Smyser”) and Robin Forman (“Forman”)(collectively, “Defendants”), as purchasers, and Gay Danna (“Danna”), as seller, for the sale of cooperative unit #1D located at 123 West 93<sup>rd</sup> Street, New York, NY (“Subject Unit”).

Pursuant to the terms of the Contract, the purchase price of the Subject Unit was \$1,325,000 and Defendants provided a down payment of \$132,500 which is being held in escrow by plaintiff Kudman Trachten Aloe LLP (“KTA”), Danna’s attorneys in the transaction. Defendants’ obligations under the Contract were subject to a mortgage financing contingency provision.

Plaintiffs filed this action on April 18, 2013 seeking a declaratory judgment directing KTA to release the Deposit to Danna on the basis that Defendants breached their contractual obligations under the Contract by failing to “complete an application for a 30-year fixed rate loan from First Meridian or any other ‘Institutional Lender’” as defined in the Contract within 15 days. Defendants filed an Answer and Counterclaims on May 28, 2013. The first counterclaim is for a declaratory judgment declaring that Defendants are entitled to the return of their deposit. The second is for breach of contract. On June 17, 2013, Plaintiffs filed a reply to the Counterclaims.

Defendants now move, pursuant to CPLR §3212, for summary judgment on their first counterclaim for a declaratory relief that they are entitled to a return of their down payment in the amount of \$132,500 and accrued interest, pursuant to the terms of the Contract dated June 8, 2012, and on their second counterclaim for breach of Contract. Defendants also seek the costs and attorneys' fees incurred in this action.

Defendants contend summary judgment is warranted because they failed to obtain a valid commitment letter from a lender to finance the purchase of the Unit, KTA communicated to Defendants' counsel that they had the option of terminating the Contract or proceed with the purchase, Defendants thereafter terminated the Contract, but Plaintiffs refused to return their down payment. Defendants further contend that Plaintiffs waived any right to enforcement of the Loan Commitment Date and are estopped from denying extension of the Contingency Period.

In support of their motion, Defendants submit the affidavit of Hugh Smyser, which annexes the following: a copy of the Contract; a letter dated September 24, 2012 from Nathan Perilstein, Senior Loan Officer of First Meridian Mortgage, to Smyser, which states that "none of the banks [he] represents would provide a fixed-rate mortgage" to Smyser; a letter dated July 20, 2012 from First Republic Bank approving Defendants' application for a residential mortgage loan; a letter dated August 6, 2012 from Joseph Badalov to John Lego, of KTA, requesting an extension of the mortgage contingency through August 20, 2012; a August 24, 2012 email from Lego from Stanley P. Kupfer; a letter dated August 27, 2012 from Badalov to Lego; and the pleadings.

Plaintiff opposes, and submits the affidavit of Gay Danna and the attorney affirmation of Jeb L. Singer. Annexed to Danna's affidavit, among other documents, are copies of a August 29, 2012 letter from Lego to Badalov, a September 21, 2012 notice sent from KTA to Defendants, a letter dated October 7, 2012 from Nathan Perilstein, a Senior Loan Office at First Meridian Mortgage, that Defendants' counsel forwarded to Plaintiff's counsel.

Paragraph 14.2 state of the Contract states provides, "The Attorneys may extend in writing any of the time limitations stated in this Contract. Any other provision of this Contract may be changed or waived only in writing signed by the Party or Escrowee to be charged." Paragraph 4 of the Rider to the Contract of Sale provides, "The parties hereby authorize their respective counsel to agree in writing to any changes in dates and time periods provided for in the Contract."

Paragraph 1.20 of the Contract made Defendants' purchase of the Unit contingent on their procurement of a "Loan Commitment" Letter within 45 days of

the “Delivery Date” as defined in the Contract. Pursuant to Paragraph 1.21, Defendants were to obtain a loan in the principal amount of \$930,000.00 for a term of thirty “fixed rate years.” Defendants were entitled to an automatic two week extension of the Loan Commitment Deadline.

Paragraph 18.1.1 defines an Institutional Lender as a bank, savings bank, savings and loan association, trust company, credit union of which Purchaser is a member, mortgage banker, insurance company or government entity that is authorized under New York State Law or Federal Law. Paragraph 18.2.1 obligated the Purchasers to apply for a loan from an Institutional Lender within (15) business days of the Delivery Date (“Loan Application Deadline”) by submitting “truthful and complete information, and submit such application together with such documents as the Institutional Lender requires, and pay such applicable fees and charges of the Institutional Lender.” Paragraph 18.2.2 required the Purchasers to “promptly submit to the Institutional Lender such further references, data and documents requested by the Institutional Lender.” Paragraph 18.3 allows the Purchaser to cancel the Contract, provided that Purchasers are in full compliance with their obligations under 18.2 and an Institutional Lender has denied the Purchaser’s loan application by the Loan Commitment Date.

On or about June 23, 2012, Kupfer, Defendants’ counsel, sent Lego, Plaintiffs’ counsel, a letter requesting an extension of the Loan Commitment Deadline until August 7, 2012. On or about August 6, 2012, Kupfer sent Lego a letter requesting a second two week extension of their time to obtain a financing commitment through August 20, 2012, stating that Defendants had not been able to obtain a fixed rate loan. Defendants advised that they had received a loan commitment from First Republic Bank but that it did not meet the requirements of the Contract because it was a commitment for a variable interest rate loan. The letter requested Danna’s Counsel to “[k]indly indicate your client’s acceptance of said extension by your written confirmation.”

On August 24, 2012, Lego sent Kupfer an email stating, “We had a good phone call earlier this week, but now I have not heard from you. From my perspective, Monday August 27th, Smysa [sic] is either in or out. If he is in, we expect a board application by the 30th [.] If out, I will return the check.”

On or about August 27, 2012, Joseph Badalov, Esq., Kupfer’s colleague, wrote to Lego: “This letter shall confirm your conversation with Stanley Kupfer wherein he informed you that the purchaser has been unable to secure a fixed rate mortgage commitment within the mortgage contingency period and the permitted Extension period. Accordingly, cancellation of the contract is hereby requested along with the

prompt return of the downpayment.”

In response, on or about August 29, 2012, Lego sent a letter to Badalov, stating “Please take notice that the Purchaser hereby objects to the release of the downpayment by your office.”

On or about September 21, 2012, Lego sent Badalov a notice stating: “We have not received a response to our August 29, 2012 letter wherein requested a copy of the Purchaser’s loan application and any rejection letter issued by the Institutional Lender. As Purchaser has not been able to demonstrate compliance with the Contract . . . Seller has now demanded that this office as Escrow Agent will release the deposit to Seller unless objection is received ten (10) days from the date hereof (October 5, 2012).”

In a letter dated September 28, 2012, Kupfer objected to the release of the Deposit. On or about October 7, 2012, Kupfer sent Lego a copy of a letter, dated September 24, 2012, from Nathan Perlstein, a Senior Loan Officer at First Meridian Mortgage, a licensed mortgage banker, stating that it had denied Defendants’ application, dated July 5, 2012, for a 30-year fixed rate loan (the “First Meridian Letter”).

On or about October 11, 2012, Lego sent a letter stating that the First Meridian Letter had deficiencies and that it did not sufficiently substantiate the Defendants’ claimed compliance with their contractual obligations. Lego requested a copy of the Purchasers’ loan application. Plaintiffs contend that despite their requests, Defendants did not provide a copy of a completed application to First Meridian at that time or at any time thereafter.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]).

A purchaser seeking to refund their deposit due to an inability to obtain

financing bears the burden of proving that they acted in good faith to secure mortgage financing. Summary judgment is inappropriate if the purchaser is unable to establish compliance with its obligations as a matter of law. *See, e.g., Katz v. Simon*, 216 A.D.2d 270, 271 (1995) (“However, triable issues of fact exist, *inter alia*, with respect to whether the plaintiffs failed to act diligently and in good faith in applying for the mortgage.”).

Here, there are issues of fact regarding Defendants’ good faith efforts to obtain mortgage financing in that the First Meridian Letter does not establish such compliance conclusively and as a matter of law. Defendants’ motion for summary judgment is denied.

Wherefore, it is hereby,

ORDERED that Defendants’ motion for summary judgment is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: OCTOBER 22, 2013

  
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EILEEN A. RAKOWER, J.S.C.