Hakimi v Antoncic
2015 NY Slip Op 31130(U)
June 26, 2015
Sup Ct, Suffolk County
Docket Number: 08-17645
Judge: Jr., Andrew G. Tarantino

[* 1]

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INDEX No. 08-17645
CAL. No. 14-00041CO

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

PRESENT:

Hon. ANDREW G. TARANTINO, JR.
Acting Justice of the Supreme Court

MOTION DATE 6-19-14
ADJ. DATE 1-6-15
Mot. Seq. # 001 - MD

FARHARD HAKIMI,

Plaintiff,

- against -

MADELYN ANTONCIC,

Defendant.

TARA HAKIMI, ESQ.
Attorney for Plaintiff
2662 Main Street, Suite 7
Bridgehampton, New York 11932

TARBET & LESTER, PLLC
Attorney for Defendant
524 Montauk Highway, P.O. Box 2635
Amagansett, New York 11930

Upon the following papers numbered 1 to 20 read on this motion summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 10 ; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 11 - 20 ; Replying Affidavits and supporting papers __; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Madelyn Antoncic for summary judgment dismissing the complaint against her is denied.

Plaintiff Farhard Hakimi commenced this action to recover damages he allegedly incurred as a result of the breach of an escrow agreement he entered into in connection with the sale of real property known as 234 Wickopogue Road, Southampton, New York, to defendant Madelyn Antonic. Plaintiff, who was also the builder and general contractor for the premises, promised to make certain repairs to the property as a condition for its sale. However, when defendant protested that plaintiff failed to make the promised repairs at closing, the parties entered into the escrow agreement which provided, inter alia, that defendant's attorney would deposit $34,000 of the sale proceeds into an interest bearing account, and that such funds would be used to reimburse defendant the cost of making the repairs and obtaining the necessary certificates of occupancy. The agreement also provided that defendant would consult plaintiff while making the purported repairs.

After taking occupancy of the premises, defendant hired a number of plaintiff's workmen and subcontractors to make the promised repairs. Upon completion of the repairs, defendant sought to retain

all of the money placed in escrow. Plaintiff subsequently brought the instant action. By way of his complaint, which asserts a single cause of action, plaintiff alleges that defendant has no right to retain any of the escrow funds, as she breached the escrow agreement by failing to comply with its requirement that she consult him prior to making the repairs. On June 16, 2008, defendant joined issue asserting affirmative defenses and counterclaims based on breach of contract, breach of warranty, and intentional misrepresentation. Specifically, defendant asserts that plaintiff concealed certain latent defects in the premises, and misrepresented his failure to make required repairs to, among other things, a deck and pool at the rear of the premises, and the home's air conditioning and electrical systems.

Defendant now moves for summary judgment dismissing the complaint against her on the ground she complied with all the requirements of the escrow agreement, including the requirement that she consult with plaintiff regarding the repairs made to the premises. In particular, defendant asserts that during the repairs she faxed plaintiff documents which identified the workers and provided estimates for the work. Defendant further argues that the escrow agreement did not require that plaintiff pre-approve the work or be the only one permitted to perform such work, and that plaintiff abandoned the agreement when he unilaterally insisted that these conditions be met, thereby, relieving her of any further obligations under the contract. Plaintiff opposes the motion, arguing that triable issues exist as to whether defendant, who sent him a single fax and failed to respond to his efforts to communicate with her, complied with the consultation requirement of the escrow agreement. In addition, plaintiff asserts that triable issues exist as to whether the hand written escrow agreement, which was hastily drafted at time of closing, is ambiguous, or whether there was a meeting of the minds.

At his examination before trial, plaintiff testified that he was not sure what was contained in the escrow agreement, because it was hastily drafted at the closing, was illegible in certain places, and some of the items listed may have been already repaired. Plaintiff testified that defendant previously agreed that some of the items listed in the escrow agreement were already fixed at the time of the walk through, and that he agreed to sign the escrow agreement because his attorney advised him defendant would likely retract some of her demands once she had an opportunity to reinspect the premises after closing. Plaintiff testified that he believed that defendant was required to consult him before agreeing to the cost and manner of the repairs, and that, as the builder of the premises with knowledge of the industry, he believed the term "consultation" meant that she should have allowed him the right to fix the problems himself or examine the work done by other contractors. Plaintiff testified that with the exception of a single phone call and a letter, defendant did not consult him prior to making any of the decisions regarding the repairs. Plaintiff testified that he did not agree to have money placed into escrow so defendant could do whatever she wanted to do, and that at the time he entered the agreement he interpreted the word "consult" in accordance with his experience in the construction industry.

At her examination before trial, defendant testified that she believed the word consult meant that she would "discuss with the seller the problem and the work that was going to be done." Defendant testified that she consulted with plaintiff on several occasions, including having telephone conversations with him and sending him faxes to confirm the details of their conversations. Defendant testified that she did not believe that "consult" meant that she was required to obtain plaintiff's approval as to who could perform the work, or that it was necessary to choose the lowest bid for the repair project. She further testified that some of the repairs were never performed, that plaintiff was required to perform

additional repairs pursuant to agreements made prior to them entering the escrow agreement, and that she had done other repairs for which she was never reimbursed.

The escrow agreement states, in pertinent part, as follows:

> (1) Whereas the purchaser signed a contract to purchase the premises, which contract provided for a new home warranty to be given by the seller . . . [and] whereas, there were certain issues noted at the premises by the parties' at the time of the walkthrough of the premises . . . the seller agreed to repair the issues at seller's sole cost and expense . . . The seller agrees to be responsible for the repair of the following items at the premises:
>
> (A) Wood floors throughout the house . . .
> (B) Foyer floor to be remedied . . .
> (C) Oven to be in working order
> (D) Ceiling in kitchen to be remedied . . .
> (E) Repair cracks and warps in sheetrock . . .
> (F) Wood decks outside to be remedied . . .
>
> (2) The purchaser agrees to handle the repair of all of the items in item 1 with consultation with the seller.
>
> (3) To ensure completion of the items, purchaser's attorney shall hold the sum of twenty five thousand ($25,000) in escrow in an interest bearing account
>
> (4) Purchaser's attorney shall reimburse purchaser for the cost of repair promptly upon receipt of invoices for same out of the money held in escrow
>
> (5) Upon completion of the items noted herein, any remaining funds shall be turned over to seller together with accrued interest.
>
> (6) Notwithstanding the foregoing, Seller is responsible for all costs associated with repairing the items noted herein, even if the costs of the same exceed the sum held in escrow
>
> (7) Purchaser's attorney shall hold the sum of $4,000 until June 1, 2007, to ensure compliance . . . relating to the part repair
>
> (8) Purchaser's attorney shall hold the sum of $5,000 in escrow to ensure issuance of the certificates of occupancy for the premises . . .
>
> (9) Seller shall undertake to obtain updated certificates of occupancy . . .

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Center***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). Once the movant meets this burden, the burden shifts to the opposing party to demonstrate the existence of such issues. However, mere conclusions and unsubstantiated allegations are insufficient to demonstrate the existence of triable issues (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]). Moreover, in determining a motion for summary judgment, the court's function is not to resolve issues of fact or to determine matters of credibility but rather to determine whether issues of fact exist precluding summary judgment (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Thus, "[o]n a motion for summary judgment the facts are to be construed in a light most favorable to the non-moving party and should be denied where there is any significant doubt whether a material issue of fact exists or if there is even arguably such an issue" (*see* ***Bulger v Tri-Town Agency***, 148 AD2d 44, 47, 543 NYS2d 217 [3d Dept 1989]).

"A familiar and eminently sensible proposition of law is that, when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms . . . and evidence outside the four corners of the document is generally inadmissible to vary the writing" (***W.W.W. Assoc. v Giancontieri***, 77 NY2d 157, 162, 565 NYS2d 440 [1990]). However, "[t]o create a binding contract, there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms . . . Generally, courts look to the basic elements of offer and acceptance to determine whether there is a objective meeting of the minds sufficient to give rise to a binding and enforceable contract" (***Matter of Express Indus. & Term. Corp. v New York State Dept. of Transp.***, 93 NY2d 584, 589, 693 NYS2d 857 [1999]). Therefore, " [w]here an offeror, using ambiguous language, reasonably means one thing and an offeree reasonably understands differently, there is no contract" (*see* ***Computer Assoc. Intl, Inc. v U.S. Balloon Mfg. Co., Inc.***, 10 AD3d 699, 700, 782 NYS2d 117 [2d Dept 2004]; *see* ***Mary Matthews Interiors v Levis***, 208 AD2d 504, 617 NYS2d 39 [2d Dept 1994]).

Moreover, a determination of the intent of the parties to a contract can only be made as a matter of law where their intent is discernable within the four corners of an unambiguously worded agreement (*see* ***Nappy v Nappy***, 40 AD3d 825, 836 NYS2d 256 [2d Dept 2007]; ***Geothermal Energy Corp. v Caithness Corp.***, 34 AD3d 420, 825 NYS2d 485 [2d Dept 2006] ***Siegel v Golub***, 286 AD2d 489, 729 NYS2d 755 [2d Dept 2001]). Courts determine as a matter of law whether a contract is ambiguous by looking at the document itself and the circumstances under which it was executed, and only look to extrinsic evidence if an ambiguity exists (*see* ***Kass v Kass***, 91 NY2d 554, 566, 673 NYS2d 350 [1998]; ***Stuyvesant Plaza v Emizack, LLC***, 307 AD2d 640, 640, 763 NYS2d 146 [3d Dept 2003]). When a contract term or clause is ambiguous, and the determination of the parties' intent depends on the credibility of extrinsic evidence or a choice among inferences to be drawn from extrinsic evidence, then the interpretation of such language is a matter for trial (*see* ***Amusement Bus. Underwriters v American Intl. Group***, 66 NY2d 878, 880, 498 NYS2d 760 [1985]; ***Brook Shopping Ctrs. v Allied Stores Gen. Real Estate Co.***, 165 AD2d 854, 560 NYS2d 317 [2d Dept 1990]).

Here, defendant failed to establish her prima facie entitlement to summary judgment by eliminating the existence of triable issues from the case (*see* ***Alvarez v Prospect Hosp.*** *supra*; ***Winegrad v New York Univ. Med. Center***, *supra*). Significantly, the escrow agreement is ambiguous with respect to the level and type of "consultation" required of defendant before she commenced the agreed upon repairs. In particular, the agreement does not specify whether defendant was required to obtain plaintiff's approval of the cost of the work before commencing the repairs, and whether she was required to give plaintiff the opportunity to conduct the repairs himself or to inspect the repairs performed by other contractors. Additionally, an examination of the parties' deposition testimony indicates that additional triable issues exist as to whether all or some of the items listed in the agreement had already been repaired prior to closing, and whether, as discussed above, the cost and method of the repair work had to be approved by plaintiff pursuant to the requirement that he be consulted at the time of the repairs.

Accordingly, the motion by defendant Madelyn Antoncic for summary judgment dismissing the complaint against her is denied.

Dated: JUN 26 2015

A.J.S.C.

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