

**Lakhati v Drimmer**

2015 NY Slip Op 31517(U)

August 14, 2015

Supreme Court, New York County

Docket Number: 151968/2015

Judge: Manuel J. Mendez

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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: MANUEL J. MENDEZ
Justice

PART 13

VICKY LAKHATI, Plaintiff, -against-

INDEX NO. 151968/2015
MOTION DATE 07-22-2015
MOTION SEQ. NO 001
MOTION CAL. NO

ERIC DRIMMER, CARLY SPAD-DRIMMER, and SCHWARTZ, LEVINE & KAPLAN, PLLC.,

Defendants.

The following papers, numbered 1 to 10 were read on this motion and cross-motion for summary judgment.

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

Table with 2 columns: PAPERS NUMBERED, and rows for 1-3, 4-6, 7, 8, 9, 10.

Answering Affidavits – Exhibits

Replying Affidavits

Cross-Motion: X Yes [ ] No

Upon a reading of the foregoing cited papers, it is Ordered that Plaintiff’s motion for summary judgment in her favor and dismissing Defendants’ counterclaim is granted, Defendants’ cross-motion for summary judgment is denied, the motion and cross-motion to consolidate this action with a related action under Index No. 151872/2015 are denied as moot, the action under Index No. 151872/2015 is dismissed.

Plaintiff entered into a written contract of sale (herein “Contract”) with defendants as owners of real property located at 630 First Avenue, New York, N.Y. (herein “Premises”) for a purchase price of \$1,062,000.00. The Contract required plaintiff to provide defendants with a down payment of \$106,200.00 (herein “Down Payment”), which would be held by defendants as a deposit and applied towards the purchase price at the time of closing.

Paragraph 22 of the Contract contained a mortgage contingency clause which states, in relevant part, that:

- (a) The obligation of Purchaser to purchase under this Contract is conditioned upon issuance, on or before [45] days from the date hereof after a fully executed copy of this Contract is given to Purchaser or Purchaser’s attorney ... of a written commitment from an Institutional Lender pursuant to which such Institutional Lender agrees to make a first mortgage loan ... to Purchaser, at Purchaser’s sole cost and expense, of \$690,300.00 ... Purchaser’s obligations hereunder are conditioned only on issuance of a Commitment. Once a Commitment is issued, Purchaser is bound under this Contract even if the lender fails or refuses to fund the loan for any reason.
(d) If all Institutional Lenders to whom applications were made deny such applications in writing prior to the Commitment Date, Purchaser may cancel this Contract by Giving Notice thereof to Seller, with a copy of such denials, provided that Purchaser has complied with all its obligations under this paragraph 22.

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

- (e) If no Commitment is issued by the Institutional Lender on or before the Commitment Date, then, unless Purchaser has accepted a written commitment from an Institutional Lender that does not conform to the terms set forth in [22(a)], Purchaser may cancel this Contract by giving Notice to Seller within 5 business days after the Commitment Date, provided that such Notice includes the name and address of the Institutional Lender(s) to whom application was made and that Purchaser has complied with all its obligations under this paragraph 22.
- (g) If Purchaser fails to give timely Notice of cancellation or if Purchaser accepts a written commitment from an Institutional Lender that does not conform to the terms set forth in [22(a)], the Purchaser shall be deemed to have waived Purchaser's right to cancel this Contract and to receive the Downpayment by reason of the contingency contained in this paragraph 22.

Defendants allege that plaintiff failed to adhere to the Contract by making a loan application in an amount exceeding the \$690,300.00 limit set in the Contract. Due to plaintiff's inability to obtain a loan, plaintiff requested multiple extensions of the Commitment Date, which defendants granted up to and including January 9, 2015. Defendants scheduled a closing date for February 6, 2015, with time being of the essence. Plaintiff did not appear for the closing on the scheduled closing date. Pursuant to the Contract, the defendants claim plaintiff was in default and retained the Down Payment.

On February 27, 2015, plaintiff filed a summons and complaint asserting a cause of action for breach of contract and seeking the return of the Down Payment from defendants and payment of reasonable attorneys fees associated with this action. On February 25, 2015 defendants Eric Drimmer and Carly Spad-Drimmer (herein "Owners") filed a summons with notice (see Index No. 151872/2015). On March 30, 2015, the Owners filed the complaint asserting a cause of action for breach of contract and seeking the release of the Down Payment to them by their attorney. The parties, as defendants in the respective actions, asserted answers with a counterclaim seeking the same relief they seek in the actions where they are plaintiffs.

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v. City of New York, 81 N.Y. 2d 833, 652 N.Y.S. 2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (Amatulli v. Delhi Constr. Corp., 77 N.Y. 2d 525, 569 N.Y.S. 2d 337 [1999]).

"Where a purchaser applies for financing on terms different from those contemplated by the financing contingency clause in the contract of sale, but the transaction fails for reasons unrelated to the financing terms for which the purchaser applied, the financing terms applied for are not deemed to have put the purchaser in breach of his or her obligation to make a good faith effort to obtain financing, and, assuming all other obligations have been fulfilled, the purchaser is entitled to the return of any deposit" (Gorgoglione v. Gillenson, 47 A.D.3d 472, 474, 849 N.Y.S.2d 526, 528 [1<sup>st</sup> Dept., 2008]).

Here, the Contract was dated October 22, 2014. Plaintiff's loan application to Citibank, N.A. was timely submitted on October 11, 2014, prior to the execution of the Contract (see Docket No. 23, Exhibit E). Although the loan application requested a loan of \$700,000.00, an amount over the agreed-upon loan amount as stated in the Contract, this did not give rise to a material breach of the contract.

Plaintiff had previously sought two brief extensions in order to obtain the necessary financing, which defendants accepted and consented to. On January 6, 2015, plaintiff received a loan commitment letter in the amount of \$625,000.00, which was \$65,300.00 below the amount needed to close the transaction. Plaintiff then sought a third extension in order to obtain alternative financing to make up for the \$65,300.00 difference. Plaintiff sent a letter dated January 6, 2015 to defendants requesting a third extension in order to obtain the required alternative financing. The letter also stated that "[p]lease confirm that your client will agree to extend the mortgage contingency date until January 23<sup>rd</sup>". In the alternative, my client will need to exercise his right to terminate pursuant to the terms of the contract" (see Docket No. 14, Exhibit D).

By letter dated January 19, 2015, defendants informed plaintiff that they were in receipt of the mortgage commitment letter in satisfaction of the mortgage contingency clause. The letter did not state that the third extension was granted, but instead scheduled a closing date for February 6, 2015. In a letter dated February 6, 2015, defendants notified plaintiff of their default by not appearing at the duly scheduled closing date (see Docket No. 23, Exhibit G). Due to plaintiff's default, defendants cited Paragraph 13(a) of the Contract as the basis for withholding the Down Payment as liquidated damages. Paragraph 13(a) states, in relevant part, that "[i]f Purchaser defaults hereunder, Seller's sole remedy shall be to retain the Downpayment as liquidated damages."

Plaintiff timely notified defendants in writing, and within the five 5 days of the Commitment Date, which had been extended to January 9, 2015, of her intention to exercise her contractual right to terminate the Contract if the defendants did not grant the third extension. Defendants did not timely accept or reject plaintiff's request for a third extension, although they were on notice that plaintiff would terminate the contract. Plaintiff was not in default under the Contract for her failure to appear at the closing date as she had not received the mortgage commitment letter with the appropriate amount to purchase the property; did not receive either an acceptance or rejection from the defendants for her request for a third extension; and she timely put the defendants on notice of her intention to exercise her contractual right to terminate the Contract.

Plaintiff makes a prima facie showing of entitlement to judgment as a matter of law. Defendants have not refuted this showing. Summary judgment in favor of plaintiff on its breach of contract claim, and dismissal of the counterclaim is granted. The cross-motion for summary judgment in favor of defendants on their counterclaim is denied.

The motion and cross-motion seeking a consolidation of this action and the action under Index No. 151872/2015 are denied as moot.

Accordingly, it is ORDERED, that the motion and cross-motion seeking a consolidation of this action with a related action under Index No. 151872/2015 are denied as moot, and it is further,

ORDERED, that the related action under Index No. 151872/2015 is hereby dismissed, and it is further,

ORDERED, that Plaintiff's motion for summary judgment in her favor and for dismissal of the counterclaim is granted, and it is further,

ORDERED, that Defendants' cross-motion for summary judgment as to the cross-claim is denied, and it is further,

ORDERED, that Defendants are directed to release the Down Payment held in an escrow account by Schwartz, Levine & Kaplan, PLLC to Plaintiff Vicky Lakhathi within five (5) days from the date of service of a copy of this Order with Notice of Entry, and it is further,

ORDERED, that plaintiff serve a copy of this Order with Notice of Entry upon the intake clerk for trial support who is located in the General Clerk's Office (Room 119) and the Special Referee Clerk's Office (Room 119M), who is directed to place this matter on the Calendar of the Special Referee's Part at the earliest convenient date for an inquest to determine the amount of reasonable attorneys fees, costs and disbursements.

Enter: **MANUEL J. MENDEZ**  
~~MANUEL J. MENDEZ~~ **J.S.C.**

Dated: August 14, 2015

  
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**MANUEL J. MENDEZ**  
*J.S.C.*

Check one:  FINAL DISPOSITION       NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST       REFERENCE