| **Reiss v Rubinstein** |
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| 2015 NY Slip Op 32418(U) |
| December 7, 2015 |
| Supreme Court, Suffolk County |
| Docket Number: 14-17969 |
| Judge: Joseph C. Pastoressa |
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[* 1]

SHORT FORM ORDER

INDEX No. 14-17969

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

COPY

***PRESENT:***

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

Mot. Seq. # 002 - MotD

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| KENNETH M. REISS and JUDITH E. REISS,<br><br>Plaintiffs,<br><br>- against -<br><br>YANO RUBINSTEIN and STEPHANIE LAUREN RUBINSTEIN,<br><br>Defendants. | ESSEKS, HEFTER & ANGEL ESQS.<br>Attorney for Plaintiffs<br>108 East Main Street, P.O. Box 279<br>Riverhead, New York 11901<br><br>LIU & SHIELDS LLP<br>Attorney for Defendants<br>41-60 Main Street, Suite 208A<br>Flushing, New York 11355 |

Upon the following papers numbered 1 to 29 read on this motion to dismiss or consolidate; Notice of Motion/ Order to Show Cause and supporting papers 1 - 14; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 15 - 24; Replying Affidavits and supporting papers 25 - 29; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

***ORDERED*** that the motion by the defendants for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the amended complaint or, in the alternative, for an order consolidating this action with an action entitled Rubinstein v Reiss, Supreme Court, Suffolk County, Index No. 14-067489, is granted to the extent that this action is set down for joint trial with said action, and is otherwise denied; and it is further

***ORDERED*** that a separate note of issue and bill of costs shall be filed in each action, and that separate court fees shall be paid for each action.

The plaintiffs bring this declaratory judgment action seeking, among other things, a declaration that the defendants are in default under the residential contract of sale between the parties, and that they are entitled to receive and retain as liquidated damages the sum of $91,500 paid as the down payment pursuant to said contract. It is undisputed that the defendants entered into a contract dated July 18, 2014 to purchase the plaintiffs' residence located at 9 Saddle Lane, East Hampton, New York for a purchase price of $915,000 (the contract). The contract provided for a down payment of $91,500 to be held in escrow, and a period of 40 days, which expired on August 27, 2014, in which the defendants were to obtain a mortgage commitment. On August 15, 2014, the defendants made application for a mortgage to

TD Bank, and they were denied said mortgage on August 25, 2014. After some discussions between the attorneys for the parties, the defendants purportedly canceled the contract pursuant to its terms on or about September 8, 2014.

The plaintiffs refused to refund the down payment due to alleged concerns about the mortgage application process undertaken by the defendants, and they commenced this action on September 12, 2014 (Action #1). On September 15, 2014, the defendants commenced an action against the plaintiffs entitled Rubinstein v Reiss, Supreme Court, Suffolk County, Index No. 14-067489, seeking, among other things, the return of their down payment (Action #2). On or about January 6, 2015, the plaintiffs served an amended complaint in this action.

The defendants now move for an order dismissing the amended complaint herein pursuant to CPLR 3211(a)(1) and (a)(7) or, in the alternative, consolidating Actions #1 and #2. In support of their motion, the defendants submit, among other things, an affidavit from the defendant Yano Rubinstein (Rubinstein), a copy of the contract, the denial of their mortgage application, the amended complaint, and correspondence between the attorneys for the parties. Pursuant to CPLR 3211(a)(1), a cause of action will be dismissed when documentary evidence submitted in support of the motion conclusively resolves all factual issues and establishes a defense as a matter of law (Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314; Leon v Martinez, 84 NY2d 83; Peter Williams Enterprises, Inc. v New York State Urban Dev. Corp., 90 AD3d 1007).

In their amended complaint, the plaintiffs allege, among other things, that the defendants failed to make prompt application for a mortgage, failed to disclose a prior mortgage application in an amount greater than permitted under the contract, and acted in bad faith by failing to supply accurate and complete information to TD Bank and "contracting to acquire property that they could not possibly afford."

Paragraph 8 of the contract, entitled "Mortgage Commitment Contingency" provides, in relevant part, as follows:

> (a) The obligation of Purchaser to purchase under this contract is conditioned upon issuance, on or before 40 days after a fully-executed copy of this contract is delivered to Purchaser's attorney ... of a written commitment from an Institutional Lender pursuant to which such Institutional Lender agrees to make a first mortgage loan ... of $515,000.00 ....
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> (b) Purchaser shall (i) make prompt application to one or, at Purchaser's election, more than one Institutional Lender for such mortgage loan, (ii) furnish accurate and complete information regarding Purchaser and members of Purchaser's family, as required, ... (iv) pursue such application with diligence, and (v) cooperate in good faith with such Institutional Lender(s) to obtain a Commitment.

* * *

> (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 to Seller, with a copy of such denials, provided that Purchaser has complied with all its obligations under this paragraph 8.
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> * * *
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> (f) If this contract is canceled by Purchaser pursuant to subparagraphs 8(d) ... neither party shall thereafter have any further rights against, or obligations or liabilities to, the other by reason of this contract, except that the Downpayment shall be promptly refunded to Purchaser ....

The defendants' online mortgage application form, dated August 15, 2014, indicates that the defendants applied for a mortgage in the amount of $515,000, and includes the notations that the defendants' "assets listed are not sufficient to close," and that "[c]o-borrower must have two year work history." The denial of said mortgage application dated August 25, 2014, entitled "Statement of Credit Denial, Termination or Change" (the Denial), indicates under the heading "Principal Reasons for Credit Denial, Termination or Other Action Taken Concerning Credit" that the denial is based upon "Foreclosure or Repossession." In addition, the Denial notes that the following "key factors" affected the defendants' credit score in making their application: serious delinquency, time since delinquency is too recent or unknown, proportion of revolving balances to revolving credit limits is too high, and number of accounts with delinquency.

When considering a pre-answer motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction and the plaintiff's allegations are to be accepted as true and accorded the benefit of every possible favorable inference (see Leon v Martinez, supra; Granada Condominium III Assn. v Palomino, 78 AD3d 996). Here, the defendants do not dispute that they submitted a prior mortgage application relative to this transaction, that they have not provided a copy of the denial purportedly issued to them regarding that prior application to the Court or the plaintiffs, and that the mortgage application on which they rely was made 28 days after the time period for them to obtain a mortgage committment. Neither do the documents submitted, including Rubinstein's submission of the bank statement for his law office operating account, establish that the defendants were ready, willing and able to close title on the subject property had a conforming mortgage application been approved, or that the defendants complied with paragraph 8 of the contract. The Court finds that the documents do not conclusively resolve all factual issues, neither do they establish a defense as a matter of law.

Pursuant to CPLR 3211 (a) (7), pleadings shall be liberally construed, the facts as alleged accepted as true, and every possible favorable inference given to plaintiffs (Leon v Martinez, supra). On such a motion, the Court is limited to examining the pleading to determine whether it states a cause of action (Guggenheimer v Ginzburg, 43 NY2d 268). In examining the sufficiency of the pleading, the Court must accept the facts alleged therein as true and interpret them in the light most favorable to the

plaintiff (Pacific Carlton Dev. Corp. v 752 Pacific, LLC, 62 AD3d 677; Gjonlekaj v Sot, 308 AD2d 471), and such motion will not be granted unless the moving papers conclusively establish that no cause of action exists (Chan Ming v Chui Pak Hoi, 163 AD2d 268). The Court's sole inquiry is whether the facts alleged in the complaint fit within any cognizable legal theory, not whether there is evidentiary support for the complaint (Leon v Martinez, supra; Thomas v Lasalle Bank N. A., 79 AD3d 1015; Scoyni v Chabowski, 72 AD3d 792).

The defendants sole contention regarding the branch of their motion seeking to dismiss plaintiffs' application for declaratory relief in their amended complaint is that, because the amended complaint alleges that the defendants breached the contract between the parties and the plaintiffs have an adequate remedy at law, the amended complaint fails to state a cause of action. It is well settled that the fact that a party has other available remedies does not require dismissal of a cause of action for declaratory judgment where a genuine controversy between the parties exists (Matter of Morgenthau v Erlbaum, 59 NY2d 143). Rather, the courts may decide the matter unless "there is already pending between the parties another action in which all the issues can be determined" (Matter of Morgenthau v Erlbaum, 59 NY2d at 148). That is, where the second action filed is a declaratory judgment, and the prior pending action between the parties would allow all of the issues to be determined, the court must dismiss the declaratory judgment action (Matter of Morgenthau v Erlbaum, supra; see e.g. Seneca Ins. Co. v Lincolnshire Mgt., 269 AD2d 274). It is undisputed that this action for declaratory judgment was commenced prior to the defendants action. In addition, it is determined that the amended complaint states a cognizable cause of action (see 184 Joralemon, LLC v Brklyn Hts Condos, LLC, 117 AD3d 699). Accordingly, those branches of the defendants' motion which seek to dismiss the amended complaint pursuant to CPLR 3211 are denied.

The Court now turns to that branch of the defendants' motion which seeks to consolidate this action with Action #2. As a general rule, where multiple actions involve "common questions of law and fact," consolidation or joint trial may be appropriate (see CPLR 602 [a]). A motion pursuant to CPLR 602 to consolidate actions or to join separate actions for trial rests within the sound discretion of the trial court (see Alizio v Perpignano, 78 AD3d 1087). It is well settled that consolidation is improper if one of the parties, as a result of the consolidation of cases, would end up as both a plaintiff and a defendant (Geneva Temps, Inc. v New World Communities, Inc., 24 AD3d 332; M & K Computer Corp. v MBS Industries, 271 AD2d 660).

However, a joint trial preserves the separate character of each action while securing the advantage of a single trial on common issues (see Import Alley of Mid-Is. v Mid-Island Shopping Plaza, 103 AD2d 797). Absent prejudice to a substantial right of a party opposing the motion, consolidation or a joint trial of actions pending before a court should be granted when common questions of law or fact exist (see Alizio v Perpignano, supra; Whiteman v Parsons Transp. Group of N.Y., Inc., 72 AD3d 677).

Here, the plaintiffs consent to the "consolidation" of the subject action and a joint trial is appropriate, as the instant action and Action #2 arise out of the same transactions and common questions of law and fact exist. Accordingly, this branch of the motion by the defendants is granted to the extent of joining the cases for trial, as a joint trial of these actions will serve the interests of the Court, the parties and the witnesses.

The parties shall complete any remaining discovery expeditiously. All matters of trial practice are reserved to the Justice presiding at the joint trial of these actions. The defendants are directed to promptly serve a copy of this order with notice of entry on the Calendar Clerk of the Court.

Dated: December 7, 2015

**HON. JOSEPH C. PASTORESSA, J.S.C.**

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