

**Fhima v Erensel**

2018 NY Slip Op 32663(U)

October 17, 2018

Supreme Court, New York County

Docket Number: 655761/2016

Judge: Debra A. James

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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: HON. DEBRA A. JAMES PART IAS MOTION 59EFM**

*Justice*

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**INDEX NO. 655761/2016**

ISAAC FHIMA and DAPHNA SHIFFELDRIM,

**MOTION DATE 08/04/2017**

Plaintiffs,

**MOTION SEQ. NO. 001**

- v -

BRENT ERENSEL and NINA ERENSEL,

Defendants.

**DECISION AND ORDER**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 48

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

ORDER

Upon the foregoing documents, it is

ORDERED that plaintiffs' motion for summary judgment is denied, and it is further

ORDERED that defendants' cross motion for partial summary judgment is denied; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in IAS Part 59, 60 Centre Street, Room 331, New York, New York on October 30, 2018, 9:30 AM.

DECISION

In this action for breach of contract, plaintiffs Isaac Fhima and Daphna Shiffeldrim move for summary judgment.

Defendants Brent and Nina Erensel cross-move for partial summary judgment.

### Background

Plaintiffs sought to purchase a co-operative apartment owned by defendants identified as Apartment 33B, located at 60 East End Avenue, New York, New York. The parties entered negotiations in May 2016.

The complaint alleges as follows: defendants advised plaintiffs that the Co-operative Board (Board) was selective in approving potential apartment purchasers. The parties needed to obtain the approval of the Board with an application to the Board's Managing Agent (Managing Agent). Defendants insisted that, prior to executing a contract of sale, plaintiffs had to provide defendants with detailed financial information, including background and employment information.

After several weeks of reviewing plaintiffs' financial information, defendants told plaintiffs to apply to defendants' real estate agent prior to applying to the Managing Agent. In accordance with defendants' demands, plaintiffs submitted the application to defendants' agent on July 8, 2016.

Between July 8 and August 3, 2016, plaintiffs, in compliance with the request of defendants and their agent, revised and resubmitted the application to them to seek their approval. Plaintiffs did not submit the application to the

Managing Agent until August 3, 2016. On August 18, 2016, the Board, through its managing agent, denied plaintiff's application, though it did not state the reason for its denial. Therefore, plaintiff demanded the return of a deposit in the sum of \$250,000, held in escrow pending Board approval.

Plaintiffs claim that they were entitled to the deposit because the sale of the apartment was never consummated. Upon defendants' refusal to return this deposit, plaintiffs commenced this action. In addition to the return of the deposit from the escrow agent, plaintiffs seek damages resulting from defendants' alleged breach of the contract of sale, plus costs and attorneys' fees. Defendants served an answer which included three counterclaims, alleging breach of contract, breach of the implied covenant of good faith, and misrepresentation, to which plaintiffs served a reply.

Upon the joinder of issue, plaintiffs move for summary judgment, seeking the return of the deposit, damages and attorneys' fees. Plaintiffs contend that they acted in good faith throughout the negotiations and provided all the requested financial information. They insist that defendants' agent requested the information and that they had to obtain approval from the agent before applying to the Board for its approval. Plaintiffs argue that the Board's unexplained denial of the sale indicates that the denial was not based on any bad faith on

their part. Thus, plaintiffs aver that defendants will not be able to show that plaintiffs negotiated in a wrongful manner.

Defendants oppose the motion and cross-move for summary judgment on their breach of contract counterclaim. They dispute plaintiffs' assertion of good faith and contend that plaintiffs made material misrepresentations about their financial status. According to defendants, the financial information offered and revised by plaintiffs included discrepancies involving their incomes, which were never resolved. Defendants deny the claim that their agent demanded an application from plaintiffs, subject to the agent's approval. Defendants also deny ever extending the time for plaintiffs to seek Board approval of the sale. Pursuant to the contract of sale, plaintiffs were allegedly required to submit the application for approval to the Board on or before July 10, 2016, which defendants state is a breach of such contract in that plaintiffs submitted their application on August 3, 2016.

While defendants argue that issues of fact preclude the grant of plaintiffs' summary judgment motion, they seek partial summary judgment based on breach of contract. Defendants contend that plaintiffs breached the contract of sale by failing to submit a timely application to the Board. Upon this breach, defendants argue that, pursuant to the contract of sale, they can retain plaintiffs' deposit as liquidated damages.

In reply, plaintiffs contend that defendants have failed to substantiate any claims of misrepresentations or bad faith on their part, and that plaintiffs did not breach the contract, because they fully complied with defendants' demands prior to the Board's denial.

### Analysis

"Summary judgment is a drastic remedy, to be granted only where the moving party has 'tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact' and then only if, upon the moving party's meeting of this burden, the non-moving party fails 'to establish the existence of material issues of fact which require a trial of the action [citation omitted]'" (Vegas v Restani Constr. Corp., 18 NY3d 499, 503 [2012]).

Each side seeks summary judgment based on breach of the contract of sale. To establish a prima facie case on a breach of contract claim, a party must show proof of a contract, performance by one party of the contract, a breach by the other party, and resulting damages (see Harris v Seward Park Hous. Corp., 79 AD3d 425, 426 [1st Dept 2010]).

The subject contract of sale requires that upon execution, plaintiffs must deposit the Contract Deposit with an escrow agent. Paragraph 6.1 provides that the sale of the apartment was "subject to the unconditional consent of the Corporation."

Paragraph 6.2 provides the plaintiffs "in good faith . . . submit to . . . the Managing Agent an application with respect to [the] sale . . . containing such data and together with such data as the Cooperative requires." Paragraph 6.3 provides that if the Cooperative refuses consent of the sale at any time, "either Party may cancel this Contract by Notice. In the event of cancellation pursuant to this . . . the Escrowee shall refund the Contract Deposit to Purchaser (Plaintiffs)." Defendants refer to Paragraph 13.1, which provides: "In the event of a default or misrepresentation by Purchaser, Seller's sole and exclusive remedies shall be to cancel the Contract, retain the Contract Deposit as liquidated damages, and, if applicable, Seller may enforce the indemnity [related to the brokerage commission]."

Defendants argue that plaintiffs breached this agreement by not timely submitting the application to the Managing Agent. In their cross motion, defendants clearly state that plaintiffs' default is not due to plaintiffs' bad faith or misrepresentation, as these are separate grounds that defendants seek to preserve. While defendants argue that the due date for submitting the aforesaid application was before or on July 10, 2016, the contract is unclear as to this specific date. Paragraph 6.2.1 provides that the application to the Board shall be submitted "within 10 business days after the Delivery Date".

The Delivery Date is defined in Paragraph 1.22 as the date on which a fully executed counterpart of the contract is deemed given to and received by plaintiffs or their attorney. While the contract of sale is dated June 20, 2016 and executed by the parties on June 15, 2016, the delivery date is not specifically defined here.

There is also the issue as to whether the parties agreed to extend the time to submit the application to the Managing Agent. Defendants have not made a conclusive case for untimeliness on plaintiffs' part and are not entitled to summary judgment based on this ground.

However, defendants have raised issues as to plaintiff's lack of good faith and fair dealing prior to the Board's denial. Paragraph 6.4 provides that if the Board's consent is not given due to plaintiffs' bad faith conduct, plaintiffs would be considered in default. While the Board did not provide any explanation for its denial, defendants offer evidence of records related to the parties' efforts to formulate the application to the Board. There is evidence provided by defendants' agent, Sotheby's International Realty, indicating that inexplicable discrepancies regarding plaintiffs' income are stated in the financial statements, in contrast to the information initially provided in the application. Efforts to revise the application papers before submitting them to the Managing Agent indicate



inconsistencies in plaintiffs' tax returns and financial statements. Defendants contend that there was a failure to finally resolve these alleged inconsistencies due to plaintiffs' failure to substantiate their actual present income. Defendants argue that during this period, the parties were trying to construct a proper application for the Board's approval. Neither defendants, nor their agent claim that plaintiffs needed the separate approval of defendant's agent.

This court finds that neither side has, at this time, made a prima facie showing of an entitlement to summary judgment as a matter of law. The issue of bad faith, based upon plaintiffs' submission of allegedly inconsistent or inadequate financial information, will require further determination, as this is usually an issue of fact (see Cetindogan v Schuyler, 95 AD3d 577, 578 [1st Dept 2012]). The herein determination is without prejudice to either or both parties moving again for summary judgment, upon the completion of discovery, on the outstanding issues, including that of bad faith.

10/17/2018  
DATE

*Debra A. James*  
DEBRA A. JAMES, J.S.C.

CHECK ONE:  CASE DISPOSED  DENIED  NON-FINAL DISPOSITION

APPLICATION:  GRANTED  GRANTED IN PART  OTHER

CHECK IF APPROPRIATE:  SETTLE ORDER  SUBMIT ORDER  FIDUCIARY APPOINTMENT

INCLUDES TRANSFER/REASSIGN  REFERENCE