

**Makris v Boylan**

2018 NY Slip Op 33702(U)

May 14, 2018

Supreme Court, Orange County

Docket Number: Index No.: EF000986/2018

Judge: Sandra B. Sciortino

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ORANGE

-----X  
JERRY MAKRIS,

Plaintiff,

-against-

JAMES BOYLAN and ELIZABETH BOYLAN,  
Defendants.

-----X  
SCIORTINO, J.

**DECISION AND ORDER**

Index No.: EF000986/2018

**Motion Date: 3/26/18**

Sequence No. 1, 2 & 3

The following papers numbered 1 to 8 were read on the following motions: (Seq. #1) Motion by Plaintiff for leave to amend the Notice of Pendency; (Seq. #2) Motion by Defendants for an order dismissing the Complaint pursuant to Civil Practice Law & Rules §3211(a)(7) and to vacate the notice of pendency; and (Seq. #3) Plaintiff's cross-motion for an order disqualifying David A. Donovan as attorney for Defendants. The motions are consolidated for purposes of this decision:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/ Kaplan Affirmation with Exhibits A-B	1 - 2
Notice of Motion/ Donovan Affirmation with Exhibits A-E	3 - 4
Notice of Cross Motion/ Kaplan Affirmation with Exhibit 1	5 - 6
Memorandum of Law	7
Reply Affirmation (Donovan)	8

This is an action for specific performance of a contract for purchase and sale of a property located at 32 Old Chester Road, Goshen, New York (the premises). On January 16, 2018, the plaintiff and defendants entered into a "Purchase Agreement" for the transfer of title of premises owned by the defendants. Following the execution of the Agreement, the defendants consulted with their attorney, David A. Donovan, Esq. who thereafter communicated with plaintiff's attorney by

letter dated January 22, 2018, advising that the defendants had elected not to proceed with the transaction. Plaintiff commenced this action on January 25, 2018 seeking specific performance or, in the alternative, compensatory and consequential damages resulting from an alleged breach of the Agreement.

Contrary to defendants' argument, the Agreement does satisfy the Statute of Frauds (General Obligations Law, § 5-703, subd. 2) as it identifies the parties to the subject real estate sales transaction, described the realty to be sold with reasonable particularity, and stated the purchase price of the realty, the down payment and the balance due upon closing. The Agreement also provided for a closing date and stated that the transaction was not subject to a mortgage financing. (See, *Willmott v. Giarraputo*, 5 N.Y.2d 250 [1959]) However, the Agreement also contains contingencies evidencing that it was not intended to be a complete agreement. (See, *Scheck v. Francis*, 26 N.Y.2d 466 [1970]; *Willmott*, 5 NY 2d 250, *Kingsbridge Improvement Co. v. American Exchange-Pacific Nat. Bank*, 249 N.Y. 97 [1928]; *Bernat v. West Seventy-Third Street Corp.*, 230 AD 18 [1 Dept 1930]; *Spielvogel v. Veit*, 197 AD 804 [2d Dept 1921])

The Agreement states, on its face, that it is subject to attorney approval and a formal contract of sale. It is undisputed that there was no attorney approval and no formal contract of sale. The Agreement, a conditional agreement not intended as a final agreement, was a memorandum of a number of terms which were later to be included in a formal contract of sale which the parties expressly agreed to execute. In fact, it was stated in the Agreement that the down payment was to be paid upon the signing of a formal contract of sale, more evidence that the writing was not intended to be a complete contract. (See, *Sheehan v Culotta*, 99 AD2d 544 [2d Dept 1984])

In his opposition, plaintiff contends the additional fact that a more formal contract was to be signed does not render the Agreement unenforceable, citing *Pescatore v Manniello* 19 AD3d 571 [2d Dept 2005] in which the Second Department cited *Maccioni v Guzman* 145 AD2d 415 [2d Dept 1988]. This Court does not agree with the plaintiff's interpretation. In that case, the purchase-offer agreement did not state on its face that it was contingent upon a more formal contract. There is a difference between an agreement where the parties contemplate a more formal contract and one that is specifically contingent upon it.

Furthermore, before specific performance of a contract for the sale of real property may be granted, a plaintiff must demonstrate that it substantially performed its contractual obligations and that it is ready, willing and able to satisfy those obligations not yet performed, regardless of any alleged anticipatory breach by the defendant. (*See, Johnson v Phelan* 281 AD2d 394 [2d Dept 2001]) In his opposition, plaintiff offers nothing to indicate that he is ready, willing and able to satisfy his obligations under the Agreement. Plaintiff never paid the down payment and there were only nine days between the date of the Purchase Agreement and the commencement of this action.

Accordingly, it is hereby

**ORDERED** that defendants' motion to dismiss is granted; and it is further

**ORDERED** that the Complaint is dismissed; and it is further

**ORDERED** that the notice of pendency of this action filed by the plaintiff in the office of the Clerk of the County of Orange on January 25, 2018 against the subject premises, 32 Old Chester Road, Goshen, New York is hereby canceled of record and the Clerk is hereby directed to cancel

same on NYSCEF referring to this order.

**ORDERED** that Plaintiff's motion and cross-motion are denied as moot.

Dated: May 14, 2018  
Goshen, New York

ENTER:



HON. SANDRA B. SCIORTINO, J.S.C.

TO: *Counsel of Record via NYSCEF*