At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse at Civic Center, Brooklyn, New York, on the 2nd day of November 2020

HONORABLE FRANCOIS A. RIVERA

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GEORGE GEHRING and GEORGE GEHRING, JR.,

Plaintiffs,

DECISION & ORDER
Index No. 10284/2010

- against -

MONTAGUE REALTY, LLC and
HARVEY D. KAMPTON, ESQ., as Escrow Agent

Defendants.

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Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of motion filed by defendants Montague Realty, LLC and Harvey D. Kampton, Esq., as Escrow Agent (hereinafter the movants) on August 26, 2019, under motion sequence number five, for an order pursuant to CPLR 3212: (1) dismissing the complaint of plaintiffs George Gehring and George Gehring, Jr. (hereinafter the Gherings); (2) granting summary judgment on the movants' counterclaim for a declaratory judgment; and (3) and imposing sanctions against the Gehrings for frivolous conduct. The motion is unopposed.

-Notice of motion
-Affidavit of defendant Harvey D. Kampton
-Affirmations of the movants' counsels in support
-Exhibits A-GG

BACKGROUND

By summons and verified complaint dated April 21, 2010, the Gehrings commenced the instant action for, among other things, recission of an agreement to purchase a condominium (hereinafter the purchase agreement). The movants have interposed an answer with a counterclaim dated May 22, 2010. The movants' motion papers are silent on whether the Gehrings have replied to the movants' counterclaim.

LAW AND APPLICATION

The movants have moved for summary judgment dismissing the complaint as asserted against them. The Gehrings have not opposed the motion. Accordingly, the verified complaint is abandoned by the Gehrings' failure to oppose the movants' motion to dismiss it (*see Elam v Ryder Sys., Inc.*, 176 AD3d 675, 676 [2nd Dept 2019], citing *Pita v Roosevelt Union Free Sch. Dist.*, 156 AD3d 833, 835 [2nd Dept 2017]; *see also Kronick v L.P. Thebault Co.*, 70 AD3d 648, 649 [2nd Dept 2010], citing *Genovese v Gambino*, 309 AD2d 832, 833 [2nd Dept 2003]).

The movants also seek an order pursuant to CPLR 3212 granting summary judgment on their counterclaim for a declaratory judgment. The movants have asserted a counterclaim for a judgment declaring that they are entitled to keep the down payment that the Gehrings deposited in accordance with the terms of the purchase agreement. The movants' motion papers are silent on whether the Gehrings have replied to the movants' counterclaim.

CPLR 3011 pertains to kinds of pleadings and provides as follows:

> There shall be a complaint and an answer. An answer may include a counterclaim against a plaintiff and a cross claim against a defendant. A defendant's pleading against another claimant is an interpleader complaint, or against any other person not already a party is a third-party complaint. There shall be a reply to a counterclaim denominated as such, an answer to an interpleader complaint or third-party complaint, and an answer to a cross claim that contains a demand for an answer. If no demand is made, the cross claim shall be deemed denied or avoided. There shall be no other pleading unless the court orders otherwise.

A main purpose of CPLR 3011 is to state the instances in which a responsive pleading is required (Siegel, New York Practice § 229, 4th Ed). It specifically provides, in pertinent part, that a counterclaim requires a reply.

CPLR Rule 3212 (a) provides, in pertinent part, that any party may move for summary judgement in any action after issue has been joined; provided however, that the court may set a date after which no such motion may be made, such date being no earlier than thirty days after the filing of the note of issue. If no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown.

Until 1996, the only time requirement for making a motion for summary judgment was that “issue has been joined” in the action. There was no outer limit until one was enacted in 1996. The moment of joinder of issue continues to be the earliest time for the making of a motion for summary judgment on the claim involved. If the motion is made against the plaintiff's cause of action, the service of the defendant's answer marks the joinder of issue; if its subject is a counterclaim, the service of the plaintiff's reply is the

moment of joinder (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3212:12). The requirement that issue be joined before a motion for summary judgment is granted "is intended to show the court precisely what the plaintiff's claims and the defendant's position as to them, and his defenses, are" (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3212:11, p 431) and has been strictly adhered to (*Miller v Nationwide Mutual Fire Ins. Co.*, 92 AD2d 723,724 [4th Dept 1983]).

It has been held that the motion does not lie before joinder of issue although the papers present no triable issue (*Milk v Gottschalk*, 29 AD2d 698 [3rd Dept 1968]). It has also been held that the Supreme Court is powerless to grant summary judgment prior to joinder of issue (*see* CPLR 3212 (a); *Union Turnpike Associates, LLC v Getty Realty Corp.*, 27 AD3d 725, 728 [2nd Dept 2006]).

A motion for summary judgment shall be supported by a copy of the pleadings (CPLR 3212 [b]). The pleadings means a complete set of the pleadings (*Wider v Heller*, 24 AD3d 433 [2nd Dept 2005]) or all the pleadings (*Welton v Drobniki,* 298 AD2d 757 [3rd Dept 2002]).

Either the plaintiffs did not reply to the movants' counterclaim or they did reply but the movants' neglected to annex the reply to their motion papers. Assuming the plaintiffs did not reply, their reply to the counterclaim was mandated by CPLR 3011. The failure to do so would render the summary judgment premature since issue has not yet been joined (CPLR 3212 [a]; *Union Turnpike Associates, LLC v Getty Realty Corp.*,

27 AD3d 725, 728 [2nd Dept 2006]).

If the plaintiffs did reply to defendants' counterclaim, by not including a copy of the reply to their motion, the movants have not met their initial burden on the motion for summary judgment on their counterclaim (*Welton, v Drobniki*, 298 AD2d 757 [3rd Dept 2002]).

The movants have also requested that sanctions be imposed on the Gehrings based on the contention that the commencement and prosecution of the instant action constitutes frivolous conduct within the intendment of 22 NYCRR 130–1.1.

The complaint is dismissed as abandoned. The branch of the movants' motion for summary judgment in its favor on its counterclaim for a declaratory judgment is denied. The denial is premised on the fact that the motion is either premature pursuant to CPLR 3212 (a) or on the basis that the movants' have failed to annex all the pleadings contrary to the requirements of CPLR 3212 (b). Consequently, the movants have not prevailed on the merits of either branch of their summary judgment motion. It was, therefore, not necessary to analyze the movants' motion papers to determine whether the plaintiffs' commencement and prosecution of the instant action was frivolous. Furthermore, inasmuch as the complaint is dismissed, the Court would not be inclined to impose sanction if the conduct were determined to be frivolous.

CONCLUSION

The motion of Montague Realty, LLC and Harvey D. Kampton, Esq., as Escrow Agent for an order pursuant to CPLR 3212 dismissing the complaint of plaintiffs George

Gehring and George Gehring, Jr. is granted.

The motion of Montague Realty, LLC and Harvey D. Kampton, Esq., as Escrow Agent for an order pursuant to CPLR 3212 granting summary judgment on their counterclaim for a declaratory judgment is denied.

The motion of Montague Realty, LLC and Harvey D. Kampton, Esq., as Escrow Agent for an order imposing sanction against George Gehring and George Gehring, Jr. is denied.

The foregoing constitutes the decision and order of this Court.

Enter:

François A. Rivera
J.S.C.