SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 33

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DIANA CIECHORKSA, MICHAEL LATA

Plaintiff,

- v -

JOEL TODD, SHANNAN TODD,

Defendant.

INDEX NO. 154746/2020

MOTION DATE 01/05/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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HON. MARY V. ROSADO:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 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, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 77

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

Oral argument took place on June 22, 2022, with Steven R. Fairchild appearing on behalf of Plaintiffs Diana Cierchorska and Michael Lata ("Buyers") and David A. Koenigsberg appearing on behalf of Joel and Shannon Todd ("Sellers"). Both Buyers and Sellers have moved against each other for summary judgment seeking $40,000.00 held in escrow as a security deposit for a failed real estate transaction (NYSCEF Docs. 7 and 57). Upon the foregoing documents and oral argument, Sellers' motion for summary judgment is granted and Buyers' motion for summary judgment is denied.

I. Procedural Background

Buyers filed a Complaint on June 26, 2020 (NYSCEF Doc. 2). Buyers alleged breach of contract and sought contract expenses; the return of the $40,000 security deposit held in escrow (the "Security Deposit"), and reasonable attorneys' fees (*id.* at ¶¶ 87-99). Sellers filed an Answer with affirmative defenses and counterclaims (NYSCEF Doc. 5). Sellers pled as affirmative

defenses that the UCC-1, which Buyer claims was the cause of Sellers' breach, was legally void due to it being discharged in bankruptcy and per NY UCC § 9-515 (*id.*). Sellers also pled that Buyers violated the implied covenant of good faith and fair dealing (*id.*) Sellers counterclaimed for breach of contract (*id.*)

On December 13, 2021, Sellers moved for summary judgment (NYSCEF Doc. 7). Through its motion, Sellers seek an order granting Sellers the $40,000 held in escrow, a declaration that Sellers are not liable to Buyers for any of the alleged damages sought, and reasonable expenses, attorneys' fees, and costs incurred in this action (*id.*) The basis of Sellers summary judgment motion is that the UCC-1 notice was expired and void, so Buyers breached the Contract by violating the covenant of good faith and fair dealing as well as failure to agree to close (NYSCEF Doc. 8).

On January 14, 2022, Buyers cross-moved for summary judgment (NYSCEF Doc. 57). Buyers sought an order stating that Buyers are entitled to the down payment held in escrow, that Sellers breached the contract, and reasonable expenses, attorneys' fees, and costs incurred in this action (*id.*). Buyers assert they did not breach the contract, but rather Sellers breached the contract by not clearing the notice of lien (NYSCEF Doc. 58).

II. Factual Background

The property giving rise to this litigation is cooperative apartment unit 2G located at 235 East 87th Street, New York, New York (the "Unit") (NYSCEF Doc. 9 at ¶ 1). Before the Sellers owned the Unit, the Unit was owned by Kevin and Peggie Byrne (the "Byrnes") (*id.* at ¶ 5). There were two liens placed on the Unit against the Byrnes (*id.*) The first lien was in favor of Emigrant Mortgage Company, Inc. ("Emigrant") dated September 18, 2008 (*id.*). The second lien was in favor of Ethan T. Klausner ("Mr. Klausner") dated March 21, 2011 (*id.*).

In 2012, the Byrnes filed for bankruptcy in the Federal District Court of New Jersey (*In Re Kevin M. Byrne and Peggie A.* Byrne, Case 12-35199-DHS [Bankr. DNJ 2012]). On October 18, 2013, the Bankruptcy Court granted the Byrnes a discharge under the Bankruptcy Code (*id.*) On June 15, 2014, the Bankruptcy Court issued a "notice of proposed abandonment" that listed the Unit as property to be abandoned to the Byrnes' debtors (*id.*). The Notice of Abandonment listed Emigrant's lien as first in priority and Mr. Klausner's lien as second in priority (*id.*). Mr. Klausner is listed as having received notice of the Notice of Abandonment (*id.*) Emigrant foreclosed on the Unit in December of 2014 (NYSCEF Doc. 9 at ¶ 113). Emigrant purchased the Unit.

Years later, Mr. Klausner filed suit in New York Supreme Court against Emigrant and others alleging damages related to the discharge of his lien in the foreclosure (*see Ethan Klausner v Retained Realty Inc.*, Index No. 656770/2016 [Sup Ct, New York County]). In that case, in a Decision and Order dated June 21, 2021, Justice Arthur F. Engoron granted defendants' summary judgment and dismissed Mr. Klausner's Complaint.

Sellers purchased the Unit from Emigrant in 2016 (NYSCEF Doc. 9 at ¶ 3). In 2019, Sellers contracted to sell the Unit, but the purchase was not completed (NYSCEF Doc. 20 at ¶ 4). However, it was during that transaction that a lien search revealed that the two UCC-1 notices of liens placed on the Unit during the Byrne's ownership were on record (albeit expired) with the Office of the City Register of the City of New York ("City Register") (*id.*). In January 2020, in a subsequent transaction, the Sellers accepted Buyers' offer to purchase the Unit for $400,000 (*id.* at ¶ 5). At that time, Sellers' attorney, Andres Valdespino, informed Buyers' attorney, Lior Aldad, about the UCC-1 notices. The parties negotiated the terms of the contract of sale (the "Contract"), leading the parties to enter the Contract on February 6, 2020 (*id.*)

As part of the Contract, the Buyers put down a $40,000 security deposit (the "Security Deposit") which is the subject of this lawsuit (*id.*). The Contract obligated Sellers to, at closing, provide the Unit free and clear of any liens, encumbrances, and adverse interests (*id.* at ¶ 8). The Contract also required Sellers to deliver to Buyers the Unit free of any recorded liens. A rider to the Contract (the "Rider") required Seller to remove any UCC-1 notices related to the Unit by closing (*id.* at ¶ 10). The Contract contemplated a closing date of March 27, 2020 but did not state time was of the essence. In the event the Sellers were unable to perform in accordance with the Contract, the Sellers were entitled to adjourn Closing for 60 calendar days (*id.* at ¶ 11). If Buyers wanted to cancel the Contract due to financing related issues, Buyers were required to provide to Seller notice and evidence that a requirement of its lender was not met (*id.* at ¶ 12).

Sellers' attorney made efforts to remove the two (expired) UCC-1 notices related to the Emigrant and Klausner liens (*id.* at ¶ 13). By April 14, 2020, the Emigrant UCC-1 notice had been removed (*id.* at ¶ 14). After repeated failures to get in touch with Mr. Klausner's attorney, Sellers' attorney wrote directly to Mr. Klausner on April 30, 2020, requesting he execute a UCC-3 to remove his UCC-1 notice (*id.* at ¶ 15). In response to the letter, Mr. Klausner's attorney, Marc Altshul ("Mr. Altshul"), responded and stated that Mr. Klausner would only execute a UCC-3 if Sellers paid Mr. Klausner (*id.* at ¶ 18). In the meantime, the Cooperative Board had approved Buyers purchase of the Unit. Buyers also secured a mortgage loan commitment from Bank of America. In correspondence dated May 27, 2020, Sellers' attorney asserted to Mr. Altshul that Mr. Klausner lien was no longer valid per the foreclosure and bankruptcy, but that Sellers would offer $1500 to have him execute a UCC-3 (*id.* at ¶¶ 22-23). Mr. Altshul did not respond until June 1, 2020, stating the $1500 was not acceptable (*id.* at ¶ 25).

Meanwhile, the Cooperative Board had approved Buyers purchase of the Unit. Sellers' attorney believed Mr. Klausner's (expired) UCC-1 could be removed by Sellers' filing their own UCC-3. However, the Buyers' attorney indicated his clients would not close until a UCC-3 was filed with either Mr. Klausner's permission or a Court Order (*id.* at ¶ 26). Sellers' attorney asserts he tried to schedule a closing date in multiple conversations and offered to hold in escrow $5,000 to indemnify any expense Buyers might incur regarding Mr. Klausner's (expired) UCC-1 (*id.* at ¶ 27). Mr. Aldad rejected these offers and would not schedule a closing. Sellers' attorney then sent Mr. Aldad a Time of the Essence Letter on June 9, 2020, setting the closing for June 22, 2020 (*id.* at ¶ 29).

On June 11, 2020, Sellers' attorney received a letter from Ms. Patricia Yak ("Ms. Yak") who was now the new attorney for Buyers (*id.* at ¶ 31). Ms. Yak's letter informed Sellers that the Buyers would not schedule a date for closing, were terminating the contract, and demanded return of the $40,000 held in escrow (*id.*). Immediately after receiving Ms. Yak's letter, Sellers' attorney filed a UCC-3 on behalf of Sellers to get rid of Mr. Klausner's (expired) UCC-1 (*id.* at ¶ 36). That UCC-3 was rejected because the City Register showed that the Klausner UCC-1 had expired and so there was no need to file a UCC-3 (*id.*) Sellers' attorney notified Ms. Yak about Mr. Klausner's expired lien and offered to extend closing to June 29, 2020. Buyers would not agree to close (*id.* at ¶ 37).

On June 30, 2020, Sellers' attorney sent Ms. Yak a notice that the Sellers had demanded release of the $40,000 in escrow unless Buyers objected within 10 days (*id.* at ¶ 38). On July 1, 2020, the Buyers objected to release of the $40,000 in escrow (*id.* at ¶ 40). The $40,000 has remained in escrow to date. Mr. Klausner's expired UCC-1 notice was finally cleared by a UCC-

3 notice filed by Sellers on September 25, 2020 (*id.*). Sellers put their Unit back on the market in January of 2021 and it sold for $350,000 (*id.* at ¶ 41).

III. Discussion

A. Summary Judgment Standard

"Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact." (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012]). The moving party's "burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (*Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 833 [2014]). Once this showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial. *See e.g., Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 [1st Dept 2003]). Mere conclusions of law or fact are insufficient to defeat a motion for summary judgment (*see Banco Popular North Am. v Victory Taxi Mgt., Inc.*, 1 NY3d 381 [2004]). To sustain a cause of action for breach of contract, a movant must prove the existence of a contract, movant's performance, the non-movant's breach, and damages (*see Markov v Katt*, 176 AD3d 401, 402 [1st Dept 2019]; *Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]).

B. Sellers' Motion for Summary Judgment

The Court finds that Sellers have shown they are entitled to summary judgment. The existence of the Contract is not in dispute. Moreover, Sellers have shown that they performed their obligations under the Contract. Sellers were working to get the UCC-1 liens removed prior to closing as contemplated by the Contract. Sellers were able to remove Emigrant's UCC-1 and were

in the process of removing Mr. Klausner's UCC-1 so that they could deliver title at closing. As discussed above, since time was not made of the essence in the contract, and Sellers were only obligated to provide clear title at closing, Sellers were performing as contemplated and had not breached the Contract.

Eventually, after coming to the correct conclusion that the Klausner lien had no force or effect, the Sellers made time of the essence to get Buyers to perform in a letter dated June 10, 2020 (NYSCEF Doc. 44). The letter stated that closing should have occurred on or about March 27, 2020, and that Sellers were ready, willing, and able to close as the Klausner UCC-1 of record was unenforceable (*id.*). The letter set a closing date of June 22, 2020, at 11:00 a.m. Although it is disputed whether the time of the essence letter was effective, the Buyers' response to the time of the essence letter indicated an unwillingness to perform under the Contract, and Buyers indeed never agreed to close.

In response in a letter dated June 11, 2020, Ms. Yak, the new attorney representing the Buyers, demanded the release of the deposit from escrow and asserted Sellers were in default under the Contract for failure to discharge Mr. Klausner's (expired) UCC-1 (NYSCEF Doc. 47). However, the Court finds the Sellers were not in default since (1) Sellers did not have to provide clear title until closing and that date had not yet come, and (2) Sellers' attorney was correct in his repeated assertions that the UCC-1 was invalid and unenforceable at the time of closing as it had expired on March 21, 2016, and this information was communicated to Ms. Yak dated June 12, 2020 (NYSCEF Doc. 49). Nevertheless, whether the time of the essence was valid or not, closing never occurred due to Buyers' refusal to proceed with the transaction. In essence, by calling off the contract, refusing to close, and demanding back their security deposit, the Buyers breached their obligations to perform under the contract.

Moreover, although the Klausner lien was unenforceable, Buyers requested Sellers refrain from taking steps to clear the notice of lien by asking they not clear the UCC-1 notice unilaterally (*William B. Clarke v Rafael Rodriguez*, 16 NY3d 815, 816 [2011] [where one party frustrated another party's efforts to perform the contract, party frustrating efforts to perform is not entitled to assert breach of contract]). Requesting a party refrain from performing, then using its non-performance as a basis to repudiate the contract constitutes a breach of the implied covenant of good faith and fair dealing (*Forman v Guardian Life Ins. Co. of America*, 76 AD3d 886, 888 [1st Dept 2010] [the implied covenant of good faith and fair dealing requires each party refrain from destroying or injuring the right of the other party to receive the fruits of the contract]).

Further, Buyers cannot rely on the fact that the UCC-1 notices were not cleared on the closing date specified in the contract of sale as a basis for their repudiation because the contract of sale never made time of the essence (*ADC Orange, Inc. v Coyote Acres, Inc.*, 7 NY3d 484, 489 [2006]; *Tisoped Corp. v Thor 138 N 6th St LLC*, 180 AD3d 587 [1st Dept 2020]). Prior to claiming that Seller defaulted under the terms of a contract, Buyers were required to serve a clear, distinct, and unequivocal notice demanding Sellers' performance, fixing a reasonable time in which to perform, and warning that failure to perform would be considered a default (*Westreich v Bosler*, 106 AD3d 569 [1st Dept 2013]; *Karamatzanis v Cohen*, 181 AD2d 618 [1st Dept 1992]). Since Buyers never made time of the essence and expressly disregarded Sellers' time of the essence letter, Buyers cannot utilize this as grounds for cancelling the contract.

Therefore, the Court finds that, based on the undisputed material facts, Sellers have showed that they performed under the Contract and Buyers breached by failing to proceed with closing based on the mistaken belief that Mr. Klausner's UCC-1 may be valid and enforceable. Sellers have also shown they were damaged by the transaction falling through as they had to sell their

apartment for $50,000 less, accrued carrying costs for the property, and accrued costs of defending themselves in this litigation. Given that Mr. Klausner's UCC-1 was expired and void according to the City Register, and this was the sole basis by which Buyers refused to go through with the Contract, the Court finds there is no excuse or triable issue of fact related to Buyers' breach.

Because section 13 of the Contract states that Sellers' remedy for Buyers' breach is to retain the security deposit, Sellers are entitled to have the security deposit currently held in escrow disbursed to it. Moreover, since section R29 of the Rider to the Contract states that if legal proceedings become necessary to enforce any of the terms of the Contract, the prevailing party is entitled to costs of the legal proceeding, including reasonable attorneys' fees, Sellers are also entitled to reasonable costs and attorneys' fees. As the Court has found that Buyers breached and Sellers are entitled to summary judgment, the Court need not address Buyers' cross motion for summary judgment. Buyers' breach precludes them from an award of summary judgment.

Accordingly, it is hereby

ORDERED that Sellers' motion for summary judgment is granted, and that Sellers are entitled to recover the $40,000 security deposit held in escrow in connection with the real estate transaction giving rise to this lawsuit; and it is further

ORDERED that Sellers are entitled to an award of reasonable costs and attorneys' fees incurred as a result of this legal action; and it is further

ORDERED that the portion of Sellers' counterclaim which seeks attorneys' fees is severed and the issue of the amount of reasonable attorney's fees that plaintiff may recover against the defendants is referred to a Special Referee to hear and report; and it is further

ORDERED that Buyers' cross-motion for summary judgment is denied; and it is further

ORDERED that, within 30 days from entry of this order, counsel for Sellers shall serve a copy of this order with notice of entry upon the Clerk of this Court; and it is further

ORDERED that service upon the Clerk of this Court shall be made in accordance with the procedures set forth in The Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh; and it is further

ORDERED that the Clerk of this Court is to enter judgment against Buyers accordingly.

This constitutes the Decision and Order of the Court.

9/26/2022
DATE

Mary V Rosado
HON. MARY V. ROSADO, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED			[x]	NON-FINAL DISPOSITION	
APPLICATION:	[ ]	GRANTED	[ ]	DENIED	[x]	GRANTED IN PART	[ ] OTHER
	[ ]	SETTLE ORDER			[ ]	SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN			[ ]	FIDUCIARY APPOINTMENT	[ ] REFERENCE