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DECISION

Demat Sabanci Cetindogan, Plaintiff v. Harvey B. Schuyler, Defendants, 112418/09

Supreme Court, New York County, Part 2
Contracts

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Cite as: Cetindogan v. Schuyler, 112418/09, NYLJ 1202491240812, at *1 (Sup., NY, Decided April 7, 2011)

Justice Louis B. York

Decided: April 7, 2011

Decision/Order

On or about March 3, 2009, Plaintiff Demet Sabanci Centindogan ("Plaintiff"), a Turkish citizen and resident, entered into an agreement with Harvey B. Schuyler ("Defendant") to purchase the lease and shares for a condominium apartment located at 812 Fifth Avenue in Manhattan. Pursuant to the purchase agreement Plaintiff put a down payment of 10 percent, or $300,000, toward the purchase price of $3,000,000. The purchase agreement ("contract") required Plaintiff to provide copies of her financial information (including net worth and copies of income tax returns) and personal letters of reference to The Fifth Central Park Corporation ("Board"). The purchase agreement also contained a good-faith requirement if cancellation were to occur; if the cancellation was not made in good faith the contract allowed for Defendant to retain the down payment. Plaintiff flew to New York to meet with the Board members for an interview held May 16, 2009. Plaintiff and Defendant disagree about what occurred during this interview. Defendant was not present at the interview, but claims that an unidentified Board member informed him that Plaintiff sabotaged the interview by answering questions in a way that would ensure the application would be rejected by the Board. Plaintiff denies all allegations of self-sabotage and expresses her disappointment with the dissolution of the agreement. Regardless of the exact occurrences at the meeting, on or about May 18, 2009, Plaintiff was notified that the Board had rejected her application. The purchase agreement was binding, contingent on approval from the Board. Without approval, the purchase agreement could not be completed. Therefore, on May 21, 2009, Plaintiff's attorney notified Defendant of the dissolution of the purchase agreement and requested the return of the $300,000 deposit. Defendant refused, alleging that Plaintiff's conduct at the Board interview violated the purchase agreement.

Plaintiff subsequently filed the current motion for summary judgment requesting the return of the $300,000 deposit, plus interest, as well as the costs and expenses incurred in this action. In response to the motion for summary judgment, Defendant filed a cross-motion for summary judgment to deny Plaintiff's motion and grant Defendant summary judgment, or, in the alternative, for an order compelling Plaintiff to comply with all outstanding discovery demands. For the reasons to follow, the Court grants Plaintiff's motion and denies Defendant's cross-motion.

To prevail on a motion for summary judgment, the moving party must establish a prima facie showing she is entitled to judgment as a matter of law. Once a prima facia case is established, the burden shifts to the non-moving party to provide evidence of a material issue of fact that would preclude summary judgment. Ferluckaj v. Goldman Sachs & Co., 12 N.Y.3d 316, 320, 880 N.Y.S.2d 869, 871 (2009). The parties agree that this case turns on the issue of whether Plaintiff acted in bad faith during her interview, essentially sabotaging Plaintiff's chance at approval by the Board. Defendant claims that Plaintiff acted in bad faith, which violates the purchase agreement and entitles Defendant to retain the down payment. However, Plaintiff claims that she acted in good faith in her cancellation of the contract and she is therefore entitled to the return of her deposit with interest.

Plaintiff has established a prima facie case for summary judgment. It is undisputed that Plaintiff followed all of the requirements set forth in the purchase agreement by providing all necessary paperwork to the Board prior to the interview. Cancellation of the purchase agreement was the result of the Board's rejection of the application. Defendant claims Plaintiff's action prior to, during and after the Board interview provide insight into her state of mind and her intentions. He points to e-mail exchanges between Plaintiff and her broker and Plaintiff's lack of "surprise, regret or even outrage" after learning of her application's rejection. Notice of Cross Motion, ¶16. Plaintiff expressed in her Affidavit her disappointment in losing the apartment, and explained the email exchanges on which Defendant relies to show Plaintiff's desires. In particular, in her Affidavit in Opposition to Defendant's cross motion, Plaintiff states:

9. I am a prominent businesswoman in Turkey. Whether or not I expressed "surprise, regret or even outrage" is irrelevant. In business, one learns to keep one's emotions at bay.

10. I did not wish to get out of the contract. I wanted the apartment and the Board acted wrongly to deny it to me.

12. This last email, the Defendant points to as somehow revealing a desire on my part not to own the apartment when, however, the truth is that it reveals that I do want to own the apartment.

13. Thus, Mr. Erickson's [last] email set the issue to rest. I could with confidence attend the Board meeting and not have to worry about my anticipated use of my apartment violating any rules. Cetindogan Affidavit in Opposition to Cross Motion, p.3-4

Plaintiff's affidavit constitutes evidentiary support for her claim. See Yates v. City of New York, 37 A.D.3d 458, 459, 831 N.Y.S.2d 186, 187 (2nd Dept. 2007).

As mentioned above, Defendant can retain the deposit if Plaintiff acted in bad faith in cancelling the agreement. Specifically the purchase agreement ("contract") provides, "In the event of a…misrepresentation by Purchaser, Seller's…remedies shall be to cancel this Contract [and] retain the Contract Deposit as liquidated damages." Contract, ¶13. Defendant claims that Plaintiff had a "change of heart" regarding her purchase of the apartment. Defendant further argues that during her Board interview, Plaintiff deliberately provided answers she knew would result in the rejection of her application by the Board.

Defendant admits that the information comes from his discussion with a board member who was present at the interview, but not from first hand knowledge. Schuyler Affidavit in Support of Cross-Motion, ¶15. Pursuant to CPLR 3212, the affidavits to support a motion for summary judgment shall be by a person having knowledge of the facts. CPLR §3212(b). Defendant does not have direct knowledge of the facts, but instead relies on hearsay and his own conjecture about Plaintiff's intentions. The hearsay which Defendant has provided does not create an issue of a fact and therefore cannot preclude summary judgment. See Roldan v. New York University, 81 A.D.3d 625,___, 916 N.Y.S.2d 162, 165-66 (2nd Dept. 2011); Stock v. Otis Elevator Co., 52 A.D.3d 816, 817-18, 861 N.Y.S.2d 722, 723 (2nd Dept. 2008). Statements attributable to an unidentified witness are considered hearsay and do not rise to the level of evidence. See MMG Financial Corp. v. Midwest Amusement Park, LLC., 630 F.3d 651, 656 (7th Cir. 2011), Ratut v. Singh, 186 Misc. 2d 350, 352, 718 N.Y.S.2d 135, 137 (Kings County 2000). Defendant has not provided the name of the Board member who allegedly informed Defendant of Plaintiff's bad faith during the Board interview. All the alleged evidence Defendant provided is conjecture or hearsay and therefore does not create material issues of fact.

Defendant relies on several pieces of so-called evidence which the court finds unsatisfactory. First, Defendant references e-mails between Plaintiff and her broker regarding Plaintiff's children living in the apartment alone. The broker initially informed Plaintiff that it was unlikely that her college-aged daughter or her other children could stay in the apartment unattended. Defendant points, in particular, to an e-mail in which Plaintiff says "this is unacceptable for us. Our three children can and must stay in the apartment as long as they want without us." According to Defendant this shows that Plaintiff had a "change of heart" about wanting to own the apartment at all. Cetindogan Affidavit in Opposition to Cross Motion p.3. However, the broker response assured Plaintiff the co-op rules do not mention this policy. Therefore, Plaintiff states, she received reassurance that her children could live in the apartment. Plaintiff states in her affidavit that the e-mail exchange only shows how much she wanted the apartment. Further, she states, the last e-mail resolved the issue to her satisfaction. After this exchange Plaintiff attended the meeting, she says, with the belief that her anticipated use of the apartment did not violate any co-op rules. Thus, Plaintiff has argued persuasively that she intended to follow through with the purchase of the apartment. Moreover, Defendant's "speculation that plaintiff "intentionally sabotaged' their application is without evidentiary support…and wholly insufficient to create a triable issue." Chung v. Chrein, No. 570834/02, 2003 WL 1088224, at *1 (N.Y.Sup.App.Term 1st Dept. Feb. 25, 2003).

Defendant also relies heavily upon Plaintiff's Board interview. According to Defendant, Plaintiff said that individuals other than herself would use the apartment during her absence, and that

her daughter, along with her large dog, would be the primary resident. These actions could potentially sabotage Plaintiff's chance at approval because they violate the co-op rules. In her affidavit, Plaintiff swears "the accusation I [made any of the claimed statements] is a lie." Cetindogan Affidavit in Opposition to Cross Motion, p.2. To counter Plaintiff's statement, Defendant, who was not present at the Board meeting, states "I have learned with my discussions with a board member present at the interview…" that Plaintiff made the assertions above. Hearsay evidence "may be sufficient to demonstrate the existence of a triable issue of fact where it is not the only evidence submitted." LaRusso v. Katz 30 A.D.3d 240, 244, 818 N.Y.S.2d 17, 20 (1st Dept. 2006) quoting Navedo v. 250 Willis Ave Supermarket 290 A.D.3d 246, 247, 735 N.Y.S.2d 132 (1st Dept. 2002). However, Defendant does not offer the Board member's name and admits that all information he has in regard to the interview is hearsay. Similarly, in Jangana v. Cogan, (76 A.D.3d 907, 907 N.Y.S.2d 670 [1st Dept. 2010]) the defendant also attempted to retain the plaintiffs' escrow deposit based on the plaintiffs' alleged bad faith at the Board interview. The 1st Department found it dispositive that "defendant failed to raise a triable issues of fact as to whether plaintiffs had, in bad faith, submitted data to the Board…[and] as a result of such bad faith submissions, the Board refused to consent to the sale of the apartment." Id. at 908.

As in LaRusso and Jangana, Defendant has provided only hearsay evidence and speculation regarding Plaintiff's state of mind and intentions.

Accordingly and for the reasons set forth

ORDERED that the plaintiff's motion for summary judgment on the complaint herein is granted, and the Clerk is directed to enter judgment in favor of plaintiff and against defendant in the sum of the $300,000 deposit, with interest at the rate of 9 percent per annum from the date of May 21, 2009, until the date of the decision on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements as taxed by the Clerk.