

Lafontaine v Ruiz

2007 NY Slip Op 30212(U)

March 6, 2007

Supreme Court, Queens County

Docket Number: 0003372

Judge: Patricia P. Satterfield

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IA Part 19
Justice

	x	Index
YURY LAFONTAINE, 2004		Number <u>3372</u>
Plaintiff,		Motion
2006		Date <u>December 20,</u>
- against -		Motion
LUCIO ALBERTO RUIZ,		Cal. Number <u>22</u>
Defendant.		
	x	

The following papers numbered 1 to 3 read on what the court deems to be a motion by plaintiff Yury LaFontaine for summary judgment and other relief and on this cross motion by defendant Lucio Alberto Ruiz for summary judgment dismissing the complaint against him.

	<u>Papers Numbered</u>
Order to Show Cause - Affidavits - Exhibits	1
Notice of Cross Motion - Affidavits - Exhibits...	2
Answering Affidavits - Exhibits.....	3

Upon the foregoing papers it is ordered that the motion is disposed of as follows:

Pursuant to a contract of sale dated May 16, 2003, plaintiff Yury LaFontaine promised to purchase premises known as 222-19 39th Avenue, Bayside, New York from defendant Lucio Alberto Ruiz at a price of \$610,000.00. The parties made the contract conditional upon the issuance on or before June 17, 2003 of a mortgage commitment of \$549,000.00 or such lesser sum that plaintiff would accept. Upon the signing of the contract, plaintiff gave a deposit of \$40,000.00 to be held in escrow by

defendant's attorney, and plaintiff subsequently made additional deposits totaling \$11,000.00. By letter dated July 10, 2003, the attorney for defendant notified plaintiff's attorney that defendant Ruiz had elected to cancel the contract of sale because the scheduled closing date had passed and calls had not been returned. By letter dated July 11, 2003, the attorney for plaintiff notified the attorney for defendant Ruiz that plaintiff had obtained a mortgage commitment from Mortgage Warehouse, Inc. in the sum of \$488,000.00. By a written agreement dated August 2003, the parties reinstated the contract of sale and stipulated that title would close "within a reasonable time of this agreement." Plaintiff agreed to pay defendant an additional \$1,000.00 on August 13, 2003 and an additional \$10,000.00 on or before August 20, 2003. By letter dated August 8, 2003, defendant's attorney scheduled a title closing for August 29, 2003, making time of the essence. The parties dispute whether defendant's attorney sent the time of the essence letter before the signing of the agreement reinstating the contract of sale and giving the plaintiff a reasonable time to close title. Plaintiff did not appear for the title closing on August 29, 2003. Apparently, plaintiff could not pay the contract price with only a loan of \$488,000.00, and he had attempted to secure a better mortgage commitment elsewhere. However, on or about September 30, 2003, American Residential rejected plaintiff's application for a mortgage because the appraisal was lower than \$610,000.00.

That branch of plaintiff's motion which is deemed to be for summary judgment is denied. Defendant's cross motion for summary judgment is denied. Summary judgment is not warranted where, as in the case at bar, there is an issue of fact which must be tried. (See, Alvarez v. Prospect Hospital, 68 N.Y.2d 320.) It is true that "[w]here time is not made of the essence in the original contract, one party may, unilaterally, give subsequent notice to that effect and avail himself of forfeiture on default ***." (Liba Estates. Inc. v. Edryn Corp., 178 A.D.2d 152, 153; see, Whitney v. Perry, 208 AD2d 1025; Mohen v. Mooney, 162 A.D.2d 664.) However, in the case at bar, there is an issue of fact as to exactly when the agreement reinstating the contract of sale was signed and whether that agreement in effect rescinded the time of the essence letter. Even if the parties signed the agreement reinstating the contract of sale before defendant sent the time of essence letter, there is an issue of fact concerning whether, under all of the circumstances of this case, defendant gave plaintiff a "reasonable time" to close title as required by the August 2003 agreement and by law. (See, Whitney v. Perry, supra; Liba Estates Inc. v. Edryn Corp., supra; Mohen v. Mooney, supra.)

Moreover, summary judgment is also precluded because the agreement reinstating the contract of sale is ambiguous

concerning whether the parties intended to allow plaintiff an additional opportunity to secure financing (see, Nina Penina, Inc. v. Njoku, 30 A.D.3d 193; Joseph v. Rubinstein Jewelry Mfg. Co., Inc., 18 A.D.3d 615), and, if so, whether plaintiff made a good faith effort to secure an adequate mortgage commitment. (See, 1951 Bedford Hills Corp. v. Hardie, 34 A.D.3d 658; Markovitz v. Kachian, 28 A.D.3d 358.)

That branch of plaintiff's motion which is for an order permitting him to serve an amended complaint for additional damages is granted. (See, Holchendler v. We Transport, Inc., 292 A.D.2d 568; St. Paul Fire & Marine Ins. Co. v. Town of Hempstead, 291 A.D.2d 488; Whitney-Carrington v. New York Methodist Hosp., 289 A.D.2d 326.) Plaintiff shall serve his amended complaint within twenty days (20) of the service of a copy of this order with notice of entry.

That branch of plaintiff's motion which is deemed to be for a preliminary injunction prohibiting the law firm of Vanchieri & Ferrier, LP from disbursing the contract down payment made by plaintiff is denied. In order to obtain a preliminary injunction, plaintiff had to demonstrate a likelihood of success on the merits, irreparable injury if provisional relief is withheld, and a weight of the equities in his favor. (See, In re Jacobs, 35 A.D.3d 860; Petervary v Bubnis, 30 A.D.3d 498.) Plaintiff failed to make the required showing. That branch of plaintiff's motion which concerns attorney's fees is denied. (See, Clelland v. Lettro, 15 A.D.3d 874.)

Dated: March 6, 2007

J.S.C.