

Lau v East Coast Dormer, Inc.
2011 NY Slip Op 31452(U)
May 25, 2011
Sup Ct, Nassau County
Docket Number: 20388/10
Judge: Jeffrey S. Brown
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SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

**P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE**

-----X **TRIAL/IAS PART 21**
SHERMAN LAU,

Plaintiffs,

- against -

EAST COAST DORMER, INC.,

Defendants.

**Index No. 20388/10
Mot. Seq. # 1
Mot. Date 3/24/11
Submit Date 5-13-11
XXX**

-----X
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The following papers were read on this motion:	Papers Numbered
Notice of Motion, Affidavits (Affirmations), Exhibits Annexed.....	1
Answering Affidavit	2
Reply Affidavit.....	3

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Plaintiff moves by notice of motion for the following relief: pursuant to CPLR 3212, an order for summary judgment and for an order dismissing the counterclaims of defendant.

This action involves the refund of a down payment in the amount of \$84,855.75 made by plaintiff to defendant pursuant to a contract dated March 10, 2009 for the design, purchase and erection of a modular home on an empty lot owned by plaintiff at 288 Sackett Street, Brooklyn, New York. Defendant interposed an answer with two counterclaims: the first seeks damages in the amount of \$400,000.00 based upon plaintiff's alleged breach of contract, the second seeks damages in the amount of \$400,000.00 based upon plaintiff's alleged anticipatory repudiation of the contract.

Plaintiff states that the March 10, 2009 contract contemplated, and his deposit was contingent upon, receiving approval of the defendant's modular home plans from the New York City Department of Buildings ("NYCDOB"). By June 25, 2010, fifteen (15) months after entering into the contract, the defendant was not able to develop a set of plans for modular construction that met NYC fire ratings. Plaintiff states that defendant acknowledged its inability

to meet the fire rating using modular constructions in conversations with its president, Scott Boerckel. Therefore, on June 25, 2010, plaintiff canceled the contract based on the failure of defendant to fulfill a condition precedent.

On September 15, 2010, defendant proffered a set of plans which supposedly met fire code and which were allegedly in compliance with the March 10, 2009 contract. Plaintiff submits an affidavit from architect, Eric Safyan, which confirms that the plans, as proffered, are not for modular construction but are for conventional construction. Therefore, defendant is not in compliance with the original agreement. Plaintiff argues that at the time of this application, 22 months have passed and defendant still has failed to produce plans for modular construction which will meet approval of NYCDOB. Furthermore, plaintiff argues that 22 months is unreasonable as a matter of law and that he is entitled to cancel the contract and receive a return of his deposit.

In opposition, defendant states that the contract does not provide for the time period within which a building permit must be issued. Defendant argues, *inter alia*, that the law shall imply a reasonable time within which a building permit must be obtained and, given the novelty and complexity of a four-story, two family modular construction with the City of New York, plaintiff is unable to demonstrate that the failure of the NYCDOB to issue a building permit as of the time of his purported termination of the contract is justification for termination of the contract as a matter of law.

In reply, plaintiff contends that defendant's argument that he terminated the contract prematurely and did not give them a "reasonable" time in which to prepare a set of plans which would conform with New York City fire code requirements misses the point. He asserts that the basis for summary judgment is not that the passage of 15 months was either reasonable or unreasonable for the defendants to prepare plans that conform with the fire code, but instead, plaintiff's argument is that no amount of time will have cured the inability for defendant to perform pursuant to the contract. The contract calls for wood construction which will never withstand the two-hour noncombustible New York City code requirement. Defendant argues that it could provide a steel structure which would conform to code. However, the defendant could not deliver the steel construction within the budget under the contract.

Plaintiff states that he would be happy to have the home built with steel, however, as a cost saving measure, he opted for a modular home built without steel. The price for the modular construction is set in the contract, therefore, it is defendant's choice not to build using steel construction.

Plaintiff additionally states that his architect and expediter were not at fault for the delay in obtaining plans which meet NYC fire code as argued by defendant. It was defendant who recommended them and who had the responsibility to prepare with them a set of plans which the NYCDOB would approve. Since it was not the fault of these people that wood construction failed to meet code requirements, the contract became impossible to fulfill, as written.

Plaintiff additionally acknowledges that it was his responsibility to obtain building permits, however, pursuant to the contract, it was defendant's responsibility to prepare architectural drawings for the modular home for submission to the municipality to obtain the permit. Since defendant failed to produce architectural drawings in accordance with the contract plans which met NYC fire code ratings, plaintiff argues he could not get the permit.

Based on the foregoing, the decision of the court is as follows:

Summary judgment is the procedural equivalent of a trial. *S.J. Capelin Assoc. Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 (1974). The function of the court in deciding a motion for summary judgment is to determine if triable issues of fact exist. *Matter of Suffolk Cty Dept of Social Services v James M.*, 83 NY2d 178, 182 (1994). The proponent must make a *prima facie* showing of entitlement to judgment as a matter of law. *Guiffrida v Citibank Corp.*, 100 NY2d 72, 82 (2003); *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). Once a *prima facie* case has been made, the party opposing the motion must come forward with proof in evidentiary form establishing the existence of triable issues of fact or an acceptable excuse for its failure to do so. It is insufficient for a party opposing a motion of summary judgment to use "mere conclusions, expressions of hope or unsubstantiated allegations or assertions." *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).

In the case at bar, plaintiff has made a *prima facie* showing of entitlement to judgment as a matter of law. The contract dated March 10, 2009 provides in pertinent part as follows:

"EAST COAST DORMER INC. (hereinafter referred to as "ECD") agrees to construct and install a modular structure as shown on the plans and/or specifications for the model and size shown on the face of this Agreement. There shall be no changes in said plan and/or specifications except as provided in a written agreement signed by the "Purchaser" and "ECD."

As part of the contract, the materials used in the construction described wood floor joists, wood exterior and wood interior walls with plywood sheathing. The plans defendant provided are for light steel framing, a different kind of construction. The affidavit of the architect, Eric Safyan, indicates that the plans dated April 23, 2010, as proffered for approval by NYCDOB do not contemplate nor depict modular construction but are for conventional construction using light steel construction. The court finds that the plans which defendant proffered are a substantial change from the plans and specifications as agreed, without any written consent by plaintiff for approval of such change.

Furthermore, the contract provides that defendant will begin working within approximately one calendar year from the date of the contract and work will be completed within approximately six months from the date of the start. Therefore, the court finds that plaintiff has made a *prima facie* showing that defendant failed to comply with the contract within a reasonable period of time.

The burden shifts to defendant to come forward with proof in evidentiary form establishing a triable issue of fact. Defendant wholly fails to address the issue of whether the proffered plans conform to the specifications set forth in the original contract. The thrust of its argument is that the delay in obtaining approval from the NYCDOB is not unreasonable and that the law implies a reasonable time for performance where the contract is silent as to a time frame.

On this record, the court finds that defendant failed to raise a triable issue of fact. Without merit is defendant's proffered evidence in opposition which states that considering the totality of the circumstances, including the relative novelty of modular four-story construction within New York City, the failure of the NYCDOB to issue a building permit as of the time of plaintiff's termination of the contract, did not justify such termination. To the contrary, given what appears to be defendant's impossibility of performance under the contract as written, plaintiff is entitled to a refund of his down payment. Moreover, the contract specifically provides that the deposit is subject to city approval and lending approval.

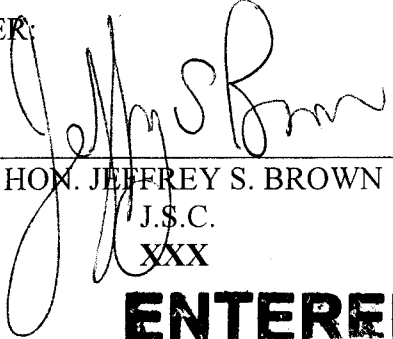
Accordingly, it is

ORDERED, that the application for summary judgment on behalf of plaintiff is **GRANTED**; and it is further

ORDERED, that all counterclaims by defendant are hereby dismissed.

This constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
May 25, 2011

ENTER:


HON. JEFFREY S. BROWN
J.S.C.
XXX

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ENTERED
MAY 27 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE