

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D33241
W/prt

_____AD3d_____

Submitted - November 7, 2011

PETER B. SKELOS, J.P.
RUTH C. BALKIN
RANDALL T. ENG
SANDRA L. SGROI, JJ.

2010-05713
2011-00071

DECISION & ORDER

2 Old, LLC, et al., appellants, v Jon Mayer, et al.,
respondents.

(Index No. 38136/07)

Anthony LoPresti, Garden City, N.Y., for appellants.

Edward J. Raskin, Deer Park, N.Y., respondent pro se and for respondent Jon Mayer.

In an action, inter alia, for the return of down payments given pursuant to contracts for the sale of real property, the plaintiffs appeal, (1) as limited by their brief, from so much of an order of the Supreme Court, Suffolk County (Farneti, J.), dated April 22, 2010, as denied their motion for summary judgment on the first and sixth causes of action, which alleged breach of contract, and (2) from an order of the same court dated October 15, 2010, which denied their motion for leave to renew their motion for summary judgment on the first and sixth causes of action.

ORDERED that the order dated April 22, 2010, is affirmed insofar as appealed from; and it is further,

ORDERED that the order dated October 15, 2010, is affirmed; and it is further,

ORDERED that one bill of costs is awarded to the respondents.

The parties entered into contracts pursuant to which the plaintiffs agreed to purchase two parcels of real property owned by the defendant Jon Mayer. The plaintiff Bayshore 6, LLC,

December 20, 2011

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tendered an \$86,000 down payment in connection with a parcel located on 2nd Avenue in Bay Shore, while the plaintiff 2 Old, LLC, tendered a \$40,600 down payment in connection with a parcel located on Bay Shore Avenue in Bay Shore. The riders to both of the two relevant contracts of sale contained mortgage contingency clauses which provided, inter alia, that the sale of each of the parcels was conditioned upon the respective plaintiff obtaining a “conventional mortgage.” However, the plaintiffs’ counsel claims that the plaintiffs are prohibited from pursuing “conventional” mortgages because the plaintiffs are self-directed, independent individual retirement accounts (*see* 26 USC § 4975[c][1][B]). The plaintiffs made several attempts to obtain nonrecourse loans, but were ultimately unsuccessful. Mayer, however, refused to return the down payments. The plaintiffs commenced this action, inter alia, for the return of the down payments, and the Supreme Court thereafter denied their motion for summary judgment on the first and sixth causes of action, which alleged breach of contract.

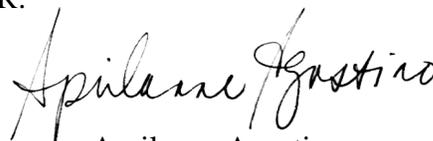
Where a contract for the sale of real property contains a mortgage contingency clause, “[a]s long as purchasers exert a genuine effort to secure mortgage financing and act in good faith, they are entitled to recover their down payment if the mortgage is not in fact approved through no fault of their own” (*Sciales v Foulke*, 217 AD2d 693, 694; *see Companion v Touchstone*, 88 NY2d 1043, 1045). The subject mortgage contingency clauses required that the plaintiffs seek “conventional mortgage[s],” and the plaintiffs did not establish, as a matter of law, that it would be impossible for a self-directed, independent individual retirement account to secure a “conventional” mortgage loan (*see* 26 USC §§ 4975[a], [b], [c][3], 408[e][2][A]). As such, the plaintiffs failed to meet their prima facie burden of demonstrating that they acted in good faith in their pursuit of financing, and that their failure to obtain approval for mortgage loans according to the terms of the contract riders was through no fault of their own (*see Chavez v Eli Homes, Inc.*, 7 AD3d 657, 658; *Sibinga v Ingenito*, 306 AD2d 457, 459).

The plaintiffs’ remaining contentions either are without merit or need not be reached in light of our determination.

Accordingly, the Supreme Court properly denied both the plaintiffs’ motion for summary judgment on the first and sixth causes of action, which alleged breach of contract, and the plaintiffs’ motion for leave to renew their motion for summary judgment.

SKELOS, J.P., BALKIN, ENG and SGROI, JJ., concur.

ENTER:



Aprilanne Agostino
Clerk of the Court