

SHORT FORM ORDER

NEW YORK SUPREME COURT : QUEENS COUNTY

P R E S E N T : HON. JOSEPH P. DORSA IAS PART 12
Justice

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EASARIE SERATAN,

Plaintiff,

Index No.: 12221/07

- against -

Motion Date: 8/22/07

BAPAZ ADERET PROPERTIES CORP. and
KESEH CORP.,

Motion No.: 54

Defendants.

Motion Seq. No. 1

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The following papers numbered 1 to 13 on this motion:

	<u>Papers Numbered</u>
Defendants' Order to Show Cause-Affirmation- Exhibit(s)-Service	1-4
Plaintiff's Notice of Motion-Affirmation- Affidavit(s)-Service-Exhibit(s)	5-8
Defendants' Affirmation in Opposition- in Opposition to Cross-Motion-Exhibit(s)	9-11
Plaintiff's Reply Affirmation-Exhibit(s)	12-13

By order to show cause, defendants seek an order of the Court, dismissing the complaint, cancelling the notice of pendency, awarding judgment to defendants on the counterclaim; and, directing plaintiff and/or the attorneys to reimburse defendants for the costs of the motion herein.

Plaintiff opposes and cross-moves for an order granting plaintiff summary judgment, and directing defendants' attorney to deposit the down payment with the Court.

Defendants file an affirmation in opposition to the cross-motion; plaintiff files an affirmation in reply.

The parties to the this action executed a contract for the

purchase/sale of real property on or about August 9, 2006. The subject premises were known as 164-02 South Road, Jamaica, N.Y., specifically, Block 10163, Lot 1.

In the contract, plaintiff was the purported buyer and Bapaz Aderet Properties Corp. was the seller. The purchase price was \$350,000 with a \$20,000 down payment provided by the purchaser with the signing of the contract. Closing was set for the same date with "time being of the essence."

The parties agree that the sale was not conditioned upon the purchaser's ability to secure financing. Defendants maintain that pursuant to the contract, if the purchaser failed, refused, or defaulted in taking title to the subject property, defendants could retain the down payment as liquidated damages. Defendants maintain that plaintiff refused to go forward with the closing after defendants extended the closing date an additional thirty days. (See defendants' Exh. D). Defendants maintain that at all times they stood ready, willing and able to convey good, insurable and marketable title, and that they set March 20, 2007 as a final closing date in a time of the essence letter sent to plaintiff on March 7, 2007.

In response, plaintiff maintains that defendant, Bapaz Aderet Properties, Corp., the signatory to the parties contract, by David Albaz (officer), never held title to the subject property. Plaintiff attaches as Exh. C to his cross-motion, a printout of the chain of title from the Queens Register's Office website, which shows that on the date the parties signed the contract, title to the premises was in the name of one David Dykes. Attached as Exh. D, plaintiff provides the recording and endorsement cover page from the Office of the City Register of the City of New York, showing the transfer of the subject property and recording of a deed from Ariel Dykes, as Executrix of the Estate of David Dykes to the Keseh Corp., for the sum of \$10.00, dated March 5, 2007.

In the contract of sale (attached as Exh. C to defendants' motion), the seller makes representations in paragraph 9(a)(ii) that:

"(a) Seller represents and warrants to purchaser that:

(ii) Seller is an owner of the entire/premises and has full right, power and authority, to sell, convey and transfer Seller's interest in accordance with the terms of this contract;..."

Paragraph 9 also states:

"(b) Seller covenants and warrants that all of the representations and warranties set forth in this contract shall be true and correct at closing."

Paragraph 11 provides in pertinent part:

"Seller shall give and purchaser shall accept such title [as] New Millennium Abstract, Inc., shall be willing to approve and insure..."

As noted in defendants' moving papers, Linda M. Lynch, President of New Millennium Abstract, Inc. affirmed that her title insurance company issued a policy of title insurance to Kesh Corp., insuring title to the subject premises, and that defendant was able to convey good, insurable and marketable title to the subject premises on the scheduled closing date. (Emphasis added).

Finally, defendants rely on paragraph 21 of the contract which states in pertinent part: "(a) if purchaser shall fail or refuse to close this transaction, or shall otherwise willfully default or fail to take title as required by this contract, then Seller's sale remedy shall be to receive and retain the down payment as liquidated damages..." Defendants, of course, maintain that plaintiff willfully refused to close, thereby entitling them to retain the \$20,000 down payment.

Defendants maintain that Bapaz Aderet Properties Corp. and Kesh Corp. are essentially "alter egos"; that the principals and shareholders for both corporations are in fact the same. Defendants make this representation through the affidavit of Nataniel Daneshrad, who claims to be an officer of both corporations. It is noted, however, that the individual signing the contract on behalf of Bapaz is one David Albaz, "officer." Defendants provide no proof that all shareholders and officers of both corporations are the same, or, for that matter, that plaintiff was aware that he was dealing with the alter ego of Bapaz when dealing with Kesh Corp.

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact from the case, and such showing must be made by producing evidentiary proof in admissible form" (Santanastasio v. Doe, 301 AD2d 511 [2nd Dep't. 2003]).

It appears to this Court that there remain material questions and issues of fact precluding summary judgment.

Accordingly, based on all of the foregoing, both defendants' and plaintiff's motions are denied.

Dated: Jamaica, New York
October 11, 2007

JOSEPH P. DORSA
J.S.C.