

Upon the foregoing papers it is ordered that the motions numbered 8 and 9 on the motion calendar for December 11, 2007 are determined together as follows:

Plaintiff entered into a contract of sale dated June 7, 2003, to purchase real property known as 35-13 101st Street, Corona, New York, from defendant Impressive, whereby she was to obtain a mortgage commitment within a certain period of time and defendant Impressive was to construct a three-family home on the property. Plaintiff failed to obtain a mortgage commitment, and the seller never commenced construction. Subsequently, defendant Impressive returned plaintiff's down payment and informed her that it was cancelling the contract. Thereafter, plaintiff commenced this action by filing, on March 5, 2004, a copy of the summons and complaint naming Impressive as the sole defendant, and alleging that defendant Impressive is in default under the terms of the contract of sale, and seeking specific performance, or alternatively, to recover damages for breach of contract, including attorneys' fees.

Defendant Impressive subsequently moved to dismiss the complaint, which motion was granted pursuant to CPLR 3211(a)(1) by order dated July 13, 2005 (Polizzi, J.). The Appellate Division, Second Department thereafter reversed such order and reinstated the complaint (Patricia Del Pozo v Impressive Homes, Inc., 29 AD3d 621 [2006]). The Appellate Court determined that the documentary evidence presented did not resolve all factual issues as a matter of law and thus, dismissal on the basis of such evidence was unwarranted (id.).

Plaintiff then moved for leave to amend the summons and complaint to add Corona Gardens, Inc. (Corona), KFIR, Cambridge and Remark as defendants and for summary judgment granting specific performance. By order dated April 23, 2007, that branch of the motion for leave to amend the complaint to add Corona, KFIR, Cambridge and Remark as additional defendants was granted to the extent of granting plaintiff leave to serve and file a supplemental summons and complaint as amended with a copy of the order with notice of entry upon the additional party defendants and the attorneys for defendant Impressive within 30 days of the entry date of the order. That branch of the motion by plaintiff for summary judgment was denied.

Plaintiff served and filed the first amended complaint on May 15, 2007, and defendants Impressive and Corona served a joint answer, denying the material allegations of the first amended complaint, and asserting various affirmative defenses, including one based upon their claim that the contract of sale was properly

cancelled due to plaintiff's failure to obtain a mortgage commitment. Defendants Impressive and Corona interposed counterclaims for rescission. Plaintiff served a reply to those counterclaims. Defendant KFIR defaulted in appearing or answering the amended complaint.

Defendants Cambridge and Remark have appeared herein in relation to the cross motion by defendants Impressive and Corona. To the extent defendants Cambridge and Remark seek to join in such cross motion for affirmative relief, they are in default in answering the amended complaint, and have failed to move for leave to vacate their default.

With respect to the cross motion for summary judgment, defendants Impressive and Corona assert that because plaintiff failed to obtain a mortgage commitment in the sum of \$579,500.00 within 30 days from the date of the contract, defendant Impressive had the right, pursuant to paragraph no. 8 of the contract (the mortgage contingency clause), to cancel the contract and return the down payment.

It is well established that 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 demonstrate the absence of any material issues of fact," (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; Zuckerman v City of New York, 49 NY2d 557 [1980]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]).

Defendants Impressive and Corona have failed to demonstrate, prima facie, that the terms of the parties' written contract granted Impressive, as the seller, the right to return the down payment and cancel the contract upon plaintiff's failure to obtain a mortgage commitment within the 30-day period set forth in the contract. The preprinted portion of paragraph no. 8 makes no mention of any right on the part of the seller to cancel the contract based upon the purchaser's failure to obtain a mortgage commitment within the 30-day time period (see Gupta v 211 Street Realty Corp., 16 AD3d 309 [2005]; cf. Ferlita v Guarneri, 136 AD2d 680 [1988]; Ingber v Greco, 135 AD2d 610 [1987]; Dale Mortg. Bankers Corp. v 877 Stewart Ave. Associates, 133 AD2d 65 [1987]). Nor does any portion of the contract expressly provide that it becomes null or void in the event the purchaser is unable to obtain the mortgage commitment (cf. Ting v Dean, 156 AD2d 358 [1989]).

Rather, defendants Impressive and Corona appear to rely upon the typewritten additional phrase "or seller," which is found immediately following the preprinted portion of paragraph no. 8 of the contract, as proof that the mortgage contingency clause was a condition precedent inuring to the benefit of both parties. The phrase, however, is preceded by two typewritten asterisks, and no other asterisks exist in the body of paragraph no. 8, or elsewhere in the contract. Thus, it is unclear as to which portion of the contract, the contracting parties intended the additional phrase "or the seller" should refer. For example, the contract provides at paragraph no. 8 that the purchaser give the notice to cancel to "other party." It may be that the contracting parties added the phrase "or the seller" at the close of that paragraph, for the purpose of insuring that "other party" would be read to include the seller itself. Contrary to the argument of defendant Impressive, the deposition testimony given by Mark Dayan, its president, and by German Del Pozo, plaintiff's relative, in the action entitled German Del Pozo v Impressive Homes, Inc., (Supreme Court, Index No. 5345/2004), fails to reveal the intent of the parties herein regarding their purpose for adding the phrase "or seller" at the close of paragraph no. 8.

Under such circumstances, the motion by defendant Impressive for summary judgment is denied (see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]).

To the extent plaintiff moves for leave to amend the amended complaint as proposed, it is well settled that leave to amend pleadings is freely given in the absence of prejudice to the opponent or surprise resulting from the delay (see CPLR 3025[b]; Edenwald Contr. Co. v City of New York, 60 NY2d 957 [1983]). It is equally without question that "in cases where the proposed amendment is palpably insufficient as a matter of law or is totally devoid of merit, leave should be denied" (Norman v Ferrara, 107 AD2d 739, 739-740 [1985]; see also Nissenbaum v Ferazzoli, 171 AD2d 654 [1991]; DeGuire v DeGuire, 125 AD2d 360 [1986]).

In support of her motion, plaintiff has offered documentary evidence to show that Merci Astudillo, Bolivar Astudillo, Citibank, N.A., and HSBC Mortgage Corporation (USA), as the proposed additional defendants, are current record owners, or holders of mortgages against the subject property, and that they acquired their interests in the subject property after plaintiff filed a notice of pendency on the property (see CPLR 6501; Novastar Mortg., Inc. v Mendoza, 26 AD3d 479 [2006]; Green Point Sav. Bank v St. Hilaire, 267 AD2d 203 [1999]; Morrocroy Marina, Inc. v Altengarten, 120 AD2d 500 [1986]; Goldstein v Gold, 106 AD2d 100, 101-102 [1984], affd 66 NY2d 624 [1986]).

However, to the extent plaintiff proposes to assert additional allegations with respect to defendants Corona, KFIR, Cambridge and Remark and to add a claim for damages as against such defendants, such proposed additional allegations are insufficient to support a claim for damages as against them. Plaintiff does not allege she is in contractual privity with those defendants, or that they breached any fiduciary duty owing to her. To the extent plaintiff proposes to allege such defendants were negligent in transferring or encumbering the premises, such additional allegations are palpably insufficient, for if plaintiff is awarded specific performance, and such defendants are in title, they will be compelled to convey the premises (see generally Maurer v Albany Sand & Supply Co., 40 AD2d 883 [1972]).

Plaintiff, furthermore, has failed to allege facts which would support a claim for fraud (see CPLR 3016; see generally Lanzi v Brooks, 43 NY2d 778, 780 [1996]; Barclay Arms, Inc. v Barclay Arms Associates, 144 AD2d 287 [1988]) or tortious conduct vis-a-vis plaintiff's contractual relations with defendant Impressive (see generally Kronos, Inc. v AVX Corp., 81 NY2d 90, 94 [1993]; Bernberg v Health Management Systems, Inc., 303 AD2d 348 [2003]). Likewise, the proposed additional allegations regarding intentional tortious conduct and negligence asserted against defendant Impressive are insufficient insofar as plaintiff has failed to allege any breach of duty owed to her separate and apart from the alleged contractual obligations (see Channel Master Corporation v Aluminum Limited Sales, Inc., 4 NY2d 403, 408 [1958]).

That branch of the motion by plaintiff, pursuant to CPLR 3025(b) and CPLR 1001, is granted only to the extent of granting leave to supplement the complaint to add Merci Astudillo, Bolivar Astudillo, Citibank, N.A., and HSBC Mortgage Corporation (USA) as additional party defendants in this action, and for leave to assert additional allegations regarding such additional defendants. Plaintiff shall serve and file the second supplemental summons with an amended caption and the second amended complaint within 30 days of service of a copy of this order with notice of entry. Service upon the additional defendants shall be pursuant to Article 3 of the CPLR, and with respect to defendants KFIR and Cambridge, service shall be pursuant to CPLR 311-a or Limited Liability Company Law §303. In addition, with respect to Remark, service shall be pursuant to CPLR 311 or Business Corporation Law §306.

With respect to the motion by plaintiff for leave to enter a default judgment against defendants KFIR, Cambridge and Remark, a plaintiff seeking leave to enter a default judgment must establish proof of service of process, a meritorious claim and default in

appearing or answering the complaint (CPLR 3215[f]). In this instance, plaintiff asserts in her reply affidavit dated November 19, 2007, that defendants KFIR, Cambridge and Remark lack any present interest in the property. In addition, she makes no claim that she is in contractual privity with those defendants. Under such circumstances, plaintiff has failed to establish a basis for a default judgment against them. Furthermore, in view of the direction herein that plaintiff serve a second amended complaint adding new defendants and allegations, the second amended complaint will supersede the first amended complaint and become the only complaint in the case. Upon being served with the second amended complaint, defendants KFIR, Cambridge and Remark shall have an opportunity to serve an answer within the applicable statutory time period. As a consequence, the motion by plaintiff for leave to enter a default judgment against defendants KFIR, Cambridge and Remark is denied.

To the extent defendants Impressive and Corona seek to consolidate or joint trial, pursuant to CPLR 602, consolidation and joint trials are favored by the courts in the interest of judicial economy. However, in this instance, where the subject properties, the purchasers and the contracts of sale are distinct, and the parties holding mortgages are not identical, there are insufficient common issues of fact and law to warrant either consolidation or joint trial (see Continental Bldg. Co., Inc. v Town of North Salem, 150 AD2d 518 [1989]). That branch of the cross motion by defendants Impressive and Corona for consolidation or joint trial is denied.

With respect to that branch of the cross motion by defendants Impressive and Corona to strike the note of issue, the Uniform Rules for Trial Courts (22 NYCRR 202.21[e]) sets forth the specific procedure for vacating a note of issue. A party can move to vacate the note of issue, within 20 days after service of such note of issue and certificate of readiness, upon a showing that the certificate of readiness is incorrect in some material way. After such period, except in a tax assessment review proceeding, no such motion may be allowed except for good cause shown. Additionally, the court can at any time, on its own motion, vacate a note of issue if it appears that a material fact in the certificate of readiness is incorrect.

In this instance, the court's records indicate that the note of issue was filed on May 30, 2007, and that defendants Impressive and Corona did not move to strike the note of issue until August 22, 2007, 84 days later. However, while good cause for the belated motion may have been shown based upon the motion by plaintiff to amend the first amended complaint and add new parties,

the striking of the note of issue is not warranted at this time. No incorrect material fact exists in the certificate of readiness and defendants Impressive and Corona have failed to show their need for further discovery at this juncture. Therefore, that branch of the cross motion to strike the note of issue is denied without prejudice to a motion to seek further discovery while the action remains on the trial calendar (see Davis v Goodsell, 6 AD3d 382 [2004]; Sun Plaza Enters. Corp. v Crown Theatres, 307 AD2d 352 [2003]) and without prejudice to the incoming defendants' rights to seek vacatur of the note of issue.

Dated: March 26, 2008

J.S.C.