

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, DUANE A. HART IAS PART 18  
Justice

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CHEN LI,

Index No: 26044/03

Plaintiff,

Motion Date:

June 2, 2004

-against-

Cal. No.: 22

HASINA AKHTAR and SHAFAYET ALAM,

Defendants.  
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The following papers numbered 1 to 9 read on this motion by the plaintiff for summary judgment.

	<u>PAPERS NUMBERED</u>
Notice of Motion-Affidavits-Exhibits .....	1 - 4
Answering Affidavits-Exhibits.....	5 - 8
Replying Affidavits.....	
Memorandum of Law.....	9

On August 7, 2003, plaintiff and defendants entered into a written contract of sale whereby plaintiff agreed to purchase and defendants agreed to sell the premises located at 48-11 Colden Street, Queens County. The purchase price is \$560,000.00.

Each party was represented by an attorney and, as part of the agreement, plaintiff deposited a \$30,000.00 down payment with sellers/defendants' attorney. The contract called for a closing seventy-five days later. It also gave plaintiff sixty days in which to obtain a mortgage of \$392,000.00.

Sometime thereafter, the parties agreed on an October 14, 2003 closing date. The closing was never held because shortly before the time set for the closing, defendants said they were unable to attend. In a letter dated October 24, 2003, plaintiff set October 31, 2003 as the date of closing, indicating that if the closing were not held, legal action would follow. Again, on October 31, the closing was not held. Defendant did not appear and indicated that they no longer wished to sell.

At some point, plaintiff discovered that sellers' attorney, the escrowee, had misappropriated the down payment. Defendants retained a new attorney. Plaintiff, in a letter dated December 23, 2003, set a February 10, 2004 closing date with time being of the essence. There was no closing and plaintiff commenced this action for inter alia, specific performance of the contract of sale

In answer, defendants allege that plaintiff: breached the contract; failed to state a cause of action; bore the risk of loss of the down payment; has refused to pay the agreed on price and is not ready, willing, and able to perform. In a counter claim, defendants seek unspecified damages.

Plaintiff now moves for summary judgment seeking specific performance and damages of \$250,000.00. Defendants oppose the motion and argue that plaintiff bear the risk of loss of the down payment.

In reviewing a dispute such as the one here, the starting point must necessarily be the contract. Paragraphs Six - "Down Payment and Escrow" - and twenty-three - "Defaults and Remedies" - are the ones to be scrutinized. Paragraph Six, in relevant part, states that the "Seller's attorney...shall hold the down payment for Seller's account..." This language clearly suggests that the escrowee is the sellers' agent and, as such is acting on their behalf. Since the escrowee is the agent of the sellers, then risk of loss of the down payment, in the case of embezzlement or other misuse of the down payment by the escrowee, falls on the sellers. (See "New York Practice Guide: Real Estate §§ 2:31(9) (Form 2-7-2: Downstate Multibar Residential Contract of Sale;)" Holtzschue on Real Estate Contracts, 2d Edition, Sec. 2.3.9, p.2-197; Doherty v. Elskamp, 58 Misc. 2d 654).

Since the contract is specific as to who holds the down payment and, by extension, who bears the risk of loss, it therefore follows that defendants' arguments are without merit and borders on the frivolous. They are disregarded.

Paragraph twenty-three spells out the remedies to which each party is entitled in the event there is a default. Here, the default is attributed to sellers because of the criminal conduct of their agent. Among the remedies available to plaintiff is specific performance.

This Court believes that because of the unique circumstances involved here, the contract can be performed as drafted. Moreover, since the escrowee was an attorney, reimbursement of the escrowed amount can be recovered from the Lawyers Fund for Client Protection. Recovery of the escrow would place the parties in the same position in which they were before the misuse of the escrow.

With the foregoing in mind, the motion is decided as follows:

- a) Defendants' counter claims are dismissed.
- b) Plaintiff's motion for specific performance and damages is denied.
- c) The parties are directed to schedule a closing at which the premises shall be conveyed to plaintiff. The closing must take place within one-hundred twenty (120) days of the serving of this order together with a Notice of Entry.
- d) To the extent that plaintiff has any interest in the down payment, she is directed to convey said interest to Defendants.
- e) Defendants are directed to apply to the Lawyers Fund for Client Protection in Albany, N.Y. for the reimbursement of the down payment. This may take some time, but with the proper proof, reimbursement will be made.

Dated:

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J.S.C.