

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IA Part 15
Justice

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SUNNY SIT and LINDA S. YAM-SIT,

Index
Number 21819/2004

Plaintiff(s),

Motion
Date 01/04/05

- against -

ANITA SCHNAPS,

Motion
Cal. Number 18

Defendant(s).

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The following papers numbered 1 to 10 read on this motion by the plaintiffs SUNNY SIT and LINDA S. YAM-SIT for an order, *inter alia*, directing the entry of summary judgment in their favor, dismissing defendant's counterclaims as against the plaintiffs, granting plaintiffs return of their downpayment in the amount of \$28,200.00, plus interest, and awarding them compensatory and punitive damages and attorneys' fees; and the cross-motion by the defendant ANITA SCHNAPS directing the entry of summary judgment permitting her to retain the plaintiffs' contract deposit as liquidated damages.

Papers
Numbered

Notice of Motion-Affirmation-Exhibits-Service.....	1 - 4
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Affirmation in Opposition to Cross-Motion.....	9 - 10

Upon the foregoing papers it is ordered that the motion and cross-motion are decided as follows:

On or about May 6, 2004, plaintiffs-purchasers and defendant-seller entered into a contract for the transfer of the shares of a cooperative apartment located at 69-10 108th Street, Apartment 7D, Forest Hills, New York, closing thereof to take place on or about June 1, 2004. Paragraph 6.1 of the subject contract provided that "[t]his sale is subject to the approval of the Corporation," referring to Woodrow Wilson Owners, Inc. (hereinafter

"Corporation," "cooperative board," or "board"). The closing date was adjourned for thirty (30) days for the purchasers to obtain the required approval of the Corporation. The purchasers submitted an application to the Corporation, along with all required documentation, and were interviewed on June 24, 2004. On July 2, 2004, the Corporation sent the purchasers an approval letter, conditioning the approval upon the purchasers paying into escrow the sum of \$13,556.16, representing the equivalent of eighteen (18) months maintenance, to be held for an indefinite period of no less than eighteen (18) months. Unable to comply for financial reasons, plaintiff's closing counsel attempted to negotiate the escrow amount and other terms of the escrow agreement with the Corporation. On July 13, 2004, the defendant's closing counsel sent plaintiffs notice that defendant was making time of the essence on August 2, 2004. On July 15, 2004, plaintiffs' counsel sent defendant a notice of cancellation of the contract pursuant to paragraph 6.3, due to the failure of the Corporation to unconditionally approve the purchasers' application within the thirty-day time period contained therein, and demanded the return of the purchasers' downpayment. On July 23, 2004, the Corporation notified the purchasers that it would not negotiate the terms of the escrow agreement. Thereafter, on July 28, 2004, the Corporation notified the purchasers' closing counsel that, due to the purchasers' failure to comply with the escrow condition, the sale of the premises was not approved by the Corporation.

A party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of a triable issue of fact (see, *Bensonhurst Real Estate, Ltd. v. Helsam Realty Co.*, 766 N.Y.S.2d 857 [2d Dept. 2003]; *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 [1986]; *Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]).

As to the threshold question, the plaintiffs have demonstrated their *prima facie* entitlement to the return of their downpayment, based upon their good-faith efforts to comply with the express terms of the contract, specifically, paragraph 6.1 thereof.

The burden on this summary judgment motion by plaintiffs then shifts to the defendant, and, as the opponent of a motion for summary judgment, the defendant has the burden of producing evidence sufficient to demonstrate that there is an issue of fact which must be tried (see, *Alvarez v. Prospect Hosp.*, *supra*). The defendant herein did not successfully carry that burden on this issue.

The fact that the purchasers acted in good faith and were duly

diligent in attempting to procure the approval of cooperative board for the purchase of the subject cooperative apartment is undisputed. After receiving their loan commitment, the purchasers duly submitted their application to the Corporation, provided all requested information therein, and were interviewed in due course.

The Corporation's July 2, 2004 "approval" letter, conditioned upon the purchasers advancing a substantial escrow, in excess of \$13,500.00, representing eighteen (18) months of maintenance charges, to be held by the Corporation for an indefinite period of no less than eighteen (18) months, was clearly an unanticipated "deal breaker." The unduly burdensome nature of this condition, the lack of prior notice thereof, the purchasers' inability to comply therewith due to financial hardship, coupled with the unreasonable refusal of the Corporation to negotiate or compromise its position, effectively eviscerated the Corporation's consent. Thus, the defendant did not carry its burden of demonstrating that the Corporation approved the purchasers, and that the purchasers breached the contract of sale by nonetheless refusing to complete the transaction. Indeed, the record indicates quite to the contrary, that Woodrow Wilson Owners, Inc. only "conditionally" approved the purchasers, and eventually disapproved them on July 28, 2004, when they were unable to comply with the Corporation's ascetic condition of approval.

Indeed, as one authority has observed,

... [a] board of directors is often placed in a dilemma where it wishes to approve a sale by a shareholder, but the applicant does not meet the financial or other criteria established by the board. To resolve this problem, many boards will render a conditional approval. n34.1 These special conditions can include a request that the applicant obtain a guarantor of the proprietary lease obligations or deposit funds in escrow, as security for the performance of the applicant's obligations to the cooperative . . . (n. 34.1) "'Conditional'" approvals may backfire. See Moss v. Brower, 213 A.D.2d 215, 624 N.Y.S.2d 5 (1st Dept. 1995). Since there was no final agreement between buyer and cooperative board as to specific conditions demanded by the board for its approval of the buyer as a shareholder, buyer was entitled to return of deposit under terms of contract of sale. . . .

(5-39 N.Y. Practice Guide: Real Estate § 39.06B [iv], fn. 34.1).

The court in its research has found no Second Department case

directly on point, and therefore looks to the First Department's decisions in this area for guidance and precedent.

In interpreting a substantially similar provision to paragraph 6.3 of the subject contract of sale, the First Department held that, where no board approval was obtained within the adjourned period of time, or, in fact, ever obtained, the contract was cancelled by its very terms (*see, Meyer v. Nelson*, 83 A.D.2d 422, 425 [1st Dept. 1981]).

In *Corazza v. Jacobs*, (277 A.D.2d 52, 53 [1st Dept. 2000]), which the court finds controlling under the facts at bar, the First Department, interpreting a contract provision requiring board approval, held that a contract for the sale of a cooperative apartment should have been canceled and the downpayment returned, where the board's failure to give its approval was caused, not by any bad-faith conduct on the part of the buyer, but upon the imposition of an unreasonable residency restriction (*see also*, 2A-8 Cooperative Housing Law and Practice: Forms § 8.01) The First Department has repeatedly held that, absent a showing that the denial of cooperative-board approval was due to any bad-faith conduct on the part of the purchasers, their downpayment should be returned (*see, e.g., Moss v. Brower*, 213 A.D.2d 215 [1st Dept. 1995]; *Chung v. Chrein*, 2003 NY Slip Op 50607U [Sup. Ct. App. Term First Dept. 2003]).

Likewise, in *Rossi v. Simms*, (119 A.D.2d 137, 138 [1st Dept. 1986]), the purchaser's downpayment was ordered returned by the trial court where the purchaser refused to comply with a condition of the cooperative board requiring him to pay a surcharge for use of the apartment as a professional office. The defendant, while attempting to distinguish these precedents from the facts at bar, has not cited a single case supporting its position herein.

Applying the above-referenced instructive and binding precedents to the case at bar fosters the conclusion that the defendant seller ought to have permitted rescission of the contract and returned the plaintiffs'-purchasers' downpayment (*see, Meyer v. Nelson, supra*). Further compelling is the fact that there was no agreement between the plaintiffs-purchasers and the cooperative board as to the conditions unilaterally imposed by the cooperative board in exchange for its approval, since the plaintiffs-purchasers were both unaware of the escrow conditions at the time they applied, and were unable to comply with the board's escrow requirement, which the board was unwilling to negotiate (*see, Moss v. Brower, supra*; 2-7 Cooperative Housing Law and Practice: Forms § 7.02). The defendant failed to proffer any evidence, other than the mere speculation of counsel, that the

escrow condition was "routine," or that the plaintiffs were aware of it.

Based upon the foregoing, the court finds that the closing of the purchase did not take place, not through any bad-faith conduct or fault of either the plaintiffs-purchasers (or the seller for that matter), but due to an unforeseen and onerous condition imposed by a third party, the Corporation, in exchange for its approval. The unique facts of this case, applicable case law, and principles of fairness and equity, all militate in favor of restoring the parties to the *status quo ante* in this matter. A contrary holding would subject the plaintiffs-purchasers to the loss of their downpayment of \$28,200.00, due to their financial inability to pay an additional non-negotiable escrow of over \$13,500.00, of which they had no awareness at the time they entered into the contract of sale. Thus, the court holds that the plaintiffs properly exercised their right to rescind the transaction pursuant to Paragraph 6.3 of the contract.

As to the plaintiffs' request for attorneys fees, compensatory and punitive damages, the court declines to award same. Paragraph 13.2 of the contract provides that "[i]n the event of a *default or misrepresentation* by Seller, Purchaser shall have such remedies as Purchaser is entitled to at law." (Emphasis added.) The court does not find any evidence of default (or misrepresentation) on the part of the defendant-seller in connection with the transaction at bar, and hence, no recovery is permitted pursuant to paragraph 13.2. Moreover, the escrowee, in good faith, permissibly retained the contract deposit pursuant to paragraph 28.2 of the contract, pending the judgment of this court. Based upon paragraph 6.1 of the contract, which subjected the sale to "approval" by the Corporation, rather than "unconditional approval", which is incorporated into current standard forms for the sale of cooperative apartments, the escrowee had a good-faith basis to retain the plaintiffs-purchasers downpayment, subject to the court's determination of the rights of the parties under the contract, as drafted. Having failed to have more artfully negotiated the terms of the language of the contract, plaintiffs' counsel is now foreclosed from claiming that the escrowee withheld the downpayment in bad faith.

Accordingly, based upon the papers submitted to this court for consideration and the determinations set forth above, it is,

ORDERED that the plaintiffs' motion is granted to the extent herein noted, and defendant's cross-motion is denied in all respects; and it is further,

DECLARED that the contract between plaintiffs SUNNY SIT and LINDA S. YAM-SIT and defendant ANITA SCHNAPS, dated May 6, 2004 is null and void, and that the plaintiffs SUNNY SIT and LINDA S. YAM-SIT are entitled to the return of their contract deposit in the sum of \$28,200.00, plus interest accrued from the date of deposit into the escrow account to present; and it is further,

ORDERED that the escrowee ROSENBERG & FORTUNA, LLP shall release and deliver the full amount of the plaintiffs'-purchasers' contract deposit now held in escrow, in the sum of \$28,200.00 plus interest accrued from the date of deposit into the escrow account to present, to the plaintiffs-purchasers within twenty (20) days of the date of service of a copy of this order with Notice of Entry; and it is further,

ORDERED that said Escrowee will submit an affidavit of compliance to this court within twenty (20) days of the date of service of a copy of this order with Notice of Entry.

The foregoing constitutes the order and decision of the court.

Dated: February 3, 2005
Jamaica, New York

JANICE A. TAYLOR, J. S. C.