

**Eckel v Francis**

2002 NY Slip Op 30114(U)

August 21, 2002

Supreme Court, Suffolk County

Docket Number: 12379/2001

Judge: William L. Jr. Underwood

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SHORT FORM ORDER

INDEX NO. 12379-2001

SUPREME COURT - STATE OF NEW YORK  
I.A.S. TERM, PART XIV - SUFFOLK COUNTY

**PRESENT:****Hon. WILLIAM L. UNDERWOOD, JR.**\_\_\_\_\_  
JAMES ECKEL,

Plaintiff(s),

-against-

JAMES D. FRANCIS, 11, EDWIN JACOBSON,  
 THE BOARD OF TRUSTEES OF THE  
 INCORPORATED VILLAGE OF  
 SOUTHAMPTON, and THE  
 INCORPORATED VILLAGE OF  
 SOUTHAMPTON,

Defendant(s).  
\_\_\_\_\_**ORIG. RETURN DATE: 10/31/01****FINAL RETURN DATE: 06/12/02****MTN. SEQ. #: 001-MD****002-MD****003-MD****004 -MG****PLTF'S/PET'S ATTORNEY:**

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**DEFT'S/RESP ATTORNEY:**

RICHARD E. DE PETRIS  
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 Attorneys for FRANCIS and JACOBSON  
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 Riverhead, New York 11901

Upon the following papers numbered 1 to 46 read on this motion to dismiss \_\_\_\_\_  
 Notice of Motion/Order to Show Cause and supporting papers 1-2; Notice of Cross Motion and supporting papers 3-12;  
13-24; 25-34; Answering Affidavits and supporting papers 36-38; Replying Affidavits and supporting papers 39-42;  
43-44; Other 45: 46; (~~and after hearing counsel in support of and opposed to the motion~~) it is,

ORDERED that defendants James D. Francis II and Edwin Jacobson's motion for  
 summary judgment pursuant to CPLR 32.12 is denied under the circumstances presented. It  
 is further

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ORDERED that the defendants Board of Trustees of the Incorporated Village of Southampton, the Zoning Board of Appeals of the Incorporated Village of Southampton and the Incorporated Village of Southampton's motion to dismiss the plaintiff James Eckel's complaint for failing to timely serve a Notice of Claim pursuant to General Municipal Law 50-e is denied as being moot. It is further

ORDERED that the plaintiffs cross motion for leave to file and serve a late Notice of Claim is denied as being moot. It is further

ORDERED that the plaintiffs cross motion for summary judgment as to the second cause of action set forth in the complaint seeking specific performance of the subject contract is granted.

This is an action for a declaratory judgment, breach of contract and specific performance as to defendants James D. Francis II and Edwin Jacobson who are the owners of a vacant, unimproved property situated in the Village of Southampton, Town of Southampton, Suffolk County, New York designated as on the Suffolk County Tax Map as parcel number 904-23-1-9.1 and also known as 961 Meadow Lane, Southampton, New York. On January 4, 2000, said defendants entered into a contract of sale to sell the subject property to plaintiff James Eckel subject to the terms and conditions set forth therein. Paragraph 5 of the rider of said contract provides in pertinent part as follows:

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This sale and the Purchaser's obligation to close title hereunder are expressly conditional upon the Seller's filing for and prosecuting at Seller's sole cost and expense prior to closing, all necessary and required governmental and/or municipal approvals necessary for the construction of a single family dwelling, stone parking area, deck, spa and sanitary system, all as more particularly shown on Schedule "B" annexed hereto (but with no obligations or representations of Sellers to survive closing). Anything contained herein to the contrary notwithstanding, however, this sale and Purchaser's obligation to close title hereunder are expressly conditional upon the Sellers' obtaining any and all necessary and required governmental and/or municipal approvals.....

Furthermore, in the event that any one or more of said municipal and/or governmental agencies shall deny Sellers' application as same relates to said improvements as provided herein, or in the event that any one or more said municipal and/or governmental agencies shall approve seller's application herein but with a variation in any setback, dimension, resulting in the loss of greater than 15% of any of the same as shown on Schedule "B" hereof or a living area less than 2,400 square feet in the aggregate, or in the living area "footprint" reduced below 1,530 square feet, then, and in any such event, either party shall have the right to cancel this contract and upon return by the Sellers to the Purchaser of the down payment hereunder, with accrued interest, if any, this contract shall be deemed at an end and neither party shall have any further rights or obligations with respect to the other. Nothing herein contained shall be deemed to obligate Sellers to institute any legal proceeding in the nature of an Article 78 proceeding, declaratory judgment, or otherwise, to challenge any decision of any municipal and/or governmental agency, nor to prepare an environmental impact statement.

\*\*\*\*\* At any time the purchaser can waive the provisions in paragraph 5 of the rider and proceed to closing.

On or about July 26, 2000 defendants Francis and Jacobson filed an application with the defendant Zoning Board of Appeals seeking a wetlands special permit **and** a front yard

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street setback variance. Prior thereto, the defendants obtained approvals from the New York State Department of Environmental Conservation and the Suffolk County Department of Public Health. By decision dated May 24, 2001, the defendant Board denied the application citing the potential for public acquisition as grounds for such denial pursuant to Section 116-19.4G of the Village Zoning Code and ECL Section 25-0403(2).

A party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*State Bank of Albany v. McAuliffe*, 97 A.D.2d 607, 467 N.Y.S.2d 944), but once a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action. (*Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923 [1986]).

It is well settled that "the interpretation of a contract is a question of law appropriate for resolution by way of summary judgment (*APF Inds. v. Mosler Safe Co.*, 85 A.D.2d 922, 446 N.Y.S.2d 762; *Financial & Real Estate Consulting Co. v. State of New York*, 63 A.D.2d 802, 803, 405 N.Y.S.2d 150; *see, also, W. A. Olson Enterprises v. Agway, Inc.*, 55

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N.Y.2d 659,446N.Y.S.2d928, 43 1N.E.2d 289; *Havel v. Kelsey-Hayes Co.* §3 A.D.2d 380, 382,445 N.Y.S.2d 333).” (*Keith v. Houck* 88 A.D.2d 763,451 N.Y.S.2d 492, 493-94 [4<sup>th</sup> Dept. 1982]). In the case at bar, by the terms of the contract of sale, defendants Francis and Jacobson were obligated to attempt to obtain the necessary permits from various governmental agencies required prior to the improving the subject property with the construction of a single family residence. It appears that they have done so.

However, the plaintiff by way of order to show cause has cross moved for summary judgment as to the second cause of action which seeks specific performance of the contract. In support thereof, the plaintiff avers that he is ready, willing and able to close title on the property notwithstanding the defendants’ failure to obtain the required permits and that he now waives the condition precedent set forth in the contract of sale. It is well settled that the party for whose benefit a condition is inserted in an agreement may waive the condition and accept performance as is [citations omitted]. (*See, OakBee Corporation v. N.E. Blankman & Company, Znc.*, 154 A.D.2d 3, 551 N.Y.S.2d 559 [2<sup>nd</sup> Dept 1990]). In determining whether the condition was for the benefit of one or both parties, “their writing should as a rule, be enforced according to its terms. Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing.” (*W.W.W.Associates, Inc. v. Giancontieri*, 77 N.Y.2d 160,565N.Y.S.2d

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440 [1990]). “It is well established that when the terms of a written contract are clear and unambiguous, the intent must be found therein \* \* \* Thus, in cases where the intention of the parties is expressed in plain and unambiguous terms, the question is one of law which may be decided on a motion for summary judgment.” (*Holiday Mgt. Assocs. v. New York Znst. of Technology*, 149 A.D.2d 462,466, 539 N.Y.S.2d 958 [2<sup>nd</sup> Dept 1989]).

Upon review of the contract of sale, it is apparent that the subject condition precedent was drafted and included in the contract for the benefit of the plaintiff. The parties hand wrote the following language to paragraph 5 of the rider to the contract of sale which contained the condition: “At any time the purchaser can waive the provisions in paragraph 5 of the rider and proceed to closing.” The right to invoke a waiver of the condition is specifically granted solely to the plaintiff and as such, we can only conclude that its contents were for the benefit of the plaintiff.

As such, based upon the foregoing, the plaintiffs cross motion for summary judgment is granted. Plaintiffs counsel has submitted an affirmation which provides that in the event summary judgment is granted on plaintiffs cross motion, the remaining causes of action as set forth in his complaint will be discontinued. Accordingly, the defendants The Board of Trustees of the Incorporated Village of Southampton, The Zoning Board of Appeals of the Incorporated Village of Southampton and The Incorporated Village of Southampton’s motion

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under separate notice for dismissal pursuant to CPLR 3211 (a) (4), (5), and (7) is denied as being moot.

Submit judgment.

Dated: August 21, 2002

  
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HON. WILLIAM L. UNDERWOOD, JR.  
J.S.C.

CHECK ONE:  FINAL DISPOSITION     NON-FINAL DISPOSITION