

**New Colony Homes, Inc. v Long Island Property  
Group, LLC**

2004 NY Slip Op 30065(U)

September 28, 2004

Supreme Court, Suffolk County

Docket Number: 0019020/9020

Judge: Edward D. Burke

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Index No: 019020/2003  
Calendar No:

**SUPREME COURT - STATE OF NEW YORK  
IAS/TRIAL PART 9 - SUFFOLK COUNTY**

**PRESENT:**

Hon. EDWARD D. BURKE  
Acting Justice of Supreme Court

Motion R/D : 08/20/04  
Adj. Date : 09/15/04  
Mot Seq # : 001 MOTD  
002 XMD

*PRELIMINARY CONFERENCE  
SCHEDULED FOR NOVEMBER 3, 2004*

NEW COLONY HOMES, INC.,

Plaintiff(s),

- against -

**ESSEKS, HEFTER & ANGEL ESQS.**

*Attorneys for Defendant(s)*  
108 East Main Street  
P.O. Box 279  
Riverhead, New York 11901

LONG ISLAND PROPERTY GROUP, LLC,

Defendant(s)/  
Counterclaim Plaintiff(s).

- against -

**PINKS, ARBEIT, BOYLE & NEMETH**

*Attorneys for Defendant/Plaintiff on Counter Claim*  
140 Fell Court, Suite 303  
Hauppauge, New York 11788

**PETER L. GRAUBARD, as escrow agent,**

Counterclaim Defendant

**PETER L. GRAUBARD, ESQ.**

*PRO SE Defendant on Counterclaim*  
600 Third Avenue  
New York, New York 10016-2097

Upon the following papers numbered 1 to 20 read on this motion by defendant and cross-motion by plaintiff for summary judgment ; Notice of Motion/Order to Show Cause and supporting papers 1 to 3 ; Notice of Cross Motion and supporting papers 4 to 6 ; Answering Affidavits and supporting papers 7 to 12 ; Replying Affidavits and supporting papers 13 to 16 ; Other 17 to 20 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that this motion (#001) by defendant for summary judgment on its counterclaims and the cross-motion (#002) by the plaintiff for summary judgment in its favor on its complaint in this action wherein plaintiff seeks specific performance of a contract for the sale of real property and the defendant seeks a declaration that it is entitled to retain all monies paid by the plaintiff in accordance with the liquidated damages clause set forth in the subject contract are decided as follows:

The plaintiff commenced this action for a judgment compelling the defendant to specifically perform its obligations as the seller under a contract for the sale of real property situated in East Moriches, New York and elsewhere. Defendant, Long Island Proper Group, LLC, answered asserting the plaintiff's breach of a material term regarding the second down-payment and a demand for a declaration that the defendant is entitled to keep all monies paid by the plaintiff as a deposit

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under the contract, namely the \$180,000.00 initial deposit and the \$60,000.00 paid by the plaintiff in cash at the time of the execution of the contract. In moving and cross-moving for summary judgment, on June 8, 2004 the plaintiff and the defendant stipulated to the following facts:

“ 1. This action was commenced by service of a summons and complaint (Complaint:) by Plaintiff on Defendant on or about July 22, 2003. A true and correct copy of the summons and complaint is attached as **Exhibit 1**. In the Complaint, the Plaintiff seeks, *inter alia*, a specific performance of the after-described Agreement in which Defendant was obligated to sell certain real property to the Plaintiff.

“ 2. On November 4, 2003, Defendant served it Verified Answer and Counterclaim (“Answer”). A true and correct copy of the answer is attached as **Exhibit “2”**. In the Answer, Defendant denied any basis for specific performance and in its counterclaim, Defendant further requested declaratory judgment that Plaintiff’s default under the Agreement entitled Defendant to retain the \$180,000.00 initial deposit made under the Agreement.

“ 3. On November 24, 2003, Plaintiff served its Verified Answer to Counterclaim (“Counterclaim Answer”) which denied any basis for the retention of the initial deposit. A true and correct copy of the Counterclaim Answer is attached as **Exhibit “3”**.

“ 4. The stipulated relevant facts are as follows:

“ (a) On October 24, 2002, the plaintiff and the defendant Long Island Property Group, LLC executed a written agreement for the sale of real property described therein upon terms and conditions stated therein (the “Agreement”). A copy of the Agreement is annexed hereto as **Exhibit “4”**.

“ (b) On October 24, 2002, the Plaintiff paid the sum of \$180,000.00 (the “Initial Deposit”) by certified check.

“ (c) The said sum of \$180,000.00 was deposited and continued to be held by Peter Graubard, Esq. (“Graubard”), Defendant’s attorney, as escrow agent pursuant to Paragraph 30(i) of the Agreement, as a down payment for the purchase of the property.

“ (d) On October 24, 2002, the Plaintiff paid the additional sum of \$60,000.00 in cash to the defendant.

“ (e) On October 24, 2002, the plaintiff and the defendant Long Island Property Group, LLC exchanged fully executed duplicate originals of the Agreement.

“ (f) On October 31, 2002, Graubard sent a letter to Plaintiff’s attorney, Richard J. Cohen (“Cohen”) which enclosed a personal guarantee of Andrew Heiberger. A true and correct copy of the October 31, 2002 letter and personal guarantee of Andrew Weiberger is attached hereto collectively as **Exhibit 5**.

“ (g) On May 7, 2003, Defendant demanded that Graubard release the “Initial Deposit” in the sum of \$180,000.00. A true and correct copy of Defendant’s May 7m 2003 letter is attached

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hereto as **Exhibit 6**.

“ (h) On May 7, 2003, Graubard sent a letter to Cohen stating that Plaintiff was in default of the Agreement “for its failure to deliver a check for the second deposit in the sum of \$100,000.00 pursuant to Paragraph 30(i) of the Rider [to the Agreement].”

“ (i) On May 8, 2003, Plaintiff, by its attorney Cohen claims that Defendant Long Island Property Group, LLC had defaulted under the contract dated October 24, 2002 (*correct date added*) by refusing to complete the transaction, demanded that the escrow agent, Graubard, release the initial deposit in the sum of \$180,000.00 to Plaintiff as a result of the default, and advised that Plaintiff would seek to recover the additional funds provided initially. A true and correct copy of Cohen’s letter dated May 8, 2003 is attached hereto as **Exhibit 8**.

“ (j) On May 8, 2003, Cohen informed Graubard that a check in the sum of \$100,000.00 would be sent to Graubard via overnight mail. A true and correct copy of Cohen’s May 8, 2003 letter is attached as **Exhibit 9**.

“ (k) A check, dated May 8, 2003 (*correct date added*), in the amount of \$100,000.00, payable to the order of Peter L Graubard, as attorney, was received by Graubard on May 9, 2003. A true and correct copy of the check is attached hereto as **Exhibit 10**.

“ (l) On May 13, 2003 (*correct date added*) Graubard returned to Cohen the check in the amount of \$100,000.00, that he had received on May 9, 2003 (*correct date added*). A true and correct copy of Graubard’s letter dated May 13, 2003 is attached hereto as **Exhibit 11**.

“ (m) In November, 2003, Defendant filed an application with the Town of Brookhaven for approval of a subdivision pursuant to the Contract.

“ (m) The application filed in November, 2003, was returned to the Defendant with a request for further information.

“ (n) In January, 2004, Defendant re-filed subdivision application with the Town of Brookhaven pursuant to the Contract.

“ (o) As of the date of this stipulation, the subdivision application has not been approved and is under review by the Town of Brookhaven.”

Upon review of the stipulated facts and the papers submitted in support of and in opposition to the instant applications for summary judgment, the court finds that the defendant is entitled to partial summary judgment on its claims for declaratory relief and dismissal of the plaintiff’s complaint. The moving papers established, *prima facie*, that the plaintiff breached the contract by failing to timely pay the second installment due as a down-payment. Contrary to the plaintiff’s claims, the defendant was under no obligation to notify the plaintiff of plaintiff’s default in paying the second down-payment installment, which the plaintiff admits it failed to pay on the due date. None of the arguments and contentions of the plaintiff regarding its entitlement to the summary judgment are meritorious. Since the plaintiff’s breach was material, the defendant cannot be

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compelled to specifically perform the contract and is entitled to retain the \$180,000.00 initial down payment paid by the plaintiff (*Maxton Builders, Inc. v LoGalbo*, 68 NY2d 373, 509 NYS2d 507; *Ittleson v Barnett*, 304 AD2d 526, 758 NYS2d 360).

The defendant failed, however, to establish, as a matter of law, its entitlement to retention of the \$60,000.00 cash payment paid by the plaintiff on the date of the execution of the contract. Indeed, the defendant admits that said "cash payment was not credited in the contract against payment of the price for the property" (see, page 17 of defendant's memorandum of law in support of motion). The defendant characterizes the payment as consideration for an option, pursuant to which the defendant withdrew the property from the real estate market, under the contract period. The defendant then cites and relies on various authorities regarding the forfeiture of consideration paid for an option by the optionee upon its default. However, defendant's characterization of the \$60,000.00 payment and its reliance upon the option case authorities do not establish the defendant's entitlement to judgment as a matter of law and to its retention of the \$60,000.00 cash payment. The record reveals that genuine questions of a fact exist regarding the nature of said \$60,000.00 cash payment and whether it constitutes "a deposit" within the contemplation of paragraph 40 set forth on the typewritten rider to the subject contract. Such questions of fact were not eliminated by the submissions of any of the moving parties.

In view of the foregoing, the plaintiff's cross-motion (#002) for summary judgment is denied. The motion (#001) by defendant, Long Island Property Group, LLC, for summary judgment dismissing the plaintiff complaint and in favor of the defendant on its demand for a declaration that it is entitled to keep the \$180,000.00 deposit and the \$60,000.00 cash payment as liquidated damages is granted to the extent that partial summary judgment is awarded to the defendant, dismissing the plaintiff's complaint. The defendant is further awarded partial summary judgment on its demands for a declaration that the plaintiff breached the subject contract and that, as a result of said breach, the defendant is entitled to keep the \$180,000.00 down-payment paid by the plaintiff as a deposit under the terms of the subject contract. However issues of fact, including those of credibility, preclude the granting of summary judgment on the defendant's further demand for a declaration of its entitlement to the \$60,000.00 cash payment received from the plaintiff at the time of the execution of the subject contract. A trial of those issues shall be had after the completion of discovery, if any be demanded; and it is further

**ORDERED** that a preliminary conference shall be held herein with respect to the scheduling of disclosure or the claims which must be tried herein. Counsel for the parties are directed to appear on November 3, 2004 at 9:30 a.m. in the courtroom of the undersigned located in the Supreme Court Annex, 215 Griffing Avenue, Riverhead, New York, ready for said conference.

Dated: September 28, 2004.



EDWARD D. BURKE, A.J.S.C.