

**Somma v Richardt**

2006 NY Slip Op 30560(U)

December 21, 2006

Supreme Court, New York County

Docket Number: 03-26887

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK  
POST-NOTE MOTION PART - SUFFOLK COUNTY

**P R E S E N T :**

Hon. ROBERT W. DOYLE  
Justice of the Supreme Court

MOTION DATE 6-7-06  
ADJ. DATE 7-7-06  
Mot. Seq. # 003 - MD  
# 004 - MG

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STEPHEN M. SOMMA and MARY SOMMA,	:	RICHARD F. ARTURA, ESQ.
	:	Attorney for the Plaintiffs
Plaintiffs,	:	150 East Sunrise Highway, Suite 206
	:	Lindenhurst, New York 11575
- against -	:	
	:	SCOTT ZAMEK, ESQ.
	:	Attorney for the Defendant
MAUREEN RICHARDT a/k/a MAUREEN	:	3124 Expressway Drive South
RICHARDT-GALLAGHER,	:	Islandia, New York 11749
	:	
Defendant.	:	

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Upon the following papers numbered 1 to 37 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 7; Notice of Cross Motion and supporting papers 8 - 31; Answering Affidavits and supporting papers \_\_\_\_\_; Replying Affidavits and supporting papers 33 - 35; 36 - 37; Other 32; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that the motion (#003) by the defendant for summary judgment on the counterclaim, pursuant to CPLR 3212, is denied; and it is further

**ORDERED** that the motion (#004) by the plaintiffs for summary judgment on the complaint, pursuant to CPLR 3212, is granted.

The summons and verified complaint in this action were filed on or about November 11, 2003 and issue was joined by the filing of defendant's answer on or about December 5, 2003. Discovery has been completed, and the note of issue was filed on or about January 31, 2006.

Plaintiff's Stephen M. Somma and Mary Somma (Somma) instituted this real estate breach of contract action to recover damages arising out of defendant seller's alleged breach of a contract. On or about April 15, 2003 the Somma's entered into a contract of sale with defendant Mary Richardt (Richardt) to purchase real property located at 6 Sparrow Lane, West Hills, Suffolk County, New York for the price of \$520,000.00. At the signing of the contract plaintiff

Somma v Richardt  
Index No. 03-26887  
Page No. 2

buyers paid the required \$25,000 down payment on the property to Richardt. The contract terms set May 15, 2003 as a closing date and the contract was subject to plaintiffs' obtaining a mortgage commitment by June 1, 2003. On May 22, 2003 plaintiffs obtained a mortgage commitment and notified seller's attorney. Title insurance was ordered on the property, as was a termite inspection and new survey. On June 9, 2003 a copy of the new survey was provided to the title company which revealed, as an exception in the title report, that the neighbor's fence was on the property. On July 3, 2003 the neighbors signed an affidavit to the effect that they made no claim to the property encumbered and the title exception was cleared. A closing between the parties, the bank and the title company was scheduled for July 8, 2003. These facts are not disputed.

It is undisputed that between July 3, 2003 and July 7, 2003 plaintiff buyers sought to do the customary "walk through" of the property prior to closing and that the defendant seller refused to allow them access to the house. On July 7, 2003 the defendant seller cancelled the closing. Plaintiffs testified in their respective depositions that they had a relationship with the mortgage broker involved with their mortgage application. They stated that after the closing was cancelled they requested an extension of the mortgage commitment from the expiration date of July 14, 2003 to July 30, 2003 which, for a fee, the lender granted. In addition, they testified that the favorable interest rate which they had obtained had previously been extended by the lender from June 27, 2003 to July 8, 2003 and that the bank, after the closing cancellation, also extended the rate lock, for a fee, until July 30, 2003. Plaintiffs testified that the bank and/or mortgage broker advised them that the commitment fee and extension fees could be paid at closing.

Plaintiffs attorney affirmed that after the closing cancellation he had many discussions with defendant seller's attorney and that the seller refused to set a new closing date because she had decided not to sell the house. Plaintiffs attorney further stated that due to the cancellation of the closing on July 8, 2003, and defendant's refusal to set a subsequent closing date, he scheduled a time of the essence closing date for July 30, 2003. He affirmed that he notified the seller's attorney of the law date by letter, sent by facsimile transmission, on July 18, 2003. He also stated that he notified the bank's attorney who, upon said notification, advised that they would require confirmation of the closing date by July 23, 2003 since the prior closing had been canceled and necessitated re-drafting of the closing documents. On or about July 23, 2003, defendant seller's attorney advised plaintiff buyer's attorney that the seller would not close on July 30<sup>th</sup> or on any other date. The bank attorney was notified of seller's refusal to close, the closing was cancelled and the lender's mortgage commitment and lock-in thereafter expired.

By letter dated July 31, 2003 plaintiff buyers declared the seller in breach of the contract and demanded return of the contract and payment of damages. In August 2003 the defendant seller returned the \$25,000.00 down payment to the plaintiff buyer. Thereafter in September 2003 defendant seller listed the property for sale at a higher price and ultimately sold the house to another buyer for \$575,000.00 on December 9, 2004.

Somma v Richardt  
Index No. 03-26887  
Page No. 3

Defendant Richardt now moves for summary judgment dismissing the complaint and seeks summary judgment on her counterclaim in the amount of \$25,000.00 in accordance with the contract of sale. Defendant alleges that the plaintiffs breached the contract because they were not ready, willing and able to close on July 30, 2003. Defendant argues in her motion that the plaintiffs had failed to comply with the terms and conditions of the mortgage commitment requiring the payment of fees, among other things, and therefore they were not ready, willing and able to complete the transaction on the law date of July 30, 2003. In support of her motion defendant submits, *inter alia*, an affirmation of counsel, a copy of the mortgage commitment, copies of the deposition transcripts of Stephen M. Somma and Mary Somma and a copy of the pleadings in her reply affirmation.

Plaintiffs oppose defendant's motion and cross move for summary judgment on the complaint on the grounds: that a valid contract existed between the parties; that the plaintiff purchasers obtained financing in accordance with the contract; that the plaintiff purchasers were ready, willing and able to close the sale on both July 8, 2003 and July 30th, 2003, and further that the July 30<sup>th</sup>, 2003 closing date was a time of the essence law date; that the defendant seller breached the contract by refusing to close on July 30, 2003; and that the defendant seller thereafter listed, and sold, the property at the increased price of \$575,000.00 on December 9, 2004. Plaintiffs' argue that they suffered compensatory damages in the form of the loss of the benefit of the bargain as well as the costs associated with the repudiated contract. Plaintiff purchasers submit, *inter alia*, in support of their cross motion, an affirmation of counsel, an affidavit from Stephen M. and Mary Somma, a copy of the pleadings, a copy of the contract of sale executed by the parties dated April 15, 2003, a copy of the mortgage commitment dated May 22, 2003, an affirmation from Michael B. Lione, Esq., an officer of MKM Abstract Services, Inc., an affirmation from Vincent Tenety, Esq., attorney for the lender, JP Morgan Chase, the original letter scheduling the closing for July 8, 2003, a copy of the certificate of property insurance issued by Liberty Mutual Fire Insurance Company dated July 3, 2003, issued for a period of one year from July 8, 2003 to July 8, 2004, a copy of the time of the essence letter dated July 18, 2003 scheduling the July 30, 2003 law date, a copy of the letter dated July 31, 2003 notifying seller that she had breached the contract, a copy of the deposition transcript of Maureen Richardt, and an affidavit from Angela Anderson, Sales Manager for Daniel Gale Realty.

With regard to the above there is no dispute that a valid binding contract existed between the parties and, the law expects that the parties will perform in the true spirit and meaning of their agreement (*see, Newburger v Lubell*, 257 NY 383, 1931 NY Lexis 868 [1931]). Where a valid and binding contract exists a court is required to compel the performance of a contract as it is written (*Nicholas v Nichols*, 306 NY 490, 1954 NY Lexis 1020 [1954]) and a party is bound by what he or she agrees to do, whether or not the party intends to do what is agreed (*see, Metropolitan Life Ins. Co. v Noble Lowndes Int'l*, 192 AD2d 83, 600 NYS2d 212, *app gr* 82 NY2d 664, 610 NYS2d 152, *aff'd* 84 NY2d 430, 618 NYS2d 882 [1993]). In the instant matter the defendant claims that the plaintiffs were not ready, willing and able to close the real estate

Somma v Richardt  
Index No. 03-26887  
Page No. 4

transaction on July 30, 2003 however, the defendant did not refute plaintiffs' claim that the defendant seller refused to close on both dates set for closing, the first being July 8, 2003 and thereafter on July 30, 2003. Instead, defendant Richardt argues that the plaintiff buyers failed to comply with the terms and conditions of the mortgage commitment, concerning fees due to the lender, proof of insurance and that the rate lock and mortgage commitment expired negating their ability to close on the transaction. However, this argument is directly contradicted by the affirmation of the bank's attorney which clearly states that the lender was ready to close on the transaction, that they had extended the rate lock and commitment to July 30, 2003 and that any fees due to the lender would be paid at closing.

Where a party seeks damages for nonperformance of a contract they must demonstrate that a tender of his or her own performance was made, unless such tender was waived or the necessity for such tender was obviated by acts of the other party amounting to an anticipatory breach of the contract (*Madison Investment, Inc. v Cohoes Assoc.*, 176 AD2d 1021, 1021, 574 NYS2d 980 [1991]). In the instant action the parties scheduled a closing for July 8, 2003, the bank's attorney stated in his affirmation that he prepared the closing documents for July 8, 2003 and the affirmation from the attorney associated with the title company affirmed that a closing was scheduled for July 8, 2003. The bank's attorney affirmed that all conditions of the lender had been satisfied, that the matter was approved for closing and that on July 7, 2003 his office received a wire from Chase, funding the transaction in preparation for the closing the following day. He stated that on July 7, 2003 he was informed that the defendant seller had cancelled the closing. Defendant's claim therefore that the plaintiff buyers were not ready, willing and able to close due to non-compliance with the terms and conditions of the mortgage commitment are, at best, disingenuous since the affirmation of the lender's attorney clearly establishes that the bank confirmed that all conditions of the commitment were complied with to the satisfaction of the lender for the closing on July 8, 2003 and there is nothing in the record to indicate that this had subsequently changed with regard to any of the commitment terms. In any event, defendant seller was not relieved of her performance obligation, i.e., to close on the property, based on what the lender may or may not have required in accordance with the mortgage commitment.

Defendant Richardt did not address in any of the papers submitted to this court plaintiffs' claim that she cancelled the first scheduled closing without providing a reason and thereafter refused to close even after the plaintiffs' notified her, through counsel, of the time of the essence closing date of July 30<sup>th</sup>, 2003. Defendant seller did not dispute that on July 18, 2003 she refused to confirm the closing on July 30, 2003 or that July 30<sup>th</sup> was the law date set by plaintiff buyer's counsel. It is undisputed that defendant seller's counsel confirmed receipt of the correspondence establishing July 30<sup>th</sup>, 2003 as the law date and defendant seller did not object to the date. Further, it is undisputed that defendant seller was aware that plaintiff buyers mortgage commitment and rate lock were scheduled to expire on July 30<sup>th</sup>, 2003.

In order to determine whether an anticipatory breach of a contract has been committed by a party, it is the intention manifested by the party's acts and words which controls (*see, Forward*

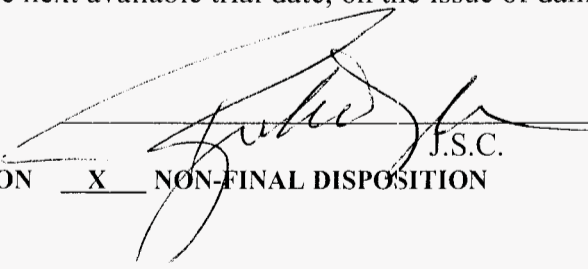
*Publications, Inc. v International Pictures, Inc.*, 277 AD 846, 98 NYS2d 139 [1950]). For an act to fall within the doctrine of anticipatory breach it must leave no doubt that it is a repudiation or refusal to perform (see, *Steinberg Press, Inc. v Charles Henry Publications, Inc.*, 1947 NY Misc Lexis 2154, 68 NYS2d 793 [1947] *aff'd* 273 AD 772, 75 NYS2d 150). Further, a renunciation or repudiation of a contract before the time for performance is a refusal to perform it at anytime (see, *Capozzola v Oxman*, 216 AD2d 509, 628 NYS2d 777 [1995]) and amounts to a violation of the contract in all respects (see, *Wester v Casein Co. of America*, 206 NY 506, 1912 NY Lexis 998 [1912]).

With regard to the July 30<sup>th</sup>, 2003 law date the evidence clearly establishes that the defendant seller failed to perform in accordance with the terms of the contract prior to, and on, the law date. The defendant seller does not dispute that she refused to close on this real estate transaction and that she informed the plaintiff buyers, through her attorney on both July 7, 2003 and July 23, 2003, that she had changed her mind about selling the property. In addition, it is undisputed that on July 23, 2003 defendant seller's counsel informed the plaintiff buyers that the defendant seller would not close on this matter on July 30<sup>th</sup> or on any other date. Thus, by her words and actions the defendant seller breached and repudiated the contract.

A consequence of a party's anticipatory breach of a contract is that it excuses the other party's obligation of future performance under the agreement and is intended to relieve the non-repudiating party of future performance (see, *American List Corp. v U.S. News & World Report, Inc.*, 75 NY2d 38, 550 NYS2d 590 [1989]). Indeed, the law does not require the useless formality of a tender where a contract has been repudiated (see, *DeForest Radio Tel. & Tel. Co. v Triangle Radio Supply Co.*, 243 NY 283, 1926 NY Lexis 752 [1926]), if such repudiation is not withdrawn (see, *Howard v Daly*, 61 NY 362, 1875 NY Lexis 419 [1875]). However, it also does not excuse the non-repudiating party from the obligation of proving readiness, willingness, and ability to have performed under the contract (see, *BSL Development Corp. v Broad Cove, Inc.*, 173 AD2d 394, 577 NYS2d 98 [1991]). The plaintiff buyers provided clear evidence that the lender had extended their mortgage commitment and favorable interest rate until July 30, 2003 and it is undisputed that defendant seller was notified that the lender's attorney required confirmation of the July 30<sup>th</sup> closing date by July 23, 2003. Further, it is undisputed that on July 23, 2003 plaintiff buyer's attorney was notified that the defendant seller refused to close on the property on July 30, 2003 or on any other date. Therefore, plaintiff buyers have established that they were ready, willing and able to perform the terms of the contract and that the actions of the defendant seller amounted to an anticipatory breach of the contract entitling them to damages.

Accordingly defendant's motion for summary judgment on the counterclaim is denied and plaintiff's cross motion for summary judgment on the complaint is granted. Upon service of a copy of this order with notice of entry, the Calendar Clerk of this Court is directed to place this action on the Calendar Control Part for the next available trial date, on the issue of damages.

Dated: DEC 21 2006

  
 \_\_\_\_\_ J.S.C.  
 FINAL DISPOSITION     NON-FINAL DISPOSITION