

**Mays v Clurfeld**

2007 NY Slip Op 30029(U)

March 6, 2007

Supreme Court, Queens County

Docket Number: 0002278

Judge: David Elliot

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ordered that these funds be held in a segregated escrow account.

The essential facts are not in dispute. On October 6, 2004 the plaintiffs entered into a residential contract of sale with the Trust for the purchase of the real property located at 178-16 Murdock Avenue, St. Albans, New York, for \$625,000.00. Plaintiffs tendered a down payment of \$30,000.

Paragraph 6(a) of the contract provides in pertinent part " At Closing, the Downpayment shall be paid by Escrowee to Seller. If for any reason Closing does not occur and either party gives Notice (as defined in paragraph 25) to Escrowee demanding payment of the Downpayment, Escrowee shall give prompt Notice to the other party of such demand. If Escrowee does not receive prompt Notice of objection from such other party to the proposed payment within 10 business days after the giving such Notice, Escrowee is hereby authorized and directed to make such payment. If Escrowee does receive such Notice of objection within 10 day period or if for any other reason Escrowee in good faith shall elect not to make such payment, Escrowee shall continue to hold such amount until otherwise directed by Notice from the parties to this contract or a final, nonappealable judgment, order or decree of court."

Paragraph 8, sets forth the contract's mortgage contingency clause, which provides, in pertinent part that: "[T]he obligations of Purchaser hereunder are conditioned upon issuance on or before 30 days from contract date (the 'Commitment Date') of a written commitment from any Institutional Lender pursuant to which such Institutional Lender agrees to make a first mortgage loan, other than a VA, FHA or other governmentally insured loan, to Purchaser, at Purchaser's sole cost and expense of \$562,500.00 or such lesser sum as Purchaser shall be willing to accept, at the prevailing fixed rate of interest or initial adjustable rate of interest or initial adjustable rate of interest for a term of at least 25 years...Purchaser shall (i) make prompt application to an Institutional Lender for such mortgage loan...If such commitment is not issued on or before the Commitment Date, then, unless Purchaser has accepted a commitment that does not comply with the requirements set forth above, Purchaser may cancel this contract by giving Notice to Seller within 5 business days after the Commitment Date, in which case this contract shall be deemed cancelled and thereafter neither party shall have any further rights, obligations or liabilities to the other by reason of this contract, except that the Downpayment shall be promptly refunded to Purchaser and except as set forth in Paragraph 27. If Purchaser fails to give notice of cancellation then Purchaser shall be deemed to have waived Purchaser's right to cancel this contract and to receive a refund of the Downpayment by reason of the contingency contained in this paragraph."

Paragraph 15 of the contract states that the closing shall take place at the office of the Seller's attorney at 10:00 A.M., "on November 29, 2004 or 60 days after signed contract is delivered to Purchaser's attorney, **time being of the essence**, at the office of Purchaser's lending institution within Queens or Nassau County."

Paragraph 25 of the contract provides that: "Any notice or other communication ('Notice') shall be in writing and either (a) sent by either of the parties hereto or by their respective attorneys who are hereby authorized to do so on their behalf or by the Escrowee, by registered or certified mail, postage prepaid, or (b) delivered in person or by overnight courier... Each Notice mailed shall be deemed given on the third business day following the date of mailing the same, except that any notice to Escrowee shall be deemed given only upon receipt by Escrowee and each Notice delivered in person or by overnight courier shall be deemed given when delivered."

Paragraph 28(b) of the contract provides that: "Neither this contract nor any provision thereof may be waived, changed or cancelled except in writing." Paragraph 28(e) provides that it "shall not be binding or effective until duly executed and delivered by Seller and Purchaser."

The contract was executed by the parties on October 6, 2004 and was mailed to Mr. Mays, who represented himself and Ms. Joseph, on October 7, 2004. In a letter dated December 1, 2004, Stephen Dowell, a person listed on Mays' letterhead as a paralegal, informed Mr. Clurfeld that "our clients' mortgage application was denied, see enclosed denial letter" and requested the return of the down payment. The enclosure consisted of a form "STATEMENT OF CREDIT DENIAL, TERMINATION OR CHANGE," that listed the applicant as Ms. Joseph and stated that her application for credit was denied on the grounds of "Inadequate Collateral." In a letter dated December 10, 2004 Mr. Clurfeld informed Mr. Curtis thereof, and requested that he "advise by return mail as whether you object to the return of the down payment." Mr. Curtis, in a handwritten letter, on his own letterhead, informed Mr. Clurfeld that he objected to the return of the down payment "because terms of the contract were not fulfilled."

Plaintiffs commenced the within action on January 28, 2005, and allege in their first cause of action that they timely obtained a loan commitment from Greenpoint Savings Bank and that, after the bank conducted an independent appraisal of the property, it declined to approve the loan due to insufficient collateral. Plaintiffs allege they duly notified the seller of their inability to obtain a mortgage, elected to cancel the

contract, and demanded the return of the down payment and that defendants refused to return the down payment. The second cause of action for breach of contract seeks damages in the sum of \$30,000.

Defendants in their answer interposed seven affirmative defenses and the Trust asserted a counterclaim for breach of contract and seeks to recover damages of \$50,000.00 in addition to retaining the down payment.

Defendants now seek an order granting summary judgment dismissing the complaint, granting judgment in their favor on the counterclaim and setting the counterclaim down for an inquest as to damages. Mr. Clurfeld states in his affidavit that on November 8, 2004, he received a telephone call from Mr. Dowell requesting that he prepare a deed solely in the name of Ms. Joseph, and that he exclude Mr. Mays' name from the deed. Mr. Clurfeld states that he informed Dowell that he would need an assignment of Mr. Mays interest in the contract, and a written guaranty by Mays of Ms. Joseph's performance. On November 9, 2004, Mr. Clurfeld states he received a second telephone from Mr. Dowell regarding the assignment, and on November 17, 2004 he received by fax a letter of that date from Mr. Dowell in which he supplied Ms. Joseph's address, and stating that Mr. Mays would call him regarding the "amendment." Mr. Clurfeld states that on November 30, 2004, Mays' mortgage broker called him and requested that the contract's sale price be reduced to \$525,000, and that on December 1, 2004 he received by fax the December 1, 2004 letter from Dowell requesting the return of the down payment. Defendants assert that the plaintiffs failed to obtain a timely mortgage commitment, that the contract explicitly made time of the essence as to the closing date, and that plaintiffs' request for the return of the down payment was untimely and was not given in accordance with the method specified in the contract. It is, therefore, asserted that plaintiffs are not entitled to recover the down payment and that defendants are entitled to retain the down payment as liquidated damages.

Plaintiffs, in opposition, concede that as the contract date was October 6, 2004, they were required to obtain a mortgage commitment by November 6, 2004, pursuant to paragraph 8(a) of the contract. Plaintiffs, however, assert that their mortgage broker, First Venture Capital, faxed them a loan commitment from Greenpoint Savings Bank along with a loan number, on November 2, 2004, and therefore they satisfied the 30 day time period for obtaining a loan commitment. Plaintiffs further assert that due to circumstances beyond their control the lending institution withdrew the commitment following an appraisal of the property. It is also asserted that, although the notice of credit denial states that it was mailed on November 8, 2004, plaintiffs did not

receive it until approximately November 29, 2004. Mr. Mays asserts he was in contact with Mr. Clurfeld and had discussions with him regarding the possibility of a reduction in the contract price, and that as the defendants failed to or refused to discuss any further changes to the contract, it was reasonable for the plaintiffs to cancel the contract. Mr. Mays also claims that defendant Clurfeld acted in bad faith in asserting that the correspondence by fax did not comport with the terms of the contract, as the parties are attorneys and professional courtesy is implied. Plaintiffs assert that triable issues of fact exist as to whether they exercised due diligence in obtaining a mortgage commitment; whether they made reasonable efforts to maintain communications with the defendant throughout the transaction; whether the defendant Clurfeld in bad faith unreasonably withheld the \$30,000 down payment held in the escrow account; and whether the letter written by Mr. Curtis regarding the return of the down payment was actually written by him.

Defendants in their reply assert that plaintiffs failed to comply with the contract's mortgage contingency clause, the notice provisions and the time limitations, and that there are no disputed material issues of fact. Mr. Clurfeld further asserts that as the contract required that he hold the down payment in an escrow account, and that the court also ordered that this money be held in a segregated escrow account, the plaintiffs' claims of bad faith are unfounded.

The court finds that plaintiffs may not rely upon the mortgage contingency provision of the contract. It is undisputed that pursuant to the terms of the contract plaintiffs were required to obtain a mortgage commitment by November 6, 2004. Plaintiff Michael Mays did not make any application for a mortgage commitment, let alone a "prompt application" as required under the contract. Therefore, as a matter of law, Mr. Mays did not exercise due diligence in obtaining a mortgage commitment.

As to Ms. Joseph, plaintiffs seek to rely upon the loan status report prepared by Greenpoint Savings Bank for plaintiffs' mortgage broker, which stated that the loan was approved on November 2, 2004. The court has examined the loan status report, and finds that at most, the bank communicated a preliminary offer on November 2, 2004, to give a mortgage provided certain conditions were met. Plaintiffs did not communicate to defendants that they had obtained a firm loan commitment, prior to the November 6, 2004 deadline. Loan application documents executed by Ms. Joseph, dated November 8, 2004, establish that she had not completed the loan application until two days after the expiration of the commitment date. On November 8, 2004, two days after the commitment date, the lender denied credit due to the fact that Ms. Joseph had insufficient collateral. However,

there is no evidence that the denial of credit was related to the bank's appraisal of the property. The court therefore, finds that Ms. Joseph has failed to raise any issue of fact as to whether she exercised due diligence in making her loan application.

Defendants' oral attempts to negotiate a lower contract price after the November 6 deadline did not serve to extend either the commitment deadline or the time in which to give notice of the demand for a return of the down payment. Any such change in the contract's terms was required to be in writing. Plaintiffs' assertion that Mr. Clurfeld failed to extend "professional courtesy" to them and thus acted in bad faith, is rejected. As parties to the written contract plaintiffs were required to comply with all of its terms, including the notice provisions.

Plaintiffs assert that they did not receive the lender's November 8, 2004 notice of denial of the loan until November 29, 2004, and thus did not advise defendants that they had failed to obtain a commitment until December 1, 2004. However, plaintiffs' right to cancel the contract for failure to obtain financing had terminated prior to the prospective lender's denial of the loan application. Furthermore, pursuant to the mortgage contingency provision, plaintiffs' failure to give notice of cancellation within five business days after the commitment date, in the manner specified in the contract's notice provisions, resulted in a waiver of their right to cancel the contract (see Roga v Westin, 212 AD2d 685, 686 [1995]; Arnold v Birnbaum, 193 AD2d 710, [1993]; Capati v Dolorico, 4 Misc 3d 138A, [2004]). Hence, plaintiffs are not entitled to recover the down payment and defendants are entitled to retain the down payment as liquidated damages (see Maxton Builders, Inc. v Lo Galbo, 68 NY2d 373, [1986]).

To the extent that the plaintiffs assert that the letter written by Mr. Curtis rejecting their demand to recover the down payment is not genuine, the court notes that the plaintiffs have not proffered an affidavit of a handwriting expert. Therefore, the court finds that the plaintiffs have failed to raise a genuine and material issue of fact regarding Mr. Curtis' letter. The court further finds that Mr. Clurfeld properly deposited the down payment in the escrow account, pursuant to the terms of the contract and was barred from releasing these funds absent an order of the court.

Defendants in support of the motion for summary judgment on the Trust's counterclaim have failed to present any evidence that the seller sustained any damages arising out of the breach of contract that are not included in the liquidated damage clause.

Accordingly, defendants request for summary judgment dismissing the complaint is granted. Defendants' request for summary judgment on the counterclaim is granted to the extent that the seller Trust is entitled to retain the \$30,000.00 down payment. That branch of defendants' motion which seeks to sever the counterclaim and set the matter down for an inquest as to damages independent of the contract's liquidated damages clause is denied, and that portion of the counterclaim is dismissed (see CPLR 3212[b]).

Dated: March 6, 2007

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J.S.C