

Shi Chang Lin v Xiao Wang

2007 NY Slip Op 31090(U)

April 20, 2007

Supreme Court, Queens County

Docket Number: 0025009/2006

Judge: Orin R. Kitzes

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SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS**

**PART 17
HON. ORIN R. KITZES**

-----X
SHI CHANG LIN and XIU RONG ZENG,
Plaintiffs,

-against-

**Index No. 25009/06
Motion Date: 4/18/07
Motion No. 33**

**XIAO WANG and YUJING HOU, HUSBAND and
WIFE,**
Defendants.

-----X
The following papers numbered 1 to 8 read on this motion by plaintiffs for an order granting them summary judgment in their favor and awarding them specific performance of a contract of sale of real property, dated March 22, 2006.

	PAPERS NUMBERED
Notice of Motion-Affirmation-Exhibits.....	1-4
Affirmation in Opposition.....	5-6
Reply Affirmation.....	7-8

Upon the foregoing papers it is ordered that the motion for summary judgment awarding plaintiffs specific performance of a contract of sale of real property, dated March 22, 2006, is denied, for the following reasons:

Plaintiffs, as the prospective purchasers, seek specific performance of a contract, dated, March 22, 2006, for the sale of real property located at 22 Grand Avenue, North Baldwin, New York, for alleged breach of contract. The parties entered into the contract of sale, whereby defendants agreed to sell the property to plaintiffs for the purchase price of \$700,000 and plaintiffs made a down payment of \$79,000.00. The contract also provided that it was contingent on the buyers obtaining a “commitment for a purchaser money first mortgage loan at prevailing rate in the amount of \$400,000.00 at the date of title closing for 25/30 years, within 45 days from the date of delivery.” However, the contract also provided that “[I]n the event the mortgage commitment may not be obtained, purchaser shall have the option to proceed with this contract notwithstanding their failure to obtain a mortgage or to terminate this agreement.”

Plaintiffs claim that they received a mortgage commitment and are ready, willing, and able to finalize the contract of sale. However, they claim defendant has refused to appear for a closing. Defendants oppose the granting of specific performance. They claim that plaintiff did not comply with the contract of sale since their mortgage commitment is not for \$400,000.00 and it was

obtained more than 45 days from the date of delivery of the contract. They also claim that plaintiffs have not shown that they are capable of providing all of the finances necessary to purchase the property. Finally, they argue that it would be unreasonable to enforce the contract since it is more than one year since it was entered into by the parties.

Before specific performance of a contract for the sale of real property may be granted, a plaintiff must demonstrate that it was ready, willing, and able to perform its obligations under the contract to purchase, regardless of any alleged anticipatory breach by the defendants. Petrelli Assocs v Germano, 268 AD2d 513 (2d Dept. 2000.) Here, the plaintiffs have not shown that they were ready, willing, and able to perform.

Initially, regarding the mortgage contingency clause; in general, this clause in a contract of sale for real estate is for the benefit of both purchaser and seller. Where a mortgage contingency clause is for the benefit of both parties, it can be waived only by agreement between the parties or by conduct. W.W.W. Associates, Inc., v Gianconteri 152 AD2d 333 (2d Dept 1989), *rev'd other grounds*, 76 NY2d 704 (1990.) When a mortgage contingency clause is solely for the benefit of a party, that party may waive that provision and purchase the property in an "as is" condition. W.W.W. Associates, Inc., v Gianconteri 152 AD2d 333 (2d Dept 1989), *rev'd other grounds*, 76 NY2d 704 (1990.) Here, the contingency clause is unambiguous and was solely for the benefit of the plaintiffs purchasers since it afforded them the ability to provide alternative financing for the purchase. Significantly, the clause did not grant the seller the option to cancel the contract in the event the purchaser failed to obtain a mortgage commitment by a specified date. Coneys v Game, 141 AD2d 792 (2d Dept 1988.) Consequently, plaintiffs had the right to waive the mortgage contingency clause and use alternative financing for the purchase of the house. Accordingly, defendants cannot defeat the instant motion based upon plaintiffs not obtaining a mortgage commitment in the amount of \$400,000.

However, plaintiffs evidence fails to demonstrate that the plaintiffs had the requisite funds or financial commitments from others in order to meet their obligations under the contract. Plaintiffs have submitted evidence that they had a mortgage commitment in the amount of \$352,000.00 and an available line of credit on their home equity line in the amount of \$196,073.00. This available financing plus the down payment of \$79,000.00 equals the sum of \$627,073.00. Plaintiffs have not shown any proof that they are able to provide the additional \$72,927, needed to purchase the premises for the \$700,000 contract price. Under these circumstances, there are triable issues regarding whether the plaintiffs could close on the contract and the motion for an order granting

specific performance is denied in its entirety. *See*, Goller Place Corp. v. Cacase, 251 A.D.2d 287 (2d Dept 1998.)

DATED: April 20, 2007

ORIN R. KITZES, J.S.C.