SHORT FORM ORDER

INDEX No. 04-13261
CAL. No. 06-02073-CO

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

PRESENT:

Hon ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 12-27-06
ADJ. DATE 2-26-07
Mot. Seq. # 006 - MD
007 - XMG; CASEDISP

GLENN D. WILLIAMS and DONA WILLIAMS, Plaintiffs, - against - ROBERT D. SINCLAIR and ANN SINCLAIR, Defendants.	GRESHIN, ZIEGLER & AMICIZA Attorneys for Plaintiffs 199 East Main Street, P.O. Box 829 Smithtown, New York 11787 GLYNN MERCEP AND PURCELL, LLP Attorneys for Defendants North Country Road, P.O. Box 712 Stony Brook, New York 11790

Upon the following papers numbered 1 to 38 read on this motion and cross motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 23 ; Notice of Cross Motion and supporting papers 25 - 34 ; Answering Affidavits and supporting papers ; Replying Affidavits and supporting papers 35 - 36; 37 - 38 ; Other 24 (plaintiff's memorandum of law) ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#006) by plaintiffs, Glenn D. Williams and Dona Williams, for an order granting them summary judgment and this motion (#007) by defendants, Robert D. Sinclair and Ann Sinclair, for an order granting them summary judgment is consolidated for the purposes of this determination; and it is further

ORDERED that this motion by plaintiffs, Glenn D. Williams and Dona Williams, for an order pursuant to CPLR 3212 granting them summary judgment and the return of their down payment for the conveyance of a single-family residence, is denied; and it is further

ORDERED that this cross motion by defendants, Ann Sinclair and Robert D. Sinclair, for an order pursuant to CPLR 3212, granting them summary judgment dismissing plaintiffs' complaint is granted.

This action arises out a contract for the sale of real estate. The plaintiffs, as purchasers, and the defendants, as sellers, entered into a written contract for the conveyance of a single-family residence, located at 10 Wicks Lane, Head of the Harbor, St. James, County of Suffolk, New York. The contract

dated March 26, 2003 [*sic*] stated that the premises were to be purchased "*as is*" for $2,250,000.00, all cash, without contingencies, with $3,000.00 as a nonrefundable binder, and $222,000.00 due at signing. The contract of sale when it was reduced to writing also included certain personalty items that had been excluded from the sales agreement and stated the balance due at closing was $2,000,000.00 as opposed to $2,025,000.00. The contract also stated that the sellers "at or prior to closing title, shall deliver to [p]urchaser the [c]ertificates of [o]ccupancy...for the premises as it presently exists, except for any decks, pools, and sheds, patios... in the event the certificates of occupancy...is not available,...the seller shall be given a reasonable adjournment of the closing date in order to obtain such certificate." Furthermore, the contract contained a liquidated damages provision, stating the sellers are allowed to keep the buyers' down payment in the event of a default by the purchasers.

Subsequently, disputes arose between the parties regarding landscaping, a reduction in the down payment, the obtaining of certificates of occupancy and certain personal items. Several letters were exchanged between the attorneys for the parties, wherein the defendants, on May 25, 2004, declared the plaintiffs to be in default of the contract of sale. The plaintiffs, on May 26, 2004, forwarded to the defendants a courtesy copy of their complaint seeking rescission of the contract because the parties failed to come to a meeting of the minds when the contract was executed. On June 5, 2004, the plaintiffs instituted the action seeking rescission of the contract and the return of their down payment as well as injunctive relief preventing the defendants from declaring them in default and in breach of the contract for failing to close title on the subject property. Injunctive relief was denied by order of the Court dated July 21, 2004 (Henry, J.). Plaintiffs then, on August 2, 2004, informed the defendants that they would close title on the property at the scheduled closing. However, defendants, by letter dated August 3, 2004, informed the plaintiffs that they had anticipatorily breached the contract and the defendants would retain the $225,000,00 down payment. Plaintiffs then held a closing at the offices of the defendants' prior attorney's office on the scheduled closing date of August 13, 2004, and when the defendants failed to appear for the closing, the plaintiffs instituted an action seeking the refund of their deposit because the defendants were unable to convey marketable title. Plaintiffs then moved for summary judgment, and that motion was denied by order of the Court dated September 20, 2005 (Henry, J.).

Plaintiffs served an amended complaint setting forth the same causes of action and realleging the same set of facts as had been stated in their original complaint. Plaintiffs now "renew" their summary judgment motion on the basis that the defendants' testimony eliminates all disputed issues of fact and the defendants after May 25, 2004 never intended to close title on the subject premises. Plaintiffs also assert that the seeking of a declaratory action does not equate breach of contract. Plaintiffs further contend that they could not be held to have anticipatorily repudiated the contract by instituting the action for rescission because there were no conditions precedents placed upon them prior to closing and their asking the defendants on May 26, 2004, to show the property to another buyer for resale evidenced their intent to close title. Plaintiffs submit the pleadings, the contract of sale, letters of correspondence between the parties' attorneys, court orders dated September 20, 2005 and July 21, 2004 (Henry, J.), attendance sheet for the closing, the Head of Harbor Code Chapter 65, copy of the certified check, and the deposition testimony of defendants.

Defendants , in opposition, contend that the plaintiff's motion is substantively and procedurally defective. Defendants also assert that the plaintiffs anticipatorily breached the contract and never

intended to close on the defendants' home, which they claim is evidenced by the fact that the defendants have never sought specific performance of the contract.

"A motion to renew is intended to draw the court's attention to new or additional facts which, although in existence at the time of the original motion, were unknown to the party seeking leave to renew and therefore not brought to the court's attention" (***Natale v Jeffrey Samel & Assocs.***, 264 AD2d 384. 385, 693 NYS2d 631 [1999]; ***Pahl Equip. Corp v Kassis***, 182 AD2d 22, 588 NYS2d 8 [1992]). However, this requirement is a flexible one and the court, in its discretion, may grant renewal, in the interest of justice, upon facts which were known to the movant where the movant offers a reasonable justification for failing to submit them on the earlier motion (*see*, ***Gomez v Needham Capital Group, Inc.***, 7 AD3d 568, 775 NYS2d 903 [2004]).

Notwithstanding plaintiffs assertion that they are "renewing" their motion, the Court finds that plaintiff's present motion, constitutes an impermissible successive motion for summary judgment (*see,* ***Laxrand Constr. Corp. v R.S.C.A. Realty Corp.***, 135 AD2d 685, 522 NYS2d 584 [1987]; ***Rosa v La Joux***, 93 AD2d 817, 460 NYS2d 612 [1983]; ***Abramoff v Fed. Ins. Co.***, 48 AD2d 676, 368 NYS2d 44 [1975]). Plaintiffs have neither shown why they were unable to obtain the defendants' deposition testimony at the time of their first motion, nor have the plaintiffs provided the Court with a reasonable excuse for their failure to submit the deposition testimony of the defendants with their earlier motion (*see*, CPLR 2221[e]; ***Gershon v Goldberg***, 30 AD3d 372, 817 NYS2d 322 [2006]). Moreover, the additional proof submitted by the plaintiffs does not warrant the Court reaching a different result from its prior decision.

Accordingly, the plaintiffs' motion is denied.

Defendants also cross move for summary judgment on the basis that plaintiffs breached the contract of sale and wrongfully demanded the return of their deposit. Defendants also contend that the plaintiffs decided not to purchase their home after it was discovered that the daily commute to and from their daughter's private school would be four hours. Defendants submit, the pleadings, correspondence between the parties' attorneys, copies of the deposition testimony of the plaintiffs and Ann Sinclair's affidavit.

Plaintiffs oppose the defendants' motion on the grounds that the plaintiffs did not breach the contract because they were only required to tender the purchase price, which they did, at closing. Plaintiffs also assert that the defendants unjustifiably held them in repudiation of the contract. Plaintiffs further contend that defendants were unable to close because they did not have the required certificates of occupancy as required by the contract.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see,* ***Alvarez v Prospect Hospital***, 68 NY2d 320 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). The burden will then shift to the nonmoving party to demonstrate that there are material issues of fact, however, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see*, ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace***

Episcopal Church, 6 AD3d 596, 774 NYS2d 785 [2004]).

Where the terms of a contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving practical interpretation to the language employed and parties reasonable expectations (***Correnti v Allstate Prop., LLC***, __AD3d __, __ NYS2d __, 2007 NY Slip Op 2057 [2d Dept, Mar 13, 2007]; ***Costello v Casale***, 281 AD2d 581, 723 NYS2d 44 [2001]). While purchasers are entitled to recover the money they have paid on a contract from sellers who default on law day without a showing or even a willingness to perform, where the sellers' title is incurably defective (***Cohen v Kranz***, 12 NY2d 242, 238 NYS2d 928 [1963]; ***Willard v Mercer***, 83 AD2d 656, 442 NYS2d 200 [1981]), a tender and demand must occur in order to place sellers in default where their title can be cleared without difficulty in a reasonable time (***Cohen v Kranz***, *supra*). However, purchasers who default or repudiate on a real estate contact, without breach by the sellers and without lawful excuse cannot recover their down payment where the sellers are ready, willing and able to perform on their behalf (***Vitolo v O'Connor***, 223 AD2d 763, 636 NYS2d 163 [1996]; ***Korabel v Natoli***, 210 AD2d 620, 619 NYS2d 833 [1994]; ***Cooper v Basse***, 85 AD2d 616, 444 NYS2d 955 [1981]; *see also,* 62 NY Jur, Vendor and Purchaser, § 137, p.406). Moreover, where purchasers, prior to the time for their performance, seek to repudiate or renounce a contract, this may be treated by the sellers as a complete anticipatory breach, in which case there is no necessity for the tender of performance or awaiting the arrival of the time of performance (***O'Connor v Sleasman***, 14 AD3d 986, 788 NYS2d 518 [2005]; ***Cooper v Basse***, *supra*; ***Matthews v Bearce***, 65 AD2d 853, 410 NYS2d 166 [1978]). The factual determination of whether a party has repudiated a contract prior to his time for performance is dependent upon a determination of whether "a breaching party's words or deeds are unequivocal" (***Norcon Power Partners v Niagrara Mohawk Power Corp.***, 92 NY2d 458, 682 NYS2d 664 [1998]; *see also,* Restatement [Second] Contracts § 250, II Farnsworth, Contracts § 8.21).

Here, the defendants have established their entitlement to judgment as a matter of law dismissing the plaintiffs' complaint against them (***Winegrad v New York Univ. Med. Ctr.***, *supra*; ***Zuckerman v City of New York***, *supra*). Defendants have demonstrated that the plaintiffs repudiated the contract entered into by the parties on March 26, 2003 [*sic*] and therefore are not entitled to the recovery of their down payment of $225,000. The signed contract between the parties clearly states that it is an "*all cash*" transaction and the premises are to be delivered to the plaintiffs "*as* is." Mrs. Sinclair testified that at the time the plaintiffs saw the home, there was no construction occurring, the swimming pool and patio were complete, the fencing for the pool had been ordered and would be in place prior to closing and although, the cabana was not complete, the exterior was complete and fully framed. Furthermore, Mrs. Williams testified that although the property's listing stated that the pool, landscaping and pool house was to be completed, there was only a verbal dialogue between her and Mrs. Sinclair regarding these items, and it was never reduced to a formal writing. In addition, the contract, in paragraph 42, clearly stated that "at or prior to closing title, certificates of occupancy...[would be delivered by the] sellers to the purchasers for the premises as it presently exists *except for any decks, pools, and sheds, patios, patio covers, or awnings which may be removed, without allowance or abatement of purchase price, if same is an impediment at closing*" (emphasis added). Therefore, the delivery of certificates of occupancy were excluded for these items and cannot be used to prove that the defendants were unable to deliver marketable title (*see,* ***Cohen v Kranz***, *supra*; ***Willard v Mercer***, *supra*). Nor may the plaintiffs use the fact that the defendants did not have all of the certificates of occupancy on the set law date to establish a breach because the contract did not state that time was of the essence and the plaintiffs never

provided the defendants with a reasonable opportunity to cure the alleged defect (***Cohen v Kranz***, *supra*; ***Willard v Mercer***, *supra*).

Moreover, the evidence received demonstrates that on May 14, 2004, plaintiffs decided against selling their home and took it off the market. On May 25, 2004, the plaintiffs, prior to closing on the property, sought permission from the defendants to show the home to another buyer for resale. Despite the fact that Mrs. Williams testified that she nor her husband authorized their attorneys to cancel the contract, she also stated that they received copies of all the correspondence between their attorney and the Sinclairs' attorney. Mrs. Williams further testified that her and her husband decided to rescind the contract a few days prior to the filing of the order to show cause on May 28, 2004. By the time the order to show cause had been filed, plaintiffs had already made numerous requests to terminate the contract and demonstrated to the defendants that they did not intend on taking title to the subject premises. Therefore, the defendants were not unjustified in seeking reassurances from the plaintiffs on May 21st and May 25th. Nor was it unjustified when the defendants on May 28th, after receiving the summons and complaint demanding rescission of the contract and the return of plaintiffs' down payment, declared the plaintiffs in default and in breach of the contract (*see,* ***O'Connor v Sleasman***, *supra*; ***Norcon Power Partners v Niagara Mohawk Power Corp.***, *supra*). Thus, the plaintiffs, who were only required to tender payment of the remaining balance on law day, had demonstrated that they did not intend to complete performance, and consequently defendants were not in breach when they failed to attend the closing on August 13th since plaintiffs had already unequivocally repudiated the contract (***Long Island R.R. Co. v Northville Indus. Corp.***, 41 NY2d 455, 393 NYS2d 925 [1977]). Moreover, the parties to this transaction were dealing at arm's length and the plaintiffs were aware that they were making a sizeable down payment. Thus, any negotiating regarding the installation of inground sprinklers or the size of the down payment should have been done before the contract was signed. Since, there has not been any evidence of overreaching on the part of the defendants and defendants have shown that the plaintiffs' anticipatorily repudiated the contract, for which the defendants, held them in total breach, the plaintiffs are not entitled to the return of their down payment (***Matthews v Bearce***, *supra*). Furthermore, the down payment was 10% of the actual purchase price and since the actual damages in cases involving real estate transactions generally are very close to the 10% retained, the defendants are entitled to maintain the plaintiff's down payment as liquidated damages (***Mexton Bldrs v La Galbo***, 68 NY2d 373, 509 NYS2d [1986]; ***Willard v Mercer***, *supra*; ***Vitolo v O'Connor***, *supra*). Therefore, it cannot be said that the defendants failed to perform any terms of the contract prior to closing that would have placed them in willful default and require them to return the plaintiff's down payment (***Vitolo v O'Connor***, *supra*; ***Cooper v Basse***, *supra*).

Accordingly, the plaintiffs' motion is denied and the defendants' cross motion is granted.

Dated: MAY 2 1 2007

J.S.C.

__X__ **FINAL DISPOSITION** ____ **NON-FINAL DISPOSITION**