SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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MITCHELL PACIFICO,

Plaintiff,

-against-

JAMES KINSELLA, AUGUST TOLOMIE, and NORMAN DELMAN, ESQ., as stakeholder,

Defendant.

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DCM PART 4

Present:
HON. ROBERT J. GIGANTE

DECISION and ORDER

Index No. 102105/06
Motion No. 273-002

The following papers numbered 1 and 2 were used on this motion the 30th day of March 2007:

Notice of Motion and Supporting Papers
(dated January 25, 2007) 1

Affidavit in Opposition and Exhibits
(dated March 23, 2007) 2

Upon the foregoing papers, plaintiff's motion for summary judgment is denied.

On August 12, 2005, plaintiff, as buyer, and defendants, as sellers, entered into a contract for the sale of land located at 2052 Richmond Road, Staten Island, New York (hereinafter "premises") for the sum of $3,300,000.00. The down-payment was $330,000.00. It is undisputed that a rider to the contract provided that the agreement was subject to (1) any proposed street widening up to 5 feet, and (2) minor encroachments from the record line of hedges, fences, curbs or retaining walls (*see* Plaintiff's Exhibit A, Rider ¶ 25 [e], [f]). In addition, paragraph 29 of the rider to the contract provided

> "[p]urchaser shall have 90 days from the date of receipt of the contract to conduct due diligence which will include, but not be

> limited to title search[,] survey of property[,] environmental review, zoning studies and other investigations deemed necessary for the development of this property for purchaser's intended purpose. Purchaser may cancel this contract and seller should return the down payment monies being held here under, if purchaser for any reason determines property is not fit for his intended purposes. Intended purpose is use of the property in accordance with Federal, State and City laws as of the date of this contract. Purchaser shall have the right of access upon reasonable notice to due inspection and testing"

On June 30, 2006, plaintiff provided defendants with a copy of a Title Abstract Report issued by Washington Title Insurance Company which indicated that approximately 17 feet of the premises was within the adopted street widening line of Midland Avenue, and up to five feet was within the widening line of Colfax Avenue. In addition, the survey indicated that a chain link fence encroached on the premises by as much as 2.8 feet. As a result, plaintiff claimed that the title was unmarketable under paragraph 25 of the rider, and opted to cancel the contract. Defendant rejected this argument, whereupon plaintiff commenced this action on or about July 13, 2006 for, *inter alia*, the return of his deposit.

In support of his motion for summary judgment, plaintiff contends that he is entitled to cancel the contract under paragraph 25. However, defendants argue that plaintiff's attempt to rescind the contract is void because it was not made within the requisite time period of ninety (90) days from receipt of the contract, as required by paragraph 29.

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 demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, the court is enjoined to accept the evidence tendered by the opposing party as true, and "must deny the motion if there is even arguably any doubt as to the existence of a triable issue"

(*Fleming v Graham*, 34 AD3d 525 [2d Dept 2006] quoting *Barker v Briarcliff School Dist.*, 205 AD2d 652, 653 [2d Dept 1994] [internal quotation marks omitted]).

It is well settled that "[w]hether a contract is ambiguous is a question of law for the court and is to be determined by looking within the four corners of the document" (*see Geothermal Energy Corp. v Caithness Corp*., 34 AD3d 420, 423 [2d Dept 2006] quoting *Kass v Kass*, 91 NY2d 554, 566 [1998][internal quotation marks omitted]). In determining whether an ambiguity exists, the court must "read [the document] as a whole to determine the parties' purpose and intent, giving a practical interpretation to the language employed so that the parties' reasonable expectations are realized" (*Queens Best v Brazal S Holdings*, 35 AD3d 695, 697 [2d Dept 2006][internal quotation marks omitted]). "[A] contract is ambiguous if the provisions in controversy are reasonably or fairly susceptible of different interpretations," whereas "[a] contract is *un*ambiguous if on its face it is reasonably susceptible of only one meaning" (*Geothermal Energy Corp. v Caithness Corp.* 34 AD at 422 [emphasis added]). When a contract or clause is found to be ambiguous, extrinsic evidence is admissible and "the resolution of the ambiguity is for the trier of fact" (*id.* at 423).

Here, plaintiff has met his burden by tendering sufficient evidence to establish that a state of facts inconsistent with paragraph 25, would permit him to rescind the contract. Therefore, "the burden shifts to the [party opposing the motion] to lay bare his or her proof and demonstrate the existence of a triable issue of fact" (*Chance v Felder*, 33 AD3d 645, 645-646 [2d Dept 2006]; *see Zuckerman v City of New York*, 49 NY2d 557 [1980]).

In this case defendants, have not met their burden of demonstrating that the 90-day period described in paragraph 29 clearly imposes that same time limit on the purchaser's ability

to disaffirm the contract under paragraph 25, especially subparagraphs (a), (c)and (e). In fact, it is clear to the court that it does not. Under paragraph 29, plaintiffs had 90 days *to conduct due diligence*, but the next sentence, giving plaintiff/purchaser the right to cancel if the property is not fit for intended purposes, contains *no* such time restriction. Had the parties intended to impose a time limit on purchaser's right to cancel for the reason stated, they would have clearly done so in the second sentence of the paragraph 29 (*Plainedge Federation of Teachers v. Plainedge Union Free School District*, 87 AD2d 631 (2d Dept.); see also, *H.K.S. Hunt Club Inc. v. Town of Claverack*, 222 AD2d 769).

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is granted. Plaintiff shall be entitled to judgment in his favor on the first and fourth causes of action of his complaint, and pursuant thereto, the escrowee, Norman Delman, Esq. shall return the $330,000.00 contract deposit to the plaintiff's attorney within 15 days after service of a copy of this order upon him.

E N T E R,

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Robert J. Gigante, J.S.C

Dated: June 11, 2007