

**Assenza v Demperio**

2007 NY Slip Op 32908(U)

September 12, 2007

Supreme Court, New York County

Docket Number: 4217-07/

Judge: Thomas A. Adams

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

*Present:*

HON. THOMAS A. ADAMS,  
*Acting Supreme Court Justice*

TRIAL/IAS, PART 37  
NASSAU COUNTY.

SALVATORE AND PATRICIA ASSENZA,

Plaintiff(s),

MOTION DATE: 9/30/07

INDEX NO.: 4217/07

-against-

SEQ. NO. 1

NO. 2

EMMA DEMPERIO,

Defendant(s)

The parties respective motions, pursuant to CPLR 3212, for an award of summary judgment are determined as hereinafter provided.

On October 23, 2006 the parties executed a contract for the purchase and sale of the defendant's single family 3050 Johnson Place residence in Wantagh (see defendant's Exhibit A). The plaintiffs paid a \$50,000.00 down payment towards the \$525,000.00 purchase price and a tentative closing date of December 16, 2006 was scheduled. Paragraph 12 of the agreement provides, in pertinent part, "[p]urchaser acknowledges and represents that Purchaser is fully aware of the physical condition and state of repair of the premises ... based on Purchaser's own inspection and investigation thereof, and that Purchaser is entering into this contract based solely upon such inspection and investigation and not upon any information ... given or made by the Seller ... and shall accept the same 'as is' ...".

On December 8, 2006 the defendant's counsel wrote to the plaintiffs' attorney requesting a closing date (see defendant's Exhibit B). A week later, on December 15, 2006, after no response to the initial inquiry had been received, the defendant's counsel sent a second missive declaring a January 15, 2007 "time of the essence" date (see defendant's Exhibit C).

The plaintiffs' attorney finally replied on January 10, 2007 stating, inter alia, "my client has not yet received a written mortgage commitment and we are not in a position to close title. We

are working diligently with our mortgage broker to secure our financing .... Inasmuch as my client has not received a commitment, your time of the essence closing is hereby rejected" (see defendant's Exhibit D). The defendant's counsel immediately responded "[p]lease be advised, that we have learned that the reason for the delay in closing is not your client's failure to secure financing which they have in place, but rather an inability to secure and obtain a Certificate of Occupancy for their house. Under the circumstances, ... we are, however, going to extend the closing date one last time until February 1, 2007 at 10:00 a.m. in our office. Time is of the Essence! Should your client, not be able to close at that time and date, Emma Demperio will retain the \$50,000.00 deposit" (see defendant's Exhibit G). Ultimately, on January 17, 2007 the plaintiffs' attorney notified the defendant's counsel "[u]nfortunately, my clients have been denied a mortgage commitment .... Pursuant to the contract terms, please refund our clients' contract down payment" (see defendant's Exhibit H). The January 12, 2007 denial (see defendant's Exhibit I) recites "insufficient income" as its basis. The defendant declined to return the down payment prompting this action.

The plaintiffs' February 22, 2007 pleading (see defendant's Exhibit C) alleges that the defendant has breached the contract by retaining the \$50,000.00 down payment and asserts a \$55,995.00 lien. Issue was joined on or about March 8, 2007 with the service of the defendant's verified answer with affirmative defenses. It also interposed a counterclaim to retain the down payment as liquidated damages in accordance with paragraph 23 of the contract (see defendant's Exhibit M). The plaintiffs' reply was served on or about March 29, 2007 (see defendant's Exhibit AA).

The defendant's conclusion that, contrary to their January 17, 2007 proclamation, the plaintiffs were able to obtain a mortgage commitment is premised, in sum, upon the April 24, 2007 deposition of their mortgage broker, Anne Fitzgerald-Castro (see defendant's Exhibit E). Ms. Fitzgerald-Castro, a Vice-President of Stafford Capital, Inc., testified, inter alia, that on January 9, 2007 (or three days prior to the January 12, 2007 denial) the plaintiffs received a \$420,000.00 mortgage commitment from Flagstar Bank by e-mail (p. 16, L10 - p. 17, L4; see defendant's Exhibit F). She did not, however, recall whether she sent a copy of the commitment to the plaintiffs (p. 18, L17) or subsequently spoke to them about it (p.

64, L12).

Moreover, the January 12, 2007 denial was thereafter allegedly issued because the plaintiff Salvatore Assenza purportedly informed her that the defendants were unable to sell their present home since "[t]here was a CO issue" (p. 24, L15-24; p. 25, L22). She was also aware that the plaintiffs were interested in purchasing a separate residence (p. 27, L6). In fact, they later sold their premises (p. 28, L19; defendant's Exhibit T) and on January 12, 2007 - the same day as the denial - they executed a contract to acquire 1389 Field Lane in Seaford and paid a \$25,000.00 down payment (see defendant's Exhibit Z). On January 23, 2007 Flagstar issued the plaintiffs a \$342,000.00 mortgage commitment (p. 34, L 2; see defendant's Exhibit S) and that deal closed on February 16, 2007 (p. 38, L14). Confirmation of the rationale for the January 12, 2007 denial exists in the form of a January 12, 2007 facsimile from the mortgage broker, Stafford Capital, Inc., to Flagstar declaring "customer has advised us that he will not be able to sell his house before and he needs to close on this one before, can he still qualify for this loan, thank you" (see defendant's Exhibit V).


The plaintiffs have cross moved for summary relief asserting, in effect, impossibility of performance. More specifically, although the premises were purportedly "marketed" to them and they allegedly "bargained for" a home with the two "legal" full baths and kitchens, a search of the Town of Hempstead's records reveals that certificates of occupancy do not exist for the conversion of the defendant's property. Therefore, the defendant's time of the essence letters are alleged to have been "merely a ruse to precipitate or create a scenario for an alleged default by the plaintiffs" (6/27/07 affirmation of Andrew R. Bensi, Esq., paras. 11, 14 and 48). Rather, the January 12, 2007 loan denial was reportedly the result of the plaintiff Patricia Assenza's loss of employment (6/27/07 affidavit, para. 3) notwithstanding Flagstar's subsequent January 23, 2007 issuance of the \$342,000.00 mortgage commitment ( see defendant's Exhibit S).

Contrary to the plaintiffs' contentions, the defendant has established a prima facie entitlement to summary judgment by demonstrating through, inter alia, Ms. Fitzgerald-Castro's non-party deposition testimony and supporting documentation (e.g., defendant's Exhibit V, the January 12, 2007 facsimile) that the plaintiffs

anticipatorily breached the contract by ignoring the time of the essence dates after acquiring a mortgage commitment ( see Henger v Reed, 2 AD3d 683, 684-685; see gen. 91 New York Jurisprudence 2d, Real Property Sales and Exchanges Section 202). In opposition, the plaintiffs have failed to establish a triable issue of fact. Their conclusory and unsubstantiated assertion that the January 12, 2007 denial was precipitated by Ms. Assenza's loss of employment rather than an inability to sell their home is belied by the record. Indeed, on January 4, 2007 (during the pendency of this contract, after the December 15, 2006 time of the essence letter and prior to the January 9, 2007 mortgage commitment), the plaintiffs executed a \$449,999.00 sales agreement for the 1389 Field Lake property ( see defendant's Exhibit X). Nevertheless, six days later, on January 10, 2007, their counsel informed the defendant's attorney "[w]e are working diligently with our mortgage broker to secure our financing" for the 3050 Johnson Place premises ( see defendant's Exhibit D).

Accordingly, the defendant's application, pursuant to CPLR 3212, for an award of summary judgment entitling her to retain the plaintiffs' \$50,000.00 down payment as liquidated damages is granted and the plaintiffs' cross motion for summary judgment and a release of the down payment is denied. Irrespective of their subjective belief as to the nature of the deal, the plain language of the contract was for the sale of the defendant's 3050 Johnsons Place single-family home "as is" ( see defendant's Exhibit A, para. 12). "For more than a century it has been well settled that in this State that a vendee who defaults on a real estate contract without lawful excuse, cannot recover the down payment" ( Micciche v Homes By Timbers, Inc., 18 AD3d 833, 834 quoting Maxton Bldrs. v Lo Galbo, 68 NY2d 373, 378).

Dated: 9-12-07

  
A.J.S.C.

**ENTERED**

SEP 17 2007

NEW YORK COUNTY  
COUNTY CLERKS OFFICE