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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MILTON A. TINGLING J.S.C.
Justice

PART 44

Shafer

-v-

Glauber

INDEX NO. 114945/07

MOTION DATE 3/26/08

MOTION SEQ. NO. 1

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 7/3/08

J.S.C.

Check appropriate: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 60

NATHANIEL SHAFER and EVE SHAFER,

Plaintiffs,

Index No. 114945/07

-against-

BARUCH GLAUBER,

Defendant.

TINGLING, J.:

Plaintiffs sellers, Nathaniel and Eve Shafer, move, pursuant to CPLR 3212, for summary judgment seeking a declaratory judgment directing that under the terms of their contract, their attorney is authorized to release a $50,000 security deposit to them, together with damages consisting of interest, costs and attorney's fees. Plaintiffs also seek dismissal of the counterclaim as barred by the statute of frauds pursuant to General Obligations Law § 5-703 (2). Defendant, prospective purchaser, Baruch Glauber, opposes the motion, arguing that issues of fact exist concerning whether the plaintiffs breached a material part of the contract.

Background

This litigation arises out of a contract of sale of plaintiffs' one family residence located at 18 Skytop Road, Woodbury, New York (Contract). The parties executed the Contract on July 17, 2007, agreeing to a closing date of August 17, 2007 and a purchase price of $700,000.00.

The buyer then deposited a $50,000 down payment in escrow with the seller's attorney (Escrowee) pursuant to the Contract's escrow clause (Escrow Clause).

The Contract's Escrow Clause provided, in pertinent part, under paragraph 6 that:

> If Escrowee does not receive Notice of objection from such other party to the proposed payment within 10 business days after the giving of such Notice, Escrowee is hereby authorized and directed to make such payment. If Escrowee does receive such Notice of objection within such 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, non-appealable judgment, order or decree of a court.**... . Escrowee ... shall be permitted to act as counsel for the Seller in any dispute as to the disbursement of the down payment ... (emphasis added).

In a rider to the Contact, fully executed by both parties, it was acknowledged and agreed that defendant purchaser would be permitted access to the property (paragraph three) and that purchaser was to accept delivery of the property in its "as is" condition (paragraph four), that any "warranties [concerning the property] shall not survive delivery of the deed" (paragraph seventeen), and that defendant purchaser is "fully aware of the physical condition and state of repair of the premises and of all other property included in the sale" (paragraph twenty-one) (Rider, Plaintiff's Ex C). The parties also executed a separate lead hazard disclosure rider (Plaintiff's Ex D).

The parties agreed to various adjournments of the August 17, 2007 closing date until seller's counsel, by letter dated September 18, 2007, and subsequent notices, set a closing date for October 9, 2007, clearly setting forth "time being of the essence" (*see* Ex A, B). In letters dated September 26, 2007, October 1, 2007 and October 3, 2007, plaintiffs reaffirmed their intention to close on October 9, 2007 and that time was of the essence. The letters clearly

conveyed that there was no longer room to renegotiate terms including price and that if defendant purchaser did not show up on the closing date, he would be considered in default and that the deposit would be forfeited.

The October 9, 2007 closing was set to take place at the office of the defendant purchaser at 1p.m. Importantly, the defendant's attorney did not object to the place or time. While the defendant's attorney was present the defendant did not appear. Plaintiffs tendered all of the papers necessary to close at the closing including the proposed deed. In accordance with the Contract, in a letter dated October 10, 2007, seller's counsel notified defendant that he had received a notice from the sellers to deliver the escrow deposit to them because of defendant's default. In response, in a letter dated October 19, 2007, defendant's counsel objected to the release of the escrow to plaintiff on the basis that his client was still "leaning toward a purchase of the property," (Plaintiffs' Ex C). On November 14, 2007, over a month after the time-of-the-essence closing, defendant's counsel wrote a second letter to plaintiffs asking plaintiffs for a $150,000 price reduction to $550,000 because plaintiffs failed to provide a second means of access to the Property, which was a breach of a material term of the purchaser's rider to the Contract (paragraph 13 subparagraph g) (Plaintiffs' Ex O). The letter continued that if plaintiffs are "incapable of delivering the required easements to the property" which was purportedly discussed at length by the parties and refuse the proposed reduction in the price, the Contract was "terminated". This declaratory action then ensued. Defendant interposed a counterclaim seeking the deposit based upon plaintiffs' asserted breach of the Contract by failing to provide a second means of access to the Property (Plaintiffs' Ex P).

The burden is on the moving party to make a prima facie showing of entitlement to

summary judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). Plaintiffs sellers have made a prima facie showing of entitlement to summary judgment as a matter of law (see *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Time is of the essence can be established by a mutual agreement (Swezey v Marra, 143 AD2d 827 [2nd Dept 1988]) or if special circumstances surrounding its execution require it (*see, Sohayegh v Oberlander,* 155 AD2d 436, 438 [2nd Dept 1989]). Where time is not stated to be of the essence in the agreement, a party may give notice making time of the essence in a "clear, distinct and unequivocal way" which fixes a reasonable time within which to perform and "inform(s) the other party that if he does not perform by that date, he will be considered in default (citation omitted)" *(Whitney v Perry*, 208 AD2d 1025 [3rd Dept 1994]).

Plaintiffs have clearly established herein that defendant was notified in multiple letters that the closing date was set for October 9, 2007 and that if defendant did not appear defendant would be considered in default (*Sohayegh v Oberlander*, 155 AD2d at 438). Moreover, plaintiffs have established that defendant failed to object to the tender of the deed on or prior to the closing date at all, for any reason. In particular, plaintiffs demonstrated that the defendant purchaser was in default because he failed to appear, in violation of the "time of the essence" closing.

The burden then shifts to the defendant to demonstrate the existence of a triable issue of material fact concerning whether plaintiffs were in breach of the Contract (*Henderson v City of New York*, 178 AD2d 129 [1st Dept 1991]). Defendant fails to point to any part of the fully executed Contract or Riders to support his assertion that the Contract requires plaintiff to provide a secondary access road. Instead, defendant's counsel seeks to enforce an oral "understanding"

between defendant and his broker that defendant was purportedly entitled to a second access road (Affirmation of Baruch Glauber dated March 10, 2008 annexed to Defendant's Opposition). Defendant argues that it was "known" that a secondary means of access was important to him and that he made this clear to his broker and that he was "told that there would be two means of access with recorded easements for both" (*id.*).

However, pursuant to General Obligations Law § 5-703 (2), any contract for the sale of an interest in real property "is void unless the contract or some note or memorandum thereof, expressing the consideration, is in writing, subscribed by the party to be charged, or by his lawful agent thereunto authorized by writing." It is clear that defendant's purported oral understanding that he was entitled to a second access road is not only in direct conflict with clear "as is" terms of the Contract and Rider, but also fails to satisfy the statute of frauds and is, therefore unenforceable (General Obligations Law § 5-703 [2]; *Apostle v Kac*, 113 AD2d 912 [2nd Dept 1985]). Nor does the unexecuted writing submitted by defendant, which purports to state at paragraph 13, subparagraph g that plaintiffs were required to provide a second means of access, suffice since this writing admittedly was never signed by either of the parties (*id.* . Document, Defendant's Ex B). Since defendant have failed to raise a triable issue of fact to oppose plaintiffs entitlement to release of the escrow deposit, plaintiffs request for relief is granted.

In addition, that portion of the motion which seeks to dismiss the counterclaim seeking release of the escrow to defendant for breach of that portion of the purported oral agreement to provide secondary access to defendant is also dismissed for the same reason. It is clear that the purported oral contract herein fails to satisfy the statute of frauds and is therefore unenforceable (*DeMartin v Farina*, 205 AD2d 659 [2nd Dept 1994]). While plaintiffs may have discussed

certain collateral terms to the Contract such as a second access road, said terms do not appear in either the Contract or the Rider and thus, are not binding and do not serve as evidence of breach.

Any relief sought not specifically addressed is denied.

Accordingly, it is

ORDERED that plaintiffs motion for summary judgment is granted; and it is hereby

ADJUDGED and DECLARED that defendant was in default in failing to appear or pay the balance of the sums required at the time of essence closing; and it is hereby

ADJUDGED and DECLARED that the $50,000 security deposit held in escrow may be distributed to plaintiffs by Jacob Rabinowitz Esq. plaintiffs' attorney ; and it is further

ORDERED that defendant's counterclaim for breach of contract is dismissed.

This constitutes the order and judgment of the court.

Dated: 7/3/08

HON. MILTON A. TINGLING
J.S.C.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).