

Suazo v Musso Realty LLC

2008 NY Slip Op 30359(U)

February 4, 2008

Supreme Court, Nassau County

Docket Number: 9940-07/

Judge: Daniel R. Palmieri

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SHORT FORM ORDER AND JUDGMENT

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

Present:

**HON. DANIEL PALMIERI
Acting Justice Supreme Court**

-----X
DULCE and MANASE SUAZO,

TRIAL TERM PART: 48

Petitioners,

-against-

INDEX NO.: 19940/07

**MOTION DATE: 11-29-07
SUBMIT DATE: 1-15-08
SEQ. NUMBER - 001**

**MUSSO REALTY LLC, MUSSO 102ND STREET
LLC, FORCHELLI, CURTO, SCHWARTZ,
MINEO, CARLINO & COHN, LLP, and
ROBERT CHICCO, ESQ.**

**MOTION DATE: 12-20-07
SUBMIT DATE: 1-15-08
SEQ. NUMBER - 002**

Respondents.

-----X

The following papers have been read on this motion:

- Order to Show Cause, dated 11-20-20.....1**
- Notice of Cross Motion, dated 12-17-07.....2**
- Affirmation in Opposition to Cross Motion, dated 1-8-08.....3**
- Reply Affirmation, dated 1-14-08.....4**

The petition for a declaration that the contract of sale between the petitioners and respondents Musso Realty LLC and Musso 102nd Street LLC is null and void, and for return of a down payment made by petitioners to the respondents, presently held in escrow by the other named respondents as attorneys, is granted to the extent that the Court converts this proceeding to an action for a declaratory judgment, and declares that petitioners are entitled

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to terminate the contract as a result of their inability to procure a Loan Commitment Letter as defined in the contract, and their giving prompt notice to the respondents upon so learning. Respondents Forchelli, Curto, Schwartz, Mineo, Carlino & Cohn, LLP, and Robert Chicco, Esq. are hereby directed to pay over to petitioners' attorney such down payment within 10 days of the date of this Order and Judgment. The cross motion for an order permitting the attorney respondents to turn over the down payment to the other respondents is denied.

Initially, the Court notes that neither petitioners nor respondents have submitted or referred to an answer to the petition. Further, the petition indicates that the essential relief sought is a declaratory judgment, more appropriately brought as an action therefor. CPLR 3001; *see Temple Constr. Corp. v Sirius America Ins. Co.*, 40 AD3d 1109 (2d Dept. 2007). Nevertheless, given the respective prayers for relief before the Court and the evidence presented, it is apparent that they have treated these applications as ones for summary judgment, even though issue has not been joined. *See*, CPLR 3212.

Accordingly, the Court hereby converts this proceeding to an action for a declaratory judgment (CPLR 103[a]; *Temple Constr. Corp., supra*) and, notwithstanding the absence of an answer, will treat the petitioners' application and the cross motion as ones for summary judgment. *See, Feitner v Town of Smithtown*, 23 AD3d 431 (2d Dept. 2005). Parties are of course free to chart their own procedural course provided public policy is not offended (*J&A Vending v J.A.M. Vending*, 303 AD2d 370, 371 [2d Dept. 2003]), and no such impediment exists here.

The record reveals that petitioners were the contract vendees of a condominium unit in Mineola, New York to be purchased from respondents Musso Realty LLC and Musso

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102nd Street LLC. The agreement was dated July 27, 2007. However, there had been a prior agreement under which the disputed down payment of \$20,000 was made, and the parties agreed that this money would be applied to the July agreement. Apparently under the initial agreement, the petitioners had applied for financing from Countrywide Home Loans, Inc., and on May 24, 2007 had received a conditional approval. One of these conditions was an exterior appraisal to support the value of the unit being purchased.

Under the “Financing Contingency Rider To Purchase Agreement”, also dated July 27, 2007, the petitioners had the right to cancel the agreement if they failed, “through no fault of Purchaser, to obtain a ‘Loan Commitment Letter’ (as defined below) within the forty-five day period following the date (the ‘Contract Date’) on which a fully executed copy of the Purchase Agreement is delivered to Purchaser or Purchaser’s Attorney (the ‘Mortgage Contingency Period’).”

The term “Loan Commitment Letter” is defined as a “written commitment for purchase money financing which is used to Purchaser by a lending institution with or without recourse, and whether or not conditional upon any factor *other than an appraisal satisfactory to the lending institution...* which provides for substantially the following:” (Emphasis supplied.)¹

The Rider further recites that “An offer to make a loan that is conditioned on obtaining a satisfactory appraisal shall become a ‘Loan Commitment Letter’ *upon such condition being met.*” (Emphasis supplied.)

¹ This list is comprised of five items other than an appraisal, and includes, among other things, the sum to be financed. Respondents do not contend that in applying for financing the petitioners failed to seek any of the named components.

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The Rider also provides that that “if Purchaser complies with Purchaser’s Financing Obligations... and is unable to obtain a Loan Commitment Letter... Purchaser shall give notice to Sponsor within five (5) days after the expiration of the Mortgage Contingency Period. A copy of any loan refusal letter or non-complying Loan Commitment Letter (as the case may be) issued by the lending institution shall accompany the notice, if available, or if not then available, shall be provided promptly after receipt.” On receipt of such a notice, the seller could establish a new contingency period of between two and four weeks – or terminate the purchase agreement.

Finally, the Rider concludes with the following: “Unless the Purchaser duly exercises his or her right to terminate this Purchase Agreement in accordance with the provisions of this Rider, Purchaser shall be deemed conclusively to have waived this financing contingency and this Purchase Agreement shall be deemed binding on an all-cash basis.”

The lending institution, Countrywide Home Loans, sent a notice to the plaintiffs dated October 10, 2007 that it would not make the loan applied for, as the appraisal was unacceptable because of an insufficient property value. Two days later, on October 12, 2007 the petitioners’ attorney wrote to respondent Robert Chicco, Esq. notifying him of the rejection and asking him for return of the down payment, asserting that the contract was now null and void.

The respondents do not dispute the fact that under the foregoing sections Countrywide’s refusal meant that the petitioners never received a Loan Commitment Letter, giving them the right to cancel the agreement. However, respondents stand behind Mr. Chicco’s response to petitioners’ attorney, made in his letter of October 15, 2007, in which he contended that because the “mortgage contingency period” ran out on September 15, 2007

(some four weeks earlier than petitioners' notice) petitioners could no longer cancel and had to appear and close. In that same letter, Mr. Chicco stated that notice of a closing date had been sent on August 27, 2007, setting such closing for September 28, 2008, but that petitioners had not appeared. He then set a "time of the essence" closing for October 31, 2007. Petitioners did not appear, and this action resulted. In their cross motion, the respondents rely, in effect, on paragraph 23 of the main contract, which provides that in the event of purchaser's breach the seller could retain monies paid on account as liquidated damages.

The history of the transaction is undisputed, and both petitioners and respondents rely on the contract. In interpreting the contract, a court should arrive at a meaning that will give fair meaning to all of the language employed by the parties, and reach a practical interpretation that will meet their reasonable expectations. *McCabe v Witteveen*, 34 AD3d 652 (2d Dept. 2006). A contract should not be interpreted in such a way as would leave on its provisions substantially without force or effect. *T.M. Bier & Assoc., Inc. v Piraino*, 16 AD3d 578 (2d Dept. 2005). Although contract language that is clear and unambiguous must be enforced according to its terms (*Manzi Homes, Inc. v Mooney*, 29 AD3d 748 [2d Dept. 2006]), no interpretation should leave one party with an unfair and unreasonable advantage over the other. *Metropolitan Life Ins. Co. v Noble Lowndes Intl.*, 84 NY2d 430, 438 (1994); *78th & Park Corp. v Hochfelder*, 262 AD2d 204 (1st Dept. 1999).

Essentially, the respondents are relying on the provision under which the petitioners could cancel only within five days after the 45 day mortgage contingency period expired. However, the agreement provides no guidance as to what a willing purchaser should do to preserve the right to cancel in the event, as happened here, that he or she had not yet received

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a determination from the lender regarding an appraisal within that 45-day period. Moreover, in the absence of an adverse determination mere lender silence within such period did not necessarily render a conditional approval “non-complying,” the other trigger for seeking cancellation, inasmuch as that term is not specifically defined to encompass such a circumstance. Indeed, as noted above the Rider requires the loan commitment letter to contain several other provisions to be acceptable, and exempts an appraisal therefrom. The Court finds that the parties thus distinguished a loan commitment letter that failed to contain one or more of the other required components – which clearly would be “non-complying” – from one that contained a satisfactory appraisal as a condition for approval.

The foregoing amounts to a trap for a purchaser. Under the Rider the purchaser is not on notice that the passage of the 45 days renders the appraisal-conditioned approval “non-complying,” yet under the respondents’ interpretation the purchaser has to cancel a purchase he or she may still want simply because there is no news from the financial institution – or face the possibility that the financing ultimately is declined and the deposit lost because the purchaser cannot complete a “cash” closing. If the purchaser does send this defensive cancellation, however, he or she turns over that very right to cancel to the seller, as that is one option available to the latter upon receiving the purchaser’s notice. The seller could, but was not obliged to, extend the period. Thus, faced with a delay on the part of his lender, the purchaser, through no fault of his/her own, has to “roll the dice” if purchase of the condominium unit is still desired.

The dilemma is made clear by what happened in this case. The respondents urge, in effect, that if the purchasers wanted to make sure that they were not in the position they now occupy – unable to close because they had no financing, but still obliged to do so and thus

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lose the deposit – they should have given notice within five days after the mortgage contingency period ended that they were canceling the agreement. They do not advise, however, as to how the purchasers could do so without also risking the loss of their bargain, as outlined above.

The sellers/respondents, on the other hand, suffer no adverse change in position if they themselves simply choose to do nothing after the five day cancellation period passes with no notice from the purchasers, and wait to see what happens. If the financing comes to fruition, even late, they could elect to sell the condominium as agreed. If the financing ultimately was declined, or even if the purchasers had not yet heard and the sellers just grow impatient, they could schedule a closing, the purchasers would not be able to close, and the deposit would be forfeited.

Here, a first closing on September 28, 2007 was scheduled by respondents' notice on August 27, even before the 45 day mortgage contingency period ended. The second, time of the essence closing was not scheduled until *after* respondents received notice that the purchasers had been unable to obtain the financing needed. Now, relying on the waiver of the mortgage contingency clause, the respondents seek the forfeit of the down payment.


Given the law cited above and the undisputed facts of this case, including petitioners' notice of cancellation within five days or the petitioners' learning that the lender had refused to make the loan as a result of an unsatisfactory appraisal, the Court holds that the contract's mortgage contingency waiver provision should not be enforced, and the down payment refunded, because enforcement would leave the respondents with an unfair and unreasonable contractual advantage, and would lead to an unconscionable result. *Metropolitan Life Ins. Co. v Noble Lowndes Intl., supra*. Thus, as the petitioners could not provide a firm commitment

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letter within the contemplated period they were not bound to close and the down payment should be refunded. *See, Severini v Wallace*, 13 AD3d 434 (2d Dept. 2004); *Munson v Germerican Assocs.*, 224 AD2d 670 (2d Dept. 1996); *Weaver v Hilzen*, 147 AD2d 634 (2d Dept. 1989).

This shall constitute the Decision, Order and Judgment of this Court.

ENTER

DATED: February 4, 2008


HON. DANIEL PALMIERI
Acting Supreme Court Justice

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ENTERED

FEB 07 2008

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**