

<b>Schwiesow v Werner</b>
2008 NY Slip Op 30749(U)
March 5, 2008
Supreme Court, Nassau County
Docket Number: 0060-07/
Judge: Thomas Feinman
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**SHORT FORM ORDER**

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

Present:

**Hon. Thomas Feinman**  
Justice

\_\_\_\_\_  
DONALD SCHWIESOW and LINDA G. BLUM-  
SCHWIESOW,

Plaintiffs,

- against -

CELESTE WERNER and STEVEN S. KAISER,  
as Escrow Agent,

Defendants

TRIAL/IAS PART 20  
NASSAU COUNTY

INDEX NO. 20060/07

**X X X**

MOTION SUBMISSION  
DATE: 1/31/08

MOTION SEQUENCE  
NOS. 001, 002

The following papers read on this motion:

Notice of Motion and Affidavits.....	<u>  X  </u>
Notice of Cross-Motion and Affidavits.....	<u>  X  </u>
Affirmations in Opposition.....	<u>  X  </u>
Reply Affirmations.....	<u>  X  </u>

The plaintiffs move, by way of notice of motion for summary judgment in lieu of complaint pursuant to CPLR §3213, for an order granting plaintiffs judgment in the sum of Thirty-Five Thousand Dollars, (\$35,000.00), based upon breach of contract, and for an order of the court directing the escrow agent to release the funds concerned to the plaintiffs. The defendant, Celeste Werner, cross-moves for an order denying plaintiffs' motion pursuant to CPLR §3213, and an order pursuant to CPLR §3212 dismissing plaintiffs' action with prejudice compelling the defendant, Steven S. Kaiser, as escrow agent, to return to the defendant, Celeste Werner, her full down payment in the amount of Thirty-Five Thousand Dollars, (\$35,000.00). The plaintiffs submit opposition to the cross-motion and a reply affirmation in support of the plaintiffs' motion for summary judgment in lieu of complaint. The defendant submits opposition to the plaintiffs' motion

The plaintiffs, owners of certain real property located at 180 Hamilton Avenue, Island Park, New York, contracted with the defendant, Celeste Werner, for the purchase and sale of the property. The defendant, Celeste Werner, deposited \$35,000.00 as down payment with plaintiffs' attorney, Steven S. Kaiser, Esq., the defendant as escrow agent, pending the closing. The plaintiffs aver that they were ready, willing and able to transmit clear title to the defendant. The plaintiffs state that they had pre-signed the deed and several other closing papers, as well as having issued a power of attorney to their Attorney in Fact with a power of attorney to appear at the closing and sign necessary

documents. Steven S. Kaiser, Esq., plaintiffs' attorney for the transaction of the sale of plaintiffs' primary residence, provides that the plaintiffs were available at the time of closing of October 3, 2007 at their residence in Florida for a telephone confirmation. Mr. Kaiser provides that when the defendant did not close on the "on or about date" stated in the contract, he sent a Time of the Essence Letter for a closing on October 3, 2007. The defendant contacted Mr. Kaiser on October 2, 2007, by way of letter, advising that she would not be appearing as there was no valid mortgage commitment in place and requested the return of the down payment.

In support of plaintiffs' motion for summary judgment in lieu of complaint, the plaintiffs submit the Residential Contract of Sale with Rider, a fax cover page dated July 23, 2007 with the attachment of a conditional approval of the mortgage commitment, the Time of the Essence letter dated September 10, 2007, and a letter from defendant's attorney dated October 2, 2007 advising that the lender would not approve the defendant's mortgage application requesting a return of the deposit.

It is well settled that a motion for summary judgment in lieu of complaint is made when an action is based on an instrument for the payment of money only. CPLR §3213. If proof is needed to make a case, other than the simple proof of non-payment, the instrument does not qualify. (*Channel Excavators, Inc. v. Amato Trucking Corp.*, 264 NYS2d 987). The movant must show the instrument itself and proof of non-payment pursuant to its terms. When the instrument requires something in addition to the party's explicit promise to pay a sum of money, CPLR §3213 is not available. (*Weissman v. Sinorm Deli*, 88 NY2d 437). Resort to the expedited procedure under CPLR §3213 has been denied where proof outside the instrument is necessary to establish the underlying obligation or where the subject documentation in addition to calling for payment of a sum of money, also required some other condition or performance. (*New Rochelle Dodge v. Bank of N.Y.*, 127 AD2d 638). It has been held that an action to recover a down payment on the purchase of property does not qualify under CPLR §3213. (*Ordonez v. New Gen, LLC*, 812 NYS2d 847).

Here, the instrument upon which plaintiff relies upon on this motion for summary judgment in lieu of complaint, the Residential Sales Contract, does not qualify as an instrument for the payment of money only pursuant to CPLR §3213. The subject instrument requires more than the explicit promise to pay, as evidenced by plaintiffs' attachments in addition to the Residential Sale Contract, to wit, a copy of a conditional approval of the mortgage commitment, the Time of the Essence letter, and defendant's letter advising that the lender would not approve the defendant's mortgage application. As proof is needed to demonstrate the defendant's alleged breach of contract, other than the simple proof on non-payment, the Residential Sales Contract does not qualify as an "instrument" for the payment of money only.

Accordingly, plaintiff's motion for summary judgment in lieu of complaint pursuant to CPLR §3213 is denied.

The defendant's cross-motion for summary judgment is decided as follows.

The Residential Sale Contract, paragraph 8, provides, under Mortgage Contingency, that the obligations of the purchaser are conditioned upon the issuance of a written commitment on or before "45 days from date hereof", the "Commitment Date". The paragraph provides that should the commitment not be issued on or before the "Commitment Date", then either party may cancel this contract by giving notice to either party within 5 business days after the Commitment Date, in which

[\* 3 ]

case the contract shall be deemed cancelled, whereby "thereafter neither party shall have any further rights against, or obligations or liabilities to, the other by reason of this contract, except that the Downpayment shall be promptly refunded to purchaser".

The defendant points out that the Residential Sale Contract was left undated and therefore, "it is impossible to determine the actual commitment date" as paragraph 8 of the contract states that the "Commitment Date" was to be 45 days from the contract date. As the subject Residential Sales Contract is undated, the "Commitment Date", to wit, 45 days from the date of the contract, cannot be determined. The mortgage contingency clause provides that either party may cancel should a commitment not be issued on or before the commitment date. Either party may cancel the contract by giving notice to either party "within 5 business days after the commitment date . . . down payment shall be promptly refunded to purchaser".

Here, the plaintiffs issued a Time of the Essence letter setting the closing date to October 3, 2007. The defendant contacted the plaintiff one day prior, October 2, 2007, advising that she was unable to obtain a commitment, and therefore, requested a refund of the down payment.

The plaintiffs refer to paragraph five of the contract which provides that "in the event of a willful default of the Purchaser, the amount deposited as a down payment shall be retained by the Seller as liquidated damages". The plaintiffs contend that since the defendant did not close, the defendant is in breach of the contract and therefore, the plaintiffs are entitled to retain the down payment. However, the plaintiffs have failed to demonstrate that the defendant wilfully defaulted when she was unable to obtain a written commitment.

Rather, the defendant, has demonstrated that she made a good faith attempt to obtain a written commitment. The mortgage contingency clause contained in the contract provides that the purchaser shall (a) make prompt application to a lender for a mortgage loan, (b) furnish accurate and complete information as required, (c) pay all fees related to the application and loan, (d) pursue such application with due diligence, (e) cooperate in good faith with the lender, and (f) promptly give notice to the seller of the name and address of each lender that the purchaser has made an application to. The defendant has demonstrated compliance with such terms.

The defendant submits that she fully complied with the terms of the contract by making a timely application for the mortgage and fully cooperating with the lender during the process. The defendant provides that she complied with lender's conditional approval, and provided all information and documentation. The defendant states that she did not learn of any issues of problems with her mortgage application and despite her efforts, she did not receive a written mortgage commitment from the lender, and therefore, was unable to close on the property. The defendant contacted the lender to ascertain the reason why her mortgage application was denied and learned that the loan she applied for was discontinued. The defendant was advised that she could be offered a different loan in October of 2007, requiring her to have "substantially more assets to put down on the house". The defendant submits that the Time of the Essence letter sent to the defendant on September 10, 2007, just five days before she received her initial denial from Chase, required the closing to be held approximately three weeks later, depriving her of an opportunity to seek another loan, since it was impossible for her to obtain a new loan within that time period.

As the defendant was unable to obtain a mortgage commitment with due diligence, and notified the plaintiff accordingly prior to the closing date, the contract was deemed cancelled and therefore, the defendant is entitled to a full refund of her down payment.

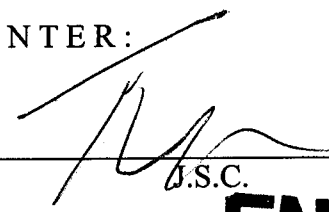
In light of the foregoing, the defendant's cross-motion for summary judgment is granted.

It is hereby,

ORDERED that the instant action is dismissed in its entirety, and it is further

ORDERED that the escrow agent, defendant, Steven S. Kaiser, is hereby directed to refund to the defendant, Celeste Werner, the full down payment in the amount of Thirty-Five Thousand Dollars, (\$35,000.00), plus any interest that accrued thereto, with ten (10) days of service of this order with notice of entry.

ENTER:

  
\_\_\_\_\_  
J.S.C.

Dated: March 5, 2008

cc: Monsour, Winn, Kurland & Warner, LLP  
Crafa & Sofield, P.C.  
Steven Kaiser, Esq.

**ENTERED**

MAR 07 2008

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**