SHORT FORM ORDER

INDEX No. 07-29321

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 24 - SUFFOLK COUNTY

PRESENT:

Hon. PETER FOX COHALAN
Justice of the Supreme Court

MOTION DATE 1-25-08
ADJ. DATE 3-19-08
MNEMONIC: # 001 - MG
002 - MD; CASEDISP

STENDA REALTY, LLC,

Plaintiff,

- against -

PETER C. KORNMAN and MARY C. KORNMAN

Defendants.

SINNREICH & KOSAKOFF, LLP
Attorneys for Plaintiff
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Central Islip, NY11722

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Attorneys for Defendants
57 Beach St.
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Upon the following papers numbered 1 to 51 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (001) 1 - 16; Notice of Cross-Motion and supporting papers (002) 17-26; Answering Affidavits and supporting papers 27-33; 34-36; 37-40; Replying Affidavits and supporting papers ; Other Plaintiff Memoranda of Law 47; 48-49; Defendant's Memoranda of Law 50; 51; and after hearing counsel in support and opposed to the motion it is,

ORDERED that this motion (001) by the plaintiff, Stenda Realty, LLC, pursuant to CPLR 3212 for summary judgment because the defendants, Peter C. Kornman and Mary C. Kornman, breached a residential contract of sale, and permitting Stenda Realty, LLC (hereinafter Stenda) to keep the defendants' down payment in the amount of $243,250.00 as liquidated damages, is granted; and it is further

ORDERED that this cross-motion (002) by the defendants pursuant to CPLR 3212 for summary judgment striking the complaint and directing Stenda to return the down payment, together with prejudgment interest, the net cost of title examination and the costs and disbursements of the action, is denied.

In this action for breach of contract and for declaratory judgment adjudging and decreeing that the purchasers/defendants breached the contract entered into on or about May 14, 2007 with Stenda it is claimed the defendants agreed to purchase property located at 1060 Willow Terrace Lane, Orient, Town of Southold, County of Suffolk, New York for the purchase price of $2,432,500.00. Pursuant to paragraph 3(a) of the contract, the purchasers were required to, and did, deposit with the seller's attorney, Edgar J. Royce, Esq., P.C., Escrowee (hereinafter "Escrowee), the amount of $243,250.00 as a down payment. Pursuant to paragraph 15 of the contract, the closing was scheduled to take place at the office of the seller's attorney on or about August 15, 2007, and it is alleged that the purchasers failed to

close in accordance with the contract on August 15, 2007 despite the fact that the purchasers' attorney was duly notified by the seller's attorney that Stenda was ready, willing and able to close and deliver good title in accordance with the contract on the closing date.

The complaint further alleges that on or about August 31, 2007, the seller's attorney provided written notice to the purchasers' attorney of "time being made of the essence" and that the seller demanded the closing of title to take place at the seller's attorney's office on September 18, 2007 at 2:00 p.m.. However, neither the purchasers nor their attorney appeared for the closing, nor did the purchasers tender any performance or the funds due to the seller for the conveyance of title in accordance with the contract. Stenda claims it has performed all of its obligations under the contract except to the extent that said performance was rendered impossible by the purchasers' default and breach of the contract. Stenda claims, pursuant to paragraph 23 of the contract, that upon default by the purchaser, Stenda is entitled to receive and retain the down payment as liquidated damages.

On or about September 17, 2007, the purchasers' attorney made a written demand to the Escrowee in accordance with paragraph 6 of the contract for return of the down payment. On or about September 26, 2007, the Escrowee provided written notice to Stenda in accordance with paragraph 6 of the contract of the purchasers' demand for return of the down payment. On or about October 4, 2007, within a period of ten business days from the date written notice was given to Stenda of the purchasers' demand for return of the down payment, Stenda provided its notice of objection in writing to the Escrowee, objecting to the return of the down payment and its demand for payment of the down payment to Stenda as liquidated damages for the purchasers' default and breach under the contract.

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 eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form ..and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (***Joseph P. Day Realty Corp. v Aeroxon Prods.***, 148 AD2d 499, 538 NYS2d 843 [2nd Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [2nd Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (***Friends of Animals v Associated Fur Mfrs.,*** 46 NY2d 1065, 416 NYS2d 790 [1979]).

Motion (001) is supported with an attorney's affirmation, the affidavit of Stephen Mattenini, a copy of the survey date stamped September 6, 2006, a copy of the Residential Contract of Sale, a letter, dated August 31, 2007, from Edgar J. Royce, Esq. (hereinafter Royce, also where appropriate, the Escrowee), to Patricia L. Doran, Esq. (hereinafter Doran), communications and abstract report, letter of September 11, 2007 from Doran to Royce, letter, dated September 13, 2007, to Doran from Royce, copy of the transcript of the closing proceeding, letter dated September 17, 2007 from Doran to Royce, letter dated September 26, 2007 from Royce to Stenda, letter dated October 4, 2007 from Stenda to Royce, copy of the complaint with annexed exhibits and a copy of the answer.

Motion (002) is supported with, inter alia, the affirmation of Mary C. Kornman and Peter C. Kornman, copy of MLS listing #1866830 and Web ID H51684, copies of letters dated: August 31, 2007 from Royce to Doran., September 11, 2007 from Doran to Royce, September 13, 2007 from Royce to Doran, September 17, 2007 from Doran to Royce, September 26, 2007 from Royce to Stenda, tax maps, affirmation of Doran, and the affidavit of Theodore Ninge.

By way of an affidavit, Stephen Mattenini, the sole member of Stenda and owner and seller of the real property at issue in this action, sets forth that Stenda faxed a copy of a written residential contract of sale to the defendants on or about March 23, 2007 and annexed a copy of the final version as exhibit B. Stephen Mattenini states that pursuant to a request from the defendants' attorney after she received the contract, Stenda provided the defendants' with a copy of the current survey on or about March 26, 2007 via their attorney, prior to the execution of the contract, which survey contained a description of the property with the correct courses and distances. He states that on or about May 14, 2007, Stenda and the Kornmans both executed the contract at a purchase price of $2,432,500.00 for the subject premises. He also states that the same accurate survey which was forwarded to their attorney prior to contract signing was also made available at the property by the brokers for every potential purchaser.

In opposing Stenda's motion, and in support of their cross-motion, the defendants have submitted an attorney's affirmation signed by each. However, CPLR 2106 does not provide for an attorney who is a party to an action to submit an affirmation, and instead, requires an affidavit. Even if the Kornmans' affirmation was in admissible form, they have not raised a factual issue which would preclude the granting of summary judgment in motion (001) and they have not established prima facie entitlement to summary judgment in motion (002).

The defendants affirm that they are both attorneys and on or about February 17, 2007 they went to see the house which is the subject of this action and at that time the broker representing the seller, Stenda, presented the multiple listing service listing which represented that the lot size was .50 of an acre or 21,780 square feet. They state they were presented with a copy of that listing information by the selling broker, Joe Cono, prepared by Thomas Uttinger of Prudential-Elliman, the listing broker, both of whom were representing the seller. They affirm they were also presented with a copy of an area map showing the property and other lots, and that this map showed the larger lot size. The seller, through its counsel, prepared a contract showing the property to have dimensions of 100 feet x 185 feet x 130 x 187 feet. The

defendants contend, however, that the seller was in possession of a survey showing the lesser dimensions of 100 feet x 154.01 feet x 124.01 feet x 151.86 feet, in which the area of the property would be 17,129 square feet or .3932 of an acre, a substantial deviation from the represented 21,780 square feet of .50 of an acre. The defendants further assert that the owner, in its subsequent listing of the property, showed it to be .39 of an acre.

The defendants further allege that it was only after they were induced into signing the contract did they become aware of the survey showing the reduced size of the property in August 2007 when their attorney was provided with a copy of the survey by the title insurer and met with them to explain it. The title report provided contained the reduced description, different from that described on the contract of sale. Also after they executed the contract and the time was set for closing, that their attorney Doran received the title report and survey. The affidavit of Theodore C. Ninger, Title Clearance Office of Congressional Abstract Co., states that Doran was advised that the company would insure the premises with exceptions 10, 11, 12, and 13 as modified:

"10. No title is insured to any land lying below the present high water line of Orient Harbor.

11. Right of the United States government to establish harbor, bulkhead or pierhead lines or the change or alter any such existing lines and to remove or compel the removal of fill and improvements(sic) thereon including building or other structures, from land now lying below the high water mark of Orient Harbor without compensation to the insured.

12. Riparian rights and easements of others over Orient Harbor, however, the policy does not insure any riparian rights or easements in favor of the owner of the premises herein.

13. Rights of the United States Government, the State of New York and Town of Southold or any of their departments or agencies to regulate and control the use of the pier, bulkhead, land under water."[1]

The defendants further set forth that these title objections can have an impact on their large financial investment, and they are especially concerned that the Federal Government, the State of New York, or Town of Southold could change the pierhead or bulkhead lines and remove fill and structures as stated in exceptions No. 11 and 13 all without compensation, meaning that they may not be able to get a condemnation award. Efforts by their attorney to have the title insurer omit objections 10, 11, 12 and 13 were not agreed upon by the insurer who would omit only objection 12. As Doran states in her affirmation, the title insurer would not completely remove the "Land Under Water Exceptions". The defendants state they were advised by their attorney that the "Land Under Water Objections" would render title both unmarketable and uninsurable and the reduction of the quantity of land whether based on mutual mistake or fraud would entitle them to return of their down payment together with the net cost of title examination.

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[1]This had been amended by the title company prior to the closing as they removed the language "land adjacent" and only the land underwater was excepted. The exceptions have no application to the upland property which was subject to conveyance.

Upon learning of the difference in the land size and the title objections, the defendants stated they asked their attorney to terminate the contract and demand return of the down payment which demand for return of the down payment was made by letter, dated September 11, 2007, prior to the "time of the essence letter" which set the closing for September 18, 2007.

In New York, with respect to a real property contract, unless the facts represented involve matters peculiarly within one party's knowledge, the other party must make use of the means available to learn, by the exercise of ordinary intelligence, the truth of such matters, or he or she will not be heard to complain that he or she was induced to enter into the transaction by misrepresentations (***Fiorilla v County of Putman,*** 1 AD3d 475, 767 NYS2d 281 [2nd Dept 2003]). In ***Fiorilla,*** supra, the court determined that the size of the subject parcel of property was not a matter peculiarly within the knowledge of the defendant, and could have been ascertained by the plaintiff by means available to him through the exercise of ordinary intelligence, including the examination of certain public records, or by physically inspecting the property before the closing (*citing,* ***Eisenthal v Wittlock,*** 198 AD2d 395, 603 NYS2d 586 [2nd Dept 1993]). (*See also,* ***O'Dell v Ginsberg,*** 253 AD2d 544, 677 NYS2d 583 [2nd Dept 1998]).

The defendants state in their affirmation that they were not in possession of a survey at the time of the execution of the contract nor was the survey appended to the contract, but they do not address the issue of whether their attorney was provided with a copy of that survey in March, 2007, months prior to their signing the contract, as set forth by Stephen Mattenini in his affidavit, and as supported by Exhibit A which sets forth that Doran, the attorney for the defendants, was provided with a copy of the survey stamped September 6, 2006, as evidenced by the fax cover sheet dated March 26, 2007. The defendants' counsel Doran does not address this issue in her attorney's affirmation and the defendants have failed to submit any evidentiary support to raise a factual issue in this regard.

Based upon the foregoing, it is determined that the defendants have failed to demonstrate that they exercised ordinary intelligence or examined the survey prior to signing the contract for sale on May 14, 2007, and thus cannot claim that they did not have notice of the size discrepancy of the lot prior to signing the contract (***Eisenthal v Wittlock,*** supra, citing ***DiFilippo v Hidden Ponds Assocs.,*** 146 AD2d 737, 537 NYS2d 222 [2nd Dept 1990]).

Pursuant to paragraph 6 of the contract of sale, on or about September 11, 2007, the defendants' attorney sent a letter by certified mail (receipt of certified mailing dated September 17, 2007) to the Escrowee stating that there was a discrepancy between schedule A to the contract and schedule A to the title commitment, asserting that the exceptions contained in the title report are not included in the exceptions that the defendants must accept pursuant to the contract and demanded return of the defendants' down payment based upon their claim that the title was uninsurable. Although received after September 18, 2007, seller's counsel Royce, advised Stenda of the receipt of the letter apprising it of the need to provide a Notice of Objection from Stenda within ten days, and upon the failure to provide such objection that Royce would be obligated to refund the down payment to the purchasers. Thereafter, Stenda timely served its objections within ten days upon Royce and Doran, the attorney for the defendants.

On September 18, 2007, a date made pursuant to the "time being made of the essence" letter, dated August 31, 2007, a closing was held at the office of the Escrowee at which time Stenda was willing and able to tender good title to the defendants in accordance with the requirement of the contract, the Escrowee tendered the deed to the property and all other instruments and documents required by the contract to convey good title to the property pursuant to the power of attorney duly executed by Stephen Mattenini as sole member of Stenda and owner and seller of the subject premises. Neither the defendants nor their attorney appeared at the closing nor did the defendants tender any performance or the funds due to Stenda for conveyance of title in accordance with the requirements of the contract. A transcript of the closing proceeding has been provided for this court's review. The defendants do not dispute that they did not appear nor did their attorney appear on their behalf at this closing.

The defendants claim that title was uninsurable. In order for a seller of real property to be found in default for failure to provide insurable or marketable title, the purchaser must first tender performance and demand good title (***Roman v Watson,*** 297 AD2d 319, 746 NYS2d 268 [2nd Dept 2002]). Since the defendants failed to attend the scheduled closing, did not tender performance, did not demand good title from the plaintiffs, and did not inform the plaintiffs of the specific defects in the title prior to the closing, it is the Kormans as purchasers who are in default not the seller (*see also,* ***Ilemar Corp. v Krochmal,*** 44 NY 702, 405 NYS2d 444; ***Cohen v Kranz,*** 12 NY2d 242 238 NYS2d 928 [1963]; ***Connolly v Hampton Landscapes,*** 210 AD2d 285, 620 NYS2d 8 [2nd Dept 1994]). Additionally, the defendants have not established a prima facie case that the subject premises was not insurable as only those riparian or underwater land rights were excepted by the title insurance and not the upland itself which was being conveyed, nor have the defendants established that the seller could in any way waive the rights of the Federal, State or local government.

Based upon the foregoing, it is determined as a matter of law that the defendants breached their contractual obligation to purchase the subject property by failing to appear at the "time being of the essence" closing on September 18, 2007 and that they have not demonstrated entitlement to return of their down payment.

Accordingly, motion (001) by Stenda Realty, LLC for summary judgment, on the basis that Peter C. Kornman and Mary C. Kornman breached the residential contract of sale and permitting Stenda Realty, LLC to keep the defendants' down payment in the amount of $243,250.00 as liquidated damages, is granted.

Accordingly, the cross-motion (002) by Peter C. Kornman and Mary C. Kornman for summary judgment striking the complaint and directing Stenda Realty, LLC to return their down payment, together with prejudgment interest, the net cost of title examination, and the costs and disbursements of the action, is denied.

Dated: July 11, 2008

J.S.C.

__X__ **FINAL DISPOSITION** ____ **NON-FINAL DISPOSITION**