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

PRESENT: Cahn Justice PART 49

Index Number : 600193/2008
ANZALONE, ROBERT
VS.
COMMUNALE, JOSEPH
SEQUENCE NUMBER : # 001
SUMMARY JUDGMENT

INDEX NO. 600193-08
MOTION DATE
MOTION SEQ. NO. #001
MOTION CAL. NO.

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE . . . . . .

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).

Dated: 9/25/08

J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 49

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ROBERT ANZALONE and JEFFREY L. WOLK,

Plaintiffs,

-against- Index No. 600193/08

JOSEPH COMUNALE, KEITH F. CARSON, and PERRI CAROL FITTERMAN,

Defendants.

----------x

Herman Cahn, J.:

This is an action to recover a $222,500 down payment paid in connection with a contract for the sale of real estate. Plaintiffs, as purchasers, now move for summary judgment and the return of the down payment. Defendants, sellers, cross-move for summary judgment and the right to retain the down payment based on plaintiffs' alleged anticipatory breach.

According to plaintiffs' Statement of Undisputed Facts, submitted pursuant to Rule 19-a of the Justices of the Commercial Division, Supreme Court, New York County, the parties entered into a contract of sale for a parcel of real property located at 664 Horserace Lane, Nissequogue, New York on November 1, 2007.

Pursuant to the terms of the contract, the purchasers delivered a $222,500 down payment to the sellers' attorney, who also acted as the escrow agent. Paragraph 30 (b) of the contract stated that if any covenants or restrictions affected the purchasers' ability to "use or enjoy" the premises, the purchaser had the right to cancel the contract, and the down payment "shall be promptly returned." If the purchasers chose to cancel, they were obligated to send the sellers notice, prior to the closing, setting forth their reasons for terminating the contract under this paragraph. The closing date was March 1, 2008.

In late November 2007, after the contract had been signed, the purchasers received a copy of certain covenants and restrictions relating to the property. Thereafter, on January 3 and January 17, 2008, they terminated the contract, by letter, stating the reasons for the termination and demanding the return of their down payment. The sellers refused to permit the escrow agent to return the down payment, and this litigation ensued.

In support of the plaintiffs' motion for summary judgment, they have submitted a copy of the contract of sale. Paragraph 30 (b) spells out permitted restrictions on title, provided they do not render title unmarketable. A handwritten note, added to the contract, modifies the printed text as follows:

> Notwithstanding the foregoing, Purchaser has not seen copies of the covenants and restrictions numbered 6-10 on Exhibit B. If any of those covenants and restrictions affect Purchaser's ability to use or enjoy the premises, Purchaser may cancel this contract and its down payment shall be promptly returned to Purchaser. Purchaser must send notice to seller prior to the closing setting forth the basis for termination hereunder.

In support of their motion, plaintiffs submitted copies of letters dated January 3, 2008 addressed to the escrow agent, and January 17, 2008 to the sellers' new attorney, terminating the contract and explaining the reasons for the termination. Plaintiffs thus established a prima facie case of entitlement to summary judgment on the issue of their right to the return of the down payment. *Zuckerman v City of New York*, 49 NY2d 557 (1980).

Defendants oppose summary judgment in plaintiffs' favor, arguing that plaintiffs failed to establish that the covenants and restrictions underlying plaintiffs' termination affected their right to the "use or enjoyment" of the premises. Defendants claim to have rejected plaintiffs' cancellation by letter from their attorney dated January 14, 2008, in which they announced their

intention to retain the down payment as liquidated damages in the event that the plaintiffs did not proceed to close on the agreed date.

Defendants, however, have failed to establish that plaintiffs breached the contract of sale by the manner in which they terminated the contract. Nowhere in the contract is there a provision which grants defendants the right to contest plaintiffs' claims that the covenants and restrictions affected their use and enjoyment of the premises. Defendants attempt to argue that plaintiffs waived their right to terminate by failing to respond to defendants' inquiries in a timely manner. But the contract did not provide defendants with a right to inquire as to plaintiffs' reasons for terminating, nor did it obligate plaintiffs to respond to such an inquiry in the event, as here, that defendants did so inquire.

The Restrictions which plaintiffs claim effected their "use and enjoyment" of the property, are described as follows:

> 2. That no building, fence, hedge, wall or other structure shall be erected on the premises hereby conveyed and that no alteration of physical condition of said premises, and no extension or addition to any building or other structure, or part of any building, new erected upon said premises shall be made, unless plans and specifications therefore and site plan shall have first been submitted to and approved by the Company, its successors, legal representatives or assigns.
>
> . . . .
>
> 4. Each lot owner further covenants and agrees that no change in the contour of the premises, nor any change in the grounds, nor in the trees and shrubbery as now growing thereon, shall be made without prior notice to and approval of the Company, its successors, legal representatives or assigns.
>
> "Conservation Easement," document number 7 on Schedule B of Contract of sale.
>
> No building or other structure . . . whatsoever shall be erected on the burdened premises, including but not limited to fences, swimming

> pools, tennis courts, dog runs, boat houses, or any other accessory structure.

Wolk Aff at 5-6.

Defendants engage in a complex factual discussion of why the covenants and restrictions objected to by plaintiffs did not affect plaintiffs' use and enjoyment of the premises. This discussion ranges from a comparison of set-back requirements contained in recorded easements and more restrictive requirements contained in the relevant municipal code, to proof that the restrictions on landscaping and alterations were lifted subsequent to plaintiffs' attempt to terminate the contract, to a claim that plaintiffs' evidence regarding their purpose in purchasing the property is precluded by the merger clauses contained in the contract and must not be considered in connection with defendants' own cross motion for summary judgment. It is quite clear that the above quoted restrictions and covenant would have affected the use and enjoyment of the property.

Defendants also argue that the supplemental rider to the contract contains express language which states that the rider take precedence over other parts of the contract, in the event of conflicting language. Thus, language in the rider which states that plaintiffs are unconditionally taking the subject real property takes precedence over the handwritten language in the main contract which granted plaintiffs a right to cancel the contract. Defendants fail to mention, however, that the supplemental rider refers to an attached schedule of covenants and restrictions, and that the attached schedule contains a handwritten note which echos the note inserted after paragraph 30 (b) of the main contract, including the initialing of its terms:

> [C]opies [of the enumerated covenants and restrictions] have *not* been delivered to Purchaser[s] as of the date Purchasers signed the Contract.

The parties intended to grant plaintiffs an absolute right to terminate the contract if they found that any of the covenants and restrictions, enumerated in an attachment to the supplemental rider, affected their use and enjoyment of the premises, so long as they gave notice to the defendants prior to the closing date. Defendants have failed to establish the existence of a material issue of fact which precludes the granting of summary judgment to plaintiffs, nor have they established a prima facie case on their claimed right to retain the down payment, paid to them under the contract. *See Indig v Finkelstein*, 23 NY2d 728 (1968).

Accordingly, it is

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

ORDERED that defendants' cross motion for summary judgment is denied; and it is further

ORDERED that plaintiffs shall have judgment against defendants on the complaint, and it is further

ORDERED that the escrow agent, Perri Carol Fitterman, is directed to turn over $222,500.00, representing the entire amount paid to her as escrow agent under the contract of sale referred to herein, and held in an IOLA account at Astoria Federal Savings, Route 25A, Stony Brook, New York, or any other account in which such monies are being held in escrow, to plaintiffs forthwith, along with any accrued interest on such funds, from the date of deposit up until and including the date of withdrawal of such funds; and it is further

ORDERED that plaintiffs are awarded the costs and disbursements of this action, as taxed by the Clerk of the Court; and it is further

ORDERED and ADJUDGED that upon such turn-over of funds, the escrow agent, Perri Carol Fitterman, shall be discharged of all liability as escrow agent, to the extent of payment made; and it is further

ORDERED, that the Clerk shall enter judgement accordingly.

Dated: September 25, 2008

ENTER:

J.S.C.