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

PRESENT: HON. CAROL EDMEAD PART 35

Index Number : 114355/2008
LILES, LAUREN
VS.
ABRAHAM, AJITA ELIZABETH
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO.
MOTION DATE 2/17/09
MOTION SEQ. NO.
MOTION CAL. NO.

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

Based on the foregoing, it is hereby

ORDERED that plaintiff motion pursuant to CPLR §3212 for summary judgment as to her first cause of action against defendants Ajita Elizabeth Abraham and Zerline Lehman Goodman, and dismissing all of defendants' counterclaims is granted; and it is further

ORDERED that defendants' cross-motion pursuant to CPLR §3212 for summary judgment in their favor, is denied; and it is further

ORDERED that defendants' cross-motion for an order, pursuant to Code of Professional Responsibility DR 5-102(a) (22 NYCRR 1200.21[a]), disqualifying plaintiff's attorney, Robert Gumenick, is denied, as moot; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.

ORDERED that the Clerk may enter judgment accordingly.

That constitutes the decision and order of the Court.

Dated: 4/13/09

HON. CAROL EDMEAD 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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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LAUREN LILES,

Plaintiff,

-against-

AJITA ELIZABETH ABRAHAM and ZERLINE LEHMAN GOODMAN,

Defendants.

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Index No. 114355/08

DECISION/ORDER

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this breach of contract action, plaintiff Lauren Liles ("plaintiff") moves pursuant to CPLR §3212 for summary judgment as to her first cause of action (the return of her down payment on a real estate sales contract), to dismiss all of the counterclaims of defendants Ajita Elizabeth Abraham ("Ms. Abraham") and Zerline Lehman Goodman ("Ms. Goodman") (collectively, "defendants"). In response, defendants cross-move 1) pursuant to CPLR §3212, granting defendants summary judgment, 2) pursuant to Code of Professional Responsibility DR 5-102(a) (22 NYCRR 1200.21[a]), disqualifying plaintiff's attorney, Robert Gumenick ("Mr. Gumenick"), and an order denying plaintiff's motion for summary judgment, and 3) costs, disbursements and attorney fees for this motion.

Factual Background[1]

By a contract of sale, dated as of July 11, 2008 (the "Contract"), Ms. Abraham agreed to sell and plaintiff agreed to purchase 150 East 56th Street, Condominium Unit # 6C, New York,

[1] Information is taken from plaintiff's motion, which comprises the affirmation of plaintiff's attorney, Mr. Gumenick ("motion") and plaintiff's affidavit ("Liles aff.") and plaintiff's Complaint.

New York ("the Premises") for $867,500. Pursuant to the Contract, plaintiff deposited $86,750 ("the down payment") with Ms. Goodman, Ms. Abraham's transactional real estate attorney. The down payment currently is being held in Ms. Goodman' s IOLA account, pursuant to the Contract. The Contract provided that the closing would be on or about September 15, 2008, which also was the time for the performance of the buyer's and seller's respective obligations.

Plaintiff's Complaint

Plaintiff now seeks the return of her $86,750 deposit pursuant to Paragraph 13(b) of the Contract (motion, ¶ 2, citing Exh. 1). In the Contract, plaintiff's obligation to purchase the Premises was conditioned on a standard 45-day financing contingency, plaintiff contends. Plaintiff's applications for a mortgage were denied in writing by two lenders pursuant to a loan declination letter from WCS Lending LLC, dated August 15, 2008 (the "WCS Declination Letter") and a loan declination letter from GuardHill Financial, dated December 8, 2008 (the "GuardHill Declination Letter"). Within the 45-day period of the first, WCS Declination Letter, (*i.e*,. on August 12, 2008), plaintiff, via her attorney, advised defendants that the financing could not be obtained and demanded return of the deposit ("Demand Letter," Exh. 2). On August 15, 2008, defendants responded to plaintiff's demand with a letter alleging that plaintiff had forfeited the deposit ("Default Letter"). The letter asserts that plaintiff failed to (i) furnish accurate and complete information to the lender/broker, (ii) pursue the application with diligence and (iii) cooperate in good faith with the lender/broker. Defendants also asserted that plaintiff did not have the right to apply for 90% financing.

Defendants' Counterclaims[1]

Defendants' Verified Answer ("Ans.") contains two counterclaims against plaintiff. First, defendants allege that plaintiff failed to comply with the terms of the Contract, specifically, Paragraph 22 requiring that plaintiff submit a mortgage application to an institutional lender and that she give defendants prompt notice of any such applications. Defendants further contend that plaintiff failed to demonstrate that she made a good faith or diligent effort to comply with §22 of the Contract. Section 13(a) of the Contract provides that, in case of plaintiff's default on the Contract, the seller's sole remedy is to retain the down payment as liquidated damages, defendants argue. As plaintiff breached the Contract by failing to timely obtain a mortgage commitment, defendants seek the transfer of her security deposit to them, pursuant to Paragraph 13(a) of the Contract .

Second, defendants allege that plaintiff's Complaint is "frivolous and vexatious in nature" (Ans., ¶ 20). They further allege, that as a result of plaintiff's action, defendants have been compelled to retain counsel to defend against the action, incurring attorney's fees. Thus, defendants seek the dismissal of plaintiff's Complaint, and damages on their counterclaims, together with costs, fees and disbursements and attorney fees.

Plaintiff's Motion

Plaintiff disputes defendants' allegations in the Default Letter. On June 17, 2008, real estate broker Alyson Gradone, of Gregory James & Associates, circulated a "Term Sheet" to the plaintiff's and Ms. Abraham's attorneys (*see* "Term Sheet," Exh. 4). The Term Sheet incorporated all of the financial terms of the deal, including that plaintiff would apply for 90%

[1]Information is taken from defendants' Verified Answer (motion Exh. 6).

financing. The 90% financing contingency is set forth in Paragraph J of the Purchaser's Rider to the Contract. Paragraph 22 of the Contract, which is incorporated by reference into said Paragraph J, granted plaintiff a clear right to terminate the Contract if her financing was not obtained, plaintiff contends. This provision states:

> If such commitment is not issued on or before the Commitment Date, then, unless Purchaser has accepted a commitment that does not comply with the requirements set forth above, Purchaser may cancel this Contract by giving Notice to Seller within 5 business days after the Commitment Date, in which case this Contract shall be deemed cancelled and thereafter neither party shall have any further rights against, or obligation or liabilities to, the other by reason of this Contract, except that the Downpayment shall be promptly refunded to Purchaser.
> (Contract, ¶ 22)

As set forth in the Liles aff., plaintiff properly terminated the Contract, pursuant to the provision in Paragraph J, and is entitled to the return of the down payment as a matter of law.

Defendants' Opposition and Cross-Motion[2]

First, defendants contend that issues of fact exist, defeating plaintiff's motion for summary judgment. Defendants argue that plaintiff breached the duty of good faith inherent in every contract and failed to diligently make efforts to obtain a mortgage as required by Paragraph 22(vi) of the Contract. Defendants further argue that plaintiff made material misrepresentations to Ms. Abraham in order to induce her into signing the Contract.

Plaintiff "outright lied" to the defendant and gave false information to defendants. At the time the Contract was being negotiated, plaintiff submitted proof in form of a financial statement to defendants showing that she had more than $500,000 in liquid assets that she intended to use to buy the Premises (the "Financial Statement"). Plaintiff gave the Financial Statement to real

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[2] Defendants' opposition ("opp.") comprises an affirmation from Vivek Suri, attorney for Ms. Abraham ("Suri aff."), an affirmation from Ms. Goodman ("Goodman aff.") and an affirmation from Ms. Abraham ("Abraham aff.").

estate broker Gregory James & Associates, which in turn forwarded it to defendants. Next, plaintiff delayed the signing of the contract because she wanted to wire funds to her attorney who would then write the down-payment check for the Contract (see "July 2, 2008 E-mail"). Plaintiff never wired the money to her attorney's account; rather, she wrote a personal check made out to Ms. Goodman (the "Check"), thereby clearly showing plaintiff's intent to use her own funds to purchase the Premises. Based on these false representations, the mortgage contingency clause added.

Plaintiff signed the Contract on July 2, 2008. After Ms. Abraham signed the contract, on or about July 11, 2008, it was sent to plaintiff's attorney, starting the 45-day time period for plaintiff to obtain a mortgage. It seems that around this time, plaintiff and her father decided that the economic conditions and the real estate market made it inadvisable to buy the Premises. Defendants contend that even then, instead of pursuing her mortgage application in good faith under the terms of the Contract, plaintiff unilaterally decided to breach the Contract and not pursue a loan diligently. Although plaintiff claims that she applied for a mortgage with two mortgage brokers, plaintiff fails to include her loan application as proof that she diligently met her obligations pursuant to the Contract.

Further, the two unsworn statements from mortgage brokers attached to plaintiff's motion lack probative value and should be rejected by the Court. The GuardHill Declination Letter dated December 8, 2008, which states that the plaintiff applied for a loan on July 9, 2008, indicates that plaintiff's application was made before the contract was finalized on July 11, 2008 and before plaintiff received an executed copy of the Contract. This fact clearly proves that plaintiff's application to GuardHill Financial does not qualify as a good faith effort, pursuant to §

22(vi) of the Contract. The WCS Loan Declination letter, consisting of an e-mail communication between plaintiff and Mark Pastolove of WCS Lending, is similarly deficient. In the e-mail, dated August 15, 2008, plaintiff is rejected because her debt-to-income ratio is too high. But plaintiff's attorney wrote a letter to Ms. Goodman on August 12, 2008 claiming that plaintiff "has not been offered a complying loan commitment letter" (see Demand Letter, plaintiff's Exh. 2). Plaintiff could not have terminated the Contract on August 12, 2008, when she was not rejected by WCS Lending until August 15, 2008, defendants argue. This again clearly proves bad faith on plaintiff's part (opp., ¶¶ 21-22).

Second, defendants cross-move for summary judgment on the ground that plaintiff breached the Contract. If plaintiff knew on July 9, 2008, before the Contract was finalized, that she would be rejected in obtaining a loan, then it is necessarily true that she was proceeding in bad faith and violating the duty of good faith that is inherent in every contract of sale. Ms. Abraham attests that plaintiff did not apply for a mortgage in good faith because plaintiff's father, who "was ultimately the person who made the decisions regarding [plaintiff's] real estate purchase" was concerned about the declining real estate market. Ms. Abraham further testified:

> When we asked about the necessity for a mortgage contingency clause, we were told by plaintiff's attorney and the Real Estate Broker Alyson Gradone of Gregory James & Associates, that the buyer wanted to test the mortgage market and attempt to obtain a low interest rate, and that if the Plaintiff did not get approved for such mortgage, she still intended to move forward with the purchase, paying cash with the help of her father if necessary. Based on these representations, I agreed to reinstate the mortgage contingency clause.

Based on these facts, it is clear that plaintiff did not pursue her loan application in good faith and that she breached the Contract.

Third, defendants argue that the Court should disqualify plaintiff's attorney, Mr.

Gumenick, from representing plaintiff in this case because Mr. Gumenick will be called as fact witnesses in the trial of this case. Mr. Gumenick will be called to testify against his client as to non-privileged matters because, due to his communications with plaintiff's father, Mr. Gumenick is privy to the facts as to plaintiff's and her father's misrepresentations and breach of the covenant of good faith. Citing the Code of Professional Responsibility DR 5-102(a) (22 NYCRR 1200.21[a]) and caselaw, defendants argue that the movant has the burden to demonstrate that an attorney's testimony would or might be prejudicial to his client, justifying that attorney's disqualification. Here, it is clear that Mr. Gumenick was intimately involved in negotiating the contract from start to finish. It clear from the Abraham affidavit and Goodman affirmation that Mr. Gumenick represented plaintiff when she was considering buying the Premises and that he represents plaintiff in the instant litigation. Mr. Gumenick was involved in the drafting and negotiations of the Contract, along with communicating to defendants, plaintiff and plaintiff's father concerning plaintiff's fulfillment of her contractual obligations. All of these facts signify that plaintiff and Mr. Gumenick worked hand in hand with plaintiff's father in negotiating the purchase of the Premises and in misrepresenting facts to defendants. Based on Mr. Gumenick's intimate involvement in all facets of this deal, it is clear that he is a fact witness as to what transpired. Moreover, Mr. Gumenick also is aware of the steps taken by plaintiff and her father in trying to obtain a mortgage.

Plaintiff's Reply and Opposition to Cross-Motion

First, plaintiff argues that defendants have not alleged any triable issue of fact precluding summary judgment for plaintiff. Plaintiff has met her burden by demonstrating that 1) the contract of sale includes the financing contingency allowing plaintiff to cancel the contract if the

financing is not obtained, 2) the timely and proper notice of cancellation of the contract, 3) a demand for the return of the contract deposit and 4) defendants' breach by their failure to return the deposit. Plaintiff further argues that defendants' allegations of plaintiff's bad faith is based solely on hearsay, and in any event, their allegations are without merit. Regarding defendants' argument challenging the admissibility of the loan declination letters because they are not in the form of an affidavit, plaintiff argues that the real issue is not the content of the letters, but the fact they the letters exist. Plaintiff made several truthful, written and timely applications for a loan and did not receive a loan commitment letter. Plaintiff's affidavit is sufficient to establish that she did not obtain a loan, and the existence of the declination letters is simply another form of proof that no such commitment was obtained.

Plaintiff further argues that hearsay alone cannot be used to defeat a motion for summary judgment, and in this case the allegations of the Abraham aff. are based only on inadmissible hearsay evidence, unsupported by any evidence.[3] Plaintiff maintains that Ms. Abraham's affirmation fails to disclose *any* instance in which she alleges that the plaintiff made any misrepresentation to her; rather, Ms. Abraham relies *exclusively* on hearsay statements made to her by her real estate brokers and attorney. Ms. Abraham fails to produce affidavits from persons with personal knowledge of any alleged misrepresentations, and her real estate brokers are certainly under her control. The absence of such affidavits is compelling reason why Ms.

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[3]Plaintiff states:
Ms. Abraham's claims, *inter alia*, that (i) the Plaintiff should not have applied for ninety percent financing because the Plaintiff's only desire was to test the mortgage market and that the contingency clause permitting the Plaintiff to cancel if she did not obtain a loan commitment for a ninety percent mortgage does not mean what it says; (ii) the Plaintiff mislead her about her intention to use all of her liquid assets to buy the ["Premises"] anyway, possibly with the help of her father, in the event the mortgage could not be obtained and (iii) the timing of the Plaintiffs mortgage applications shows bad faith.

Abraham's story should not be considered. Citing caselaw, plaintiff argues that the submission of unsworn emails, letters or other matters cannot be accepted as the only evidence to defeat summary judgment and thus, defendants have failed to rebut the plaintiff's *prima facie* case.

Even if defendants' allegations were submitted in admissible form, they would not be relevant. Plaintiff and Ms. Abraham were represented by counsel. Section 24 of the Contract specifically requires that all understandings between the parties are to be in writing and that all prior conversations between the parties are incorporated into the written agreement. The expressed justification in the Default Letter for defendants' refusal to return plaintiff's down payment is irrelevant. Defendants submit no evidence of any representation that plaintiff made any enforceable, non-merged, pre-contract promise to put down $500,000 in cash. To the contrary, defendants submit an e-mail of what they describe as "a copy of the plaintiff's offer through the real estate broker." However, such e-mail is not a copy of plaintiff's offer, but a copy of an e-mail from Ms. Abraham's husband, Reynaldo Geerken ("Mr. Geerken"), to Ms. Abraham's broker, Lori Malkin ("Ms. Malkin"). Plaintiff's actual offer as set forth in the Term Sheet, specifically and unambiguously shows that the offer was submitted with a 90% financing contingency. Ms. Abraham further states: "As part of the negotiations, the plaintiff/buyer represented to the real estate brokers and I that she had considerable savings, would be putting a large down payment of approximately $500,000.00 and would only borrow around $400,000.00 towards the purchase of the [Premises]" (the "Malkin E-mail"). Ms. Abraham's allegation is clearly erroneous. Because this is a reference to a pre-contract discussion, defendants are absolutely barred from relying on it. Nevertheless, this representation was made by Ms. Malkin (and not by plaintiff). Ms. Abraham's allegation that the plaintiff asserted misrepresentations to

her is entirely unsupported by anything contained in the Malkin E-mail. Notably, the Malkin E-mail is hearsay and the only documentary evidence submitted of plaintiff's alleged pre-contract, non-survivable, misrepresentation.

To the extent defendants relied on Ms. Malkin's statement that "plaintiff's family was wealthy" and supported her decision to purchase the Premises, such pre-contract, non-survivable, hearsay came did not come from plaintiff. Plaintiff contends that the Gumenic E-mail to which Ms. Abraham cites, does not contain a single reference to a market test, but simply states that the term sheet transmitted by the brokers provides for a 90% contingency, which was" not reflected in the draft."

Ms. Abraham admits that she relied on the brokers who told her that the financing contingency was necessary because of the buyers. Ms. Abraham's admission that she relied on statements by the broker is fatal to Ms. Abraham's allegation of misrepresentation by plaintiff. Defendants' gullibility in accepting the broker talk cannot be held against plaintiff. Moreover, the Contract's merger clause, precludes consideration of defendants' alternative version of events. Therefore, Ms. Abraham had no right to rely on any supposed pre-contract representations that were not incorporated into the contract.

Plaintiff further argues that, given the number of legal professionals involved in the Contract and this dispute, it is beyond comprehension that defendants insist on pressing their clearly frivolous claim to retain the plaintiff's deposit. Plaintiff points out that Ms. Abraham is an attorney, as is her husband; Ms. Abraham was represented by an attorney in connection with the Contract, co-defendant Ms. Goodman; and defendants currently are represented by their attorney of record, Vivek Suri, who is assisted by Ms. Abraham's husband. Not only do

defendants ignore the consequences of the written agreement, which in and of itself defeats defendants' claims, defendants have also failed to come forward with any evidence to oppose the motion. Plaintiff also argues that defendants' allegations that plaintiff failed to pursue the mortgage application in good faith, breached the implied covenant of good faith and fair dealing and committed fraud[4] lack any basis in law or fact. Contrary to defendants' assertion, the GuardHill Declination Letter does not say that the loan was declined on July 9, 2008, but that the application was made on July 9, 2008, *several days after plaintiff's attorney transmitted the signed contract to Ms. Abraham's attorney* along with the contract deposit, and before it was countersigned by Ms. Abraham and returned to the plaintiff's attorney. The Contract signed by plaintiff and plaintiff's deposit check were transmitted to defendants on July 3, 2008. This correspondence proves that plaintiff did not know on July 3, 2008, when she signed the Contract, that she had been rejected. It only shows that plaintiff got a head-start on her application, which she made prior to receiving a fully executed Contract from Ms. Abraham. Even if plaintiff had been rejected on July 9, 2008, that would have been after she signed the Contract and while the Contract was in the possession of Ms. Abraham or her attorney.

Plaintiff provides the copies of an e-mail and a letter from GuardHill (the "GuardHill Mortgage Application") that plaintiff claims were sent to plaintiff on July 9, 2008. The e-mail states that the loan application (a copy of which was attached to the e-mail), will be *picked up by messenger* when it is completed. The letter states that GuardHill would order the credit report and appraisals. Obviously, July 9, 2008 was the date of application, not the date of the lender's

[4]Plaintiff points out that defendants have not pleaded fraud or breach of the implied covenant of good faith and fair dealing in their Verified Answer. Accordingly, plaintiff argues, any remarks about these potential causes of action would properly be ignored. Plaintiff further argues that, given the merger provisions of the Contract, defendants could not justifiably rely on any of the alleged pre-contract misrepresentations. (reply, p.13, footnote 10).

declination. Defendants' "strained assertions" that the timing of plaintiff's loan application to GuardHill was in bad faith because it was declined prior to the date of the Contract is clearly not the case and must be rejected. Moreover, even had plaintiff received one loan declination prior to signing the contract (which is not the case), this would not necessarily mean that some other source of financing would not have approved her application.

Plaintiff also contends that defendants' allegations about the WCS Declination Letter is similarly unavailing. Nothing in the Contract required plaintiff to obtain any specific number of declinations, and plaintiff's submission of two such letters is evidence of her good faith. The date of the WCS Declination Letter is irrelevant.

Further, defendants failed to allege any contractual provision that requires plaintiff to provide a copy of the loan application. It would simply be impossible for the two lenders to issue loan declination letters unless plaintiff made an application for a loan.

Nor does the Contract provide for a forfeiture of the down payment in the event that plaintiff failed to "promptly give Notice to seller of the name and address" of each lender to which plaintiff applied. The Contract does not impose a time of the essence provision for compliance with this obligation, but says that the buyer shall comply "promptly." Further, defendants have not claimed any damages due to plaintiff's alleged non-compliance with this technical obligation.

Further, defendants fail to specify any conduct by plaintiff that supports their allegation that plaintiff breached the implied covenant of good faith and fair dealing. Defendants failed to allege any facts showing that plaintiff acted in a manner that, although not expressly forbidden by the Contract, deprived defendants of their right to receive benefits under the Contract.

Finally, defendants failed to specify what particular facts would be elicited from Mr. Gumenick that cannot be elicited from the plaintiff, her father, the real estate brokers or the mortgage brokers, so as to warrant his disqualification. Citing caselaw, plaintiff argues that defendants have made no showing that Mr. Gumenick has any specific, non-cumulative personal knowledge regarding any fact in controversy. Disqualification denies a party's right to representation by the attorney of its choice, and defendants fail to provide convincing reasons why disqualification is appropriate.

Analysis

Summary Judgment

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR §3212[b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390(U) [Sup Ct New York County, Oct. 21, 2003]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as

depositions" (CPLR § 3212[b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR § 3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman* at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman* at 562). The defendant "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" *(Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*,62 NY2d 686 [1984]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient *(Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Fried v Bower & Gardner*, 46 NY2d 765, 767, 413 NYS2d 650 [1978]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347, 668 NYS2d 157 [1st Dept 1998]).

Here, plaintiff has demonstrated the absence of any genuine issues of material fact, warranting summary judgment in her favor.

Breach of Contract

It is well settled that to "state a cause of action for breach of contract, the proponent of the pleading must specify the making of an agreement, the performance by that party, breach by the other party, and resulting damages" (*Volt Delta Resources LLC v Soleo Communications Inc.*, 11 Misc 3d 1071, 2006 NY Slip Op 50497 [U] [Sup Ct, New York County 2006], *citing Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). Further, the "essential terms of the parties' purported contract, including the specific provisions of the contract upon which liability is predicated, must be alleged" (*Volt Delta Resources LLC, citing Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995]; and *Caniglia v Chicago Tribune-New York News Syndicate Inc.*, 204 AD2d 233, 234 [1st Dept 1994]). A complaint alleging breach of contract also must set forth the terms of the agreement upon which liability is predicated by making specific reference to the relevant portions of the contract or by attaching a copy of the contract to the complaint (*Atlantic Veal & Lamb, Inc. v. Silliker, Inc.*, 11 Misc 3d 1072, 2006 NY Slip Op 50527 [U] [Sup Ct New York County 2006], *citing Chrysler Capital Corp. v Hilltop Egg Farms, Inc.*, 129 AD2d 927, 928 [1987] and *accord Valley Cadillac Corp. v Dick*, 238 AD2d 894, 894 [1987]).

Here, the Contract at issue contains a mortgage contingency clause (Contract, ¶ 22) that is crossed out on the actual document, but restated in Paragraph J of the Purchaser's Rider to the Contract ("Rider"). Paragraph 22 of the Contract states in relevant part:

> Purchaser shall (i) make prompt application to an Institutional Lender for such mortgage loan, (ii) furnish accurate and complete information on Purchaser and members of Purchaser's family, as required, (iii) pay all fees, points and charges required in connection with such application and loan, (iv) *pursue such application with diligence, (v) cooperate in good faith with such Institutional Lender to the end of securing such first mortgage loan and (vi) promptly give Notice to Seller of the name and address of each Institutional Lender to which Purchaser has made such application. . . . If such commitment is not issued on or before the Commitment Date, then*, unless Purchaser has a

> commitment that does not comply with the requirements set forth above, Purchaser may cancel this Contract by giving Notice to Seller within 5 business days after the Commitment Date, in which case this Contract shall be deemed cancelled and thereafter *neither party shall have further rights against, or obligation or liabilities to, the other by reason of this Contract except that the Downpayment shall be promptly refunded to Purchaser and except as set forth in para. 22. If Purchaser fails to give Notice of cancellation or if Purchaser shall accept a commitment that does not comply with the terms set forth above*, the Purchaser shall be deemed to have waived Purchaser's right to cancel this Contract and to receive a refund of the Downpayment by reason of the contingency contained in this para. 23 [*sic*].
> (Contract, ¶ 22) (*emphasis added*)

Paragraph J of the Rider defines the term "Commitment Date" in the Contract as 45 days after the Purchaser (plaintiff) receives a full executed copy of the Contract. Paragraph J also states that "the loan amount shall be $780,750.00," which represents 90% of the $867,500 purchase price.

The Contract also contains a merger clause, which states: "All prior understandings and agreements, written or oral, between Seller and Purchaser are merged in the Contract and this Contract supersedes any and all understandings and agreements between the parties and constitutes the entire agreement between them with respect to the subject matter hereof" (Contract, ¶ 24).

Finally, the Contract clearly defines the parties' remedies in the case of default by either party:

> (a) If purchaser defaults hereunder, Seller's sole remedy shall be to retain the Downpayment as liquidated damages . . . .
> (b) If Seller defaults hereunder, Purchaser shall have such remedies as Purchaser shall be entitled to at law or in equity, including, but not limited to, specific performance
> (Contract, ¶ 13)

Here, it is undisputed that plaintiff received an executed copy of the Contract on or about July 11, 2008, commencing the 45-day time period for plaintiff to obtain a mortgage. It also is

undisputed that plaintiff gave defendants timely notice of her cancellation of the contract. However, the issues are 1) whether plaintiff pursued a mortgage "application with diligence," cooperated "in good faith with" the lender to the secure such a mortgage, and "promptly" gave defendants "the name and address of each" lender to which plaintiff applied, pursuant to Paragraph 22 of the Contract, and 2) whether the failure to do perform any of those obligations amounted to a default under the Contract, justifying defendants' retention of plaintiff's down payment, pursuant to Paragraph 13(a) of the Contract.

According to the First Department, "[w]hen a condition of a mortgage loan commitment is not fulfilled through no fault of the purchasers, their performance is excused, so long as they acted in good faith" (*Lunning v 10 Bleecker Street Owners Corp.*, 160 AD2d 178, 178 [1st Dept 1990], *citing Cone v Daus*, 120 AD2d 788, 789-790 [3d Dept 1986]). Further, the burden is on party claiming that a mortgage was not pursued in good faith to establish via documentary evidence or otherwise the opposing party's failure to act in good faith (*see Creighton v Milbauer*, 191 AD2d 162, 166-167 [1st Dept 1993] [holding that the defendant had failed to establish by documentary evidence or otherwise that the plaintiff was denied mortgage financing because the lender was unable to verify her employment and income, which would have been evidence of the plaintiff's lack of good faith]; *see also Singh v Dyckman*, 202 AD2d 412, 413 [2d Dept 1994] [holding that the "sellers failed to establish the existence of material factual issues relating to the purchasers' due diligence in obtaining the required loan commitment"]).

For example, courts have found genuine issues of fact regarding a party's failure to exercise a good faith effort to procure a mortgage where the defendants provided proof in the form of financial statements that the plaintiff mischaracterized his financial situation to the

lender (*BTS, Inc. v Webny Corp.*, 157 AD2d 638, 639 [2d Dept 1990]).

Here, plaintiff's submissions indicate that a mortgage commitment was "not issued on or before the Commitment Date" and that plaintiff gave notice within five business after the "Commitment Date" so as to trigger her entitlement to the return of her down payment. By the date of plaintiff's cancellation letter, August 12, 2008, plaintiff had not received a commitment letter from any bank, and there is no indication to suggest otherwise. The August 15, 2008 email from WCS indicates that its determination on plaintiff's loan application was not made until August 15, 2008, and that no commitment letter was issued by WCS as of August 12, 2008. And, the December 8, 2008 letter from GuardHill indicates that plaintiff applied for a loan application on July 9, 2008, but did not issue its determination until December 2008. Thus, as concerning GuardHill, no commitment letter was given by GuardHill as of August 12, 2008 either. Thus, plaintiff has demonstrated that no commitment letter was issued by either lender as of August 12, 2008, which was "before the Commitment Date," thereby entitling plaintiff to cancel the Contract and the return of her downpayment.

Defendants failed to provide any evidence that plaintiff failed to cooperate with either lender in good faith. Further, defendants do not allege that plaintiff misled or withheld information from the lenders, which courts have considered evidence of the lack of good faith (*see Ruggeri v Brenner*, 186 AD2d 441 [1st Dept 1992] ["It is not disputed that plaintiff twice sought financing, provided all the required documents, and *was unsuccessful for reasons not of his own making*"]). Defendants have provided no proof that the rejection from the lenders was based on anything other than a review of plaintiff's financial situation. There is no indication that the lender's denials were based on circumstances created by plaintiff to thwart her ability to

fulfill the mortgage contingency clause. As the Court held in *Galasso v Ferraro* (280 AD2d 450, 450 [2d Dept 2001]), "when financing was denied based on the bank's conclusion that the value of the property was insufficient for the loan amount requested, the plaintiff properly exercised her right to cancel the contract and demand the return of her down payment."

Defendants argue that plaintiff knew that she would not qualify for her loan prior to her signing the Contract of sale because she applied for a mortgage before signing the Contract, which is proof of her bad faith. However, plaintiff has provided sufficient evidence that by August 12, 2008, neither lender provided her with a mortgage commitment. Further, there is no evidence that plaintiff was aware or should have been aware that her applications would have been denied at the time she executed the Contract on July 11, 2008.

Defendants argue that because the Declination Letters are "unsworn statements," they "have no probative value and should be rejected by the Court" (opp., ¶ 18). However, in addition to the Declination Letters, plaintiff provides sworn statements, in the form of an affidavit, that GuardHill and WCS declined to give her a mortgage:

> At GuardHill Financial Corp. I applied through and worked directly with Jere Lyons, a senior vice president. As noted Mr. Lyon's letter to me, *"neither GuardHill nor any of its investors or lending institutions are able to provide a product which meets your needs."*
>
> Similarly, I made application through and worked directly with Mark Pastalove, a Senior Licensed Mortgage Broker at WCS Lending, LLC. As noted in Mr. Pastalove's letter to me, *"Unfortunately, due to your high debt to income ratio we will not be able to provide you with financing under your present loan scenario at this time."*
>
> Having received two loan declinations, I was compelled to cancel the Contract, as permitted by the mortgage contingency clause contained in the Contract.
> (Liles aff., ¶¶ 9-11)

"A sworn affidavit is an admissible form of evidentiary proof sufficient to make a prima facie

showing of entitlement to judgment as a matter of law (*see* CPLR 3212(b); *Zuckerman v City of New York*).

Defendants also point to various conversations prior to the Contract as evidence that plaintiff mislead them about her plans to purchase the Premises and as further evidence lack of good faith and diligence in pursuing a mortgage. These oral and e-mail exchanges involved defendants, plaintiff, plaintiff's father and the real estate brokers. "Based on these false representations, the seller reinstated the mortgage contingency clause in the contract of sale," defendants argue (Complaint, ¶ 13). However, the Contract contains a merger clause that makes clear that it "supersedes any and all understandings and agreements between the parties and constitutes the entire agreement between them with respect to the subject matter hereof" (Contract, ¶ 24). A merger clause bars the consideration of extrinsic evidence to the Contract (*Sorenson v Bridge Capital Corp.*, 30 AD3d 1144, 1145 [1st Dept 2006]). Accordingly, the parol evidence rule precludes consideration of such communications for purposes of this motion.

Although plaintiff failed to establish that she "promptly" gave defendants "the name and address of each" lender to which plaintiff applied, plaintiff's entitlement to the return of her down payment was not made contingent upon her compliance with this provision. Instead, the return of her down payment was conditioned upon her ability to obtain a mortgage commitment ("If such commitment is not issued . . . then . . . Purchaser may cancel this Contract . . . the Downpayment shall be promptly refunded . . .").[5]

Accordingly, the Court find that defendants failed to raise an issue of fact so as to

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[5] According to defendants, they also asked plaintiff to provide them with a written rejection letter from a lender and a copy of plaintiff's filled-out loan application, and plaintiff "refused to provide us with any details and refused to provide us with a rejection letter from a lender." However, the Contract does not require this obligation.

preclude summary judgment in plaintiff's favor. Therefore, plaintiff's motion for summary judgment seeking the return of her down payment is granted, and defendants' cross-motion for summary judgment permitting them to retain the down payment is denied.

Attorney Disqualification

Based on the above, the Court does not reach the issue of whether Mr. Gumenick should be disqualified as a necessary witness in this action.

Conclusion

Based on the foregoing, it is hereby

ORDERED that plaintiff motion pursuant to CPLR §3212 for summary judgment as to her first cause of action against defendants Ajita Elizabeth Abraham and Zerline Lehman Goodman, and dismissing all of defendants' counterclaims is granted; and it is further

ORDERED that defendants' cross-motion pursuant to CPLR §3212 for summary judgment in their favor, is denied; and it is further

ORDERED that defendants' cross-motion for an order, pursuant to Code of Professional Responsibility DR 5-102(a) (22 NYCRR 1200.21[a]), disqualifying plaintiff's attorney, Robert Gumenick, is denied, as moot; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.

That constitutes the decision and order of the Court.

Dated: April 13, 2009

Hon. Carol R. Edmead, J.S.C.