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

PRESENT: MARTIN SHULMAN Justice PART 1

Index Number : 602600/2008
SEGUNDO, TARA MARIE
VS.
KILLERLANE, JAMES J., III
SEQUENCE NUMBER : # 001
SUMMARY JUDGMENT

INDEX NO. 602600-08
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 ... A-M	1
Answering Affidavits — Exhibits A-I	2
Replying Affidavits 1-4	3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

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

Dated: May 8, 2009

MARTIN SHULMAN J.S.C.

J.S.C.

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 : IAS PART 1

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TARA MARIE SEGUNDO,

Plaintiff, Index No. 602600/08

-against-

JAMES J. KILLERLANE III,

Defendant.

----------X

MARTIN SHULMAN, J.:

Plaintiff moves for summary judgment pursuant to CPLR 3212 in this action to recover a $62,860 deposit she paid to defendant in connection with her aborted purchase of defendant's cooperative apartment at 130 West 67th Street in Manhattan, a building owned by Toulaine Owners Corp. (the "cooperative"). Defendant has counterclaimed for the deposit as liquidated damages.

Under the parties' contract of sale (¶ 6.1, at exhibit D to moving papers), plaintiff's purchase of the apartment was conditioned on the unconditional approval of the cooperative's board of directors (the "board"). The board was concerned that plaintiff, who was in the midst of starting a new business, would not be able to meet her maintenance and other obligations to the cooperative because her prior year's income was too low. Plaintiff's father, Ernest C. Segundo ("Segundo"), offered to personally guarantee his daughter's obligations to the cooperative to obviate the problem. The board appeared to accept that solution and asked Segundo to sign an irrevocable guarantee which required him to bind not just himself until plaintiff's income increased, but also his estate and heirs in perpetuity (see exhibit E to moving papers). Segundo

refused to sign the guaranty in that form unless the board agreed to cancel it upon plaintiff's submission of a financial statement showing she had liquid assets of at least $1 million (see exhibits F and G to moving papers). The board rejected Segundo's terms, but offered plaintiff the opportunity to request another interview with the board, which would take place in August, 2008.

Despite the fact that the sales contract contained a mutual cooperation clause (¶ 24.1) and time was not of the essence, defendant did nothing to help plaintiff get board approval, even to the extent of adjourning the closing to allow her to meet with the board a second time, something he was required to do under the contract (¶ 6.3), which provided that if board approval was not obtained by the scheduled closing date, the closing was to "be adjourned for 30 business days for the purpose of obtaining such consent. If such consent is not given by such adjourned date ... [or i]f such consent is refused at any time, either Party may cancel this Contract by Notice. In the event of cancellation pursuant to this ¶ 6.3, the Escrowee shall refund the Contract Deposit to Purchaser."

Instead, when the impasse made it unlikely for the closing to take place on July 14, 2008 as scheduled, defendant's counsel notified plaintiff's counsel by letter dated July 9, 2008 (exhibit H to moving papers) that if Segundo did not sign the guarantee in the form requested by the board so the closing could take place on the scheduled date, defendant would deem plaintiff to be in default under the contract and claim the deposit, held in escrow, as liquidated damages. Plaintiff's counsel responded (by letter dated July 10, 2008, at exhibit I to moving papers) that nothing in the contract of sale obligated Segundo to sign such an open-ended guaranty and since the board did not

give the unconditional consent on which the sale was premised, plaintiff was electing to cancel the contract and demand the return of her deposit. On July 14, 2008, when the closing did not take place, defendant's counsel, as escrowee, formally notified plaintiff it would not return her deposit because defendant had declared plaintiff to be in default and made a claim to the deposit (exhibit J to moving papers). By return mail, plaintiff's counsel countered with a formal reciprocal default declaration and deposit demand (exhibit K to moving papers). This second impasse gave rise to the instant litigation, in which both parties lay claim to the deposit on the grounds stated above.

This is not a case where plaintiff willfully failed to furnish financial information required by the board for approval (compare *Hovav v Loew*, 50 AD3d 488 [1st Dept 2008]) or otherwise sabotaged the process (compare *Moustakas v Noble*, 259 AD2d 602 [2d Dept], app dism 93 NY2d 958 [1999]). Rather, plaintiff furnished the information and the board, upon reviewing it, decided to approve her purchase only on the condition that her father furnish a Draconian guaranty. While the board had the absolute right to insist on this condition (see *Rossi v Simms*, 119 AD2d 137, 140 [1st Dept 1986], app and rearg den 509 NYS2d 775 [1st Dept 1987]; *Application of Folic*, 139 AD2d 456, 457 [1st Dept 1988]), plaintiff was under no duty to comply. A purchaser is not required to meet unreasonable requests from a co-op board to satisfy the good faith requirements of her contract with the seller (*Pierre Properties, LLC v Marcus*, NYLJ 5/3/00, p. 27, col. 4 [Sup Ct, NY Co, Shainswit, J.]).

Nothing in the contract of sale, which contained a merger clause (¶ 14.1), obligated plaintiff (or Segundo, who was not even a party to that contract) to procure a

guarantee (see *Meyer v Nelson*, 83 AD2d 422, 424-425 [1st Dept 1981]). Plaintiff and Segundo negotiated with the board in good faith and agreed in principle to a guarantee, but were unable to agree on the specific terms, so one was never executed (see *Moss v Brower*, 213 AD2d 215 [1st Dept 1995]). "Under these circumstances, where there was still an area of disagreement to be resolved, there was no unconditional approval by the [b]oard" (*Lovelace v Krauss*, 60 AD3d 579 [1st Dept 2009]). Failure to close for lack of unconditional board approval in this situation is justifiable, and warrants return of the deposit to plaintiff (*Albert & Kimmel v Herman*, 276 AD2d 413, 413-414 [1st Dept 2000]).

The record shows that plaintiff made a good-faith effort to obtain unconditional board approval, but once defendant attempted to force Segundo to sign the guarantee drafted by the board instead of adjourning the closing so plaintiff could meet with the board a second time, she could do no more and "the question of board approval became academic" (see *Gaffin & Mayo, P.C. v Mok*, 106 AD2d 320, 322 [1st Dept 1984]). Given the board's failure to approve plaintiff unconditionally, she was fully within her contractual rights to cancel the proposed purchase.

Defendant's alternate argument that plaintiff misrepresented her income as being higher than it was, so he is entitled to the deposit under the contract of sale, which allows him to cancel the sale and retain the deposit as liquidated damages in the event of plaintiff's misrepresentation as well as default (sales contract, ¶ 13.1), is not supported by the facts. Accordingly, for the foregoing reasons, it is hereby

ORDERED that plaintiff's motion for summary judgment on the complaint is granted. The escrowee shall turn over the contract deposit to plaintiff forthwith. The Clerk shall enter judgment in plaintiff's favor accordingly.

The foregoing is this court's decision and order. Courtesy copies of this decision and order have been sent to counsel for the parties.

Dated: May 8, 2009

Martin Shulman, J.S.C.