Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS PART 22**
Justice

LUIS A. VELASCO and MARIA PIEJAJ,

Plaintiffs,

-against-

34-06 73RD STREET LLC and JERRY I. LEFKOWITZ, AS ESCROWEE,

Defendants.

Index No. 27818/07

Motion Date April 7, 2009

Motion Cal. No. 25

Motion Sequence No. 2

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Upon the foregoing papers it is ordered that the motion by plaintiffs, Luis A. Velasco and Maria Piejaj for an order pursuant to CPLR 3212 for summary judgment against defendants, 34-06 73rd Street LLC and Jerry I. Lefkowitz, as Escrowee in favor of plaintiffs; and cross motion by defendant 34-06 73rd Street LLC ("34-06") for an order pursuant to CPLR 3212 granting summary judgment against plaintiffs and dismissing the action and the complaint herein on the grounds that plaintiff breached the contract of sale by refusing to close after receiving a "time of the essence" letter, plaintiff's so-called objections to title are barred under the express terms of the contract of sale or were capable of being satisfied at closing out of the proceeds of the sale, as expressly authorized under the contract of sale, or were otherwise not valid reasons for refusing to close, and plaintiffs are not entitled to a return of any portion of the down payment as a result of their wilful breach of the contract of sale are hereby decided as follows:

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue.

(*Andre v. Pomeroy*, 32 NY2d 361 [1974]; *Kwong On Bank, Ltd. v. Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980]; *Crowley Milk Co. v. Klein*, 24 Ad2d 920 [3d Dept 1965]. Even the color of a triable issue forecloses the remedy (*Newin Corp. v. Hartford Acc & Indem. Co.*, 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against (*Bennicasa v. Garrubo*, 141 AD2d 636 [2d Dept 1988]; *Weiss v. Gaifield*, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (*see, Zuckerman v. City of New York*, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Pizzi by Pizzi v. Bradlee's Div. of Stop & Shop, Inc.*, 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (*Gervasio v. DiNapoli*, 134 AD2d 235 [2d Dept 1987]). The role of the court on a motion for summary judgment is to determine if bona fide issues of fact exist, and not to resolve issues of credibility (*Knepka v. Tallman,* 278 AD2d 811 [4th Dept 2000]).

On or about February 26, 2007, plaintiffs Luis A. Velasco and Maria Piejaj entered into a written contract for the purchase of certain real property located at 34-06 73rd Street a/k/a 72-22 34th Avenue, Jackson Heights, New York for the sum of one million one hundred thousand dollars ($1,100,000.00) from defendant 34-06 73rd Street LLC.

Plaintiffs (buyers) maintain that defendant (seller) is in material breach of Paragraphs 14, 19, and 30 of the Contract of Sale, which provisions set forth the seller's requirements to be ready, willing, and able to close title on the property. Said contractual provisions allegedly require conveyance free and clear from violations, judgments, and encumbrances, and a Title Report dated on or about March 15, 2007 revealed: outstanding violations; numerous judgments against the prior record owners of the premises and principal of the seller; and numerous liens against the premises. On or about May 16, 2007, seller's attorney sent a letter to buyer's attorney scheduling a "time of the essence"closing for June 7, 2007. As of June 7, 2007, the violations, judgments, and liens remained open; and therefore, defendant was not ready, willing, and able to close title at the closing. Plaintiffs allege that since the defendant failed to

clear the liens and violations, defendant failed to meet the condition precedent to closing. Additionally, plaintiff maintains that pursuant to the terms of the Contract, they had to obtain a purchase money loan commitment, and defendant failed to provide the documentation necessary for the buyer's lending institution to have in order for a mortgage commitment to be obtained, and so the buyers were unable to get the mortgage commitment.

Defendant, 34-06 argues in its cross motion papers that plaintiffs breached the Contract of Sale by refusing to close and by raising so-called objections to title that either were not allowed under the Contract of Sale or did not form the basis for an objection to title under the Contract of Sale since those obligations could be satisfied out of the sales proceeds at the closing. Defendant argues that while plaintiffs contend in there moving papers that 34-06 was not able to close since there were existing violations, judgments, and liens, under the express terms of the Contract of Sale, the objections did not constitute valid objections to justify refusing to close under the Contract of Sale. Defendant maintains that the premises were sold subject to violations of record and points to paragraph 36(m) of the Contract of Sale which paragraph states:

> "[s]aid premises are sold and are to be conveyed subject to ***(m) All notes or notices of violations of law or municipal ordinances, orders, or requirements noted in or issued by the Department of Housing and Building, Fire, Labor, Health, or other state or municipal department having jurisdiction against or affecting the premises through the date of closing."

Defendant further maintains that paragraphs 40 and 53 of the Contract of Sale state that defendant was permitted to discharge any taxes or liens against the property with sale proceeds or to require plaintiffs to advance money on the Contract of Sale to get any liens discharged of records. Defendant asserts that it is customary to satisfy any outstanding judgments or liens at the closing by giving sufficient proceeds of the sale to the title company so that they get satisfied and discharged of record and paragraph 53 of the contract expressly authorized that procedure. Also, defendant claims that the New York City Department of Finance adds the amount of any emergency repair liens to the real estate tax bills for the premises, so that when the taxes are paid, the emergency repair liens also get paid. Finally, defendant contends that closing adjustments include real estate

taxes and are dealt with at the closing.

Plaintiffs responds that paragraph 14 of the Contract contradicts and prevails over paragraph 36 of the contract, and that defendant 34-06 was unable to close as of the date of the "time of the essence" closing. Paragraph 14 states:

> "The seller agrees to take care of all notes and notices of violation of law or municipal ordinance, orders or requirements noted in or issued by the Department of Housing and Buildings, Fire, Labor, Health, or other State or Municipal Departments, except for H.P.D. violations attached hereto as schedule C, having jurisdiction against or effecting the premises up to the contract date."

Plaintiffs argue that defendant failed to perform a condition precedent to closing, and reiterate that defendant failed to deliver documentation that was required by plaintiffs' lending institution, and therefore, plaintiffs were unable to obtain a mortgage commitment, citing Paragraph 30 of the Contract, which states that defendant is required to "execute, acknowledge where appropriate and deliver such further instruments and documents and take such other action as may be reasonably requested by the other party in order to carry out the intent and purpose of this contract."

Defendant responds by raising an argument that under paragraph 42 of the Contract of Sale, plaintiffs agreed to deliver to seller's attorney a specific list of objections to title required to be cured at least 10 days prior to the closing date, and this was not done (and the fax dated March 30, 2007 was insufficient under paragraph 42 of the Contract of Sale), and plaintiffs failed to appear at the closing. This argument is procedurally improperly before the Court as this issue was not noticed in defendant's original motion papers and is only raised for the first time in defendant's reply papers (*see, Azzopardi v. American Blower Corp.* 192 AD2d 453 [1st Dept 1993] [holding that it is impermissible in reply papers to introduce new arguments in support of or new grounds for movant's motion). Defendant further asserts that by refusing to close, plaintiffs forwent whatever right they may have had to require seller to cure any existing violations required under the Contract of Sale to be cured by seller.

The plaintiffs' (buyers') argument that defendant (seller) is in breach of paragraph 30 of the Contract fails. Plaintiffs

fail to make out a prima facie case with respect to Paragraph 30. Paragraph 30 of the Contract states that defendant is required to "execute, acknowledge where appropriate and deliver such further instruments and documents and take such other action as may be reasonably requested by the other party in order to carry out the intent and purpose of this contract." As discussed *supra*, plaintiffs argue that defendant failed to perform a condition precedent to closing by failing to deliver documentation that was required by plaintiffs' lending institution, and therefore, plaintiffs were unable to obtain a mortgage commitment. However, plaintiffs offer no evidentiary proof as to what specific documentation was requested or how and when such requests were made (ie. by letter, telephone, etc.). Therefore, the Court is unable to reach the determination that documentation necessary to carry out the intent and purpose of the contract was not provided to the plaintiffs from the defendant. Accordingly, plaintiffs fail to make out a prima facie case with respect to Paragraph 30, and summary judgment is denied as to this cause of action.

The plaintiffs' (buyers') argument that defendant (seller) is in breach of paragraphs 14 and 19 of the Contract fails. Plaintiffs fail to make out a prima facie case with respect to either paragraph 14 or paragraph 19. The buyers contend that since there were defects to title prior to the closing, seller was not ready, willing, and able to close since there were existing violations, judgments, and liens. Specifically, the defects consisted of two outstanding New York City violations, two judgments against prior owners, and emergency repair liens. Regarding the defect of outstanding judgments, paragraphs 14 and 19 do not address the issue of judgments. As an initial matter, said sections merely obligate the seller to "take care of" notes and violations of law or municipal ordinance, orders or requirements noted in or issued by specific city agencies. There is no mention of any obligation on the part of the seller to "take care of" judgments against prior owners.

Secondly, paragraph 14 merely obligates the seller to "take care of" specific violations and emergency repair liens. There is no deadline by which the seller must "take care of" such obligations. The seller could have taken care of the two outstanding New York City violations and the emergency repair liens <u>at</u> the closing, as opposed to <u>before</u> the closing (*see, Mahaney v. 580 Madison Ave.*, 135 Misc. 603 [Sup Ct, NY County 1930][holding that there is no justification for rejection of title based upon the existence of liens where documents satisfying the liens are tendered to the buyer at the closing of title]). Paragraph 40 specifically allows the seller to discharge or satisfy liens <u>at</u> the closing and Paragraph 53 states

that mortgages, liens, or encumbrances are not objections to title as long as "properly executed instruments in recordable form necessary to satisfy the same are delivered to the Purchaser at the Closing of Title or a pay-off letter from any institutional lender, together with recording and/or filing fees, and such mortgages, liens or encumbrances may be paid out of the cash consideration paid by the Purchaser.

Certain paragraphs of the Contract give the seller even after the closing date to cure defects. For example, paragraph 42 states in relevant part, that "[i]f it shall appear that such objections may be removable according to reasonable expectation within sixty (60) days after the Closing Date, notwithstanding anything to the contrary contained herein, Seller, at Seller's election, shall have the privilege to remove and satisfy the same and shall, in the event of such election, be entitled for such purpose to an extension of such time for the performance of this Agreement for sixty (60) days. Paragraph 42 evidences an intention on the part of parties that there be a period to cure defects listed in the title report during a period of time after the closing date.

By failing to appear at the closing, the plaintiffs failed to give the defendant a chance to cure the defects to title. Nor did the buyer establish that the title insurance company was unwilling to insure or approve of title even with the defects. The Contract indicates that the property does not have to be free of defects in title, just as long as the title insurance company is still willing to insure in spite of the defects, the buyer still must appear at the closing and accept title.

Accordingly, plaintiff fails to make out a prima facie case with respect to Paragraphs 14 and 9, and summary judgment is denied.

Defendant's cross motion for summary judgment dismissing the plaintiffs' complaint on the grounds that plaintiffs breached the contract of sale is denied. Defendant failed to establish a prima facie entitlement to summary judgment. As an initial matter, defendant does not include an affidavit of one with personal knowledge of the facts in the matter (*see,* CPLR 3212). The herein allegations of fact, by an attorney who does not aver such personal knowledge, amounts to mere unsubstantiated hearsay (*Sloan v. Schoen*, 251 AD2d 319 [2d Dept 1998]). It is well settled that an affirmation from a party's attorney who lacks personal knowledge of the facts, is of no probative value (*see, Zuckerman v. City of New York*, 49 NY2d 557 [1980]; *Wisnieski v Kraft*, 242 AD2d 290 [2d Dept 1997]; *Lupinsky v. Windham Constr.*

Corp., 293 AD2d 317 [1st Dept 2002]). While seller does include along with the attorney's affirmation, a copy of the contract, seller fails to assert specific facts, indicating that it was ready, willing, and able to perform its obligations under the contract. "It is axiomatic that in order to be entitled to specific performance of a contract, a plaintiff must demonstrate that he was ready, willing and able to perform his obligations under the contract regardless of the defendant's anticipatory breach." (*Zev v. Merman*, 134 AD2d 555 [2d Dept 1987][internal citations omitted]). It is evident that in the instant case, the seller failed to prove that it was ready, willing and able to perform its obligations under the contract on the closing date of June 7, 2007 or within an agreed upon time thereafter. For example, no specific factual allegations are made regarding the seller's ability or readiness to dispose of violations such as those listed in Paragraph 14 of the Contract by the Closing date or within an agreed upon time thereafter and in accordance with the terms of the Contract. The Court is unable to glean from defendants papers whether or not it was in a position to timely cure any defects to title that it was contractually obligated to cure. Accordingly, defendant's cross motion for summary judgment is denied.

This constitutes the decision and order of the Court.

Dated: June 9, 2009

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Howard G. Lane, J.S.C.