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

HON. CAROL EDMEAD

PART _____

Justice

Index Number : 102113/2009

PERKIN, JONATHAN

VS.

ANDERSEN, G. CHRIS

SEQUENCE NUMBER : # 001

SUMMARY JUDGMENT

INDEX NO. 102113-09

MOTION DATE 8/28/09

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 _____

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).

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

The instant motion is decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED and ADJUDGED that the application of Plaintiff Jonathan Perkin for an order pursuant to CPLR 3212, granting summary judgment on his Complaint, as against defendants G. Chris Andersen and Sungeun Han-Andersen, **is granted in its entirety, and the Clerk of the Court is directed to enter judgment accordingly**. And it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry within twenty days of entry on counsel for defendants.

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

Dated: 8/24/09

J.S.C.

HON. CAROL EDMEAD

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: PART 35

JONATHAN PERKIN,

Index No. 102113/09

Plaintiff,

DECISION/ORDER

-against-

G. CHRIS ANDERSEN and SUNGEUN HAN-ANDERSEN,

Defendants.

EDMEAD, J.S.C.

MEMORANDUM DECISION

Plaintiff Jonathan Perkin ("plaintiff") moves for an order pursuant to CPLR 3212, granting summary judgment on his Complaint, as against defendants G. Chris Andersen ("Mr. Andersen") and Sungeun Han-Andersen ("Ms. Andersen") (collectively "defendants").

This matter involves a dispute over $302,500 being held in escrow as a result of a residential real estate transaction which did not close.

Background

By contract dated July 31, 2008 (the "Contract"), plaintiff as seller agreed to sell, and defendants as purchasers, agreed to purchase cooperative apartment unit designated 8E, located at 1050 Fifth Avenue, New York, New York (the "Unit"). Plaintiff and defendants are neighbors, and the Unit is adjacent to defendants' unit. Defendants were purchasing the Unit with the intent to combine the two units. The Contract provides for a total purchase price of $3,025,000.00 (the "Purchase Price") for the Unit, including a contract deposit of $302,500. 00 (the "Contract Deposit").

Paragraph 13 of the Contract addresses defaults, remedies and indemnities. Paragraph

13.1 of the Contract reads as follows:

> 13.1 In the event of a default or misrepresentation by Purchaser, Seller's sole remedy shall be to terminate this Contract and retain the Contract Deposit as liquidated damages, except there shall be no limitation on Seller's remedies for a breach of Par. 12.1. In case of Purchaser's misrepresentation or default, Seller's damages would be impossible to ascertain and the Contract Deposit constitutes a fair and reasonable amount of compensation.

Paragraph 13.2 of the Contract reads as follows:

> 13.2 In the event of a default or misrepresentation by Seller, Purchaser shall have such remedies as Purchaser is entitled to at law or in equity, including specific performance, because the Unit and possession thereof cannot be duplicated.

Paragraph 1.11 of the Contract provided that "The 'Closing' is the transfer of ownership of the Shares and Lease, which is scheduled to occur on November 24, 2008 at 12:00 P.M. ..."

Plaintiff's Contentions

For weeks leading up to the November 24, 2008 closing date, counsel for plaintiff alleges that she repeatedly telephoned defendants' counsel to coordinate the closing. Despite her numerous efforts, defendants refused to agree to proceed to closing.

As the closing date approached, the only substantive response counsel for plaintiff received from defendants' counsel was a request for an adjournment of the closing. Reflecting plaintiff's good faith efforts to work with defendants to consummate this transaction, by letter dated November 25, 2008 (the "November 25th Letter"), counsel for plaintiff sent a letter to defendants via certified mail, return receipt requested, consenting to defendants' request for an adjournment of the closing to December 29, 2008. However, said letter advised that time is of the essence.

Approximately one week later, by letter dated December 3, 2008 (the "December 3rd

Letter") defendants' counsel wrote to plaintiff's counsel to inform him that his "clients continue to work towards fulfilling their obligations under the contract," and that "[t]hey may require reasonable adjournment time especially in light of the current extraordinary financial conditions."

Over the next few weeks, defendants' counsel implored plaintiff's counsel to further adjourn the Contract closing due to his clients' inability to close. Notwithstanding the already extensive contract period, and the generous extensions of time, as a final attempt to consummate the sale of the Unit, and as an accommodation to defendants, but specifically without prejudice to plaintiff's rights and remedies, by letter dated December 24, 2008 (the "December 24th Letter"), plaintiff's counsel sent a letter to defendants via certified mail, return receipt requested, reflecting plaintiff's agreement to adjourn the closing one final time to 2:00 p.m. on January 12, 2009, again, with time being of the essence as to that date.

The December 24th Letter further advised defendants that if they failed to close as required, they risked being declared in default and forfeiture of the Contract Deposit pursuant to Paragraph 13.1 of the Contract.

On January 12, 2009, plaintiff was ready, willing and able to close under the Contract, and did, in fact, by tender to the transfer agent of the cooperative corporation the Shares and the Lease. Closing agent of the cooperative's management company, Maria Riccio, also appeared at the closing. Ms. Riccio stood ready to provide the cooperative corporation's consent to the sale of the Unit. Despite there being an unambiguous time of the essence closing, defendants failed to appear and did not close under the Contract on January 12, 2009. Plaintiff tendered title to the Unit as required under the Contract.

Defendants' willful failure to close under the Contract on January 12, 2009, despite due

and proper declaration of time being of the essence, constitutes a material breach of the Contract, which entitles plaintiff to retain the Contract Deposit as liquidated damages.

Defendants' Contentions

Defendants first argue that the instant motion is premature as issues of fact exist regarding plaintiff frustrating defendants' ability to perform under the Contract; plaintiff breaching the covenant of good faith and fair dealing, plaintiff's interactions with the cooperative and whether those interactions influenced the cooperative, purchasers' reliance on plaintiff's representations and the effect of those representations. No only do issues of fact exist, but defendants have not had the opportunity to depose plaintiff or complete discovery.

Defendants intended to purchase the Unit from plaintiff, but plaintiff prevented the sale from occurring by arbitrarily setting a deadline which could not be met.

Despite defendants' good faith efforts to obtain a mortgage during the midst of the recent financial/credit crisis, and plaintiff's representations to defendants that he would cooperate with them to allow them reasonable time to obtain the necessary financing to close the transaction, plaintiff then set a "time of the essence" closing date which he knew could not be met in order to seek to retain the down payment.

Defendants did not originally intend to take a loan against either apartment but to partially finance the purchase by refinancing another property they own.

After the financial crisis struck the nation's economy in September 2008, defendants were unable to obtain their expected financing and were forced to seek other sources of financing for the intended purchase. Despite the drastic change in financial circumstances, the cooperative's board of directors approved the defendants' purchase application on or about October 20th

without requesting any additional or updated information from defendants.

While the Contract was not contingent on financing, it did not prohibit the purchaser from financing and did not even set forth any time periods in which purchasers need to seek financing.

Even though the defendants were making good faith efforts to secure financing during a financial crisis, plaintiff presumably directed his lawyer to send defendants a "time of the essence" closing letter on November 25th, just a single day after the closing date set forth in the Contract. Mr. Andersen was assured by plaintiff that this was just a "procedural thing" and that as long as defendants were working on obtaining the mortgage, everything would be fine and he would give them a reasonable time to close the transaction.

Based on plaintiff's misrepresentations, defendants continued their efforts to obtain a mortgage on the property. On December 18, 2008, defendants received a mortgage commitment from Astoria Federal Savings but it was conditioned on, among other things, proof that the cooperative approve the combination of the two units. Faced with the threat of a claimed "time of the essence" closing and with the holidays approaching, there was no possibility of receiving formal board approval.

Plaintiff's Reply

Throughout his affidavit in opposition, Mr. Andersen attempts to divert the court's attention from the Andersens' obligations under the Contract by repeatedly lamenting his apparent economic distress and indicating that he could not close on the Contract because he did not have appropriate financing. However, the Contract clearly provides that this was to be an all-cash purchase of the Unit.

Also, in the purchasing application to the cooperative board, defendants affirmatively

state that the subject transaction did not involve any kind of financing. Indeed, throughout the pendency of this transaction, defendants never applied to the cooperative board to purchase the Unit with financing. Apparently, defendants did not even obtain financing until December 2008, after the original closing date. The fact that defendants obtained financing is of no moment as this Contract was not subject to financing.

And, Mr. Andersen's implications that plaintiff in some way acted as his "broker," had improper dealings and/or influence with the cooperative board, and that Mr. Andersen relied on plaintiff's "assurances" are unfounded, plaintiff argues. Plaintiff points out that Mr. Andersen is a sophisticated businessman having served as Vice Chairman of PaineWebber. His argument that he somehow relied on plaintiff's representations regarding financing does not change the fact that the defendants were obligated to consummate this all-cash transaction.

Mr. Andersen's argument that plaintiff somehow intentionally set an impossible closing date is untrue. Indeed, as late as a week prior to the January 12, 2009 closing, plaintiff argues that he offered to extend additional time to defendants if they would put down an additional $150,000 deposit in escrow. Again, plaintiff argues, he never received a response from defendants or their attorneys and the closing proceeded.

Analysis

To obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor (CPLR § 3212 [b]). 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] [defendant not entitled to summary judgment where he failed to produce admissible evidence demonstrating that no triable issue of fact exists as to whether plaintiff would have been successful in the underlying negligence action]). 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, supra*; *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 v City of New York, supra*, 49 NY2d 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, supra* at 562). 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]; *Platzman v American Totalisator Co.*, 45 NY2d 910, 912, 411 NYS2d 230 [1978]; *Mallad Const. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290, 344 NYS2d 925 [1973]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347, 668 NYS2d 157 [1st Dept 1998]).

Contract

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, 816 NYS2d 702 [Supreme Court New York County 2006], *citing Furia v Furia,* 116 AD2d 694, 695 [2d Dept 1986]). 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 v Soleo Communications Inc.*, 11 Misc 3d 1071 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 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, 816 NYS2d 693 (Supreme Court 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]).

Contract interpretation:

Courts must construe a contract in a manner that avoids inconsistencies and reasonably harmonizes its terms (*James v. Jamie Towers Housing Co., Inc.*, 294 A.D.2d 268, 743 N.Y.S.2d 85 [1st Dept. 2002]; *Barrow v. Lawrence United Corp.*, 146 AD2d 15, 18, 538 NYS2d 363 [3rd Dept. 1989]), (*Barrow v Lawrence United Corp.*, 146 AD2d 15, 18), remaining "consistent[ ] with the over-all manifest purpose of the ... agreement." The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent (*see Slatt v. Slatt*, 64 NY2d 966, 967, 488 NYS2d 645, *rearg denied* 65 NY2d 785, 492 NYS2d 1026 [1985]). "The best evidence of what parties to a written agreement intend is what they say in their writing" (*Slamow v. Del Col*, 79 NY2d 1016, 1018, 584 NYS2d 424 [1992]). Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms *(see e.g. R/S Assoc. v. New York Job Dev. Auth.*, 98 NY2d 29, 32, 744 NYS2d 358, *rearg denied* 98 NY2d 693, 747 NYS2d 411 [2002]; *W.W.W. Assoc. v. Giancontieri*, 77 NY2d 157, 162, 565 NYS2d 440 [1990]).

Furthermore, a contract is unambiguous if the language it uses has "a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion" (*Breed v. Insurance Co. of N. Am.*, 46 NY2d 351, 355, 413 NYS2d 352 [1978], *rearg denied* 46 NY2d 940, 415 NYS2d 1027 [1979]). Thus, if the agreement on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity (*see e.g. Teichman v. Community Hosp. of W. Suffolk*, 87 NY2d 514, 520, 640 NYS2d 472 [1996]; First Natl. Stores v. Yellowstone Shopping Ctr., 21 NY2d 630, 638, 290 NYS2d 721,

rearg denied 22 NY2d 827, 292 NYS2d 1031 [1968]).

Ultimately, the aim is a practical interpretation of the language employed so that there be a realization of the parties' "reasonable expectations" (*see Sutton v. East River Sav. Bank*, 55 NY2d 550, 555, 450 NYS2d 460 [1982]).

It is well-settled under New York law that "a vendee who defaults on a real estate contract without a lawful excuse cannot recover the down payment." *Maxton Builders, Inc. v Lo Galbo,* 68 N.Y.2d 373, 378 (1986); *Rivera v Konkol,* 48 AD3d 347 (1st Dept 2008); *Gillette v Meyers,* 42 AD3d 654 (3d Dept 2007).

Upon the plaintiff's *prima facie* showing of entitlement to judgment as a matter of law, the defendants herein have failed to raise a triable issue of fact (*see Alvarez v Prospect Hosp.,* 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572; *Zuckerman v. City of New York,* 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718). Notwithstanding defendants' contentions, that Mr. Andersen was assured by plaintiff that the "time of the essence" demand was just a "procedural thing" and that as long as defendants were working on obtaining the mortgage, everything would be fine and he would give them a reasonable time to close the transaction, in light of the documentary evidence to the contrary, defendants' argument on this point is insufficient to raise a triable issue of fact. (*see Mosdos Oraysa, Inc. v Sausto,* 13 A.D.3d 838, 787 N.Y.S.2d 160; *Arnold v. Birnbaum,* 193 A.D.2d 710, 711, 598 N.Y.S.2d 68; *Zahl v Greenfield,* 162 A.D.2d 449, 556 N.Y.S.2d 393; *Cortesi v R & D Constr. Corp.,* 137 A.D.2d 901, 524 N.Y.S.2d 874, *affd.* 73 N.Y.2d 836, 537 N.Y.S.2d 475, 534 N.E.2d 313).

The Contract at issue here contains "merger," "completeness" and "no oral modification clauses:

14. Entire Agreement; Modification

> 14.1 All prior oral or written representations, understandings and agreements had between the Parties with respect to the subject matter of this Contract...are merged in this Contract, which alone fully and completely expresses their agreement.
>
> 14.2 A provision of this Contract may be changed or waived only in writing signed by the Party (or Escrowee) to be charged.

It is also a long held general rule that a party to a contract cannot rely on the failure of another to perform when he or she has frustrated or prevented the performance, see *Kooleraire Service & Installation Corp. v Board of Ed. of City of New York,* 28 N.Y.2d 101, 106, 320 N.Y.S.2d 46, 268 N.E.2d 782 (1971). Every contract contains an implied obligation by each party to deal fairly with the other and to eschew actions which would deprive the other party of the fruits of the agreement *Miller v Almquist,* 241 A.D.2d 181, 184, 671 N.Y.S.2d 746 (A.D. 1st Dept.1998). The record fails to raise an issue of fact as to plaintiff being responsible for thwarting the closing of this Contract.

To the degree that defendants seek to invoke the financial crisis as a basis for avoiding a finding of default, such effort is unpersuasive. The worldwide economic downturn is an assertion that is totally unsupported by any statutory or judicial precedent, and one that the Court finds to be specious. Since the Contract did not provide that the Contract was subject to/contingent on financing, defendants' assertion that the circumstances surrounding their attempts to secure financing should be considered, is unavailing.

Lastly, defendants maintain that plaintiff was impermissibly attempting to insert a time of the essence clause. However, it was defendants who were never able to meet a closing date, and ultimately failed to appear at closing.

Insufficient Discovery

It is well settled that an argument opposing summary judgment on the grounds of insufficient discovery "is unavailing where the nonmoving party has failed to 'produce some evidence indicating that further discovery will yield material and relevant evidence'" (*Heritage Hills Soc., Ltd. v Heritage Development Group, Inc.*, 56 AD3d 426, 427 [2d Dept 2008], *quoting Fleischman v Peacock Water Co., Inc.*, 51 AD3d 1203, 1205 [3d Dept 2008]); *Hayden v City of New York*, 809 NYS2d 75, 76 [1st Dept 2006] ["In addition, plaintiff failed to show that the representatives already deposed had insufficient knowledge or were otherwise inadequate, or that further discovery was warranted by reason of a substantial likelihood that additional persons sought for deposition possessed information material and necessary to oppose the motion"]; *Prestige Decorating and Wallcovering, Inc. v U.S. Fire Ins. Co.*, 49 AD3d 406, 407 [1st Dept 2008] ["Based on the record, the discovery that has already taken place, and the lack of a showing of what further evidence might be unearthed, the asserted need for further discovery reduces itself to a 'mere hope,' which is insufficient to defeat summary judgment"]; *Steinberg v Abdul*, 230 AD2d 633, 633 [1st Dept 1996] ["We add that the mere hope, expressed by plaintiffs, that evidence sufficient to establish defendants' assumption of a duty to plaintiffs' decedent may be obtained during discovery does not fulfill their obligation to demonstrate the likelihood of such disclosure (CPLR 3212[f]) and, thus, is insufficient to defeat defendants' motions for summary judgment"]; *Frierson v Concourse Plaza Associates*, 189 AD2d 609, 610 [1st Dept 1993] ["Neither can [defendants] avoid summary judgment by claiming a need for discovery. The 'mere hope' of defendants that evidence sufficient to defeat such a motion may be uncovered during the discovery process is not enough . . . . Defendants were bound to show there was a

likelihood of discovery leading to such evidence, *i.e.*, that facts "may" exist but cannot be stated at that time (CPLR 3212[f]). This they failed to do"]; *Pro Brokerage, Inc. v Home Ins. Co.*, 472 NYS2d 661, 662 [1st Dept 1984] ["The plaintiff's later assertion that further discovery was necessary, not only was set forth in mere conclusory terms, but no attempt was made to explain what further discovery was necessary and to what extent such further discovery would overcome the legal insufficiency of the complaint."].

In the instant case, defendants have provided no evidence in their opposition papers indicating that further discovery will yield material and relevant evidence. Therefore, defendants' argument lacks merit.

As to defendant's final argument concerning plaintiff's attorney affirmation, as has been stated in *Olan v Farrell Lines, Inc.* (64 NY2d 1092, 1092 [1985]), "The fact that [plaintiff's] supporting proof was placed before the court by way of an attorney's affidavit annexing plaintiff's deposition testimony and other proof, rather than affidavits of fact on personal knowledge, does not defeat defendant's right to summary judgment." *Hoeffner v Orrick, Herrington & Sutcliff LLP*, 61 AD3d 614 (1st Dept 2009). The affidavit or affirmation of an attorney, even if he has no personal knowledge of the facts, may, of course, serve as the vehicle for the submission of acceptable attachments which do provide "evidentiary proof in admissible form", e. g., documents, transcripts. Such an affidavit or affirmation could also be accepted with respect to admissions of a party made in the attorney's presence.

In the present instance, plaintiff's counsel states that she has personal knowledge.

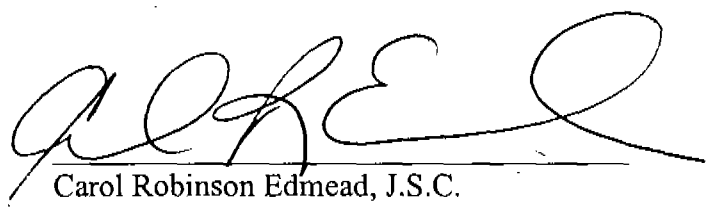
Conclusion

Based on the foregoing, it is hereby

ORDERED and ADJUDGED that the application of Plaintiff Jonathan Perkin for an order pursuant to CPLR 3212, granting summary judgment on his Complaint, as against defendants G. Chris Andersen and Sungeun Han-Andersen, **is granted in its entirety, and the Clerk of the Court is directed to enter judgment accordingly**. And it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry within twenty days of entry on counsel for defendants.

Dated: August 24, 2009



Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD