

**Ashby v Baah**

2009 NY Slip Op 32054(U)

September 8, 2009

Supreme Court, New York County

Docket Number: 112079/08

Judge: Carol R. Edmead

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. CAROL EDMEAD

PART 35

Index Number : 112079/2008  
ASHBY, LYNETTE DAWN  
VS.  
BAAH, EUGENE OFORI  
SEQUENCE NUMBER : 003  
PARTIAL SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE 7/1/09  
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

**FILED**  
SEP 10 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Based on the accompanying Memorandum Decision, it is hereby

ORDERED that plaintiff's motion for partial summary judgment on liability against defendant pursuant to CPLR § 3212, for breach of contract is denied; and it is further

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

This constitutes the decision and order of the Court

Dated: 9/8/09

**HON. CAROL EDMEAD** <sup>J.S.C.</sup>

Check one: FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST  REFERENCE

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

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

-----X  
LYNETTE DAWN ASHBY,

Plaintiff,

-against-

EUGENE BAAH,

Defendant.

Index No. 112079/08

DECISION/ORDER

**FILED**  
SEP 10 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

-----

MEMORANDUM DECISION

In this action for partition, breach of contract, and injunctive relief, plaintiff Lynette Dawn Ashby (“plaintiff”) moves for partial summary judgment on liability on her breach of contract claim against her former boyfriend, defendant Eugene Baah (“defendant”).

*Motion*

After the parties’ relationship ended in 2007, they executed an exclusive brokerage agreement with Brown Harris & Stevens (“BHS”), dated December 18, 2007, to sell their jointly owned residential condominium unit located at 300 Cathedral Parkway, #9B, New York, New York (the “unit”).<sup>1</sup>

Thereafter, on May 3, 2008, the parties entered into a “Cooperative Agreement” (or “Agreement”) whereby they agreed to continue cooperating towards the sale and division of proceeds of their unit. Specifically, paragraph 1 of the Agreement provides that “All efforts will continue to be made to sell the apartment as soon as possible, which is the mutual goal of both

---

<sup>1</sup> It is alleged that the unit was purchased for \$570,000.00, and that plaintiff contributed at least \$87,000.00 towards its acquisition and renovation, while defendant contributed only \$30,000.00. Plaintiff contends that the mortgage financing was procured solely on the strength of her own, significantly higher credit score, and that defendant was unemployed. Plaintiff and defendant are joint owners of the subject property pursuant to the deed to the subject premises, dated June 13, 2007.

parties.” Paragraph 11 provides that the brokerage commission and closing fees would be deducted “off the top” of the sales proceeds, after which the mortgage and home equity line of credit financing would be fully repaid to JP Morgan & Chase. Paragraph 11(c) provides that net proceeds would be divided “50/50” between the parties. However, paragraph 14 provides that if any provision in the Agreement is breached, the contract is “null and void.”

In support of her motion, plaintiff argues that the evidence demonstrates that defendant materially breached the Cooperative Agreement.

Plaintiff asserts that from the time the contract was executed, defendant repeatedly, intentionally, and maliciously thwarted all of her attempts to sell the unit. Specifically, defendant rejected five separate purchase offers without any legal justification. Furthermore, BHS had shown the premises, as of September, 2008, to at least 65 sets of possible purchasers, and there had been several broker open houses as of the time this lawsuit had been initiated. However, defendant has repeatedly obstructed the brokers’ efforts to sell the unit.

Specifically, in June, 2008, an offer of \$730,000.00 was presented. Defendant rejected this initial offer as “too low,” even though it would have represented a 28% profit over and above the initial acquisition price of the unit. As of the time this lawsuit was initiated in September, 2008, the defendant had also rejected a second offer in the sum of \$690,000.00, which would have realized a profit of 21% over and above the acquisition cost of the premises. Emails between plaintiff and defendant, dated August 7, 2008, indicate that defendant would not agree to any offer unless he received \$115,000 in net proceeds, which plaintiff contends represent a 400% return on his initial investment of approximately \$30,000. Plaintiff also contends that the “comparative” listings at the premises ranged in price from \$649,000 (on the high side for a 19th

floor unit-the subject unit is on the 9th floor) to a low of \$470,000, which were the prices as of the time this lawsuit was instituted. These comparables indisputably establish that the two initial offers of \$730,000 and \$690,000 were eminently fair and reasonable, and that defendant's rejection of same violated the Cooperation Agreement.

On June 18, 2008, defendant, without prior notice to plaintiff, appeared at a broker open house which was being conducted on that day at the premises. On this day, defendant forcibly ejected the brokers and interested parties who were in attendance. Thereafter, defendant advised BHIS by email that BHS would no longer be given access to show the premises without prior advance consent from him - even though defendant had moved out of the unit and agreed to cooperate in the listing and sale of the property. Based on the foregoing, it is beyond reasonable dispute that as of the time this action was commenced, defendant had rejected two fair, market-competitive prices for the unit, and had already begun interfering and obstructing the broker's efforts to sell the unit.

As indicated by the transcript of the initial conference held with the Court in this proceeding,<sup>2</sup> defendant's counsel's affirmation in opposition to the order to show cause, and

---

<sup>2</sup> The transcript provides as follows:

THE COURT: ... what is your problem with the brokerage Brown Harris being the agent selling the property?

MR. BAAH: Because they have gone against my instructions to keep me in the loop in terms of communication regarding the apartment. They negotiated the price of the apartment without my consent and the two of them are working together. . . .

THE COURT: What is the price you are seeking?

MR. BAAH: The price we agreed to was \$875,000.

THE COURT: How big is this unit?

MR. BAAH: A two bedroom apartment on Central Park West...

THE COURT: . . . are there other apartments in the building?

MS. ASHBY: Six hundred fifty to 700 sold in the past six months.

THE COURT: In the past six months two bedrooms of the same layout were sold for 650. If that was sold for 650, what is your basis?

MR. BAAH: The 875 number was from Brown Harris Stevens and they -

THE COURT: They . . . they gave you an unrealistic number. You are telling me you want to hold to the 875?

various emails, defendant advised BHS to cease showing the unit until BHS cooperated with him, in the hopes that this would encourage them to keep defendant apprised of the progress in the attempted sale of the unit. Emails from defendant to the BHS broker states that defendant "would like to respectfully decline the offer. My reasoning is that I have decided not to work with BHS. I think you understand why." Additional emails indicate that open houses had been suspended by BHS in response to defendant's aggressive and threatening conduct to the BHS brokers. Defendant's admission that at or about the time this lawsuit was commenced, he specifically directed the listing broker not to continue showing the unit, demonstrates defendant's violation of the Cooperation Agreement.

After defendant's rejection of the two initial market-competitive offers, a third, lower offer was received on or about October 20, 2008, in the sum of \$676,500, which offer was communicated to defendant's broker. However, defendant once again rejected and obstructed the sale of the unit in violation of the Cooperative Agreement.<sup>3</sup>

Subsequently, a fourth offer was presented through the efforts of BHS for \$605,000. Yet, defendant once again rejected this offer. Plaintiff's attorney's most recent email correspondence

---

MR. BAAH: I said that the number she received was too low.

THE COURT: What was the number you received?

MS. ASHBY: We had two offers, one for 730.

THE COURT: 730 is too low? When the market is selling 650 for two bedrooms and you think 730 is too low?

MR. BAAH: When she came to me with that offer, I asked for information about the buyer and she did not respond.

<sup>3</sup> Plaintiff refers to the following emails: October 19, 2008 email indicating that an initial offer of \$653,000 was made for purchase of unit; October 20, 2008 email to plaintiff (and transmittal of same to defendant's counsel) indicating firm offer of \$676,500; counsel's follow up with defendant's counsel seeking a response to offer; October 23, 2008 email from listing broker confirming that defendant directly contacted offeror's broker, and that unnecessary and irrelevant information had been requested by defendant; defendant's counsel's October 24, 2008 email requesting unnecessary and irrelevant information concerning the offeror; October 10, 2008 email between counsel wherein defendant's counsel is warned against further delay and damages which would result if offer is lost due to defendant's conduct; and email from offeror's broker confirming withdrawal of offer.

to defendant's attorney, indicates that a fifth offer was received for \$500,000.

The foregoing establishes that defendant violated the Cooperation Agreement. The defendant's breach thereof has suspended plaintiff's obligations to comply with same, and nullified any rights or entitlements that defendant might otherwise have received if he had complied with said Agreement. Defendant has obstructed plaintiff's efforts to sell the subject unit, while plaintiff continues to pay all of the carrying charges (including mortgage, maintenance and taxes) every month. Defendant has speculated with plaintiff's financial future to the extent that he has unjustifiably refused and rejected a series of declining market-value offers. The first four of the offers outlined above could have resulted in a selling price in excess of the acquisition price for the subject unit, and would have covered the underlying mortgage, all attendant transactional cost, and would have resulted in actual return to the parties herein.

#### *Opposition*

The clause of the "Cooperation Agreement" that is allegedly breached states that, "All efforts will continue to be made to sell the Apartment as soon as possible, which is the mutual goal of both parties." The clause does not specify a price point that is acceptable to both parties, does not specify which broker they will use, if any, and does not clarify what "efforts will be continued." Nor does plaintiff mention any agreement to a specific price point. Plaintiff does not mention when the agreement with BHS expired, and whether the parties agreed to renew the agreement. Plaintiff does not provide any evidence to what "efforts will continue" refers to. Therefore, plaintiff has not proven that defendant has breached the Cooperation Agreement. Plaintiff simply attempts to hedge the risks associated with having the property sold at auction and still being held liable to the mortgage lender thereafter.

With respect to the sale price, once the parties entered into the Cooperation Agreement, they discussed the sales price, and thereafter, further discussed the sales price with BHS and agreed to set an asking price of \$875,000. Plaintiff alleges that the first offer obtained came through BHS and was for \$730,000, which was \$145,000 less than the price agreed to by the parties, in June 2008, the same month the property was listed, prior to the market crash, while property values were still exponentially growing (as evidenced by the fact that the parties purchased the property in June 2007 for \$570,000, and were at least offered \$730,000 approximately one year thereafter). Thus, defendant's rejection of this offer or any other offer at a price point not agreed to is not a breach of contract, as no price was agreed to in the Cooperation Agreement.

Further, defendant made an offer to buy the plaintiff out for \$85,000, which is more than what her share would have been had they sold for \$730,000. The profits would have been \$160,000, shared equally, under the Cooperation Agreement, resulting in an individual profit of \$80,000. Plaintiff rejected defendant's offer, on the assumption that the offer did not include a transfer of the mortgage. Clearly, plaintiff at the time did not believe that defendant's offer was a fair one, and that she had the right to reject it; defendant had the right to reject the first offer that was made without breaching the contract, and plaintiff had the right to reject the second offer that was made without breaching the contract. Thus, both parties continued to reject offers that were made - without breaching the contract.

In addition, plaintiff fails to sufficiently explain the alleged financial harm she is suffering. The Cooperation Agreement stated that when the unit was sold, the lender would be paid off and then the parties would divide any additional dividends, and that plaintiff would

reside in the unit until such time of sale. As a result of the benefit of residing at the unit, plaintiff agreed, in the Cooperation Agreement, that she would solely carry the costs of the unit. Plaintiff continues to realize the benefit of residing in the unit, and therefore her financial condition has not been harmed by defendant. If plaintiff claims that she did not expect to live in the unit for this duration, as in matrimonial law, the party residing at the premise may get a credit for a portion of the mortgage paid, after rent is subtracted and divided, thereby, eliminating any possibility of financial harm. This however, does not constitute a breach of contract. In response to any claim that plaintiff would have profited by a sale at a higher price, defendant points out that profit does not constitute financial harm if not received, a purchase of property does not guarantee a financial gain, and plaintiff should have accepted defendant's offer in August 2008.

The final offer supplied by plaintiff that she seemingly was willing to accept, was an offer for a \$500,000 in a short sale. Defendant countered that offer, and agreed to purchase the unit at said price with conditions. Plaintiff's response was that it was less than the lien amount, which was \$502,000, and therefore rejected the defendant's offer. Plaintiff was ready to accept an offer of \$500,000, without reviewing the amount due to the bank, and defendant then agreed to make another counter-offer for \$502,000, with a provision in the contract that stated that the lien must be paid off in full, for the sale to go through. Plaintiff made no response to defendant's offer, placing the parties in the current situation of being forced to sell the property at auction. Plaintiff's action/inaction is inconsistent, in that she was willing to sell the property to a "stranger," without consideration of her finances first, and yet rejected an equivalent counter offer from defendant, which raises issues of fact as to plaintiff's intent to sell the unit.

As to the allegations concerning BHS, defendant points out that the agreement submitted

to the Court that was entered by the parties with BHS, was a blank contract, with a signature page. Defendant has requested, and the Court has ordered that a copy of all agreements entered into with BHS by the parties be provided. However, plaintiff has yet to provide copies of said agreements. In any event, plaintiff failed to establish that defendant violated any agreement with BHS; and even if he had, the breach would have been with BHS. Further, defendant did not breach any agreement with BHS, as the contract for exclusivity with BHS had expired, and not been renewed by defendant due to BHS's lack of communication with him on the progress of the sale. Had plaintiff provided the discovery requested, it would be evident that only the plaintiff had continued to contract with BHS, and only the plaintiff made decisions, without defendant's knowledge or consent as to the listing price of the property or as to BHS's exclusivity. In addition, plaintiff's decisions to allow BHS to change the listing price also arguably adversely affected the value of the offers that were being made. Again, plaintiff's continued relationship with BHS without defendant's consent or knowledge could not in any way result in defendant's breaching the Agreement. Arguably, plaintiff breached the Cooperation Agreement in that she failed to notify defendant of any changes in the listing price of the unit or her extension of the exclusive agreement alone.

As to the property value of the unit, plaintiff repeatedly attempted to lower the listing price of the property, thereby reducing any profits that she and defendant would receive. Indeed defendant is the only party who has consistently attempted to preserve the value of the property by requesting that the listing price of the property be comparable to the market value obtained by the independent appraisal. The only undisputed numbers that we know regarding the property value are the purchase price (\$570,000); the original listing price (\$875,000); and theoretically,

the remaining mortgage value (\$502,000). Defendant was ordered to, and obtained an appraisal, showing that the property value as of January 23, 2009, based on comparables in the area, was \$730,000, which was the appraised value after the market crash. This value supports and substantiates defendant's unwillingness to sell for less than that value (and definitely not prior to the market crash), and willingness to buy when the plaintiff supposedly wanted to sell at \$500,000. Further, at the parties' first appearance in Court, where the value of the property, and alleged comparables were discussed, what was not discussed was the view of Central Park, the floor on which the apartment was, and the need for renovations in the other apartments. Plaintiff, in her motion references an amount that defendant was seeking in the sale of the unit; this again does not result in a breach of the Agreement, as no agreement was made as to the sale price of the unit.

In any event, defendant argues, plaintiff breached the Cooperation Agreement, in that she changed the locks without prior notice to the defendant, and did not maintain the defendant's mail pursuant to the Agreement. In plaintiff's Reply Affidavit, she admits to the locks being changed and the Agreement clearly states that if any provision is breached, "the contract is null and void." It further states that even if it was breached due to a force majeure, to reinstate the contract the parties must mutually agree to do so, and do so in writing. Therefore, even if plaintiff's breach was out of her control, the parties would have needed to sign an Amendment so stating, which never occurred. Therefore, if plaintiff breached the Agreement, defendant is released from any further obligations in the Agreement, and therefore could not have breached the Agreement. The multiple fabrications and omissions created by the plaintiff, the blank BHS contract, the signing of extensions with BHS without defendant's knowledge or consent, and the

accepting of \$500,000 offer, but then rejecting the same counter offer from defendant, demonstrates that plaintiff has a personal vendetta against defendant.

*Reply*

In reply, plaintiff argues that defendant has failed to raise an issue of fact with regard to defendant's liability on plaintiff's contract claim. Plaintiff points out that defendant has offered the affirmation of his attorney in opposition to the motion. However, defendant's attorney has little or no first hand knowledge of the facts and circumstances referred to in her opposition paper. While it is true that defendant annexed his verification to his counsel's opposition, it is also nonetheless true that the submission of a hearsay affirmation by counsel does not satisfy the opposing parties' legal burden when confronted with a motion for summary judgment.

In any event, the bulk of the allegations set forth in the moving affidavit and allegations which clearly show defendant's repeated and malicious breach of the contract at issue are uncontroverted. Rather than identifying any of plaintiff's allegations which are the subject of genuine factual dispute, defendant's counsel has instead engaged in legal argument. The material statements in plaintiff's motion substantiating the terms of the Cooperative Agreement, the offers made to purchase the unit, the potential profits that could have been realized by the parties, and defendant's repeated rejections of those offers, remain undisputed.

The record supports the one reasonable conclusion that defendant has intentionally, maliciously and repeatedly breached the Cooperation Agreement. It is further clear from this record that the defendant breached such Agreement first, thereby suspending plaintiff's further performance obligations.

### *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 Perlbinde*r, 307 AD2d 230, 762 NYS2d 386 [1<sup>st</sup> Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1<sup>st</sup> 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, supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

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, supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1<sup>st</sup> 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 [1<sup>st</sup> Dept 1998]).

To prevail on a breach of contract action, plaintiff must establish an agreement, the performance by that party, breach by the other party, and resulting damages (*see Volt Delta Resources LLC v Soleo Communications Inc.*, 11 Misc 3d 1071, 2006 NY Slip Op 50497 [NY Sup 2006], *citing Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). Plaintiff must set forth the terms of the agreement upon which liability is predicated by making specific reference to the relevant portions of the contract (*see 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]). "The essential terms of the parties' purported contract, including the specific provisions of the contract upon which liability is predicated, must also be established (*Volt Delta Resources LLC v Soleo Communications Inc.*, *citing Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995]; *see also Caniglia v Chicago Tribune-New York News Syndicate Inc.*, 204 AD2d 233, 234 [1st Dept 1994]; *Atlantic Veal & Lamb, Inc. v Silliker, Inc.*, 11 Misc 3d 1072, 816 NYS2d 693 [NY Sup 2006]), *citing Chrysler Capital Corp. v Hilltop Egg Farms, Inc.*, 129

AD2d 927, 928 [3d Dept 1987], accord *Valley Cadillac Corp. v Dick*, 238 AD2d 894, 894 [4th Dept 1987]).

Under the Cooperative Agreement, the parties agreed, in relevant part, as follows:

- 1. All efforts will continue to be made to sell the Apartment as soon as possible, which is the mutual goal of both parties.

\* \* \* \* \*

- 4. Lynette will pay all mortgage, taxes and fees relating to the Apartment after Eugene moves out.

\* \* \* \* \*

- 7. Lynette agrees not to change the locks to the Apartment without advance notice and without providing a copy of the new key to Eugene.

\* \* \* \* \*

- 9. Eugene will continue to receive some mail at the Apartment.

- 10. Lynette will put all mail not addressed to her in one place designated by Eugene.

- 11. Eugene and Lynette agree to the following in regards to the sale of the apartment:

- a. The agent fee and all closing fees shall be deducted first from the sale amount;
- b. After which, the mortgage and home equity line of credit shall be paid in full to JP Morgan Chase & Co. before any further distributions of the proceeds;
- c. After both the closing fees and pending liabilities owed to JP Morgan Chase & Co. have been settled, then the remain [sic] proceeds are to be divided 50/50 between Eugene and Lynette[.]

\* \* \* \* \*

- 14. **If any provision in the Agreement is breached, the contract is null and void.** The parties may then renegotiate, or, if the breach [sic] was the result of inadvertent or administrative error or force majeure event, the parties can agree to reinstate the contract after the breach [sic] is promptly cured by signing an Amendment stating that the breach [sic] has been cured to the mutual satisfaction of both parties.  
(Emphasis in original)

The provision obligating both parties to "expend all efforts to continue to list and sell the Premises, 'as soon as possible,'" is tantamount to the requirement to employ reasonable efforts or

"best efforts", implicit in every agreement (*see Timberline Development LLC v Kronman*, 263 AD2d 175, 702 NYS2d 237 [1st Dept 2000] *citing Wood v Lucy, Lady Duff-Gordon*, 222 NY 88, 92). "Best efforts" requires more than "good faith," which is an implied covenant in all contracts (*Kroboth v Brent*, 215 A.D.2d 813, 625 N.Y.S.2d 748 [3d Dept 1995] *see, Kirke La Shelle Co. v Armstrong Co.*, 263 N.Y. 79, 85), and requires that the parties pursue all reasonable methods for obtaining the parties' objectives (*see, 750 Blask v. Miller*, 186 A.D.2d 958, 959, 588 N.Y.S.2d 940).

Plaintiff has submitted substantial documents, as attested to by plaintiff, evidencing that the following facts remain undisputed: that the Cooperation Agreement was intended to provide for the parties' cooperation and sale of the subject apartment unit "as soon as possible"; in June, 2008 defendant and plaintiff were presented with an offer in June 2008 of \$730,000.00, and that defendant rejected this initial offer as "too low" even though it would have represented a 28% profit over and above the initial acquisition price of the condominium unit; at the time that this lawsuit was commenced, defendant had rejected a second, lower offer made in August 2008 for \$690,000.00, and that this offer would have resulted in a realized profit of 21% over and above the acquisition cost of the premises; defendant stated that he would accept the \$690,000.00 offer "if you [plaintiff] will pay Elaine [BHS] out of your half"; as of September 2008, BHS had shown the unit to at least 65 possible purchasers; on June 18, 2008, defendant showed up to a broker open house, and ejected all parties there including the real estate professionals and possible buyers; defendant unilaterally, and via email, advised BHS that they would no longer be given access to show the unit without prior advance consent from him; that two additional offers were received: for \$676,500.00 in October 2008, and for \$605,000.00 in January 2009, which

were rejected by defendant; and if any of the first four offers had been accepted and closed, that there would have been sufficient proceeds not only to pay the underlying mortgage and transactional costs, but also that would have resulted in some level of distribution to the parties in this lawsuit. Such submissions, sufficiently establish that defendant breached the Cooperation Agreement by rejecting the initial two offers on the unit.

The Cooperation Agreement does not specify any price, or range of prices at which the unit must sell, or provide any guidelines with which the parties can determine the price at which the unit must sell. The Agreement is silent in this regard, which is consistent with the clear intent of the parties to simply sell the unit "as soon as possible." Further, defendant's claim that the parties "agreed" to sell the unit at \$875,000 wholly unsupported by any evidence, especially in light of the Cooperative Agreement and brokerage agreement's failure to expressly state any price. Notably, the brokerage agreement with BHS did not contain an expiration date, and the provision authorizing BHS to sell the unit at a certain price did not contain a price. Further, plaintiff's Reply Affidavit in dated September 18, 2008 indicates that BHS would "test the market at \$875,000 and if the Apartment did not sell, they would adjust the price." Further, the Court notes that although defendant instructed BHS to cease showing the unit, such unilateral attempt to terminate the parties' agreement with BHS was a nullity, since the brokerage agreement clearly calls for a "writing, signed by both parties." in order to change, rescind or modify the brokerage agreement (§ 11). And, upon a fair reading of the Cooperation Agreement and agreement with BHS, there is also nothing in either agreement expressing an intent of the parties to realize any "profit" from the sale of unit, or condition the sale of the unit upon a price where the parties would receive a profit; the parties clearly agreed to sell the unit, pay the

broker's fee, and loans due on the property, *prior to any* distributions. Further, the Court notes that although defendant instructed BHS to cease showing the unit, such unilateral attempt to terminate the parties' agreement with BHS was a nullity, since the brokerage agreement clearly calls for a "writing, signed by both parties" in order to change, rescind or modify the brokerage agreement (§ 11). Therefore, defendant's insistence that the unit sell at a certain price, and rejection of the first two offers, and actions attempting to prohibit BHS from showing the unit, prior to September 18, 2008, was without justification, and unreasonable under the circumstances.

However, defendant's submissions raise an issue of fact as to his liability under the Cooperation Agreement, as amended.

Plaintiff's chief complaint is that defendant unreasonably rejected all reasonable offers to purchase the unit. It cannot be disputed that notwithstanding defendant's conduct noted above, in September 18, 2008, the parties then agreed to "list" the unit at \$765,000.00, and agreed to "sell" the unit "for any price/offer of at least 95% of the listing price" (*i.e.*, \$726,750.00) (see So-Ordered Stipulation dated September 8, 2008). The So-Ordered Stipulation further provides that if an offer is received for less than 95% of the listing price, and one party wishes to accept, "further application to the Court will be made for approval of such offer."

The Court notes that such circumstances present the Court with an issue of whether there was an "accord and satisfaction," an accord being "an agreement that a stipulated performance will be accepted, in the future, in lieu of an existing claim" and the execution of the agreement constituting the satisfaction (*Chappelow v Savastano*, 195 Misc 2d 346, 758 NYS2d 782 [Sup Ct Richmond County 2003] *citing Reilly v Barrett*, 220 NY at 173). "The distinctive feature of an

accord and satisfaction is that the obligee does not intend to discharge the existing claim merely upon the making of the accord; what is bargained for is the performance, or satisfaction. If the satisfaction is not tendered, the obligee may sue under the original claim or for breach of the accord” (*Id. citing Plant City Steel Corp. v National Mach. Exch.*, 23 NY2d 472, 478, 297 NYS2d 559 and General Obligations Law § 15-501[3]). Thus, where there is a subsequent failure to perform the accord according to its terms, the non-breaching party has the choice of suing on the accord or the original obligation (*American Broadcasting-Paramount Theatres, Inc. v American Mfrs. Mut.*, 48 Misc 2d 397, 265 NYS2d 76 Sup Ct New York County 1965]).

By contrast, the parties may intend that a new agreement, though executory, will immediately discharge the existing obligation (*Chappelow v Savastano, supra citing Morehouse v Second Natl. Bank*, 98 NY 503, 509). That is a substituted agreement (*Calamari and Perillo, Contracts* § 21-4, at 869 [3d ed.]). Thus, “where the parties have clearly expressed or manifested their intention that a subsequent agreement supersede or substitute for an old agreement, the subsequent agreement extinguishes the old one and the remedy for any breach thereof is to sue on the superseding agreement” (*American Broadcasting-Paramount Theatres, Inc. v American Mfrs. Mut.*, 48 Misc 2d 397, 265 NYS2d 76 Sup Ct New York County 1965] *citing Blair & Co. v Otto V.*, 5 AD2d 276, 171 NYS2d 203). Whether a particular arrangement is an accord or a substituted agreement hinges on the parties' intent, determination of which may be aided by certain presumptions (*Chappelow v Savastano, supra* at 349, *citing Goldbard v Empire State Mut. Life Ins. Co.*, 5 AD2d 230, 234, 171 NYS2d 194). The intention of the parties is often a question of fact, unless the court may determine the issue as a matter of law where the parties intent can be determined from the writing itself (*Id.*).

Based on a reading of the submissions, including the terms of the Cooperation Agreement, the terms of the So-Ordered Stipulation, and subsequent email exchanges, it cannot be said that the parties have clearly expressed their intent that the So-Ordered Stipulation supercede the Cooperation Agreement, so as to extinguish plaintiff's right to seek redress under the Cooperation Agreement for defendants' unwarranted rejections of the two initial offers.

Further, the Court notes that third and fourth offers were made after the execution of So-Ordered Stipulation, and both offers were well below the \$726,750.00 as agreed to by the parties therein; however, no party petitioned the court to approve either offer, as provided for in the So-Ordered Stipulation. Therefore, it cannot be said that defendant's rejection of the third and fourth offers received for \$676,500.00 in October 2008, and for \$605,000.00 in January 2009, respectively, constituted a breach of the Cooperation Agreement, or the So-Ordered Stipulation, at this juncture (*Dalton v Educational Testing Service*, 87 NY2d 384, 392 [1995] [holding that a party must fulfill its contractual obligation and act in good faith, but a court "will not interfere with [the party's] discretionary determination unless it is performed arbitrarily or irrationally"]).

Therefore, plaintiff's motion for partial summary judgment against the defendant on the issue of liability for breach of contract is denied.

*Conclusion*

Based on the foregoing, it is hereby

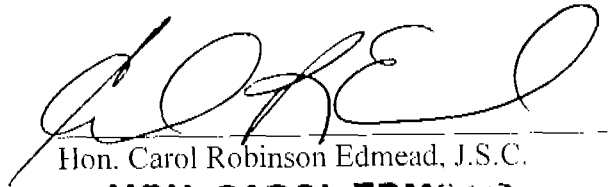
ORDERED that plaintiff's motion for partial summary judgment on liability against

defendant pursuant to CPLR § 3212, for breach of contract is denied; and it is further

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

This constitutes the decision and order of the Court.

Dated: September 8, 2009

  
Hon. Carol Robinson Edmead, J.S.C.  
**HON. CAROL EDMÉAD**

**FILED**  
SEP 10 2009  
COUNTY CLERK'S OFFICE  
NEW YORK