[* 1]

SUPREME COURT — NEW YORK — NEW YORK COUNTY

PART 7

Index Number : 104524/2008

MANOOCHEHRI-YEGANEH, LEYDI

VS.

LEUNG, CHAI HO LEE

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO.

MOTION DATE 5/20/09

MOTION SEQ. NO. 001

MOTION CAL. NO. 78

The following papers, numbered 1 to 6 were read on this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits A-S; A	1-3
Answering Affidavits — Exhibits 1-3	4-6
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and cross motion are decided in accordance with the annexed memorandum decision and order.

FILED
DEC 10 2009
NEW YORK
COUNTY CLERK'S OFFICE

MICHAEL D. STALLMAN

Dated: 12/7/09

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 : IAS PART 7

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LEYDI MANOOCHEHRI-YEGANEH,

Plaintiff,

INDEX NO.
104524/08

-against-

CHAI HO LEE LEUNG,

Decision and Order

Defendant.

HON. MICHAEL D. STALLMAN, J.:

Defendant moves for partial summary judgment pursuant to CPLR 3212 on the issue of liability, and "to strike Plaintiff's purported corrections to her deposition transcript pursuant to CPLR ... 3116."

Plaintiff cross-moves pursuant to CPLR 3212 "striking Defendant's Answer and granting summary judgment for the relief sought in the Complaint" together with costs and disbursements.

Plaintiff, a British citizen and London realtor, brought this action to recover an $80,000 deposit she paid defendant toward her $800,000 purchase of a mixed-used property at 77-08 Woodside Avenue[1] in Elmhurst, Queens (the "property"), owned by defendant.

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[1] Although in her supporting affidavit (¶ 2) and supporting memorandum (p 3) defendant avers that her property is located at 77-08 Elmhurst Avenue, the contract, the pleadings and the lender's appraisal of the property all place the property at 77-08 Woodside Avenue.

The contract of sale for the property executed by the parties on August 30, 2007 (the "contract") provided for a closing date of November 1, 2007, but no later than December 14, 2007, with time being of the essence. The sale was contingent on plaintiff's obtaining a mortgage of "$560,000 or less" by October 15, 2007, with plaintiff undertaking the obligation to "diligently and in good faith apply for said mortgage no later than seven (7) business days after the date" of the contract (contract, ¶ 16[a], defendant's exhibit A).

On October 9, 2007, a few days before the expiration of the mortgage contingency period, plaintiff's mortgage broker received the following electronic mail (exhibit 1 to plaintiff's affidavit) from InterBay Funding, LLC ("Interbay"), plaintiff's best prospect for financing:

> "Hi, Rob,
>
> I finally have some info for you. The head underwriter and management here took a look at this file, and they said that the max ltv [loan to value ratio] that they would go is 55% ... which would be a loan amount of $440,000. The borrower would also have to put the other 45% down as downpayment which would be $360,000 (no seller second allowed).
>
> Before we go any further, I wanted to see if this would even work for your borrower (I know that you were looking for $624,000). If it does, then we have to send the file to our corporate office to get pricing. Once I have that I would be able to issue you a pre-approval.
>
> Please let me know when you can, if he is interested in pursuing this any further, & if the 55% LTV will work.
>
> I apologize again for the timeframe in getting the info to you. It had to be reviewed by several people.
>
> Thanks!

By letter dated Ocober 11, 2007 (exhibit 2 to plaintiff's affidavit), plaintiff's counsel notified defendant's counsel that plaintiff had been unable to obtain a loan greater than $440,000 and was therefore electing to cancel the contract. Counsel went on to request a 30-day extension of the financing contingency perior so plaintiff could pursue applications made to two other lenders, and asked that the $80,000 deposit be returned to plaintiff if defendant was unwilling to grant the extension.

By letter dated Ocober 15, 2007 (exhibit 3 to plaintiff's affidavit), defendant's counsel rejected plaintiff's notice of cancellation on the grounds that the Interbay letter was "not a letter of declination at all, and the notice was served improperly. Counsel then made a counter-offer to plaintiff's request for an extension: the financing contingency period would be extended to November 5, 2007, but only if plaintiff made an immediate application to a particular person at a particular mortgage company, and immediately released $10,000 from the security deposit held in escrow as consideration to defendant for extending the contingency period. By return letter that same day, plaintiff's counsel rejected defendant's counter-offer, reiterated plaintiff's cancellation of the contract, and demanded the return of plaintiff's $80,000 deposit (exhibit 3 to plaintiff's affidavit).

However, that was not the end of it. Only two days after cancelling the contract, plaintiff's counsel wrote to defendant's counsel asking her to confirm his "understanding that the parties have reached an agreement relative to the subject matter at hand and that my client has agreed to waive the financing contingency in exchange for a closing date on or about January 15, 2008" (defendant's exhibit H). Defendant's counsel wrote back on October 23, 2007, clarifying that the agreement was to close by January 15 with time being of the essence, provided plaintiff waived the financing contingency and agreed to immediately release the security deposit to defendant if the closing did not take place on or before January 15, 2008 (defendant's exhibit I). This apparently did not happen.

By letter dated November 28, 2007, plaintiff's counsel informed defendant's counsel that plaintiff had finally gotten financing, although only for $396,000 because the lender had appraised the property below the contract price, at $720,000, and offered defendant the choice of

either honoring plaintiff's October 11 contract cancellation and returning the deposit or selling plaintiff the property for $745,000 (defendant's exhibit J). It seems defendant did not choose either option. On December 6, 2007, plaintiff's counsel again wrote to defendant's counsel describing her stated reasons for rejecting the October 11 cancellation notice as "entirely spurious and without basis in fact" since the notice had been sent by both certified and regular mail, and demanding the return of the security deposit (defendant's exhibit K).

Further, fruitless, efforts to recover the deposit were made on plaintiff's behalf (defendant's exhibit L); defendant declared plaintiff in breach becaue the closing did not take place by December 14, and announced her intention of retaining the deposit as liquidated damages (see defendant's exhibits M and N). This action ensued, in which both sides claim entitlement to the $80,000 down payment..

It is well established that "a vendee who defaults on a real estate contract without lawful excuse cannot recover his or her down payment" (*Uzan v 845 UN Limited Partnership*, 10 AD3d 230, 236 [1st Dept 2004]). On the other hand, if "purchasers exert a genuine effort to secure mortgage financing and act in good faith, they are entitled to recover their down payment if the mortgage is not in fact approved through no fault of their own" (*Sciales v Foulke*, 217 AD2d 693, 694 [2d Dept 1995]).

The first question raised is whether the mortgage contingency clause was satisfied by the availability of substantially less financing than the amount applied for by the buyer.

Plaintiff characterizes the October 9 e-mail from Interbay is as a letter of declination and defendant as a mortgage commitment for $440,000. In fact, it is neither. While Interbay denied plaintiff the mortgage she hoped for, it did not foreclose the possibility of giving her a

mortgage in a lesser amount. What it definitely is not is a commitment letter. The contract specifically provides that anything that looks like a commitment letter subject to an appraisal of the property, as the e-mail was, "shall not be deemed a commitment" for purposes of the mortgage contingency clause (contract, ¶ 16[b]; see *Dairo v Rockaway Blvd. Properties, LLC*, 44 AD3d 602, 602-603 [2d Dept 2007]).

Plaintiff argues that she could not afford to purchase the property with such a small mortgage because her "budget did not allow for the differential" (plaintiff's affidavit, ¶ 17) "between the mortgage contingency sum of $560,000.00 and the reduced sum of $440,000.00" (*id.*, ¶ 16), and that it would be absurd to interpret the contract to mean that any financing for less than $560,000 – even $1.00 – was a suitable mortgage under the contract. She contends that the "or less" language of the mortgage contingency clause cannot be interpreted to mean anything other than the standard clause, which is a "loan in a fixed sum or such lesser sum as the purchaser is willing to accept" (*id.*, ¶¶ 35-39, 44).

Defendant argues that because the mortgage contingency clause anticipated plaintiff's purchase of the property if she obtained financing of "$560,000 or less," she became obligated to buy it when she got a mortgage commitment for the "less" (the $440,000 loan Interbay offered her on October 9 or the $396,000 commitment it later gave), regardless of her financial inability to effect the purchase with a substantially lower than anticipated mortgage, and plaintiff was obligated to purchase the property or forfeit the $80,000 deposit. This kind of argument has been considered and rejected by the First Department. In a case where the buyer's mortgage commitment was revoked after the expiration of the contingency period because he lost his job, the dissent's analysis echoed defendant's argument:

> A sudden downturn in the finances of a contract vendee does not eliminate his obligation to make the contracted-for purchase, and the failure to do so entitles the contract vendor to all available remedies for breach of contract. Generally, once a party to a contract has made a promise, that party must perform or respond in damages for its failure, even when unforeseen circumstances make performance burdensome. Impossibility excuses a party's performance only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible

(*Kapur v Stiefel*, 264 AD2d 602, 606 [1st Dept 1999, Saxe, J., dissenting], citations omitted).

The majority spurned this rationale, holding that

> the dissent's interpretation ... would put the purchaser in the unenviable position of either having to proceed to closing notwithstanding that its diligent and good faith efforts to secure ... financing were unsuccessful, or to risk foreiture of the down payment. This is not the law, nor should it be. As our cases have consistently held, when 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

(*id.* at 603). "The law does not require a party to fulfill a condition of a contract that is incapable of fulfillment and is not that party's fault" (*Cone v Daus*, 120 AD2d 788, 790 [3d Dept 1986]).

This is in fact consistent with the provisions of the contract's mortgage contingency clause, which provides that if the buyer gets a mortgage commitment in an amount less than that applied for, the only way the seller can force the buyer to go through with the contract is to lower the sales price by the difference between the mortgage applied for and the mortgage given. If that price reduction is acceptable to the buyer's lender, the buyer does not have the right to declare the mortgage null and void (contract, ¶ 16[d]). Defendant made no such price reduction in this case.

In view of the foregoing, the Court finds that, as long as plaintiff acted in good faith in pursuing financing, she would be entitled to cancel the contract under the mortgage continency

clause if she did not obtain a mortgage at least very close to $560,000 by the end of the contingency period. Thus, the next question becomes did plaintiff fulfill her contractual obligation to "diligently and in good faith" seek suitable financing in a timely manner.

Defendant has submitted evidence that plaintiff made two mortgage applications (exhibits B and C to moving papers), both before the date of the contract. At her deposition, plaintiff testified that she first saw the property on August 1, 2007 and made an offer for it of $780 that same day (plaintiff's EBT, pp 39-40, at defendant's exhibit D). She was so eager to buy the property she applied for financing that same day, and then amended her application after the contract was signed to apply for the $560,000 figure specified in the contract (EBT pp 39-40, 60-61; see also plaintiff's opposing affidavit, ¶¶ 9-10, 27). Defendant makes much out of plaintiff not making any applications during the 7-day period following the contract closing, when she was bound to "diligently and in good faith" apply for a mortgage (contract, ¶ 16[a]). The court finds such 7-day inactivity immaterial. Plaintiff's contractual obligation is not to make an application during that period, but to make it "no later than seven business days" after the contract (*ibid.*). Plaintiff's applying when she first made the offer and then amending that application to reflect the contract after it was signed satisfies that requirement. It does not, however, necessarily establish that she was diligent or acted in good faith. Where, as here, the contract "requires plaintiff[] to use 'diligent efforts' to obtain a mortgage loan," plaintiff's obligation "goes somewhat beyond a mere good-faith effort ... and dictates that the purchasers pursue all reasonable sources of potential financing" (*Blask v Miller*, 186 AD2d 958, 959 [3d Dept 1992]; *Bucciero v Li*, 191 AD2d 887, 888 [3d Dept 1993]).

Defendant argues that plaintiff did not pursue financing in good faith because she did little else than make those two pre-contract applications. There is no set number of loan applications that a prospective purchaser must make to be deemed diligent and acting in good faith. Two have been held enough (see, *e.g.*, *Ruggeri v Brenner*, 186 AD2d 441 [1st Dept 1992], lv den 81 NY2d 704), and even a single application is sufficient if further applications would be futile (*Companion v Touchstone*, 222 AD2d 1087 [4th Dept 1995], affd 88 NY2d 1043 [1996]). It all depends on the circumstances of each case.

Plaintiff testified that she sought financing for the property through her long-time London financial adviser, Rob Miller, who acted as her agent and mortgage broker, and he dealt primarily with Interbay – and also Mortgage Express (EBT p 13). She spoke directly to Power Mortgage (unsure of name) and had an initial general informational talk with Mortgage Express, but all other financing contacts, including Interbay, were through Rob Miller (EBT pp 15-16, 22). Plaintiff spoke to another mortgage broker (EBT p 31) in September who told her they would lend her only 45% because she was a foreign national (EBT p 34). She also spoke to a woman from Mortgage Express in October, after the contract date, and was told that the maximum they would lend her was 50% of the purchase price because she was a foreign national (EBT p 19). She stopped looking for new sources when she ran into the same stumbling block with all the different institutions she approached: because she is a foreign national, U.S. banks would not give her a mortgage for more than 45% to 50% of the sale price, but not one advised her that there was a law to that effect (EBT pp 31-38). Plaintiff's best hope, Interbay, was only willing to lend her 55% of the sales price (EBT p 65), which she later learned was due to the same reason (EBT p 67).

If plaintiff is correct that no lender would give her financing for more than the 55% offered by Interbay because she is a foreign national, good faith and diligence did not require her to make any further applications. If one lender denies a mortgage based on a requirement which is standard in the area, a prospective buyer is not required to apply to other financial institutions (*Cone v Daus*, *supra*, 120 AD2d at 790). However, plaintiff has not established the truth of her averments. She points to no statute, rule or regulation restricting the amount of mortgages that may be given to foreign nationals, and does not offer an affidavit from a mortgage professional stating that such an unwritten policy exists among New York lenders. Plaintiff does not even offer an affidavit from Rob Miller stating that he made diligent efforts on plaintiff's behalf. A "plaintiff's speculation as to the underlying reasons for the denial of the loan application" alone will not defeat defendant's motion for summary judgment (*Hoft v Frenkel*, 52 AD3d 779, 781 [2d Dept 2008]). Plaintiff also does not contend that she alerted defendant about her problem in obtaining financing as soon as she became aware of it, an obligation arguably imposed by the contract's implicit and explicit duty of good faith.

On the other hand defendant, who bears the burden of establishing that plaintiff failed to act diligently and in good faith, does not offer any evidence indicating that plaintiff's status as a foreign national would not have posed a problem. More importantly, although defendant contends that plaintiff did not act diligently and in good faith in pursuing adequate financing because she did not apply to the lender hand-picked by defendant, defendant does not offer an affidavit from that lender stating that they would have given plaintiff anything close to a $560,000 mortgage.

In short, the only evidence before the court on the issue of whether plaintiff exercised diligence and good faith in her pursuit of financing is plaintiff's own unrebutted testimony, in her affidavit and deposition – but such testimony is self-serving, uncorroborated hearsay. It is an insufficient basis for summary judgment. The issue of credibility is properly resolved by the finder of fact, not the court, particularly when the affidavit relied upon is self-serving (see *Wilson v Sponable*, 81 AD2d 1, 5 [4th Dept 1981]; *Carter v Maskell*, 192 AD2d 898, 900 [3d Dept 1993]; see also *S.J. Capelin Assoc., Inc. v Globe Manufacturing Corp.*, 34 NY2d 338, 341 [1974]). Based upon the foregoing, the court finds there is a triable issue of fact as to the dispositive issue of whether plaintiff diligently and in good faith pursued financing for her proposed purchase of the property. "[W]hether such obligation has been fulfilled will almost invariably, as here, involve a question of fact" (*Kroboth v Brent*, 215 AD2d 813, 814 [3d Dept 1995]).

Finally, defendant also moves to strike plaintiff's corrections to her deposition testimony. A deponent may correct the deposition transcript by entering the changes "at the end of the deposition with a statement of the reasons given by the witness for making them" (CPLR 3116[a]). The transcript must be corrected and signed under oath by the deponent withing sixty days, or it "can be used uncorrected as though signed" (*ibid.*). Here, plaintiff does not give reasons for either the changes or the delay, even in the wake of defendant's motion. Her only opposition to defendant's motion to strike the corrections to her deposition is that defendant never objected to the lack of either explanation before making her motion. In fact, this branch of defendant's motion seems to be an afterthought for both sides. Upon a showing of good cause for

the delay, the court, pursuant to CPLR 2004, has the discretion to extend the deponent's time to correct the transcript, but such discretion may not be exercised to allow a deponent to belatedly change the substance of his testimony under the guise of correcting it, without giving reasons for those changes or for the delay in making them (see *Zamir v Hilton Hotels Corporation*, 304 AD2d 493 [1st Dept 2003]). Since plaintiff has not given such reasons, defendant's motion will be granted in this respect.

CONCLUSION

Accordingly, it is ORDERED that defendant's motion is granted only to the extent that plaintiff's corrections to her deposition transcript are hereby stricken pursuant to CPLR 3116, in all other respects, the motion is denied; and it is further

ORDERED that plaintiff's cross-motion is denied in its entirety.

This decision constitutes the order of the court.

DATED: December 7, 2009
New York, NY

FILED
DEC 10 2009
NEW YORK
COUNTY CLERK'S OFFICE

J.S.C.

FILED
DEC 10 2009
NEW YORK
COUNTY CLERK'S OFFICE

MICHAEL D. STALLMAN
J.S.C.