SCAN

**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. F. DANA WINSLOW,**

**Justice**

**TRIAL/IAS, PART 6**

---

**ROBERT J. KURRE,**

**Plaintiff,**

**-against-**

**STEVE YIUFAI WONG and TAO GUAN,**

**Defendants.**

---

**STEVE YIUFAI WONG and TAO GUAN,**

**Defendants/Third-Party Plaintiffs,**

**-against-**

**ROBERT J. KURRE & ASSOCIATES, P.C.,**

**Third-Party Defendant.**

---

**MOTION DATE: 11/4/09**
**MOTION SEQ. NO.: 003, 004**

**INDEX NO.: 2010/08**

**The following papers read on this motion (numbered 1-3):**

**Defendants' Notice of Motion for Summary Judgment.....1**
**Notice of Cross-Motion.....2**
**Reply Affirmation in Support of Defendants' Motion For Summary Judgment and in Opposition to Cross-Motion.....3**

**Defendant/Third Party Plaintiffs' Memorandum of Law in Support of Motion for Summary Judgment.....A**

Defendants/Third-Party Plaintiffs' Motion and Plaintiff/Third-Party Defendant's

Cross-Motion for summary judgment pursuant to **CPLR §3212** are determined as follows.

This is an action for breach of a contract for the purchase of plaintiff's cooperative apartment. On or about August 29, 2007, plaintiff ROBERT J. KURRE (the "Seller") and defendants/third-party plaintiffs STEVE YIUFAI WONG and TAO GUAN (the "Purchasers") entered into the Contract of Sale – Cooperative Apartment dated August 29, 2007 (the "Contract") of Seller's shares, and the unit they represent, in a cooperative apartment located in Great Neck, New York, which was owned and operated by Cutter Mill Owners' Corp. (the "Corporation"). [See Motion Exh. A.] Pursuant to the Contract, Purchasers delivered a deposit of $20,000 (the "Contract Deposit") to Third-Party Defendant ROBERT J. KURRE & ASSOCIATES, P.C., Seller's attorney, as Escrowee (the "Escrowee").

Section 6 of the Contract, entitled "Required Approval and References" ("Section 6") made the sale contingent upon the consent of the Corporation. The Purchasers were required to submit an application, to provide such information as the Corporation required, and to appear for one or more personal interviews as required by the Corporation. Section 6 provided that, if no decision were made prior to the scheduled closing date, then the closing would be adjourned for an additional 30 business days, for the purpose of obtaining such consent. If the Corporation's consent was refused, or not given by the adjourned closing date, then either party would be authorized to cancel the Contract upon notice to the other. In the event of a cancellation pursuant to Section 6, the Purchasers would be entitled to a refund of the Contract Deposit, unless the Corporation's refusal was due to the Purchasers' bad faith conduct.

The Corporation's consent was not given on or before the scheduled closing date of October 15, 2007. The Purchasers were interviewed by the Corporation's Board of Directors (the "Board") on November 12, 2007. On November 13, 2007, the Purchasers learned, through the real estate broker and in follow-up communications with the Seller and others, that their application was denied by the Corporation. The Corporation sent formal written notification of the denial on or about January 2, 2008. By letter dated January 4, 2008, Purchasers formally notified the Escrowee of the Corporation's decision, and requested the return of the Contract Deposit. On January 31, 2008, the Seller commenced this action for breach of contract.

Seller's prior motion for a default judgment and Purchasers' cross-motion for sanctions were denied by order of this Court dated April 20, 2009. By stipulation of the parties, the Contract Deposit was transferred to the Clerk of the Court on July 22, 2009, pending further determination by this Court. Both parties now seek summary judgment.

The Seller seeks to hold the Purchasers in default and to retain the Contract Deposit as liquidated damages. The Purchasers maintain that the Contract was terminated by reason of the Corporation's denial of their application, and that they are entitled to the return of the Contract Deposit pursuant to Section 6.

Seller claims that Purchasers breached the Contract as follows (1) Purchasers' application to the Corporation included an additional proposed occupant (defendant GUAN's son) who was not agreed to in the Contract; (2) Purchasers applied for financing of their purchase, despite the fact that all provisions authorizing them to do so were deleted from the Contract; (3) Purchasers failed to provide to the Corporation the "necessary, required and consistent information" substantiating their income; and (4) Purchasers failed to bring their son to the November 12, 2007 personal interview with the Board. Seller claims that the Purchasers' application to the Corporation was denied on the basis of the above transgressions. Seller also claims that the Corporation was willing to reconsider Purchasers' application and to give Purchaser an opportunity to cure these transgressions, but that Purchasers chose not to do so. Accordingly, Seller argues, Purchasers are in default, and Seller is entitled to retain the Contract Deposit pursuant to Section 13 of the Contract.

The Court disagrees. First, Seller has presented no evidence that the denial of Purchasers' application was based upon any or all of the purported transgressions cited above. The January 4, 2008 letter was silent as to the reasons for the Corporation's decision. The one-sentence letter from the Corporation's agent stated: "This is to advise you that your clients have been DENIED by the Board of Directors to purchase the above-noted apartment." Seller's cross-motion does not contain a sworn statement from anyone with first-hand knowledge of the Board's rationale. There is no affidavit from a Board member who participated in the decision. Although a Board member was deposed on August 18, 2009 pursuant to a so-ordered subpoena, Seller does not cite or otherwise refer to that deposition, and no copy of the transcript is attached to the Cross-Motion. In the absence of evidentiary proof, Seller's statement of the reasons for the Board's denial amounts to nothing more than speculation or hearsay, devoid of probative value. Similarly, there is no admissible evidence that the Board was willing to reconsider Purchasers' application at any time after the initial denial on November 13, 2007 nor to afford them an opportunity to cure the purported transgressions.

Seller not only fails to establish that the purported transgressions listed above provoked the Board's denial, but also, that any one of them otherwise constituted a breach of the Contract. To the extent that adding GUAN's son [(1) above] or financing the transaction [(2) above] constituted departures from the terms of the Contract, the record suggests that such actions were undertaken by Purchasers with the knowledge of, and

without objection from, the Seller and/or the Board. Accordingly, any breach based upon either of those grounds has been waived. Purchasers' failure to provide adequate information substantiating their income [(3) above] is not established in the record. Purchasers' failure to bring their son to the November 12, 2007 interview [(4) above] is mis-characterized. The Contract obligated Purchasers and any proposed occupant to attend one or more personal interviews "as requested by the Corporation." [Motion Exh. A, ¶6.2.2]. There is no evidence that the Board requested the son to attend the November 12, 2007 interview. The November 6, 2007 e-mail from the Corporation's agent stated: "You have been scheduled for an interview with board of Cutter Mill Road Owners. Both *you and the co-applicant*, Tao Guan, must attend." [Motion Exh. L (emphasis supplied)]. In the absence of a request to bring the additional proposed applicant to the interview, the omission to do so is neither a "failure" nor a breach of the Contract.

Pursuant to Section 6, in order to retain the Contract Deposit, Seller was required to show that the denial of Purchaser's application process was due to bad faith conduct. Seller has not made the required showing. There is no competent evidence regarding the reasons for the Board's decision. There is no evidence that the Purchasers refused or failed to comply with any request of the Board. To the contrary, the correspondence attached to the motion papers suggests that Purchasers made a diligent effort to satisfy the Board.

Thereafter, the fact that Purchasers rejected Seller's suggestion to re-apply to the Board is not evidence of bad faith. As discussed above, the Court cannot credit speculation or hearsay regarding the intent of the Board. Purchasers were under no obligation to pursue the Board's consent after the initial denial, particularly without official communication from the Board informing them of the reasons for the denial and affording them an opportunity to cure. In any event, the right to cancel the Contract arose independently and automatically, contemporaneous with November 13, 2007, by virtue of the Corporation's failure to consent on or before the adjourned closing date (30 business days after the scheduled closing date of October 15, 2007). [See Motion Exh. A, ¶ 6.3]

Purchasers provided formal notice of their election to cancel the Contract and demand return of the Contract Deposit on January 4, 2008, promptly upon receipt of the written decision of the Corporation. Accordingly, the Court finds that the Purchasers are entitled to recover the Contract Deposit in the amount of $20,000 plus interest running from January 4, 2008, at the prevailing rates of interest applicable to escrow accounts in the New York metropolitan area during the years in question. Although the assessment of interest at a rate below that provided in **CPLR §5004** might be construed as violative of the statute, the Court believes that, in the current economic climate, use of the statutory interest rate would be punitive and constitute a penalty. **CPLR §5004** was adopted in

1981 at a time when prevailing interest rates approached and exceeded 20%. There has been no change in such CPLR provision since 1981, even though the prevailing rates of interest in all sectors of the economy have dramatically changed since 1981 and are, at present and in 2008, less than 1% for escrow rates of interest. Use of the prevailing interest rate is an appropriate exercise of the Court's discretionary power and in accordance with both the intent of the parties and the equities presented.

The Court has considered the remaining arguments of the parties and finds them to be without merit. Based upon the foregoing, it is

ORDERED, that Defendants/Third-Party Plaintiffs' motion for summary judgment (Seq. 003) is **granted.** Defendants/Third-Party Plaintiffs are entitled to judgment in the amount of $20,000 plus interest in accordance with the above. It is further,

ORDERED, that Plaintiff/Third-Party Defendant's cross-motion for summary judgment (Seq. 004) is **denied.**

Settle judgment on notice.

Dated: December 18, 2009

J.S.C.