

**Cappadoro v Mayer**

2010 NY Slip Op 30513(U)

March 15, 2010

Supreme Court, Nassau County

Docket Number: 15842/09

Judge: Karen V. Murphy

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK  
TRIAL TERM, PART 17 NASSAU COUNTY**

**PRESENT:**

**Honorable Karen V. Murphy**  
**Justice of the Supreme Court**

\_\_\_\_\_ x

**KRISTEN CAPPADORO,**

Index No. 15842/09

**Plaintiff(s),**

Motion Submitted: 1/6/10  
Motion Sequence: 001, 002

**-against-**

**STEVEN MAYER and ALEXANDER FINE, ESQ.,**

**Defendant(s).**

\_\_\_\_\_ x

The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....XX
- Answering Papers.....XX
- Reply.....X

Plaintiff, Kristen Cappadoro, moves, pursuant to CPLR § 3212, for an Order of this Court, granting her summary judgment as a matter of law. Defendants, Steven Mayer and Alexander Fine, Esq., cross move, pursuant to CPLR § 3212, for an Order of this Court, granting them summary judgment and dismissal of the plaintiff's complaint. The motion and cross motion are determined as herein set forth below.

Plaintiff, Kristen Cappadoro ("Cappadoro") brings this action to recover a \$17,500.00 Contract Deposit (hereinafter referred to as "Contract Deposit") delivered in connection with a written Contract of Sale (hereinafter referred to as "Contract") to purchase the shares and proprietary lease for a cooperative apartment located at 55 Monroe Boulevard, Unit 1M, Long Beach, New York 11756. Defendant Steven Mayer ("Mayer") is the owner of the cooperative shares and proprietary lease. Defendant, Alexander Fine, Esq. ("Fine") is Mayer's attorney and the designated Escrow Agent. Defendants have asserted a counterclaim and three affirmative defenses for the release of the Contract Deposit to them as liquidated damages.

Pursuant to the Contract, dated March 23, 2009, Cappadoro agreed to “directly or through a mortgage broker registered pursuant to Article 12-D of the Banking Law, shall diligently and in good faith: . . . apply only to an Institutional Lender for a loan on the Financing Terms . . . on the form required by the Institutional Lender containing truthful and complete information, and submit such application together with such documents as the Institutional Lender requires, and pay the applicable fees and charges of the Institutional Lender, of all of which shall be performed within 5 business days after the Delivery Date” (Contract, ¶¶ 18.2, 18.2.1). A Contract Deposit of \$17,500.00 was placed in escrow and according to the plaintiff, within the prescribed 5 day period following the signing of the Contract, she complied with the Contract provisions and applied for a mortgage loan for \$300,000.00 from Michael Assumen, an employee of East Coast Capital, a licensed mortgage broker in the State of New York registered pursuant to Article 12D of the Banking Law.

Insofar as is relevant to the determination of the parties’ instant motions, the Contract stated, in pertinent parts, as follows:

1.16 The “Purchase Price” is: \$350,000.00

1.16.1 The “Contract Deposit” is: \$17,500.00

1.16.2 The “Balance” of the Purchase Price due at Closing is: \$332,500.00 . . . .

1.17 The monthly “Maintenance” charge is approximately . . . \$1,178.76.

\* \* \*

### **13. Defaults, Remedies and Indemnities**

13.1 In the event of a default or misrepresentation by Purchaser, Seller’s sole and exclusive remedies shall be to cancel this Contract, retain the Contract Deposit as liquidated damages . . . Purchaser prefers to limit Purchaser’s exposure for actual damages as to the amount of the Contract Deposit, which Purchaser agrees constitutes a fair and reasonable amount of compensation for Seller’s damages under the circumstances and is not a penalty. The principles of real property law shall apply to this liquidated damages provision.

\* \* \*

### **18. Financing Provisions**

18.1.2 A “Loan Commitment Letter” is a written offer from an Institutional Lender

to make a loan on the Financing Terms . . . at prevailing fixed or adjustable interest rates and on other customary terms generally being offered by Institutional Lenders making cooperative share loans. An offer to make a loan conditional upon obtaining an appraisal satisfactory to the Institutional Lender shall not become a Loan Commitment Letter unless and until such condition is met. An offer conditional upon any factor concerning Purchaser (e.g. sale of current home, *specifically student loans do not have to be paid off*, no material adverse change in Purchaser's financial condition, etc.) is a Loan Commitment Letter whether or not such condition is met. Purchaser accepts the risk that, and cannot cancel this Contract if, any condition concerning Purchaser is not met.

Notably, the language italicized above was handwritten into the contract and agreed upon by the parties. Thus, from the outset, it was apparently made clear by and among the parties that the plaintiff was liable for certain student debts and that any condition of having such debt be paid off would not otherwise render a Loan Commitment Letter invalid. In other words, the parties agreed that the payment in full of any student loans by the purchaser would not be a condition precedent to the Loan Commitment Letter as defined in paragraph 18.1.2. The Contract further states, in pertinent part, as follows:

18.2 Purchaser, directly or through a mortgage broker registered pursuant to Article 12-D of the Banking Law, shall diligently and in good faith:

18.2.1 apply only to an Institutional Lender for a loan on the Financing Terms . . . on the form required by the Institutional Lender containing truthful and complete information, and submit such application together with such documents as the Institutional Lender requires, and pay the applicable fees and charges of the Institutional Lender, all of which shall be performed within 5 business days after the Delivery Date.

\* \* \*

18.3.7 Purchaser cannot cancel this Contract pursuant to ¶18.3.1.4 and cannot obtain a refund of the Contract Deposit if the Institutional Lender fails to fund the loan:

18.3.7.1 because a requirement of the Loan Commitment Letter concerning Purchaser is not met (e.g., Purchaser's financial condition or employment status suffers an adverse change; Purchaser fails to satisfy a condition relating to the sale of an existing residence, etc.)

\* \* \*

### 31. Purchaser's Additional Representations and Covenants

31.1 Supplementing ¶4.2 of the Contract, Purchaser also represents and covenants that:

31.1.1 Purchaser has, and will at Closing have, available unencumbered cash and cash equivalents . . . in a sum of at least equal to (and having a then current value of) the Balance; and

31.1.2 Purchaser has, and will at and immediately following the Closing have, a positive net worth.

31.2 the Maintenance and the monthly amount of the Assessment (if any) do not aggregate more than 25% of the current total gross monthly income of the individuals comprising the Purchaser;

31.3 . . . the monthly debt service (interest and amortization of principal, if any) of the proposed financing, together with the Maintenance and the monthly Assessment amount (if any), do not aggregate more than 35% of said current total gross monthly income.

Plaintiff maintains that she relied upon the expertise of her mortgage broker, Michael Assumen, to complete the loan application, which he completed "with all of the information that was necessary so that [she] could obtain a mortgage." According to the plaintiff, in an in-person meeting on March 16, 2009, eight days prior to the date of Contract, she discussed her income, including her base salary as a high school teacher, working as a tutor, and as a sports supervisor over a period in excess of two years; her various bank assets totaling \$91,538.96; the option of a gift of money from her grandmother; as well as her unremarkable credit score. Plaintiff maintains that she also disclosed to the mortgage broker that she was the co-signor of certain student loans for a friend and that as of her February 2009 credit check (which she performed on her own), all accounts were current. She contends that she relied upon the expertise of her mortgage broker who assured her that there would be "no problem" in obtaining a mortgage loan commitment, and, with that assurance, she signed the loan application.

The Loan Application allegedly prepared by Michael Assumen, and signed by the plaintiff, noted, plaintiff's employer as Levittown Public Schools and her position as Teacher. The application listed plaintiff's Total Gross Monthly Income as \$6,931.00 and projected her monthly mortgage (principal and interest) amount to be \$1,610.46. The Loan Application did not list any assets and listed plaintiff's liabilities as totaling \$45,309.00. Her Net Worth was listed as "-45,309.00." Plaintiff also declared in her mortgage loan

application that she is not “presently delinquent or in default on any Federal debt or any other loan, mortgage, financial obligation, bond or loan guarantee.” The “Acknowledgement [sic] and Agreement” on the Loan Application also stated in pertinent part, as follows:

Each of the undersigned specifically represents to Lender . . . and agrees and acknowledges, that: (1) the information provided in this application is true and correct as of the date set forth opposite my signature and that any intentional or negligent misrepresentation of this information contained in this application may result in civil liability, including monetary damages, to any person who may suffer any loss due to reliance upon any misrepresentation that I have made on this application, and/or in criminal penalties including, but not limited to, fine or imprisonment or both under the provisions of Title 18, United States Code, Sec. 1001, et. seq.; . . . .

In a “Corrected” form<sup>1</sup> entitled “Statement of Credit Denial, Termination, or Change” dated May 26, 2009, East Coast Capital Corp. informed Cappadoro that her application for a mortgage was denied because of her credit, income and her inability to obtain mortgage insurance. Specifically, Cappadoro’s loan was denied because of her “Excessive Obligations in Relation to Income - Insufficient Income for Total Obligations,” “Lack of Cash Reserves - Delinquent Past or Present Credit Obligations,” “Insufficient Income for Mortgage Payment” and “Information from Consumer Reporting Agency.”

Plaintiff’s counsel, in a letter dated April 27, 2009, sought to cancel the Contract and sought recovery of the Contract Deposit. By letter dated May 7, 2009, counsel for the defendant seller requested the plaintiff to provide, *inter alia*, additional documentation including dated true copies of all applications, proof that the lender is authorized, and a dated denial letter from Flag Star Bank along with a copy of terms and conditions requested. Plaintiff’s response dated June 8, 2009 provided only the copy of the terms and conditions requested and a “Statement of Credit Denial, Termination or Change.” By letter dated June 16, 2009, defendants reiterated their requests to the plaintiff and by letter dated June 18, 2009, plaintiff provided, *inter alia*, a copy of a completed loan application as well as copies of notifications regarding student loans co-signed by the plaintiff.

On August 7, 2009, plaintiff commenced this action for the return of her Contract Deposit plus interest. Defendants interposed an Answer on or about September 4, 2009 and advanced a counterclaim alleging plaintiff’s breach of Contract. Defendants claim that

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<sup>1</sup>It is unclear to this Court as to when the original “Statement of Denial” by East Coast Capital was issued. Said form, annexed as Exhibit G to plaintiff’s motion in chief is undated. Presumably, however, this form was forwarded to Cappadoro and/or her counsel prior to April 27, 2009 - the date when plaintiff sought to cancel the Contract and a return of the Contract Deposit.

Cappadoro failed to comply with the terms of the Contract in that she did not submit a truthful, accurate and complete loan application and that she did not act in good faith when she did not report to the lender or the seller that she had co-signed for the student loans of a third party. Defendants therefore cross move for summary judgment on their counterclaim for the Deposit and for dismissal of the complaint.

In support of her motion, plaintiff submits, *inter alia*, her own affidavit wherein she states that her application for a mortgage loan was denied due to the delinquency of certain student loans which she had co-signed for a friend, that she did not know that her "friend" was not paying the student loans for which she was a co-signor, that the information provided on the completed loan application was all the information requested by the loan officer, that the loan officer did not properly calculate her gross monthly income as she had explained to him at the time, and that even though the loan application does not list any assets, she had sufficient assets such that she in fact had a positive net worth. Plaintiff's motion also annexes documentation supporting her statements in her affidavit including: the affidavit of the student loan borrower, Michael Colongione; the affidavit of the mortgage broker, Michael Assumen; copies of pay stubs showing additional income as a tutor and as a sports supervisor; copies of 1099s from tutoring and cash bank deposits; copy of bank statement from April 2009 showing a balance greater than the amount of her assets represented in the Contract; and her statement of assets, including her 403(b) plan.

In support of their cross motion, defendants submit the Contract of Sale, the correspondence as between counsel for the seller and purchaser concerning the return of the Contract Deposit, and the supporting documentation therein.

Together, defendants' aforesaid submissions unequivocally prove that the plaintiff repeatedly breached the Contract and had misrepresented her ability to secure a loan commitment. Plaintiff argues that the default of the student loans for which she was a co-signor was a fact that she was unaware of and the sole reason why her loan application was denied. She points to the Contract itself and argues that at all times, she represented to the buyer (as well as to the mortgage broker) that she was a co-signor of student loans for a friend and that this was not a condition precedent to the Contract. She submits that there is no evidence of "bad faith" on her part as she at all times raised the issue of student loans specifically in the Contract. This Court disagrees.

First and foremost, a plain reading of the Corrected Denial form issued by East Coast Capital Corp. makes it clear that the delinquency of the student loans for which she was a co-signor was not the only reason her mortgage loan application was denied. Certainly while "Delinquent Past or Present Credit Obligations" was a reason for her denial, her loan application was also denied because, *inter alia*, "Excessive Obligations in Relation to

Income,” “Insufficient Income for Total Obligations,” “Lack of Cash Reserves,” and her inability “to obtain mortgage insurance.”

Plaintiff’s argument that she specifically raised the student loan issue with the buyer and incorporated it into the Contract, is rendered moot as a result of East Coast Capital’s denial letter which identifies additional reasons for the denial. Further, a close reading of the Contract language makes it clear that an offer from an Institutional Lender to make a loan on the Financing Terms that was conditioned upon any factor except the payment in full of student loans would still be deemed a Loan Commitment Letter for the purpose of the real estate transaction. However, the student loan issue was not a condition for any Loan Commitment; rather, it was a basis for the denial of the Loan Commitment.

In addition, plaintiff also breached the contract in other ways. For instance, according to her completed loan application, plaintiff reported a gross monthly income of \$6,931.00. Maintenance (\$1,178.76), set forth in the contract, together with her proposed principal and interest on the mortgage of \$1,610.46, is a sum of \$2,789.22. This amount is greater than 35% of the gross monthly income listed on her loan application of \$2,425.85 and violates ¶31.3 of the Contract. In addition, a plain review of plaintiff’s assets and liabilities and her net worth is clearly a *negative* \$45,309.00 and this violated ¶31.1.2 of the Contract. That the plaintiff relied on the expertise of her mortgage broker is irrelevant (cf. *Deutsche Bank Nat. Trust Co. v. Sinclair*, 68 A.D.3d 914, 891 N.Y.S.2d 445 [2d Dept., 2009]) to the fact that the loan application provided by the plaintiff failed to meet the minimum financial standards clearly set by the Contract. Certainly, at the very least, it cannot be overlooked by this Court that plaintiff knowingly signed a loan application that also itself contained a plainly worded “Acknowledgement [sic] and Agreement”, that she knew to be an incomplete representation of her financial position. This is especially troubling in light of the fact that prior to signing said loan application plaintiff, a competent high school teacher, entered into the Contract of Sale for the cooperative unit herein, which Contract clearly spelled out that she was required to have a positive net worth, and that her monthly debt service of the proposed financing together with the maintenance and the monthly amount, do not aggregate more than 35% of said current total gross monthly income. “It is axiomatic that a Contract is to be interpreted so as to give effect to the intention of the parties as expressed in the unequivocal language employed” (*Breed v. Insurance Co. of North America*, 46 N.Y.2d 351, 355, 385 N.E.2d 1280, 413 N.Y.S.2d 352 [1978]). Accordingly, “[a] party that signs a document is conclusively bound by its terms absent a valid excuse for having failed to read it” (*Guerra v. Astoria Generating Co., L.P.*, 8 A.D.3d 617, 779 N.Y.S.2d 563 [2d Dept., 2004]; *Shklovskiy v. Khan*, 273 A.D.2d 371, 709 N.Y.S.2d 208 [2d Dept., 2000]). Plaintiff’s representations in support of her motion and in opposition to defendants’ cross motion that she provided her mortgage broker with complete and truthful information about her three jobs, assets, and current credit report does not help her argument that she acted in good faith and provided complete and truthful information in attempting to obtain a loan commitment.

Having determined that plaintiff repeatedly breached the Contract with the defendant, Mayer, this Court must turn to whether those breaches entitle the defendant to retain the Contract Deposit as liquidated damages. Pursuant to ¶13.1, “[i]n the event of a default or misrepresentation by Purchaser, Seller’s sole and exclusive remedies shall be to cancel this Contract, retain the Contract Deposit as liquidated damages.” As stated above, there is no doubt that the Purchaser misrepresented to the Seller her ability to secure a loan commitment and ultimately close title on the cooperative property.

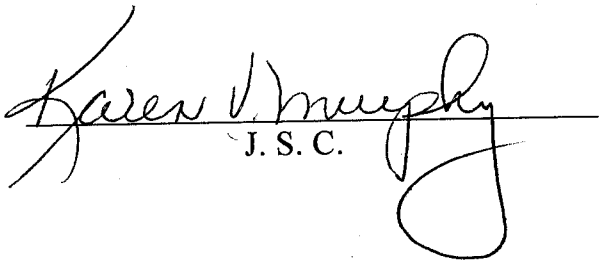
Accordingly, this Court finds that defendants’ motion for summary judgment on their counterclaim is granted and the plaintiff’s complaint is dismissed in its entirety. Defendant is entitled to retain the Contract Deposit of \$17,500.00 as liquidated damages.

Plaintiff’s motion for summary judgment is therefore denied.

This shall constitute the decision and order of this Court.

Settle Judgment on Notice.

Dated: March 1, 2010  
Mineola, N.Y.

  
J. S. C.

**ENTERED**  
MAR 09 2010  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE