Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19
Justice

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SWETA M. SHAH,
CARDONA,

Plaintiffs,

Index No.: 243443/09
Motion Date: 11/16/09
Motion Cal. No.: 7
Motion Seq. No.: 1

-against-

SAMUEL S. H. AHNE, Individually and as,
Escrowee and JOB 121 CORP. d/b/a WASH HOUSE,

Defendants.

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The following papers numbered 1 to 8 read on this motion by plaintiff Sweta M. Shah for an order: (a) pursuant to CPLR § 3212, granting summary judgment to plaintiff, directing and compelling defendant Samuel S. H. Ahne to immediately release and return the sum of $25,000.00 with interest from October 2006 that defendant is wrongly holding in an attorney escrow account for the benefit of the plaintiff pursuant to the terms of a Contract of Sale; and (b) pursuant to CPLR 3211(a)(7), dismissing defendant's counterclaim with prejudice based upon its failure to state a cause of action.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1 - 4
Affidavit in Opposition-Memorandum of Law in Opposition.....	5 - 8

Upon the foregoing papers, it is hereby ordered that the motion is disposed of as follows:

This is an action to recover the $25,000.00 down payment made by plaintiff Sweta M. Shah ("plaintiff"), the purchaser, toward the purchase of defendant Job 121 Corp. d/b/a Wash House ("defendant"), the seller, which is being held in escrow by defendant Samuel S. H. Ahne ("Ahne"). Plaintiff and defendant entered into a Contract of Sale on August 10, 2006, for the sale and purchase of the Wash House, a Laundromat business located at 248-23 Union Turnpike, Bellerose, New York. September 10, 2006, was set as the closing date. Alleging that defendant failed to met the condition precedent required by the Contract of Sale, to wit, "a list of all Accounts Receivable and corresponding deposition," plaintiff refused to close on the purchase of the property and, by letter dated October 25, 2006, sent a written demand to defendant Ahne stating that defendant had failed

to perform the contract and demanded that defendant Ahne return the down payment. This action was commenced thereafter for a return of the down payment; defendant, in its answer, counterclaimed for the same relief, alleging that pursuant to the contract, the $25,000.00 was liquidated damages that it was entitled to due to plaintiff's breach of contract. Plaintiff now moves for summary judgment , and an order directing and compelling defendant Ahne, as escrowee, to immediately release and return the sum of $25,000.00 with interest from October 2006 , and dismissal of defendant's counterclaim.

It is well recognized that summary judgment should be granted when there is no doubt as to the absence of triable issues. See, Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231 (1978); Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974); Taft v. New York City Tr. Auth., 193 A.D.2d 503, 505 (1st Dept. 1993). As such, the function of the court on the instant motion is issue finding and not issue determination. See, D.B.D. Nominee, Inc., v. 814 10th Ave. Corp., 109 A.D.2d 668, 669 (2nd Dept. 1985). The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. See, Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position. See, Zuckerman v. City of New York, supra.

Here, plaintiff alleges that section "1(f)" of the Agreement of Sale entitles it to the information not provided by defendant, and that defendant's failure to produce "the list of receivables and bank deposits as required by the Contract, despite due demand from plaintiff," entitled to receive the down payment being held in escrow. Section 1 of the Agreement, in pertinent part, provides:

> Agreement to Sell. Seller agrees to sell, transfer and deliver to Purchaser, and Purchaser agrees to purchase, upon the terms and conditions hereinafter set forth, all of the assets (other than cash, certificates of deposit, securities and cash equivalents) of the Laundromat business. . ., including without limitation the following:
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> . . .
>
> (f) the goodwill of the business (the "Goodwill"); and

Plaintiff further alleges that paragraph 13 of the Agreement, which reads "[i]f the agreement is terminated Seller shall direct Escrow Agent to return, without interest, the down payment. . .," compels the return of her down payment. Plaintiff argues, in conclusion:

> There is no language in the Contract that bestows upon Ahne, as Escrowee, any quasi-judicial discretion to hold the funds in escrow. Much to the contrary, the terms expressly authorize and direct Ahne, for any reason, upon proper notice, which was provided, to return the

> down payment to plaintiff as the Contract terminated since the condition precedent was not satisfied.

"'A fundamental tenet of contract law is that agreements are construed in accordance with the intent of the parties and the best evidence of the parties' intent is what they express in their written contract (see e.g. Innophos, Inc. v. Rhodia, S.A., 10 NY3d 25, 29 [2008]).' 'Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms,' without reference to extrinsic materials outside the four corners of the document' (Greenfield v. Philles Records, 98 N.Y.2d 562, 569, 750 N.Y.S.2d 565, 780 N.E.2d 166 [2002])." Goldman v. White Plains Center for Nursing Care, 11 N.Y.3d 173, 176 (2008). No where in the Agreement at issue is there any language even hinting that a "list of receivables and bank deposits" was a condition precedent of the sale and purchase of the Laundromat; however, a review of the Rider to the Agreement of Sale, which plaintiff did not reference, obligated the seller, "prior to closing," to "provide list of all Accounts Receivable and corresponding deposits." The Rider expressly provided that "[i]n the event there are any discrepancies between the printed form of the contract and this rider, the rider shall prevail."

Plaintiff's evidence, in the form of the Agreement of Sale and the annexed Rider to the Agreement, was sufficient to establish her prima facie entitlement to a grant of summary judgment in her favor, and both the return of her down payment and the dismissal of defendant's counterclaim seeking retention of the down payment as liquidated damages. Once the moving party makes a prima facie showing of entitlement to summary judgment in its favor, it is incumbent upon the opposing party to come forth with evidentiary proof in admissible form sufficient to demonstrate the existence of triable issues of fact. Chalasani v. State Bank of India, New York Branch, 283 A.D.2d 601 (2nd Dept. 2001); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980); Pagan v. Advance Storage and Moving, 287 A.D.2d 605 (2nd Dept. 2001); Gardner v. New York City Transit Authority, 282 A.D.2d 430 (2nd Dept. 2001). This defendant failed to do.

Submitted in opposition to the motion were the affidavit of Janet Park ("Park"), defendant's president, and the affirmation of defendant Ahne. In her affidavit, Park, states:

> Plaintiff (through counsel) alleges that Job 121 Corp. breached the Agreement by failing to produce list of receivables and bank deposits" as required by the Contract." However, this was not a condition to the Agreement and plaintiff requested and was provided time to conduct an accounting of the business. I[n] fact, plaintiff was at the business for 14 days prior to signing of the Agreement and did in fact inspect the list of receivables and bank deposits. Plaintiff's counsel is attempting, however, to misguide this Court in stating that there was an obligation to 'produce the list of receivables and bank deposits' when there was no such requirement in the Agreement.

Park then, in further support, references paragraph 10 of the Agreement, which provides:

> Inspections. That Purchaser has relied solely upon such investigations, examinations and inspections as the Purchaser has chosen to make or had made. That Seller has afforded the Purchaser the opportunity to conduct a full and complete investigation, inspection and examination and this Agreement is not conditioned on any inspection of any kind other than as may be set forth in this Agreement.

Defendant concludes that as their was no requirement that it provide a list of all accounts receivable and corresponding deposits, plaintiff, not defendant, breached the contract and thus defendant is entitled to retain the down payment pursuant to the liquidated damages provision.

The problem with defendant's argument is that the Rider to the Agreement did obligate it to provide the information at issue, prior to closing, which was scheduled to occur sometime after the signing of the Agreement. Any inspection or review of accounts receivable and corresponding deposits prior to the signing of the Agreement would not include accounts receivable and corresponding deposits following the signing of the Agreement and the scheduled closing date. Moreover, defendant would be entitled to retain the down payment if the plaintiff had no authority to cancel or terminate the contract. See, DiBlanda v. ADC Pinebrook, LLC, 44 A.D.3d 702 (2nd Dept. 2007); see, also, Engelhardt v. McGinnis, 2 A.D.3d 572 (2nd Dept. 2003). Although the contract is silent with respect to setting forth when the contract may be terminated, the inclusion in the Agreement of the language that " [i]f the agreement is terminated Seller shall direct Escrow Agent to return, without interest, the down payment. . .," indicates the parties' recognition that the Agreement was subject to termination. Certainly, defendant's failure to comply with its obligations, as set forth in the Rider, to list of all accounts receivable and corresponding deposits, prior to closing represents a reasonable basis for terminating the contract.

Defendant further argues that this summary judgment motion is premature because discovery has not been conducted. It is recognized that where substantial discovery remains outstanding, an award of summary judgment would be premature. See, Miller v. Adamski, 54 A.D.3d 1011 (2nd Dept. 2008); McGovern v. St. Cyril, 52 A.D.3d 787 (2nd Dept. 2008); Ruiz v. Griffin, 50 A.D.3d 1005 (2nd Dept. 2008); Rengifo v. City of New York, 7 A.D.3d 773 (2nd Dept. 2004). "A party should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment." Elliot v. County of Nassau, 53 A.D.3d 561 (2nd Dept. 2008). "CPLR 3212(f) permits a party opposing summary judgment to obtain further discovery when it appears that facts supporting the position of the opposing party exist but cannot be stated . . . [or] 'where facts essential to justify opposition to a motion for summary judgment are exclusively within the knowledge and control of the movant.'" Juseinoski v. New York Hosp. Medical Center of Queens, 29 A.D.3d 636, 637 (2nd Dept. 2006); see, Aurora Loan Services, LLC v. LaMattina & Associates, Inc., 59 A.D.3d 578 (2nd Dept. 2009); Lambert v. Sklar, 61 A.D.3d 939 (2nd Dept. 2009); Ruiz v. Griffin, 50 A.D.3d 1005 (2nd Dept. 2008). What must be offered is "an evidentiary

basis to show that discovery may lead to relevant evidence (citations omitted) and that facts essential to justify opposition to the motion were exclusively within the knowledge and control" of the moving opposing party." Gasis v. City of New York, 35 A.D.3d 533, 534 (2nd Dept. 2006); see, Cavitch v. Mateo, 58 A.D.3d 592 (2nd Dept. 2009); "The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion." Id., Sasson v. Setina Mfg. Co., Inc., supra; Associates Commercial Corp. v. Nationwide Mut. Ins. Co., 298 A.D.2d 537 (2nd Dept. 2002). Here, "in view of the fact that the defendant had personal knowledge of the relevant facts underlying the [transaction], [its] purported need to conduct discovery [does] not warrant denial of the motion (citations omitted)." Lampkin v. Chan, __ A.D.2d. __, __ N.Y.S.2d __, 2009 WL 4452055 (2nd Dept. 2009).

Accordingly, as the alleged issues of fact raised by defendant are specifically resolved by reference to the Rider to the Agreement, plaintiff failed to raise a triable issue of fact (see Taussig, 31 AD3d at 533) sufficient to defeat plaintiff's motion for summary judgment. Plaintiff's motion therefore is granted, and it hereby is

ORDERED AND ADJUDGED, that defendant Samuel S. H. Ahne hereby is directed to immediately release and return the sum of $25,000.00, without interest, pursuant to the terms of a Contract of Sale; and it is further

ORDERED AND ADJUDGED, that defendant's counterclaim hereby is dismissed with prejudice.

Dated: January 14, 2010

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J.S.C.

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