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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

CYNTHIA C. KAISER-HAIDRI and
NAZAR H. HAIDRI,

Plaintiffs,

- against -

BATTERY PLACE GREEN, LLC.,

Defendant.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 2262/10
Motion Seq. No.: 01
Motion Date : 05/03/10

The following papers have been read on the motion:

	Papers Numbered
Notice of Motion, Affidavit, Affirmation and Exhibits	1
Affirmation in Opposition	2
Reply Affirmation	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendant moves, pursuant to CPLR § 3212, for an order granting summary judgment dismissing plaintiffs' complaint, awarding it the relief sought in the counterclaim and awarding it legal fees and disbursements in connection with the defense of this action. Plaintiffs oppose the motion.

This action arises out of an aborted closing for Unit 26D of the Visionaire Condominium at 70 Little West Street, New York, New York. On May 15, 2007, plaintiff Cynthia Kaiser-Haidri ("Kaiser-Haidri") executed an Agreement (Exhibit D to the moving papers) with defendant to purchase Unit 26D for $2,535,000.00. Plaintiff Kaiser-Haidri then assigned her rights under the Purchase Agreement to herself and plaintiff Nazar Haidri ("Haidri") (Exhibit E to the moving papers). Plaintiffs tendered the initial deposit of $253,500.00 on May 15, 2007, and an additional

deposit of $126,750.00 on November 22, 2007. These payments, which amount to fifteen percent (15%) of the purchase price, are being held in an escrow account at the office of defendant's attorneys, Albanese & Albanese LLP.

By letter dated February 6, 2009 (Exhibit F to the moving papers), defendant's attorneys scheduled the closing for March 20, 2009. After plaintiffs failed to attend the closing, they were sent a notice of default dated April 6, 2009, wherein they were advised of their right to cure their default within thirty (30) days.

Plaintiffs commenced this action for the return of their down payment after they failed to cure their default. They allege seven causes of action seeking damages and declaratory relief based upon their claims that the Agreement violates the Rule Against Perpetuities (NY EPTL 9-1.1(b)) and the Interstate Land Sales Full Disclosure Act (15 USC 1701, *et seq*). On this motion, defendant seeks summary judgment dismissing the complaint in its entirety and judgment in its favor on its counterclaim alleging the right to retain the initial and additional deposits in the amount of $380,250.00, together with interest and reasonable attorneys' fees and disbursements.

Summary judgment is the procedural equivalent of a trial. *See S.J. Capelin Associates, Inc. v. Globe Mfg. Corp.*, 34 N.Y.2d 338, 357 N.Y.S.2d 478 (1974). The function of the court in deciding a motion for summary judgment is to determine if triable issues of fact exist. *See Suffolk County Dept. of Social Services on behalf of Michael V. v. James M.*, 83 N.Y.2d 178, 608 N.Y.S.2d 940 (1994). The proponent must make a *prima facie* showing of entitlement to judgment as a matter of law. *See Giuffrida v. Citibank Corp.*, 100 N.Y.2d 72, 760 N.Y.S.2d 397 (2003); *Alvarez v. Prospect Hospital,* 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). Once a *prima facie* case has been made, the party opposing the motion must come forward with proof in evidentiary form establishing the existence of triable issues of fact or an acceptable excuse for its failure to do so. *See Zuckerman v. City of New York,* 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980). Summary judgment will not be defeated by mere conclusions or unsubstantiated allegations. *See Zuckerman v. City of New York, supra.*

The elements of a cause of action for breach of contract are the existence of a contract, the movant's performance under the contract, the opponent's breach of that contract and resulting damages. *See JP Morgan Chase v. J.H. Elec. of New York, Inc.*, 69 A.D.3d 802, 893 N.Y.S.2d

(2d Dept. 2010). In the case at bar, defendant has submitted a copy of the executed Agreement and the assignment. The Agreement provides that the purchasers' failure to pay the balance of the purchase price on the closing date designated by the seller is an event of default (Agreement §15.1(I)) and that the seller may cancel the Agreement and retain all sums paid upon purchasers' default as liquidated damages (Agreement §15.2). Defendant has further established plaintiffs' failure to attend the closing (Varney affidavit) and defendant's notice of default to plaintiffs. On this record, defendant has made out a *prima facie* case of breach of the Agreement.

Plaintiffs argue that the Agreement is void *ab intio* because it violates the Rule Against Perpetuities found in NY EPTL 9-1.1(b). This statute provides, that:

> no estate in property shall be valid unless it must vest, if at all, not later than twenty-one years after one or more lives in being at the creation of the estate and any period of gestation involved.

This rule seeks to ensure the productive use and development of properties, and it applies to options to purchase. *See Symphony Space, Inc. v. Pergola Properties, Inc.* 88 N.Y.2d 466, 646 N.Y.S.2d 641 (1996) (option that could be exercised twenty-fours years later invalid); *Barnes v. Oceanus Navigation Corp, Ltd*, 21 A.D.3d 975, 801 N.Y.S.2d 368 (2d Dept. 2005) (repurchase option with indefinite duration invalid).

In contrast, the Agreement here does not grant plaintiffs an option. It is a contract to purchase a specific condominium unit. Although the Agreement lacks a closing date, the law will presume a reasonable closing date. *See Tobias v. Lynch*, 233 N.Y. 515 (1922); *Omar v. Rozen*, 55 A.D.3d 705, 867 N.Y.S.2d 458 (2d Dept. 2008); *Linda M. Kirk Associates, Ltd. v. McDonald Equities, Inc.*, 155 A.D.2d 281, 547 N.Y.S.2d 44 (1st Dept.1989), *lv app den* 75 N.Y.2d 706, 552 N.Y.S.2d 929 (1990).

Plaintiffs' reliance upon *Dimon v. Starr,* 299 A.D.2d 313, 749 N.Y.S.2d 78 (2d Dept. 2002), *lv app den* 100 N.Y.2d 501, 760 N.Y.S.2d 764 (2003) and *Reynolds v. Gagen* 292 A.D.2d 310, 739 N.Y.S.2d 704 (1st Dept. 2002) is unavailing. *Dimon* involved a future right to receive compensation that was intended to last indefinitely. The "heirs and assigns" language in *Reynolds* was found to require the defendant's heirs and assigns to honor the defendant's commitment and did not violate the Rule Against Perpetuities. Following *Reynolds*, the "heirs, legal

representatives, successors and permitted assigns" herein (Agreement §40) does not run afoul of the Rule Against Perpetuities.

Finally, plaintiffs' equitable arguments do not suffice. Plaintiffs were aware that the Visionaire Condominium was under construction and they agreed to purchase Unit 26D within thirty (30) days of receiving notice from defendant. Upon their failure to close or cure their default, the Agreement plainly gives defendant the right to cancel the Agreement and retain all sums deposited. Plaintiffs have failed to raise a triable issue of fact as to their main defense to defendant's counterclaim and their first two causes of action based upon the Rule Against Perpetuities. Consequently, defendant is entitled to summary judgment dismissing the first and second causes of action.

Plaintiffs further make several arguments based upon the Interstate Land Sales Full Disclosure Act ("the Act")[15 USC 1701 *et seq*. They allege that defendant failed to register with the Department of Housing and Urban Development, but defendant shows that the Visionaire's statement of record was accepted for filing by letter dated March 14, 2007 (Exhibit I to the moving papers). In response to plaintiffs' further claim that defendant failed to provide to them a printed property report as required by the Act, defendant annexes a copy of the receipt for the property report at issue (Exhibit J to the moving papers). Plaintiffs' further complaint that the Agreement fails to include certain refund language is refuted by review of the Agreement which contains the disputed language (Agreement §15.4). Under these circumstances, plaintiffs have failed to raise a triable issue of fact as to defendant's counterclaim, and their third, fourth, and fifth causes of action and defendant is entitled to summary judgment dismissing these claims.

The sixth cause of action for interest, court costs, and reasonable attorneys' fees pursuant to 15 USC 1709(c), is predicated on the alleged breaches of the Act set forth in the third, fourth and fifth causes of action. As these claims have been dismissed as meritless, the sixth cause of action must also be dismissed.

In their seventh cause of action, plaintiffs purport to allege a claim for anticipatory breach of the offering plan by defendant warranting rescission (complaint par. 81), based upon their prediction that the "Visionaire condominium will financially falter and imminently fail." *See* complaint, par. 80. In order to justify the intervention of equity to rescind a contract, a party must allege fraud in the inducement of the contract; failure of consideration, inability to perform the contract after it is made or a breach of the contract which substantially defeats the purpose

thereof. *See Babylon Associates v. Suffolk County*, 101 A.D.2d 207, 475 N.Y.S.2d 869 (2d Dept. 1984). Plaintiffs allege none of these grounds for rescission and present no factual basis for their allegations of anticipatory breach.

Furthermore, plaintiffs misjudge the request for relief, calling it dismissal pursuant to CPLR§ 3211, rather than summary judgment pursuant to CPLR § 3212. They argue that summary judgment is premature because discovery has not yet commenced. However, plaintiffs fail to offer an evidentiary basis for their claim that discovery might lead to relevant evidence. *See Davila v. New York City Transit Authority*, 66 A.D.3d 952, 888 N.Y.S.2d 138 (2d Dept. 2009); *Lauriello v. Gallotta*, 59 A.D.3d 497, 873 N.Y.S.2d 690 (2d Dept. 2009); *Brewster v. Five Towns Health Care Realty Corp.*, 59 A.D.3d 483, 873 N.Y.S.2d 199 (2d Dept. 2009). The mere hope or speculation that evidence sufficient to defeat the summary judgment motion may be uncovered during the discovery process is insufficient to deny the motion. *See Davila v. New York City Transit Authority*; *supra; Lauriello v. Gallotta, supra*; *Brewster v. Five Towns Health Care Realty Corp., supra.*

Overall, it is well established that a purchaser who defaults on a real estate contract without lawful excuse cannot recover the down payment. *See Willsey v. Gjuraj*, 65 A.D.3d 1228, 885 N.Y.S.2d 528 (2dDept. 2009); *Micciche v. Homes by Timbers, Inc.*, 18 A.D.3d 833, 796 N.Y.S.2d 628 (2d Dept. 2005). *See generally Cipriano v. Glen Cove Lodge 1458,* 1 N.Y.3d 53, 769 N.Y.S.2d 168 (2003) *citing Maxton Builders Inc. v. LoGalbo*, 68 N.Y.2d 373, 509 N.Y.S.2d 507 (1986). On this record, plaintiffs have failed to raise a triable issue of fact as to any lawful excuse. Accordingly, defendant is entitled to summary judgment dismissing the seventh cause of action, as well as summary judgment on its counterclaim for retention of the down payment.

According to the Agreement, the plaintiffs are obligated to reimburse defendant for any "legal fees and disbursements" incurred by defendant in defending its rights thereunder (Agreement §31). For this reason, the matter of defendant's reasonable attorneys' fees shall be set down for a hearing.

Defendant shall file a note of issue on or before July 28, 2010. A copy of this order shall be served upon the County Clerk when the note of issue is filed. Failure to file a note of issue or appear as directed shall be deemed an abandonment of the claim giving rise to the inquest. A copy of this order shall be served upon defendant by July 28, 2010.

The matter is hereby set down for an inquest, for an assessment or account of defendant's reasonable attorneys' fees, to be held before the Calendar Control Part (CCP) on the 10th day of August, 2010 at 9:30 a.m.

This constitutes the decision and order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
July 7, 2010

ENTERED
JUL 14 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE