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| <b>Matter of Bevilacqua v Cuomo</b>  |
| 2011 NY Slip Op 30931(U)   |
| April 12, 2011   |
| Supreme Court, New York County   |
| Docket Number: 113314/2010   |
| Judge: Carol E. Huff   |
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: CAROL E. HUFF

PART 32

Justice

Index Number : 113314/2010  
BEVILACQUA, CHRISTOPHER  
VS.  
CUOMO, ANDREW  
SEQUENCE NUMBER : 001  
ARTICLE 78

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

motion is decided in accordance  
with accompanying memorandum decision

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: APR 12 2011

  
**CAROL E. HUFF**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 32

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In the Matter of the Application of : Index No. 113314/10  
CHRISTOPHER MYLES BEVILACQUA,

Petitioner, :

For a Judgment Under Article 78 of the CPLR :

- against - :

ANDREW CUOMO, in his Official Capacity as Attorney :  
General of the State of New York,  
CRP/EXTELL PARCEL I, LP and STROOCK &  
STROOCK & LAVAN, LLP,

Respondent(s) :

**UNFILED JUDGMENT**

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CAROL E. HUFF, J.:

In this Article 78 proceeding, petitioner seeks to annul respondent's determination dated June 22, 2010, which denied petitioner's application seeking the refund of his down payment on a condominium apartment. Petitioner also seeks an order directing the return of the down payment from the sponsor.

According to the petition, on August 23, 2007, petitioner entered into an agreement (the Original Agreement) with CRP/Extell Parcel I, LP (the Sponsor), for the purchase of a condominium apartment located at 80 Riverside Boulevard, Unit 10B, New York, New York. The purchase price was \$3.5 million. Petitioner placed a deposit of \$525,000 into escrow to secure the purchase. In its Offering Plan with respect to the condominium, the Sponsor provided that if the first closing of title to a residential unit to a purchaser did not occur by September 1, 2008, the Sponsor was required to offer purchasers the right to rescind their purchase agreements

and recover their deposits.

The Sponsor did not close on a condominium sale by September 1, 2008, but, petitioner argues, despite the Sponsor's obligations under the Offering Plan, it did not inform petitioner of the fact. Pursuant to the Offering Plan, if the first closing did not occur by that date, "Sponsor will amend the Plan to update the budget and to offer Purchasers the right to rescind their Agreements within fifteen (15) days after the presentation of the amendment disclosing the updated budget, and any Purchaser electing rescission will have their deposits and any interest earned thereon returned." None of this, according to petitioner, was ever done.

In or about October 2008, petitioner, dissatisfied with the view from the original condominium, entered into negotiations with the Sponsor that resulted in a new agreement (the New Agreement), dated March 5, 2009, to terminate the Original Agreement and to purchase Unit 12B. Only subsequently, petitioner contends, did he learn of the Sponsor's failure to secure a first purchase by September 1, 2008, and did he seek to rescind the New Agreement and recover his deposit.

Pursuant to General Business Law Article 23-A, the Attorney General has promulgated regulations governing newly constructed condominiums. 13 NYCRR Part 20. The regulations relating to purchasers' down payments require sponsors to state in their offering plans that funds held pursuant to GBL §§ 352-e(2-b) and 352-h will be held in escrow accounts. If a dispute arises with respect to the down payment, the purchaser may apply to the Attorney General for a determination regarding the dispute. 13 NYCRR § 20.3(o)(3)(viii)(a).

Petitioner applied to the Attorney General pursuant to these regulations, seeking a refund of his deposit. In its June 22, 2010, determination, the Attorney General denied the application,

finding that the New Agreement contained a clause terminating the Original Agreement, including a release from claims “arising from or out of the Original Agreement or the termination thereof.” New Agreement, ¶ 3. The New Agreement also contained an integration clause that provided: “This Agreement together with the Plan constitutes the entire agreement between the parties and supersedes any and all understandings and agreements between the parties with respect to the subject matter thereof.” New Agreement, ¶ 36. Accordingly the Original Agreement became null and void, and because the New Agreement was entered into after the September 1, 2008, first closing date, the Offering Plan’s rescission provision did not apply.

In this Article 78 proceeding, respondent’s determination will be upheld unless it is shown that it “was affected by an error of law . . . or was arbitrary and capricious or an abuse of discretion.” CPLR 7803(3). The test is whether the determination is “without sound basis in reason and is generally taken without regard to the facts.” Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, 34 NY2d 222, 231 (1974).

Respondent cannot be said to have made its determination without reason or regard to the facts. Under 13 NYCRR § 20.3(o)(3)(viii)(a), the Attorney General is charged with making “a determination on the disposition of the down payment. . . .” Considering the operative contract before it – the New Agreement – it correctly determined that the down payment was not subject to return. To the extent that petitioner retains claims for damages lying in fraud or some other theory, they were not before the Attorney General.

Accordingly, it is

ADJUDGED that the petition is denied and the proceeding is dismissed.

Dated: APR 12 2011

  
**CAROL E. HUFF**  
J.S.C.

**UNFILED JUDGMENT**

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