

**Matter of Ting Kou Cheng v New York State Off. of
Attorney Gen. Real Estate Fin. Bur.**

2011 NY Slip Op 32272(U)

August 17, 2011

Supreme Court, New York County

Docket Number: 104299/11

Judge: Joan B. Lobis

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: JOAN B. LOBIS
Justice

PART 6

TING KOU CHENG, et al.

INDEX NO. 104299/11

- v -

MOTION DATE 5/31/11

NEW YORK STATE OFFICE OF THE
ATTORNEY GENERAL, et al.

MOTION SEQ. NO. 001

The following papers, numbered 1 to 24, were read on this motion to/for Article 78 relief

Notice of Motion / Order to Show Cause - Affidavits - Exhibits _____

No(s). 1-17
No(s). 18, 19-20 (x mot.)
No(s). 22-23, 24

Answering Affidavits - Exhibits _____

Replying Affidavits _____

Upon the foregoing papers, it is ordered that this motion is

**THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION, ORDER
& JUDGMENT**

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).

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

Dated: 8/17/11

JBL, J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

-----X
IN THE MATTER OF THE APPLICATION OF
TING KOU CHENG AND AI JUN LIU,

Petitioners,

Index No. 104299/11

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

Decision, Order and Judgment

- against -

NEW YORK STATE OFFICE OF THE ATTORNEY
GENERAL REAL ESTATE FINANCING BUREAU,
BATTERY PLACE GREEN, LLC,

Respondents.

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).

-----X
JOAN B. LOBIS, J.S.C.:

Petitioners Ting Kou Cheng and Ai Jun Liu bring this proceeding under Article 78 of the C.P.L.R. seeking to annul the New York State Office of the Attorney General Real Estate Financing Bureau's (the "OAG") Determination of the Disposition of a Down Payment (the "Determination") in a dispute between petitioners and Battery Place Green LLC (the "Sponsor"), the sponsor of the Visionaire Condominium (the "Visionaire"). The OAG cross-moves to dismiss the proceeding under C.P.L.R. Rules 3211(a)(1) and (7). The court notes that at the April 19, 2011 oral argument of petitioners' separate motion (brought by order to show cause) seeking injunctive relief, the court denied same.

On or about May 1, 2007, petitioners and the Sponsor entered into an agreement (the "Agreement") to purchase a unit (the "Unit") at the Visionaire for \$1,855,000.00. The petition sets forth that petitioners were not represented by counsel at the time they executed the Agreement. Pursuant to the Agreement, petitioners made a down payment of \$278,250.00 that was placed into

an escrow account. In December 2008, petitioners obtained a mortgage commitment effective through February 19, 2009. By notice dated February 10, 2009, the Sponsor scheduled the closing on the Unit for March 12, 2009. Petitioners were able to obtain an extension of the mortgage commitment from their lender through February 26, 2009, but the parties did not complete the sale prior to that date,¹ and the lender declined to extend the mortgage commitment beyond February 26, 2009.

Having lost their financing, petitioners asked the Sponsor to adjourn the March 12, 2009 closing date, and the Sponsor agreed to adjourn the closing to May 8, 2009. On May 8, 2009, petitioners still had not secured financing for the Unit and did not close on that date. On May 11, 2009, the Sponsor informed petitioners of their default and gave them thirty (30) days to cure the default or risk cancellation of the Agreement by the Sponsor. Apparently, petitioners and the Sponsor attempted to negotiate for a less expensive unit in the Visionaire, but those negotiations fell through after the Sponsor told petitioners that they would only be able to apply a portion of their prior down payment to the less expensive unit. Petitioners and the Sponsor attempted to settle the matter of the down payment, but petitioners did not accept the Sponsor's offer to return \$20,000.00 to petitioners. Consequently, on October 2, 2009, the Sponsor applied to the OAG for the release of the down payment in the escrow account, and petitioners cross-applied for the return of the down payment. See 13 N.Y.C.R.R. § 20.3(o)(3)(viii)(a).

¹ Petitioners allege, *inter alia*, that the Sponsor's delay in obtaining a temporary certificate of occupancy ("TCO"), which their lender required before funding their mortgage, caused them to lose their mortgage commitment before the closing could occur. The petition sets forth, however, that the TCO was issued on February 18, 2009, before petitioners' mortgage commitment expired on February 26, 2009.

As pertains to this dispute, the Agreement states that the purchasers' (petitioners') obligations under the Agreement are not contingent on securing financing and that failure to obtain financing will not relieve the purchasers of their obligations under the Agreement. The Agreement further states that the Sponsor may keep the down payment as liquidated damages if the purchasers default. The purchasers' failure to pay the balance of the purchase price on the closing date designated by the Sponsor is a considered a default under the Agreement. The Sponsor is required to give purchasers thirty (30) days to cure a default. The Agreement states that if the purchasers fail to cure a default and the Sponsor elects to cancel the Agreement, the Sponsor may retain all sums deposited by the purchasers, plus interest earned, as liquidated damages.

On March 11, 2011, the OAG issued the Determination, which ordered the release of the down payment in its entirety to the Sponsor. The OAG noted that under the Agreement, petitioners had defaulted by failing to close on May 8, 2009, and the Sponsor had given petitioners thirty (30) days to cure the default. When petitioners failed to cure, the Sponsor was entitled to cancel the Agreement. The Determination set forth that, according to the terms of the Agreement, petitioners were required to close whether or not they had secured financing, and the fact that they had not secured financing did not give them the right to the return of their down payment.

Petitioners now seek to have this court set aside the Determination as legally erroneous and arbitrary and capricious. They maintain that the Determination is arbitrary and capricious because the OAG failed to recognize that the Agreement was a "contract of adhesion" and was, therefore, unconscionable. They aver that they were not permitted to negotiate a mortgage

contingency into the Agreement and were not represented by an attorney at the time they executed the Agreement. They did not foresee, when they executed the Agreement, that an economic downturn would make it "impossible" to find financing. They argue that the lack of a mortgage contingency made the Agreement unconscionable because they "had no choice but to accept the Agreement without a mortgage contingency clause and this unreasonably favored . . . [the] Sponsor."

Petitioners further argue that the Determination is arbitrary and capricious because the OAG failed to acknowledge the reality of the current market conditions or recent case law regarding condominiums. They maintain that recently, federal courts situated in New York have considered the economic downturn in allowing condominium buyers to recoup their down payments and "appear to disfavor allowing developers to keep buyer's down payments as liquidated damages in light of the current economic recession." Petitioners contend that the OAG should have considered these cases (discussed, *infra* at pp. 7-8) and the economic downturn in arriving at the Determination.

The OAG argues, in support of its pre-answer motion to dismiss the petition, that the documentary evidence submitted by petitioners (specifically, the Agreement) clearly establishes that they are not entitled to the relief they seek herein. See C.P.L.R. Rule 3211(a)(1). The OAG further argues that petitioners have failed to set forth facts required to support their claim that the Determination was arbitrary and capricious (see C.P.L.R. Rule 3211[a][7]) because the Determination was rational and supported by applicable law; they have failed to set forth allegations that satisfy the procedural and substantive elements of the unconscionability doctrine, as courts have

repeatedly sustained contracts that do not have financing contingency clauses; and that a difficult economic environment is not an excuse for defaulting under a contract.

On a motion to dismiss a pleading for failure to state a cause of action, if the court considers extrinsic evidence submitted with the motion (as in the instant matter), the

motion should be granted where the essential facts have been negated beyond substantial question by the affidavits and evidentiary matter submitted. [A]llegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not presumed to be true and accorded every favorable inference.

Biondi v. Beekman Hill House Apt. Corp., 257 A.D.2d 76, 81 (1st Dep't 1999) (internal quotation marks and citations omitted), aff'd, 94 N.Y.2d 659 (2000).

Pursuant to 13 N.Y.C.R.R. § 20.3(o)(3)(viii)(a), in the event of a dispute between parties regarding the purchase of a condominium, the OAG is authorized to direct the release of money held in escrow. The court's review of a determination that the OAG makes pursuant to its authority in section 20.3(o)(3)(viii)(a) is limited to an inquiry as to whether the OAG's determination violated lawful procedures, whether it was affected by an error of law, or whether it was arbitrary and capricious or an abuse of discretion. C.P.L.R. § 7803(3). Petitioners bear the burden (see generally In re Stanton v. Town of Islip Dep't of Planning and Dev., 37 A.D.3d 473, 474 [2d Dep't 2007]) of demonstrating that the OAG's determination was arbitrary and capricious, i.e., "without sound basis in reason or regard to the facts." In re Peckham v. Calogero, 12 N.Y.3d 424, 431 (2009), citing In re Pell v. Board of Educ., 34 N.Y.2d 222, 231 (1974). However, it is well established that

"an administrative agency's construction and interpretation of its own regulations and of the statute under which it functions is entitled to the greatest weight." In re Herzog v. Joy, 74 A.D.2d 372, 375 (1st Dep't 1980), aff'd, 53 N.Y.2d 821 (1981).

The petition fails to state facts supporting petitioners' contention that the Determination is arbitrary and capricious. The OAG was well within its authority under 13 N.Y.C.R.R. § 20.3(o)(3)(viii)(a) to direct the release of monies in the escrow account after determining that the Sponsor had fully complied with its obligations under the Agreement, including with regard to a default event; that petitioners were required to close whether or not they had secured financing; and that petitioners' failure to secure financing did not give them the right to the return of their down payment. Petitioners have failed to allege facts supporting their claim that it was arbitrary and capricious for the OAG to determine as without merit petitioners' contentions that either they did not default or their default was due to the Sponsor's bad faith. On the contrary, the facts as stated indicate that the OAG found that the Sponsor had complied with its obligations under the Agreement but that the purchasers (petitioners) had not, so it was reasonable for the OAG to enforce the default provisions of the Agreement, including the provision for the Sponsor retaining the down payment as liquidated damages. Further, the OAG's determination that the Sponsor's was entitled to retain the entire down payment in the event of a default is neither irrational nor in disregard of the facts. New York courts have repeatedly reaffirmed the principle that a seller is entitled to retain a down payment as liquidated damages in the event a buyer defaults on a contract for the purchase of real estate. See Atlantic Dev. Group, LLC v. 296 E. 149th St., LLC, 70 A.D.3d 528, 529 (1st Dep't 2010). See also, e.g., Lawrence v. Miller, 86 N.Y. 131 (1881), cited in Rivera

v. Konkol, 48 A.D.3d 347, 348 (1st Dep't 2008); Kaiser-Haidri v. Battery Place Green, LLC, 85 A.D.3d 730 (2d Dep't 2011). "[A] purchaser who, without breach on the part of the seller, defaults on a real estate contract without lawful excuse cannot recover her down payment." Rivera, 48 A.D.3d at 348 (citations omitted). Petitioners fail to allege that they had a lawful excuse for defaulting on the Agreement. Even accepting as true the factors that they now raise as reasons why their default should be excused—i.e., that they were not permitted to negotiate for a mortgage contingency, that they could not have foreseen that the economic recession would render it "impossible" to comply with the Agreement, or that they were unrepresented at the time they signed the Agreement—it cannot be said that any of these factors excused petitioners' default or rendered the Agreement so one-sided as to be unconscionable.

Finally, petitioners' contention that the OAG's failure to consider the economic recession in arriving at the Determination fails to state a claim that the Determination was arbitrary and capricious. First, it is not clear that petitioners argued this issue before the OAG in the underlying proceeding. Second, the federal cases that petitioners cite in support of their argument that the OAG's failure to consider the economic recession renders the Determination arbitrary and capricious are inapposite to this proceeding under Article 78 and the facts herein. See Bacolitsas v. 86th & 3rd Owner, LLC, 09 Civ. 7158 (PKC), 2010 U.S. Dist. LEXIS 99642 (S.D.N.Y. 2010) (finding plaintiffs-buyers entitled to rescind sales contract and recoup down payment due to defendants-sellers' failure to comply with Interstate Land Sales Full Disclosure Act ["ILSA"], 15 U.S.C. § 1701, et seq.); CRP/Extell Parcel J, L.P. v. Cuomo, 394 F. App'x 779 (2d Cir. 2010) (affirming district court's order denying preliminary injunction on the return of down payments to

condominium purchasers who were granted the right to rescind their purchase agreements and recoup their down payments following binding arbitration conducted by OAG); Nu-Chan, LLC v. 20 Pine Street LLC, 09 Civ. 00477 (PAC), 2010 U.S. Dist. LEXIS 103541 (S.D.N.Y. 2010) (holding that plaintiffs-sellers' claims for equitable rescission and damages under certain provisions of ILSA were not time-barred). Third, difficulty in obtaining financing does not render a default excusable (see, e.g., 407 East 61st Garage v. Savoy Fifth Ave. Corp., 23 N.Y.2d 275, 281 [1968]; Urban Archaeology Ltd. v. 207 E. 57th St. LLC, 68 A.D.3d 562 [1st Dep't 2009]), so whether or not the OAG considered the "reality of the current market conditions" is irrelevant and insufficient to support petitioners' claim that this lack of consideration renders the Determination arbitrary and capricious. Accordingly, it is hereby

ORDERED and ADJUDGED that the cross motion is granted, the petition is denied, and the proceeding is dismissed in its entirety.

Dated: August 17, 2011



JOAN B. LOBIS, J.S.C.

UNFILED JUDGMENT

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