

Matter of Boyle v Baker
2011 NY Slip Op 33933(U)
November 2, 2011
Sup Ct, NY County
Docket Number: 109073/11
Judge: Manuel J. Mendez
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

In the Matter of the Application of
JASON BOYLE and CORINNE CHMIELEWSKI,

INDEX NO. 109073/11

MOTION DATE 10-19-2011

- v -

MOTION SEQ. NO. 001

SUSAN BAKER,

MOTION CAL. NO. _____

The following papers, numbered 1 to 6 were read on this petition to compel return of contract deposit.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1-2</u>
Answering Affidavits — Exhibits _____	<u>3-4</u>
Replying Affidavits _____	<u>5-6</u>

FILED

NOV 04 2011

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers it is the decision and order of this court that the petition is granted. Escrowee shall, 30 days after the date of service of a copy of this order with notice of entry upon Respondent, release the contract deposit to petitioners.

NEW YORK COUNTY CLERK

On March 11, 2011 Petitioners and Respondent entered into a contract for the purchase of a co-op apartment located at 333 East 75th Street, Unit 4G. The closing was scheduled for May 15, 2011, but the contract did not state that "time was of the essence". Petitioners made a contract deposit of \$38,400 which is being held in escrow pursuant to the contract. For the purposes of this petition the relevant portions of the contract are paragraphs 6.1, 6.2, 6.2.1, 6.3, 6.4 and 13.1 , which state in relevant part:

Paragraph 6.1 - "this sale is subject to the unconditional consent of the corporation."

Paragraph 6.2 - " purchaser shall in good faith":

paragraph 6.2.1 -"submit to the corporation or the managing agent an application with respect to this sale on the form required by the corporation....within ten(10) business days after the earlier of (1) the loan commitment date...or (2) the date of receipt of the loan commitment letter..."

Paragraph 6.3- "either party after learning of the corporation's decision shall promptly advice the other party thereof. If the corporation has not made a decision on or before the schedule closing date, the closing shall be adjourned for 30 business days for the purpose of obtaining such consent. If such consent is not given by such adjourned date, either party may cancel this contract by notice, provided that the

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

corporation's consent is not issued before such notice of cancellation is given. If such consent is refused at any time either party may cancel this contract on notice. In the event of cancellation pursuant to this ¶ 6.3 Escrowee shall refund the contract deposit to purchaser."

Paragraph 6.4 - " if such consent is refused or not given, due to purchaser's bad faith conduct, purchaser shall be in default and ¶ 13.1 shall govern."

Paragraph 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...."

Petitioners received the loan commitment letter on April 7, 2011 but did not submit the application for the corporation's board approval within the required 10 business days contemplated in paragraph 6.2.1 of the contract. Petitioner submitted the application to the real estate broker on May 11, 2011 who transmitted it to the managing agent on May 25, 2011, ten days after the contract scheduled closing date. Respondent did not cancel the contract due to Petitioner's default in complying with paragraph 6.2.1, instead by letter dated June 6, 2011 notified Petitioner's attorney that "closing was scheduled for July 6, 2011 TIME BEING OF THE ESSENCE.... and that Purchasers failure to appear and close the transaction on the foregoing date and time....shall be a default under the contract, at which time the contract will be declared cancelled and the contract price deposit will be forfeited."

On June 30, 2011 the corporation's board denied approval of the sale. The Escrowee informed Respondent's attorney that due to the board's refusal to consent to the sale the contract deposit would be refunded to Petitioners. Respondent objected to the refund of the contract deposit and claimed that this should be released to her pursuant to ¶ 13.1 of the contract.

"Ordinarily it is the court's responsibility to interpret written instruments" (1210 Colbin Ave., Inc., v. Tops Markets, LLC, 30 A.D. 3d 995, 816 N.Y.S. 2d 639 [4th Dept. 2006]). "However, When the meaning of a contract is plain and clear It is entitled to be enforced according to its terms (Vintage , LLC v. Laws Construction Corp. 13, N.Y.3d 847, 892 N.Y.S. 2d 286, 920 N.E. 2d 342 [2009]; Samuel v. Druckman & Sinel, LLP, 12 N.Y.3d 205, 879 N.Y.S. 2d 10, 906 N.E. 2d 1042 [2009]) and not to be subverted by straining to find an ambiguity that otherwise might not be thought to exist" (Uribe v. Merchants Bank of New York, 91 N.Y. 2d 336, 670 N.Y.S. 2d 393, 693 N.E. 2d 740 [1998]).

"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" (Goldman v. White Plains Center for Nursing Care, LLC, 11 N.Y. 3d 173, 867 N.Y.S. 2d 27, 896 N.E. 2d 662 [2008]; AGCO Corp., v. Northrop Grumman Space & Mission Systems Corp., 61 A.D. 3d 562, 878 N.Y.S. 2d 20 [1st. Dept. 2009]). "In searching for the probable intent of the parties the fair and reasonable meaning of the words control (Sutton v. East River Sav. Bank, 55 N.Y.2d 550, 450 N.Y.S. 2d 460, 435 N.E. 2d 1075 [1982]), and when the terms are clear and unambiguous the Intent of the parties must be found within the four corners of the contract"(Goldstein v. AccuScan, Inc., 2 N.Y.3d 811, 782 N.Y.S. 2d 50, 815 N.E. 2d 657[2004]; Signature Realty, Inc. V. Tallman, 2 N.Y. 3d 810, 781 N.Y.S. 2d 259, 814 N.E. 2d 429 [2004]). "In interpreting a contract, primary attention must be given to the

purpose of the parties in making the contract”

(Greenfield v. Philles Records, Inc., 98 N.Y. 2d 562, 750 N.Y.S. 2d 565, 780 N.E. 2d 166[2002]).

Petitioners and Respondent entered into a contract for the purchase of the Co-op apartment. Petitioners were, in good faith, to submit to the Co-op board an application for approval of the sale within ten (10) business days of receipt of either a (1) loan commitment date or (2) loan commitment letter. Petitioners did not do so within the time stipulated in the contract and the failure to do so constituted a default. Respondent could have, at that point, cancelled the contract and retained the contract deposit. (See Hovav v. Lowe, 50 A.D. 3d 488, 856 N.Y.S. 2d 80 [1st. Dept. 2008]; Contract ¶ 6.4).

Respondent did not cancel the contract, instead it mailed a letter scheduling closing for July 6, 2011, making time of the essence. “A party to an agreement who believes it has been breached may elect to continue to perform the agreement and give notice to the other side rather than terminate it” (Syracuse Orthopedic Specialists, P.C. v. Hootnick, 42 A.D. 3d 890, 839 N.Y.S. 2d 897[4th Dept. 2007]; Albany Medical College v. Lobel, 296 A.D. 2d 701, 745 N.Y.S. 2d 250[3rd. Dept. 2002]); “However, by choosing not to terminate the contract at the time of the breach, the non-breaching party surrenders the right to terminate later based on that breach” (Awards.com v. Kinko’s, Inc., 42 A.D. 3d 178, 834 N.Y.S. 2d 147 [1st. Dept. 2007];New York Telephone Co., v. Jamestown Telephone Corporation, 282 NY 365, 26 N.E. 2d 295[1940]). Respondent had two remedies, consider the failure to submit the application to the board for its approval in accordance with ¶ 6.2.1 a default and claim the contract deposit under, or in accordance with ¶ 6.3 adjourn the closing for 30 business days. Respondent chose to disregard the default.

A party cannot elect to terminate a contract for a default it chose to disregard (Emigrants Indus. Sav. Bank v. Willow Builders, 290 N.Y. 133, 48 N.E.2d 293[1943]; Kirkland v Niagara Gorge R. Co., 109 A.D. 201, 95 N.Y. 657 [2nd. Dept. 1905]). Thus Respondent cannot claim entitlement to the contract deposit based on Petitioners’ default.

The sale of the apartment was contingent on “the unconditional consent of the corporation. (see ¶ 6.1). The Corporation denied its consent on June 30, 2011 and that same day Petitioners’ attorney notified Respondent’s attorney that board approval was not obtained, that the contract was being cancelled and that the contract deposit was being returned to Petitioners (see ¶ 6.3). This was done in accordance with the terms of the contract, entitling Petitioners to return of the security deposit (see Segundo v. Killerlane III, 2009 WL 1401187 [N.Y.Sup Ct. 2009]).


Accordingly, it is ORDERED, that the petition is granted, solely to the extent of directing the Escrowee to release the contract deposit to Petitioners 30 days after service of a copy of this order with notice of entry upon Respondent, and it is further

ORDERED, that the remainder of the petition is denied.
This constitutes the decision and order of this court.

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: November 2, 2011



Manuel J. Mendez
J.S.C.

Check one: XFINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

FILED

NOV 04 2011

NEW YORK
COUNTY CLERK'S OFFICE