[* 1]
SCANNED ON 7/29/2013

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: _____ **PART** _____
Justice

Index Number : 107910/2011
WELTMAN, JOHN J.
vs.
STRUCK, HARRY
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____ , were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

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

is decided in accordance with the annexed decision.

FILED
JUL 29 2013
COUNTY CLERK'S OFFICE
NEW YORK

RECEIVED
JUL 29 2013
IAS MOTION SUPPORT OFFICE
NYS SUPREME COURT-CIVIL

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

Dated: 7/26/13

_____, 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
COUNTY OF NEW YORK: Part 55

----------x

JOHN J. WELTMAN and JAMES C. ATKINS, JR.,

Plaintiffs,

Index No. 107910/2011

-against-

DECISION/ORDER

HARRY STRUCK and FRIEDBERG PINKAS PLLC,

Defendants.

----------x

HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits and Cross Motion.....	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiffs commenced the instant action to recover $155,000 advanced as a down payment on the purchase of a condominium apartment owned by defendant Harry Struck ("Struck"). Defendants now move pursuant to CPLR § 3212 for an order granting summary judgment on their counterclaim and dismissing plaintiff's complaint in its entirety. Plaintiffs' cross-move pursuant to CPLR § 3212 for an order granting them summary judgment and ordering defendants to return the down payment. Additionally, plaintiffs seek an order pursuant to CPLR § 3204 striking Edan Pinkas' affidavit as unfair and prejudicial and granting plaintiffs damages for defendants' bad faith. For the reasons set forth below, defendants' motion is denied and

plaintiffs' cross-motion is granted in part.

The undisputed facts and procedural history are as follows. This action concerns the rights to a down payment made pursuant to a real estate transaction between the parties. On May 16, 2011, the parties entered into a written contract of sale (the "Contract") in which defendant Harry Struck ("Struck"), as seller, agreed to sell to plaintiffs John J. Weltman ("Weltman") and James C. Atkins, Jr. ("Atkins"), as purchasers, the condominium unit located at 350 West 42nd Street, Unit 41G, New York, New York (the "Property") at a price of $1,550,000.00. Upon the execution of the Contract and pursuant to its terms, plaintiff tendered to defendants a down payment in the amount of $155,000.00 (the "down payment"). Specifically, the down payment was tendered to defendant Friedberg Pinkas PLLC ("Friedberg"), who was serving as Struck's counsel and escrow agent.

The closing on the Property was scheduled for July 11, 2011. However, the Contract contained a "Mortgage Commitment Contingency" clause, which conditioned plaintiffs' duty to purchase the Property on their ability to obtain a commitment from a lender to provide a mortgage. Specifically, paragraph 22(a) of the Contract provided:

> The obligation of Purchaser to purchase under this Contract is conditioned upon issuance, on or before 30 days after a fully executed copy of this Contract is given to Purchaser or Purchaser's attorney . . . (the "Commitment Date"), of a written commitment from an Institutional Lender pursuant to which such Institutional lender agrees to make a first mortgage loan . . . to Purchase, at purchaser's sole cost and expense, or $1,240,000.00 for a term of at least 30 years (or such lesser sum or shorter term as Purchaser shall be willing to accept) at the prevailing fixed or adjustable rate of interest and on other customary commitment terms (the "Commitment") . . . a commitment conditioned on the Institutional Lender's approval of an appraisal shall not be deemed a "Commitment" hereunder until an appraisal is approved (and if that does not occur before the Commitment Date, Purchaser may cancel under subparagraphs 22(e) unless the Commitment Date is extended). Purchaser's obligations hereunder are conditioned only on issuance of a Commitment. Once a Commitment is issued, Purchaser is bound under

this Contract even if the lender fails or refuses to fund the loan for any reason. Accordingly, plaintiffs had until June 14, 2011, to secure a "Commitment" or they were entitled to cancel the Contract.

Plaintiffs chose to work with mortgage broker Lisa Ryll of Manhattan Mortgage Co., Inc. to secure the necessary Commitment. Overall, plaintiffs submitted mortgage applications to three Institutional Lenders: (1) Pentagon Federal Credit Union ("PenFed"); (2) Luxury Mortgage Corporation ("Luxury"); and (3) NCB FSB ("NCB"). On or about June 13, 2011, plaintiffs, through their counsel, requested a two week extension of the Commitment Date and defendants agreed to extend the Commitment Date from June 14, 2011 to June 28, 2011.

On June 28, 2011, Ms. Ryll forwarded to plaintiffs copies of the documents that she had received from Luxury and NCB. By letter dated June 23, 2011, the NCB issued a "Commitment Letter" to plaintiffs. However, paragraph 24 of the letter specified the "conditions specific" to the loan transaction, which included a "full original appraisal" of the property. Additionally, there is an "Underwriter Approval" notice from Luxury dated June 27, 2011, which also laid out conditions to approval. These conditions included "satisfactory appraisal report with exterior and interior photos" and "satisfactory second appraisal report with exterior and interior photos." According to Weltman's affidavit, he was not presented with either of these letters until June 28, 2011.

By letter dated June 28, 2011, plaintiffs' attorney notified Struck's attorney that "pursuant to and in accordance with paragraph 22(e) of the Contract of sale our clients have elected to cancel the Contract in connection with the purchase of Unit 41G at The Orion Condominium, as they have not received a Commitment by the Commitment Date, which as extended, expires

today, June 28, 2011" and requested that the down payment be returned. It is undisputed that plaintiffs did not request, nor did Struck offer, to further extend the Commitment Date. Thereafter, Struck refused to return the down payment and this action was commenced.

On or about July 6, 2011, plaintiffs commenced the instant action asserting, among other things, a breach of contract claim against Struck for his failure to return the down payment. In his answer, Struck admitted that "[p]laintiffs failed to obtain a commitment from a lender to provide a mortgage as required by the Contract." However, Struck asserted a counterclaim seeking to retain the down payment on the ground that plaintiffs "failure to pursue any such commitment with diligence, to cooperate in good faith with prospective lenders, and to comply with the requirements of such lenders" was a default under the Contract entitling Struck to retain the down payment.

Plaintiffs originally moved for summary judgment on September 6, 2011. However, on November 3, 2011, the Honorable Marcy S. Friedman denied the motion without prejudice with leave to renew after completion of discovery on the ground that plaintiff's affidavit contained only conclusory allegations as to his due diligence in attempting to obtain a Commitment prior to the Commitment Date and no discovery had yet occurred in the action. Discovery is now complete and the parties have each respectively moved for summary judgment.

By way of their respective motions for summary judgment, both parties agree that there is no material issues of fact in dispute. Indeed, defendants no longer argue that plaintiffs failed to pursue a Commitment with due diligence and expressly state in their moving papers that plaintiffs "promptly and appropriately made multiple applications for financing." Instead, the issue in dispute on the instant motions is whether the NSB and Luxury letters, which were

conditioned on approval of an appraisal, were Commitments as defined by the Contract. Specifically, defendants contend, for the first time, that paragraph 22(a) "expressly and unequivocally provides that the appraisal contingency is waived when 'the Commitment Date is extended.'" Thus, they conclude, as the Commitment Date was extended in the present case, both the NCB and Luxury letters were Commitment Letters as defined by the Contract notwithstanding that they were conditioned on appraisals and, as such, plaintiffs were not entitled to cancel the Contract. Plaintiffs object to defendants' interpretation of the Contract terms on the ground that such interpretation has no basis in reason or law and, in any event, defendant Struck is barred from raising such an argument as he has already judicially admitted that plaintiffs did not obtain a Commitment prior to the Commitment Date.

It is well settled that the interpretation and construction of a written contract presents only questions of law, appropriately decided by the court on a motion for summary judgment as long as the contract is unambiguous and the intent of the parties can be determined from the face of the agreement. *Mallad Constr. Corp. v. County Fed. Sav. & Loan Assn.*, 32 N.Y.2d 285, 291 (1973); *see also Time Warner Entertainment Co. v. Brustowsky*, 221 A.D.2d 268 (1st Dept 1995) (holding that resolution by a fact finder only required where "interpretation of a contract term is susceptible to varying reasonable interpretations"). "An agreement is unambiguous when its words 'have a definite and precise meaning, unattended by danger of misconception in the purport of the [contract] itself, and concerning which there is no reasonable basis for a difference of opinion." *Vintage LLC v. Laws Construction Corp.*, 13 N.Y.3d 847, 849 (2009). When a contract is unambiguous, the court must enforce it as written. *Id.*

In the present case, as an initial matter, it is clear that paragraph 22(a) of the Contract is

unambiguous. Paragraph 22(a) explicitly provides in clear and precise terms that "a commitment conditioned on the Institutional Lender's approval of an appraisal shall not be deemed a "Commitment" hereunder until an appraisal is approved (and if that does not occur before the Commitment Date, Purchaser may cancel under subparagraphs 22(e) unless the Commitment Date is extended.)." By these terms, the Contract is clear that if a commitment is conditioned on approval of an appraisal and such approval does not occur prior to the Commitment Date, purchaser has the right to cancel the contract or seek an extension of the Commitment Date. Accordingly, the Contract, specifically paragraph 22(a), is unambiguous and must be enforced by this court as written.

Based on the foregoing, plaintiffs' are entitled to summary judgment directing defendants to return their down payment. Paragraph 22(e) of the Contract provided

> If no Commitment is issued by the Institutional Lender on or before the Commitment Date, then, unless Purchaser has accepted a written commitment from an Institutional Lender that does not conform to the terms set forth in subparagraph 22(a), Purchaser may cancel this Contract by giving Notice to Seller within 5 business days after the Commitment Date.

Additionally, pursuant to paragraph 22(f), "if the Contract [was] canceled by Purchaser pursuant to subparagraphs 22(d) or (e) . . . the Downpayment [was to] be promptly refunded to Purchaser." Here, it is undisputed that both the Luxury and NFB commitments were conditioned on approval of an appraisal and that an appraisal was not approved prior to the Commitment Date. Moreover, it is undisputed that plaintiffs did not request, nor did Struck offer to extend the Commitment Date. Thus, by the explicit terms of the Contract, plaintiffs did not obtain a Commitment by the Commitment Date and were entitled to cancel the contract pursuant to paragraph 22(e), which they did by letter dated July 28, 2011.

Defendants' contention that the Luxury and NSB commitments were Commitments under the Contract is without merit. While defendants assert that paragraph 22(a) waives the appraisal condition of the Commitment definition when an extension is granted, such interpretation of 22(a) is nonsensical. Moreover, defendants fail to present any authority or reasonable basis for interpreting paragraph 22(a) in such a way other than its conclusory self-serving assertion that "[t]he plain reading of ¶22(a) is that once the purchaser accepts an extension of time to obtain his mortgage, he may no longer rely upon the express exculpatory language relating to the appraisal condition." Interrupting paragraph 22(a) in this way would be contrary to its express terms and basic common sense. Accordingly, defendants' motion is denied and plaintiffs' cross-motion for summary judgment is granted.

However, the remainder of plaintiffs' motion seeking damages based on defendants' bad faith and an order striking the affidavit of Edan Pinkas is denied. As an initial matter, plaintiffs cite no authority for their right to collect damages in the form of costs of the litigation based on defendants' alleged bad faith. Additionally, plaintiffs' reliance on CPLR § 3024 to strike Pinkas's affidavit is misplaced as CPLR § 3024 only applies to "scandalous or prejudicial matter unnecessarily inserted in a *pleading*." (emphasis added).

Accordingly, defendants' motion is denied and plaintiffs' cross-motion is granted to the extent that it is hereby ORDERED that defendant Friedberg Pinkas, PLLC, as escrowee, is directed to turnover to plaintiffs the deposit in the amount of $155,000.00, including any applicable interest that has incurred, currently held in its escrow account. The Clerk is directed to enter judgment accordingly. This constitutes the decision and order of the court.

Dated: 7/26/13

Enter: _____
J.S.C.

FILED

JUL 29 2013

COUNTY CLERK'S OFFICE
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