

**Neeley v 242 W. 139th St. Group, LLC**

2014 NY Slip Op 31238(U)

May 8, 2014

Supreme Court, New York County

Docket Number: 158211/2012

Judge: Shlomo S. Hagler

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 17

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NATALIE NEELEY and ANTHONY GUARALDO,

Plaintiffs,

-against-

Index No. 158211/2012

242 W. 139TH ST. GROUP, LLC, and  
STEVEN M. ADLER, PLLC,

DECISION/ORDER

Defendants.  
-----X

HON. SHLOMO S. HAGLER, J.S.C.:

Plaintiffs Natalie Neeley and Anthony Guaraldo (“Purchasers” or “plaintiffs”) move for an order pursuant to CPLR § 3212 granting them summary judgment against defendant 242 W. 139th St. Group, LLC, (“Seller” or “defendant”). Defendant opposes the motion and cross-moves for an order pursuant to CPLR § 3212 granting it summary judgment dismissing the complaint and granting it judgment on its counterclaim. Plaintiffs oppose the cross-motion. Both the motion and cross-motion are consolidated herein for disposition.

**Background**

On July 24, 2012, plaintiffs and defendant entered into a contract in which plaintiffs sought to purchase from defendant a brownstone located at 242 West 139<sup>th</sup> Street, New York, New York (“Property”) for the amount of \$1,300,000.00 (“Contract”) (Exhibit “1” to the Motion). Pursuant to the Contract, Purchasers made a down payment in the amount of \$130,000.00 (“Down Payment”).

Article 19 of the Contract contained a mortgage contingency clause which provided that:

This contract is made on the condition that, on or before the date, which is 45 days from the date of this contract, a lending institution shall issue to Purchasers a written commitment to make a conventional first mortgage loan on the Premises in the principal amount of \$910,000.00 and bearing interest at the prevailing rate for such loans. . .

If such a commitment is not issued within 45 days after the date of this contract, this contract shall continue in full force and effect (but no longer subject to the contingency provided herein) unless Purchasers deliver to Seller, within three business days after the expiration of said period, a written notice that they were unable to procure such commitment and therefore elect to cancel this contract. Seller may extend said contingency period by written notice to Purchasers. If this contract is cancelled as provided above, Seller shall direct Escrow Agent to refund the down payment to Purchasers, without interest, whereupon this contract shall terminate and neither party shall have any further claim against the other.

Purchasers applied for a mortgage from JP Morgan Chase Bank ("Chase") and received a commitment dated August 1, 2012, for \$910,000.00 conditioned upon an independent appraisal of the Property (Exhibit "A" to the Cross-Motion). The appraisal (Exhibit "2" to the Reply) was completed on August 23, 2012 and valued the property at \$200,000.00 less than the Contract price. Plaintiffs' attorney promptly notified Seller's attorney about the low appraisal by email on August 27, 2012 (Exhibit "2" to the Motion). Thereafter, by letter dated September 6, 2012 (Exhibit "3" to the Motion), Purchasers formally notified Sellers that they were unable to procure a mortgage in the required amount and requested that the Down Payment be returned.

After the Contact was terminated, Purchasers' attorney told Seller's attorney that his clients were still interested in purchasing the Property and not to return the Down Payment (Affirmation of Brian R. Feinstein dated February 15, 2013 in Opposition to Motion and in Support of Cross-Motion, at ¶¶ 26-27). Discussions and email exchanges, mainly relating to title issues, continued for many weeks. On or about November 1, 2012, Purchasers' attorney sent an email to Seller's attorney stating that his clients have decided to invoke its request, made on September 6, 2012, for the return of the Down Payment (Exhibit "H" to the Cross-Motion). Defendant has refused to return the Down

Payment and claims that the Purchasers have waived the mortgage contingency clause by instructing the Seller not to return the Down Payment, and continuing to represent that they were interested in purchasing the Property.

### **Summary Judgment**

The movant under CPLR § 3212 has the initial burden of proving entitlement to summary judgment. (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985].) Once such proof has been offered, in order to defend the summary judgment motion, the opposing party must “show facts sufficient to require a trial of any issue of fact.” (CPLR § 3212[b]; Zuckerman v City of New York, 49 NY2d 557 [1980]; Friends of Animals v Associated Fur Mfrs., 46 NY2d 1065 [1979]; Freedman v Chemical Construction Corp., 43 NY2d 260 [1977]; Spearmon v Times Square Stores Corp., 96 AD2d 552 [2d Dept 1983].) “It is incumbent upon a [litigant] who opposes a motion for summary judgment to assemble, lay bare and reveal [his, her, or its] proof, in order to show that the matters set up in [the] answer are real and are capable of being established upon a trial.” Spearmon, 96 AD2d at 553 (quoting Di Sabato v Soffes, 9 AD2d 297, 301 [1st Dept 1959].) If the opposing party fails to submit evidentiary facts to controvert the facts set forth in the movant’s papers, the movant’s facts may be deemed admitted and summary judgment granted since no triable issue of fact exists. (Kuehne & Nagel, Inc. v F.W. Baiden, 36 NY2d 539 [1975].)

### **Arguments**

Plaintiffs argue that they are entitled to summary judgment because they complied with the terms of the Contract by promptly and diligently applying for a mortgage and were denied through no fault of their own. Purchasers argue that they properly invoked their right to cancel the Contract pursuant to the mortgage contingency clause and terminated the Contract.

Defendant argues that the instruction by Purchasers not to return the Down Payment and the continued negotiations between the parties constituted an oral revocation of the termination that reinstated the Contract. As a result, Seller contends that Purchasers breached the reinstated Contract by failing to close which entitled Seller to keep the Down Payment as liquidated damages pursuant to Article 23 of the Contract.

In order for Purchasers to prevail on this motion, they have the burden of establishing *prima facie* entitlement to summary judgment by showing that they fully complied with Article 19 of the Contract. To comply with Article 19, plaintiffs have to show that they did not obtain a commitment for a loan in the amount of \$910,000.00. Plaintiffs first submitted proof that they did not obtain a commitment in their reply (Exhibit "3" to the Reply). "Arguments advanced for the first time in reply papers are entitled to no consideration by a court entertaining a summary judgment motion." Lumbermens Mut. Cas. Co. v Morse Shoe Co., 218 AD2d 624 (1st Dept 1995).

Even if the Court would accept the evidence submitted for the first time attached to the reply, plaintiffs have still failed to establish *prima facie* entitlement to summary judgment. Article 19 states, in part, that "[p]urchasers promptly and diligently shall apply for a mortgage loan, and shall furnish all information and documents requested by the lending institution." Plaintiffs did not submit any evidence in admissible form that they have complied with this requirement. Therefore, plaintiffs' motion for summary judgment is denied, without prejudice, with leave to renew upon submission of evidence that they fully complied with Article 19 of the Contract.

Defendant argues that the Purchasers somehow reinstated the contract by continuing negotiations after the contract was terminated. Defendant also claims that there was some sort of oral or written modification that waived the mortgage contingency clause. However, there is nothing

in the record to suggest that there was any type of agreement, oral or written, to modify the Contract in any way. Further negotiations between the parties after the termination of the contract did not create a new contract. Antolotti v Verderame, 175 AD2d 822, (2d Dept 1991). Therefore, defendant's cross-motion for summary judgment is denied.

**Conclusion**


Accordingly, it is

ORDERED that the plaintiffs' motion for summary judgment is denied without prejudice with leave to renew upon submission of admissible evidence that they complied with Article 19 of the Contract; and it is further

ORDERED that the defendant's cross-motion for summary judgment is denied.

The foregoing constitutes the decision and order of the Court.

Dated: May 8, 2014  
New York, New York

  
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Hon. Shlomo S. Hagler, J. S. C.