SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15
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REGINA CHEN,

Plaintiff,

Index No.:
159569/2014

-against-

JOHN MAJEWSKI, MEGUMI TAMANAHA and
BRICKNER MAKOW LLP, as escrowee,

Defendants.
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MELISSA A. CRANE, J.:

This action arises out of a failed real estate transaction between plaintiff Regina Chen and defendants John Majewski (Majewski) and Megumi Tamanaha (Tamanaha) (together, the Sellers), for the sale of a one-bedroom residential cooperative apartment located at 430 West 34th Street, New York, New York (the "Apartment"). Plaintiff moves, pursuant to CPLR 3212, for an order granting summary judgment on the complaint seeking the return of her security deposit, that remains in an escrow account, and attorneys' fees.[1] For the following reasons, the court denies the motion.

BACKGROUND AND FACTUAL ALLEGATIONS

On October 30, 2013, plaintiff and the Sellers executed a contract of sale (Contract) for the Apartment for the price of $560,000. Plaintiff paid a security deposit of $56,000 into escrow. The Contract provides that the sale is subject to the unconditional consent of the cooperative

[1] As Brickner Makow LLP has been substituted by Stewart Occhipinti, LLP as escrowee, plaintiff has since discontinued her claims against Brickner Makow LLP.

corporation (Corporation). However, should the Corporation refuse consent due to the purchaser's bad faith, the purchaser shall be in default:

> "6.1 This sale is subject to the unconditional consent of the Corporation.
>
> "6.2 Purchaser shall in good faith:
> 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, containing such data and together with such documents as the Corporation requires . . . .
> 6.2.2 attend . . . one or more personal interviews . . . .
>
> "6.3 Either party, after learning of the Corporation's decision, shall promptly advise the other Party thereof . . . . If such consent is refused at any time, either Party may cancel this Contract by Notice. In the event of cancellation pursuant to this ¶ 6.3, the Escrowee shall refund the Contract Deposit to Purchase.
>
> "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."

See Contract, Sellers' exhibit H.

With respect to default remedies, section 13.1 of the Contract indicates that, "[i]n the event of a default or misrepresentation by Purchaser, Seller's sole and exclusive remedies shall be to cancel this Contract, [and] retain the Contract Deposit as liquidated damages . . . ."

Regarding maintenance charges, the Seller was to notify the Purchaser promptly about any changes in maintenance; however, this was a courtesy only. The Contract provides that failure to notify is not a breach of the Contract by the Seller. (*See* Contract, additional rider, ¶ 14).

Pursuant to the terms of the Contract, plaintiff met with the Corporation's board of directors. After the Corporation did not approve plaintiff's purchase of the Apartment, plaintiff gave notice to the Sellers and demanded the return of her security deposit. When the Sellers

would not return plaintiff's security deposit, plaintiff commenced this action.

Plaintiff's first cause of action alleges that the Sellers breached the Contract when, after the Corporation did not consent to the sale, the Sellers did not return the $56,000 deposit. Plaintiff's second cause of action is for attorneys' fees incurred as a result of this litigation. Pursuant to the terms of the Contract, "[i]n connection with any litigation arising out of this Contract, the prevailing party shall be entitled to recover all costs thereof, including, without limitation, reasonable attorneys' fees and disbursements for services rendered in connection with such litigation." (*See* Contract, ¶ 45).

The Sellers answered and set forth three counterclaims. The first counterclaim alleges that plaintiff breached the contract by "intentionally and in bad faith submitt[ing] false and/or misleading financial statements to Seller and the Corporation in violation of the terms and conditions of the Contract." Answer, ¶ 43. In addition, the Sellers contend that plaintiff intentionally and in bad faith sabotaged her interview with the Corporation, in violation of the Contract. The Sellers maintain that, as a result of plaintiff's breach of the Contract, they are entitled to retain the contract deposit, as they incurred additional costs associated with re-listing the apartment and paying for a rental.

The second counterclaim, for fraudulent misrepresentation, alleges that plaintiff misrepresented to the Sellers that she had no outstanding loans or debts, and that she had cash reserves equal to 100 maintenance and mortgage payments. They state that they relied on those financial statements when they entered into the Contract.

In the third counterclaim, pursuant to the terms of the Contract, the Sellers are seeking the costs and attorneys' fees they incurred as a result of litigation arising out plaintiff's alleged

breach of the Contract.

Plaintiff now moves for summary judgment on the complaint, alleging that, as there is no question of fact that she was in compliance with the Contract, the Court should grant her motion for return of her security deposit and attorneys' fees.

The record sets forth the following additional facts pursuant to the answer, plaintiff's motion for summary judgment and the opposition to summary judgment:

In September 2013, the Sellers listed the apartment for sale for the price of $575,000. Plaintiff submitted an initial offer of $535,000, with a down payment of $250,000. Plaintiff's offer letter stated that she had no loans/debt outstanding, a stable job, over $600,000 in total assets in bank and investment accounts and "post-closing liquidity: $276,000 (100+ months of mortgage and maintenance)." Sellers' exhibit A at 1. Plaintiff further indicated that she had a mortgage pre-approval letter from the bank for $470,000.00.

On October 6, 2013, plaintiff accepted the Sellers' counter offer of $565,000. After the Sellers sent a proposed contract of sale to plaintiff's attorney and took the apartment off the market, plaintiff emailed the Sellers to request a reduction in the sale price. Plaintiff claimed that, after researching the financials and reviewing the board meeting notes, she had "some concerns around the financials of the building, and that a maintenance increase as well as an assessment will take place in the near future." Sellers' exhibit F at 1. Plaintiff indicated that she was "revising" her offer price to $555,000, which would be "more in line with my original expectation . . . ." (*Id.* at 2).

Majewski responded that he had spoken to real estate agents who sold apartments in the building, and that plaintiff's "typical due diligence findings [ ] do not merit a price reduction, and

there is nothing out of the ordinary for the building." (*Id.* at 1). Majewski noted that the average maintenance for 24-hour doorman buildings is $1,680, and "the lowest is $1,176 which is higher than our current maintenance." (*Id.* at 2). Majewski continued that he did not "understand the logic for your reduced offer price. Assessments that we have experienced during 10 years in the building have been less than $1000 every 2 years . . . [and] these were mostly offset by the STAR rebate." *Id.*

Nevertheless, Majewski agreed, "[a]gainst my better judgment, in order to close the deal we are willing to meet you half way and reduce the price to $560,000." (*Id.* at 3).

Evidently, after the Sellers reduced the initial accepted price, plaintiff emailed Jennifer Liu (Liu), "[s]o they went down to $560,000. Just as I expected. So we take it?" (Sellers' exhibit G at 3).

Liu, plaintiff's friend, would be living in plaintiff's apartment with her after the closing. Liu and plaintiff have known each other since high school and had previously started a business together. Plaintiff testified that she introduced Liu to the Sellers as her sister, not as a friend, and that she did not inform them that Liu is listed as a dependent on her tax forms.

In any event, despite plaintiff's professed concerns, on October 30, 2013, she and the Sellers executed the Contract for $560,000 and plaintiff provided the security deposit. Plaintiff then secured her mortgage loan commitment.

The record indicates that, on November 20, 2013, Majewski emailed plaintiff to check the status of her loan application and board approval package. He states, "[w]e are in the process of applying for our future home and would like to present that our home sale is close to closing." (Plaintiff's exhibit F at 1).

After a couple of email exchanges, in December 2013, plaintiff emailed the Sellers again, asking for a reduction in the purchase price of the apartment. She stated, "[i]f we can come to an agreement in the next day or so, I will have the board package submitted before week's end." *Id.* at 2. Plaintiff claimed that she was concerned, because the apartment was appraised at 40 percent less than the selling price.

The Sellers did not agree to a reduction, stating that their attorney and real-estate broker friends advised them that lower appraisal values are "common in this competitive market, but not an accurate expression of value. The market determines value." *Id.* Majewski reminded plaintiff that the apartment had undergone extensive renovations and that they "already made significant reductions, even reducing the price after we had reached an agreement. . . . When we accepted your offer and signed the contract, there were multiple interested parties. It is not fair to expect further reductions after the competition has been removed." *Id.* at 3.

Plaintiff then emailed Liu, "They are unwilling to budge even one bit. What should I do?" *Id.*

After further communication from plaintiff regarding the appraisal value, the Sellers reminded plaintiff that it was she who was "adamant that the deal needed to be done quickly." *Id.* at 6. They continued, "[i]t is worrisome to us that after agreeing to the terms and signing the contract, you have done nothing but hedge and seek a lower price, causing delays." *Id.*

Plaintiff submitted the required documentation to the Corporation on December 17, 2013. When Majewski reviewed the documentation, he found that plaintiff had listed a personal loan of $177,000, which had not been listed on any prior financial documents. Majewski immediately emailed plaintiff about this discrepancy, stating, "[p]art of our decision to offer you the

apartment was because of your high cash reserves. It is very concerning if this is a loan that you did not disclose to us, and are hopeful that there is some misunderstanding." (Sellers' exhibit N at 2).

In response, plaintiff advised that, although she did list her financial information correctly, her aunt "mentioned the possibility of needing some of the money she gifted to me back, but this is not certain . . . . Even with the deduction, there is still more than $100K of post-closing liquidity in my bank account . . . so I'm not sure that there would be an issue with the board." *Id.* at 1.

Plaintiff ultimately removed the loan from her application. Plaintiff's counsel emailed the Sellers' lawyer regarding the discrepancy and stated, "I am working with [plaintiff]. She wants the unit so don't please [sic] do not think she wants out of the deal." (Sellers' exhibit Q at 1.)

The record indicates that there is a letter from plaintiff's aunt, who signed a gift certification on November 7, 2013, prior to the board application. The gift certification advised that, on September 30, 2013, plaintiff's aunt "made a wire transfer to my niece, Regina Chen, in the amount of $102,000.00 for her home purchase. This was noted on the TT form as a loan. Since then, I have decided to give the funds to her as a gift without repayment." (Sellers' exhibit O at 1).

Plaintiff met with the Corporation on January 6, 2014. Although not mentioned in the complaint, the record indicates that, right after plaintiff's interview, the board of directors approved the sale of the apartment, pending a credit report and registry check report on Liu. The Corporation reviewed financial and other documentation plaintiff submitted. The

Corporation was aware that Liu would be living in the apartment with plaintiff and that plaintiff classified her as plaintiff's dependent.

Subsequently, on the morning of January 7, 2014, the board of directors informed the parties that it approved the sale of the apartment from the Sellers to plaintiff.

Also in the morning of January 7, 2014, plaintiff emailed her attorney and advised him to speak to the Sellers' attorney about reducing the price of the apartment. Plaintiff stated that she met with the Corporation and that, among other things, she was completely surprised to learn about an increase in maintenance of approximately $100 a month, and was surprised to learn that she would probably not be allowed to have a washer/dryer in the unit.

Plaintiff advised her attorney that, based on this "drastic increase," the price of the apartment should be adjusted to $523,500. (Sellers' exhibit S at 1). She concluded, "[t]he 8% increase in maintenance immediately devalues the unit from the contract price of $560,000 to $523,500. This was totally not within my expectation when I signed the contract . . . [and] unless the sellers adjust the selling price . . . I would honestly have to let the board know that I could not afford the purchase." (*Id.* at 1-2). She concluded, "[p]lease discuss with the seller's attorney as soon as you can as I need to send communication to the management company." (*Id.* at 2).

A few hours later, plaintiff emailed the managing agent and requested that the agent email the Corporation the following information:

> "The truth is, I am not at all comfortable with making the monthly payments as it is over a 30% debt-to-income ratio. . . . Having to support 2 people on a single income, the original price was already a stretch for me, but with an 8% increase in maintenance . . . . the apartment will become a burden for me. I know that the board has already sent you their decision, but could you please forward my concerns to them as it was their request that I would let them know."

Plaintiff's exhibit I at 1.

After receiving plaintiff's email, the board members discussed the situation. In one email, a board member advised, "[w]ell, if we have a prospective shareholder that is uncertain of her financial resources, then it is in the building's best interest to reject this candidate. Based on [plaintiff's] email, I propose that we reject the shareholder." Plaintiff's exhibit L at 4.

In the interim, Tamanaha emailed plaintiff, congratulating her on the Corporation's approval of the sale. Tamanaha stated that she was aware of plaintiff's claim that she could not afford the apartment due to the maintenance increase. She reminded plaintiff of the previous reduction in the price of the apartment to account for any future maintenance increase. Nevertheless she concluded,

> "in any case, in order to avoid potential litigation and the precious time we have all invested in this process, we would like to offer you an additional $2,500 decrease in price. That will cover an additional 27 months of the maintenance increase! Please consider this before claiming to the Board that you cannot afford the unit. Your financials prove that you can, indeed, afford the unit, as evident in both the Board and Bank approvals."

Plaintiff's exhibit H.

A few hours later, on January 7, 2014, the building's managing agent issued another letter to the Sellers advising them that the Corporation had denied the sale from the Sellers to plaintiff.

Plaintiff argues that her conduct in no way rises to the level of bad faith and that she did not make any misrepresentations regarding her income. She states that, "[a]t that meeting, I was informed for the first time that there was an 8% increase in maintenance and there would likely be increases for each of the next 2 to 3 years." (Plaintiff's aff, ¶ 20). She states that the

Corporation asked her if the increases would impact her ability to pay for the apartment. Plaintiff alleges that she advised them that she would need to review her budget and then she could give them an answer.

Plaintiff notes that, at the outset of negotiations, she had concerns about the price of the apartment and whether she could afford it with future maintenance increases. She claims that the Sellers are "attempting to misconstrue my honesty in sending the January 7, 2014 email as bad faith." *Id.*, ¶ 32. Plaintiff further argues that there was no fraudulent misrepresentation on her part regarding her income or other information.

According to plaintiff, the board members uniformly agreed that plaintiff should be rejected. She points to an email sent prior to her interview, where a board member had questions about plaintiff's finances.

The Sellers maintain that plaintiff is not entitled to the return of the deposit because she acted in bad faith throughout the negotiation and purchase process for the apartment, and intentionally sabotaged her interview with the Corporation. As noted above, plaintiff made numerous demands for the Sellers to lower the purchase price, even after she already signed the Contract and after the Corporation had initially approved the sale.

According to Sellers, plaintiff further acted in bad faith when she submitted her application to the Corporation, because this information contradicted plaintiff's actual financial documentation and plaintiff's previous continuous representations that she wanted the apartment. When plaintiff applied for the apartment, she stated that she had no loans or debt and that she had enough cash reserves for 100 mortgage and maintenance payments. She applied for and received a mortgage, and also the Corporation's approval, based on her financial documentation.

The Corporation only rescinded their approval based on plaintiff's email, whereby she advised that the apartment would be a burden for her. Plaintiff had already received the approval and then, after asking for another price reduction from the Sellers, emailed the Corporation.

The Sellers argue that plaintiff further attempted to undermine the approval process by intentionally delaying in submitting her financial information to the Corporation and by listing false information on the application. For example, plaintiff listed a $177,000 loan on her application that she had never mentioned previously.

In addition, the Sellers contend that plaintiff's assertions that she was surprised or could not afford a maintenance increase, are mere pretext. They note that they addressed plaintiff's concerns regarding a proposed maintenance increase and reduced the price of the apartment based on those concerns. Further, the Sellers allege that they never made any representations in the Contract about a washer/dryer, and that this further demonstrates plaintiff's bad faith.

The Sellers also argue that plaintiff acknowledged that the contract included all representations regarding the apartment, including maintenance fees. The Sellers maintain that plaintiff cannot use her concern for maintenance fees as a legitimate basis to undermine the approval process.

DISCUSSION

I. Summary Judgment

Plaintiff claims she is entitled to summary judgment because, pursuant to the Contract, consent from the Corporation was a requirement for the sale. As plaintiff did not receive consent, and there was no showing of deceit on plaintiff's part, plaintiff is entitled to

return of the deposit."The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007). The movant's burden is "heavy," and "on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 (2013) (internal quotation marks and citation omitted). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact." *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008) (internal quotation marks and citation omitted). The failure by the movant "to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers." *William J. Jenack Estate Appraisers & Auctioneers, Inc.*, 22 NY3d at 475.

While the Contract provides that plaintiff may cancel the Contract if she does not receive the Corporation's approval, it also indicates that, if the Corporation's refusal is due to the purchaser's bad faith, the purchaser shall be in default. Here, plaintiff has failed to make a prima facie showing that there are no material issues of fact in dispute as to whether she satisfied the terms of the Contract, or as to whether her actions frustrated the Corporation's approval process. Even if plaintiff had met her burden, the Sellers raise issues of fact as to whether the Corporation's refusal to approve the sale was due to plaintiff's bad faith conduct.

Courts routinely deny summary judgment motions by purchasers seeking the return of their contract deposit, when issues of fact remain as to whether the Corporation's denial was due

to the purchaser's bad faith conduct. (*see, e.g., Cetindogan v Schuyler*, 95 AD3d 577, 578 [1st Dept 2012] [motion for summary judgment seeking the return of the contract deposit denied because whether plaintiff sabotaged board interview was issue of fact]; *Mounessa v Promenade Holding Corp.*, 74 AD3d 1296, 1297 [2d Dept 2010] ["issues of fact existed whether the plaintiff acted in bad faith by failing to disclose the mortgage loan obligation in his application and, if so, whether the Board denied the plaintiff's application due to the plaintiff's bad faith"]).

Here, triable issues of fact remain as to whether the Corporation's refusal to approve the sale was attributable to plaintiff's bad faith. In pertinent part, after plaintiff's initial interview and its review of the financial documentation plaintiff had submitted, the Corporation approved the sale of the apartment. However, the Board rescinded this approval based on a post-interview email from plaintiff. In that e-mail, plaintiff advised the Corporation that a planned increased of approximately $90-100 in maintenance each month would be burdensome for her, in light of having to support two people with one income.

Although plaintiff claimed surprise at the maintenance increase, the record contains multiple indications that plaintiff was aware of or should have known about the potential for maintenance increases. Specifically, after her initial due diligence, plaintiff informed the Sellers that she was revising her initial offer price, because, among other things, "issues point to an increase in maintenance and assessments at regular intervals, which was totally unexpected." (Sellers' exhibit F at 2). In response to these concerns, the Sellers offered to reduce the agreed-to price. Plaintiff then executed the Contract for the apartment.

Plaintiff claims that she did not act in bad faith when she contacted the Corporation about her concern that she could not afford the apartment. However, this conflicts with her continuous

representations to Sellers regarding her ability to pay multiple years' worth of mortgage and maintenance payments based on her salary, assets and job. Even after the discrepancy on her application regarding the $177,000 loan, plaintiff assured Sellers that she still had more than $100K of post-closing liquidity, and that her cash reserves had gone up $26,000 since she submitted her offer. The Sellers even agreed to take $2,500 more off the sale price, to cover an additional 27 months of the maintenance increase.

Moreover, at no point, prior to her email to the Corporation, did plaintiff ever suggest that it would be hard for her to support two people on her single income. The Court further notes that, after receiving the board's approval, plaintiff informed the Sellers that, unless they negotiated and reduced the price to $523,500, she would have to inform the Corporation that she could not afford the apartment.

Plaintiff claims that all board members agreed that she could not afford the apartment, and points to concerns that one board member shared with the other members prior to the interview. However, there was no uniform conclusion by the Corporation, prior to plaintiff's post-approval email, that plaintiff could not afford the apartment.

Further, courts have dismissed purchasers' claims, seeking the return of deposit money, when they have acted in bad faith during the cooperative application process. For example, in *Moustakas v Noble* (259 AD2d 602, 603 [2d Dept 1999]), the Court found that plaintiff acted in bad faith by, among other things, submitting contradictory financial documentation to the Corporation and withdrawing the application three months prior to closing.

Here, credibility issues remain as to whether plaintiff, in good faith, submitted the documentation to the Corporation as required for the sale process. The record indicates that

plaintiff received a gift of $102,000 prior to the application process. Nevertheless, during her deposition, plaintiff testified that, although $102,000 was a gift, she wrote down on her application that she owed a loan for $177,000, because her aunt might ask her to return the $102,000 gift, as well as to return some additional sums. "A motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility." *Ruiz v Griffin*, 71 AD3d 1112, 1115 (2d Dept 2010) (internal quotation marks and citation omitted).

In addition, "a party may not frustrate the performance of an agreement by bringing about the failure of a condition precedent." *Rachmani Corp. v 9 E. 96th St. Apt. Corp.*, 211 AD2d 262, 269 (1st Dept 1995) (internal quotation marks and citations omitted). Here, the Contract was clear that the sale was subject to the approval of the Corporation, and the Corporation did initially approve plaintiff's application. However, it is not surprising that, after creating the impression that she could be a liability, the Corporation rescinded its approval. Accordingly, issues of fact remain as to whether plaintiff's actions caused the Corporation to rescind its approval and whether plaintiff made material misrepresentations to induce defendants into the contract and to take their property off the market.

The Sellers note that plaintiff's counsel does not submit a memorandum of law, but only an affirmation containing legal arguments, including contract interpretation. "Affirmations, like affidavits, are reserved for a statement of the relevant facts; a statement of the relevant law and arguments belongs in a brief (i.e., a memorandum of law)." *Tripp & Co., Inc. v Bank of N.Y. (Del), Inc.*, 28 Misc 3d 1211(A), 2010 NY Slip Op 51274[U], *6 (Sup Ct, NY County 2010), citing NYCRR § 202.8 (c). While the affirmations will not be stricken, counsel should

not repeat this error.

CONCLUSION, ORDER AND JUDGMENT

ORDERED that plaintiff Regina Chen's motion for summary judgment is denied in its entirety; and it is further

ORDERED that all remaining claims shall continue; and it is further

ORDERED that a pre-trial conference will be held on January 4, 2018 in Room 304, 71 Thomas Street at 11:00 A.M.

Dated: 10/19/2017

ENTER:

J.S.C.

HON. MELISSA CRANE