SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

VETRO ASSET CORP.,

Plaintiff,

-against-

VETERANS REALTY CORP.,

Defendant.

DECISION/ORDER

DCM PART 21

HON. ORLANDO MARRAZZO, JR.

Index No.: 151674/2018

Motion No. 1 & 2

The following numbered 1 through 6 were marked submitted on March 26, 2019

	Papers
Notice of Defendant's Motion, dated January 21, 2019	1
Affirmation in Support of Defendant's Motion, with Exhibits, dated January 21, 2019	2
Affidavit of Munzer Elayyan in Support of Defendant's Motion, dated January 21, 2019	3
Notice of Plaintiff's Cross-Motion to Consolidate, dated February 25, 2019	4
Affirmation in Support of Plaintiff's Cross-Motion to Consolidate and in Opposition to Motion for Summary Judgment, with Exhibits, dated February 25, 2019	5
Affirmation in Opposition and Reply, dated March 5, 2019	6

Defendant's Motion to Dismiss the above-titled Action is hereby granted and Plaintiff's Cross-Motion to Consolidate is denied.

On June 28, 2012, Defendant purchased real property from Plaintiff known as 3044 Veterans Road West, Staten Island (the "Property"), for a purchase price of $3,000,000.00 (which was adjusted with credits at the closing for the price of $3,000,892.00). Defendant gave a contract deposit of $333,000.00 to Plaintiff at or before the closing and paid certain expenses on

behalf of Plaintiff, which Defendant states it received total credits at the closing of $630,236.90. Defendant's officer Munzer Elayyan states in his affidavit in support of this Motion that the balance of the funds was delivered to Plaintiff at the closing, in addition to a promissory note for $1,884,985.10 totaling the adjusted purchase price at the closing. In exchange for this, Plaintiff-seller signed and delivered a deed at the closing. Defendant asserts that it first learned that Plaintiff was claiming it did not receive all the funds at the closing in 2018. After being served with a subpoena, Defendant appeared and testified at depositions in related actions. Defendant now seeks dismissal of Plaintiff's claims, as it argues that the case is barred by (1) the Merger Doctrine, (2) Plaintiff's admission and (3) laches.

There are two separate actions that Plaintiff seeks to consolidate with the above-titled Action. In the first action, Plaintiff is suing the title Company Express Abstract Services, Inc. ("Express") in connection with the sale of the Property ("Action 1"). In the second action ("Action 2"), Plaintiff is suing Menicucci Villa Cilmi PLLC f/k/a Menicucci, Villa & Associations, PLLC ("MVC"), the attorneys for Defendant Veteran. According to Plaintiff, at the Closing of the Property, Express was to hold $76,584.00 of Plaintiff's money in escrow for NYC Transfer Taxes for 1996 Transfer, including penalties and interest. Out of this $76,584.00, Plaintiff claims that only $20,209.22 was paid to New York City for the 1996 Transfer, leaving $56,374.00 owed to Plaintiff. The Plaintiff also claims that it is due $26,400.00 from Express's escrow account. Plaintiff contends it is owed $83,118.00 arising out of a settlement agreement with Cilmi and Associates. In a June 25, 2018 non-party deposition of the Defendant in Action 1, Defendant represented that they paid all funds indicated on Plaintiff's closing papers from the sale. MVC has represented in Actions 1 and 2 that it was not and never was in possession of the money indicated on Plaintiff's closing papers. Plaintiff now cross-moves to consolidate the

current Action with Action 1 and Action 2, claiming that all such actions concern the same escrow money and involve same issues of fact and law.

The Court finds that Plaintiff's claims are barred by the Merger Doctrine. As the Second Department explained in *Dourountoudakis v. Alesi,* "it is well settled that 'the obligations and provisions of a contract for the sale of land are merged in the deed and, as a result, are extinguished upon the closing of title' unless 'there is a clear intent evidenced by the parties that a particular provision shall survive delivery of the deed, or where there exists a collateral undertaking.'" *Dourountoudakis v. Alesi*, 271 A.D.2d 640, 641, 706 N.Y.S.2d 476, 476 (N.Y. App. Div. 2d Dep't April 24, 2000) (quoting (*Davis v Weg,* 104 A.D.2d 617, 619, 479 N.Y.S.2d 553, 555 (App. Div. 2d Dept., 1984)). *See Josovich v. Ceylan*, 133 A.D.3d 570, 572-573, 19 N.Y.S.3d 554, 557 (App. Div. 2d Dept., 2015); *Bibbo v. 31-30, LLC*, 105 A.D.3d 791, 792, 963 N.Y.S.2d 303, 305 (App. Div. 2d Dept., 2013).

In *Novelty Crystal Corp. v. PSA Institutional Partners, L.P.,* the Second Department gave a detailed explanation regarding what constitutes a "collateral undertaking" in this context and provided several examples of such, none of which correlate to the current Action. "Collateral undertaking" is a "contractual commitment 'that is not connected with the title, possession or quantity of land'" ((*Alexy v Salvador,* 217 AD2d 877, 878, 630 NYS2d 133 [1995]; *see Carr v Roach,* 9 Duer 20, 25 [1853]), usually involving ". . . either an obligation that is extraneous to the sale of the realty, such as the obligation to build on the property. . . or which establish a continuing duty that will outlive the consummation of the sale, such as a seller's agreement to construct improvements on the property for the purchaser after the closing title, correct construction defects thereafter, or pay for the future maintenance of a common bulkhead . . ." *Novelty Crystal Corp. v. PSA Institutional Partners, L.P.*, 49 A.D.3d 113, 116, 850 N.Y.S.2d

497, 500 (App. Div. 2d Dept., 2008) (citing several cases). The Court made clear that "by contrast, a "contract provision cannot be a collateral undertaking if it is 'an integral part of the principal purpose of the contract, namely a conveyance of title to real property'". . .Thus, the payment of the purchase price is not collateral. . . nor is the obligation to convey the entire property . . . or some aspect of it. . ." *Novelty Crystal Corp. v. PSA Institutional Partners, L.P.*, 49 A.D.3d 113, 116-117, 850 N.Y.S.2d 497, 500-501 (App. Div. 2d Dept., 2008).

Under the abundant case law on this issue, the Court finds that Plaintiff's claims in their entirety are barred by the Merger Doctrine. The obligations and provisions of the Purchase Agreement were merged in the deed and extinguished by the closing. The Court finds that Plaintiff has not shown that there was a clear intent by the parties that a particular provision relating to Plaintiff's claims was to survive the deed. Additionally, none of Plaintiff's claims are collateral undertakings which would allow this Action to survive Defendant's Motion. Plaintiff has not shown any contractual obligations that are not connected with the title, possession or quantity of land. Since Plaintiff's claims are regarding an integral part of the principal purpose of the contract, namely the conveyance of title to real property, such claims cannot be considered collateral undertakings.

The Court further finds that the fraud exception to the Merger Doctrine does not apply here. It is widely established that "'a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated.'" *Junger v John V. Dinan Assoc., Inc.*, 164 A.D.3d 1428, 1431, 84 N.Y.S.3d 574, 578 (App. Div. 2d Dept., 2018) (quoting *Clark-Fitzpatrick, Inc. v. Long Island R. Co.*, 70 N.Y.2d 382, 390, 51 N.E.2d 190, 521 N.Y.2d 653 (1987)). While Plaintiff has alleged fraud in this Action, the Court finds that such claim cannot stand, as Plaintiff has failed to allege that a legal duty independent of the contract

itself has been violated. As this claim for fraud is hereby dismissed, Plaintiff cannot rely on the fraud exception to the Merger Doctrine and therefore Plaintiff's Action against Defendant is hereby dismissed.

Due to the dismissal of the current Action, Plaintiff's Cross-Motion to consolidate this Action with Action 1 and Action 2 is hereby denied.

This constitutes the final decision and order of this Court.

Dated: May 9, 2019
Staten Island, New York

Orlando Marrazzo, Jr.,
Justice, Supreme Court