SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------x

In the Matter of the Application of

JONATHAN P. SIEGEL and KAREN SIEGEL ENGEL, as co-executors of the ESTATE OF RUTH L. SIEGEL a/k/a RUTH LEE SIEGEL, deceased, to have the validity and enforceability of the claim of the trustees of the MELVIN H. GELLMAN LIVING TRUST against the ESTATE of said deceased determined.

File No. 2016-4434/A

----------x

G I N G O L D , S .

The following papers were read in determining the cross-motions for summary judgment:

	Papers Numbered
Notice of Motion dated May 2, 2022 – Affirmation – Memorandum of Law in Support – Amended Notice of Motion dated May 24, 2022	1-4
Notice of Cross-Motion dated July 5, 2022 – Affirmation in Support of Cross-Motion and in Opposition to Motion	5-6
Reply Affirmation in Support of Motion	7
Reply Affirmation in Support of Cross-Motion	8

The executors of the estate of Ruth Siegel (the "Estate"; petitioners) commenced this proceeding to determine the validity of a claim (SCPA 1809) asserted by the trustees of the Melvin H. Gellman Living Trust (the "Trust"; respondents) who are seeking the return of a contract deposit of $226,250 which is held in escrow. Petitioners now move for summary judgment seeking a determination that the Trust's claim is invalid and respondents cross-move for summary judgment seeking a determination that their claim against the Estate is valid.

In July 2017, the Estate, as seller, and the Trust, as purchaser, entered into a contract of sale for cooperative apartment #4V at 70 East 10th Street, New York, New York 10003 for the sum of $2,262,500. In connection with the sale, Mr. Gellman paid a deposit of $226,250, or 10% of the sales price, to petitioners' counsel as escrow agent. At the time, Mr. Gellman was 91 years old and

intended to reside in the apartment, which was located next door to his daughter Melinda Gellman's apartment. It is undisputed that while the cooperative permitted ownership of the units by a trust, the board's policy required an occupant for the apartment in order for the sale to be approved (Affirmation of Ambrose Madison Richardson dated May 2, 2022 [Richardson Aff.], Exh. I [by-laws]; Affirmation of Ambrose Madison Richardson dated July 15, 2022, Exh. C [E. Hussein Dep. 7, 17]). On August 29, 2017, shortly after the contract was signed and before the sale was closed, Mr. Gellman died.

The same day, respondents' counsel emailed petitioners asking "that the contract be cancelled and the down payment returned" (Petition to Determine Validity of Claim filed February 21, 2018, Exhibits p. 15). On September 25, 2017, respondent-trustee Melinda Gellman advised petitioners that "we [would] not purchase the apartment after my father's death" (*See* Richardson Aff., Exh. D). Petitioners attempted to negotiate a settlement with respondents regarding the down payment but they were unsuccessful. Then, in December 2017, in an effort to "avoid litigation," respondents submitted a purchase application for the apartment to the board (Richardson Aff., Exhs. F). The application was submitted long past the ten-day deadline set forth in the contract (Richardson Aff., Exh. A para. 6.2.1). The application stated that there would be no tenant occupying the apartment, even though respondents were fully aware of the board's policy that there must be an occupant listed in order for the sale to be approved (Richardson Reply Aff., Exhs. D and B [Gellman Dep. 31]). The board immediately rejected the Trust's application without even reviewing it because the board "must be able to interview the person who would be living in the apartment" (Richardson Aff., Exh. G; Richardson Reply Aff., Exh. C [E. Hussein Dep. 17]).[1]

[1] In June 2018, respondents commenced an action in Supreme Court, New York County, seeking a judgment declaring that the contract of sale was void and directing the escrow agent to return the down payment (Index No. 652953/2018). By decision and order dated October 18, 2018, the court (Lebovits, J.) dismissed the case in favor of this proceeding (Richardson Aff., Exh. J).

In their motion for summary judgment, petitioners argue that they are entitled to retain the down payment because respondents breached the contract of sale by refusing to go forward with the purchase after Mr. Gellman died. "It has long been the rule in New York that a purchaser who defaults on a real estate contract without lawful excuse cannot recover the down payment" (*DiScipio v Sullivan*, 30 AD3d 660, 661 [3d Dep't 2006]; *Maxton Bldrs v Lo Galbo*, 68 NY2d 373, 378 [1986]). Further, paragraph 13.1 of the parties' contract of sale provides that "[i]n the event of a default or misrepresentation by Purchaser, Seller's sole and exclusive remedy shall be to cancel this Contract [and] retain the Contract Deposit as liquidated damages" (Richardson Aff., Exh. A). Therefore, absent a legally cognizable excuse for respondents' failure to perform the contract, petitioners may retain the down payment (*DiScipio*, 30 AD3d at 661).

Respondents assert that their refusal to perform the contract was excused by the unexpected death of Mr. Gellman prior to closing. In support, respondents rely on paragraph 23.2 of the contract which states that the "[c]ontract shall terminate upon the death of all persons comprising Purchaser" (Richardson Aff., Exh. A). Paragraph 1.1.2 in the contract defines the "Purchaser" to be "Melvin H. Gellman, as trustee of the Melvin H. Gellman Living Trust" (*Id.*). Thus, the purchaser in the contract was the Trust, and not Mr. Gellman individually. Since the Trust has not terminated and is in fact represented in this proceeding by respondents, the death clause in paragraph 23.2 is inapplicable and does not excuse respondents' refusal to perform on the contract of sale.

Respondents also argue that Mr. Gellman's death rendered it impossible for them to perform on the contract because the "Purchaser", who was the proposed occupant of the apartment, had died (Richardson Aff., Exh. A, para. 1.23). However, as discussed above, the "Purchaser" of

the apartment was the Trust, which cannot occupy the apartment, and thus this provision is inapplicable. Moreover, even if the proposed occupant was listed as Mr. Gellman individually, this provision does not change the respondents' contractual obligation to purchase the apartment, regardless of whether the board approved the proposed occupant (*see Warner v Kaplan*, 71 AD3d 1, 5 [1st Dep't 2009] [holding that proposed occupant provision irrelevant to estate's obligation to honor the contract of sale]).

Respondents also contend that Mr. Gellman's death justified nonperformance under the contract under the defenses of impossibility and frustration of contract.

"Impossibility excuses a party's performance only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible. Moreover, the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract (*Koldin v Valenti*, 115 AD3d 197, 200 [1st Dep't 2014]). Here, the death of Mr. Gellman was not the type of unanticipated event that could not have been foreseen as Mr. Gellman was 91 years old at the time the contract of sale was executed. Moreover, the contract of sale did in fact contain a death clause, which, while inapplicable here, conclusively disproves this theory (*Warner*, 71 AD3d at 5 [holding that impossibility defense inapplicable where contract provided that it would be binding on purchaser's heirs and thus purchaser's death was not unforeseeable]).

Similarly, "[i]n order to invoke the doctrine of frustration of purpose, the frustrated purpose must be so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense" (*Id.* at 6). However, "the doctrine of frustration of purpose is not available where the event which prevented performance was foreseeable and

provision could have been made for its occurrence" (*Id.*). Here, since the contract had an explicit provision for the event of the purchaser's death, the doctrine is unavailable.

Respondents challenge the contract on the additional ground that the contract contingency was not satisfied because the board rejected their application for approval of the sale (Richardson Aff., Exh. A, para. 6.1 ["sale is subject to the unconditional consent of the Corporation"]). "A condition precedent is 'an act or event, other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the agreement arises" (*Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 690 [1995]). However, it is equally well settled "that a party may not frustrate the performance of an agreement by bringing about the failure of a condition precedent" (*Creighton v Milbauer*, 191 AD2d 162, 165 [1st Dep't 1993]).

Here, respondents submitted their application to the board with the intention and expectation that it would be rejected. Respondents made their intentions clear at the outset of this dispute by immediately rejecting the contract after Mr. Gellman died and demanding the return of their deposit. After this was unsuccessful, respondents changed course and attempted to get out of the contract by getting their application rejected by the board.

Respondents communicated this intention to the board in their cover letter (Richardson Aff., Exh. F). The letter states that although his clients believed that the contract was terminated and that "there [was] no one to occupy the apartment," respondents were nonetheless submitting the application to "avoid litigation in this matter" and asked that the board "act accordingly on our application." (*Id.*). The application itself provided that there was "no tenant" for the apartment (Richardson Reply Aff., Exh. D). It is undisputed that the board's policy required there to be an occupant for the apartment in order for a sale to be approved (Richardson Reply Aff., Exh. C

[Hussein Dep. 17]). Respondents submitted their application without a tenant listed even though they were fully aware of this policy (Richardson Reply Aff., Exh. B [Gellman Dep. 31]). Indeed, by their own admission, respondents fully expected the board to reject their application (*Id.* [Gellman Dep. 19]). In her transmission email to the board, the managing agent flatly states that she is "submitting the application, as requested, for the purpose of rejection" (Richardson Aff., Exh. G). As predicted, the board immediately rejected the Trust's application without even reviewing it because there was no proposed occupant for the apartment (Richardson Aff., Exh. G; Richardson Reply Aff., Exh. C [E. Hussein Dep. 17]).

Although respondents anticipated that Mr. Gellman would occupy the apartment, his death did not relieve the Trust of its contractual obligations and did not preclude the trustees from submitting an application for another occupant for the apartment (*Warner*, 71 AD3d at 7 [estate was obligated to reapply for board approval once proposed occupant died and could not rely on its general belief that application would have been rejected since the estate was the purchaser]). In fact, the evidence establishes that the cooperative did not have a policy in place that would have precluded a transfer to the Trust (Richardson Reply Aff., Exh. C [Hussein Dep. 7] and Richardson Aff., Exh. I [by-laws silent as to ownership by trusts]). Having frustrated the contract by bringing about the failure of the condition precedent, respondents cannot then rely on this condition to evade their obligations under the contract.

The respondents' failure to diligently and in good faith pursue any application to the board, along with their unequivocal declaration that they would not perform under the contract and their correspondence demanding the return of the contract deposit of $226,250 together establishes a repudiation of the contract by the Trust, entitling petitioners under the clear terms of the contract

to the liquidated damages of the contract deposit (*Warner*, 71 AD3d at 7; *Willsey v Gjuraj*, 65 AD3d 1228, 1230-31 [2d Dep't 2009]).

Accordingly, it is

ORDERED that petitioners' motion for summary judgment is granted; it is further

ORDERED that respondents' cross-motion for summary judgment is denied; it is further

ORDERED, ADJUDGED and DECREED that the claim of the trustees of the Melvin H. Gellman Living Trust seeking the return of the contract deposit of $226,250 is disallowed.

Dated: September 12, 2023

SURROGATE