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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. JOHN P. DUNNE,

Justice

THOMAS P. SMYTH,

Plaintiff(s),

-against-

KENNETH W. BEINER, MARILYN E. BEINER,
WALTER GILL and SGC FEDERAL CREDIT UNION,

Defendant(s).

TRIAL/IAS, PART 13
NASSAU COUNTY

MOTION SEQ. No. 1

INDEX No. 10719/01

MOTION SUBMISSION
DATE: 3/1/02

The following papers read on this motion: 4

Notice of Motion.....X
Answering Affidavits.....XX
Replying Affidavits.....X

Upon the foregoing papers, it is hereby ordered that the plaintiff's motion for summary judgment on the first cause of action only is granted for the following reasons.

The instant action is for specific performance of a contract to purchase certain real property located at 57 George Street, Roslyn Heights.

The plaintiff argues that a contract of sale made on December 22, 2000, between Kenneth Beiner and Marilyn Beiner (husband and wife) and Thomas Smyth for the premises 57 George Street, Roslyn Heights, New York, Section 19, Block 10, Lots 152 and 153 for \$220,000. A \$15,000 down payment was made and is held in escrow by the seller's attorney. The sale was

subject to good title and plaintiff receiving a mortgage commitment for \$185,000.

Plaintiff has submitted proof that a mortgage commitment and a new survey and title report was obtained prior to the closing date (one month prior).

Defendant, Kenneth Beiner refused to complete the transaction and failed to appear for a closing on May 30, 2001. The contract called for a closing date of March 1, 2001.

The defendant, Marilyn Beiner has submitted an affirmation in support of plaintiff's motion. According to the defendant Marilyn Beiner, the defendants settled a matrimonial/divorce action on March 6, 2000, pursuant to a stipulation of settlement. Pursuant to that stipulation, the premises located at 57 George Street, Roslyn Heights, New York was to be sold and the net proceeds divided between the parties.

Defendant Marilyn Beiner states she has been ready to perform the terms of the contract and is not in default.

In opposition to the plaintiff's motion defendant Kenneth Beiner submits an unsigned, unexecuted copy of the contract containing different provisions with respect to the closing date. However, on the proposed contract submitted by the defendant Kenneth Beiner, the name of the proposed buyer is Thomas P. Smyth.

The defendant, Kenneth Smyth argues that pursuant to the Stipulation of Settlement, the proposed seller was James F. Smyth, the brother of co-defendant Marilyn Beiner. Although the signed contract of sale was between Thomas Smyth and the defendants. Thomas Smyth is the father of co-defendant Marilyn Beiner. Defendant Kenneth Beiner submits an appraisal report on the subject premises dated November 29, 1998, stating that the property at 57 George Street, East Hills, New York is worth \$235,000.

In addition, Mr. Beiner submits a letter to Mr. Beiner from an appraiser dated February 6, 2002, who states the property has an estimated market value of \$285,000 as of December 1, 2000. The report does not cite the basis for the appraisal.

The gravamen of Mr. Beiner's refusal to close this real estate transaction involves post-contract dissatisfaction with the purchase price.

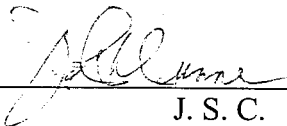
Nonetheless, the defendant's proof has failed to raise a material issue of fact regarding the contract of sale for the premises.

Therefore, the plaintiff's motion for summary judgment is granted on the first cause of action.

However, no applications were made with respect to the plaintiff's second cause of action or the defendant Kenneth Beiner's counterclaim or defendant Marilyn Beiner's cross-claim.

It is, so ordered.

Dated: April 10, 2002


J. S. C.

ENTERED

APR 17 2002

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**