

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JANE S. SOLOMON

PART 55

Justice

Index Number : 107683/2009

ISMAEL-AGUIRRE, YOUNES

VS.

WHARTON, C.MICHAEL

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 2/19/10

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

on this motion to/for _____

PAPERS NUMBERED

1-4

5-7

8-9

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, It is ordered that this motion *is decided by the annexed memorandum decision and Order*

FILED

APR 12 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4-2-10

JANE S. SOLOMON
J.S.C.

Check one: ☒ FINAL DISPOSITION

☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

☐ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 55

YOUNES ISMAEL-AGUIRRE and LEEN
BAKKALI,

Plaintiffs,

-against-

C. MICHAEL WHARTON, DORIS WHARTON
and MARC E. SCOLLAR, ESQ.,
Defendants.

INDEX NUMBER 107683/2009
Motion Sequence 002
DECISION & ORDER

FILED

APR 12 2010

JANE S. SOLOMON, J.:

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiffs Younes Ismael Aguirre and his wife Leen Bakkali (the buyers) move for summary judgment in their favor on their claim for the recovery of a downpayment for the purchase of a cooperative apartment. Defendants C. Michael Wharton and Doris Wharton (the Whartons) oppose and cross-move for summary judgment in their favor on their counterclaim for breach of the contract of sale.

The buyers are husband and wife as are the Whartons. Marc E. Scollar, Esq. (Scollar) was the Whartons' attorney in a real estate transaction in which, on or about February 2, 2009, by a written contract of sale (Exhibit B attached to Memorandum of Law in support), the Whartons agreed to sell their shares and appurtenant proprietary lease for a cooperative apartment at 159 Madison Avenue, New York County, to the buyers for \$465,000. The

buyers then deposited \$46,500 in escrow with Scollar.¹ The closing date was set for "on or about March 23, 2009" (Contract, ¶ 1.15). The transaction required "unconditional consent" from the cooperative corporation (Id, ¶ 6.1), and the submission to the cooperative of a loan commitment letter conforming to expressed parameters (Rider, ¶ J), if plaintiffs were financing the purchase. According to the contract, if approval by the cooperative had not occurred by the specified closing date, the closing would be adjourned for 30 days. However, if approval was still lacking by the adjourned closing date, either party could cancel the transaction on notice, with the funds in escrow returned to plaintiffs (Contract, ¶ 6.3).

Paragraph 18.3 identified several other circumstances under which buyer or seller could cancel the contract, such as denial of buyers' loan application or failure to deliver the loan commitment letter to the sellers on a timely basis. In all circumstances, cancellation pursuant to this paragraph required notice within 5 business days of the precipitating event, and failure to deliver notice of cancellation "shall constitute a waiver of the right to cancel under this ¶ 18.3."

Wells Fargo Bank, N.A., the buyers' lender issued a

¹ By a stipulation dated July 13, 2009, the claim against Scollar was discontinued with prejudice, provided that the buyers' liability to him for costs, expenses and attorney's fees in connection with his service as escrowee did not exceed \$422.50, and the downpayment in escrow was to be deposited with the Supreme Court, New York County.

loan commitment letter on February 17, 2009, subject to certain conditions, notably the right to withdraw or modify the commitment if "there is any adverse change in your credit, outstanding liabilities or employment" (Exhibit B attached to Affidavit of Younes Ismael-Aguirre). Plaintiffs submitted the commitment letter to the cooperative. On March 13, 2009, plaintiff Ismael-Aguirre lost his job as an auditor with a major firm and was unemployed until July 7, 2009. Leen Bakkali, a physician, was pregnant at the time. The buyers' counsel notified Scollar, the bank and the real estate agents on both sides of the transaction of this development by e-mail on March 17, 2009. The next day, Mr. Wharton sent an e-mail to Kathy Kahng, the cooperative board's president, informing her of Ismael-Aguirre's job loss, offering his somewhat optimistic view of the buyers' financial position, and stating that, according to Scollar, plaintiffs "want to walk away from the deal, and only the board's refusal of their application would give them a free pass." Exhibit H attached to Affidavit of Younes Ismael-Aguirre. The message continued: "Please don't let them walk away, because I don't have the cash to afford finding another buyer."

Also on March 18, 2009, apparently unaware of the changed circumstances, Margaret Powell, an employee of the cooperative's managing agent, called the buyers' real estate agent, Uri Hanoch, to set up a board interview with the buyers. Hanoch responded by e-mail that the husband had lost his job and

asked "if the board still wishes to interview." Exhibit F attached to Affidavit of Younes Ismael-Aguirre. Powell, in turn, forwarded the e-mail to Kahng on March 19, 2009 and asked for her advice. *Id.* Kahng responded that, if plaintiffs agreed to place one year's maintenance payments in escrow, the board's interview with them would proceed that evening (*Id.*). While Kahng and Powell were exchanging messages, Hanoch wrote to Powell that the husband "is very actively seeking new employment," could obtain financing upon reemployment, and "would be very happy to move forward with the purchase, however it is uncertain at this time how long this process will take" (*Id.*). This message was forwarded to Kahng who wrote to Powell that there is "no point in doing the interview if they don't have the financing. Please ask them to resubmit their package once their financing is set."

Wells Fargo meanwhile withdrew its loan commitment by an e-mail message on March 19, 2009 (Exhibit E attached to Affidavit of Younes Ismael-Aguirre). Still on March 19, 2009, the buyers' counsel again sent an e-mail to Scollar informing him of Wells Fargo's changed position, "the Potential of the rejection of the Loan"² and that the buyers "will reserve [their] right to receive a refund of the Contract Deposit if, indeed, the Loan is retracted" (Exhibit G attached to Affidavit of Younes Ismael-Aguirre). Although the apartment apparently was sold to

²On April 10, 2009, Wells Fargo formally notified Ismael-Aguirre that it was unable to approve his application (Exhibit I attached to Affidavit of Younes Ismael-Aguirre).

another buyer on July 28, 2009 for \$529,500, a gross difference of \$64,500, the Whartons and Scollar continued to refuse to return the deposit.

Plaintiffs' assert claims for breach of contract against the Whartons and to compel Scollar to return their deposit. The Whartons counterclaimed that the buyers breached the contract by acting in bad faith in "allegedly attempting to sabotage this transaction" and by failing to meet their financial obligations (Verified Answer, Exhibit 5 attached to Notice of Cross-Motion).

"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), citing *Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 (1985). 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 ex rel. Spitzer v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978); *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 (1st Dept 2002).

The Whartons' counterclaim includes the allegation that the buyers or their counsel contacted a board member, at some indeterminate time, thereby "attempting to sabotage this transaction" (Verified Answer, at ¶ 18). The only evidence that might fit this characterization, quite inaccurately, is the exchange of e-mail messages between Hanoch and Williams on March 18 and 19, 2009, instigated by Williams telephoning Hanoch to arrange a board interview for buyers. Nothing about this exchange suggests sabotage as Hanoch informed Williams of the material change in the buyers' lives, sought the board's guidance on next steps, and attempted to stay positive regarding the future of the transaction. By contrast, at the same time, the Whartons were attempting to interfere with the normal workings of the board by urging Kahng to preserve the deal, because of their own financial condition. Possibly in deference to the Whartons, the board kept the transaction in limbo for a brief while.

When Scollar wrote to plaintiffs' counsel, on April 9, 2009, alleging they defaulted on the contract, he stated that "your client received a letter to obtain financing and . . . the Board was ready to meet with your client and that your client has refused a Board meeting" (Exhibit J attached to Affidavit of Younes Ismael-Aguirre), a view of events at odds with the record. Similarly, his allegations of plaintiffs' bad faith appear to be inventions to bolster his clients' position. He presents no evidence of the sort of conduct which has warranted the retention of contract deposits as liquidated damages, such as found in

Hovav v Loew, 50 AD3d 488 (1st Dept 2008) (refusal to supply financial information); *Glanzer v Altman*, 267 AD2d 79 (1st Dept 1999) (failure to submit application package to cooperative board in timely fashion); *Moustakas v Noble*, 259 AD2d 602 (2d Dept 1999) (refusal to correct contradictory financial information previously submitted). Even after plaintiffs advised all those with an interest in the transaction of their changed circumstances, they attempted to find alternate financing, and a new job for Ismael-Aguirre. There is no new evidence that permits a finding that the buyers sabotaged the transaction or conducted themselves in bad faith.

The evidence supports the conclusion that the transaction was terminated on March 19, 2009, when the cooperative board stopped the interview process after learning that Wells Fargo rescinded its loan commitment. These events, coupled with the conduct of the bank and the board, eliminated the possibility of performance of the contract.

Finally, the Whartons rely on the contractual requirements for notice of cancellation within five days of denial of financing or expiration of the financing commitment. The parties agree that formal notice of cancellation was in the May 19, 2009, letter from the buyers' counsel to Scollar (Exhibit K attached to Affidavit of Younes Ismael-Aguirre; see Ismael-Aguirre transcript at 34, Exhibit 2 attached to Notice of Cross-Motion, and Verified Answer, at ¶ 17), more than five weeks after

the Wells Fargo formal notice declining the loan application.

However, the buyers argue, and the court agrees, that they exercised the right to cancel the contract pursuant to para. 6.3, which reads:

"If the Corporation has not made a decision on or before the scheduled Closing Date, the Closing shall be adjourned for 30 business days for the purpose of obtaining such consent. If such consent is not given by such adjourned date, either Party may cancel this Contract by Notice, provided that the Corporation's consent is not issued before such Notice of cancellation is given. 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 Purchaser."

The contract's closing date was March 23, 2009; the board's interview, scheduled for March 19, 2009, was cancelled by the board without a date. Obviously, the board made no decision by March 23, 2009, which tacitly adjourned the closing until May 4, 2009, 30 business days later. Absent board consent within the meaning of the foregoing paragraph, the buyers' notice of cancellation meets the contractual requirements, and buyers are entitled to the return of the deposit.

Buyers' request for attorney's fees, to which they appear entitled, is not specifically articulated and will be discussed at the conference scheduled below.

The moving papers do not address the fourth claim, for punitive damages which, sub silentio, appears to be withdrawn. Finally, buyers' claim for damages in excess of the contractual

liquidated damages clause (Contract, ¶13.1) is denied.

Accordingly, it is

ORDERED that plaintiffs' motion for summary judgment in their favor is granted as to the first and second claim in the complaint to the extent that Plaintiffs are entitled to the \$46,500 deposit, together with interest thereon from May 20, 2009, and costs and disbursements as taxed; and it further is

ORDERED that the New York City Department of Finance, Treasury Division, Client Services, located at 1 Centre Street, Rm. 2200, New York, NY, is directed, upon receipt of a certified copy of this order, a Certificate of Deposit duly issued by the Department of Finance, and any other forms required by the Department, to turn over to plaintiffs Younes Ismael-Aguirre and Leen Bakkali the funds deposited with the Department by defendant Marc E. Scollar, Esq.; and it further is

ORDERED that the Whartons' cross-motion for summary judgment in their favor on their counterclaim is denied; and it further is

ORDERED that the parties shall appear for a conference in Part 55, 60 Centre Street, Room 432, on May 10, 2010, at 2:00 P.M., in connection with the attorney's fees to be awarded to plaintiffs and any judgment to be entered hereon.

DATED: April 2, 2010

ENTER:



J.S.C.
JANE S. SOLOMON

FILED
APR 12 2010
NEW YORK
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