

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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HELEN PARADISE,

Plaintiff,

Index No. 59392/2018
Motion Sequence Nos. 1-4
DECISION AND ORDER

-against-

TINA DeGASPERIS WOOD, et al.¹,

Defendant.

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RUDERMAN, J.

The following papers were considered in connection with (1) the motion by defendant Tina DeGasperis Wood (“defendant”) for an order pursuant to CPLR 3212 granting her summary judgment on her first counterclaim for breach of contract against plaintiff, (2) plaintiff’s cross-motion for an order granting summary judgment dismissing defendant’s counterclaims, (3) plaintiff’s motion for summary judgment on the first and second cause of action of her complaint, and (4) defendant’s cross-motion for an order pursuant to CPLR 3217(b) permitting her to discontinue her second counterclaim:

Papers
Defendant’s Notice of Motion (seq 1), Affirmation, Affidavit,
Exhibits 1 - 8

NYSCEF Docs.
No. 21-31

¹ Plaintiff stipulated to discontinue the action as against the other named defendants, Robert Vincent Sisca, Esq. and Law Offices of Robert Vincent Sisca & Associates LLC (*see* NYSCEF Doc. No. 35), but that filed stipulation was not an order of the court and did not make provision for a modification of the caption.

<u>Papers</u>	<u>NYSCEF Docs.</u>
Plaintiff's Notice of Cross-Motion (seq 2), Affidavit in Opposition to Motion Seq 1 and in Support of Cross-Motion, Exhibits A - M, and Memorandum of Law	No. 38-53, 60
Defendant's Reply, Exhibit 1	No. 65-66
Plaintiff's Notice of Motion (seq 3), Affidavit, Exhibits 1 - 3, and Memorandum of Law	No. 54-59
Defendant's Notice of Cross-Motion (seq 4), Affidavit in Opposition to Motion Sequences 2 and 3 and in Support of Cross-Motion, Exhibit 1	No. 64, 62-63
Plaintiff's Reply Memorandum of Law	No. 67

Facts

Plaintiff Helen Paradise and defendant Tina DeGasperis Wood entered into a contract dated November 1, 2017, providing for plaintiff to purchase from defendant a cooperative apartment consisting of unit 1C located at 4 Alden Place, Bronxville, New York, for a price of \$220,000.00. Plaintiff paid a down payment of \$22,000.

Although paragraph 1.23 of the contract listed plaintiff, the "purchaser," as the only "proposed occupant," and paragraph 4.2.1 provided that the purchaser was acquiring the shares and lease for occupancy by the proposed occupant(s) identified in paragraph 1.23, plaintiff intended that her parents would be the apartment's occupants, and her application to the cooperative board so indicated. The board approved the application "upon the specific condition that [plaintiff]'s parents, who will occupy the apartment, will have their names added to the stock and lease." Plaintiff, who had intended to be the sole owner, declined to make her parents co-owners. Being unwilling to satisfy the imposed condition, she demanded the return of her down payment. Defendant did not accede to that demand. Instead, counsel for defendant issued a "time of the essence" letter setting a closing date of February 20, 2018, and declared plaintiff in

default upon her failure to appear and close on the sale on that date. The foregoing facts are undisputed.

The complaint in this action, filed June 15, 2018, seeks the return of the \$22,000 and money damages on theories of specific performance and breach of contract. Defendant's answer contains seven affirmative defenses and two counterclaims; the first counterclaim asserts that plaintiff willfully failed to comply with the co-op board's requirements that the intended occupants who were not parties to the contract be named in the shareholder certificates, and accordingly claims the right to retain the down payment based on a theory of breach of contract. The second counterclaim asserts fraud based on the non-disclosure of plaintiff's intention to have other occupants in the apartment.

Defendant now seeks summary judgment on her first counterclaim, while plaintiff seeks summary judgment dismissing the counterclaims and awarding judgment on her claims. Defendant seeks leave to discontinue the second counterclaim.

In support of the relief plaintiff seeks, she submits her own affidavit, in which she explains that she already owns and resides in a different unit in the same building, with her partner and her daughter. Before entering into the contract in question, plaintiff states, she spoke with both a member of the board and its chairwoman, to ask if she would be able to purchase an apartment in the building for occupancy by her parents, and was assured that it was no problem. Nor was the intended occupancy by her parents kept from defendant: the email from plaintiff's broker to the listing broker conveying plaintiff's offer for defendant's apartment, stated "[m]y client would be buying the unit for her parents" (*see* Plaintiff's Exhibit B, NYSCEF Doc. No. 41). In addition, plaintiff submits an email from defendant's husband, dated January 3, 2018, in

which he stated, “[w]e and the board knew her parents were going to be living there” (*see* Plaintiff’s Exhibit H, NYSCEF Doc. No. 47).

Discussion

The parties’ arguments in support of their competing claims to the down payment do not include any citation to case law that is directly on point. Plaintiff relies on paragraph 6.1 of the contract, which provided that the sale was “subject to the unconditional consent of the [cooperative] Corporation,” and argues that because the board’s approval of the sale was merely conditional, the necessary consent was never given, allowing the cancellation of the contract under paragraph 6.2.3. She also looks to case law concerning contracts of sale containing a mortgage contingency clause, where the purchaser is unable to obtain a mortgage.

Defendant emphasizes plaintiff’s failure to recite in the contract that her parents were the intended occupants, and looks to contract provision paragraph 6.4: “If [the Corporation’s] consent is refused, or not given, due to Purchaser's bad faith conduct, Purchaser shall be in default and ¶13.1 shall govern.” Paragraph 13.1 provides that “In 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.”

In the mortgage context, where a mortgage contingency clause creates a condition precedent to the contract of sale, ordinarily, “[t]he purchaser is entitled to return of the down payment where the mortgage contingency clause unequivocally provides for its return upon the purchaser’s inability to obtain a mortgage commitment within the contingency period” (*Blair v O’Donnell*, 85 AD3d 954, 955 [2d Dept 2011]). “When a condition of a mortgage loan commitment is not fulfilled through no fault of the purchasers, their performance is excused, so

long as they acted in good faith” (*Lunning v 10 Bleecker Street Owners Corp.*, 160 AD2d 178, 178 [1st Dept 1990]). By a parity of reasoning, in the context of the sale of a co-op apartment, where, as here, the contract of sale is explicitly made subject to the corporation’s unconditional approval, the lack of the required unconditional approval should entitle the purchaser to the return of her down payment, at least where the purchaser acted in good faith.

However, a seller may be entitled to retain the down payment if it is established that the purchaser frustrated the performance of the agreement by affirmatively bringing about the failure of a condition precedent (*see Creighton v Milbauer*, 191 AD2d 162, 165 [1st Dept 1993]). The burden to establish that the purchaser brought about the failure of the condition precedent must rest upon the proponent of that claim (*id.*). Here, defendant’s suggestion that plaintiff acted in bad faith, by bringing about the failure of the board’s imposed condition, finds no support in the record. In contrast, plaintiff has submitted documents that support her assertion that she acted in good faith throughout. Moreover, given the evidence that the seller and the board knew that plaintiff intended that her parents would reside in the apartment, and the absence of any evidence to the contrary, the lack of any such recitation in the contract fails to justify a finding that plaintiff acted in bad faith, or that she engaged in misrepresentation by omission with the purpose of bringing about the failure of the contract’s condition precedent.

Because the sale was subject to the corporation’s unconditional consent, and the corporation did not give its unconditional consent, and in the absence of any showing that plaintiff acted in bad faith in order to create the lack of unconditional consent, plaintiff had the right to cancel the contract and receive the return of her down payment. Notably, the board’s imposed condition was not an inconsequential technicality; it would have a significant impact,

which plaintiff was reasonably entitled to reject.

Plaintiff has established her prima facie right to summary judgment on her first cause of action, seeking repayment of the down payment of \$22,000, together with interest from the date a demand was made for the return of the funds, February 5, 2018. None of defendant's affirmative defenses are supported by the submissions on this motion, and accordingly, they fail to establish the existence of a defense that would prevent the grant of summary judgment. However, plaintiff's submissions on these motions have failed to establish entitlement to any additional form of relief under her second cause of action.

Summary judgment dismissing defendant's first counterclaim is granted pursuant to the foregoing analysis; defendant's second counterclaim is permitted to be discontinued.

Based upon the foregoing, it is hereby

ORDERED that the motion (sequence 1) by defendant Tina DeGasperis Wood for an order pursuant to CPLR 3212 granting summary judgment in her favor on her first counterclaim for breach of contract against plaintiff is denied, and plaintiff's cross-motion (sequence 2) for an order granting summary judgment dismissing defendant's counterclaims is granted as to defendant's first counterclaim, and it is further

ORDERED that defendant's cross-motion (sequence 4) for an order permitting her to discontinue her second counterclaim is granted, and it is further

ORDERED that plaintiff's motion for summary judgment on her complaint (sequence 3) is granted to the extent that plaintiff shall have judgment against defendant in the amount of the down payment, \$22,000, with interest from February 5, 2018, along with costs and disbursements, and it is further

ORDERED that the escrow agent shall release to plaintiff the escrowed funds in accordance with the foregoing.

This constitutes the decision and order of the Court.

Dated: White Plains, New York
July 9, 2019

/s/
HON. TERRY JANE RUDERMAN, J.S.C.

Appearances:

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