

**Morrin v Levy**

2011 NY Slip Op 32500(U)

September 19, 2011

Sup Ct, Nassau County

Docket Number: 002827-11

Judge: Steven M. Jaeger

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEVEN M. JAEGER,  
Acting Supreme Court Justice

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YVROSE MORRIN,

Plaintiff,

-against-

PAUL LEVY, ESQ. and PIRONI HOMES, INC.,

Defendants.  
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TRIAL/IAS, PART 43  
NASSAU COUNTY  
INDEX NO.: 002827-11

MOTION SUBMISSION  
DATE: 6-28-11

MOTION SEQUENCE  
NOS. 1 and 2

The following papers read on this motion:

- Order to Show Cause and Affirmation X
- Notice of Cross-Motion, Affirmation and Exhibits X
- Reply Affidavit X
- Comment to Defendant's Cross-Motion X

Motion by plaintiff brought by order to show cause for summary judgment pursuant to CPLR 3212 against defendants and return of the downpayment plaintiff tendered in connection with the purchase of premises known as 486 Kirkman Avenue, Elmont, New York is denied.

Cross motion by defendants pursuant to CPLR 3212 for summary judgment on Pironi Homes, Inc.'s cross claim to retain the subject downpayment is granted.

Plaintiff Yvrose Morrin, as purchaser, commenced this action against defendant Pironi Homes, Inc., as seller, and defendant Paul S. Levy, Esq. as escrowee, to recover \$22,500 she paid as a downpayment toward the purchase of premises known as 486

Kirkman Avenue, Elmont, New York, pursuant to a written contract dated August 16, 2010.

Paragraph 6 of the contract provides that the downpayment was to be held in escrow by defendant's attorney<sup>1</sup>, until closing or sooner termination of the contract. The balance of the purchase due at closing, which was to take place on or about October 1, 2010, was \$427,500.

Claiming that, despite her best efforts, she was unable to secure a mortgage in accordance with the contract, plaintiff maintains that she is entitled to the return of her deposit and summary judgment against defendant Pironi Homes, Inc. on her claim. In opposition to plaintiff's motion, defendant Pironi Homes, Inc. has cross moved for summary judgment on its counterclaim declaring that plaintiff defaulted under the terms of the contract by failing to apply for a conventional mortgage; by applying for a loan in excess of the amount set forth in the mortgage contingency clause; and by failing to send a valid termination notice. As such, the downpayment should be paid over to defendant Pironi Homes, Inc.

Paragraph 8 of the contract of sale contains a mortgage contingency clause which states, in relevant part, as follows:

“The obligations of Purchaser hereunder are conditioned upon issuance on or before September 15, 2010 (the “Commitment Date”) of a written commitment from any institutional Lender pursuant to which such Institutional Lender agrees to make a first mortgage loan, other than a

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<sup>1</sup>Paul S. Levy, Esq., seller's attorney and escrowee, attests that he continues to hold the escrowed funds in his IOLA account in accordance with his duty as escrowee not to deliver the escrow to anyone except upon strict compliance with the conditions imposed by the escrow agreement. *Iannizzi v Seckin*, 5 AD3d 555, 556 [2<sup>nd</sup> Dept. 2004].

VA, FHA or other governmentally insured loan, to Purchaser, at Purchaser's sole cost and expense of \$400,000.00 or such lesser sum as Purchaser shall be willing to accept . . .

The paragraph further provides that:

"If purchaser fails to give notice of cancellation or if Purchaser shall accept a commitment that does not comply with the terms set forth above, then Purchaser shall be deemed to have waived the Purchaser's right to cancel the contract and to receive a refund of the Downpayment by reason of the contingency contained in the paragraph."

Although plaintiff's former counsel attempted to invoke the contingency clause, cancel the contract and obtain the return of her client's downpayment,<sup>2</sup> defendants have refused to return the downpayment. Instead, on January 6, 2011, defendant Paul S. Levy, Esq. sent a time of essence closing notice, setting a closing date of February 7, 2011 at 2:30 p.m. and stating that if plaintiff did not close at that time, she would be in default, the contract terminated and the downpayment forfeited. On February 8, 2011, defendant Paul S. Levy, Esq. advised plaintiff's attorney of plaintiff's default and defendant Pironi Homes, Inc.'s right to retain the downpayment.

In support of her motion, plaintiff alleges that, since her application for a conventional loan in the amount of \$400,000 with Citibank was denied, the contract was terminated entitling her to return of her downpayment. Defendants counter that plaintiff failed to comply with the mortgage contingency clause as evidenced by the Statement of Credit Denial, Termination, or Change which indicates that plaintiff applied for an

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<sup>2</sup>Multiple faxes were sent to defendant Paul S. Levy, Esq. on September 13, 2010, September 17, 2010, September 29, 2010 and October 14, 2010 demanding return of plaintiff's downpayment.

FHA mortgage in the amount of \$409,000 rather than \$400,000 specified in the mortgage contingency clause. The application was denied based on “insufficient credit file” and “insufficient income for total obligations” by Washington Equities on September 13, 2010.

Since the contract of sale did not provide for such an application, plaintiff was in breach thereof as a matter of law. Significantly, plaintiff has failed to produce a loan application for a conventional mortgage in the amount of \$400,000 or less as called for by the mortgage contingency clause.

#### ANALYSIS

When parties set down their agreement in a clear, complete document, their writing should, as a rule, be enforced according to its terms. *W.W.W. Associates, Inc. v Giancontieri*, 77 NY2d 157, 162 [1990]. A mortgage contingency clause is construed to create a condition precedent to the contract of sale. *Blair v O'Donnell*, 85 AD3d 954, 955 [2<sup>nd</sup> Dept. 2011]. The purchaser is entitled to return of the downpayment where the mortgage contingency clause unequivocally provides for its return upon the purchaser's inability to obtain a mortgage commitment within the contingency period. To cancel a contract of sale based on an inability to obtain financing in accordance with the mortgage contingency clause, however, a prospective purchaser is required to show that the lending institution rejected her application. *Dobbins v Moss*, 305 AD2d 534, 535 [2<sup>nd</sup> Dept. 2003].

It is well established that a purchaser who, without breach by the seller, refuses to perform a contract for the purchase of real estate cannot recover against the seller

on the contract where the seller was ready, willing and able to perform its part of the contract. *Cooper v Bosse*, 85 AD2d 616, 618 [2<sup>nd</sup> Dept. 1981]. In this regard, paragraph 31 of the rider to the contract provides that:

“If Purchaser shall fail to comply with, uphold or perform any of the terms and provisions of this Contract, then, except as expressly provided otherwise herein, this Contract shall terminate at Seller’s option and shall be of no further effect, and the deposit shall be paid to Seller as and for liquidated damages, the parties having agreed that an exact amount of damage will be difficult to ascertain.”

Under the circumstances of this case where plaintiff failed to apply for a conventional mortgage in the amount of \$400,000 or less, and the notices sent to defendant’s counsel by plaintiff’s counsel were not in the manner prescribed by paragraph 25 of the contract of sale, i.e., certified mail, return receipt requested; registered mail; personal delivery; or overnight courier, plaintiff had no authority to cancel the contract and defendant Pironi Homes, Inc. is entitled to retain the downpayment.

The letter dated August 25, 2010 from a Citibank senior lending consultant, stating that he reviewed plaintiff’s “preliminary application” and, based on the information contained therein she “will not be approved for a mortgage of \$400,000,” does not compel a different result. The record is devoid of any proof that plaintiff did, in fact, apply to Citibank for a loan or that a *bona fide* application was denied. In this regard, defendant asserts that plaintiff had been working with Wells Fargo Mortgage from in or about June 8, 2010 until in or about September 13, 2010 and, in fact, had provided a letter from a Well Fargo Mortgage consultant dated June 8, 2010 stating that plaintiff might qualify for a mortgage loan of up to \$414,112 including FHA. The only

loan application actually furnished to defendant Pironi Homes, Inc.'s counsel, however, was that made to Wells Fargo Mortgage.

Moreover, plaintiff's reliance on paragraph 30<sup>3</sup> of the contract of sale is unavailing as it is only applicable when "the escrowee sends notice that a demand has been made to release the downpayment." Defendant escrowee, Paul S. Levy, Esq., sent no such notice.

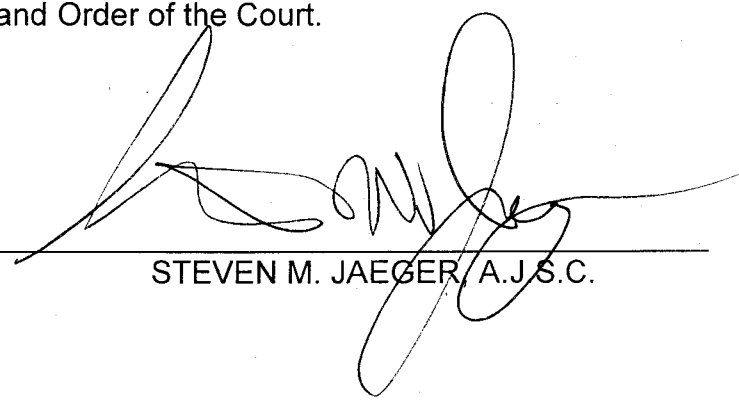
Accordingly, defendant Pironi Homes, Inc. is entitled to judgment on its counterclaim to retain the downpayment at issue herein pursuant to the terms of the contract of sale between the parties.

Plaintiff's motion for summary judgment and return of her downpayment is denied. Defendant Pironi Homes, Inc. shall submit a Judgment on Notice.

This constitutes the Decision and Order of the Court.

Dated: September 19, 2011

**ENTERED**  
SEP 20 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE

  
\_\_\_\_\_  
STEVEN M. JAEGER, A.J.S.C.

<sup>3</sup>Paragraph 30 reads as follows;

"In the event that escrowee sends notice that a demand has been made to release the downpayment, if a party responds by objecting to said release, then such party shall have 30 days from the date of the notice to institute a lawsuit to determine the proper disposition of the downpayment. In the event that such lawsuit is not commenced within 30 days, then the party objecting to the release of the downpayment shall be considered to have waived such objection and escrowee may thereafter pay out the escrow to the party demanding it without incurring any liability. This section shall survive closing or the termination of the Contract.

The escrowee is Seller's attorney and Seller and Purchaser acknowledge and agree that in the event of any dispute with respect to the deposit, escrowee may continue to represent Seller."