SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY
PRESENT: Hon. Doris Ling-Cohan, Justice **Part 36**

MIRIAM CHAN,

Plaintiff,

INDEX NO. 651238/10

-against-

MOTION SEQ. NO. 002

EDWARD KARAKASH and KARINE KARAKASH,

Defendants.

The following papers, numbered 1-12 were considered on the motion for summary judgment:

PAPERS	NUMBERED
Notice of Motion/Order to Show Cause, — Affidavits — Exhibits	1, 2, 3
Answering Affidavits — Exhibits	4, 5, 6, 7, 8
Replying Affidavits	9, 10, 11, 12
Cross-Motion: [ ] Yes [X] No	

Upon the foregoing papers, it is ordered that this motion is decided as indicated below.

BACKGROUND

Plaintiff Miriam Chan (Plaintiff/Buyer) commenced this breach of contract action seeking the return of $175,000. On April 13, 2006, Plaintiff/Buyer entered into a contract of sale, with riders, (collectively the Contract) with defendants Edward Karakash and Karine Karakash (collectively the Defendants/Sellers), for the purchase of Defendants/Sellers' residential property located at 53-15 Queens Boulevard, Woodside, New York, New York (Premises). Pursuant to the terms of the Contract, the purchase price was set at $5,550,000, with a downpayment of $100,000 and an additional $175,000 to be paid upon the re-zoning of the Premises. It is undisputed that Plaintiff/Buyer paid a total amount of $275,000 towards the purchase of the Premises, but breached the Contract by failing to close title.

Thereafter, Defendants/Sellers commenced an action against Plaintiff/Buyer in Supreme Court, Queens County, index number 29451/07 (Prior Action), seeking specific performance. In the Prior

Action, Plaintiff/Buyer filed a motion to dismiss which was granted in a decision by Honorable Marguerite A. Grays, dated June 3, 2008 (Decision). The Decision held that specific performance, in the Prior Action, was not viable, as the Contract provided for the retention of the downpayment, as the sole remedy for a breach by Plaintiff/Buyer. *See* Notice of Motion, Exhibit 4, Decision, p. 2. After the issuance of the Decision, Defendants/Sellers retained the $275,000 paid by Plaintiff/Buyer.

Plaintiff/Buyer commenced this current action alleging that Defendants/Sellers breached the Contract and was unjustly enriched by retaining the $175,000 payment, made after the Premises was re-zoned, in addition to the downpayment amount of $100,000. Defendants/Sellers now move to dismiss Plaintiff/Buyer's complaint pursuant to CPLR 3211(a)(1) and (5), on the grounds that her causes of action are barred by documentary evidence and res judicata. Alternatively, Defendants/Sellers move for summary judgment pursuant to CPLR 3212, based upon the Prior Action having decided all issues and collateral estoppel.

By interim order dated, October 11, 2011, the court provided the parties with notice that, pursuant to CPLR 3211(c), the current motion to dismiss would be treated as a motion for summary judgment, wherein the court is permitted to search the record, and where appropriate, grant judgment for any party, even the nonmoving party; the parties were given an opportunity to submit additional papers.

DISCUSSION

In support of its motion, Defendants/Sellers proffer, *inter alia*, the Contract and the Decision. Defendants/Sellers allege that the Prior Action was based upon the same set of facts as this action, that the Decision was served on the same attorneys which represented Plaintiff/Buyer in the Prior Action as in this action, and that Plaintiff/Buyer never contested Defendants/Sellers' retention of $275,000, until almost two years after the Decision. Defendants/Sellers argue that no issues of fact exist as the Queens Supreme Court decision has decided all issues, and thus, res judicata and collateral estoppel apply.

Defendants/Sellers further argue that any and all issues could and should have been raised in the Prior Action, or on an appeal of the Decision.

Plaintiff/Buyer opposes Defendants/Sellers' motion stating that the issue of the downpayment amount was not determined by the court in the Prior Action and that neither res judicata nor collateral estoppel applies. Plaintiff/Buyer argues that the Contract clearly states the downpayment amount is $100,000. She further argues that the $175,000 was an additional payment to be paid upon the re-zoning of the Premises and that, according to the Contract, was not a portion of the downpayment amount. Plaintiff/Buyer contends that the Decision never resolved the issue concerning the amount Defendants/Sellers were entitled to retain under the liquidated damages clause of the Contract. Plaintiff/Buyer states she obtained dismissal in the Prior Action, prior to serving an answer, so she did not have an opportunity to set forth any counterclaims. Additionally, Plaintiff/Buyer states that she prevailed in the Prior Action so there was no need to appeal the Decision.

The Decision conclusively states that specific performance was not a remedy pursuant to the Contract and that the sole remedy for a breach by Plaintiff/Buyer was the retention of the downpayment by Defendants/Sellers. *See* Notice of Motion, Exhibit 4, Decision, p. 2. The Decision refers to Paragraph 3 of the Contract with respect to Defendants/Sellers' right to retain the downpayment due to Plaintiff/Buyer's breach, but fails to specify the amount which the Defendant/Sellers are entitled to retain. The Contract, Paragraph 3, states in pertinent part that:

> The purchase price is $5,550,000.00 payable as follows:
> (a) on the signing of this contract...to be held in escrow pursuant to paragraph 6 of this contract (the 'Downpayment'): $100,000.00
> (b) an additional $175,000.00 upon the rezoning of the premises to RX7/C2-3".

Notice of Motion, Exhibit 2. Significantly, the downpayment is specifically defined in the Contract as $100,000.

Defendants/Sellers' argument that this action is barred by res judicata and/or collateral estoppel

is misplaced. It is well settled that New York has adopted the transactional analysis approach to res judicata. "Under the transactional analysis approach..., once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy." *Cornwall Warehousing, Inc. v Town of New Windsor*, 238 AD2d 370, 371 (2nd Dep't 1997) (internal quotations omitted). However, allegations and claims arising from acts occurring after a prior lawsuit are not barred by res judicata. *O'Brien v City of Syracuse*, 54 NY2d 353, 358 (1981). Here, the Decision granted Plaintiff/Buyer's motion to dismiss, based on documentary evidence, on the ground that the Contract unambiguously stated that specific performance was not a remedy to a breach by Plaintiff/Buyer and that retention of the downpayment was Defendants/Sellers' sole remedy. However, the Decision failed to address the issue of the amount of the downpayment and the amount that could be retained by Defendant/Sellers. After issuance of the Decision, it is not disputed that Defendants/Sellers' retained $275,000, which had been paid by Plaintiff/Buyer. Since the act of retention, as permitted by the Decision, did not occur until after the issuance of the Decision, Plaintiff/Buyer's claims for unjust enrichment and breach of contract did not accrue until after the Prior Action; thus this action is not barred by res judicata.

The doctrine of collateral estoppel also does not bar this case. "The doctrine of collateral estoppel...precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity." *Ryan v New York Tel. Co.*, 62 NY2d 494, 500 (1984). Two essential elements must be satisfied before the doctrine of collateral estoppel can be invoked: (1) there must be identity of an issue which has necessarily been decided in the prior action and is decisive of the present action; and (2) there must have been a full and fair opportunity to contest the decision now said to be controlling. *Gilberg v Barbieri*, 53 NY2d 285, 291 (1981). The party seeking the benefit of collateral estoppel has the burden of demonstrating those

issues which were decided in the first action. *See Ryan v New York Tel. Co.*, 62 NY2d at 501. Once it has been established that the issue in the prior litigation is identical to the issue in the present litigation, the party attempting to defeat the estoppel has the burden of demonstrating the absence of a full and fair opportunity to litigate the issue in the prior action. *Id.*

Here, in the Prior Action, Defendants/Sellers sought specific performance alleging that Plaintiff/Buyer breached the Contract. The issue as to the downpayment amount was not litigated nor decided in the Prior Action. As correctly argued by Plaintiff/Buyer, the only issue determined in the Prior Action was whether Defendants/Sellers were entitled to specific performance. Furthermore, in lieu of filing an answer in the Prior Action, Plaintiff/Buyer moved to dismiss the Defendants/Sellers' complaint, which was granted and therefore Plaintiff/Buyer never had an opportunity to interpose an answer to assert any counterclaims with respect to the downpayment amount. Thus, it is clear from the Decision that the amount Defendant/Sellers were entitled to retain upon Plaintiff/Buyer's breach was not previously decided in the Prior Action. As neither element to invoke collateral estoppel is satisfied, Defendants/Sellers' motion seeking dismissal based upon collateral estoppel is denied.

It is well settled that "'[o]n a motion for summary judgment, the construction of an unambiguous contract is a question of law for the court to pass on, and ... circumstances extrinsic to the agreement or varying interpretations of the contract provisions will not be considered, where ... the intention of the parties can be gathered from the instrument itself.'" *Maysek & Moran, Inc. v S.G. Warburg & Co., Inc.*, 284 AD2d 203, 204 (1st Dep't 2001), *quoting Lake Constr. & Development Corp. v City of New York*, 211 AD2d 514, 515 (1st Dep't 1995). CPLR 3212(b) allows the court to search the record, and where appropriate, grant judgment for any party, even the nonmoving party.

Here, there are no factual issues in dispute and the only issue, is one of contract interpretation. When interpreting unambiguous contract provisions, "matters extrinsic to the agreement may not be

considered when the intent of the parties can be gleaned from the face of the instrument." *Chimart Assoc. v Paul*, 66 NY2d 570, 572-573 (1986). "The best evidence of what parties to a written agreement intend is what they say in their writing". *Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 (2002) (internal citations omitted). A writing that is clear will be enforced according to its plain meaning. *Id.* Here, the Contract is clear on its face. As indicated above, Paragraph 3 of the Contract, unambiguously provides that the downpayment amount is $100,000, in addition to requiring a payment of $175,000, upon the re-zoning of the Premises; the amount of $175,000 was not labelled a "downpayment" in the Contract. Thus, as it is not disputed that Defendants/Sellers retained more than the downpayment amount of $100,000 (as specifically provided for in the Contract), Plaintiff/Buyer is entitled to summary judgment on her breach of contract claim.

Accordingly, it is

ORDERED that Defendants' motion is denied in its entirety; and it is further

ORDERED that summary judgment is granted in favor of Plaintiff; and it is further

ORDERED that judgment shall be entered against Defendants in the amount of $175,000, together with interest, from June 3, 2008, as calculated by the Clerk, together with costs and disbursements, to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that within 30 days of entry, Plaintiff shall serve a copy of this decision/order upon all parties with notice of entry.

This constitutes the decision/order of the Court.

Dated: 2/23/12

BORIS LING-COHAN, J.S.C.

Check one: [X] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION
Check If Appropriate: [ ] DO NOT POST

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