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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

LUCY BILLINGS
J.S.C.

PRESENT: _____ PART 46
Justice

Index Number : 401493/2011
1136 REALTY LLC
VS.
BANCO POPULAR NORTH AMERICA
SEQUENCE NUMBER : 001
SUMMARY JUDGEMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

n to/for _____
No(s). 1
No(s). 2
No(s). 3

Upon the foregoing papers, it is ordered ~~that this motion is~~ and adjudged that:

The court grants defendant's motion for summary judgment and dismisses this action pursuant to the accompanying decision. C.P.L.R. § 3212(b)

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

FILED
MAY 11 2012
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/13/12

_____, J.S.C.
LUCY BILLINGS

1. CHECK ONE: ..... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☑ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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1136 REALTY, LLC,

Plaintiff

-against-

BANCO POPULAR OF NORTH AMERICA,

Defendant

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Index No. 401493/2011

DECISION AND ORDER

BILLINGS, J.

Defendant Banco Popular of North America moves for summary judgment dismissing this action by plaintiff 1136 Realty, LLC, for damages based on breach of contract. C.P.L.R. § 3212(b). For the reasons explained below, the court grants defendant's motion.

On March 4, 2008, the parties entered a written Purchase Agreement, whereby defendant Banco Popular agreed to sell and plaintiff 1136 Realty agreed to purchase, for $975,000, all Banco Popular's right, title, and interest in a note, mortgage, guarantee, assignment of leases, title policies, and foreclosure action concerning the premises at 213 Union Street, Brooklyn, New York. The closing took place September 29, 2008. After the closing, 1136 Realty was required to satisfy a delinquent tax lien and water charges on the Union Street property for a period before the closing, amounting to $79,629, and claims that Banco Popular is obligated to reimburse plaintiff for that amount.

Banco Popular relies on the terms of the parties' Purchase

Agreement March 8, 2008, which makes no provision for such a tax obligation. In opposition to the motion, 1136 Realty presents post-closing e-mails between its personnel and an outgoing vice-president of Banco Popular, to show that it understood the Purchase Agreement as obligating it to pay the taxes and water charges that had accrued on the property before the closing, although ultimately it refused to pay them, prompting this action.

While 1136 Realty claims entitlement to reimbursement for paying Banco Popular's obligation pursuant to the parties' written Purchase Agreement, its terms do not support plaintiff's claim. The Purchase Agreement neither creates nor reserves any obligation of the seller for any liabilities accrued on the property before the sale's closing.

"A basic precept of contract interpretation is that agreements should be construed to effectuate the parties' intent .... Where an agreement is clear and unambiguous, a court is not free to alter it and impose its personal notions of fairness." Welsbach Elec. Corp. v. Mastec North America, Inc., 7 N.Y.3d 624, 629 (2006). Instead, the "best evidence of what parties to a written agreement intend is what they say in their writing." Greenfield v. Philles Records, 98 N.Y.2d 562, 569 (1992); Slamow v. Del Col, 79 N.Y.2d 1016, 1018 (1992); RM 14 FK Corp. v. Bank One Trust Co., N.A., 37 A.D.3d 272, 274 (1st Dep't 2007). See Weissman v. Sinorm Deli, 88 N.Y.2d at 446; Slatt v. Slatt, 64 N.Y.2d 966, 967 (1985).

Contracts "must be given their plain and ordinary meaning, and the interpretation of such provisions is a question of law for the court." Vigilant Ins. Co. v Bear Stearns Cos., Inc., 10 N.Y.3d 170, 176 (2008). Here, the absence of a provision in the parties' written agreement for payment of taxes and water charges accrued on the property before the closing does not render the contract ambiguous. In fact the text of the Purchase Agreement, particularly the provisions quoted below, shows that 1136 Realty agreed to purchase the property under foreclosure in whatever financial condition it was.

Paragraph 1(A) of the Purchase Agreement provides:

> Seller, at the Closing (as hereinafter defined), shall assign to Purchaser, without representation, warranty or recourse whatsoever, all of Seller's right, title and interest in and to: (i) the Note, ... (ii) the Mortgage, ... (iii) the Guarantees, ... (iv) the Assignment of Leases, ... (v) the Foreclosure Action, ... and (vi) the Policy of Title Insurance insuring the Mortgage ....

Aff. of Wilfredo Fuentes Ex. C. Paragraph 5 provides:

> Purchaser hereby acknowledges and agrees that it has made its own independent investigation of the financial condition and financial prospects of all of the defendants in the Foreclosure Action and the probability of prevailing with regard to the Foreclosure Action and the Property. Purchaser further acknowledges and agrees that it has reviewed the Note, Mortgage, Guarantees, Assignment of Leases and Title Policy, and is entering into this agreement based on its own investigations and not in reliance in any manner upon any statement made or document provided by any officer, director, shareholder, agent, employee, counsel or representative of Seller.

Id. Paragraph 7(B) provides:

> Purchaser hereby acknowledges and agrees that Seller and its counsel have made no representations as to (i) the value of the Property; (ii) the validity and enforceability of any term, covenant or condition contained in the Note, Mortgage, Guarantee or Assignment of Leases; (iii) anything

related to the Foreclosure Action; or (iv) as to any matter or thing whatsoever not expressly set forth herein.

Id. Paragraph 14(A) provides:

> This Agreement (and documents given in connection herewith) and documents to be furnished hereunder constitute the entire Agreement between the parties hereto as to the subject matter hereof and supersede any previous agreement, oral or written as to such subject matter. No amendment, modification, termination or waiver of any of the terms and conditions of this Agreement or other such agreements shall in any event be effective, unless the same shall be in writing and signed by the Seller and then such waiver or consent shall be effective only in the specific instance and for the specific purpose for which given.

Id.

It was up to 1136 Realty to discover the prior tax and water charges obligation and, if plaintiff sought to free itself of such an obligation, to negotiate the inclusion of such a provision in the text of the Purchase Agreement. If 1136 Realty instead chose to rely on the past practice of Banco Popular in paying accrued charges on its property before closing, the purchaser did so at its own risk. The post-closing e-mail exchanges between 1136 Realty and Banco Popular concerning its previous practice of covering such expenses constitute parole evidence that is not admissible to vary the terms of the parties' unambiguous written contract, South Rd. Assoc., LLC v. International Bus. Machs. Corp., 4 N.Y.3d 272, 278 (2005); R/S Assoc. v. New York Job Dev. Auth., 98 N.Y.2d 29, 33 (2002); Unclaimed Prop. Recovery Serv., Inc. v. UBS Paine Webber, Inc., 58 A.D.3d 526 (1st Dep't 2009); Riverside S. Planning Corp. v. CRP/Extell Riverside, L.P., 60 A.D.3d 61, 66 (1st Dep't 2008), nor to imply provisions not stated in that contract. Reiss v.

Financial Performance Corp., 97 N.Y.2d 195, 199 (2001).

Consequently, the court grants defendant's motion for summary judgment dismissing the complaint. C.P.L.R. § 3212(b). This decision constitutes the court's order and judgment of dismissal.

DATED: April 13, 2012

LUCY BILLINGS, J.S.C.