STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

RALPH H. DRAKE, JR.,

Plaintiff,

-against-

RICHARD FRIEDENTHAL,

Defendant.

**DECISION and ORDER**
**INDEX NO. 2207-12**
**RJI NO. 01-12-107340**

Supreme Court Albany County All Purpose Term, July 26, 2012
Assigned to Justice Joseph C. Teresi

**APPEARANCES:**
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Stephen Waite, Esq.
*Attorney for Plaintiff*
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Robert Ganz, Esq.
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*Attorneys for Defendant*
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**TERESI, J.:**

Plaintiff commenced this action seeking specific performance of its contract to purchase 30 Railroad Avenue, Albany, New York (hereinafter "30 Railroad Avenue") from Defendant. Issue was joined by Defendant, who now moves for summary judgment dismissing Plaintiff's complaint. Plaintiff opposes such motion and cross moves for summary judgment, which Defendant opposes. Because Defendant established his entitlement to summary judgment and Plaintiff raised no triable issue of fact, Defendant's motion is granted and Plaintiff's denied.

"On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (Vega v Restani Const. Corp., 18 NY3d 499, 503 [2012], quoting Ortiz v. Varsity Holdings, LLC, 18 NY3d 335 [2011][internal quotation marks omitted]). First, "the moving party bears the burden of establishing that no material issues of triable fact exist and that it is entitled to judgment as a matter of law." (U.W. Marx, Inc. v Koko Contr., Inc., __AD3d__ [3d Dept 2012]). "Once this burden has been met, it becomes incumbent upon the opponent to come forward with competent, admissible evidence creating a genuine triable issue of fact." (Wells v Ronning, 269 AD2d 690, 691 [3d Dept 2000]).

As correctly noted by Defendant, "failure to make the down payment required by a standard real estate contract will generally constitute a material breach of the agreement warranting rescission." (RR Chester, LLC v Arlington Bldg. Corp., 22 AD3d 652, 654 [2d Dept 2005]; Texter v Trotta, 48 AD3d 455 [2d Dept 2008]; Daimon v Fridman, 5 AD3d 426 [2d Dept 2004]; Baystone Equities, Inc. v Gerel Corp., 305 AD2d 260 [1st Dept 2003]). However, a party is "entitled to rescind [only] where the other party has made a substantial and fundamental breach, but not where there has been merely a slight, casual or technical breach." (Mtge. Elec. Registration Sys., Inc. v Maniscalco, 46 AD3d 1279, 1281 [3d Dept 2007], quoting O'Herron v Southern Tier Stores, 9 AD2d 568, 568 [1959][internal quotation marks omitted]; RR Chester, LLC v Arlington Bldg. Corp., supra).

Even viewing the evidence in a light most favorable to Plaintiff, Defendant demonstrated his entitlement to judgment as a matter of law.

On this record, the parties' written agreement is not in dispute. Defendant agreed to sell 30 Railroad Avenue to Plaintiff, by written contract dated January 12, 2012 (hereinafter "the

Agreement"), for a total purchase price of $525,000. The purchase price included a down payment of $25,000 (hereinafter "deposit"), to be made by bank or certified check and deposited with Defendant's real estate agent (hereinafter "Escrow Agent"). Such deposit was to be paid when the Agreement "was fully executed by both Seller and Purchaser." The Agreement also contained a merger clause, which stated that "all prior or contemporaneous agreements, understandings, representations and statements... are merged into this Agreement." Additionally, no provision of the Agreement could be "waived, modified, amended, discharged or terminated except by a written agreement of such waiver, modification, amendment, discharge or termination executed by both Seller and Purchaser."

Defendant established, by Plaintiff's admission in his complaint, that Plaintiff "did not make the deposit" required by the Agreement. Instead, soon after full execution of the Agreement, Plaintiff submitted a $25,000 check "to be held" (hereinafter "the Check") by the Escrow Agent pending Plaintiff selling another parcel of real estate to a third party. It is uncontested that Plaintiff's "hold" was never lifted and the Check never deposited.

Defendant's attorney also established, upon his own personal knowledge and submission of his e-mail correspondence, Defendant's demands for the deposit and Defendant's recision of the Agreement. Approximately one week after the Check was delivered, Defendant's attorney requested permission to deposit it. Plaintiff did not authorize such deposit. Two weeks thereafter, Defendant's attorney informed Plaintiff's attorney that the Agreement was not binding because no deposit was actually given. Despite such position, the parties continued their efforts to transfer title in accord with the Agreement's terms. Then, approximately one month later and almost two months after the Agreement was fully executed, Defendant's attorney demanded

Plaintiff "deliver a bank or certified check for the $25,000.00 deposit to [the Escrow Agent] by no later than 2 PM tomorrow." If such demand was not met, Defendant's attorney advised that there was "no contract." After such deadline passed and Plaintiff failed to deliver the deposit, Defendant's attorney duly rescinded the contract by informing Plaintiff's attorney that there was "no contract... and any offer to sell [was] withdrawn."

From the above, Defendant established his entitlement to judgment as a matter of law. The Agreement unambiguously required a $25,000 deposit, and Plaintiff admitted that he made no such deposit. This non-payment was a fundamental and material breach. Defendant's requests for the deposit and his attempts to close do not lessen the breach. Rather, his final demand properly made the deposit payment time of the essence, with its unequivocal condition, and Plaintiff's default permitted Defendant's recision of the Agreement. As such, Defendant demonstrated his entitlement to judgment dismissing Plaintiff's claim.

With the burden shifted, Plaintiff failed to raise a triable issue of fact. While Plaintiff properly submitted his own, his attorney's and his realtor's affidavits, their allegations of pre-Agreement negotiations and understandings are irrelevant. Because the Agreement contains a broad merger clause "any claimed prior oral condition or agreement was necessarily extinguished at the moment the written contract became fully executed by both parties." (Torres v D'Alesso, 80 AD3d 46, 53 [1st Dept 2010] appeal withdrawn, 15 NY3d 951 [2010]). Similarly, Plaintiff's allegations concerning Defendant's alleged agreement to "hold the [deposit] check" raises no issue of fact because, contrary to the Agreement's explicit terms, he proffered no written agreement of such waiver or modification that was executed by both parties. "[I]n the absence of such a writing, any alleged oral modification to the [deposit] provision, in light of the contractual

proscription against oral modification contained in the parties' written agreement[], is barred by the statute of frauds." (No. 1 Funding Ctr., Inc. v H & G Operating Corp., 48 AD3d 908, 910 [3d Dept 2008]). Nor did Plaintiff raise an issue of fact with his estoppel cause of action. "[C]onduct relied upon to establish estoppel must not otherwise be compatible with the agreement as written." (Rose v Spa Realty Assoc., 42 NY2d 338, 344 [1977]; Tompkins Med. Off. Bldg. Assoc. L.P. v Meltzer, 238 AD2d 851 [3d Dept 1997]; Phoenix Corp. v U.W. Marx, Inc., 64 AD3d 967 [3d Dept 2009]). Here, Plaintiff alleged no such conduct. Neither Plaintiff's selling an unrelated parcel of real estate nor Defendant's continuing efforts to close constitute such unequivocal conduct. Moreover, Plaintiff proffered no "evidence showing that [he] substantially relied upon the oral modification to [his] detriment. Accordingly, [Plaintiff] failed to establish an estoppel." (Isaacs Bus. Ventures, Inc. v Thompson, 223 AD2d 957, 959 [3d Dept 1996]). As such, Plaintiff raised no issue of fact.

To the extent not specifically addressed above, the parties' remaining contentions have been examined and found to be lacking in merit.

Accordingly, Defendant's motion is granted, Plaintiff's motion is denied, the Notice of Pendency is cancelled and the complaint is dismissed.

This Decision and Order is being returned to the attorney for the Defendant. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall

not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: August 9, 2012
Albany, New York

JOSEPH C. TERESI, J.S.C.

**PAPERS CONSIDERED:**

1. Notice of Motion, dated June 28, 2012, Affidavit of Richard Friedenthal, dated June 28, 2012, Affidavit of Jed Wolkenbreit, dated June 28, 2012, with attached Exhibits A-B.
2. Notice of Cross Motion, dated July 2012; Affidavit of Ralph Drake, dated July 19, 2012; Affidavit of Steve Waite, dated July 20, 2012, with attached Exhibits A-F; Affidavit of Francesco Pecoraro, dated July 19, 2012.
3. Affidavit of Jed Wolkenbreit, dated July 24, 2012.
4. Affidavit of Steve Waite, dated July 26, 2012, with attached Exhibit A.