State of New York
County of Ontario
Canandaigua City Court

Index Number: **SC-000357-12/CA**

William W. Farmer Jr.
Claimant(s)

-against-

Donald Braun
Defendant(s)

DECISION

Present: Hon. Stephen D. Aronson

Appearances: Claimant: Barrett Greisberger Fletcher, LLP; Mark Greisberger, Esq. of counsel

Defendant: David P. Miller, Esq.

In this small claims case, the claimant ("buyer") seeks $5000 from the defendant ("seller") alleging that the seller did not return his deposit on a real estate contract. A hearing was held on July 19, 2012. The undisputed evidence showed that the seller owned some real property in the Town of Naples, Ontario County; the parties entered into a written purchase and sale contract on July 8, 2007; the buyer gave the seller two (2) checks -- a check for $2500 dated June 27, 2007 and a check for $2500 dated July 8, 2007; the real estate transaction never closed due to a title objection that the seller was unable to cure; and the $5000 was never returned to the buyer. The buyer contends, in words or substance, that the two (2) $2500 checks constituted the deposit under the purchase and sale contract; and the contract clearly provides that if the contract "fails to close for any reason not the fault of" the buyer, the deposit is to be returned. The seller contends, in words or substance, that prior to the execution of the purchase and sale contract, the buyer agreed to pay the seller the nonrefundable sum of $5000 to enable the seller to pay real

estate tax arrearages making the purchase price $125,000 instead of $120,000. The seller contends that parol evidence is admissible to show a prior purchase and sale contract signed only by the buyer which shows the $5000 as nonrefundable. The seller also contends that the buyer backed out of the deal when he got "cold feet" after an environmental issue arose. The buyer contends that parol evidence is not admissible and any negotiations merged in the execution of the contract.

In every small claims case, the court is bound to perform substantial justice to the parties in accordance with principles of substantive law. *See Uniform City Court Act §1804.* Under well-established principles of New York law, a general merger clause in a real estate contract bars the admission of parol evidence, including evidence of prior negotiations between the parties to contradict or modify terms of the final written agreement. *Bero Contracting & Development Corp. v. Verhile, 19 A.D. 3d 1160 (4th Dept., 2005).* In *Bero*, the buyers signed an option contract to buy two lots from the seller in the Canandaigua Lakeside Estates Subdivision. The option contract gave the buyers the right to purchase the lots provided that the seller would be the only builder to construct a home on the lots. Thereafter, the parties signed a purchase agreement for the lots containing a merger clause. However, the purchase contract failed to incorporate the language of the original option contract that the seller would be the homebuilder. When negotiations for the construction of a home broke down, the buyers hired a different builder. The seller's lawsuit to prevent the buyer from using a different builder was dismissed on the theory that the merger clause in the purchase agreement bars the admission of parol evidence, including evidence of prior negotiations to contradict or modify the terms of the final written agreement. *Id.* Similarly, in this case, it would seem to follow that the merger clause in the parties' final written agreement bars the admission of parol evidence to contradict or modify the

terms of the final purchase and sale contract. Under this reasoning, the seller would be obligated to return the $5000 deposit to the buyer. However, in actuality, there was no $5000 deposit made by the buyer. Under paragraph 12 of the final written contract prepared by the buyer:

> "12. Deposit to Listing Broker.
>
> Buyer [ ] has deposited [ ] will deposit upon acceptance $5000.00 in the form of a check with Donald Braun. . . which deposit is to become part of the purchase price or returned if not accepted of if this contract thereafter fails to close for any reason not the fault of the Buyer."

It is noteworthy that the box checked in paragraph 12 is next to the words "will deposit upon acceptance." The words "has deposited" is not checked. The parties final contract was signed on July 8, 2007. The buyer gave the seller a check for $2500 dated July 8, 2007. However, the buyer also gave the seller a $2500 check on June 27, 2007 -- 11 days before the contract was signed.

When interpreting a contract it is also well settled that the fundamental precept of contract interpretation is that agreements are construed in accord with the parties' intent." *See Wellsey v. Gjuraj, 65 A.D.31 1228 (2nd, Dept., 2009).* "When the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving practical interpretation to the language employed and the parties' reasonable expectations." *Id.* "Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." *Id.* "Courts may not by constructive add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing." *Id.* In this case, the contract

is clear. The buyer was to pay the sum of $5000 upon acceptance. The acceptance took place on July 8, 2007; however, the buyer only paid the sum of $2500 on or after July 8, 2007. The sum of $2500 had been paid 11 days earlier and, according to the plain language of the contract, cannot not be considered to be part of the $5000 deposit because it was not paid "upon acceptance."

So, if the actual deposit given to the seller "upon acceptance" was only $2500, what can be said about the $2500 that was paid on June 27, 2007? It was clearly not part of the deposit on the final contract since it was not paid "upon acceptance." The seller contended that the buyer agreed to pay real estate tax arrearages so that the property would be "free and clear" when the buyer purchased the property. The buyer did not offer a credible adequate explanation in contradiction. Therefore, in the interest of performing substantial justice to the parties, and in accordance with principles of substantive law, the buyer is awarded the sum of $2500. The sum of $2500 that was tendered on July 8, 2007 was the only deposit paid "upon acceptance" and according to the plain language of the contract, was to be returned if the transaction did not close provided there was no fault on the part of the buyer.

Judgment for the buyer for $2500 plus the $20 filing fee.

ENTERED: Canandaigua, New York
DATED: July 30, 2012

Hon. Stephen D. Aronson
City Court Judge

"An appeal from this judgment must be taken no later than the earliest of the following dates: (I) thirty days after receipt in court of a copy of the judgment by the appealing party, (ii) thirty days after personal delivery of a copy of the judgment by another party to the action to the appealing party (or by the appealing party to another party), or (iii) thirty-five days after the mailing of a copy of the judgment to the appealing party by the clerk of the court or by another party to the action."

Exhibits will be held for 30 days at which time they will be destroyed, if not picked up.