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SHORT FORM ORDER

INDEX No. 09-18632

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 10-28-10 (#004)
MOTION DATE 11-18-10 (#005)
ADJ. DATE 2-23-12
Mot. Seq. # 004 - MD
005 - XMD

LORRAINE M. YARDE, Plaintiff, - against - MELANIE ARTOGLOU and KATHLEEN A. NOCELLA Individually and as Tenants in Common CLASSIC HOMES, INC., and WILLIAM T. LAVELLE, Attorney at Law, Defendants.	MARK R. BASILE, ESQ. Attorney for Plaintiff 736 Carlisle Road Jericho, New York 11753 LAVELLE & MENECHINO, LLP Attorney for Defendants 57 East Main Street Patchogue, New York 11772

Upon the following papers numbered 1 to 40 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 16; Notice of Cross Motion and supporting papers 17 - 34; Answering Affidavits and supporting papers 35 - 40; Replying Affidavits and supporting papers __; Other __; it is,

ORDERED that plaintiff's motion for summary judgment in her favor on the complaint and the counterclaims is denied; and it is further

ORDERED that defendants' cross-motion for an order granting summary judgment in their favor on the counterclaims, dismissing plaintiff's complaint, and terminating the notice of pendency filed against the subject premises is denied.

On May 14, 2008, plaintiff Lorraine Yarde entered into a written contract with defendants Melanie Artoglou and Kathleen Nocella for the purchase of real property known as 62 Winston Drive, Smithtown, New York. The contract states, among other things, that upon signing, plaintiff was required to make a down payment of $110,000, and that such sum would be held in escrow by defendant William LaVelle. Upon execution and delivery of the agreement, plaintiff paid the required down payment into escrow. On June 16, 2008, plaintiff notified defendants in writing that her application for a mortgage was denied, and requested the return of her down payment. In response to defendants' request for further proof of the denial, plaintiff provided defendants with a copy of a letter by Citimortgage Inc., dated July 1, 2008, notifying defendants that her mortgage application was denied because her credit report indicated, among other things, insufficient income and delinquent and/or excessive liabilities.

Subsequently, the parties entered an amended agreement which reduced the sales price, promised the installation of an indoor swimming pool and spa on the property, and extended the closing date to February 15, 2009. However, by letter dated March 30, 2009, plaintiff informed defendants she was unable to obtain mortgage financing for purchase of the property as a result of financial hardship due to the loss of her employment and her mother's illness, and she requested the return of her down payment. The letter included a report by Hudson City Savings Bank informing plaintiff of its denial of plaintiff's application for a mortgage loan. Shortly afterwards, on April 6, 2009, defendant William LaVelle faxed a response to plaintiff stating she had previously agreed that any unpaid extras would be deducted from the deposit, and that he was awaiting a list of those extras from his clients and would contact her within one week.

Plaintiff filed a notice of pendency on the subject premises on May 12, 2009, and commenced the instant action. The complaint also names Classic Homes Inc. as a defendant to the action. Classic Homes, which was listed as the title owner of the subject property at the time the action was commenced, is allegedly owned and operated by David Artoglou and Robert Nocella. Plaintiff's complaint includes causes of action for breach of contract and conversion. By her complaint, plaintiff alleges defendants breached the mortgage contingency clause contained in the contract for the sale of the premises by refusing to return her down payment despite proof of her unsuccessful efforts to obtain a mortgage loan. The complaint further alleges defendants lacked the capacity to close the transaction and deliver clear title of the property because, among other things, they divested their interest in the property prior to the proposed closing date and failed to obtain required certificates of occupancy from the Smithtown Building Department. Defendants' answer denies plaintiff's allegations and asserts counterclaims for breach of contract and abuse of process.

Plaintiff now moves for summary judgment in her favor on the complaint and counterclaims arguing she complied with the mortgage contingency clause by providing defendants with proof of her unsuccessful efforts to obtain a mortgage loan within the required time period. She avers that, in any event, defendants were unable to deliver clear title to the property, because they failed to obtain the required certificate of occupancy and divested their interest in the property on September 29, 2008, when they transferred title to the premises to Tiberius Angel Realty, LLC. Plaintiff also asserts that defendants' claim for the deduction of unpaid extras from the down payment based upon alleged verbal agreements is barred by the terms of their agreement and the Statute of Frauds. In opposition, defendants argue plaintiff's motion should be denied, as she failed to submit a complete copy of the pleadings, namely her verified answer to their counterclaims, with her moving papers. Defendants also assert they did not divest their interest to the premises, as the alleged deed purporting to transfer title to the property was held in escrow to secure a loan against the property and not made effective until June 24, 2009, seven months after the date of closing. Defendants further aver triable issues exists as to whether plaintiff provided them with a fraudulent loan rejection notice, and whether she knowingly hindered them from obtaining the required certificate of occupancy by failing to pay for the completion of an indoor spa on the premises.

Defendants cross-move for an order granting summary judgment in their favor on their counterclaims, dismissing plaintiff's complaint against them, and terminating the notice of pendency filed against the subject premises. Defendants contend that plaintiff's March 30, 2009 letter constituted

an anticipatory breach of their agreement because the amended contract did not incorporate the original mortgage contingency clause and precluded plaintiff from asserting her failure to obtain a mortgage loan as a valid ground for cancelling the agreement. Defendants also assert that even if the mortgage contingency clause had been incorporated into the amended agreement, plaintiff failed to provide adequate notice of her failure to obtain a mortgage loan until 116 days after the closing date. Alternatively, defendants request, should their cross-motion be denied, that the Court cancel plaintiff's notice of pendency and permit them to file an undertaking in an amount equivalent to the down payment.

Paragraph three of the purchase agreement states, in pertinent part, that "closing shall take place . . . 10 days from the date Purchaser's attorney receives a copy of the final certificate of occupancy . . . In the event the dwelling or its environs are not completed, but are substantially completed and habitable, on the date set by Seller for closing of title, same shall not constitute objection to closing title, provided Seller shall deposit with his attorney a sum acceptable to Purchaser sufficient to ensure completion of any items within 90 days after closing. . . Issuance of a Permanent Certificate of Occupancy shall signify that a Home is habitable." The agreement also includes a mortgage contingency clause, which provides as follows:

> This purchase agreement is subject to and contingent upon purchaser obtaining, at its own cost and expense within 45 days from the date of this agreement, a mortgage loan commitment for a loan in the amount set forth in paragraph 2 A of this agreement . . . In the event purchaser shall be unable to obtain such mortgage commitment within 30 days from such date, either party may cancel this agreement by giving the other party written notice to that effect after the expiration of such 45 day period. In the event either party elects to cancel this contract as described above, upon return of all monies deposited hereunder, the parties shall be released from all liability hereunder.

The parties December 19, 2008 letter amending the purchase agreement further provides that the closing date would be amended to on or before February 15, 2009, the purchase price reduced to $1,100,000, and that the seller agrees to construct a 40 x 20 gunite pool on the premises. The letter also requests the purchaser be reminded "that all extras have to be paid for at the time of the order pursuant to the terms of the Contract, otherwise the Seller will not be obligated to add such extras."

Initially, the Court notes that while a movant's failure to include a complete copy of the pleadings is ordinarily grounds for denial of a summary judgment motion (*see* ***Wider v Heller***, 24 AD3d 433, 805 NYS2d 130 [2005]), such a procedural defect may be overlooked if the record is sufficiently complete and the opposing party has not been prejudiced (*see* CPLR 2001; *see also* ***Welch v Hauck***, 18 AD3d 1096, 795 NYS2d 789 [3d Dept 2005]; ***Julien v New Greenwich Gardens Assoc., LLC***., 21 Misc 3d 1132 [A], 875 NYS2d 821 [Sup Ct, Kings County 2008]). Thus, notwithstanding plaintiff's failure to include a copy of her answer to defendants' counterclaims with her moving papers, to the extent such pleading has been included in defendants' cross-motion, the record is sufficiently complete, and the Court may decide the motion on its merits (*see* ***Welch v Hauck***, *supra*; ***Julien v New Greenwich Gardens Assocs.***, *supra*).

On a motion for summary judgment the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden shifts to the opposing party to demonstrate that there are material issues of fact. Mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]). However, the court's function is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

The common law elements for breach of contract are: (1) formation of a contract between plaintiff and defendant; (2) performance by plaintiff; (3) defendant's failure to perform; and (4) resulting damage (*see* ***Furia v Furia***, 116 AD2d 694, 498 NYS2d 12 [2d Dept 1986]). "A familiar and eminently sensible proposition of law is that, when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms . . . and evidence outside the four corners of document is generally inadmissible to vary the writing" (***W.W.W. Assoc. v Giancontieri***, 77 NY2d 157, 162, 565 NYS2d 440 [1990]). However, extrinsic evidence of the parties' intent may be considered if their agreement is ambiguous (*see* ***Greenfield v Philles Records***, 98 NY2d 562, 753, 750 NYS2d 565 [2002]). While silence does not equate to contractual ambiguity (***Greenfield v Philles Records***, *supra,* at 753, 750 NYS2d 565), an omission as to a material issue can create an ambiguity and allow the use of extrinsic evidence where the context within the document's four corners suggests that the parties may have intended a result not expressly stated (*see* ***Louis Dreyfus Energy Corp. v MG Ref. & Mktg., Inc.***, 2 NY3d 495, 500, 780 NYS2d 110 [2004]). Resolution of such ambiguities is for the trier of fact (*see* ***State v Home Idem. Co.***, 66 NY2d 669, 495 NYS2d 969 [1985]).

Moreover, to place a seller in default for a claimed failure to provide clear title, the purchaser must first tender performance and demand good title (*see* ***Steinberg v Linzar***, 27 AD3d 450, 812 NYS2d 565 [2d Dept 2006]). Such tender of performance by the purchaser is excused only if the title defect is not curable (*see* ***Cohen v Kranz***, 12 NY2d 242, 238 NYS2d 928 [1963]; ***Ilemar Corp. v Krochmal***, 44 NY2d 702, 405 NYS2d 444 [1978]). Although it is not necessary that a deed conveying ownership of property be recorded (*see* ***Cayea v Lake Placid Granite Co.***, 245 AD2d 659, 665 NYS2d 127 [1997]), it is a well-established rule that delivery of the deed with intent to transfer title is required and the absence thereof will render the attempted transfer of ownership ineffective (*see* ***219 Broadway Corp. v Alexander's Inc.***, 46 NY2d 506, 414 NYS2d 889 [1979]). While there is a strong presumption that a deed purporting to transfer ownership in real property has been delivered and accepted, this presumption may be overcome by evidence of the parties' actual intent (*see* ***Manhattan Life Ins. Co. v Continental Ins. Cos.***, 33 NY2d 370, 353 NYS2d 161 [1974]; ***Janian v Barnes***, 284 AD2d 717, 727 NYS2d 182 [2001]). Thus, whether a deed is absolute or is only a security device is a question of intent (*see* ***Finnegan v Brown***, 43 AD2d 812, 350 NYS2d 830 [4th Dept 1973]), which may be discerned from the course of dealings between the parties (*see* ***Basile v Erhal Holding Corp.***, 148 AD2d 484, 538 NYS2d 831 [1989], *lv denied* 75 NY2d 701 [2d Dept 1989]).

Here, the submissions on the motion and the cross-motion for summary judgment raise numerous issues of fact and credibility which cannot be resolved as a matter of law (*see* ***Freeman Lbr. Co. v A.C. Dutton Lbr. Corp.***, 220 AD2d 641, 632 NYS2d 965 [2d Dept 1995]; *see also* ***Winegrad v New York Univ. Med. Ctr.***, *supra*; ***S.J. Capelin Assoc. v Globe Mfg. Corp.***, 34 NY2d 338, 357 NYS2d 478 [1974]). Although plaintiff submitted as proof of an incurable defect to clear title a copy of a deed, executed by defendants on September 29, 2008, transferring the subject premises to Tiberius Angel Realty LLC, in opposition defendants submitted a copy of proof of actual recording of the deed on June 24, 2009, and the affidavit of Kathleen Nocella stating the transfer was executed to secure a construction loan and was held in escrow until it was clear plaintiff would not purchase the subject premises. Inasmuch as no additional evidence regarding the purpose of the purported security transfer or defendants' course of dealings with Tiberius Angel Realty LLC has been submitted, plaintiff's application for summary judgment on the cause of action for breach of contract is denied, as a material triable issue of fact exists as to whether the deed was transferred with the intent to convey ownership or merely as a security device (*see* ***Dipasquale v M.J. Ogiony Bldrs., Inc.***, 60 AD3d 1338, 875 NYS2d 373 [4th Dept 2009]; ***Godell v Rosetti***, 52 AD3d 911, 859 NYS2d 770 [3d Dept 2008]; ***Finnegan v Brown***, *supra*). The existence of this triable issue also precludes summary judgment in plaintiff's favor on her cause of action for conversion of her down payment as defendants' continued possession of the down payment is lawful until plaintiff proves her right to its return (*see* ***Bradley v Roe***, 282 NY 525, 27 NE2d 35 [1940]).

As for the portion of defendants' cross-motion alleging plaintiff anticipatorily repudiated the agreement, the existence of an issue of fact as to whether defendants were able to deliver clear title to plaintiff precludes summary judgment in their favor on their counterclaim for breach of contract (*see* ***Cohen v Kranz***, *supra*; ***Eurovision 426 Dev. v 26-01 Astoria Dev., LLC***, 80 AD3d 656, 915 NYS2d 288 [2d Dept 2011]; ***Matter of Hicks***, 72 AD3d 1085, 899 NYS2d 371 [2d Dept 2010]). Moreover, the amended contract is silent as to whether it incorporated the mortgage contingency clause contained in the original contract, or whether it provided defendants with a "guaranteed" sale by deleting the mortgage contingency clause altogether. Such silence renders the contract ambiguous and raises a triable issue that must be resolved by the trier of fact (*see* ***Louis Dreyfus Energy Corp. v MG Ref. & Mktg., Inc.***, *supra*; ***State v Home Idem Co.***, *supra*).

Further, a triable issue exists as to whether plaintiff entered ancillary agreements with defendants and/or independent contractors for the installation of "extras," such as additional fixtures and facilities within the subject premises, and, if so, whether her failure to render complete payment for these improvements hindered defendants from obtaining required certificates of occupancy. While General Obligations Law § 15-301 protects parties against oral modifications to a written contract, it only prohibits "executory" oral modifications (*see* ***Rose v Spa Realty Assoc.***, 42 NY2d 338, 397 NYS2d 922 [1977]). Once executed, even partially, the oral agreements may be proved (*see* ***Rose v Spa Realty Assoc.***, *supra,* at 343, 397 NYS2d 922). The Court may consider not only past oral exchanges, but also the conduct of the parties as proof of the existence of such modifications (*see* ***Rose v Spa Realty Assoc.***, *supra,* at 343, 397 NYS2d 922; ***Sudit v Schapiro***, 57 AD3d 968, 872 NYS2d 140 [2d Dept 2008]; ***B. Reitman Blacktop, Inc. v Missirlian***, 52 AD3d 752, 860 NYS2d 211 [2d Dept 2008]). Thus, while plaintiff contends that payment for all "extras" was included in the final sale price and that any additional alleged oral agreements are precluded by the Statute of Frauds, defendants' submissions,

including affidavits and emails by Frank Norberto requesting payment from plaintiff for completion of the spa and pool, raise material issues of fact and credibility to be resolved at trial (*see* ***Roth v Barreto***, *supra*; ***O'Neill v Fishkill***, *supra*).

As for defendants' counterclaim for abuse of process, the elements of the tort of abuse of process are as follows: (1) regularly issued process; (2) an intent to do harm without justification; and (3) use of the process in a perverted manner to obtain a collateral objective (***Curiano v Suozzi***, 63 NY2d 113, 116, 480 NYS2d 466 [1984]). Although the filing of a notice of pendency may be the basis for an abuse of process claim where the filing party had no interest in the disputed premises and filed the instrument with an intent to do harm without excuse or justification (*see* ***Felske v Bernstien***, 173 AD2d 677, 570 NYS2d 331 [2d Dept 1991]), here, the second paragraph of the parties' agreement specifically provides that "[a]ll sums paid on account of this agreement are hereby made liens upon said premises." Moreover, defendants failed to submit any evidence that plaintiff filed the notice of pendency in order to obtain a collateral objective other than the return of her down payment. Thus, defendants failed to establish their *prima facie* entitlement to summary judgment on their counterclaim for abuse of process (*see* ***Hornstein v Wolf***, 67 NY2d 721, 499 NYS2d 721 [1986]; ***Curiano v Suozzi***, *supra*; ***Segreto v Petrelli Assocs.***, 285 AD2d 499, 728 NYS2d 488 [2d Dept 2001]).

With regard to defendants' requests for the cancellation of plaintiff's notice of pendency and the posting of an undertaking, a notice of pendency is authorized to be filed in an action seeking a judgment that would affect the title to, or possession, use, or enjoyment of, real property (CPLR 6501; *see* ***5303 Realty Corp. v O & Y Equity Corp.***, 64 NY2d 313, 486 NYS2d 877 [1984]; ***Nastasi v Nastasi***, 26 AD3d 32, 805 NYS2d 585 [2d Dept 2005]). While an action merely seeking the return of a purchaser's down payment is not ordinarily an appropriate ground for the imposition of a notice of pendency (*see* ***Tsiporin v Ziegel***, 203 AD2d 451, 610 NYS2d 603 [2d Dept 1994]), as mentioned above, the parties' agreement specifically provides for the imposition of a lien against the subject premises for any sums paid under the contract. Thus, the portion of defendants' cross-motion seeking the cancellation of the notice of pendency is denied. Furthermore, in light of the parties' aforementioned agreement that a lien be filed against the property in lieu of the recovery of any sums paid under the contract, the portion of defendants' motion which seeks permission to post an undertaking in connection with plaintiffs' action is denied (*see generally* ***5303 Realty Corp. v O&Y Equity Corp.***, *supra*).

Dated: November 1, 2012

Hon. Joseph Farneti
Acting Justice Supreme Court

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**