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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. RICHARD F. BRAUN J.S.C. PART PART 22
Justice

Siegel, A

-v-

Fuk. L Kate, Escrow agent et al!

INDEX NO. 122592-01
MOTION DATE 9/5/02
MOTION SEQ. NO. 02
MOTION CAL. NO.

The following papers, numbered 1 to 4 were read on this motion ~~to~~ for Summary Judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Notice of cross motion Answering Affidavits — Exhibits	2
Replying Affidavits	3, 4

SCANNED JAN 10 2003

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is granted to the extent of awarding plaintiff summary judgment to plaintiff against defendant Alice Yao declaring that the subject contract of sale between them is cancelled and that the escrow agent, defendant Leon K. Luk of defendant Fuk & Luk, P.C. return the downpayment thereunder to plaintiff, plus any accrued interest,

and it is further

ORDERED that, upon searching the record, summary judgment is awarded dismissing the counterclaim, and it is further

ORDERED that the cross motion is denied.

This constitutes the decision and order of the Court. Separate Opinion.

ENTER:

Dated: New York, New York, December 19, 2002

J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 23

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ANDREW SIEGEL, Index No. 122592/01

Plaintiff, **OPINION**

-against-

LEON K. LUK, LUK & LUK, P.C., as Escrow Agent, and ALICE YAO,

Defendant.

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RICHARD F. BRAUN, J.:

In this action for a judgment declaring a contract of sale for a condominium unit cancelled and returning to plaintiff the $33,500 downpayment under the contract, plaintiff moves for summary judgment. Alice Yao (defendant) counterclaimed for breach of the contract and a judgment that she is entitled to keep the downpayment. This court granted a prior motion by defendants Leon K. Luk and Luk & Luk, P.C., defendant's attorney and her law firm, that they be permitted to pay the downpayment into court, and, upon doing so, that they be discharged as escrow agent from any further liability in this action. Defendant cross-moves for an order cancelling the notice of pendency filed in this action, and awarding defendant her costs and expenses, including reasonable attorney's fees. By stipulation, the parties agreed to cancel the notice of pendency.

On June 27, 2001, plaintiff and defendant entered into a contract of sale in which plaintiff was to purchase defendant's condominium apartment at 250 South End Avenue, unit number 4E, in Battery Park City in Lower Manhattan. At the time, plaintiff was residing in apartment 3E in the building. Pursuant to the contract, plaintiff was to receive title to the air conditioners and certain other personal property in defendant's apartment. Plaintiff deposited $33,500 in escrow with

defendant Leon K. Luk as a downpayment under the contract.

The original date of closing of title for the subject apartment under the contract of sale was August 30 or 31,2001. The closing was adjourned to September 12,2001. On September 11,2001, the devastating, tragic terrorist attacks on the World Trade Center occurred. The subject building is very near "Ground Zero" where the World Trade Center had stood. Access to the subject building and thus the apartment was restricted until about September 24,2001. Dust and debris were in the courtyard of the building, and dust one inch thick and soot were inside the subject apartment. The apartment and the air conditioners therein had to be cleaned. Defendant asserts that the apartment was cleaned and ready for occupancy in early October 2001. Plaintiff submits photographs as of November 12, 2001 that show large piles of soot on the window sill of the subject apartment, and alleged contamination on the facade of the building which was still being cleaned on that date.

Under paragraph 20 (a) of the contract of sale, defendant as the seller of the apartment assumed the risk of loss or damage to the apartment or personal property included in the sale of the apartment caused by any kind of casualty and had no obligation to make repairs or replace any loss or damage unless she elected to do so. If loss or damage occurred, defendant had to notify plaintiff buyer by the earlier of the date of the closing or the tenth day after the date of the loss or damage of (1) such loss or damage, (2) whether she elected to repair or restore the apartment and personal property, and (3) what would be the further adjourned date of the closing. Under paragraph 14 of the contract, all notices under the contract had to be in writing, and sent by registered or certified mail, return receipt requested, or delivered in person or by overnight courier.

It is undisputed that no such timely notice was given by defendant to plaintiff. Plaintiff, not surprisingly, admits that he knew of the destruction of the World Trade Center but complains that he did not know of the extent of the damage to the subject apartment and had no idea what defendant

intended to do in relation to the apartment. Plaintiff's attorney reiterated in a September 26, 2001 letter to defendant's attorney an earlier request by plaintiff to have the contract of sale cancelled and his downpayment refunded to him. In the letter, plaintiff's attorney stated:

> Due to the horrendous devastation that occurred at the World Trade Center leaving the subject premises inaccessible and unsafe due to poor *air* quality, potential structural and foundation problems, dirt, filth, acrid and potentially unsafe air, lack of transportation both above and below ground, etc., you must agree that the premises and the common areas are not in the same condition as they were contemplated to be in the contract of sale.

Defendant's attorney rejected the request to cancel the contract in an October 22, 2001 letter to plaintiff's counsel That letter still did not give the notice required as to a new closing date, and did not directly address the damage to the subject apartment and the personal property therein being purchased by plaintiff, and defendant's intentions pertaining thereto. Plaintiff states in his affidavit in support of his motion that he needed a place to live, had no idea of defendant's intentions until October 22,2001, and by then he was making plans to buy elsewhere. It was not until a November 20, 2001 letter from defendant's attorney to plaintiffs attorney that defendant finally attempted to set a new closing date of December 20, 2001.

The contract of sale clearly provides that defendant had an obligation to give notice to plaintiff of defendant's intentions regarding restoration of the apartment and its personal property being sold to plaintiff, including the air conditioners, and of an adjourned closing date. Plaintiff was entitled to such notice so that he could make appropriate arrangements.

Even if it was difficult under the circumstances at the time for defendant to give notice to plaintiff (*cf. Gutowski* v *Louie*, ___ Misc 2d ___, 2002 NY Slip Op 22719 [Sup Ct, NY County, Nov. 12, 20021 [where a buyer sent a letter by FedEx Express and facsimile transmission the night of September 11,2001 to cancel the purchase by his wife and him of a condominium unit in lower Manhattan]), performance by the date of the closing or at least within ten days of the date of damage

or loss was not impossible (*cf. Metpath, Inc. v Birmingham Fire Ins. Co. of Pa*, 86 AD2d 407, 411 [1st Dept 1982] [where impossibility of performance under a contract was caused by government action, performance was excused]).

Thus, due to defendant's failure to comply with a material provision of the contract of sale and the ensuing prejudice to plaintiff (see ***Matter of Brandon*** *[Nationwide Mut. Ins. Co.]*, 97 NY2d 491, 496 [2002]), this court by its separate decision and order has awarded summary judgment to plaintiff declaring the contract of sale cancelled (see *Corazza* v *Jacobs*, 277 AD2d 52, 53 [1st Dept 2000]) and ordering that the downpayment be returned to plaintiff. Furthermore, the court has searched the record, pursuant to CPLR 3212 (b), and dismissed the counterclaim.

CPLR 6514 (c) states:

> The court, in an order cancelling a notice of pendency under this section, may direct the plaintiff to pay any costs and expenses occasioned by the filing and cancellation, in addition to any costs of the action.

CPLR 6514 (d) provides:

> At any time prior to entry of judgment, a notice of pendency shall be cancelled by the county clerk without an order, on the filing with him of
>
> 1. an affidavit by the attorney for the plaintiff showing which defendants have been served with process, which defendants are in default in appearing and answering, and which defendants have appeared or answered and by whom, and
>
> 2. a stipulation consenting to the cancellation, signed by the attorney for the plaintiff and by the attorneys for all the defendants who have appeared or answered including those who have waived all notices, and executed and acknowledged, in the form required to entitle a deed to be recorded, by the defendants who have been served with process and have not appeared but whose time to do so has not expired, and by any defendants who have appeared in person.

Here, the notice of pendency has been cancelled by stipulation between the attorneys for the parties and an affidavit by plaintiff's attorney pursuant to CPLR 6514 (d) (1). Therefore, an order

cancelling the notice of pendency is unnecessary, and, because CPLR 6514 (c) only provides for an award of costs where a notice of pendency is cancelled by a court order, **costs** and expenses have not been awarded to defendant. Therefore, the cross motion has been denied.

Dated: New York, New York
Decmber 20,2002

RICHARD F. BRAUN, **J.S.C.**