Schad v Chagas
2005 NY Slip Op 30546(U)
December 19, 2005
Supreme Court, New York County
Docket Number: 104829-2005
Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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KATHERINE SCHAD,

Index No. 104829-2005

Plaintiff,

DECISION/ORDER

-against-

ANTONIA ELIANA ALVES CHAGAS AND
THE 54 EAST 1ST STREET OWNERS CORP.,

Defendants.

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HON. CAROL EDMEAD, J.S.C.

MEMORANDUM DECISION

This action for specific performance, injunctive relief, breach of contract, and fraud involves a contract of sale (the "Contract") of a cooperative apartment, Unit 1B, (the "Apartment") and capital stock ("Stock") of defendant The 54 East 1st Street Owners Corp. (the "Co-op"), between defendant, Antonia Eliana Alves Chagas, ("Chagas" or the "Seller") and plaintiff, Katherine Schad (Schad or the "Purchaser").

Defendant Chagas now moves for summary judgment (CPLR 3212) dismissing the Complaint in its entirety. Plaintiff Schad opposes the motion. The motion is granted.

Factual Background

Chagas owns and holds 499 shares of the Co-op, which pertain to the Apartment at issue pursuant to a proprietary lease (the "Lease") (*see* Chagas Affidavit and Stock Certificate, dated January 28, 2003). Under a separate lease agreement dated April 7, 2004 (the "Sublease"), Chagas and her husband, Plauto Baptista, sublet the Apartment to Thu Huu Thu Do (the "Subtenant"). The Sublease, provides in pertinent part, that

> As there are possibilities for the sale of the above property [the Apartment], Thu Huu Thu Do agree [sic] to provide access to prospectus buyer, such visits will have at least 2 days notice. In return, Plauto Baptista will give Thu Huu Thu Do at least four months notice to request the vacancy of the apartment in case of sale.
> (Sublease, page 2 of 4, last paragraph)

Subsequently, when the Apartment was listed for sale, Schad went to look at the Apartment, and was told by Jeff Silverstein, the real estate broker, that "there was a tenant in the apartment" and that "the tenant knew they had to get out within . . . months' notice" (Schad EBT, 17-19). On September 10, 2004, Schad and Chagas executed the Contract, which set the Closing date four months away on January 6, 2005.

As relevant to this action, paragraph 16 of the Contract provides:

> Seller's Inability
> 16.1. If Seller shall be unable to transfer the items set forth in ¶ 2.1 [the Stock and Lease] in accordance with this Contract for any reason other than Seller's failure to make a required payment or other willful act or omission, then Seller shall have the right to adjourn the Closing for periods not exceeding 60 calendar days in the aggregate, but not extending beyond the expiration of Purchaser's Loan Commitment Letter, if ¶1.20.1 or 1.20.2 applies.
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> 16.2 If Seller does not adjourn the Closing or (if adjourned) on the adjourned date of Closing Seller is unable to perform, then unless Purchaser elects to proceed with the Closing without abatement of the Purchase Price, either Party may cancel this Contract on Notice to the other Party given at any time thereafter.
>
> 16.3 In the event of such cancellation, the sole liability of the Seller shall be to cause the Contract Deposit to be refunded to Purchase and to reimburse Purchaser for the actual costs incurred for Purchaser's lien and title search, if any.

Five days thereafter, on September 15, 2005, Chagas and her husband provided written notice (the "Notice") to the Subtenant that the Apartment "has been sold" and that it was "promised to be delivered to the buyer on January 15th 2005." The Notice expressly gave the

Subtenant "four month notice to vacate" the Apartment. This was followed by a letter on November 2, 2005, indicating Silverstein's attempts to obtain access to the Apartment for the "future owner" to take measurements, and to reconfirm "your move out date for January 15th. 2005."

On November 23, 2004, the Subtenant notified Chagas and her husband that "due to my busy schedule . . . I intend to stay at my apartment, #1B until the complete term of my lease, end of April. Also, I will not grant access into my apartment while I am living there. . . ." In response, counsel for Chagas notified the Subtenant of the Subtenant's obligation to vacate the Apartment, and Chagas' intent to hold the Subtenant liable for any damages, including legal fees, incurred by Chagas as a result of any litigation commenced or damages sustained by the Purchaser.

On December 20th and 22nd, Schad's counsel urged Chagas' counsel to commence a lawsuit and seek injunctive relief against the Subtenant, in order that the Closing could take place in January. When Chagas' counsel was notified that the appraiser was denied access to the Apartment, he notified the Subtenant on January 3, 2005, that the Subtenant's refusal to grant access to the appraiser for purposes of processing the Purchaser's loan, was "causing damage upon continued damage [and that the Subtenant will be held] personally responsible for absolutely everything." On January 4, 2005, Chagas' counsel proposed three options to Schad's counsel as a result of the Subtenant's actions: (1) to close as scheduled with the Subtenant in place, (2) close the end of April when the tenant vacates, or (3) "if the [Purchaser] insists," cancel the contract.

On January 13 and 20, 2005, the Subtenant then informed Chagas that Chagas could buy

the Subtenant out of the Sublease, which was then due to expire by its terms in 3 ½ months, as well as compensate her for personal time in packing and moving, and the movers' and broker's fees. Meanwhile, on January 18, 2005, Chagas had commenced a holdover proceeding against the Subtenant, and notified Schad of same by fax on January 19, 2005. The first court appearance in the holdover proceeding was scheduled for January 31, 2005.

Notwithstanding, Schad then served a letter imposing a "Time of the Essence" obligation to close on February 22, 2005[1] (the "Time of the Essence Closing date").

On January 31, 2005, the holdover proceeding was scheduled for trial on February 10, 2005.[2] The Holdover Proceeding was subsequently dismissed after trial for failure to establish a *prima facie* case.

Having lost the trial, on February 15th, Chagas offered additional proposals to Schad: (1) to close on the "Time of the Essence" date of February 22, 2005 with an assignment of all Schad's rights to Subtenant's rent, (2) adjourn the closing for 60 days or until the Subtenant vacates, or (3) cancel the Contract with a return of the deposit, and (4) close the sale on February 22, 2005 with the tenant in place, while holding the sums in escrow, and any future proceeding to dispossess the Subtenant at Chagas' cost and expense.

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[1] Schad's counsel was willing to extend the Time of the Essence Law Date to the end of February if Chagas obtained a Stipulation of Discontinuance of the Holdover Proceeding providing for a February 28, 2005 move out, issuance of a warrant of eviction, an allowance for an immediate scheduling of eviction with an effective date the day after the scheduled move out. (Exh. 15 to the Moving Papers).

[2] On the day before trial, Chagas' counsel requested the Purchaser's counsel's appearance as a witness for the Holdover Proceeding, and to also be present for the negotiations with the Subtenant's counsel. Chagas' counsel also outlined what the Subtenant had agreed to, *to wit*: consent to a judgment of possession, warrant to issue forthwith, and a stay of execution until April 30, 2005, which would assure physical possession by the Purchaser on May 1, 2005. (Exh. 16 to the Moving Papers).

Schad agreed to extend the Closing date to February 23, 2005, but the terms of the proposal were not agreed to.[3] On February 22, 2005, the Stock and Lease, as well as ancillary documents to closing were tendered by Baptista (Chagas' attorney-in-fact) and their counsel, but counsel for Schad rejected same as a result of the Subtenant's occupancy. Moreover, Schad was not present, no Power of Attorney for Purchaser was presented, and no bank was present. Nor was the Purchase Price tendered. Since Schad would not adjourn the Closing, by letter dated February 23, 2005, Chagas cancelled the Contract pursuant to paragraph 16 of the Contract and returned the down payment. In response, Schad rejected Chagas' cancellation, returned the check, and took the position that since Chagas chose to sublet the Apartment and failed to deliver the Apartment vacant and free of all occupant and rights of possession pursuant to the Contract, Chagas was in default, and responsible for damages resulting therefrom.

This action ensued.

Motion

As to Schad's first cause of action for specific performance, Chagas argues that even assuming the Contract was not rightfully terminated, since Schad was not ready, willing or able to close on the Time of the Essence Closing date, she is not entitled to specific performance. Schad did not tender the Purchase Price, appear for the Time of the Essence Closing, and did not have a loan commitment effective on that date. The latest version of Schad's loan commitment expired on January 28, 2005, and she testified at her deposition that she intended to pay the Purchase Price in large part through a mortgage loan from a bank. Further, since Schad had no loan money available for the Time of the Essence Closing, her refusal to agree to the any of the

[3] Chagas' husband claims that the February 23, 2005 Closing date was not agreed to by Chagas' counsel.

proposals is incredible.

As to Schad's second cause of action for injunctive relief, she cannot establish a likelihood of success on the merits of her claim for specific performance and therefore, this cause of action should likewise be dismissed.

Chagas also argues that the third and fourth causes of action for breach of contract lack merit. Paragraph 13 of the Contract speaks to the Purchaser's remedies in the event of default by the Seller, and since there has been no default by Chagas, Paragraph 13 is irrelevant. Paragraph 16, however, addresses circumstances that may occur between execution of the Contract and the Closing, outside the control of the Seller, making the Seller's ability to close impossible. Chagas argues that the Contract permitted termination of same in the event the Seller, other than for a "wilfull act or omission" was unable to deliver title (the stock and lease) in accordance with the terms of the Contract. Chagas maintains that through no fault of her own, she was unable on the Time of the Essence Closing date, to deliver the Apartment vacant of all subtenants, and Chagas was entitled to cancel the Contract pursuant to paragraph 16 of the Contract. But for the actions of the Subtenant, which were out of Chagas' control, Chagas was prepared to close the transaction. According to Chagas, it was Schad who would accept no other alternative, declared the Time of the Essence Closing, who would not assist in negotiations with the Subtenant or appear in the Holdover Proceeding, and refused to adjourn the Time of the Essence Closing date. Also, Schad used the Subtenant's actions to extract concessions from Chagas. Further, Chagas made no misrepresentations within the Contract.

Furthermore, the fifth and sixth causes of action for fraud cannot stand, given that this action is one based on contract. Plaintiff's fraud claims are based on the allegation that at the

time the Contract was executed, Chagas represented, in paragraph 4.1.7 of the Contract, that she "has not entered into . . . and has not actual knowledge of any agreement (other than the lease) . . affecting title to the Unit or its use and/or occupancy after closing, or which would be binding on or adversely affect Purchaser after closing. . . ." If Schad's claim is based on the Subtenant's occupancy after the Time of the Essence Closing date, any alleged representation regarding a post-closing state of affairs is irrelevant since the Closing never occurred. Any claim is based on Chagas' alleged failure to alert Schad as to the subtenancy also fails, since Schad admitted that she knew of the subtenancy.

In opposition, Schad contends that under paragraph 4.1.7 of the Contract, Chagas intentionally and deliberately misrepresented to Schad that there was no lease or sublease agreement that would affect the Apartment or its use or occupancy after Closing, fully knowing that this representation was false.

The Contract specified the Closing date to be January 6, 2005 and Schad obtained a mortgage commitment on November 10, 2004 as required under the Contract for the closing. Schad argues that Chagas failed and refused to take reasonable steps to effect the Subtenant's vacatur prior to the Closing date, and as a result of her failure to remove the Subtenant, the Subtenant prevented the mortgage appraiser from entering the Apartment. Schad points out that in a letter dated January 4, 2005, Chagas' attorney stated that Chagas was not prepared to spend any more money "in court suing the tenant." On the January 6, 2005 Closing date, Schad was ready, willing and able to acquire title to the Apartment, but Chagas could not close. At the new Time of the Essence Closing date, Chagas was still unable to deliver possession of the Apartment "broom-clean, vacant and free of all occupants and rights of possession" as required, and on

February 23, 2005, the Subtenant still occupied the Apartment. Since Schad was aware on February 22, 2005 that Chagas was still unable to deliver the Apartment vacant, Schad was excused from appearing on the following date, February 23, 2005. Schad's obligation to tender at the Closing was excused once it was evident that Chagas failed and refused to take the necessary actions in good faith to remove the Subtenant from the Apartment. It was impossible for Chagas to abide by the terms of the Contract as long as the Subtenant remained in the Apartment. Further, to complete the mortgage process and formerly renew Schad's commitment, an appraiser needed access to the Apartment, and since Chagas failed to remove the Subtenant from the Apartment or otherwise obtain access, an inspection by the appraiser could not be arranged. Also, although Chagas claims that Schad did not have a mortgage commitment for the Time of the Essence Closing date, Schad argues that her commitment would have been extended again if Chagas had actually complied with paragraph 4.1.7 of the Contract. Since Chagas breached the Contract, by failing to deliver the Apartment pursuant to the Contract and by misrepresenting the status of the Apartment, she never had the option to cancel the Contract.

Furthermore, the fraud claims are viable where fraud induces an innocent party to sign a contract. Schad relied on the representation in paragraph 4.1.7 of the Contract that Chagas would deliver the Apartment free of all tenancies and rights and claims. And, Chagas knew this representation was false when it was made, to induce Schad to sign the Contract.

Schad also argues that Chagas never intended to close. Based on a listing in the *New York Times* Real Estate section, the Apartment was subsequently placed for sale for a price well in excess of the Contract Price. Chagas could have, but decided not to remove the Subtenant, and saw this as an opportunity to breach the Contract and sell the Apartment at a higher price.

For example, Chagas could have bought the Subtenant out the remaining Sublease.

Additionally, Schad argues that the motion is premature because discovery, including a deposition of Mr. Baptista, has been stayed pending this motion. Mr. Baptista's deposition is necessary to oppose this motion, since he was the manager of the Apartment, and aware of what actions were and were not taken to remove the Subtenant. Chagas' deposition indicates she did not manage the day to day affairs of the Apartment, and she deferred many questions to her husband.

In reply, Chagas contends that Schad did not oppose any facts set forth in the motion. It is undisputed that the Apartment was occupied by the Subtenant both at the time the Contract was executed and at the time of Closing. The Subtenant's occupancy beyond the Closing date was the basis of defendant Chagas's inability to close pursuant to the Contract. After Schad's refusal to adjourn the Closing date, Chagas had no choice but to terminate the Contract. Further, there is no issue of fact regarding the reasonable steps Chagas took to ensure that the Apartment would be free of occupants on the Closing date. Although Chagas was not willing to spend any legal fees to remove the Subtenant as of January 4, 2005, her position changed after Schad's counsel offered insight on the law (*see* email dated January 12, 2005). The day after the four-month Notice expired, Chagas commenced a holdover proceeding against the Subtenant. Further, in this case, while Chagas had sublet the Apartment over three months before plaintiff even saw the Apartment, it was done with the provision within the written Sublease permitting termination of the Sublease in the event of a sale. Chagas did not knowingly contract beyond her power; the Sublease provided for its own termination. Plaintiff's allegations that the Subtenant could have been removed for "modest sum" is nothing more than speculation. Additionally, any

issue regarding Schad's mortgage appraiser or her commitment is irrelevant. After Chagas wrote to the Subtenant requesting access for Schad's mortgage appraiser on January 3, 2005, the issue was never again brought to Chagas' attention. On January 20, 2005, less than one month later, Schad declared herself "ready, willing and able" to close. Yet, Schad did not claim that she could not gain access or was denied access; she declared "Time of the Essence." Further, Schad's request for discovery should be denied, as nothing more than a fishing expedition. Schad failed to demonstrate a *prima facie* case, and has not demonstrated that she does not have facts necessary to oppose the motion.

Analysis

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR § 3212 [b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor *(Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390(U) [Sup Ct New York County, Oct. 21, 2003]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential*

Securities Inc. v Rovello, 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212 [b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York, supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562).

It is axiomatic that in order to be entitled to specific performance of a contract, a plaintiff must demonstrate that he was ready, willing and able to perform his obligations under the contract regardless of the defendant's anticipatory breach (*Zev v Merman*, 134 AD2d 555, 521 NYS2d 455 [2d Dept 1987] ; *28 Properties, Inc. v Akleh Realty Corp.*, 309 AD2d 632, 766 NYS2d 18 [1s Dept 2003]). In a contract where time is of the essence, "each party must tender performance on law day" (*Grace v Nappa*, 46 NY2d 560, 565, 415 NYS2d 793, rearg. denied 47 NY2d 952, 419 NYS2d 1028). Schad responds that her Commitment Letter demonstrates that she did obtain the necessary funds, and that she was in fact ready, willing and able to tender, and that it was defendant Chagas who thwarted Schad's attempts to close by failing to provide access to Schad's mortgage appraiser for an extension of the commitment.

The Contract set the original Closing Date as January 6, 2005, and it is uncontested that

Schad was ready, willing and able to close on this date. Since Chagas was unable to deliver the Apartment vacant, Chagas offered to *inter alia*, cancel the contract. However, although the appraiser was denied access to the Apartment on multiple occasions prior to December 30, 2004, and Schad's Commitment Letter expired on January 28, 2005, on January 20, 2005, Schad adjourned the Closing for February 22, 2005 "TIME BEING OF THE ESSENCE." Once Schad set the Closing date as "Time of the Essence," Schad had an obligation to tender full performance on February 22, 2005. In order to sustain her claim for specific performance, Schad must demonstrate that she was ready, willing and able to tender full performance on February 22, 2005, regardless of the defendant's anticipatory breach *to wit*: failure to tender the premises in a vacant, broom-clean condition. However, the record demonstrates that Schad's Commitment Letter expired January 15, 2005, and the underlying documents to the Commitment expired on January 28, 2005, well before the February 22, 2005 Time of the Essence Closing date. The record also demonstrates that Schad knew, at the time she set the Time of the Essence Closing date, that the Subtenant's possession was still at issue. Schad cannot rely on any alleged failure of Chagas to remove the Subtenant and therefore provide access to the appraiser, before the Time of the Essence Closing date, since plaintiff's obligation to fully perform on "Law" day is mandatory for specific performance regardless of a defendant's "anticipatory breach." Schad's conclusory allegation that her commitment "would have been extended again" is insufficient to demonstrate her ability to fully tender on "Law" day, and Schad offers no caselaw in support of her apparent position that a plaintiff may obtain specific performance where plaintiff's inability to fully perform on "Law" day is somehow caused by the defendant. Therefore, Schad's claim for specific performance is dismissed. Since it is uncontested that Schad's claim for injunctive

relief stems from her claim for specific performance, her injunctive relief claim is similarly dismissed as against Chagas and the Co-op.

An action for breach of contract requires proof of (1) a contract, (2) performance of the contract by one party, (3) breach by the other party, and (4) damages (*WorldCom, Inc. v Francisco Sandoval*, 182 Misc 2d 1021 [Sup Ct New York County [1999] *citing Rexnord Holdings v Bidermann*, 21 F3d 522 [2d Cir. 1994]). Schad claims that Chagas breached the Contract by failing to deliver the Apartment pursuant to the Contract, and by violating paragraph 4.1.7 of the Contract. Although the Complaint does not cite to any default provision in the Contract, paragraph 13.2 of the Contract provides that in the event of a default or misrepresentation by Chagas, Schad "shall have such remedies as Purchaser is entitled to at law or equity . . . ."

However, paragraph 16.2 of the Contract provided Chagas with a qualified right to cancel the Contract in the event of her inability to deliver the Apartment pursuant to the Contract. Paragraph 16.2 provides that if, on the adjourned date of Closing, Chagas is unable to perform, then unless Schad elects to proceed with the Closing without abatement of the Purchase Price, "either Party may cancel this Contract on Notice to the other Party given at any time thereafter." The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent (*see Slatt v Slatt*, 64 NY2d 966, 967, 488 NYS2d 645, *rearg denied* 65 NY2d 785, 492 NYS2d 1026 [1985]). "The best evidence of what parties to a written agreement intend is what they say in their writing" (*Slamow v Del Col*, 79 NY2d 1016, 1018, 584 NYS2d 424 [1992]). Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms *(see e.g. R/S Assoc. v New York*

Job Dev. Auth., 98 NY2d 29, 32, 744 NYS2d 358, *rearg denied* 98 NY2d 693, 747 NYS2d 411 [2002]; *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162, 565 NYS2d 440 [1990]). Paragraph 16.2 of the Contract clearly permits the Seller, Chagas, to cancel the Contract after the Closing date if Chagas is unable to perform, unless Schad elects to proceed with the Closing without an abatement in the Purchase Price. Clearly, Chagas was unable to perform on Law day, in that she was unable to deliver the premises in a vacant and broom-clean condition. Since the record demonstrates that Schad was unwilling and did not elect to proceed with the Time of the Essence Closing with the Subtenant in possession, Chagas was permitted to cancel the Contract the day after the closing. The Court notes that prior to the original Closing date, Chagas gave the Subtenant four-months notice in accordance with the Sublease terms in order to effectuate the Subtenant's vacatur, and that before Schad made the Closing "Time of the Essence," Chagas commenced a holdover proceeding against the Subtenant. Therefore, based on the above, there can be no breach of contract claim against Chagas for failing to deliver the Apartment vacant on Law Day, since the Contract expressly permitted her to cancel the Contract if Schad did not elect to proceed to Closing with Chagas' inability so deliver.

With respect to Schad's breach of contract claim arising from Chagas' violation of paragraph 4.1.7 of the Contract, such claim is dismissed. Schad visited the Apartment and was made aware of the Subtenancy before signing the Contract. Although Chagas subsequently stated, in paragraph 4.1.7 of the Contract, that Chagas "has not entered into . . . and has not actual knowledge of any agreement (other than the lease) affecting title to the Unit or its use and/or occupancy after closing, or which would be binding on or adversely affect Purchaser after closing. . . ," it is uncontested that at the time Chagas entered into the Contract, the Sublease

provided for the vacatur of the Subtenant upon four-months notice. The Contract set the Closing and delivery date of the Apartment for four months after the execution of the Contract, and Chagas immediately notified the Subtenant of her request that the Subtenant vacate the Apartment. Notwithstanding the Housing Court's determination to dismiss Chagas' holdover proceeding against the Subtenant, Chagas believed that the Sublease expressly provided for vacatur of the Apartment upon four-months notice, and it is undisputed that on September 15, 2004, Chagas served the Subtenant with a four-month vacate notice in order to timely comply with the original delivery date of January 15, 2005. Therefore, in light of the four-month notice clause in the Sublease, the existence of the Sublease, in and of itself, does not establish that Chagas violated paragraph 4.1.7 of the Contract. Schad failed to raise an issue of fact as to whether Chagas had any basis to know or reasonably should have known, that the Sublease at issue would affect the Apartment's "use and/or occupancy after closing," or "would be binding on or adversely affect Purchaser after closing." As such, Schad's third and fourth causes of action for breach of contract arising from the alleged failure to deliver possession of the Apartment are dismissed.

Similarly, and in light of the above, Schad's fifth and sixth causes of action for fraud, which is based on the alleged misrepresentation in paragraph 4.1.7 of the Contract, lack merit. Moreover, "a cause of action for fraud does not arise when the only fraud charged relates to a breach of contract (*Highland Securities Co. v Hecht*, 145 AD2d 393, 536 NYS2d 67 [1st Dept 1988]). And, "[a] contract action may not be converted into one for fraud by the mere additional allegation that the contracting party did not intend to meet his contractual obligation" (*Id.* citing *Comtomark, Inc. v Satellite Communications Network, Inc.*, 116 AD2d 499, 500, 497

NYS2d 371).

Schad's remaining claims concerning discovery are insufficient to overcome Chagas' entitlement to summary judgment.`

Based on the foregoing, it is hereby

ORDERED that the motion by defendant Antonia Eliana Alves Chagas for summary judgment (CPLR 3212) dismissing the Complaint in its entirety, is granted; and it is further

ORDERED that the Clerk shall enter judgment dismissing the Complaint against all defendants accordingly; and it is further

ORDERED that defendant shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: December 19, 2005

Hon. Carol Robinson Edmead, J.S.C.