

**Washington Realty Owners Group, LLC v 206  
Washington St., LLC**

2012 NY Slip Op 30336(U)

February 7, 2012

Supreme Court, New York County

Docket Number: 603169/2009

Judge: Saliann Scarpulla

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

PRESENT **SALIANN SCARPULLA**

PART 19

Index Number : 603169/2009

WASHINGTON REALTY OWNERS

vs

260 WASHINGTON STREET

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion *is decided in accordance with the accompanying memorandum decision.*

**FILED**

FEB 10 2012

NEW YORK COUNTY CLERK'S OFFICE

Dated: 2/6/12

*Saliann Scarpulla*  
SALIANN SCARPULLA J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 19

----- X  
WASHINGTON REALTY OWNERS  
GROUP, LLC

Plaintiff,

- against-

Index No.: 603169/2009  
Submission Date: 11/30/11

206 WASHINGTON STREET, LLC,

Defendant.  
----- X

For Plaintiff:  
Stacey Van Malden, Esq.  
401 Broadway, Suite 306  
New York, NY 10013

For Defendant:  
Meyner & Landis LLP  
One Gateway Center, Suite 2500  
Newark, NJ 07102

Papers considered in review of this motion for summary judgment:

Notice of Motion . . . . . 1  
Brief in Support  
of Motion. . . . . 2  
Aff in Partial Opposition. . . . . 3  
Reply Mem of Law. . . . . 4

**FILED**

**FEB 10 2012**

NEW YORK  
COUNTY CLERK'S OFFICE

HON. SALIANN SCARPULLA, J.:

In this action to recover damages from the unconsummated sale of commercial property, defendant 260 Washington, LLC ("defendant") moves for summary judgment pursuant to CPLR § 3212 to dismiss the complaint.

In April 2009, defendant entered into a contract to sell commercial property located at 260 Washington Street in Newark, New Jersey (the "premises") to Washington Realty Owners Group, LLC ("plaintiff"). The purchase price was \$1,100,000 and the

contract of sale required a \$100,000 nonrefundable deposit, which plaintiff paid on May 8, 2009. The contract stated that the premises was to be accepted “[a]s-is and in its present condition, subject to the reasonable use, wear and tear and natural deteriorations . . .” The contract also stated that defendant was responsible for providing a \$35,000 credit to cover all claims related to the premises’ condition. The parties designated New Jersey law as the contract’s governing law.

Before entering into the contract, plaintiff and its engineer inspected the premises with Geoffrey Bailey (“Bailey”), defendant’s real estate agent. After the inspection, Susan Zheng (“Zheng”), a relative of one of plaintiff’s members, sent an email to Bailey listing repairs needed on the premises. Zheng requested that defendant make the repairs or provide a purchase price reduction. Bailey testified at his deposition that the parties agreed to the \$35,000 credit to include the repairs Zheng listed in her email.

The parties scheduled the closing, “time-of-the-essence,” for June 15, 2009. Before the closing, plaintiff and Bailey conducted a final inspection of the premises. According to Bailey, there was pooled water in the basement during this final inspection. However, Bailey testified that the premises’ condition had not changed since the pre-contract inspection.

On June 15, 2009, the parties met at the office of defendant’s attorney to close title on the premises. Bailey testified that at the closing, Zheng told him that plaintiff was not going to close that day. Bailey further testified that defendant’s representatives at the

[\* 4]

closing, Ron Glazer (“Glazer”) and David Belt (“Belt”), were prepared to close title that day and that Zheng and plaintiff’s attorney, Shawn Yuen (“Yuen”), were aware that plaintiff would lose its deposit if it did not close. In his deposition, Glazer testified that Yuen stated, after discussions amongst plaintiff’s representatives, that plaintiff was unwilling to close.<sup>1</sup> Glazer stated that he and Belt then left the office.

After the aborted June 15 closing, defendant extended the time-of-the-essence closing date and allowed plaintiff to conduct another inspection of the premises. Bailey testified that plaintiff still refused to close. Thereafter, defendant sold the premises to a new buyer, closing title on August 3, 2009.

In October 2009, plaintiff commenced this action to recover the \$100,000 non-refundable deposit as well as liquidated and incidental damages. In its complaint, plaintiff alleges that defendant left the closing when plaintiff was ready, willing and able to close.

Defendant now moves for summary judgment, arguing that the contract of sale is unambiguous, the \$100,000 deposit is non-refundable, and that plaintiff refused to close on June 15, 2009. Defendant further maintains that plaintiff refused to close even after defendant extended the time-of-the-essence closing date.

In opposition, plaintiff maintains that defendant, not plaintiff, failed to tender performance on the closing date and defendant’s leaving the office before plaintiff

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<sup>1</sup>Because plaintiff’s members were not fluent English speakers, both Bailey and Glazer communicated primarily through Zheng and Yuen.

[\* 5]

indicates that defendant, not plaintiff, refused to close. Plaintiff further argues that defendant breached its implied covenant of good faith and fair dealing. Lastly, plaintiff contends that there are issues of fact related to whether the damage to the premises exceeded the bounds the contract allowed.<sup>2</sup>

### Discussion

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980).<sup>3</sup>

Here, defendant has made out its *prima facie* showing of entitlement to dismissal of the complaint. The contract of sale provided that the property was to be sold as-is, and that time was “of the essence” for the closing date. Both Bailey and Glazer testified that

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<sup>2</sup>Plaintiff also argues that defendant’s motion is defective because defendant did not include a copy of the pleadings. In the interest of resolving this motion on its merits, the Court exercises its discretion pursuant to CPLR § 2001 to disregard this error.

<sup>3</sup>Though the parties designated New Jersey law as the law governing this contract for sale, choice of law clauses apply to substantive, not procedural issues. *See Portfolio Recovery Assoc., LLC v. King*, 14 N.Y.3d 410, 416 (2010). Thus this Court applies New York’s standard for summary judgment. *See NEC Fin. Servs., Inc. v. First Fidelity Mtge. Group, Ltd.*, 2009 NY Misc. LEXIS 5859, at \*1-2 (Sup. Ct. NY Co. 2009). *See also Matter of Tradale CC. v. Tiffany DD.*, 52 A.D.3d 900, 901 (3d Dept. 2008) (referring to summary judgment as a “procedural device”).

[\* 6]

defendant was ready, willing and able to close on the closing date. Baily and Glazer also testified that Yuen told them at the closing that plaintiff was unwilling to close, despite the “as-is” covenant in the contract, unless defendant made a further price concession. Moreover, Bailey attested that plaintiff continued to refuse to close after defendant extended the time-of-the-essence deadline.

While plaintiff’s attorney argues in opposition that defendant failed to tender performance, plaintiff has not produced any competent evidence, e.g., an affidavit from either Zheng or Yuen, to contradict Bailey’s and Glazer’s testimony that plaintiff refused to close on the closing date. Under these circumstances, plaintiff has failed to raise an issue of fact requiring a trial. *See Zuckerman*, 49 N.Y.2d at 563.

In its papers opposing this motion, plaintiff also argues that defendant breached its covenant of good faith and fair dealing by not making concessions after plaintiff discovered a latent defect on the premises, and by refusing to return plaintiff’s deposit after defendant left the closing prematurely. For the reasons stated above, the Court rejects this claim to the extent plaintiff is arguing that defendant breached its covenant by leaving the June 15, 2009 closing prematurely. Further, defendant’s refusal to make additional concessions, or to return the deposit, was not required and should not have been expected, because the property was being sold as-is and the deposit was non-refundable. Plaintiff may not recover simply because defendant properly exercised its

right to retain the deposit, which resulted in economic advantage to defendant. *See Wilson v. Amerada Hess Corp.*, 168 N.J. 236, 251 (2001).

Lastly, on this motion plaintiff maintains that issues of fact remain as to whether the premises' condition exceeds the bounds of "reasonable use, wear and tear and natural deterioration." However, plaintiff does not assert in its complaint any allegation that the condition of the property exceeded the bounds of reasonable use, wear and tear and natural deterioration. Moreover, the contract of sale plainly stated that the property was being sold as-is, and plaintiff has presented not even a scintilla of evidence to substantiate its argument that the premises' defects exceeded these bounds. Accordingly, plaintiff may not assert these defects as a basis for recovering the deposit. *See Sikander v. Prana-BF Partners*, 22 A.D.3d 242, 243 (1<sup>st</sup> Dept. 2005).

In accordance with the foregoing, it is hereby

ORDERED that defendant 260 Washington Street, LLC's motion for summary judgment dismissing the complaint against it is granted; and it is further

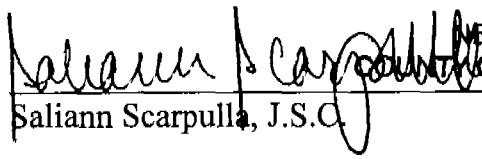
ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: New York, New York  
February 7, 2012

**FILED**

ENTER: FEB 10 2012

  
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Saliann Scarpulla, J.S.C.