SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ALEXANDER M. TISCH** **PART** **IAS MOTION 18EFM**

Justice

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ALAN TREITMAN, LISA TREITMAN

Plaintiffs,

- v -

ALLEN HASSAN, TAMAR SIEDLECKI,

Defendants.

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INDEX NO. 652057/2018

MOTION DATE 02/13/2019

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67

were read on this motion to/for SUMMARY JUDGMENT

Upon the foregoing papers, plaintiffs move for summary judgment pursuant to CPLR 3212 and move to dismiss the counter-claims of defendant Tamar Siedlecki (Siedlecki) and defendant Allen Hassan (Hassan) pursuant to CPLR 3211 (a) (1), (6), and (7).

This action arises out of plaintiffs' agreement with Siedlecki and Hassan to purchase the premises located 315 West 99th Street, Apt. 1D in the County, City and State of New York. The parties intended to close the sale after obtaining unconditional consent of the board of directors of the cooperative corporation (the Board). The original closing date was scheduled for November 17, 2017. Plaintiffs submitted their application to the Board on or about November 11, 2017. By letter dated January 10, 2018, the Board rejected plaintiffs' application stating that the decision was final. Julie Friedman, one of the agents working on the deal, asked the Board to reconsider and allow plaintiffs to re-submit their application. Plaintiffs submitted a new application on February 26, 2018, providing the Board with a more detailed explanation of their financial situation and qualification.

By email dated March 21, 2018, nearly six months after the agreement was signed, the Board sent plaintiffs the following:

> "The Board reviewed the package submitted for the sale of 1D to the Trietmans. The mortgage must be for $350,000 max. Please forward the signed commitment letter. The application doesn't say where the additional $600,000 is coming from after they close on their apartment and put down the $1,000,000 leaving a mortgage of approximately $950,000. Are the buyers going to cash in some of the UBS accounts? If so that drops there [*sic*] income from them down from the $5,000 they say they received each month reducing their monthly income. Granting them an interview does not mean we are or will approve their application for the sale. There would probably be a large security escrow account for maintenance required at closing if the sale is approved."

(NYSCEF Doc. No. 30)

After receiving this email, plaintiffs requested a price reduction because they felt that at a lower price, they would not get rejected by the Board again. Defendants denied the request. On March 26, 2018, plaintiffs terminated the deal and requested the return of their deposit. Plaintiffs sent a second request on April 26, 2018. Defendants thereafter indicated that they would be keeping the deposit as liquidated damages, pursuant to ¶13.1 of the agreement, because plaintiffs had breached the contract by not continuing the application process. Plaintiffs initiated the instant action to recover their deposit.

Plaintiffs argue that they are entitled to return of the deposit, pursuant to ¶6.1 and ¶6.3 of the agreement, because they never received unconditional consent of the Board. In opposition, defendants argue that ¶6.1 and ¶6.3 are inoperative because plaintiffs waived their right to cancel when they re-submitted their application. Defendants further argue, that at the very least, it is an issue of fact as to whether plaintiffs' re-submission constitutes a waiver of their right to cancel. In their counter-claims, defendants allege that plaintiffs committed a breach of contract by acting in bad faith in submitting their application packages.

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (Dallas-Stephenson v Waisman, 39 AD3d 303, 306 [1st Dept 2007]). The movant's burden is "heavy," and "on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party" (William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh, 22 NY3d 470, 475 [2013]

[internal quotation marks and citation omitted]). Failure to do so requires that the motion be denied regardless of the sufficiency of the opposing papers (Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact'" (People ex rel. Spitzer v Grasso, 50 AD3d 535, 545 [1st Dept 2008], quoting Zuckerman, 49 NY2d at 562). "[A] motion should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (Scott v Long Is. Power Auth., 294 AD2d 348 [2d Dept 2002]).

Paragraph 6.1 of the agreement states that "this sale is subject to the unconditional consent of the corporation." Paragraph 6.3 states:

> "If the [Board] has not made a decision on or before the Scheduled Closing date, the Closing shall be adjourned for 30 business days for the purpose of obtaining such consent. If such consent is not given by such adjourned date, either Party may cancel this Contract by Notice, provided that the [Board's] consent is not issued before such Notice of Cancellation is given. If such consent is refused at any time, either party may cancel this Contract by Notice. In the event of cancellation pursuant to this ¶6.3, the Escrowee shall refund the Contract Deposit to Purchaser."

(NYSCEF Doc. No. 28, ¶6.3)

It is undisputed that the Board explicitly rejected plaintiffs' application by letter dated January 10, 2018, after both the closing date of November 17, 2017, and the adjourned closing date of January 2, 2018. The Board's second email, dated March 21, 2018, made clear that even if plaintiffs lowered the mortgage amount, put money in escrow for maintenance, and interviewed with the Board, there was no guarantee that the sale would be approved. While this was not a rejection per se, it did set conditions that plaintiffs were not in agreeance with, nor were feasible (NYSCEF Doc. No. 38, ¶11-¶15). Viewing these facts in a light most favorable to the non-movant, it is clear that there was no final agreement with the Board regarding the conditions demanded by the Board for its approval of the sale (see Moss v

Brower, 213 AD3d 215 [1st Dept 1995]). Under the plain terms of the agreement, plaintiff is entitled to return of the deposit as the Board never provided consent before the closing date (see id.; see also Lovelace v Krauss, 60 AD3d 579 [1st Dept 2009]). Defendants' argument that plaintiffs waived their right to cancel by virtue of their re-submission lacks any legal authority and fails to raise an issue of fact.

With respect to defendants' counter-claims, according them every favorable inference, defendants have not adequately plead a motive of bad faith on the part of plaintiffs (see CPLR 3211 [a] [7]). Defendants' claim relies entirely on speculation in that they fail to plead any factual allegations indicating bad faith. The fact that plaintiffs sent a more detailed application the second time around, without more, does not suppose that they acted in bad faith in submitting their first application (see Chung v Chrein, 2003 NY Slip Op 50607(U) [App Term Feb. 25, 2003]).

Accordingly, it is hereby

ORDERED that the plaintiff's motion for summary judgment on the complaint herein is granted and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant in the amount of $192,240.00 together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

ORDERED that plaintiffs' motion to dismiss defendants' counter-claims is granted.

This constitutes the final decision and order of the Court.

HON. ALEXANDER M. TISCH

5/2/2019
DATE

ALEXANDER M. TISCH, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED			[ ]	NON-FINAL DISPOSITION	
	[X]	GRANTED	[ ]	DENIED	[ ]	GRANTED IN PART	[ ] OTHER
APPLICATION:	[ ]	SETTLE ORDER			[ ]	SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN			[ ]	FIDUCIARY APPOINTMENT	[ ] REFERENCE