Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IAS Part 15
Justice

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SURENDRA TEKRAM and ANJANIE RAJKUMAR,

Plaintiff(s),

- against -

REO WORLDWIDE HOLDINGS, INC.,

Defendant(s).

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Index No.:9407/13

Motion Date: 8/15/13

Motion Cal. No.:143

Motion Seq. No: 1

The following papers numbered 1 to 10 read on this motion by defendant for an order dismissing the complaint pursuant to CPLR §3211(a)(1),(5) and (7); cancelling the notice of pendency pursuant to CPLR §6514(b); directing plaintiffs to pay costs and expenses pursuant to CPLR §6514(c); and awarding costs, sanctions and punitive damages, pursuant to 22 NYCRR 130-1.1 and Disciplinary Rule 7-102(a)(1).

	Papers Numbered
Notice of Motion-Affirmation-Exhibits-Service.....	1-4
Affirmation in Opposition-Exhibits-Service.....	5-7
Reply Affirmation-Exhibits-Service.....	8-10

Upon the foregoing papers it is **ORDERED** that the motion is decided as follows:

This is an action for, *inter alia*, a breach of contract and damages regarding the property located at 120-23 132nd Street, South Ozone Park, New York. This action was commenced on May 14, 2013 by the filing of a summons, complaint and a notice of pendency.

Plaintiffs, in their verified complaint, allege that in early January or February of 2013, they entered into a contract as purchasers, with defendant Reo Worldwide Holdings, Inc. (Reo) as seller, to purchase real property located at 120-23 132nd Street, South Ozone Park, New York. The purchase price was $480,000.00, and

plaintiffs allege that they duly delivered a check in the sum of $5000.00, representing the downpayment pursuant to the terms of the contract. It is alleged that a fully executed copy of the contract was received by the purchasers' attorney on February 13, 2013. Plaintiffs allege that they were issued a loan commitment letter on April 26, 2013, and that in order to qualify for the loan in the sum of $446,000.00, a co-borrower was added at the suggestion of the lender. It is alleged that upon receipt of the commitment letter the defendant's counsel scheduled a time of the essence closing for May 14, 2013.

Plaintiffs allege that with the cooperation of the seller they would have been in a position to be ready, willing and able to perform the contract on May 14, 2013, but that the seller acted to prevent the plaintiffs from obtaining funding, in that: the seller's counsel stated in a letter dated May 1, 2013 that the commitment letter would be disregarded, and that any further correspondence related to their financing would be disregarded; that the seller's broker Elite Realty USA, Inc. (Elite) contacted Reo's president on May 3, 2013 in order to schedule an appraisal of the premises on May 4, 2013 and was informed that the seller was not interested, did not provide access to the premises, and stated that he had another purchaser who offered a higher purchase price; that the appraiser could not gain access to the premises on May 6, 2013 and the seller's president did not answer his phone; that Reo refused to sign the FHA amendatory clause form provided by the lender; that the contract of sale stated that the sole broker was Elite and that the property appears to have been listed for sale with another broker ERA/Professional Realty on April 18, 2013, for a sale price of $559,000.00, under another contract of sale as of April 20, 2013, prior to the time of the essence letter.

Plaintiffs also allege that the defendant's failure to cooperate with them and their lender so that they would have funding to close on May 14, 2013, was deliberate and constitutes wilful acts of bad faith. Plaintiffs further allege that as of May 14, 2013, there was a tenant on the first floor of the subject premises, and therefore defendant would not be able to close on that date even if funding had been obtained, as the premises were required to be in broom clean condition, free of leases and tenancies, as a condition of closing.

Plaintiffs further contend that Reo has defaulted and is in breach of contract, and that they incurred expenses for title search, appraisal fees and attorneys fees. Plaintiffs seek specific performance and an award of damages, and in the alternative seek a return of their down payment, as well as attorney's fees, and damages for out-of-pocket costs and expenses, loss of bargain,

costs and disbursements and interest.

Defendant Reo has served an amended answer in which it states that the contract of sale was entered into in December 2012; that a fully executed contract was sent to plaintiffs' counsel on or about December 13, 2012; and that the plaintiffs tendered a down-payment in the sum of $5,000.00 on December 31, 2012. Defendant alleges that its counsel in a letter dated May 1, 2013 advised plaintiffs that their 45-day mortgage contingency had expired long ago; that on April 3, 2013, Reo notified plaintiffs' counsel by phone that the mortgage contingency had expired and that because the plaintiffs would not be able to qualify for a mortgage, it was entitled to retain the downpayment; that the plaintiffs were obligated pursuant to the contract to procure their own financing, and Reo had no obligation under the contract to consent to adding an additional buyer in order for plaintiffs to qualify for a mortgage. Reo has interposed four affirmative defenses, as well as two unnumbered "further affirmative defenses"; a counterclaim for breach of contract in which it seeks to retain the downpayment; and a counterclaim for compensatory and punitive damages and attorney's fees, based upon the plaintiffs' action for specific performance and the filing of the notice of pendency.

Defendant now seeks an order dismissing the complaint pursuant to CPLR §3211(a)(1),(5), (7) and (10), and seeks an order directing the clerk of the court to cancel the notice of pendency, directing plaintiff to pay costs and expenses occasioned by filing and canceling the notice of pendency pursuant to CPLR §6514(c), and seeks an award of costs, sanctions, punitive damages and attorney's fees, pursuant to Disciplinary Rule 7-102(a)(1) and 22 NYCRR 130-1.1, against plaintiffs and their counsel based upon abuse of process and malicious prosecution in filing a frivolous claim and a notice of pendency in bad faith.

Defendant, in support of its motion, has submitted a copy of the pleadings, an affirmation from its counsel, a copy of the contract of sale, a letter from its counsel, dated April 10, 2013, stating that the mortgage contingency clause had expired on April 1, 2013, and requesting that the closing be scheduled, as the contract had not been cancelled; a letter from its counsel, dated April 30, 2013, setting forth the time of the essence closing date of May 14, 2013; a letter from plaintiffs' counsel, dated May 7, 2013, requesting access to the premises in order to perform an appraisal, in which it is stated that access was not provided on May 4, 2013 and May 6, 2013, and also requesting that corporate documents be submitted to the lender, that the FHA amendatory clause form be executed and submitted, and that the amendment to the contract of sale be executed; and a copy of the amendment of

the contract of sale adding a third co-purchaser. Defendant has also submitted a copy of its retainer agreement with its counsel.

Plaintiffs, in opposition, have submitted an affirmation from their counsel, a copy of the contract and rider; a fax from Reo's president David Persaud, dated February 20, 2013, requesting a copy of the mortgage commitment and title report; a copy of a letter from Reo's counsel, dated February 25, 2013, stating that the mortgage contingency had expired on February 18, 2013, and demanding either the mortgage commitment or a waiver of the contingency by the purchasers and a copy of the title report; a letter from Reo's counsel dated April 10, 2013 stating that the mortgage contingency expired on April 1, 2013 and that as the purchasers had not cancelled the contract the contingency clause had been waived, and requested that the closing be scheduled; a listing of the property with another broker, on April 18, 2013 with a purchase price of $559,000.00, and indicating a contract dated April 20, 2013; a copy of the mortgage commitment letter dated April 25, 2013; and a copy of a letter from Reo's counsel dated April 30, 2013, setting forth the time of the essence closing date of May 14, 2013.

Plaintiffs further submit a fax from "David," dated April 26, 2013, sent to the purchasers' counsel requesting that he "PLEASE FAX A LETTER TO MY ATTORNEY MR. CHRISTOPHER LIM REQUESTING YOUR CLIENT Downpayment CHECK BE REFUNDED. UNFORTUNATELY I HAVE DECIDED NOT TO GIVE ANY MORE VERBAL OR WRITTEN EXTENSION ON THE ABOVE PENDING MATTER. THANK YOU".

In addition, plaintiffs submit a letter from Reo's counsel dated May 1, 2013, addressed to the purchasers' counsel, in which he acknowledged receipt of the mortgage commitment letter on April 26, 2013, and stated that " the mortgage contingency had long since expired and has been waived. As such, I have no idea why such a document was sent to my office and it has been disregarded. Any further such correspondence relating to your client's financing will be similarly disregarded and Seller's failure to respond to any such further correspondence should not be deemed as a waiver of Seller's rights and remedies."

Finally, plaintiffs have submitted an affidavit, sworn to on July 29, 2013, from Ronald Khan, the real estate agent associated with the Elite Realty USA Inc., which is named in the contract of sale as the sole broker. Mr. Khan states that he had the keys to the premises but could not enter without Reo's permission, and that on May 3, 2013 he spoke with Mr. Persaud and requested permission to enter the property in order to conduct an appraisal on May 4, 2013 in connection with the plaintiffs' loan application. He states

that Mr. Persaud advised him not to allow any appraiser onto the property, as he had another buyer who was paying cash, and giving him much more money for the property. Mr. Khan stated that he took the appraiser to the property on May 6, 2013 and called Mr. Persaud at approximately 4:30 p.m., in order to gain access to the premises, and that as Persaud did not answer his phone the appraisal was not performed.

Defendant, in reply, has submitted an affidavit from the former tenant of the premise, Erica Artis, notarized on July 5, 2013, stating that she was aware of the need to vacate the premises, due to the contract with the plaintiffs; that she was prepared to move upon the closing; and that she ultimately was vacating the premises on July 5, 2013.

It is well-established that on a motion to dismiss pursuant to CPLR §3211(a)(7), "the court must afford the pleadings a liberal construction, accept the allegations of the complaint as true and provide plaintiff the benefit of every possible favorable inference"*(AGCapital Funding Partners, L.P. v State St. Bank&TrustCo.*,5NY3d582,591[2005]; *see Goshen v Mutual Life Ins. Co. of N.Y .*, 98 NY2d 314, 326 [2002]; *Leon v Martinez*, 84 NY2d 83,87-88 [1994]). The court's "sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail" (*Polonetsky v Better Homes Depot, Inc.*, 97 NY2d 46, 54 [2001], *quoting Guggenheimer v Ginzburg*, 43 NY2d 268, 2 75 [1977]; *see also Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *Leon v Martinez*, 84 NY2d at 87-88; Tom Winter Assoc., Inc. v Sawyer, 72 AD3d 803 [2d Dept 2010]; *Uzzle v Nuzzie Court Homeowners Assn. Inc.*, 70 AD3d 928 [2d Dept 2010]; *Feldman v Finkelstein & Partners, LLP*, 76 AD3d 703 2010]). The facts pleaded are to be presumed to be true and are to be accorded every favorable inference, although bare legal conclusions, as well as factual claims, flatly contradicted by the record are not entitled to any such consideration (*see Morone v Morone*, 50 NY2d 481 [1980]; *Gertler v Goodgold*, 107 AD2d 481 [1985], *affirmed* 66 NY2d 946 [1985]).

"When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one *(Guggenheimer v Ginzburg*, 43 NY2d at 275). This entails an inquiry into whether or not a material fact claimed by the pleader is a fact at all and whether a significant dispute exists regarding *it(see, id.; accord*, Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book

7B, CPLRC 3211:25, at 39)"(*Gershon v. Goldberg*, 30 AD2d, 372 [2dDept2006], *quoting Doria v. Masucci*,230AD2d 764,765 [2d Dept 2006]; *lv. to appeal denied* 89 NY2d 811 [1997]). On a motion to dismiss pursuant to CPLR §3211(a)(7) for failure to state a cause of action, the court must" accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d at 87-88]; *ee Stathakos v Metropolitan Tr. Auth. Long Is. R.R.*, 109 AD3d 979 [2d Dept 2013]; *Green v. Gross & Levin, LLP*, 101 AD3d 1079, 1080-1081[2dDept2012]). Moreover, a motion pursuant to CPLR 3211 (a) (1) to dismiss the complaint on the ground that the action is barred by documentary evidence may be granted "only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *see Stathakos v Metropolitan Tr. Auth. Long Is. R.R.; Green v Gross & Levin, LLP*, 101 AD3d at 1080-1081). Affidavits submitted by a defendant in support of the motion, however, do not constitute documentary evidence *(Berger v Temple Beth-El of Great Neck*, 303 AD2d 346, 347 [2003]).

A plaintiff seeking specific performance or monetary damages for nonperformance of a contract must demonstrate that he or she was ready, willing and able to perform on the contract (*Pesa v Yoma Dev. Group, Inc.*, 18 NY3d 527, 531-532 [2012]). Here, plaintiffs concede that the mortgage commitment was conditioned, among other things, upon an amendment to the contract of sale adding the name of a third co-purchaser. The defendant seller, however, was not required to amend the contract to add a third co-purchaser, and plaintiffs do not allege that they otherwise had the financial wherewithal to purchase the property. As plaintiffs do not plead and are unable to establish that they were ready, willing and able to perform on the contract on May 14, 2013, that branch of the defendant's motion which seeks to dismiss plaintiffs' claims for specific performance and/or monetary damages, is granted.

As the claim for specific performance is the only claim that could affect title to real property, that branch of the defendant's motion which seeks to cancel the notice of pendency is granted (*see* CPLR §6514[a]; *3801 Review Realty LLC v Review Realty Co. LLC*, AD3d, 975 NYS2d 36, 37-38 [1st Dept 2013]; *Jericho Group Ltd. v Midtown Dev., L.P.*, 67 AD3d 431, 432, [1st Dept 2009], *lv denied* 14 NY3d 712 [2010]). That branch of defendant's motion which seeks an award of costs and expenses in connection with the canceling of the notice of pendency, pursuant to CPLR §6514(c), is denied.

Plaintiffs claim for the return of the downpayment is not based upon the contract's mortgage contingency clause. Although both the contract and rider are dated "December 2013" [sic], the parties each assert that the contract was fully executed on January 3, 2013, and disagree as to when the mortgage contingency date expired. The documentary evidence submitted herein establishes that Reo, in separate correspondence, informed the purchasers' counsel that the mortgage contingency date expired on February 18, 2013, and thereafter asserted that the expiration date was April 1, 2013. Plaintiffs do not claim that the mortgage contingency clause date extended beyond April 1, 2013, and it is undisputed that they did not obtain a mortgage commitment by said date and that they did not cancel the contract, or seek an extension of the commitment date.

By its clear and unambiguous terms, the mortgage contingency clause was intended for the sole benefit of the purchasers, and does not permit the defendant to unilaterally cancel the contract if the terms of the contingency were not met (*see Suburban Hous. Dev. & Research v Island Props. & Equities*, 6 AD3d 423 [2004]; *Coneys v Game*, 141 AD2d 795 [1988]). Plaintiffs, thus, were entitled to continue to seek to obtain financing after April 1, 2013, and were also entitled to seek the seller's cooperation in providing or executing necessary documents in connection with a loan, and conducting an appraisal, prior to the time of the essence closing date of May 14, 2013.

It is noted that paragraph 23 of the contract provides that:

> "(a) if Purchaser wilfully defaults hereunder, Seller's sole remedy shall be to receive and retain the Downpayment as liquidated damages, it being agreed that Seller's damages in case of Purchaser's default might be impossible to ascertain and that the Downpayment constitutes a fair and reasonable amount of damages under the circumstances and is not a penalty. (b) if Seller defaults hereunder, Purchaser shall have such remedies as Purchaser shall be entitled to at law or in equity, including, but not limited to specific performance."

The court finds that plaintiffs' have sufficiently alleged a claim for the return of the downpayment based upon the defendant's alleged anticipatory breach of the contract, and that the documentary evidence submitted by defendant is insufficient to defeat this claim. Therefore, that branch of defendant's motion which seeks to dismiss plaintiffs' claim to recover the downpayment, is denied.

That branch of defendant's motion which seeks an award of costs, sanctions, and punitive damages, pursuant to Disciplinary Rule 7-102(a)(1) and 22 NYCRR 130-1.1 is denied.

Accordingly, defendant's motion is granted to the extent that plaintiffs' claims for specific performance and damages, are dismissed. The Clerk of the Court is directed to cancel the notice of pendency filed in this action against the real property known as 120-23 132nd Street, South Ozone Park, New York and indexed against Block 11756 Lot 101. The remainder of defendant's motion is denied in its entirety.

Dated: January 10, 2013

JANICE A. TAYLOR, J.S.C.

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