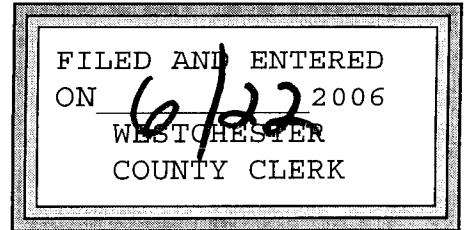


DECISION AND ORDER

To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.



**SUPREME COURT OF THE STATE OF NEW YORK
IAS PART, WESTCHESTER COUNTY**

Present: HON. ALDO A. NASTASI, J.S.C.

-----X
MARIO V. GRECO,
Plaintiff,

Index No. 1799/05
Motion Date & Cal. Nos.
5/19/06 17 & 18

- against -

ERIC BYRNE, ANDREA BYRNE, AND
DANIELS AND PORCO, LLP, AS ESCROWEE,

Defendants.

-----X

NASTASI, J.

The following papers numbered 1 to 57 read on this motion by defendants Byrne for summary judgment dismissing amended complaint, etc. and motion by plaintiff for summary judgment, etc.

	<u>Papers Numbered</u>
Notice of Motion-Affidavit-Exhibits	1-30
Answering Affidavit-Exhibits	32-33
Notice of Motion-Affidavit-Exhibits	34-56
Memorandum of Law	31, 57

Upon the foregoing papers it is ordered and adjudged that these motions are consolidated and disposed of as follows:

The instant action seeks to recover the sum of \$35,000.00, plus interest from December 7, 2004, which represents a down payment tendered to defendants Byrne pursuant to a contract of sale, dated September 27, 2004, for the purchase by plaintiff of real property known as 4 Woodland Drive, Somers, New York. Escrowee, Daniels & Porco, LLP is also named as a defendant.

It is not here disputed that upon execution of the sale, plaintiff, as purchaser, made a downpayment of \$35,000.00, which was deposited in the escrow account of sellers' attorney, defendant Daniels & Porco, LLP and remains in that account pending judicial resolution of the dispute that is the subject of this litigation.

DISP.

Defendants Bryne have interposed a counterclaim seeking to retain the down payment based on the plaintiff's alleged breach of the contract of sale.

It is also not here disputed that an extended period of negotiations concerning the contract of sale as originally proposed¹ resulted in the deletion of certain language and a ten thousand (\$10,000.00) dollar reduction in the agreed upon purchase price. Nor is it disputed the sale of the residence owned by the plaintiff prior to closing was within the parties' intent as to what was an acceptable commitment as defined in the mortgage contingency clause of the subject contract of sale.

The contract of sale was entered into on October 5, 2004. Insofar as here relevant, paragraph 8 of the contract contained a mortgage contingency clause, which obligated the plaintiff to promptly apply for and diligently pursue an application for a mortgage commitment satisfying certain terms and conditions detailed in paragraph 8 of the contract:

(a) The obligation of Purchaser to purchase under this contract is conditioned upon issuance, on or before 40 days after a fully executed copy of this contract is given to Purchaser or Purchaser's attorney ... (the "Commitment Date"), of a written commitment from an Institutional Lender, pursuant to which such Institutional Lender agrees to make a first mortgage loan ... of \$350,000 ... at the prevailing fixed or adjustable rate of interest and on other customary commitment terms (the "Commitment"). To the extent a Commitment is conditioned on the payment of any outstanding debt, no material adverse change in Purchaser's financial condition or any other customary conditions, Purchaser's accepts the risk that such conditions may not be met; however, a commitment conditioned on the Institutional Lender's approval of an appraisal shall not be deemed a "Commitment" hereunder until an appraisal is approved (and if that does not occur before the Commitment Date, Purchaser may cancel under subparagraph 8(e) unless the Commitment Date is extended). Purchaser's obligations hereunder are

¹The original proposed contract utilized the New York State Bar Association's standard real estate contract.

conditioned only on issuance of a Commitment. Once a Commitment is issued, Purchaser is bound under this contract even if the lender fails or refuses to fund the loan for any reason.

* * *

(e) If no Commitment is issued by the Institutional Lender on or before the Commitment Date, then, unless Purchaser has accepted a written commitment from an Institutional Lender that does not conform to the terms set forth in paragraph 8(a), Purchaser may cancel this contract by giving Notice to Seller within 5 business days after the Commitment Date, provided that such Notice includes the name and address of the Institutional Lender(s) to whom application was made and that Purchaser has complied with all of its obligations under this paragraph 8.

/ * * *

(g) If Purchaser fails to give timely Notice of cancellation or if Purchaser accepts a written commitment from an Institutional Lender that does not conform to the terms set forth in subparagraph 8(a), then Purchaser shall be deemed to have waived Purchaser's right to cancel this contract and to receive a refund of the Downpayment by reason of the contingency contained in paragraph 8. (emphasis supplied).

As originally drafted, the proposed mortgage contingency clause had provided that to the extent the commitment was conditioned on the sale of plaintiff's current home, plaintiff accepted the risk that such condition might not be met. This language would have compelled the plaintiff, if he received a commitment conditioned on the sale of his current home, to accept the risk that the sale of his current home would not occur prior to the scheduled closing for the new home, and he would not have had the option of rejecting that commitment, but rather would be forced to accept the risk that he would lose his downpayment if that current home was not sold prior to the closing.

Here, however, the proposed language was modified to strike the phrase "sale of purchaser's current home".

Admittedly, as a result, plaintiff was not automatically compelled to accept the risks associated with a commitment conditioned upon the sale of his home. Rather, he had the option to accept this commitment and its attendant risks, and become bound to proceed with the closing pursuant to section 8(a) of the contract or to promptly reject this commitment and cancel the contract pursuant to paragraph 8(d).² Nevertheless, the modification did not render the sale of the subject property contingent upon the plaintiff's ability to sell his current home. Rather, plaintiff-purchaser could choose to cancel the contract upon timely notice.

Finally, pursuant to paragraph 23(a) of the contract, the defendants'-sellers were entitled to retain the downpayment as liquidated damages in the event that the plaintiff-purchaser defaulted in his obligations under the contract of sale.

It is also not disputed that prior to entering into the contract of sale, after the defendants-sellers' accepted plaintiff's offer, the plaintiff had applied for a mortgage to finance the purchase of the property by submitting a loan application to Columbia Equities Ltd. (hereinafter "Columbia"). On or about September 1, 2004, Columbia issued a "Commitment Letter" approving plaintiff's mortgage loan application which authorized the purchase of the property for \$509,00, with a \$350,000 mortgage subject to certain conditions, including an appraisal of the property to support a value of \$509,000.00. Further, insofar as here relevant, among the conditions to be "satisfied at closing" was a fully executed HUD-1 settlement statement from the sale of plaintiff's residence in Katonah, New York and evidencing net proceeds of no less than \$350,000.00 and satisfaction of the mortgage thereon with New York Community Bank.

On or about October 7, 2004, after the execution of the subject contract of sale for the reduced purchase price of \$499,000.00, Columbia re-issued the "Commitment Letter". Said letter is identical to the September 1, 2004 Commitment Letter, with the sole exception being a handwritten notation on page three thereof setting forth the reduced purchase price of \$499,000.00. The same terms and conditions were set forth as were the same items to be satisfied at closing. The Commitment Letter dated October 7, 2004 was accepted and signed by the

²As hereinafter set forth, however, plaintiff accepted the commitment.

plaintiff-purchaser on October 11, 2004.³

Thus, at the time he entered into the contract of sale plaintiff already possessed a commitment letter containing a condition that he sell his current home prior to closing, failed to disclose that letter to defendants'-sellers during the mortgage contingency period, and failed to submit any other application to another lender during the mortgage period.

Nevertheless, by letter dated November 15, 2004, plaintiff's counsel provided defendants' attorney with written notice that plaintiff "is not yet in receipt of a satisfactory mortgage commitment" and requested "an extension of the mortgage contingency period through and including November 30, 2004, and an extension of the closing date to December 15, 2004". Counsel further notified defendants that if they refused to grant the requested extension, the letter should be deemed to constitute plaintiff's election to cancel the contract of sale, in accordance with the provisions of paragraph 8 thereof.

Defendants rejected plaintiff's request for an extension. In response, plaintiff's attorney requested return of the downpayment.

By letter dated November 24, 2004, defendants' attorney again rejected plaintiff's request for an extension, acknowledged plaintiff's cancellation of the contract, but rejected plaintiff's request for the return of the downpayment based upon his default under the contract.

By letter dated December 7, 2004, defendant Daniels and Porco, LLP, as escrowee, provided plaintiff's attorney with written notice that, pursuant to paragraph 6 of the contract, it would not release the downpayment absent a mutual notice from the parties or a final judgment from the Court.

Plaintiff and defendants Byrne now move for summary

³However, it is not disputed that neither plaintiff-purchaser nor his attorney provided defendants-sellers or their counsel with a copy of the letter. Rather, defendants became aware of the existence of the letter upon receiving Columbia's response to a subpoena demanding all documents comprising Columbia's files with respect to plaintiff's application for a mortgage commitment for the property.

judgment on the complaint and counterclaim respectively, each seeking the return or retention of the counterclaim.

Upon the documentary and testimonial evidence before this Court, this Court finds that the defendants-sellers are entitled to summary judgment on their counterclaim and to retain the downpayment to retain the downpayment as liquidated damages for plaintiff's default under the contract. Defendants' motion is hereby granted. Plaintiff's motion is denied and the complaint is hereby dismissed.

It is well-settled that the interpretation of a contract is a matter of law for the court (see 805 Third Avenue Co. v. M.W. Realty Assoc., 58 N.Y.2d 447; 1550 Fifth Avenue Bay Shore, LLC v. 1550 Fifth Avenue, LLC, 297 A.D.2d 781, lv. denied, 99 N.Y.2d 505; Gassman v. Rothlein, 275 A.D.2d 731). A contract is to be interpreted so as to give effect to the intention of the parties as expressed in the unequivocal language employed (see Morlee Sales Corp. v. Manufacturers Trust Co., 9 N.Y.2d 16, 19; see also, Breed Insurance Co., 46 N.Y.2d 351). A Court may not, in the guise of interpreting a contract, add or excise terms or distort the meaning of those used to make a new contract for the parties (see Morlee Sales Corp. v. Manufacturers Trust Co., *supra*; North Fork Bank & Trust Co. v. Romet Corp., 192 A.D.2d 591). Evidence outside the four corners of the document as to what was rally intended but unstated or misstated is generally inadmissible to add to or vary the writing' (W.W.W. Assocs. v. Giancontieri, 77 N.Y.2d 157, 162; see also, North Fork Bank & Trust Co. v. Romet Corp., *supra*; Katz v. American Tech. Indus., 96 A.D.2d 932). Thus, where the language of a contract is unambiguous, its interpretation is a matter of law and effect must be given to the intent of the parties as reflected by the express language of the agreement (Matter of Wallace v. 600 Partners Co., 86 N.Y.2d 543, 548; see 1550 Fifth Avenue Bay Shore, LLC v. 1550 Fifth Avenue, LLC, *supra* at 783; Highland Sand & Gravel, Inc. v. Squicciarini, 272 A.D.2d 375; Wood v. Maggie's Tavern, Inc., 257 A.D.2d 733; Gora v. D.I.D. Acquisition Co., Inc., 226 A.D.2d 425).

In the case at bar, the language of paragraph 8 of the contract is clear and unambiguous and demonstrates that the parties intended to and did, indeed, agree in paragraph 8(g) that if the plaintiff accepted a written commitment from a lender that did not conform to the terms set forth in subparagraph 8(a), then plaintiff would be deemed to have waived his right to cancel the contract and to receive a refund of the downpayment by reason of the contingency contained in this paragraph 8. Moreover, the contract further provided in paragraph 8(e) that if plaintiff accepted a commitment that did

not conform to the terms set forth in paragraph 8(a), plaintiff could cancel that contract giving notice to the defendants within five (5) business days after the commitment date. This he did not do.

Thus, to the extent that plaintiff could have cancelled the contract had he found the commitment not to be "satisfactory", plaintiff waived that ability on October 11, 2004 when he accepted of the Commitment Letter and failed to give timely notice to the defendants⁴ (see Eves v. Bureau, 13 A.D.3d 1004; Severini v. Wallace, 13 A.D.3d 434; Chavez v. Eli Homes, Inc., 7 A.D.3d 657; cf. Miranda v. Jay Construction Corporation, 2 A.D.3d 420; compare Munson v. Germerican Associates, 224 A.D.2d 670).

The Commitment Letter dated October 7, 2004 otherwise satisfied all the conditions of the contract and was a "firm commitment" once the appraisal of the property was made. Specifically, it was issued by an "Institutional Lender", that Institutional Lender agreed to make a first mortgage loan of \$350,000.00 to finance plaintiff's purchase of the property, the Institutional Lender agreed to provide that financing at the prevailing fixed or adjustable rate of interest, and was subject to the additional and customary commitment terms, all of which were required to be satisfied either five (5) business days prior to closing or at the closing table. Accordingly, the letter satisfies the contract's definition of a "Commitment". Moreover, while said letter was conditioned on Columbia's approval of an appraisal, Columbia received a certified appraisal satisfying this condition on or about September 8, 2004, which concluded that the market value of the property was \$515,000. Pursuant to paragraph 8(a) of the contract, once the certificate appraisal satisfying the appraisal condition contained in the Commitment Letter was obtained, the letter was a "Commitment".

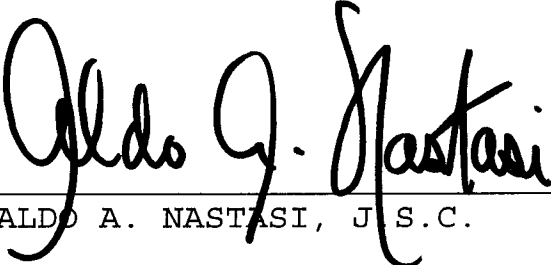
Accordingly, this Court finds that plaintiff's cancellation of the contract on November 15, 2004, based upon his unilateral determination that he had not received a "satisfactory" mortgage commitment was not warranted and untimely. This Court must agree that having waived his ability to cancel the contract based upon the mortgage contingency clause, plaintiff's subsequent attempt to cancel the contract on November 15, 2004 was ineffective, and constituted a default

⁴The Court finds it unnecessary to consider the earlier letter issued prior to the execution of the contract of sale.

under the contract entitling defendant to retain the downpayment and accumulated interest as liquidated damages.

Under such circumstances, this Court finds it unnecessary to address the additional arguments raised by defendants as to plaintiff's failure to timely disclose the earlier and virtually identical commitment letter to that here found by plaintiff to be "unsatisfactory" or his failure to promptly or at any time seek funding from any other lender.

Dated: White Plains, New York
June 21, 2006


ALDO A. NASTASI, J.S.C.

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