

SHORT FORM ORDER

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

FILED AND ENTERED ON 10/5/2011 WESTCHESTER COUNTY CLERK

SUPREME COURT : STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. NICHOLAS COLABELLA
J.S.C.

X

DEBORAH TORIA,

DECISION/ORDER

Plaintiff,

INDEX NO.
[REDACTED]

- against -

[REDACTED]

MOTION DATE
7/8/11

Defendants.

D

X

The following papers numbered 1-34 were read on this motion by plaintiff for injunctive relief and cross-motion to dismiss or for summary judgment, change venue and sanctions.

Papers Numbered

Order to Show Cause, Affidavits, Exhibits 1-16
Notice of Cross-Motion, Affidavit, Exhibits 17-31
Answering Affidavit 32.33-34

Motion is denied and cross-motion insofar as it seeks to dismiss or for summary judgment is granted to the extent the action is dismissed pursuant to CPLR 3211.

This is an action for specific performance, money damages and injunctive relief arising out of a contract of sale for the purchase of real property. After defendants, the sellers, initially scheduled a closing date for February 10, 2011 with time being of the essence, the parties agreed to a new closing date on April 22, 2011 with time again being of the essence. That date was also not met and the parties agreed to another closing date on May 13, 2011, with time being of the essence, as set forth in the third rider to the contract.

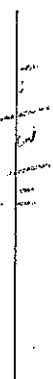
The foregoing contained a section for defaults and remedies, as follows: "Purchaser agrees that should he be unwilling or unable to close on or before May 13, 2011 for any reason all money paid under this Contract and/or rider(s) hereto shall be forfeited and he waives any right to bring any proceeding or action for specific performance."

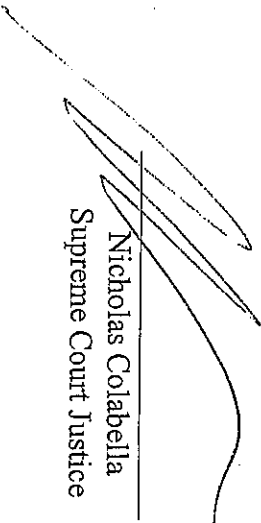
It is undisputed that, although defendants were ready to close May 13, 2011, plaintiff was not able to do so. Plaintiff concedes that she lacked the funds to close on that date, but claims she had the funds several days later, and was then able to close. Defendants, however, refused to consummate the transaction.¹ Plaintiff contends nonetheless that the Court may yet enforce the contract. Plaintiff's position is without merit.

The parties' agreement is clear and unequivocal, and the scheduled closing date was agreed to by both purchaser and seller after prior aborted efforts to close with time being of the essence. Plaintiff's position ignores the express contract language that provides for forfeiture and waiver upon default "for any reason". Plaintiff is bound by that language. Accordingly, having defaulted, there is no basis for this action.²

That part of defendants' cross-motion which seeks to change venue has been withdrawn. That part of defendants' cross-motion which seeks sanctions is denied in the exercise of discretion.

Dated: White Plains, New York




Nicholas Colabella
Supreme Court Justice

¹Complaint, pars. 22-24.

²The parties' express agreement to the closing date and the remedy upon default distinguishes this case from Miller v. Almqvist, 241 AD2d 181, on which plaintiff relies. In Miller, the parties had not agreed on the date and the Court held the date set by the sellers was unreasonable under the circumstances.

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