SHORT FORM ORDER

INDEX No. 14-68809

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 1-17-15 (#001)
MOTION DATE 2-13-15 (#002)
ADJ. DATE 3-31-15
Mot. Seq. # 001 - Mot D
002 - XMG; CDISPSUBJ

ARTHUR MINEROF and LAWRENCE GENCO,	KUCKER & BRUH, LLP Attorney for Plaintiffs 747 Third Avenue New York, New York 10017
Plaintiffs,	
- against -	ESSEKS, HEFTER & ANGEL, LLP Attorney for Defendants 108 East Main Street P.O. Box 279 Riverhead, New York 11901
EDWARD F. LONERGAN and LAURA HUTCHINSON-LONERGAN,	
Defendants.	

Upon the following papers numbered 1 to 46 read on the motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; Notice of Cross Motion and supporting papers 13 - 40; Answering Affidavits and supporting papers 41 - 45; Replying Affidavits and supporting papers 46; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by plaintiffs Arthur Minerof and Lawrence Genco for *inter alia* summary judgment in their favor pursuant to CPLR § 3212 is denied; and it is further

ORDERED that the cross motion by defendants Edward F. Lonergan and Laura Hutchinson-Lonergan for summary judgment in their favor on the counterclaim is granted; and it is further

ORDERED that the Clerk of Suffolk County or any other County is directed to cancel the notice of pendency in relation to property known as 8 Aqua Drive, Southampton, New York identified on the tax map of Suffolk County by the designations District 0900, Section 232.00, Block 03.00, lot 035.000; and it is further

ORDERED that the escrow agent, Kucker & Bruth, LLP, is directed to disburse the down payment of $560,000.00 to defendants.

Plaintiffs, sellers of property located at 8 Aqua Drive, Southampton, New York, commenced this action for disbursement of a down payment, cancellation of a notice of pendency, and other relief, including costs. The parties entered into a contract for the sale of the property located at 8 Aqua Drive, Southampton. The contract dated October 6, 2014, contains in relevant part, a rider that provides in clear and unequivocal terms that the sellers represent that the basement, pools and roof are free from water leaks and/or seepage and that the premises is free and clear of any mold or evidence of any existing mold remediation and /or radon emissions. The terms are unqualified and made in the present tense. After inspection of the property, on October 16, 2014, the purchasers cancelled the contract on the basis that the inspector found extensive evidence of mold throughout the premises along with evidence of still water puddles, water leaks and water seepage in the basement. In response, plaintiffs did not deny the presence of water damage and mold. Rather they took the position that, the breach of contract or misrepresentations alleged by purchasers did not constitute a substantial and material breach of contract permitting cancellation and repudiation of the contract. Contending that the purchasers anticipatorily breached the contract, the sellers retained the down payment as liquidated damages. This litigation ensued, and the purchasers filed a notice of pendency on the subject property.

The sellers, Arthur Minerof and Lawrence Genco, allege that the buyers, Edward F. Lonergan and Laura Hutchinson-Lonergan, terminated and breached the sales contract and thereby forfeited the right to the return of the $560,000.00 down payment. The first cause of action alleges breach of contract. The second cause of action alleges anticipatory breach of contract. In the counterclaim, defendants allege causes of action sounding in false representation, breach of contract, fraud in the inducement and a vendees' lien. The buyers demand return of the down payment and allege the sellers misrepresented that the property was free of water damage and mold.

Plaintiffs now move for *inter alia* summary judgment. In support of the motion, plaintiffs submit, among other things, the pleadings, the contract of sale, an affidavit of Arthur Minerof and various correspondence. The defendants cross move for summary judgment. In support thereof, the buyers submit an affidavit of Laura Hutchinson-Lonergan, an engineer's report, and affidavits of professional engineers Victor Keneiby, and Harold Krongelb.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

When parties set down their agreement in a clear, complete document, their writing should as a general rule be enforced according to the terms found in the four corners of the agreement (*see* ***W.W.W. Assoc., Inc. v Giancontieri***, 77 NY2d 157, 565 NYS2d 440 [1990]). This rule has been deemed especially relevant "in the context of real property transactions, where commercial certainty is a paramount concern, and where . . . the instrument was negotiated between sophisticated, counseled business people negotiating at arm's length" (***Matter of Wallace v 600 Partners Co.***, 86 NY2d 543, 548, 634 NYS2d 669 [1995]; *see*

Vermont Teddy Bear Co. v 538 Madison Realty Co., 1 NY3d 470, 775 NYS2d 765 [2004]). A contract should be "read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose" (***Matter of Westmoreland Coal Co. v Entech, Inc.***, 100 NY2d 352, 358, 763 NYS2d 525 [2003]). "An interpretation that gives effect to all the terms of an agreement is preferable to one that ignores terms or accords them an unreasonable interpretation" (***Ruttenberg v Davidge Data Sys. Corp.***, 215 AD2d 191, 196, 626 NYS2d 174 [1st Dept 1995]). Therefore, "where two seemingly conflicting contract provisions reasonably can be reconciled, a court is required to do so and to give both effect" (***Proyecfin de Venezuela v Banco Indus. De Venezuela***, 760 F2d 390, 395-396 [2d Cir 1985]; *see* ***G&B Photography v Greenberg***, 209 AD2d 579, 581, 619 NYS2d 294 [2d Dept 1994]).

Anticipatory repudiation occurs when a party "attempt[s] to avoid its obligations by advancing an untenable interpretation of the contract, or ... communicate[s] its intent to perform only upon the satisfaction of extracontractual conditions" (***SPI Communs. v WTZA-TV Assocs. Ltd. Partnership***, 229 AD2d 644, 645, 644 NYS2d 788 [3d Dept 1996]; *see* ***IBM Credit Fin. Corp. v Mazda Motor Mfg. [USA] Corp.***, 92 NY2d 989, 684 NYS2d 162 [1998]). Such conduct excuses the non-repudiating party from further performance and entitles it to claim damages for total breach (*see* ***Long Is. R. R. Co. v Northville Indus. Corp.***, 41 NY2d 455, 393 NYS2d 925 [1977]; ***QK Healthcare, Inc. v InSource, Inc.***, 108 AD3d 56, 965 NYS2d 133 [2d Dept 2013]; ***Fonda v First Pioneer Farm Credit, ACA***, 86 AD3d 693, 927 NYS2d 417 [3d Dept 2011]). Absent a breach on the part of the seller, a purchaser who defaults on a real estate contract without lawful excuse cannot recover its down payment (*see* ***Lawrence v Miller***, 86 NY 131, 139-140 [1881]; ***Rivera v Konkol***, 48 AD3d 347, 348, 851 NYS2d 537 [1st Dept 2008]; ***Uzan v 845 UN Ltd. Partnership***, 10 AD3d 230, 236, 778 NYS2d 171 [1st Dept 2004]).

Here, plaintiffs have not established their prima facie entitlement to summary judgment on the complaint. Plaintiffs have not demonstrated that they, themselves, were not in breach of the contract. Nor have they demonstrated that defendants anticipatorily breached the contract. Plaintiffs do not dispute, by admissible evidence, that at the time of the inspection, both water damage and mold were present. In fact, Arthur Minerof avers, "I am not in a position to discuss the merit, or rather lack thereof, of the Defendants position..." Rather, plaintiffs take the position that if mold existed, they had the right to cure prior to the closing date and that defendants failed to prove that the property was not in conformance with the contract. Plaintiffs rely on paragraph 21b of the contract which permits cures to "other objections to title or otherwise" at the sellers sole election "to remove, remedy, discharge or comply with such defects" or to cancel the contract. Given the plain language of the contract, plaintiffs may not remedy the situation, as the seller expressly represented the premises were free and clear of any mold or evidence of any existing mold remediation. In order to cure "any mold," problem plaintiffs would have to, as they have offered, remediate the mold. That remediation would, by its very nature, leave evidence of existing mold remediation. The sellers false representation, that there was no mold, went to the heart of the parties agreement. Thus, the express terms of the contract do not permit remediation. Contrary to plaintiffs' position "any mold" means just that, not "toxic mold" or known mold but any mold which they have not denied exists.

On the cross motion, defendants have established their entitlement to summary judgment dismissing the complaint as asserted against them and on their second counterclaim alleging breach of the express terms of the contract. The court has not considered the engineer's inspection report as it is not in admissible form. Nor has the court considered plaintiffs' unauthenticated photographs (***Burns v City of Poughkeepsie***, 293AD2d 435, 739 NYS2d 459 [2d Dept 2002]). Defendants have submitted expert affidavits from their

professional engineers, Victor Keneiby and Harold Krongelb. On October 11, 2014, Keneiby performed the home inspection and "observed evidence of water in the basement, including puddles, rust on the bottom of the boilers and metal, stains on the floor, and suspect mold." He observed "suspect mold" on the garage ceiling, the basement utility room, the sub-basement utility room and the second floor master bedroom closet. He explained that as an engineer, he can only report on his observations of the suspect mold and that only a certified industrial hygienist or someone with similar experience can determine the scope of the mold. Krongelb opined that "in every case" where a similar substance was visually identified as suspect mold and then tested, it was confirmed to be mold. These affidavits, coupled with plaintiffs' lack of denial of the existence of mold and their offer of remediation, establishes that "suspect mold" is inclusive of "any mold." The court notes that plaintiffs offer a United States Environmental Protection Agency (EPA 402-k-02-003) printout that advises "[i]t is impossible to get rid of all mold and mold spores indoors..." While the document is not in admissible form, it is attached to plaintiffs' papers and offered by plaintiffs, and in conjunction with the admissible evidence it has been established that mold exists within the home.

Plaintiffs' offer to remediate the mold is unavailing, as the specific contract rider provision agreed to by the parties represented that the premises were free of "evidence of any existing mold remediation." The defect therefore was not curable and the purchaser was entitled to cancel the contract (***Cohen v Kranz***, 12 NY2d 242, 238 NYS2d 928 [1963]; ***Spivak v Farkas***, 217 AD2d 430, 629 NYS2d 45 [1st Dept 1995]; ***Delegated Properties, Ltd. v Lewis***, 36 AD2d 766, 321 NYS2d 234 [2d Dept 1971]). In opposition, plaintiffs failed to raise any triable issues of fact that warrant a denial of the cross motion. Accordingly the cross motion by the defendants for summary judgment on the second counterclaim for breach of contract is granted. The remaining causes of action for false representation, fraud in the inducement, and vendees' lien are dismissed as moot given the decision herein.

Plaintiffs have also moved, pursuant to CPLR 6514, for an order canceling the notice of pendency filed by defendants. A notice of pendency may be filed in an action seeking a judgment that would affect the title to, or possession, use, or enjoyment of, real property (*see* CPLR 6501; ***5303 Realty Corp. v O & Y Equity Corp.***, 64 NY2d 313, 320, 486 NYS2d 877 [1984]; ***Nastasi v Nastasi***, 26 AD3d 32, 805 NYS2d 585 [2d Dept 2005]). Cancellation of a notice of pendency is mandatory where such action has been "settled, discontinued or abated" (CPLR 6514 [a]). Given the decision herein, the vendees' lien and lis pendens filed against the subject premises, the notice of pendency is subject to mandatory cancellation (CPLR 6514 [a]; *see generally* ***Gallagher Removal Serv. v Duchnowski***, 179 AD2d 622, 578 NYS2d 584 [2d Dept 1992]). Accordingly, that branch of the motion is granted. Additionally, plaintiffs correctly point out that a notice of pendency is effective only when a summons is served upon the defendant (*see* CPLR §6512), and as defendants here proceeded by way of counterclaim, the notice of pendency was improperly filed (***Neiderfer v Hampton Design and Construction Group, Inc.***, 6 Misc 3d 1009, 800 NYS2d 351 [Sup Ct, Nassau County 2005]). Plaintiffs' application for costs and expenses related to the cancellation of the notice of pendency pursuant to CPLR §6514 (c) is denied. CPLR §6514 (c) permits the court to direct the plaintiff to pay costs and expenses occasioned by the filing and cancellation of the notice of pendency but does not permit the court to order a cross claiming defendant to pay the same sanction. In any event, the applications for costs and expenses by both parties are denied.

Submit judment.

Dated: September 1, 2015

J.S.C.

X FINAL DISPOSITION **NON-FINAL DISPOSITION**