ORIGINAL

Index No.: 611541/2019

**SUPREME COURT - STATE OF NEW YORK**
**I.A.S. PART 39 - SUFFOLK COUNTY**

**PRESENT:**
**Hon. DENISE F. MOLIA**
**Justice**

EDWIN S. FRYER and DOROTHY S. FRYER,

Plaintiffs,

-against-

BLAIR MURPHY,

Defendant.

CASE DISPOSED: YES
MOTION R/D: 11/22/19
SUBMISSION DATE: 1/10/2020
MOTION SEQUENCE NO: 001; MG
CASEDISP

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Upon the **E-file document list** numbered 10 to 25 and 30 to 38 read on the application by plaintiffs for an order pursuant to CPLR 3212 granting them summary judgment on their claims set forth in their verified complaint and dismissing defendant's counterclaims; it is

***ORDERED*** that plaintiffs' motion for an order granting them summary judgment on the claims in their complaint and dismissing defendant's counterclaims is granted (CPLR 3212).

This is a breach of contract and declaratory judgment action brought by plaintiffs Edwin F. Fryer and Dorothy S. Fryer ("plaintiffs"or "sellers") commenced by the filing of a summons and complaint on June 18, 2019. Issue was joined by defendant Blair Murphy ("defendant" or "purchaser") through the service of a verified answer with counterclaims on July 23, 2019. Plaintiff served their reply to the counterclaims on August 12, 2019. Plaintiffs allege in their verified complaint that defendant anticipatorily breached the fully executed and unconditional contract of sale (the "contract") dated September 22, 2018 for the purchase of their property known as 4 Flying Point Road, Southampton, New York (the "subject premises"). Plaintiffs herein seek to enforce their rights

under the contract to liquidated damages in the amount of $101,000.00[1], representing the down payment (the "down payment") placed in escrow by defendant, as a result of defendant's anticipatory breach. It is undisputed that the down payment is being held by Classic Abstract, Inc. ("Classic Abstract"), as escrowee. Defendant counterclaims for a judgment releasing the down payment to her due to the discovery of mold at the subject premises. Defendant alleges in her counterclaims that the presence of mold at the subject premises is a violation of applicable zoning and environmental regulations, which permitted the termination of the contract prior to closing.

Plaintiffs now move for summary judgment on their claims and for a dismissal of the counterclaims. In support thereof, plaintiffs submit, *inter alia*, an attorney affirmation, the sworn affidavit of plaintiff Edwin S. Fryer, a memorandum of law, a copy of the pleadings, the contract, certain correspondence, and the certificate of occupancy for the subject premises. Defendant opposes the motion and submits an attorney affirmation, a sworn affidavit, a memorandum of law, and copies of a mold report, photographs, and certain correspondence. Plaintiffs submit a memorandum of law in reply.

The contract between the parties provided that the purchaser was accepting the subject premises in its present condition, specifically stating in that regard as follows:

> 12. Condition of Property. Purchaser acknowledges and represents that Purchaser is fully aware of the physical condition and state of repair of the Premises and of all other property included in the sale, based on Purchaser's own inspection and investigation thereof, and that Purchaser is entering into this contract based solely upon such inspection and investigation and not upon any information, data, statements or representations, written or oral, as to the physical condition, state of repair, use, cost of operation or any other matter related to the Premises or the property included in the sale, given or made by Seller or its representatives and shall accept the same as in their present condition and state of repair, subject to reasonable use, wear, tear and natural deterioration between the date hereof and the date of the Closing, without any reduction in the purchaser price or claim of any kind for any change in such condition by reason thereof subsequent to the date of this contract. Purchaser and its authorized representative shall have the right, at reasonable times and upon reasonable notice...to Seller, to inspect the Premises before Closing.

The contract further contained a merger clause, which stated:

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[1]Defendant asserts in her affidavit that in addition to the $100,000.00 down payment tendered at signing, she wired an additional $1,000.00 to Classic Abstract. Plaintiffs have deferred to defendant's statements in regards to the total down payment being $101,000.00.

> All prior understandings, agreements, representations and warranties, oral or written, between Seller and Purchaser are merged into this contract; it completely expresses their full agreement and has been entered into after full investigation, neither party relying on any statement made by anyone else that is not set forth in this contract.

Paragraph 10 of the contract obligated the sellers to tender title to the property free of governmental violations at closing. The contract further provided at paragraph 23 that the purchaser's down payment would serve as the sellers' liquidated damages in the event of the purchaser's default, as it was agreed that the down payment represented "a fair and reasonable amount of damages under the circumstances." The closing date for the sale was scheduled to be held on or about October 25, 2018.

In his affidavit, Mr. Fryer avers that in early November, the purchaser's attorney contacted him to advise that the sale would not be proceeding due to the possible presence of mold at the subject premises. Mr. Fryer further alleges that he and Mrs. Fryer were ready, willing and able to perform under the contract at or before the closing. In anticipation of the closing, Mr. Fryer avers that an updated certificate of occupancy for the subject premises was secured from the Town of Southampton. According to Mr. Fryer, on November 6, 2018, purchaser's attorney requested their consent to authorize Classic Abstract to release the down payment to the purchaser, which the sellers declined. Further correspondence from purchaser's attorney dated November 6, 2018 stated, in pertinent part, "my client has informed me she will not be proceeding with the purchase of the property. On her behalf, I requested the return of the contract deposit, which you informed me you would not do." Mr. Fryer further avers that he was advised by the purchaser's attorney that Ms. Murphy would not close on the purchase, under any circumstances, even should any purported mold be remediated. Mr. Fryer states that he and his wife considered the contract in breach by defendant and pursuant to paragraph 25 thereof, they provided notice to Classic Abstract of their demand for the down payment as their liquidated damages.

Defendant alleges by way of her sworn affidavit that prior to the execution of the contract, she had a mold detection specialist conduct an inspection of the property and thereat it was discovered sheetrock in the basement had been infected with mold. Defendant further asserts that between the date that the contract was signed in September of 2018 and November 2018, the mold condition had worsened such that the subject premises were not as they were on the date the contract was executed. Defendant alleges that because of the worsened condition of the subject premises, plaintiffs breached the contract, entitling her to a return of her down payment of $101,000.00. It is undisputed that Classic Abstract has requested written instructions agreed to by all parties before it will release the down payment.

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact *(see* ***Rotuba Extruders, Inc. v. Ceppos***, 46 NY2d 223, 413 NYS2d 141 [1978]; ***Andre v. Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). It is well settled that the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a

matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (***Alvarez v. Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]; ***Zuckerman v. City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v. New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Once a prima facie showing has been made, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact *(see* ***Alvarez v. Prospect Hosp.****, 68 NY2d at 324, 508 NYS2d 923,* citing ***Zuckerman v. City of New York***, 49 NY2d at 562, 427 NYS2d 595). To defeat a motion for summary judgment, a party opposing such motion must lay bare his proof in evidentiary form; conclusory allegations are insufficient to raise a triable issue of fact (*see* ***Friends of Animals, Inc. v. Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790; ***Burns v. City of Poughkeepsie***, 293 AD2d 435, 739 NYS2d 458 [2d Dept 2002]).

In determining the rights and obligations of the parties, it is well established that "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (***Greenfield v. Philles Records*** 98 N.Y.2d 562, 569 [2002]; ***R/S Assoc. v. N.Y. Job Dev. Auth.***, 98 N.Y.2d 29, 32 [2002]). "In construing a contract, one of a court's goals is to avoid an interpretation that would leave contractual clauses meaningless" (***Two Guys from Harrison-N.Y. v. S.F.R. Realty Assoc.***, 63 NY2d 396, 403, 482 NYS2d 465, 468 [1984]). The aim of the court when interpreting a contract is to arrive at a construction that gives fair meaning to all of its terms and provisions, and to reach a "practical interpretation of the expressions of the parties so that their reasonable expectations will be realized" (*see* ***Pellot v. Pellot***, 305 AD2d 478, 759 NYS2d 494 [2d Dept 2003]; ***Gonzalez v. Norrito***, 256 AD2d 440, 682 NYS2d 100 [2d Dept 1998]; ***Joseph v. Creek & Pines, Ltd.***, 217 A.D.2d 534, 535, 629 N.Y.S.2d 75 [2d Dept], *lv dismissed* 86 N.Y.2d 885, 635 N.Y.S.2d 950 [1995], *lv denied* 89 N.Y.2d 804, 653 N.Y.S.2d 543 [1996]; *see also* ***Matter of Matco-Norca, Inc.***, 22 A.D.3d 495, 802 N.Y.S.2d 707 [2d Dept 2005]; ***Tikotzky v. City of New York***, 286 A.D.2d 493, 729 N.Y.S.2d 525 [2d Dept 2001]; ***Partrick v. Guarniere***, 204 A.D.2d 702, 612 N.Y.S.2d 630 [2d Dept], *lv denied* 84 N.Y.2d 810, 621 N.Y.S.2d 519 [1994]). "If the language of the agreement is free from ambiguity, its meaning may be determined as a matter of law on the basis of the writing alone without resort to extrinsic evidence" (***Salerno v. Odoardi***, 41 AD3d 574, 575 [2d Dept 2007]). As it is a question of law whether or not a contract is ambiguous (***W. W. W. Assoc. v. Giancontieri***, 77 N.Y.2d 157, 565 N.Y.S.2d 440 [1990]), a court must first determine whether the agreement at issue on its face is reasonably susceptible to more than one interpretation (***see Chimart Assoc. v. Paul***, 66 N.Y.2d 570, 498 N.Y.S.2d 344 [1986]).

Here, there is no dispute that the contract is unambiguous and that defendant agreed to accept the property in its present condition. The contract further contains a specific disclaimer that no representations were being made by the sellers as to the physical condition of the subject premises. There is no dispute that defendant executed the contract on September 22, 2018, a date after she received the report indicating the presence of mold in the basement. The contract does not contain a clause requiring the property to be "free and clear of mold", nor does it require mold remediation prior to closing, nor does it permit defendant to cancel the contract upon the discovery of mold at a final inspection prior to closing or otherwise. There is no dispute that defendant refused to proceed

with the closing due to the presence of mold at the subject premises and demanded the return of her down payment.

An anticipatory breach of contract by a purchaser "is a repudiation of a contractual duty before the time fixed in the contract for performance has arrived" (***LaMarche Food Products Corp. v. 438 Union, LLC,*** 178 AD3d 910, 912, 115 NYS3d 436 [2d Dept. 2019]). An anticipatory repudiation occurs when a party to a contract positively and unequivocally expresses an intent not to perform (***Id.***; *see also* ***Princes Point LLC v. Muss Development LLC,*** 30 NY3d 127, 65 NYS3d 89 [2017]). Indeed, it is well established that "the party harmed by the repudiation must make a choice either to pursue damages for the breach or proceed as if the contract is valid...[and] a wrongful repudiation of the contract by one party before the time for performance entitles the nonrepudiating party to immediately claim damages for a total breach" (***Princes Point LLC v. Muss Development LLC,*** 30 NY3d at 133, 65 NYS3d at 93). "Where a purchaser, prior to the time of performance, seeks to repudiate or renounce a contract, this may be treated by the vendor as a complete anticipatory breach, in which case there is no necessity for the tender of performance or the waiting for the time of performance to arrive" (***Cooper v. Bosse,*** 85 AD2d 616, 618, 444 NYS2d 955 [2d Dept. 1981]).

Here, plaintiffs demonstrated their prima facie entitlement to summary judgment as a matter of law by demonstrating that the purchaser anticipatorily breached the contract. The correspondence from purchaser's attorney indicating a refusal to perform, together with a request for a return of the down payment, constituted a positive and unequivocal repudiation of the contract to purchase the subject premises (*see* ***Hegner v. Reed,*** 2 AD3d 683, 685, 770 NYS2d 87 [2d Dept. 2003]). The purchaser's cancellation of the contract excused plaintiffs from any duty of performance (***Cooper v. Bosse,*** 85 AD2d 616, 444 NYS2d 955 [2d Dept. 1981]). Thus, plaintiffs were not required to demonstrate "that they were ready, willing, and able to perform because the necessity for such tender was obviated by the defendant's anticipatory breach" (***Somma v. Richardt,*** 52 AD3d 813, 814, 861 NYS2d 720 [2d Dept. 2008]; *see also* ***Peek v. Scialdone,*** 56 AD3d 743, 868 NYS2d 700 [2d Dept. 2008]).

In opposition, defendant claims there are factual issues regarding the extent of the mold, plaintiffs' knowledge and alleged concealment of the extent of the mold, and plaintiffs' obligation to remediate the mold pursuant to paragraph 10 of the contract, which required that the property be free of governmental violations at closing. The issue of mold at the subject premises, however, is irrelevant, inasmuch as the contract did not include a mold contingency clause or otherwise address the mold issue. Notwithstanding, defendant provides no evidence, other than her own bare and conclusory allegations, that the mold worsened between September 22, 2018 when she executed the contract and November 6, 2018, when she terminated the contract. Further, defendant provides no evidence that the mold condition violated any governmental laws requiring remediation prior to closing. Even had that been so, defendant should have, but did not, afford plaintiffs the opportunity to remediate the mold prior to closing (***Hegner v. Reed,*** 2 AD3d 683, 770 NYS2d 87 [2d Dept. 2003]). Rather, defendant advised plaintiffs she would not close on the property under any circumstances.

Defendant's position, as well, is inconsistent with the case law in the Second Department. Where, as here, a contract for the purchase of real property contains a provision that specifically disclaims any reliance upon oral representations as to the condition of the property and further that the purchaser accepts the property in its current condition or "as is", a purchaser's claim that representations made by the sellers prior to the execution of the contract regarding the lack of mold does not create a question of fact (*see* ***Comora v. Franklin,*** 171 AD3d 851, 97 NYS3d 734 [2d Dept. 2019]; ***Kagan v. Freedman,*** 55 AD3d 558, 866 NYS2d 216 [2d Dept. 2008]). In ***Kagan***, *supra*, the Second Department found that the purchasers' breach of contract action against the sellers based upon their claim that the sellers dissuaded them from obtaining a professional mold inspection of the basement was barred by the disclaimer language in the contract and the merger doctrine.

The application of these legal principles is even more compelling under the facts presented. Here, defendant had the subject premises inspected for mold and the report provided to her disclosed the presence of mold in the basement. Defendant, armed with this knowledge and fully aware of the mold in the basement, executed a contract of sale that was unconditional as to the physical condition of the property and contained no clause regarding the remediation of any mold prior to closing. Defendant could have refused to sign the contract or she could have insisted upon a provision requiring the mold to be remediated prior to closing. Defendant did neither but rather signed the contract with full knowledge of the presence of mold in the basement.

There being no question of fact presented, plaintiffs are entitled to summary judgment on their breach of contract claim (***Hegner v. Reed,*** 2 AD3d 683, 770 NYS2d 87 [2d Dept. 2003]; *see also* ***Comora v. Franklin,*** 171 AD3d 851, 97 NYS3d 734 [2d Dept. 2019]; ***Kagan v. Freedman,*** 55 AD3d 558, 866 NYS2d 216 [2d Dept. 2008]).

As to the declaratory judgment claim, plaintiffs assert they are entitled to the receive and retain the down payment as liquidated damages pursuant to paragraph 23 of the contract. It has long been determined that liquidated damages of the entire down payment are recoverable upon a purchaser's inexcusable default on a real estate contract (*see* ***Maxton Builders, Inc. v. Lo Galbo,*** 68 NY2d 373, 509 NYS2d 507 [1986]; ***Micciche v. Homes By Timbers, Inc.,*** 18 AD3d 833, 796 NYS2d 628 [2d Dept. 2005]; ***Hegner v. Reed,*** 2 AD3d 683, 770 NYS2d 87 [2d Dept. 2003]). Due to defendant's inexcusable anticipatory breach of the contract, plaintiffs are entitled to the down payment of $101,000.00 pursuant to the liquidated damages provision of the contract (***LaMarche Food Products Corp. v. 438 Union, LLC***, *supra*; ***Hegner v. Reed***, *supra*).

Accordingly, the motion by plaintiffs for an order granting them summary judgment on their breach of contract and declaratory judgment claims and dismissing defendant's counterclaims is granted.

Dated: 5/26/20

**HON. DENISE F. MOLIA**

**HON. DENISE F. MOLIA, A.J.S.C.**