Short Form Order

Index No. 613551-2022

SUPREME COURT – STATE OF NEW YORK
PART 78 – SUFFOLK COUNTY

P R E S E N T:
Hon. Maureen T. Liccione
Justice Supreme Court

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KRISTIN FARRELL,

Plaintiff,

-against-

DANIEL GARDNER and LISA GARDNER,

Defendants.

----------x

Mot. Seq. No. 002 – MD
Mot. Seq. No. 003 – MG
Orig. Return Date: 05/22/2023
Mot. Submit Date: 11/22/2023

PLAINTIFF'S ATTORNEY
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DITALIA & PASCA, LLP
108 E. Main Street
Riverhead, NY 11901

DEFENDANTS' ATTORNEY
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QUARTARARO, LLP
33 W. Second Street
Riverhead, NY 11901

Upon the e-filed documents numbered 30 to 177 and upon due deliberation, it is hereby

ORDERED that defendants' motion to dismiss and for summary judgment dismissing the complaint against them (motion sequence no. 002) is denied; and it is further

ORDERED that plaintiff's motion for summary judgment (motion sequence no. 003) is granted; and it is further

ORDERED that plaintiff Kristen Farrell is entitled to the immediate return of the downpayment of $800,000 and accrued interest, if any, and the Suffolk County Comptroller shall release the downpayment to plaintiff Kristen Farrell upon service of this Order with notice of entry upon the Comptroller's office by personal delivery; and it is further

ORDERED that within sixty (60) days of the date of this Order, plaintiff shall file an itemized invoice for the attorneys' fees and costs expended for the commencement and prosecution of this litigation, as well as a proposed judgment including attorneys' fees and costs, and pre-judgment interest on the downpayment to be calculated from June 9, 2022; and it is further

ORDERED that the surety bond which was ordered to serve as additional security for plaintiff's monetary claims above and beyond the $800,000 downpayment amount shall remain in force until satisfaction of the eventual judgment including attorneys' fees, costs, and interest or until further court order.

This is an action to recover a downpayment made pursuant to a contract for the sale of real property. Plaintiff Kristen Farrell (Purchaser) commenced this action alleging breach of contract and seeking a determination that Purchaser is entitled to rescind the contract for the sale of the real property located at 149 Seascape Lane, in the Village of Sagaponack, New York (Property) and to recover compensatory damages, including the $800,000 downpayment that Purchaser paid (Downpayment), with interest from the date of defendants' Daniel Gardner and Lisa Gardner (Sellers') breach, and reasonable attorneys' fees and costs. The Sellers have moved to dismiss the complaint and both parties have moved for summary judgment.

Factual Background

1985: Certificate of Occupancy from the Town of Southampton

In 1985, the Town of Southampton issued a certificate of occupancy (1985 CO) for the Property, describing the use as a "new" "[o]ne family dwelling and deck," completed in July 1985 (NYSCEF Doc No. 39). The 1985 CO was issued by the "Town of Southampton Building Department," with reference to the Southampton "Building Zone Ordinance – Article XXIV, Section 1" and "to certify that the New Building ... has been COMPLETED substantially according to the approved plans, and the requirements of the above ordinances have been met" (*id.*). (Emphasis in original). In 1985, the Property was located within the jurisdiction of the Town of Southampton, as the Village of Sagaponack, where the Property is located, was only incorporated in 2005.

Based on the review the original 1985 house plans stored by the Village of Sagaponack, the Village's building inspector (Building Inspection) testified that at the time of the 1985 CO, the third floor was "a finished mezzanine when the structure was built" with a "partial wall" at the top of the stairs (NYSCEF Doc No. 69).

2007: Village Zoning and Building Codes Adopted

The Village adopted its first Zoning and Building Codes in 2007. The Village Code requires certificates of occupancy (COs) to be issued by the Building Inspector (Village of Sagaponack Code §§ 30-15; 245-82). Village of Sagaponack Code § 30-15 provides that:

> B. *No building hereafter enlarged, extended or altered* or upon which work has been performed which required the issuance of a building permit shall continue to be occupied or used for more than 30 days after the completion of the alteration or work unless a certificate of occupancy shall have been issued by the Building Inspector, in addition to any which may be required under Chapter 245, Zoning.
>
> C. *No change shall be made in the use or type of occupancy* of an existing building unless a certificate of occupancy authorizing such change shall have been issued by the Building Inspector, in addition to any which may be required under Chapter 245 Zoning. (...)
>
> F. No building where there has been a *change of ownership* shall be used or occupied, in whole or in part, unless and until an updated certificate of occupancy has been issued by the Building Inspector.
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> (Emphasis added).

At his deposition, the Building Inspector testified that alterations within a house of "non-habitable space into habitable space" and "addition or deletion of bedrooms or bathrooms" would constitute a change "in the use or type of occupancy of an existing building as specified in Village of Sagaponack Code § 30-15 (C)" (NYSCEF Doc No. 69, pp 20-25, 28). The Building Inspector further stated that the "addition or demolition of interior partition walls and rooms to create rooms or remove rooms" would typically require a building permit followed by a CO (*id.*). As to the requirement that a new certificate of occupancy be issued each time there is a transfer of ownership (Village of Sagaponack Code § 30-15 [F]), the Building Inspector testified that a seller "typically applies for this type of updated Certificate of Occupancy" (NYSCEF Doc No. 69, p 30).

The Building Inspector added that changes to electrical systems, including addition or removal of electric service to an entire floor and changes to plumbing systems, including the removal of an entire bathroom would require a certificate of compliance (*id.*; *see also* Village of Sagaponack Code § 30-15 [D] ["Electrical systems hereafter installed, extended or modified shall not be used until a certificate of compliance has been issued by the Building Department"]; *id.* § 30-15 [E] ["Plumbing and drainage systems hereafter constructed, altered, or removed shall not be used until a certificate of compliance has been issued by the Building Department"]).

2016: Sellers Acquired the Property

The Sellers acquired the Property in February of 2016 with a finished third floor space, which contained two enclosed rooms, a bathroom and a hallway connecting all three of those

rooms (NYSCEF Doc No. 67). The Sellers affirmed that they were unaware at the time of their purchase that the finished third floor was "illegal" (NYSCEF Doc Nos. 32-33). Pursuant to the Building Inspector's testimony, neither the Village's nor the Town's zoning codes allow "third stories in single-family residences" (NYSCEF Doc No. 69, p 38). However, a mezzanine, which the Property initially had when it was built, is allowed by the State Building Code and recognized by the Village, is a habitable space, and is an "interim level not considered to be a full floor" (*id.*, p 39). A mezzanine is defined in the Village of Sagaponack Code as an "an intermediate level … between the floor and ceiling of any story" (Village of Sagaponack Code § 245-4), interchangeable with the term "loft" and open to the floor below so one "is able to observe the area down below" (NYSCEF Doc No. 69, p 38). The Building Inspector testified that he could not locate any permit or application for the pre-2007 conversion of the mezzanine into a third-floor area with enclosed bedrooms and a bathroom (*id.*, p 85). The Sellers became aware of the third floor's illegality in 2019 (NYSCEF Doc No. 68, pp 24-29; NYSCEF Doc No. 32, para 3).

2021-2022: Property Listed for Sale

In 2021, the Property was listed for $8.995 million, as consisting of 4 bedrooms and 3.5 bathrooms and offering the "possibility (with plans and permits set in place) to build a newly modern 5,000 sq ft house if desired" (NYSCEF Doc No. 86). One of the third-floor rooms was staged and shown furnished as a bedroom. On March 24, 2022, Purchaser made an offer of $8 million, which was accepted by the Sellers. Purchaser was looking in the Village of Sagaponack for an opportunity to build a "spec" house which she defined as a house designed and newly built without a specific buyer in mind (NYSCEF Doc No. 46). Purchaser visited the Property, including the rooms on the finished third floor. A pre-contract walkthrough video of the Property from March 25, 2022 shows a finished third floor with a bedroom and bathroom.

March 2022: Contract of Sale

Sellers and Purchaser entered into a contract dated March 29, 2022 (Contract) for the sale of the Property. Paragraph 12 of the Contract relating to "condition of the property" states as follows:

> 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 this 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 other property included in the sale, given or made by Seller or its representatives, and shall accept the same "**as is**" 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 Closing (except as otherwise set forth in paragraph 16(e) or elsewhere in this contract including riders, without any reduction in the purchase price or claim of any kind for any change in such condition by reason thereof subsequent to the date of this contract. (...)
>
> (NYSCEF Doc No. 36 [emphasis added]).

Similarly, Paragraph 30 repeats that the Property was being sold "as is":

> The Purchaser has examined the premises ... and is familiar with the physical condition thereof ... Purchaser ... agrees to take the premises "AS IS" (except as set forth in in this contract).
>
> (*id.*)

Paragraph 42 also acknowledges that the Property was being sold "as is":

> It is understood and agreed that, except as specifically stated in this contract, the property is being sold "AS IS".
>
> (*id.*)

Furthermore, under Paragraph 16 (b), the parties agreed that the Contract and Purchaser's obligation to purchase the Property were "subject to and conditioned upon the fulfillment of the following conditions precedent:

> The delivery by Seller to Purchaser of a valid and subsisting Certificate of Occupancy or other required certificate of compliance, or evidence that none was required, covering the building(s) and all of the other improvements located on the property authorizing their present use and the use as a single family dwelling at the date of Closing."
>
> (*id.*, underscoring in original).

Notably, the condition precedent of delivery by the Sellers to the Purchaser of a valid and subsisting CO was not conditioned upon Purchaser's delivery of an updated survey to Sellers. Accordingly, under the Contract terms, Sellers were required to convey title to the Property in the condition it was at the time of Contract with a valid CO for the present use.

Following the execution of the Contract, the Purchaser paid the Downpayment of $800,000 to Sellers' counsel. By letter dated May 10, 2022, Purchaser set a time-of-essence closing for June 9, 2022.

April/May 2022: Removal of the Finished Third Floor

A few weeks after the Contract was signed, the Sellers learned from their real estate broker that Purchaser was considering occupancy of the Property in August and would need an updated CO to do so. In April 2022, the Building Inspector informed Seller Lisa Gardner via email that "all aspects of a finished third floor must be extinguished to receive an updated C.O." and that the requirement for an updated CO upon the transfer of the property was part of the Village Code (NYSCEF Doc No. 87). The Building Inspector testified that when Ms. Gardner asked him if after the renovation work they could just rely on the 1985 CO, he told her no (NYSCEF Doc No. 69, p 63).

In mid-April 2022, Purchaser's counsel corresponded with counsel for the Sellers indicating that he had just learned that the third floor rooms were illegal and conveyed his concern that the Sellers would be unable to provide a valid CO in accordance with the Contract. On April 22, 2022, Purchaser's counsel again communicated with counsel for the Sellers indicating that he had become aware that Sellers were planning to make changes to the house and informed him that such changes were unacceptable under the Contract terms.

Nevertheless, in early May 2022, the Sellers' handyman gutted the finished third floor, which included doing plumbing and electrical work to the third floor, demolishing the rooms on the third floor, including the bathroom and the bedroom and transforming the finished third floor into an enclosed unfinished attic space, all without permits. Although the Contract had not been terminated, Sellers nevertheless re-listed the Property in May 2022 as having only 3 bedrooms and 2.5 bathrooms and reduced the asking price by $1 million.

On June 1, 2022, the Sellers applied to the Village for an updated CO. Sellers' attorney directed that the CO inspection be scheduled for June 10, 2022, the day after the time of the essence closing (NYSCEF Doc. No. 98).

June 9, 2022: Scheduled Time of the Essence Closing

On June 9, 2022, the day of the time of the essence closing, Sellers' counsel stipulated that the Purchaser "arrived with the correct amount of money to close, and [was] prepared to tender that payment under the contract, however [she] had an objection to the condition of the house" (NYSCEF Doc No. 100, p 5). At the closing, Purchaser's counsel testified on the record before the two stenographers present that at the June 8, 2022 walk-though he saw that the "third floor had been visibly destroyed down to the studs," that the third floor was "now [an] unfinished space"

and that the Property was not the house that the Purchaser intended to buy (*id.*, p 6). Purchaser's counsel added that the Property was no longer in as-is condition and there was no valid and subsisting CO covering the uses existing at the time of the Contract (*id.*). Sellers' counsel indicated that the premises were in the condition that they were required to be produced under the Contract. The closing was not completed.

Post-Closing Certificate of Occupancy

The Building Inspector conducted a CO inspection of the Property on June 10, 2022, the day after the aborted closing. The inspection was described as "failed" in the inspection report. The inspection report indicated that the electrical wires needed to be secured and the open waste pipe needed to be capped in the attic, the pool fence needed to be repaired, and the smoke detectors on the second floor needed to be moved. The Building Inspector testified that the Property was not in compliance with the Village's Code on the date of inspection. Mr. Gardner indicated in his deposition that no changes were made to the Property between June 9th, the date of the closing and June 10th, the date of the inspection. On August 19, 2022, another CO inspection occurred and on August 22, 2022, a CO was issued. The Property was subsequently sold to a third party for a lower price of $7.3 million.

Legal Discussion

Sellers have moved to dismiss the complaint and for summary judgment on their breach of contract counterclaim. They assert that summary judgment should be awarded to them because Purchaser failed to close and breached the Contract. Sellers further contend that they tendered at closing the Property in "as is" condition for use as a single family detached dwelling with a valid and subsisting CO, the 1985 CO, compliant with the Village of Sagaponack's Code. Purchaser opposed Sellers' motion for summary judgment and moved for summary judgment arguing she is entitled to relief on her claims because (a) Purchaser properly set a time-of-essence closing under the Contract, (b) Purchaser was ready, willing, and able to perform on the law date, and (c) Sellers breached the Contract by failing to perform because there was no valid CO as required by Paragraph 16 (b) and the Property was not in "as is" condition as of the date of the Contract as required by Paragraphs 12, 30, and 42 of the Contract.

A party moving for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Failure to make

such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact, which require a trial of the action (*see Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (*see Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]).

When the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving practical interpretation to the language employed and the parties' reasonable expectations (*Correnti v Allstate Properties, LLC*, 38 AD3d 588, 590 [2d Dept 2007]; *Costello v Casale*, 281 AD2d 581, 583 [2d Dept 2001]; *see also S. Rd. Assocs., LLC v Intl. Bus. Machines Corp.*, 4 NY3d 272, 277 [2005] ["In cases of contract interpretation, it is well settled that when parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms"] [internal quotation omitted]). The "[i]nterpretation of an unambiguous contract provision is a function for the court, and matters extrinsic to the agreement may not be considered when the intent of the parties can be gleaned from the face of the instrument" (*Lui v Park Ridge at Terryville Assn., Inc.*, 196 AD2d 579, 580, [2d Dept 1993] [internal quotation omitted]; *see S. Rd. Assocs., LLC*, 4 NY3d at 278). Here, both parties affirm that the Contract is clear and unambiguous. The Court agrees and finds that the language used by the Contract has "a definite and precise meaning, unattended by danger of misconception in the purport of the [contract] itself, and concerning which there is no reasonable basis for a difference of opinion" (*Greenfield v Philles Recs., Inc.*, 98 NY2d 562, 569 [2002]).

Based on the clear and unambiguous terms of the Contract, Purchaser established, prima facie, that she was entitled to the return of the Downpayment. "To prevail on a cause of action for the return of a down payment on a contract for the sale of real property, the plaintiff must establish that the defendant breached or repudiated the contract and that the plaintiff was ready, willing, and able to perform on the closing date" (*Martocci v Schneider*, 119 AD3d 746, 748 [2d Dept 2014]; *Yu Ling Hu v Zapas*, 108 AD3d 621, 621 [2d Dept 2013]). Here, as noted below, Purchaser established that: (1) Sellers breached the Contract by failing to deliver a valid and subsisting CO for the Property and could not deliver the Property in "as is" condition at the closing, and (2) that Purchaser was ready, willing, and able to perform on the time of the essence closing date.

Sellers Failed to Deliver a Valid and Subsisting Certificate of Occupancy at the Closing

Nonfulfillment of a condition precedent to a contract for the sale of real estate has been found as grounds for relieving the buyer of the obligation to purchase the property and for recovery of money paid by the buyer on the purchase price (*see e.g. Costello*, 281 AD2d 581; *Second Ave. Realty LLC v 1355 Second Owner LLC*, 164 AD3d 1153 [1st Dept 2018]).

Specifically, a purchaser may maintain an action for the recovery of payments when the seller fails to provide a certificate of occupancy as required by the contract (*Costello*, 281 AD2d 581 [holding that the seller breached the condition precedent to the closing of title and the purchaser was thus entitled to the return of the down payment, where the seller produced neither a certificate of occupancy at the time of closing nor proof that no such certificate was needed, as required by the contract for the sale of a home]; *see Stoyanov v Strihic*, 216 AD3d 840, 842 [2d Dept 2023] ["plaintiffs established, prima facie, that they were entitled to the return of the down payment under the contract" where the plain language of the contract required defendants to provide a certificate of occupancy and the defendants did not provide a certificate of occupancy]; *Chao-Yu C. Huang v Harry An-Ling Shih*, 73 AD3d 981, 982 [2d Dept 2010] ["sellers breached their contractual duty to either provide a certificate of occupancy or provide proof that none was necessary"]; *Rufeh v Schwartz*, 50 AD3d 1000 [2d Dept 2008] [summary judgment granted to the buyer for a return of the downpayment when contract required a CO for the basement and seller, without obtaining a CO for the basement, tried to adjourn the closing]; *Gobetz v Sencer*, 2009 NY Slip Op 30552(U) [Sup Ct, New York County 2009] [buyer was entitled to return of downpayment when seller failed to provide CO for wooden deck and the contract required the seller to either produce a certificate of occupancy for the premises as it existed at the time of closing, or proof that no such certificate was needed and seller breached a condition precedent to the closing of title]).

The plain and unambiguous language of the Contract required as a "condition precedent" to the Purchaser's obligation to purchase the Property the "delivery by Seller to Purchaser of a valid and subsisting certificate of occupancy or other required certificate of compliance, or evidence that none was required, covering the building(s) and all of the other improvements located on the property authorizing their present use and the use as a single family dwelling at the date of Closing" (NYSCEF Doc No. 73 [underlining in original]). It is clear from the Contract that

the parties intended this provision to operate as a condition precedent (*Lui v Park Ridge at Terryville Assn., Inc.*, 196 AD2d 579, 582 [2d Dept 1993]). However, the Sellers failed to provide a "valid and subsisting" CO covering the building on the date of closing thus breaching the Contract.

Pursuant to documentary evidence, the Property failed its CO inspection one day after the closing, based on four listed defects in the inspection report (including two located in the attic), and only obtained a CO in mid-August 2022, more than two months after the scheduled time of the essence closing. The Building Inspector testified that the Property was not in compliance with the Village's Code on the date of inspection and did not have a CO "recognized by the Village of Sagaponack covering the house, pool, electric system, plumbing system in the condition that those items were on June 10, 2022" (NYSCEF Doc No. 69). And pursuant to Mr. Gardner's testimony, no changes had been made to the Property between June 9th, the date of the closing, and the next day, June 10th, the date of the failed CO inspection. Thus, Sellers breached their obligation to deliver the house with a "valid and subsisting Certificate of Occupancy" as required by the Contract, since they did not complete the CO process for the attic conversion in time for the closing (*see e.g. Kopp v Boyango*, 67 AD3d 646 [2d Dept 2009] [summary judgment granted to purchaser because seller failed to procure a CO for a garage that had been illegally concerted to living space without the necessary permits or variances]; *Ahmad v Pahlavan*, 8 Misc 3d 1022(A) [Sup Ct, Nassau County 2005] [summary judgment granted to purchaser on a downpayment claim because seller failed to deliver a CO at a time of the essence closing that included a "breeze way" that had been converted to living space]).

Sellers argue that the 1985 CO remained valid after the Village of Sagaponack's incorporation and was valid on the date of the closing, and that the 1985 CO had no expiration date on its "use" as a single-family residence (NYSCEF Doc No. 175). Sellers contend that at the closing they tendered the deed to the Property in compliance with all provisions of the Contract including a "valid and subsisting Certificate of Occupancy" for use as a "[o]ne family dwelling and deck" (NYSCEF Doc No. 31), which is the 1985 CO. Sellers further assert that the 1985 CO remained in effect, was never revoked before the Closing date, and that no notices of violations were issued or filed.

Sellers' arguments are unpersuasive for various reasons. The 1985 CO was not a valid and subsisting CO at the time of Closing, as (1) at the time of the Closing the Property was subject to

the Zoning and Building Codes of the Village and not the Town of Southampton laws, (2) the building had been altered in April/May 2022 which required a new CO, and (3) the Village's Code required an updated CO to be issued at the transfer of title.

First, the 1985 CO certifies compliance with the 1985 Town of Southampton laws (specifically the Southampton Building Zone Ordinance), not with the Village of Sagaponack zoning and building laws, which have been in effect since 2007, when the Village adopted its first Zoning and Building Codes. Under Village Law § 2-250, once a village is incorporated and adopts its own code, which the Village had done here, the prior town code "shall cease to be in effect in the village … when replaced by any general or special law covering the same subject matter." Thus, at the time of the Closing, the Village of Sagaponack's Code was in effect and governing CO requirements for the Property.

Second, and most important, under the Village of Sagaponack Code §§ 30 (B) and (C) and pursuant to the testimony of the Building Inspector, who is authorized to issue COs in the Village, the gutting of the third floor including demolition of rooms and a bathroom to convert the finished space into an enclosed unfinished attic, required a new CO as it involved alterations to the building. Furthermore, the plumbing and electrical work performed by the Sellers' handyman (removal of the bathroom and all electrical services and fixtures on the third floor) were all triggering events for certificates of compliance pursuant to the Village of Sagaponack Code §§ 30 (D) and (E) and the testimony of the Building Inspector. However, on the day of the closing, Sellers had not obtained a CO for the alterations or the electrical and plumbing work that had been performed.

Thus, because the third floor was gutted by the Sellers after they executed the Contract, and since substantial renovations were performed on the dwelling and no new CO had been obtained, the 1985 CO was not a valid and subsisting CO covering the Property as it existed on June 9, 2022, the time-of-the-essence closing date. This is similar to the situation in *Costello* (281 AD2d at 583), where the contract required the seller to provide "a valid and subsisting Certificate of Occupancy or other required certificate of compliance, or evidence that none was required, covering the building(s) and improvements … at the date of Closing." The house in *Costello* had been built in 1923, and the municipality where the house was located did not begin issuing COs until 1930. Consequently, the seller argued that no CO was required, but the buyer contended "that because substantial renovations had been performed on the dwelling, [seller] had failed to fulfill a condition precedent to closing since she had not provided a certificate of occupancy for the

dwelling as it existed at the time of closing" (*id.*). The Second Department awarded summary judgment to the buyer, because the seller failed "to produce either a certificate of occupancy for the dwelling and property as it existed at the time of closing, or proof that no such certificate was needed" (*id.*; *see also Gobetz*, 2009 NY Slip Op 30552(U), *5 [buyer entitled to judgment as a matter of law when seller failed to produce certificate of occupancy for wooden deck and buyer objected to the seller's proposal of removing the wooden deck]).

Third, the 1985 CO was not valid on the day of closing as a new CO was required by the Village of Sagaponack Code § 30 (F) for a change of ownership. In fact, the Building Inspector informed one of the Sellers that an "updated" CO was required by the Village Code "at the transfer of the property" when asked by the Seller if, after the Building Inspector inspected the renovation work, the Sellers could just rely on the 1985 CO (NYSCEF Doc No. 133).

Therefore, Purchaser successfully demonstrated that the Sellers breached the Contract by not providing the Purchaser with a valid and subsisting CO on time of the essence closing day (*see New Colony Homes, Inc. v Long Island Prop. Grp., LLC*, 21 AD3d 1072, 1073 [2d Dept 2005] ["where time is of the essence, performance on the specified date is a material element of the contract, and failure to perform on that date constitutes, therefore, a material breach of the contract"]).

Sellers Failed to Deliver the Property in Its "As-Is" Condition

Purchaser also established that Sellers breached the Contract by failing to deliver the Property in its "as-is" condition on the closing day, as the Sellers gutted the third floor before the closing day. The Contract includes several provisions that required Seller to deliver the Property in "as-is" condition. Most importantly, Paragraph 12 of the Contract provides that the sale of the Property is "as is" and that Purchaser "shall accept the [Property] "as is" 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 Closing" (NYSCEF Doc No. 3). Paragraphs 30 and 42 of the Contract also contain representations that the Property is being sold as "as is," further indicating that the Purchaser "acknowledges that Purchaser has inspected the premises and agrees to take the premises "AS IS" (except as set forth in this contract)" (*id.*).

The reference to "present condition" in Paragraph 12 refers to the date of the execution of the Contract, March 29, 2022, and the only change allowed by the Contract between then and the date of closing was reasonable wear and tear and natural deterioration. Sellers admit gutting the

third floor in April/May 2022, after the Contract was signed. Undoubtedly, the gutting of a third floor that had transformed the third floor from habitable space with a bedroom and a bathroom to an uninhabitable space, does not qualify as "reasonable use, wear, tear and natural deterioration" (*id.*; *see also Approved Properties, Inc. v City of New York*, 52 Misc 2d 956, 958 (Sup Ct, Richmond County 1966] ["The 'as is' clause here simply means that the purchaser must take that which he bargained for, reasonable use, wear, tear and natural deterioration excepted. It was not required to accept something changed by intervening acts of destruction."]). The intentional alterations to the third floor before the closing represent a breach of the Contract and entitle Purchaser to the rescission of the Contract (*see Jewell v Rowe*, 119 AD2d 634, 635 [2d Dept 1986] ["Where a premises to be conveyed is substantially damaged prior to title closing, the purchaser out of possession under a real estate contract containing no risk of loss provision may seek rescission, or, in the alternative, specific performance with an abatement of the purchase price"]).

Sellers argue that it was impossible to deliver the house both in "as is" condition and with a valid and subsisting CO, as a finished third floor cannot be authorized under the Zoning Code of the Village of Sagaponack, which restricts residences to two stories (NYSCEF Doc Nos. 62, 166), but permits mezzanines.[1] Sellers' argument actually underscores Purchaser's claim that Sellers could not abide by the Contract terms requiring them to deliver the premises "as is" and with a valid CO.

Furthermore, even if it were determined that Sellers found it "impossible"[2] to deliver a CO for the "as is" habitable third floor, it would be inequitable for the Sellers to benefit from such an alleged impossibility by keeping the Downpayment when Sellers knew at the time they entered into the Contract that the finished third floor was illegal (*see e.g. Chirra v Bommareddy*, 22 AD3d 223, 224 [1st Dept 2005] ["issues as to whether appellants were attempting to utilize the illegality defense as a "sword" for personal gain rather than a "shield" for the public good"]). Moreover, the "impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract" (*Kel Kim Corp. v Cent. Markets, Inc.*, 70 NY2d 900, 902 [1987]).

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[1] A mezzanine is defined in the Village of Sagaponack Code § 245-4 as a "loft" open to the floor below, and one differentiated from a "story".

[2] The court also notes that the Sellers did not raise an impossibility/illegality defense in their Answer and thus waived their right to challenge the Contract based on impossibility/illegality (*see e.g., Centi v McGillin*, 155 AD3d1493, 1495 [3d Dept 2017], *aff'd* 34 NY3d 1072 [2019] ["defendant waived his right to challenge the loan on the basis of illegality because it was not raised as an affirmative defense"]).

That is not the case here, since the Contract contemplated that in the event of the Seller's inability to comply with the Contract terms, the Downpayment will be returned (NYSCEF Doc No. 3, para 21) and since the Sellers were aware of the illegality of the third floor at the time of the Contract.

Purchaser Was Ready, Willing, and Able to Perform

Additionally, Purchaser met her prima facie burden of showing that she was ready, willing, and able to perform on the closing date, and thus her ability to perform her own contractual undertakings (*Skyline Restoration, Inc. v Roslyn Jane Holdings, LLC*, 95 AD3d 1203, 1204 [2d Dept 2012]; *Coizza v 164-50 Crossbay Realty Corp.*, 73 AD3d 678, 681 [2d Dept 2010]). In fact, at the closing, Sellers' counsel stipulated that the Purchaser "arrived with the correct amount of money to close, and [was] prepared to tender that payment under the contract, however [she] had an objection to the condition of the house" (NYSCEF Doc No. 100). It is clear the Purchaser complied with her obligations as set forth in the Contract.

As the Sellers breached the Contract and the Purchaser was ready, willing, and able to perform her contractual obligations on the closing day, the Purchaser is entitled to summary judgment on her breach of contract cause of action and to recover the Downpayment.

Sellers' Other Arguments

Sellers argue that Purchaser's claim of "missing bedrooms" is a pretext to justify Purchaser losing interest in the Property and entering into a different and more "attractive" "spec" house deal, that Purchaser intended to tear the house down, not to occupy or rent it, and that Purchaser "knew or should have known the finished attic was illegal" as she was a "sophisticated real estate investor" (NYSCEF Doc Nos. 31, 62). However, none of these arguments has any relevance to the issues at hand, which is whether the Sellers fulfilled their contractual obligations to deliver a CO and the Property in "as is" condition. Furthermore, pursuant to the parol evidence rule, such extrinsic evidence as to the intent or motivation of the Purchaser is inadmissible to alter or add a provision to a contract that is clear and unambiguous, such as this Contract is (*Schron v Troutman Sanders LLP*, 20 NY3d 430, 436 [2013]; *see Vivir of L I, Inc. v Ehrenkranz*, 127 AD3d 962, 964 [2d Dept 2015]). Moreover, as the Contract contains a merger clause in paragraph 28, the Court "is obliged to require full application of the parol evidence rule in order to bar the introduction of extrinsic evidence to vary or contradict the terms of the writing" (*Vivir of L I, Inc.*, 127 AD3d at 964).

Purchaser Is Entitled to Reasonable Attorneys' Fees, Costs and Pre-Judgment Interest

Purchaser is entitled to reasonable attorneys' fees and costs as the Contract authorized the recovery of attorneys' fees from the unsuccessful party (NYSCEF Doc No. 2, para 25 ["upon a final determination, the party against whom the determination is made, in addition to any damages the successful party may have incurred, agrees to indemnify the successful party for their reasonable attorneys' fees, expenses and court costs incurred in defending against said claim"]; *see also Hooper Assocs., Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 491 [1989] ["attorneys' fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule"]; *Heung Rha v Blangiardo*, 189 AD3d 1098, 1100 [2d Dept 2020] [plaintiffs were entitled to reasonable attorneys' fees "pursuant to the provision in the contract stating that in the event litigation arises out of the contract, the prevailing party is entitled to recover reasonable attorneys' fees from the losing party"]).

The Downpayment was placed in a non-interest-bearing account and pursuant to the Contract, the Purchaser retained "such remedies as Purchaser shall be entitled to at law or in equity" (NYSCEF Doc No. 3, paras 6, 23 [b]). Therefore, Purchaser is also entitled to the requested statutory pre-judgment interest on the Downpayment to be calculated from the date of the breach, which is June 9, 2022, the scheduled closing date (*see* CPLR 5001 [a] [providing for interest on awards recovered for breach of contract]; *Nikolis v Reznick*, 214 AD2d 658, 659 [2d Dept 1995] [award of statutory interest on downpayment calculated from last scheduled closing date]).

Purchaser shall submit an itemized invoice for the attorneys' fees and costs expended for the commencement and prosecution of this litigation, as well as a proposed judgment including such attorneys' fees and costs and the pre-judgment interest on the Downpayment to be calculated from June 9, 2022.

Accordingly, with respect to Purchaser's motion for summary judgment, Purchaser established her prima facie entitlement to judgment as a matter of law by showing that the Sellers breached the Contract and she was willing, able and ready to perform under the Contract. In response Sellers failed to raise a triable issue of fact. Purchaser is entitled to the return of the Downpayment and reasonable attorneys' fees and costs. Moreover, Sellers are not entitled to

judgment as a matter of law on their counterclaim and failed to demonstrate that they were not in breach of the Contract.

The parties' remaining contentions are either unnecessary to this determination or are without merit.

The foregoing constitutes the decision and Order of the Court.

ENTER

DATE: April 3, 2024
Riverhead, NY

HON. MAUREEN T. LICCIONE, J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION