

CHARLES N. INTERNICOLA, ESQ.

CASE LITIGATION REPORT



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*** RE: DISMISSAL OF CONTRACT CLAIMS AND ENFORCEMENT OF
LIQUIDATED DAMAGES PROVISION CONTAINED IN A NEW
YORK REAL ESTATE CONTRACT OF SALE**

“Liquidated damages” provisions play a critical role in real estate purchase agreements and contracts of sale.

In a New York action involving a contract sellers attempt to obtain “contract damages” representing the difference between the contract price and the significantly lower price that the seller eventually received, Charles Internicola, Esq. successfully moved for summary judgment resulting in the dismissal of the sellers claims for contract damages. A copy of Mr. Internicola’s successful brief, follows:

Charles N. Internicola, Esq. is a Business and Franchise Litigation Lawyer. Licensed in the States of New York and New Jersey, Mr. Internicola represents entrepreneurs and non-public corporations in commercial litigation matters. For more information about Mr. Internicola, visit www.BusinessandFranchiseLaw.com or call (800) 976.4904. * Prior Results do not guarantee a similar outcome

**BY ORDER OF JUSTICE RAMOS, THESE MOTION PAPERS MAY NOT BE TAKEN
APART OR OTHERWISE TAMPERED WITH.**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

LOUIS V. COLACURTO,

Index No.: 114772/08

Plaintiffs,

-against-

CHING-PIN HUS, JOYCE HUNG and
CHU LAW FIRM, PLLC,

Defendants.

PLAINTIFF'S STATEMENT OF UNDISPUTED FACTS

Pursuant to 22 NYCRR §202.70(g) – Rule 19-a, in further support of plaintiff's motion for summary judgment, plaintiff submits the following statement of undisputed facts:

1. The instant action relates to a dispute between plaintiff and defendants respecting a real estate contract (hereinafter referred to as the "Contract of Sale") for the residential real property known as 350 West 42nd Street, Unit 71, New York, New York (Block 1032, Lot 1049), (hereinafter the "property").
2. A copy of the Contract of Sale is attached as Exhibit "A" to the Affidavit of Louis V. Colacurto, sworn to on the 7th day of December 2009.
3. The Contract of Sale was executed between plaintiff and defendants.
4. In connection with the preparation, negotiation and execution of the Contract of Sale plaintiff and defendants were each represented by their respective legal counsel.
5. At the time of entering into the Contract of Sale a final certificate of occupancy was not issued for the property.

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6. At the time of scheduling a closing, the defendants did not possess a final certificate of occupancy for the property.

7. The Contract of Sale is comprised of a standard pre-printed NYSBA's Residential Real Estate Form (9/03) and one (1) rider to contract of sale prepared by the defendants real estate attorney.

8. Upon full execution of the Contract of Sale, plaintiff deposited with defendants real estate lawyers, Chu Law Firm, PLLC, the sum of thirty thousand (\$30,000.00) dollars representing plaintiff's contract deposit.

9. Chu Law Firm, PLLC is the escrow agent in this transaction and continues to maintain plaintiff's thirty thousand (\$30,000.00) dollar contract deposit.

10. The Contract of Sale contains language and agreed upon terms specifically addressing the issue of liquidated damages in the event of a dispute between plaintiff and defendants, including, any alleged breach of the Contract of Sale.

11. Paragraph "13" of the Contract of Sale states:

Defaults and Remedies: (a) If the Purchaser willfully defaults hereunder, Seller's sole remedy shall be to retain the Downpayment as liquidated damages, it being agreed that Seller's damages in case of Purchaser's default might be impossible to ascertain and that the Downpayment constitutes a fair and reasonable amount of damages under the circumstances and is not a penalty.

12. Paragraph "44" of the Contract of Sale (contained in the rider) states:

In the event Purchaser shall fail to pay the balance of the purchase price on the agreed Closing date or otherwise defaults in the performance of this Contract, Seller shall have the option to terminate this Contract upon notice to Purchaser, and, upon giving such notice, this Contract shall be deemed cancelled, all rights and obligations of the parties hereto shall terminate, and neither party hereto shall have any claim against the other. Seller shall be entitled to retain the Downpayment as liquidated damages since the parties agree that the damages are not otherwise ascertainable.

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Respectfully Submitted,

DECKER DECKER DITO & INTERNICOLA, LLP

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Plaintiffs,

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Defendants.

**MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

PRELIMINARY STATEMENT

This Memorandum of Law is submitted in support of Plaintiff Louis V. Colacurto's motion seeking (a) summary judgment dismissing defendants Ching-Pin Hsu and Joyce Hung's (hereinafter collectively referred to as "defendants") first counterclaim for "specific performance" and (b) partial summary judgment as to the defendants second and fifth counterclaims, limiting the defendants potential recovery to the liquidated damages sum set forth in the contract of sale, *viz.*, the contract deposit of thirty thousand (\$30,000.00) dollars. In further support of this motion plaintiff further submits the Affidavit of Louis V. Colacurto sworn to on the 7th day of December, 2009 (hereinafter referred to as the "Colacurto Aff."), the exhibits attached thereto and plaintiff's statement of undisputed facts. A copy of the contract of sale is attached as Exhibit "A" to Colacurto Aff, and a copy of the verified answer and counterclaims is attached as Exhibit "B" to the Colacurto Aff.

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In the complaint the plaintiff seeks the return of plaintiff's thirty thousand (\$30,000.00) dollar contract deposit based on the plaintiff's termination of the contract of sale for the residential real property known as 350 West 42nd Street, Unit 71, New York, New York (Block 1032, Lot 1049). The plaintiff terminated the contract of sale due to the defendants' failure to obtain and produce a final certificate of occupancy for the subject property at the time set for closing of title.

As will be demonstrated below and as set forth in the Colacurto Aff. it is respectfully submitted that the defendants' counterclaims for specific performance and damages exceeding the liquidated damages sum of thirty thousand (\$30,000.00) dollars be dismissed.

STATEMENT OF FACTS

The pertinent facts are set forth in the supporting Colacurto Aff. dated December 7, 2009 and the Rule 19-a Statements of Undisputed Facts.

ARGUMENT

On a motion for summary judgment, the test is "whether the pleadings raise a triable issue of fact." *Creighton v. Milbauer, et. al.*, 191 A.D.2d 162 (2nd Dept 1993). Where the proponent of a motion for summary judgment makes 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, the burden shifts to the party opposing the motion for summary judgment to produce evidence in admissible form sufficient to establish the existence of material issues of fact requiring trial. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986).

In matters related to real estate contracts of sale, courts must construe a contract so as to avoid an interpretation that effectively renders meaningless a part of the contract or the intent of the parties. *Helmsley-Spear, Inc. v. New York Blood Center, Inc.*, 257 A.D.2d 353 (1st Dept. 1999). Where, as here, there is no inconsistency in the contract provisions establishing the rights

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and obligations of the parties thereto, the proponent of a motion for summary judgment is entitled, as a matter of law, to a summary adjudication. *Id.* at 357.

POINT I

PLAINTIFF IS ENTITLED TO PARTIAL SUMMARY JUDGMENT DISMISSING DEFENDANTS' FIRST COUNTERCLAIM FOR SPECIFIC PERFORMANCE

Despite the clear and unambiguous language contained in the contract of sale the defendants in their counterclaim seek “specific performance.” That is, the defendants seek an order from this Court forcing the plaintiff to obtain financing and to purchase defendants’ property. The defendants further allege that they will some how be irreparably harmed unless they are granted specific performance. A copy of the contract of sale between plaintiff and defendants is attached as Exhibit “A” to the Colacurto Aff. As with the vast majority of “residential contracts of sale” the contract between the plaintiff and defendants contains a “liquidated damages” clause limiting the potential liability between the parties.

Paragraph “13” of the contract of sale between plaintiff and defendants states:

Defaults and Remedies: (a) If the Purchaser willfully defaults hereunder, Seller’s sole remedy shall be to retain the Downpayment as liquidated damages, it being agreed that Seller’s damages in case of Purchaser’s default might be impossible to ascertain and that the Downpayment constitutes a fair and reasonable amount of damages under the circumstances and is not a penalty.

Paragraph “44” of the rider to the contract of sale states:

In the event Purchaser shall fail to pay the balance of the purchase price on the agreed Closing date or otherwise defaults in the performance of this Contract, Seller shall have the option to terminate this Contract upon notice to Purchaser, and, upon giving such notice, this Contract shall be deemed cancelled, all rights and obligations of the parties hereto shall terminate, and neither party hereto shall have any claim against the other. Seller shall be entitled to retain the Downpayment as liquidated damages since the parties agree that the damages are not otherwise ascertainable.

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To justify a decree of specific performance, there should exist no doubt as to whether a party to the underlying contract is required to specifically perform its terms; any doubt should be resolved against the party seeking performance. *The National Cash Register Company v. Remington Arms Company*, 212 A.D. 343, 209 N.Y.S. 40 (1st Dept 1925).

Moreover, where the plain language of a contract and incorporated parts thereto, when read in the context of an entire agreement, is not ambiguous, such contract has a definite and precise meaning and must be interpreted accordingly. *United States of America v. Site Remediation Services Corp., et. al.*, 92 F.Supp.2d 132 (E.D.N.Y. 2000) (Subcontract and attachment thereto are two parts of a single contract whose joint terms define a single liquidated damages clause); *see also W.W.W. Assocs., Inc. v. Giancontieri*, 77 N.Y.2d 157 (1990).

Based on the foregoing, as a matter of law, the defendants are precluded from (a) seeking specific performance and (b) seeking damages in excess of the liquidated damages sum of thirty thousand (\$30,000.00) dollars.

Accordingly, it is respectfully submitted that defendants' First Counterclaim for specific performance be dismissed.

POINT II

PLAINTIFF IS ENTITLED TO THE PARTIAL DISMISSAL OF DEFENDANTS' SECOND COUNTERCLAIM FOR BREACH OF CONTRACT

For the reasons set forth in Point I it is respectfully submitted that the defendants' remedies for plaintiff's alleged breach of contract are limited to the liquidated damages provisions stated in the contract of sale. In the second counterclaim defendants seek judgment awarding them damages in excess of six hundred thousand (\$600,000.00) dollars.

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Accordingly, it is respectfully submitted that the Court partially dismiss the defendants Second Counterclaim for breach of contract to the extent that the defendants seek damages in excess of the liquidated damages sum of thirty thousand (\$30,000.00) dollars.

POINT III

PLAINTIFF IS ENTITLED TO DISMISSAL OF THE DEFENDANTS' COUNTERCLAIMS FOR SLANDER OF TITLE AND CANCELLATION OF NOTICE OF PENDENCY

Defendants' counterclaims for slander of title and cancellation of notice of pendency are moot as all parties stipulated to removal of the notice of pendency filed by plaintiff in reference to the underlying property.

Accordingly, it is respectfully submitted that the defendants Third and Forth Counterclaims for slander of title and cancellation of notice of pendency be dismissed.

CONCLUSION

For all of the reasons set forth above, it is respectfully submitted that plaintiff Louis V. Colacurto is entitled to (a) partial summary judgment dismissing defendants counterclaims for specific performance, (b) partial summary judgment as to defendants remaining counterclaims, limiting defendants potential damages to the stipulated and agreed liquidated damages sum of thirty thousand (\$30,000.00) dollars and (c) summary judgment dismissing defendants counterclaims as to slander of title, cancellation of notice of pendency and forfeiture of down payment, and for such other and further relief as the court deems just and proper.

Respectfully Submitted,

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**THIS NOTICE OF MOTION IS IN COMPLIANCE WITH 22 NYCRR §202.70(g) –
RULE 24(g)**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

LOUIS V. COLACURTO,

Index No.: 114772/08

Plaintiffs,

-against-

**AMENDED NOTICE
OF MOTION**

CHING-PIN HUS, JOYCE HUNG and
CHU LAW FIRM, PLLC,

Defendants.

S I R S:

PLEASE TAKE NOTICE that upon the annexed affirmation of LOUIS V. COLACURTO, sworn to on the 14th day of December, 2009, together with the exhibits annexed thereto, plaintiff's Memorandum of Law and upon all the pleadings and proceedings heretofore had herein, the undersigned counsel for plaintiff LOUIS V. COLACURTO will move this Court at the New York County Supreme Courthouse, located at 60 Centre Street, New York, New York, submission part room 130 on the 30th day of December, 2009, at 9:30 A.M., or as soon thereafter as counsel can be heard for an Order (a) dismissing defendants counterclaims for specific performance, (b) limiting defendants potential damages to the stipulated and agreed liquidated damages sum of thirty thousand (\$30,000.00) dollars and (c) dismissing defendants counterclaims as to slander of title, cancellation of notice of pendency and forfeiture of down payment, and for such other and further relief as this Court deems just and proper.

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PLEASE TAKE FURTHER NOTICE, that pursuant to CPLR § 2214(b), answering and/or opposing affidavits, if any, are to be served upon the undersigned within seven (7) days prior to the return date of this motion.

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