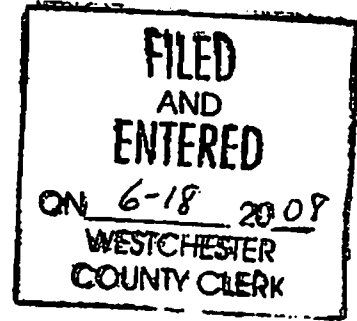


To commence the statutory time period for appeals as of right (CPLR 5513(a)), you are advised to serve a copy of this order, with notice of entry upon all parties.



SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - CENTRAL CALENDAR PART

-----X
STEPHEN RYDER, JANET LEE RYDER,
ROBERT RYDER and ANNA RYDER,

Plaintiffs,

SHORT FORM ORDER

-against-

Index No. 19442-07
Motion Date: May 23, 2008

JAMES J. MULLEN, JANICE LYNNE MULLEN
and CALABRESE & CALABRESE, LLP,

Defendants.
-----X

NICOLAI, J.

The following papers numbered 1 to 24 were read on this motion by the defendants for an order granting them summary judgment dismissing the complaint and cancelling the notice of pendency, and on the cross motion by the plaintiffs for an order granting them summary judgment on their complaint.

This motion and cross motion shall be determined in the Central Calendar Part pursuant to the Memorandum of the Hon. Francis A. Nicolai, Administrative Judge, Ninth Judicial District, dated November 30, 2007.

Notice of Motion- Affirmation	1-2
Exhibits	3-12
Notice of Cross Motion-Affidavit and Affirmation	13-15
Exhibits	16-21
Memo of Law	22
Reply Affirmation and Opposition to Cross Motion	23
Reply Affirmation	24

Upon the foregoing papers, it is ordered that motion and cross motion are decided as follows:

The plaintiffs and the defendants are both moving for summary judgment in this dispute regarding a \$50,000 down payment paid by the plaintiffs into escrow as part of a residential real estate sale that never closed. The plaintiffs seek return of the down payment on the basis that they did not breach the contract and, if they did, the breach was immaterial, unintentional and otherwise of a type that may not serve as a forfeiture as a matter of law. The defendants claim that pursuant to the contract between the parties, they are entitled to keep the down payment as liquidated damages for the plaintiffs' breach.

The facts of this matter are as follows: On April 25, 2007, the Mullen defendants, as sellers, entered into a purchase and sale agreement with the four plaintiffs to sell their home in Pelham Manor. The plaintiffs, Stephen Ryder and Janet Lee Ryder, were described in the agreement as taking a 95 % interest and the plaintiffs Robert Ryder and Anna Ryder (Stephen's parents) were described in the agreement as taking a 5 % interest in the purchase. The purchase price was \$760,000 and the plaintiffs were required to make a \$ 50,000 good faith down payment. The defendant law firm, Calabrese & Calabrese, LLP, placed the down payment in escrow and continues to act as escrow agent.

This action was commenced on or about October 1, 2007. In their complaint, the plaintiffs assert three causes of action. In the first cause of action they assert that the defendants have breached the contract of sale by refusing to return the down payment to them. In their second cause of action, they assert that the defendant law firm, as an escrowee and stakeholder, has refused to return the down payment and by reason thereof, is in breach of its obligations under the contract. Finally, in their third cause of action they have asserted a vendees' lien against the property to secure the return of the down payment.

The defendants are presently moving for summary judgment dismissing the complaint and for an order cancelling the notice of pendency. They state that there is no question that under the subject agreement, each of the four plaintiffs were required to apply for a mortgage in good faith and in an amount not exceeding \$ 450,000. In this matter two purchasers failed to apply for a mortgage and the purchasers who did apply, applied for a mortgage \$50,000 more than allowed under the agreement.


The plaintiffs are cross-moving for summary judgment on their complaint. In their Memo of Law they note that they are withdrawing their request for a lis pendens. The plaintiffs assert that Robert and Anna Ryder, each with a 2.5 % interest under the agreement, were not required to apply for a mortgage. In any event, insofar as these two plaintiffs have no liquid assets, whether or not they were on the mortgage application would have had no effect on the results thereby making a breach in this regard, if any, immaterial. The plaintiffs assert that Robert and Anna Ryder were added to the agreement only nominally because they were going to live in the house. They were never going to be a part of the mortgage application.

In their reply affirmation the defendants admit that two of the plaintiffs did, in fact, apply for a \$ 450,000 mortgage on the last day of the extension of time granted to them by the defendants to apply for a mortgage.

Upon a review of all the facts, this court finds that the plaintiffs exerted a genuine effort to secure mortgage financing and acted in good faith. The defendants have not provided any evidence that the denial of the mortgage was due to the failure to join Robert and Anna Ryder in the loan application. The plaintiffs are entitled to a return of their down payment since the mortgage was denied through no fault of their own (see, Sciales v Foulke, 217 AD2d 693; see also, Gorgoglione v Gillenson, 47 AD3d 472; Markovitz v Kachian, 28 AD3d 358).

Accordingly, the plaintiffs' cross motion is granted and the court directs the defendant law firm to return to the plaintiffs the down payment it is now holding in escrow with interest from June 25, 2007. The clerk of this court is directed to cancel the Notice of Pendency filed in this action upon presentation of a certified copy of this order.

Dated: White Plains, New York
June 17 2008



FRANCIS A. NICOLAI
J.S.C.

TO:

Schlanger & Schlanger, LLP
1025 Westchester Avenue Suite 108
White Plains, New York, 10604
Attorneys for Plaintiffs

Perry Dean Freedman
Ten Bank Street, Suite 650
White plains, New York 10606
Attorney for Defendants