

SUPREME COURT - STATE OF NEW YORK  
COMMERCIAL DIVISION  
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Hon. Elizabeth Hazlitt Emerson

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THE ARKER COMPANIES & CHEROKEE ARKER  
KINGS PARK, LLC,

Plaintiffs,

-against-

NEW YORK STATE URBAN DEVELOPMENT  
CORPORATION D/B/A EMPIRE STATE  
DEVELOPMENT CORPORATION, THE STATE OF  
NEW YORK, THE NEW YORK STATE DORMITORY  
AUTHORITY and THE NEW YORK STATE OFFICE  
OF MENTAL HEALTH,

Defendants.

MOTION DATE: 8-14-06; 8-28-06; 9-13-06  
SUBMITTED: 9-20-06  
MOTION NO.: 003-MG  
004-MG  
005-MOT D; CASE DISP  
006-MOT D

JONES DAY  
Attorneys for Plaintiffs  
222 East 41<sup>st</sup> Street, 4<sup>th</sup> Floor  
New York, New York 10017

WILSON, ELSER, MOSKOWITZ, EDELMAN  
& DICKER LLP  
Attorneys for Defendant New York State  
Dormitory Authority  
150 East 42<sup>nd</sup> Street  
New York, New York 10017

ELIOT SPITZER, ESQ.  
Attorney for Defendants State of New York and  
New York State Office of Mental Health  
The Capital  
Albany, New York 12224

ARENT FOX PLLC  
Attorneys for Defendant New York State Urban  
Development Corporation, d/b/a Empire State  
Development Corp.  
1675 Broadway  
New York, New York 10019

Upon the following papers numbered 1 to 121 read on these motions to dismiss, for summary judgment, and for a protective order; Notice of Motion and supporting papers 1-9; 15-21; 28-88; 105-117; Notice of Cross Motion and supporting papers     ; Answering Affidavits and supporting papers 10-13; 22-26; 89-97; 118-120; Replying Affidavits and supporting papers 14; 27; 98-104; 121; it is,

**ORDERED** that the motion by the defendant New York State Dormitory Authority (hereinafter "the Dormitory Authority") for an order dismissing the complaint insofar as it is asserted against the Dormitory Authority is granted; and it is further

**ORDERED** that the motion by the defendant State of New York and the defendant New York State Office of Mental Health (hereinafter “the State defendants”) for an order dismissing the complaint insofar as it is asserted against the State defendants is granted; and it is further

**ORDERED** that the motion by the defendant New York State Urban Development Corporation (hereinafter “the UDC”) for summary judgment is granted to the extent of dismissing the plaintiffs’ first, third, fourth, and fifth causes of action insofar as they are asserted against the UDC, and the motion is otherwise denied; and it is further

**ORDERED** that, on the court’s own motion, the plaintiffs are awarded summary judgment on their second cause of action; and it is further

**ORDERED** that the plaintiffs are awarded damages in the amount of \$250,000 plus accrued interest thereon and interest at the statutory rate from January 13, 2006; and it is further

**ORDERED** that the motion by the UDC for a protective order and for an order permitting it to file certain documents under seal is granted solely to the extent of permitting the UDC to file exhibit 6 in support of its motion for summary judgment under seal, and the motion is otherwise denied.

This action arises from the aborted sale of the Kings Park Psychiatric Center (hereinafter “the Kings Park property”) in Smithtown, New York. In March 2003, the plaintiff Arker Companies, the buyer, and the defendant UDC, the seller, entered into a purchase-and-sale-agreement. The original purchase price was \$2.5 million. The agreement required that the buyer’s deposit in the amount of \$250,000 be held in an interest-bearing escrow account at JP Morgan Chase Bank. Paragraph 2(a) of the agreement provided, in pertinent part, that, in the event of a default by the seller that was not timely cured, the buyer was entitled to a return of its deposit and all accrued interest thereon. Paragraph 2(a) of the agreement also provided that the return of the deposit and payment of accrued interest to the buyer shall constitute the buyer’s sole remedy for the seller’s default under the agreement. Although the parties executed three amendments to the purchase-and-sale-agreement, paragraph 2(a) remained unchanged. In April 2005, the plaintiff Arker Companies assigned all of its rights, title and interest in the agreement to the plaintiff Cherokee Arker Kings Park, LLC. On January 13, 2006, in response to community opposition to the sale, the seller terminated the contract. This action ensued. The plaintiffs seek specific performance of the purchase-and-sale-agreement and money damages as a result of the seller’s failure to honor that agreement. The State defendants move to dismiss the complaint pursuant to CPLR 3211 (a)(1) and (a)(2). The defendant New York State Dormitory Authority moves to dismiss the complaint pursuant to CPLR 3211 (a)(1) and (a)(7). The UDC moves for summary judgment dismissing the complaint and for a protective order.

Under the New York State Constitution (Art IV § 7), the Supreme Court is vested with general original jurisdiction in law and equity. However, claims against the State cannot be adjudicated in that forum due to the doctrine of sovereign immunity (*see, Kagen v Kagen*, 21 NY2d 532, 538); **State Div. of Human Rights [Geraci] v New York State Dept. of Correctional**

Servs., 90 AD2d 51, 61). The State is immune from suit unless it waives its sovereign immunity (*see, Brown v State of New York*, 89 NY2d 172, 179), which it has done in Court of Claims Act § 8. The Court of Claims has exclusive jurisdiction over claims against the State (*see, Kagen v Kagen, supra* at 538). Court of Claims Act § 9(2) confers jurisdiction on the Court of Claims to hear and determine almost every conceivable kind of action against the State (*see, Brown v State of New York, supra* at 179-180), including claims for breach of contract, express or implied.

In this case, the plaintiffs are seeking specific performance of the purchase-and-sale-agreement and money damages as a result of the UDC's failure to honor that agreement. Because these are quintessential breach-of-contract allegations, the Supreme Court does not have subject matter jurisdiction to hear and determine the action insofar as it is asserted against the State defendants. The plaintiff may commence an action in the Court of Claims against the State defendants, which will be limited to a claim to recover damages for breach of contract only (*see, Matter of Barrier Motor Fuels v Boardman*, 256 AD2d 405, 406) since specific performance may not be enforced against the State (*see, Gifford v Whittemore*, 4 AD2d 379, 383).

The plaintiffs attempt to characterize their claim in terms of RPAPL article 15 in order to trigger the Supreme Court's jurisdiction over it. RPAPL 1501 provides that a person who claims an interest in real property, including a contract-vendee, may maintain a declaratory judgment action against any other person, known or unknown, to compel the determination of any claim adverse to that of the plaintiff which the defendant makes, or which it appears from the public records or from the allegations of the complaint, the defendant might make (*see, Hanigan v State of New York*, 213 AD2d 80, 82). An action pursuant to RPAPL may be maintained by or against the State (*see, RPAPL 1541; Hanigan v State of New York, supra* at 82). The plaintiffs argue that because a judgment pursuant to RPAPL article 15 directing real property to be conveyed may be enforced by the sheriff, who may convey the property if the defendant does not (*see, RPAPL 1521[5]*), RPAPL article 15 permits a purchaser of real property to maintain an action for specific performance against the State. The plaintiffs have not provided the court with any authority for their interpretation of RPAPL article 15, and the court finds that the plaintiffs' argument is merely a transparent attempt to circumvent the limited jurisdiction of the Court of Claims.

Finally, the court notes that, in addition to not having subject matter jurisdiction to hear and determine this controversy insofar as it is asserted against the State defendants, the State defendants are not even signatories to the purchase-and-sale-agreement that the plaintiffs seek to enforce.

In view of the foregoing, the motion by the State defendants for an order dismissing the complaint insofar as it is asserted against the State defendants is granted.

Like the State defendants, the Dormitory Authority is not a signatory to the purchase and sale agreement. Had the parties intended to make the Dormitory Authority a party to their agreement, or to have any obligations thereunder, they could have done so. They did not. Moreover, the purchase-and-sale-agreement clearly identifies the seller as the UDC and provides in paragraph 5.1 that the agreement is a valid obligation of the UDC. Paragraph 5.1 also provides that

consummation by the UDC of the transaction is within its powers and that all requisite action has been taken to make the agreement valid and binding upon the UDC in accordance with its terms and conditions. There is no reference to the Dormitory Authority in the agreement except in paragraph 3, "Certain Conditions Precedent," which provides, in pertinent part, that the closing shall be contingent upon the occurrence of, inter alia, "conveyance of the Property by [the Dormitory Authority] to the seller" and approvals by the New York State Department of Law and the Office of the Comptroller of the State of New York, if required. Such language does not create any obligation on the part of the Dormitory Authority, and there is no evidence in the record to support the plaintiffs' allegation that the UDC was acting as an agent for the Dormitory Authority. Rather, the evidence establishes that there was no privity of contract between the plaintiffs and the Dormitory Authority, that the UDC was not an agent for any other governmental body, and that the obligation to transfer the property to the plaintiffs was entirely that of the UDC. When, as here, the documentary evidence submitted utterly refutes the plaintiff's factual allegations, conclusively establishing a defense to the asserted claims as a matter of law, dismissal is warranted (*see, Goshen v Mut. Life Ins. Co.*, 98 NY2d 314, 326; *Leon v Martinez*, 84 NY2d 83, 88). Accordingly, the motion by the defendant Dormitory Authority for an order dismissing the complaint insofar as it is asserted against the Dormitory Authority is granted.

Turning to the motion by the UDC for summary judgment in its favor, the court finds that the UDC has established its entitlement to judgment as a matter of law on the first, third, fourth, and fifth causes of action. (*see, Winegrad v New York Univ. Med. Center*, 64 NY2d 851; *Zuckerman v City of New York*, 49 NY2d 557; *Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395) and that the plaintiffs have not presented evidentiary facts sufficient to raise a triable issue of fact with respect thereto (*see, Freedman v Chemical Constr. Co.*, 43 NY2d 260).

The plaintiffs' first cause of action is for specific performance of the purchase-and-sale-agreement. Contracting parties in New York are free to agree that specific performance is unavailable as a remedy as a matter of law, as long as they provide in their contract that the agreed-upon specified damage remedy is the sole and exclusive remedy (*see, Deutsche Lufthansa AG v The Boeing Co.*, US Dist Ct, SD NY, Sand, J., 06 CV 76679[LBS], *citing Rubinstein v Rubinstein*, 23 NY2d 293, 298; *see also, Karpinski v Ingrasci*, 28 NY2d 45; *101123 LLC v Solis Realty*, 23 AD3d 107, 112-113; *Filiotis v Noonan*, 150 AD2d 425; *Papa Gino's of Am. v Plaza at Lathan Assocs.*, 135 AD2d 74, 76; *Barclay Arms Assocs. v Clemente*, 98 AD2d 892; Here, paragraph 2(a) of the purchase-and-sale-agreement specifically provides that the UDC's return of the deposit and payment of accrued interest thereon to the plaintiffs shall constitute the plaintiffs' sole remedy for the UDC's default under the agreement. Although the term "default" is not defined in the agreement itself, "default" has been defined as the omission or failure to perform a legal or contractual duty (*see, Black's Law Dictionary* 449 [8<sup>th</sup> ed]; *see also, Credit Car Leasing Corp., v DeCresenzo*, 138 Misc 2d 726, 732). The UDC's termination of the purchase-and-sale-agreement and subsequent failure to convey title to the Kings Park property was a failure to perform a contractual duty. Since the agreement provides that the UDC's return of the deposit is the plaintiffs' sole remedy for the UDC's default, the plaintiffs are not entitled to specific performance.

The plaintiffs' third and fifth causes of action, sounding in promissory estoppel and

equitable estoppel, respectively, also seek specific performance of the purchase-and-sale-agreement. An estoppel rests upon the word or deed of one party upon which another rightfully relies and, in so relying, changes his position to his injury (*see, Ramrup v 131 Starr Realty Corp.*, 3 Misc 3d 1106[A]) at \*7). Here, the only words or promises upon which the plaintiffs allege they relied relate to the agreement to convey the Kings Park property to them. The third and fifth causes of action are, therefore, duplicative of the first cause of action for breach of contract (*see, New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 319-320). Moreover, a governmental agency may be subject to estoppel only when there has been a showing of manifest injustice or other exceptional circumstances (*see, Bainbridge-Wythe Partnership v Niagara Falls Urban Renewal Agency*, 294 AD2d 806, 808; *Incorporated Vil of Freeport v Sanders*, 121 AD2d 430, 431; *Landmark Colony at Oyster Bay v Board of Supervisors of County of Nassau*, 113 AD2d 741, 744). The plaintiffs have failed to make such a showing. Finally, the language in paragraph 2(a) of the purchase-and-sale-agreement that the UDC's return of the deposit and payment of accrued interest thereon shall constitute the plaintiffs' sole remedy for the UDC's default is a complete bar to equitable relief (*see, Rubinstein v Rubinstein, supra* at 298).

The plaintiffs' fourth cause of action, which sounds in judicial estoppel, also seeks specific performance of the purchase-and-sale-agreement. Under the doctrine of judicial estoppel, or estoppel against inconsistent positions, a party is precluded from inequitably adopting a position directly contrary to or inconsistent with an earlier assumed position in the same proceeding or in a prior proceeding. Once clearly asserted by the party against whom the doctrine is invoked, the party is bound by such prior stance (*see, Clifton Country Road Assocs. v Vinciguerra*, 252 AD2d 792, 793). The plaintiffs contend that, in prior proceedings before the Supreme Court and the Appellate Division, the UDC represented that it intended to proceed with the transfer of the Kings Park property, which was in the best interest of the State of New York. The plaintiffs' contention to the contrary notwithstanding, that position is not inconsistent with the UDC's position in this proceeding. The UDC is not taking the position in this proceeding that it did not convey the Kings Park property because it was not in the best interest of the State. Rather, the UDC contends that it terminated the purchase-and-sale-agreement because of community opposition to the sale. The doctrine of judicial estoppel, therefore, does not apply (*see, Matter of Thrift Assocs. Service Corp. v DeBuono*, 255 AD2d 809; 813).

In view of the foregoing, the UDC's motion for summary judgment is granted to the extent of dismissing the plaintiffs' first, third, fourth, and fifth causes of action insofar as they are asserted against the UDC.

The plaintiffs' second cause of action seeks to recover compensatory and consequential damages, including attorney's fees, for the UDC's breach the purchase-and-sale-agreement.

When interpreting contracts, the Court of Appeals has repeatedly applied the familiar and eminently sensible proposition of law that, when parties set down their agreement in a clear and complete document, their writing should be enforced according to its terms. In the context of real property transactions, commercial certainty is a paramount concern. When, as here, the instrument was negotiated between sophisticated, counseled business people negotiating at

arm's length, courts should be extremely reluctant to interpret an agreement as impliedly stating something that the parties have neglected to specifically include. Hence, courts may not by construction add or excise terms, nor distort the meaning of those used and, thereby, make a new contract for the parties under the guise of interpreting the writing. In the absence of ambiguity, courts look solely to the language used by the parties to discern the contract's meaning (*see*, **Vermont Teddy Bear Co. v 538 Madison Realty Co.**, 1 NY3d 470, 475). The parties to a contract for the sale of real property may agree, as they did here, to restrict the liability resulting from a breach, or they may agree that no damages will be payable at all once the status quo ante has been restored. However, an obligation to act in good faith will be implied should the seller wish to avail itself of such a limitation-of-liability provision, which contemplates the existence of a situation beyond the control of the parties (*see*, **Emptage & Assoc, Inc. v Cape Hampton, LLC** 19 AD3d 536, 537; **Andersen v Ferdinand**, 17 AD3d 386, 386-387; **9 Bros. Bldg. Supply Corp. v Buonamicia**, 299 AD2d 529, 530).

The court finds that the limitation-of-liability provision contained in paragraph 2(a) of the purchase-and-sale-agreement is not susceptible to more than one interpretation and is, therefore, unambiguous (*see*, **Chimart Assoc. v Paul**, NY2d 570, 573). The court also finds that the UDC did not act in bad faith. The record reveals that the UDC terminated the purchase-and-sale-agreement only after its attempts to respond to the escalating community opposition to the plaintiffs' proposed use of the Kings Park property failed. The court finds that the community's opposition was not a self-created or easily scaled barrier that could be remedied by a reasonable expenditure of money (*see*, **Andersen v Ferdinand**, *supra* at 387; **9 Bros. Bldg. Supply Corp. v Buonamicia**, *supra* at 530). Bad faith, the mirror image of good faith, connotes a dishonest purpose (*see*, **Kalisch-Jarcho, Inc. v City of New York**, 58 NY2d 377, 385 n 5). It cannot be said that the UDC's actions, in responding to the community's concerns, evinced a dishonest failure to carry out a contract (*cf.*, **L.J.B. Corp.**, 182 AD2d 485). Moreover, it appears that most of the property is to be dedicated to a public use, i.e., a park (*see*, **Min-Lee Assoc. v City of New York**, 28 AD2d 553, *affd* 27 NY2d 790). This is not a case in which the property was sold to another after the cancellation (*see*, **Portnoy v City of New York**, 55 Misc 2d 382, *affd* 28 AD2d 959).

In view of the foregoing, the court finds that the limitation-of-liability provision in the parties' purchase-and-sale-agreement is enforceable and that the plaintiffs may not recover compensatory or consequential damages. The court also finds that the plaintiffs may not recover attorney's fees. In the absence of statutory liability or a contractual provision, counsel fees and legal expenses necessarily incurred in carrying on a lawsuit are not considered items of expense recoverable as general or special damages (*see*, **Coopers & Lybrand v Levitt**, 52 AD2d 493, 496; *see also*, **Central Trust Co. v Goldman**, 70 AD2d 767). The plaintiffs fail to allege any statutory liability or contractual provision in support of their contention that they are entitled to attorney's fees.

CPLR 3212(b) provides, in pertinent part, "If it shall appear that any party other than the moving party is entitled to summary judgment, the court may grant such judgment without the necessity of a cross-motion." Thus, a motion for summary judgment, irrespective of who makes it, empowers a court to search the record and award judgment where appropriate (*see*, **Grimaldi v Pagan**, 135 AD2d 496). Here, it is undisputed that the UDC breached the purchase-and-sale

agreement. Under these circumstances, the court denies so much of the UDC's motion as seeks summary judgment dismissing the plaintiffs' second cause of action to recover damages for the UDC's breach and grants summary judgment to the plaintiff on the issue of liability. Moreover, the court finds, as a matter of law, that the plaintiffs' damages for the UDC's breach are limited to the return of their \$250,000 deposit and all accrued interest thereon. Accordingly, the plaintiffs are awarded summary judgment on their second cause of action in the amount of \$250,000 plus accrued interest and interest at the statutory rate from January 13, 2006.

Finally, the UDC, relying on Public Officers Law §87(2)(c), seeks to prevent the public disclosure of certain documents. Pursuant to FOIL (Public Officers Law §87), all government records are presumptively open for public inspection unless specifically exempted from disclosure in the Public Officers Law (*see, Fappiano v New York City Police Dept.*, 95 NY2d 738, 746). Such exemptions are to be narrowly construed, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a specific justification for denying access (*see, Matter of Belamy v New York Cty Police Dept.*, 272 AD2d 120, 123 *citing Matter of Hanig v State of N.Y. Dept. of Motor Vehicles*, 79 NY2d 106, 109). Mere conclusory allegations, without factual support, that the requested materials fall within an exemption are insufficient to sustain an agency's burden of proof (*see, Matter of Professional Stds. Review Council of Am. v New York State Dept. of Health*, 193 AD2d 937, 939; *Matter of CAT\*ASI, Inc. v New York State Ins. Dept.*, 195 Misc 2d 456, 459).

Public Officers Law §87(2)(c) exempts from disclosure records that, if disclosed, would impair present or imminent contract awards. The UDC contends that the sale of the Kings Park property is still open and inchoate until there is a closing and the deed is conveyed. However, the sale was terminated by the UDC on January 13, 2006, and no future sale of the Kings Park property is anticipated. Moreover, this court has now determined that the plaintiffs are not entitled to specific performance of the purchase-and-sale-agreement and that their sole remedy is the return of their deposit and accrued interest thereon. Accordingly, there will be no closing or conveyance of the deed. Under these circumstances, the court finds that, there is no present or imminent contract award.

In any event, the UDC has failed to provide the court with copies of all of the documents that it seeks to designate as exempt from disclosure. Moreover, a review of the documents provided reveals that, with one exception, they do not contain any information that should not be disclosed. The UDC seeks to designate as exempt from disclosure certain exhibits submitted in support of its motion for summary judgment, including an executed copy of the escrow agreement that was attached to the UDC's invitation to bid, a deed transferring the Kings Park property from the Dormitory Authority to the UDC, a resolution of the Town of Smithtown, and the updated title report for the property. These documents are public documents, based on public documents, or documents that are already in the possession of the parties and others. The UDC also seeks to designate as exempt from disclosure correspondence between the parties on the ground that it contains information about the transaction, its terms, ongoing negotiations, and termination of the sale. The court has reviewed the correspondence in question and is unpersuaded that it contains any information that is not already public or that is not contained in other

documents that are part of the record. Likewise, the affidavits of Lawrence Gerson, Eileen Mildenberger and Dermot Kelly, which were submitted by the UDC in support of its motion for summary judgment, do not contain any information that it not already public or that is not contained elsewhere in the record. Exhibits 6 and 11 in support of the UDC's motion for summary judgment are intra-agency documents. The UDC's contentions to the contrary notwithstanding, Exhibit 11, an unsigned escrow release and cover memorandum, contains no information about the terms of the sale or negotiations between the parties. Exhibit 6, on the other hand could be considered intra-agency predecisional material that includes subjective comments, opinions, and recommendations by the UDC's employees in making the award determination. It is, therefore, exempt from disclosure (*see, Matter of CAT\*ASI, Inc. v New York State Ins. Dept., supra* at 459). Accordingly, the court grants the UDC's motion solely to the extent of permitting the UDC to file exhibit 6 under seal.

HON. ELIZABETH HAZLITT EMERSON

DATED: December 12, 2006

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J. S.C.