

The Bernard Madoff Ponzi scheme will continue to give rise to litigation that will continue for many years to come. Equally clear is the fact that most of this litigation will involve attempts by the victims of the scheme to recover the money they lost. The recent New York case, *Sassower v Blumenfeld*

878 N.Y.S.2d 602 (Sup. Ct. May 1, 2009) may be a harbinger of cases in which the Madoff scheme, while only peripherally involved, is nevertheless invoked by desperate defendants in mitigation of damages in peripheral litigation. In fact, *Sassower* may well make the beginning of an attempt to establish a variation the traditional impossibility of performance defense, a variation that may be called the "Madoff Defense."

Sassower was an action for declaratory judgment brought by Michael and Lauren Sassower against the defendant, David Blumenfeld, seeking a ruling that the Sassowers were entitled to retain a deposit paid by Blumenfeld for the purchase of real property.

The Sassowers entered into an agreement with Blumenfeld on November 18, 2008, whereby Blumenfeld was to purchase real property, consisting of a residence and other improvements located in New Hartford, N. Y. For \$1.8 million, with a deposit of \$180,000 to be paid on the signing of the contract and the balance to be paid at closing. The deposit was paid and was held in escrow by the Sassowers' attorney.

The contract provided that the closing was to take place on December 12, 2008 but that the purchaser, upon giving the seller five business days' notice, had a right to one or more adjournments of the closing date and that in no event could the closing date be adjourned beyond December 31, 2008. The contract also provided that should the purchaser willfully default, the seller's sole remedy would be to retain the down payment as liquidated damages.

Prior to the scheduled closing date, the Sassowers signed the deed and transfer tax documents. On December 10, Blumenfeld requested an adjournment of the closing date until December 19. Then, Blumenfeld, in a letter dated December 24, 2008, announced the termination of the contract and asked that Sassower's counsel release the \$180,000 down payment from escrow.

The Sassowers moved for summary judgment on the basis that they were ready and willing to perform but that the closing did not take place as scheduled due to Blumenfeld's wrongful

termination of the contract. Blumenfeld, in opposing the motion, asserted that on December 11, 2008, without any warning, he learned that he had lost nearly all of his assets as a result of the fraudulent scheme of Bernard Madoff. He further stated that as a result of Madoff's crimes, his ability to close pursuant to the contract terms was rendered impossible.

While acknowledging that defenses such as impossibility-of-performance were recognized under the common law, the court noted that such defenses would have been applied narrowly, due in part to the judicial recognition that one purpose of contract law is to allocate risks that affect performance, with performance to be excused only in extreme cases. Citing case law, the court set forth the principles that impossibility excuses...performance only when the destruction of the subject matter of the contract or means of performance makes performance objectively impossible and that the impossibility must result from an unanticipated event that could not have been guarded against in the contract.

The court dismissed Blumenfeld's impossibility-of-performance defense and granted the Sassowers' motion for summary judgment. At the same time, the court did not completely shut the door on the defense in other situations:

At bar, therefore, that the defendant may have been the victim of an unfortunate fraud which impacted on his assets and finances would not excuse his performance under the contract of sale. Furthermore, even assuming that the defendant could raise impossibility as a defense to non-performance based on a change in financial condition occasioned by the actions of Bernard Madoff, he has utterly failed to provide any details as to the amounts lost, the nature of his lost investments, or the actual state of his current finances and assets.

The Madoff defense may not be dead on arrival. To be successfully asserted may require the type of information the court outlined in its opinion.