

At an IAS Term, Part Comm-1 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 20th day of May 2011.

P R E S E N T:

HON. CAROLYN E. DEMAREST,

Justice.

-----X

55 ECKFORD REALTY LLC, JUDAH SEPTIMUS,
AND AARON GERTZ,

Plaintiffs,

- against -

Index No. 31923/08

THE BANK OF EAST ASIA (U.S.A.) N.A.,

Defendant.

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The following papers numbered 1 to 9 read on this motion:

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed_____

Papers Numbered

1-3

Opposing Affidavits (Affirmations)_____

4-6

Reply Affidavits (Affirmations)_____

_____ Affidavit (Affirmation)_____

Other Papers Memoranda of Law_____

7-9

In this action by plaintiffs 55 Eckford Realty LLC (55 Eckford), Judah Septimus, and Aaron Gertz (collectively, plaintiffs) for breach of a commitment to provide a building construction loan, defendant The Bank of East Asia (U.S.A.) N.A. (defendant) moves for summary judgment dismissing plaintiff's complaint.

FACTS

On or about June 5, 2008, Judah Septimus entered into a sales agreement with Blue Diamond Development LLC (Blue Diamond), which owns premises located at 55 Eckford Street, in the Williamsburg section of Brooklyn, New York (the premises), whereby Blue Diamond agreed to transfer the premises to Septimus or his assignee upon the satisfaction of certain conditions, which included obtaining a mortgage in the amount of \$9.9 million for the completion of construction of the premises. Blue Diamond had obtained approval from the New York City Department of Buildings to construct a 16-story mixed use condominium building consisting of 26 residential units and three floors of community facility space at the premises, and had commenced construction of the premises but was unable to complete it, allegedly due to insufficient capital resources.

In or about June 2008, Shai Denburg and Shloime Goldstein, who are mortgage brokers for Fairmont Capital, LLC, on behalf of plaintiffs, approached defendant regarding construction financing for the premises. On June 16, 2008, Denburg submitted a transaction package to Brian Law, defendant's vice-president and senior business manager, on behalf of plaintiffs, which constituted their application for a construction loan. The transaction package, in its Executive Summary, stated that the designated community facility space, which comprised the basement, first, and second floors of the proposed building, was intended to be used as a day care center, and specified that Septimus and Aaron Gertz "have contracted with a new architect to reconfigure the commercial space and the basement for a day care center." The transaction package further specified that "[t]he architect has confirmed that the

4500 sq. ft of space allocated for storage and parking can be used for the day care center without changing the zoning or permitting,” and that “Gertz and Septimus are close to signing a lease with an experienced day care center for the entire commercial space at 44 dollars a sq. foot.”

Prior to submitting the transaction package to defendant, Septimus had entered into a consultation agreement, dated April 1, 2008, with Dr. Frieda Spivack, with regard to the organization and administration of services at the proposed day care center, and Dr. Spivack had prepared a detailed proposed program, dated April 4, 2008, for the day care facility at the premises including the outdoor and interior space allocation, layout of the floor plan, staff, and number of children. Carole Margolin and Ronalee Hodge also provided consulting services to Gertz and Septimus concerning the design of the day care space, for which they billed them. According to their invoices, Dr. Spivack and Ronalee Hodge also consulted directly with plaintiffs’ architect, Walter C. Maffei, in May and June 2008. In May 2008, Mr. Maffei prepared preliminary sketches for the day care space in consultation with Ronalee Hodge.

On June 18, 2008, defendant issued a non-binding letter to Septimus, Gertz, or a new company to be formed, offering to lend them up to \$10 million, and outlining the proposed terms and conditions of the construction loan. Septimus and Gertz executed the non-binding letter and paid a \$15,000 good faith deposit to cover defendant’s costs for an appraisal.

Following defendant’s credit committee’s approval of plaintiffs’ loan application, on August 15, 2008, defendant issued a commitment letter, signed by Brian Law and Peng-Wah

Tang, defendant's president and chief executive officer, for a \$9,975,000 construction loan (the commitment letter). The commitment letter stated that it would expire on August 29, 2008 unless defendant received a fully executed copy of that letter together with the non-refundable commitment fee of \$99,750. The commitment letter further stated that defendant's commitment would expire if the loan did not close by October 24, 2008.

The commitment letter provided that defendant's obligation to make the loan was conditioned upon plaintiffs' delivery to defendant, sufficiently in advance of the closing and at plaintiffs' sole cost and expense, of 27 listed "due diligence" materials in a form and substance satisfactory to defendant. These "due diligence" materials included: "submission of approval of [the] construction project by related government agencies," "[the] assignment of final plans and specifications for the improvement and architect's consent," a current title report for the premises, a lender's title insurance policy, a current survey of the premises, copies of the general contractor's and architect's insurance policies, property and builder's risk insurance policies, and "such other information and documentation as [defendant] and its counsel shall deem necessary in connection with the [l]oan or any due diligence concerning the same [to] adequately assess [defendant's] risk on the [l]oan." The commitment letter also stated that "[defendant's] obligation to close on the [l]oan[] is further conditioned upon the completion by [defendant] and its counsel of such due diligence investigations with respect to [plaintiff] and the [p]roperty as [defendant] and its counsel shall deem appropriate."

The "Lender's Discretion" section of the commitment letter provided that "[w]henver pursuant to this Commitment (a) [defendant] exercises any right given to it to approve or

disapprove, (b) any arrangement or term is to be satisfactory to [defendant], or (c) any other decision or determination is to be made by [defendant], the decision of [defendant] to approve or disapprove, all decisions that arrangements or terms are satisfactory or not satisfactory and all other decisions and determinations made by [defendant] shall be in the sole and absolute discretion of [defendant] and shall be final and conclusive, except as is otherwise expressly and specifically provided for herein.” This section further provided that “[a]ll approvals of or waivers by [defendant] in respect of any of the terms, conditions or requirements of this Commitment must be in writing.”

Aaron Gertz and Judah Septimus executed the commitment letter on August 27, 2008. The commitment fee was not simultaneously paid, but defendant agreed to reduce the required commitment fee by approximately 50% to \$50,000. On August 29, 2008, Gertz and Septimus formed 55 Eckford and assigned their rights under the commitment letter and the sales agreement to it. On September 15 and 28, 2008, plaintiffs paid the \$50,000 commitment fee in two installments of \$25,000 each.

On September 15, 2008, Brian Law e-mailed Shai Denburg and Shloime Goldstein, seeking approval to spend \$9,000 (of the \$15,000 already paid by plaintiffs) to obtain the appraisal report, and, on the following day, Denburg, on behalf of plaintiffs, confirmed that defendant should proceed with the appraisal. On September 22, 2008, defendant engaged First American Appraisal and Consulting Services LLC (First American) to appraise the premises. According to the September 22, 2008 engagement letter executed between

defendant and First American, the appraisal was to be concluded by “NOON on October 13, 2008 or earlier,” and “[t]iming [wa]s critical.”

On October 6, 2008, Guy Engelman, an associate appraiser at First American, sent an e-mail to Christina So, an employee of defendant, which stated that, as of that morning, he had the information necessary for the appraisal of the premises, and that he should be able to deliver the appraisal by the end of the next week. By e-mail dated October 8, 2008, Engelman informed So that plaintiffs were planning to use the cellar, first, and second floors of the building as a day care center, that plaintiffs did not have plans yet for the space, and that plaintiffs were working with an architect on plans for this portion. Engelman further stated, in this e-mail, that he could “make the extraordinary assumption [that plaintiffs] will get approvals from the Department of Health for a day care center with the square footage proposed but [he] wanted to check with [her] first,” that “[t]he values would then be based on the plans [plaintiffs] ha[d at that time] for the residential portion and for 12,590 square feet of community space, rather than three separate commercial units as what was initially planned,” and to let him know how [defendant] would like him to proceed.” So, by an e-mail sent on October 9, 2008, responded that Engelman should “hold the appraisal report until further notice,” and then revised the e-mail to state that he should “hold the report until [he] ha[s] received all the architect plans.” By e-mail sent on October 9, 2008, Brian Law advised plaintiffs’ mortgage brokers, Shloime Goldstein and Shai Denburg, that “[t]he appraiser needs the architect plan for the day care spaces in order to evaluate the property value,” and that “the value will be distorted without the appropriate plan.”

By e-mail sent on October 10, 2008, Guy Engelman advised Christina So and Donald Lai, defendant's senior vice-president and head of business development, that "[First American] c[ould] perform the appraisal based on the approved plans . . . provided," and that "[First American] c[ould] provide an alternate value for the property based on the proposed changes which include leasing the entire first two floors to a day care center." Engelman further stated, in this e-mail, that "[i]n order to do this [First American] w[ould] require an architect's letter outlining the proposed changes to the plans," and that "[t]he value based on the proposed changes w[ould] be rooted in the assumption that all the necessary approvals for the proposed use w[ould] be obtained by the owners." Based upon the additional work entailed in this proposal, the appraisal fee would be increased by \$1,000 (Ex. 15 to Septimus Aff. in Opposition).

Plaintiffs, through Shloime Goldstein and Shai Denburg, provided a copy of the day care center lease signed by Ronalee Hodge to defendant on October 13, 2008. In addition, on October 13, 2008, Walter Maffei, plaintiffs' architect, issued a detailed letter addressed to Peng-Wah Tang, defendant's president, stating that the "occupancy of a day care center is eminently allowable within the building." Mr. Maffei explained, in his letter, that according to the New York City Zoning Resolution, a day care center is considered a community facility use, under a use group 3 designation, which is allowed in the zone in which this building is located. As defendant repeatedly has acknowledged, the original loan commitment permitted any number of permissible community service uses, and the commitment was not contingent

on the approval of a day care center, although such use was specified in the initial application (see Ex. 13 to Alenstein Aff. in Support of Motion; Dep. of Brian Law).

By e-mail dated October 15, 2008, Guy Engelman informed Christina So that he received an architect's letter and a proposed lease for the day care center, and asked her if he should move forward with the appraisal or if it should stay on "hold." Donald Lai, by e-mail dated October 15, 2008, responded that plaintiffs "had a proposed lease for the day care center, which will change the financial structure of the construction project from the original proposal, i.e., lease rent and square footage," that defendant thought that plaintiffs "should get proper approval for the plans as a day care center instead of making assumptions to come up with a value," and that, therefore, the appraisal report should remain on "hold."

By e-mail dated October 24, 2008, plaintiffs informed Brian Law that they had instructed their architect to prepare the necessary construction documents for the day care center, and review them with the proper division of the Department of Health in order to obtain oral assurance that it would license the day care center once the building was completed. The e-mail further informed Brian Law that the Department of Health does not involve itself with "approving plans," but issues a license to operate a day care center only after a building has been built in accordance with plans approved by the Department of Buildings and a certificate of occupancy has been issued, and that the Department of Health does not issue opinion letters as to the propriety of a particular project. Plaintiffs, in this e-mail, further assured Brian Law that the plans submitted to defendant had "been through audit

by the Department of Buildings and [had] been fully approved by them” (Ex. 24 to Alenstein Aff. in Support of Motion).

On October 28, 2008, three days after the October 24, 2008 expiration date set forth in the commitment letter, Gerard Tener, an engineer for First American, sent Brian Law an e-mail, indicating that his reviews of the DOB filings for 55 Eckford confirmed that the original plans filed under a Professional Certification had been audited, “were found deficient” and had been withdrawn, but that new or amended plans had been filed and accepted. This email further advised that “[t]he Department of Health will not approve the plans [for a daycare facility] prior to construction in writing,” but would “review the plans with the architect and provide comments and requirements that should be incorporated into the plans.” Mr. Tener further stated, in this e-mail, that he had “requested that the architect do this and provide a letter stating who he met with and provide a summary of comments and/or requirements.”

However, by letter dated October 24, 2008, Mr. Tener had advised Brian Law, who was responsible for handling this matter for defendant and had requested such opinion, that “possible difficulties and/or other complications” might arise from the fact that the plans had been self-certified by the project designer to be in compliance with the Building Code, but had not been examined by the DOB and remained subject to audit throughout the construction. If found to be deficient upon audit, “expenses in time and money may be substantial.” Tener, on behalf of First American, advised against the use of the self-certification procedure and recommended submission of the “construction documents” to the DOB for examination. Mr.

Tener also recommended that the “construction documents” be informally reviewed by the Department of Health as to compliance with “nebulas” regulations relating to day care centers (Appendix 1 to Defendant’s Reply Memorandum). It appears that this advice was first communicated to plaintiffs by email at 3:13 PM on October 24, 2008, to which plaintiffs responded, at 5:44 PM the same day: “please be assured that the plans submitted to you have been through audit by the Building Department and have been fully approved by them. We will work to get you a stamped set as soon as possible. I trust that the foregoing will allay your concerns” (Ex. 24 to Septimus Aff. in Opp.).

By e-mail sent on November 4, 2008 to Shloime Goldstein, Tender advised that he “spoke with Walter [Maffei] and everything should be fine,” and that he would get his report to defendant that day (Ex. 26 to Septimus Aff. in Opp.). By e-mail dated November 4, 2008, however, Brian Law informed plaintiffs that “due to the unpredicted issues aris[ing, defendant was] not able to complete the required due diligence and therefore was not able to close the loan before October 24, 2008,” and that defendant’s “offer to make [the] loan ha[d] expired.” This e-mail attached a November 3, 2008 letter from Donald Lai, which stated that “[u]nder the terms of the schedule annexed to the [August 15, 2008 commitment l]etter, [defendant’s] obligation to make the loan was conditioned upon a number of deliveries and other matters, including the completion by [defendant] and its counsel of such due diligence investigation with respect to [plaintiffs] and the [p]roperty as [defendant] and its counsel deemed appropriate.” The November 3, 2008 letter further stated that “because [defendant] did not learn for some time after the [commitment l]etter was signed and returned to it that the

community facility portion of the [p]roject would be used as a day care center and because of regulatory and approval issues concerning such use, [defendant] was not able to complete the required due diligence and therefore was not able to close the loan before . . . October 24, 2008, the latest closing date as specified in [the commitment l]etter,” and that “[defendant’s] offer to make the loan ha[d] expired.”

By letter sent by e-mail on November 4, 2008, addressed to Brian Law, plaintiffs’ counsel responded that plaintiffs had complied with every requirement necessary to close the loan pursuant to the commitment from defendant and had been requesting a closing date “for the last two (2) weeks” without a response from defendant, that plaintiffs had been informed by Guy Engelman that defendant “ha[d] placed everything on hold,” that plaintiffs were prepared to close the loan immediately, and that “[i]n today’s economic environment, it [wa]s impossible to obtain another [loan] commitment for this project.” Defendant’s counsel responded by letter dated November 13, 2008, that “it was not possible for [defendant] to complete the required due diligence prior to October 24, 2008” because “the decision to use the community facility portion of the [p]roject as a day care center . . . [was] not made known to [defendant] until almost two months after the August 15, [2008 commitment] letter was issued,” and that “regulatory and approval issues . . . arose.” This November 13, 2008 letter further stated that, in addition, the commitment letter was “conditioned upon . . . the absence of a material adverse change in the financial condition of . . . the [p]roperty,” and “there was

an adverse change in the real estate market, and thus the [p]roperty, between August 15 and October 24, 2008.”¹

Consequently, on November 24, 2008, plaintiffs filed this action against defendant, alleging that defendant had breached its mortgage commitment. Plaintiffs’ complaint alleges a first cause of action for specific performance, requiring defendant to proceed with its financing of the construction project, and stating that they are unable to obtain replacement financing.² Plaintiffs’ complaint also alleges a second cause of action seeking recovery of the sums paid by plaintiffs to defendant as well as all damages, including the costs of readying the project for completion and lost profits. Defendant has interposed an answer to plaintiffs’ complaint. Depositions have been held and documents have been exchanged among the parties, however, there remains outstanding discovery, including a Second Set of Interrogatories to Plaintiffs, dated January 14, 2011, after the filing of defendant’s motion on January 4, 2011, and follow-up demands by plaintiffs, which plaintiffs contend precludes summary judgment.³

DISCUSSION

¹ In his Affidavit in Opposition to defendant’s motion, Judah Septimus cites to a “plethora of negative financial data that surrounded the Bank’s parent in Hong Kong [which] incited its customers to cause a ‘run’ on the Bank” in September 2008 as a possible explanation for defendant’s failure to fund the loan to plaintiffs.

² While there is some precedent for granting specific performance in the context of a construction loan (*see Destiny USA Holdings, LLC v Citigroup Global Markets Realty Corp.*, 69 AD3d 212, 220-221 [4th Dept 2009]), the availability of such relief where money damages may suffice was hotly disputed in dissent in *Destiny* and does not appear to be otherwise supported in precedent.

³ Plaintiffs contend that defendant, and particularly First American from whom records have been subpoenaed, have not fully disclosed relevant communications regarding the appraisal and loan.

In support of its motion, defendant argues that plaintiffs failed to provide approved revised architectural plans for the building's commercial space after they determined to use that space for a day care center, and that this failure constituted a breach of contract on plaintiffs' part. Defendant notes that on July 3, 2008, Shai Denburg e-mailed to Judah Septimus a copy of defendant's closing checklist, in which item 5 listed a "copy of approved plans (architectural, mechanical, electrical, plumbing and sprinkler)." Plaintiffs, however, had submitted the stamped-approved architectural plans for the entire 16-story building as part of the transaction package. Defendants claim that these plans were insufficient because they were the plans that had been approved by the Department of Buildings in 2005, before plaintiffs had taken over the project, and that there were never any final architectural plans for the community facility space reconfigured for use as a day care center.⁴

Plaintiff's architect, Walter C. Maffei, has submitted his sworn affidavit, in which he explains that the stamped-approved architectural plans for the entire 16-story building, designating the community facility portion of the building as a "Vanilla Box," would enable plaintiffs to develop a day care center in that space that would ultimately be approved so long as plaintiffs followed the procedures of the Department of Health and Mental Hygiene. Mr. Maffei explains that the procedure for approval is that, after construction of the building commences and the outside of the building is erected, the architectural plans for the interior of the day care center can be drafted. Mr. Maffei states that the frame of the entire 16-story

⁴It is noted that item 10 of defendant's closing checklist requested an architect's letter describing the plan, which was provided by plaintiffs.

building must be constructed and a certificate of occupancy for the completed building must be obtained prior to obtaining approval from the Fire Department, and then the Department of Health, for use of the space as a day care center. Judah Septimus also asserts that it was impossible to obtain written government approval for the contemplated day care center before the closing since the Department of Health and Mental Hygiene issues a license to operate a day care facility only after that Department conducts certain inspections and personnel investigations, which take place only after the building is constructed. New York City Health Code (25 RCNY) § 47.07, issued by the Department of Health and Mental Hygiene, provides as follows:

“Permit: required approvals and clearances.

No permit shall be issued unless the permit applicant has obtained and submitted to the Department:

(a) Certificate of Occupancy. A Certificate of Occupancy, or a statement of approval from the Department of Buildings that the premises comply with all applicable building laws and codes and may be used as a child care facility. Where a Certificate of Occupancy is not required by law, the permit applicant shall submit a current inspection report from the Department of Buildings showing that there are no outstanding uncorrected violations of the City's Building Code.

(b) Fire safety statement. A statement or report from the Fire Department that the premises have been inspected and currently comply with all applicable laws and regulations pertaining to fire control and prevention. A permit shall not be issued or renewed, unless a statement or report is submitted demonstrating compliance with such laws, based upon the Fire Department's determination on an inspection made within 12 months of the date of submitting the permit renewal application.

(c) Criminal justice and child abuse screening. Documentation satisfactory to the Department that the permit applicant has submitted all necessary forms and requests for all persons

requiring criminal justice and State Registry of Child Abuse and Maltreatment screening in accordance with § 47.19 of this Code.”

Thus, based upon New York City Health Code § 47.07, it is indisputable that approval from the Department of Health could not have been obtained until after the building was built and a certificate of occupancy was issued.

Defendant, however, argues that approved informal review of architectural plans by the Department of Health would have assured the bank that the physical layout and the required utilities/plumbing were in the design. Defendant relies upon New York City Health Code (25 RCNY) § 47.09, which provides:

“(a) New application. An application for a new permit shall be submitted on forms approved or provided by the Department and shall include:

(1) Facility pre-permit technical plan. Each plan, consisting of blueprints, architectural or engineering drawings, shall be drawn to scale, and labeled to show floor layout, all indoor rooms and outdoor areas to be occupied or used by the child care service, dimensions of such rooms and areas, and intended use of each area; outdoor spaces location in relation to actual distance and location from indoor spaces; and all toilets, sinks and kitchen(s) to be used by children and staff.”

Defendant contends that this code provision supports its position that architectural plans specific to a day care center are required prior to construction. However, this section, like New York City Health Code § 47.07, similarly requires submission of:

“(2) A copy of a current certificate of occupancy issued by the Department of Buildings, or if no certificate of occupancy is required by applicable law, a statement from the Department of

Buildings that the premises and facility to be used for child care comply with all applicable building laws and codes.”

Thus, as a certificate of occupancy could not be obtained until after the building was built, no approval of the proposed day care facility could have been obtained prior to closing on the loan which was to finance the construction.

In his November 13, 2008 letter, defendant’s counsel claimed that defendant did not know until two months after the August 15, 2008 commitment letter was issued that the community facility portion of the project was going to be used as a day care center. This is belied by the June 16, 2008 transaction package, which explicitly stated that the community facility space, comprising the basement, first, and second floors of the proposed building, was intended to be used as a day care center. The evidence submitted from Walter Maffei, plaintiff’s architect, as well as defendant’s appraiser Guy Engelman and engineer Gerard Tener, and particularly the deposition testimony of defendant’s witnesses Law and Lai that any authorized use for community purposes would have been acceptable under the terms of the commitment, satisfies this court that defendant’s contention, that the failure to obtain approval from the DOB or the Department of Health for a childcare facility was a fatal defect in plaintiffs’ compliance with defendant’s due diligence requirements, was pretextual.

Defendant’s notice to plaintiffs of its determination not to make the loan was contained in the cover-email dated November 4, 2008 from Brian Law, enclosing the letter of Donald Lai. The email advised: “Due to unpredicted issues arise [*sic*], we are not able to complete the required due diligence and therefore was [*sic*] not able to close the loan before October 24,

2008. The Bank's offer to make loan [*sic*] has expired" (Ex. 25 to Alenstein Aff.). Mr. Lai's letter, dated November 3, 2008, also makes reference to the Bank's failure to complete due diligence as "deemed appropriate" by the Bank and its counsel before the closing date of October 24, 2008, noting that the commitment "was conditioned upon a number of deliveries and other matters," and concluding that the commitment had expired. The letter cites the use of the community facility as a day care center for which "regulatory and approval issues" prevented the completion of due diligence (*id.*). Defendant's counsel's letter of November 13, 2008, again recites that the Bank was unable to complete its due diligence due to "regulatory and approval issues" relating to the day care center, but also states that "an adverse change in the real estate market . . . alone would have permitted the Bank to terminate the Commitment" (Ex. 27 to Alenstein Aff.).

Plaintiffs have adduced unrefuted evidence that defendant deliberately did not obtain an appraisal of the property prior to the expiration of the commitment, even though plaintiffs had paid for the appraisal in advance in accepting the commitment. The appraisal was essential to closing because of the loan to value limitations contained in the commitment. Plaintiffs speculate that the appraisal was not obtained because it would have supported the value requirements and thus required defendant to fund a loan it no longer wanted to make. In his deposition, Mr. Lai acknowledged that an appraisal was a necessary pre-condition to closing the loan. Thus, defendant's refusal to obtain this information necessarily frustrated timely closing. Plaintiffs, therefore, argue that defendant's unilateral direction to the appraiser to put the appraisal "on hold" constituted a material breach of the loan agreement, noting that Guy

Engelman's October 10, 2008 e-mail discloses that First American had the necessary information and could have performed the appraisal based on the approved plans given to it.

Defendant maintains that it had a right to put the appraisal "on hold" because it was entitled to a new architectural plan approved by the Department of Buildings, including the design details for the day care center. Defendant cites to the provisions in the Commitment that purport to give defendant the sole discretion to accept, approve or disapprove plaintiffs' submissions, in compliance with their due diligence obligations and to demand additional information. "It is well settled that '[t]he interpretation of an unambiguous contractual provision is "a function for the court"' (*Destiny USA Holdings, LLC v Citigroup Global Mkts. Realty Corp.*, 69 AD3d 212, 218 [2009], quoting *Pyramid Brokerage Co. of Buffalo, Inc. v Atlas Auto Glass, Inc.*, 39 AD3d 1176, 1177 [2007], quoting *Teitelbaum Holdings v Gold*, 48 NY2d 51, 56 [1979]; see also *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). In the event that a contract is ambiguous, its interpretation is still a matter for the court unless "determination of the intent of the parties depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence" (*Hartford Acc. & Indem. Co. v Wesolowski*, 33 NY2d 169, 172 [1973]). The court concludes that in this action, the interpretation of the provisions of the commitment letter and the parties' performance in compliance therewith raise issues which require further development of the facts and that dismissal upon summary judgment must be denied.

The Commitment letter was unilaterally drafted by defendant, to be "accepted" by plaintiffs. As such, it was a contract of adhesion to be construed against the drafter (*Jacobson*

v Sassower, 66 NY2d 991, 993 [1985]). The language upon which defendant relies is so broad as to give defendant unfettered right to make any demand it wanted upon plaintiffs, even to the extent of effectively unilaterally terminating its own obligation to loan the funds in spite of plaintiffs' attempts to comply. However, "[i]mplicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance" (*Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 [1995]; *see also Bombardier Capital v Reserve Capital Corp.*, 295 AD2d 793, 795 [2002]). "This embraces a pledge that 'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract'" (*id.*, quoting *Kirke La Shelle Co. v Armstrong Co.*, 263 NY 79, 87 [1933]). Thus, where a contract "contemplates the exercise of discretion, this pledge includes a promise not to act arbitrarily or irrationally in exercising that discretion" (*Dalton*, 87 NY2d at 389). Consequently, defendant cannot use this provision to intentionally interfere with and thwart plaintiffs' rights under this contract by belatedly imposing new requirements not specifically contained therein, such as an approved plan for a day care center.

Defendant further argues that the commitment letter expired by its own terms, and, therefore, became unenforceable since it stated that it would expire on October 24, 2008 if there had been no prior closing. It is noted, however, that time was not made of the essence in the commitment letter (*see Resource Mtge. Banking v Turley*, 233 AD2d 308, 310 [1996]). In any event, the stated expiration date passed without closing due to defendant's own inaction. "One who demands strict performance as to time by another party must perform on its part all of the conditions which are requisite in order to enable the other party to perform its part"

(Fifty States Mgt. Corp. v Niagara Permanent Sav. & Loan Assn., 58 AD2d 177, 181 [1977]).

“A failure on the part of the party demanding performance to do the preliminary work required in order to enable the other party to complete its obligations within the time limit operates as a waiver of the time provision in the contract” (*id.*). Defendant’s failure to obtain the necessary appraisal prior to the expiration date raises a question of fact as to whether its actions constituted a waiver of the stated expiration date.

Moreover, the e-mail correspondence before the court establishes that the defendant was continuing to process the documentation presented by plaintiffs and was not enforcing the October 24, 2008 expiration date up to the November 4, 2008 notice of expiration. In light of the fact that the delays in closing were caused by defendant’s own failure to complete due diligence and obtain the necessary appraisal, defendant may be equitably estopped from enforcing the time restriction. *See generally, Towers Charter & Marine Corp. v Cadillac Ins. Co., 894 F2d 516, 522 (2d Cir. 1990).* It is further noted that although the Lender’s Discretion provision requires that approvals or waivers in respect to “terms, conditions or requirements” be in writing, there is no mention of the closing date in that provision. Thus, the time of performance, the closing date, was not an essential term of the commitment that could not be extended, orally or by conduct. *See Rose v Spa Realty Assoc., 42 NY2d 338, 343-46 (1977); Lusker v Tannen, 90 AD2d 118 (1st Dept 1982).* Whether such an extension occurred presents a question of fact precluding summary judgment. *4th Ave. Realty Holding Corp. v Pappas, 254 AD2d 250 (2d Dept 1998).*

Defendant argues that plaintiffs failed to obtain an updated survey, lender's title insurance policy, property and builder's risk insurance policies, and general contractor's and architect's insurance policies, as required by the commitment letter. Plaintiffs, however, note that the time to complete these "due diligence" obligations was at or around the time of closing, after the appraisal was delivered, and that obtaining these items before that time would have been an exercise in futility. It is well established that compliance with a condition precedent will "be excused if, under the circumstances, compliance would be meaningless, add nothing or be a gesture in futility" (*Irving Trust Co. v Nationwide Leisure Corp.*, 95 FRD 51, 74 [SD NY 1982]). Plaintiffs contend that defendant's breach of the loan agreement excused their performance of the obligation to obtain this documentation, particularly in light of defendant's failure to set a closing date. Where, as here, "a party to a contract has both repudiated the agreement and purported to terminate it, without justification, then the other party need no longer satisfy the conditions that might otherwise be required of it" (*O'Hare v General Marine Transport Corp.*, 564 F Supp 1064, 1069 [SD NY 1983], *affd* 740 F2d 160 [2d Cir 1984], *cert denied* 469 US 1212 [1985]). "It is well-settled that a party cannot insist upon performance of a condition precedent when its non-performance has been caused by the party itself" (*Fifty States Mgt. Corp.*, 58 AD2d at 181).

Plaintiffs, in any event, have submitted: an estimate from Perfect Point Corp., which substantiates that an updated survey would have taken only three days to conduct; a pro forma title insurance policy, delivered to defendant from Fidelity National Title Insurance Company, with the final title policy contingent upon receiving the appraisal; a letter from Fairmont

Insurance showing that plaintiffs' liability policy was in force in 2008 and subsequently covered any and all construction projects; Walter C. Maffei's sworn statement that he maintained professional insurance coverage; and Judah Septimus' assertion that the general contractor also had insurance coverage which could easily have been presented if the deal was going to proceed. Thus it appears that plaintiffs had substantially performed their obligations, although questions remain regarding the sufficiency of the architectural drawings which must be resolved at trial.

CONCLUSION

Accordingly, upon the numerous factual issues raised and the fact that discovery is apparently incomplete, defendant's motion for summary judgment dismissing plaintiffs' complaint is denied. Such motion may only be renewed with leave of the court as the evidence thus far adduced clearly indicates that serious issues of fact are disputed and are likely to require resolution by trial.

The case is scheduled for conference before this court at 2:30 PM on June 22, 2011.

This constitutes the decision, order, and judgment of the court.

E N T E R,

J. S. C.