

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

PRESENT: HON. BARBARA R. KAPNICK  
Justice

PART 39

LUDLOW STREET HOLDING, LLC

INDEX NO. 1052134/2010

- v -

SH LUDLOW STREET, LLC

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH  
ACCOMPANYING MEMORANDUM DECISION**

Dated: 9/7/11

[Signature]  
BARBARA R. KAPNICK J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IA PART 39

-----x  
LUDLOW STREET HOLDING, LLC,

Plaintiff,

-against-

SH LUDLOW STREET, LLC,

Defendant.  
-----x

**DECISION/ORDER**

Index No. 652134/10

Mot. Seq. No. 001

**BARBARA R. KAPNICK, J.:**

Defendant SH Ludlow Street, LLC ("Defendant" or "Seller") owns 99% of 180 Ludlow Development, LLC (the "Property Owner"), which is the fee owner of 180-182-184 Ludlow Street, New York, New York (the "Property"), the site of a 20-story hotel project that is under development.<sup>1</sup>

According to the Verified Amended Complaint dated December 8, 2010 (the "Complaint"), on June 21, 2010, plaintiff Ludlow Street Holding, LLC ("Plaintiff" or "Purchaser") and Defendant entered into an agreement (the "Purchase Agreement"), pursuant to which defendant agreed to sell the Property to Plaintiff for \$25.5 million, with the closing to occur once defendant resolved two (2) issues that were expressed as conditions to closing (the "Closing Condition(s)") in Sections 3.5 and 13.14 of the Purchase Agreement. Plaintiff allegedly "paid an unusually large good-faith deposit of

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<sup>1</sup> The concrete structure of the hotel was completed approximately two years ago, but no work has apparently been performed on the project since that time.

\$5 million on signing," because it was understood between the parties that it might require an extended period of time for Defendant to satisfy the Conditions. (Compl., ¶ 5).

The first Closing Condition involves a prior transaction whereby Serge Hoyda ("Hoyda"), Defendant's principal owner, acquired the Property from 182 Realty, LLC ("182 Realty"). Hoyda allegedly advised Plaintiff that 182 Realty is still owed approximately \$11 million on the prior deal and still holds a 1% interest in the Property.<sup>2</sup>

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<sup>2</sup> This issue is the subject of an action entitled *182 Realty LLC v. 180 Ludlow Development LLC, SH Ludlow Street, LLC & Serge Hoyda*, Index No. 651705/2010, pending before the Hon. O. Peter Sherwood. The defendants therein moved by Notice of Motion, (Motion Sequence 001), dated November 18, 2010, to dismiss the first, second, third and fifth causes of action pursuant to CPLR 3211(a)(1) and (7) based on a prior settlement agreement.

In a Decision and Order dated March 14, 2011, Justice Sherwood granted the defendants' motion to dismiss the first, second and third causes of action and denied the motion as to the fifth cause of action. Subsequently, on March 25, 2011, Justice Sherwood issued a Revised Decision and Order, withdrawing the March 14, 2011 Decision and Order. The Revised Decision and Order granted the motion to dismiss the first and second causes of action and denied the motion as to the third and fifth causes of action.

On May 13, 2011, Justice Sherwood issued an Order denying defendant's motion for leave to reargue his Decision and Order dated March 25, 2011 (Motion Sequence 002).

Plaintiff's motion for leave to reargue the Decision and Order dated March 25, 2011 (Motion Sequence 003), is scheduled for oral argument before Justice Sherwood on September 13, 2011.

Plaintiff's motion to dismiss counterclaims and affirmative defenses (Motion Sequence 004), as well as a motion to dismiss the third-party complaint or to sever the third party action (Motion Sequence 005), have been adjourned in the Submissions Part and are now returnable there on September 12, 2011.

The second Closing Condition relates to a real property dispute concerning an adjacent property, 176-178 Ludlow Street (the "Adjacent Property"), which is owned by Ithilien Realty Corp. (the "Adjacent Property Owner"). Pursuant to a 2007 Zoning Lot Development Agreement ("ZLDA") between the Property Owner and the Adjacent Property Owner, the Property Owner was permitted to "cantilever" over the Adjacent Property, i.e., to build out and over the air space of the Adjacent Property, in order to increase the size, and therefore the value, of the hotel project.

After the cantilever was built, Defendant allegedly came to believe that the cantilever created building violations on the Adjacent Property, and that the existence of these violations would allow the Department of Buildings to revoke permits and/or deny a Certificate of Occupancy for the hotel project. The Property Owner, therefore, sought permission from the Adjacent Property Owner to cure the violating conditions. The Adjacent Property Owner, however, refused and commenced an action, captioned *Ithilien Realty Corp. v. 180 Ludlow Development LLC, et al.*, Index No. 117013-2009. (the "Adjacent Property Litigation"), which is pending in this Court before the Hon. Debra James.

The Purchase Agreement provides, in relevant parts, as follows:

3.1 The closing of the sale and purchase of the Interest (and, in turn, beneficial ownership of 100% of the Property Owner) (the "Closing") shall take place . . . on the date which is the later to occur of (i) the date which is sixty (60) days after the date of this Agreement (if such date shall be a business day, or, if not, on the first (1<sup>st</sup>) business day thereafter); or (ii) subject to the further terms and conditions of Section 3.5 hereof, the date which is ten (10) business days after the date upon which Seller gives written notice to Purchaser that Seller has entered into a Settlement Agreement with 182 Realty LLC (such date, the "Scheduled Closing Date"). If Seller shall not be ready, willing and able to sell and convey the Interest to Purchaser in accordance with the terms and conditions of this Agreement on the Scheduled Closing Date, then, except as otherwise expressly provided to the contrary in this Agreement, the Scheduled Closing Date shall be the first date thereafter that Seller shall either (1) be ready, willing and able to sell and convey the Interest to Purchaser in accordance with this Agreement or (2) notify Purchaser in writing that Seller shall be unable to satisfy any of the closing conditions under this Agreement (in which event Purchaser shall have five (5) business days thereafter to either terminate this Agreement or to agree in writing to waive the closing conditions that Seller is unable to satisfy and close hereunder without such conditions being satisfied). If Purchaser shall waive any such conditions in writing, then the Scheduled Closing Date shall thereafter be deemed to be the date which is ten (10) business days after Purchaser shall waive such closing conditions in writing.

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13.14 (a) Seller has heretofore advised Purchaser of pending litigation involving the Property Owner and Ithilien Realty Corp... Seller, at Seller's expense, shall diligently prosecute and/or defend the Adjacent Property

Litigation between the date hereof and the Closing Date. If Seller shall not be able to either (i) settle the Adjacent Property Litigation, with prejudice (other than with respect to the portion thereof relating to property damage covered by insurance; (ii) obtain a judgment in favor of the Property Owner with respect to the Adjacent Property Litigation (other than relating to the insured property claim); or (iii) have the Adjacent Property Litigation dismissed with prejudice (other than with respect to the insured property claim), then Seller shall notify Purchaser in writing and Purchaser's sole remedy shall either be (i) to terminate this Agreement and receive a refund of the Escrow Funds within five (5) business days after receipt of Seller's notice or (ii) to purchase the Interest, subject to the Adjacent Property Litigation, without any abatement of the Purchase Price in which event the Adjacent Property Litigation shall be transferred to Purchaser (as necessary) and Purchaser shall assume responsibility therefor after the Closing Date.

In a letter from Serge Hoyda on behalf of defendant to Richard Born on behalf of plaintiff, dated November 8, 2010 (the "November 8 Notice"), Mr. Hoyda wrote that:

Seller hereby provides notice to Purchaser that Seller has not been able to resolve the Adjacent Property Litigation in the manner described in the fourth sentence of Section 13.14(a) of the Purchase Agreement. Accordingly, pursuant to and in accordance with the terms of Section 13.14(a) of the Purchase Agreement, Purchaser has the right, within five (5) business days of receipt of this notice, to elect to (i) terminate the Purchase Agreement and receive a full refund of the Escrow Funds or (ii) purchase the Interest, subject to the Adjacent Property Litigation, without any abatement of the Purchase Price. A failure of Purchaser to

provide such written response within five (5) business days of receipt of this notice shall be deemed to be an irrevocable election by Purchaser, as its sole remedy, to terminate the Purchase Agreement and receive a full refund of the Escrow Funds.

Plaintiff thereafter commenced this action on December 1, 2010, seeking declaratory and injunctive relief.

Following the commencement of the instant action, by written letter dated December 3, 2010 (the "December 3 Notice"), Defendant withdrew and rescinded the November 8 Notice, and provided a new notice stating the following, in relevant part:

Seller hereby provides notice to Purchaser that Seller has not been able to resolve the Adjacent Property Litigation in the manner described in the fourth sentence of Section 13.14(a) of the Purchase Agreement. Accordingly, pursuant to, and in accordance with, the terms of Section 13.14(a) of the Purchase Agreement, Purchaser has the right, within five (5) business days of receipt of this notice, to elect to: (i) terminate the Purchase Agreement and receive a full refund of the Escrow Funds, or (ii) purchase the Interest, subject to the Adjacent Property Litigation, without any abatement of the Purchase Price. A failure of Purchaser to provide such written response within five (5) business days of receipt of this notice shall be deemed an irrevocable election by Purchaser, as its sole remedy, to elect to purchase the Interest, subject to the Adjacent Property Litigation, without any abatement of the Purchase Price.

Seller also hereby provides notice to Purchaser pursuant to: (a) Section 3.1 of the Purchase Agreement, that Seller is unable to

satisfy the condition to closing set forth in Section 3.4 of the Purchase Agreement that 100% of the ownership interest in Property Owner be conveyed by Seller to Purchaser at Closing in accordance with the Purchase Agreement; and (b) Section 5.2 of the Purchase Agreement, that Seller is unable to convey title to the Interest with the Property in accordance with the provisions of the Purchase Agreement, or does not elect to remedy an Objection.

Plaintiff then filed the Amended Verified Complaint dated December 8, 2010 as of right.

In the first cause of action, Plaintiff seeks a declaration that (a) the November 8 Notice and the December 3 Notice are each null, void and ineffective; (b) the Purchase Agreement has not been terminated by reason of any notice from the Defendant, and remains in effect; (c) Plaintiff shall not be required, based on the circumstances described in defendant's Notices, to elect to (i) terminate the Purchase Agreement and receive a full refund of the Escrow Funds or (ii) purchase the Interest, subject to the claims of 182 Realty and the Adjacent Property Owner; and (d) Plaintiff's failure to elect one of those options within five days of receipt of such Notices is not, and shall not be deemed to be, an irrevocable election of Plaintiff either to terminate the Purchase Agreement or to proceed to closing subject to the claims of 182 Realty and the Adjacent Property Owner. (Compl., ¶ 74.)

In the second cause of action, Plaintiff seeks temporary, preliminary and permanent injunctions enjoining and restraining the Defendant from terminating the Purchase Agreement pursuant to the November 8 Notice, or proceeding, pursuant to the December 3 Notice, to schedule or hold a Closing pursuant to and under the Purchase Agreement, or seeking to obtain the down payment (a/k/a the "Escrow Funds") from the Escrow Agent, or requiring Plaintiff to make the so-called "election" demanded in the third, fifth and sixth paragraphs of the December 3 Notice, and tolling and extending Plaintiff's time to make any election pursuant to a Notice. (Compl., ¶ 77.)

Plaintiff now moves by Order to Show Cause for an order, pursuant to CPLR Article 63, pending the final determination of this action, or further order of this Court, enjoining and restraining Defendant from proceeding, pursuant to the December 3 Notice, to schedule or hold a Closing pursuant to and under the Purchase Agreement, or seeking to obtain the down payment (a/k/a the "Escrow Funds") from the Escrow Agent, or requiring Plaintiff to make the so-called "election" demanded in the third, fifth and sixth paragraphs of the December 3 Notice, and tolling and extending Plaintiff's time to do so.<sup>3</sup>

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<sup>3</sup> After hearing oral argument on the record on December 8, 2010, this Court granted a temporary restraining order, pending the hearing of this motion, (a) tolling and staying the time for

Defendant opposes the motion and cross-moves for an order pursuant to CPLR 3211(a)(1) and/or (a)(7) dismissing the Complaint on the grounds that the Purchase Agreement violates the prohibition against remote vesting embodied in the Rule Against Perpetuities (the "RAP") (Estates, Powers and Trusts Law ("EPTL") 9-1.1(b)) and is therefore void.

### **Discussion**

#### *Cross-Motion to Dismiss*

Turning first to the cross-motion to dismiss, a motion to dismiss based on documentary evidence, under CPLR 3211(a)(1), "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002) (citing *Leon v. Martinez*, 84 NY2d 83, 88 [1994]).

Pursuant to CPLR 3001, a declaratory judgment may be granted ". . . as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." "To constitute a 'justiciable controversy,' there

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Plaintiff to make the "election," and (b) enjoining and restraining Defendant from proceeding to schedule or hold a Closing, pursuant to and under the Purchase Agreement, and from seeking to obtain the Escrow Funds.

must be a real dispute between adverse parties, involving substantial legal interests for which a declaration of rights will have some practical effect (citations omitted).” *Chanos v. MADAC, LLC*, 74 AD3d 1007, 1008 (2d Dep’t 2010).

The Court of Appeals has held that “[a] declaratory judgment action may be an appropriate vehicle for settling justiciable disputes as to contract rights and obligations (citations omitted).” *Kalisch-Jarcho, Inc. v. City of New York*, 72 NY2d 727, 731-32 (1988).

Here, Plaintiff contends that there is a controversy regarding the parties’ rights, which centers around the parties’ interpretation of Sections 3.1 and 13.14(a) of the Purchase Agreement.

Plaintiff argues that Defendant is not yet “unable” to satisfy the Closing Conditions, because they are still capable of being satisfied and that Defendant is required to act in good faith and use its best efforts to satisfy the Closing Conditions. See *Sorenson v. Bridge Capital Corp.*, 52 AD3d 265, 267 (1<sup>st</sup> Dep’t 2008), *lv. dismiss.*, 12 NY3d 748 (2009) (“Implicit in every contract is a promise of good faith and fair dealing that is breached when a party acts in a manner that - although not expressly forbidden by

any contractual provision - would deprive the other party of receiving the benefits under their agreement.").

Defendant, on the other hand, argues that the Purchase Agreement violates the RAP, if it does not place a time limit or deadline on defendant's obligation to meet the Closing Conditions.

The RAP is codified in EPTL 9-1.1(b), which provides in pertinent part: "[n]o estate in property shall be valid unless it must vest, if at all, not later than twenty-one years after one or more lives in being . . . ."

Even though the RAP applies to options to purchase commercial real estate, *Symphony Space v. Pergola Props.*, 88 NY2d 466, 477-78 (1996), which is the case here, the rules of construction set forth in EPTL 9-1.3(a) and (d) also apply and require that the Court "construe the option in such a way as to avoid invalidating it." *Scutti Enters. v. Wackerman Guchone Custom Bldrs.*, 153 AD2d 83, 88 (4<sup>th</sup> Dep't 1989), *lv. den.* 75 NY2d 709 (1990)). EPTL 9-1.3(a) and (d) provide in relevant part:

(a) Unless a contrary intention appears, the rules of construction provided in this section govern with respect to any matter affecting the rule against perpetuities.

\* \* \*

(d) Where the duration or vesting of an estate is contingent upon the probate of a will, the appointment of a fiduciary, the location of a distributee, the payment of debts, the sale of assets, the settlement of an estate, the determination of questions relating to an estate or transfer tax or the occurrence of any specified contingency, **it shall be presumed that the creator of such estate intended such contingency to occur, if at all, within twenty-one years from the effective date of the instrument creating such estate** (emphasis added).

This statute is "designed to prevent the problem . . . created by an instrument's reference to a specified event which ordinarily would take a short time to occur but which theoretically could take more than 21 years." *Scutti Enters. v. Wackerman Guchone Custom Bldrs.*, *supra* at 89.

Unless the "option agreement 'contains no limitation on duration nor words suggesting that the parties intended the extent of its life to be anything other than indefinite,' the agreement violates the rule against remoteness in vesting." *Rozina v. Casa 74<sup>th</sup> Development LLC*, 29 Misc.3d 675, 678 (Sup Ct, NY Co Aug. 27, 2010) (citing *Buffalo Seminary v. McCarthy*, 86 AD2d 435, 444 [4<sup>th</sup> Dep't 1982], *aff'd for reasons stated below* 58 NY2d 867 [1983]).

Here, to the extent that Plaintiff's purchase of the Property depends on the satisfaction of the Closing Conditions, EPTL 9-1.3 is applicable to validate the Purchase Agreement. Because there is

no evidence in the Purchase Agreement of a contrary intent, it is presumed, pursuant to Section 9-1.3(d) that the parties intended such contingency to occur within 21 years of the Purchase Agreement's execution.

Accordingly, the Court finds that the Purchase Agreement does not violate the Rule Against Perpetuities and is therefore valid and enforceable. Therefore, defendant's cross-motion to dismiss is denied.

#### *Preliminary Injunction*

In order to be entitled to a preliminary injunction, Plaintiff must show a likelihood of success on the merits, danger of irreparable injury in the absence of the injunction, and a balancing of the equities in its favor. See *W.T. Grant Co. v. Srogi*, 52 NY2d 496, 517 (1981).

Under Plaintiff's interpretation of Section 3.1, it cannot be forced to elect to either terminate the Purchase Agreement and receive its deposit back or to agree in writing to waive the Closing Conditions, so long as those conditions are still "able" to be satisfied, which Plaintiff urges is possible through further litigation or settlement of the 182 Realty litigation and the Adjacent Property Litigation.

Defendant argues that Plaintiff misinterprets Section 3.1 by essentially asking for the Scheduled Closing Date to be held in abeyance until Seller is "able" to satisfy the Closing Conditions. Defendant contends, however, that the Scheduled Closing Date arrives regardless of whether the Closing Conditions have been met. Under Defendant's interpretation of the first part of Section 3.1, the Scheduled Closing date was September 20, 2010. Defendant arrives at this date by making the following calculation:

The date that is sixty (60) days after the June 21, 2010 date of the Agreement is August 20, 2010. The date that is ten (10) business days after the June 28, 2010 date on which written notice of the Settlement Agreement was provided is July 12, 2010. Because the Scheduled Closing Date is the later of those two dates, the applicable date is August 20, 2010. By letter dated August 18, 2010 to Seller, Purchaser adjourned the August 20, 2010 closing for a period of thirty (30) days, to September 20, 2010.

(Def. Mem. Law, pgs. 7-8).

Defendant urges that, under part two of Section 3.1, if Seller is "unable" to meet the Closing Conditions by the Scheduled Closing Date (September 20, 2010), then the Scheduled Closing Date is the date that either: (1) Seller can consummate the transaction in accordance with the Agreement or (2) Purchaser is notified that Seller is "unable" to satisfy the Closing Conditions.

Defendant asserts that part two of Section 3.1 was invoked when it gave Plaintiff the December 3 Notice, meaning that Plaintiff had five (5) business days, or until December 10, 2010, to elect its remedy, and that as a result, Purchaser is entitled to choose between: (1) closing "as is;" or (2) terminating the Purchase Agreement and receiving its deposit back.

Plaintiff, however, maintains that part two of Section 3.1 has not yet been triggered, because Defendant is not yet "unable" to satisfy the Closing Conditions.

Section 3.1 clearly sets forth the methods by which the "Scheduled Closing Date" would be determined and evidences the parties' intent that the option to purchase the Property would not be indefinite. See RAP discussion, *supra* at 10-13.<sup>4</sup>

There is no dispute that the Purchase Agreement is dated as of the 21<sup>st</sup> day of June, 2010. It is also clear that under Section 3.1, the Closing would take place on the date which is the later to occur of the date which is sixty (60) days after June 21, 2010 or ten (10) business days after Seller gave written notice to Purchaser that Seller entered into a Settlement Agreement with 182

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<sup>4</sup> Plaintiff cannot argue both that the RAP does not apply and that the Closing Date is indefinite.

Realty LLC. Sixty days after June 21, 2010 is August 20, 2010. Both the Complaint (¶ 40) and the documentary evidence (Hoyda Aff. Ex. C) show that Seller advised Purchaser in an e-mail that it had reached a Settlement Agreement with 182 Realty on June 28, 2010. Ten (10) business days after June 28, 2010 is July 12, 2010. Pursuant to the first sentence of Section 3.1, the Scheduled Closing Date turned out to be August 20, 2010, since that date is later than July 12, 2010. On August 18, 2010, however, Purchaser sent a letter to Seller stating that

[p]ursuant to Section 3.2 of the Agreement, Purchaser hereby gives notice that it elects to adjourn the Scheduled Closing Date, as that term is defined in the [Purchase] Agreement, for a period of thirty (30) days. The conditions precedent to closing have not been met and Purchaser in sending this notice does not waive any of said conditions.

This meant that the Scheduled Closing Date was now September 20, 2010.<sup>5</sup>

The second part of Section 3.1 of the Purchase Agreement, see *supra* at p. 4, also contemplates how the Scheduled Closing Date will be determined, should the Seller not be able to meet the Closing Conditions by September 20, 2010.

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<sup>5</sup> Because the thirtieth (30<sup>th</sup>) day fell on Sunday, September 19, 2010, the closing would occur the next business day.

There is obviously no dispute that the transaction did not close on September 20, 2010. It is also apparent from the documentary evidence attached both to the instant Complaint and to the affidavit of Serge Hoyda, sworn to on December 15, 2010, that by September 20, 2010, the Settlement Agreement with 182 Realty had fallen apart and Seller was not "ready, willing and able" to close in accordance with the first Closing Condition because it had not yet obtained the 1% interest from 182 Realty,<sup>6</sup> nor had it resolved

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<sup>6</sup> In a letter dated August 9, 2010, from David M. Levy, Esq. of Robinson Brog Leinwand Greene Genovese & Gluck P.C. counsel for 182 Realty LLC to Nicholas T. Donovan, Esq. of Donovan & Giannuzzi LLP, counsel to 180 Ludlow Development LLC, et al., Mr. Levy wrote:

... please be advised that 182 Realty does not consent to the transaction memorialized in that certain Limited Liability Company Interest Purchase Agreement dated June 21, 2010 . . . . Nor will our client agree to convey its one percent (1%) interest in 180 Ludlow Development LLC or enter into a Settlement Agreement as contemplated in the aforementioned agreement.

Our client's clear preference is to meet with you and Mr. Hoyda in order to resolve these issues and to avoid a dispute. As previously stated, we do not view the document drafted by Rabbi Benjaminson to be binding or enforceable. Please be further advised that unless this matter is resolved amicably, we have been authorized to take every action necessary to protect the interests of our clients, including but not limited to communicating directly with the contract vendee, the commencement of a legal action, and/or the filing of a *lis pendens*. Our client is prepared to consent to the contemplated transaction only upon our

the Adjacent Property Litigation in accordance with Section 13.14.

Accordingly, the Court finds that the second portion of Section 3.1 was triggered and governs the way in which the new Scheduled Closing Date is to be determined.

Section 3.1 provides, in relevant part:

. . . the Scheduled Closing Date shall be the first date thereafter that **Seller** shall either (1) be ready, willing and able to sell and convey the Interest to Purchaser in accordance with this Agreement **or** (2) notify Purchaser in writing that Seller shall be unable to satisfy any of the closing conditions under this Agreement . . .

(emphasis added). Accordingly, Seller had the option of (1) going to closing if it was "ready, willing and able" to do so under the terms of the Purchase Agreement; or (2) notifying Purchaser that it was unable to satisfy any of the Closing Conditions (the "Notice Provision"). Here, there is no dispute that Seller elected the second option by serving the November 8 and December 3 Notices.

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reaching satisfactory terms or, in the alternative, subject to a written agreement that the proceeds of sale will be held in escrow pending the adjudication of our clients' respective claims through binding arbitration.

The action entitled *182 Realty LLC v. 180 Ludlow Development LLC, SH Ludlow Street, LLC & Serge Hoyda*, Index No. 651705/2010 was subsequently commenced by service of a Summons and Verified Complaint in October 2010.

Plaintiff argues that it is preposterous to think that the Defendant has the ability to trigger the Closing Date, simply by providing notice that it is "unable" to satisfy the Closing Conditions and that, in any event, the December 3 Notice is premature because defendant is still "able" to satisfy the Closing Conditions. Moreover, at oral argument, held on the record on December 20, 2011, Plaintiff argued that ". . . if [the Defendant] ha[s] not fulfilled [its] duty, clearly we have the right to complain that the notice is phony, premature . . ." (Tr. 9:16-18 [Dec. 20, 2011]).

The Court finds that Plaintiff's interpretation of the Purchase Agreement - that Seller could have only properly sent the Notices, if it first demonstrated that it was "unable" to satisfy the Closing Conditions, is untenable, given the express language of Sections 3.1 and 13.14.<sup>7</sup>

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<sup>7</sup> In fact, Section 13.14 only expressly requires Defendant to "diligently prosecute and/or defend the Adjacent Property Litigation between the date hereof and the Closing Date," which the Court has already found was September 20, 2010. Section 13.14 also expressly provides that once Seller notifies Purchaser that it cannot settle, obtain a favorable judgment or have the Adjacent Property Litigation dismissed, the Purchaser's "**sole remedy**" is either to terminate the Purchase Agreement and receive a refund of the Escrow Funds **or** to purchase the Interest, subject to the Adjacent Property Litigation, without any abatement of the Purchase Price.

There is no basis to conclude that the December 3 Notice is null, void or ineffective.<sup>8</sup> There is also no basis for the Court to conclude that Seller is under any obligation to expend a certain amount of time, expense or effort before using the Notice Provision to set the Scheduled Closing Date and allow Purchaser to choose between two (2) enumerated options - either request a return of its deposit or move forward to closing, despite the unmet Closing Conditions. The relief requested by Plaintiff in this action, however, asks this Court to read in a third option of forcing the Seller to spend an unspecified amount of additional time, expense and effort resolving the pending litigations, without a reasonable basis in the express language of the Purchase Agreement. Moreover, the Court finds Plaintiff's argument that Defendant has violated the implied covenant of good faith and fair dealing by not using its best efforts to satisfy the Closing Conditions, (Compl., ¶¶ 36-37), to be without merit.<sup>9</sup>

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<sup>8</sup> The November 8 Notice was rescinded in the December 3 Notice.

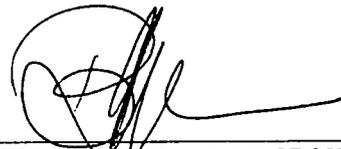
<sup>9</sup> Not only does the Complaint lack a cause of action for breach of the implied covenant of good faith and fair dealing, but the Complaint fails to even allege that Defendant acted in bad faith, other than the allegation that it sent the November 8 and December 3 Notices in bad faith, which cannot form the basis of a cause of action for the breach of the implied covenant of good faith and fair dealing.

Accordingly, based on the papers submitted and the oral argument held on the record, the Court finds that there is not a likelihood of success on the merits and the motion for a preliminary injunction must be denied. The temporary restraining order contained in the Order to Show Cause is hereby vacated.

Defendant is directed to serve an Answer to plaintiffs' Complaint within 30 days of the date of this Order. Counsel for both parties shall appear for a preliminary conference in IA Part 39, 60 Centre Street, Room 208 on October 19, 2011 at 10 a.m.

This constitutes the Decision and Order of this Court.

Dated: 9/7, 2011



BARBARA R. KAPNICK  
J.S.C.

**BARBARA R. KAPNICK**  
**J.S.C.**