

NEW YORK SUPREME COURT - COUNTY OF BRONX  
**PART 32**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX

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**ANDREW BULLARO,**

Plaintiff,

- against -

Index No. **35022/2020E**

Hon. **FIDEL E. GOMEZ**  
Justice

**LEDO, INC. AND THOMAS P. ANSELMO,**

Defendants.

-----X  
**LEDO, INC.,**

Third-Party Plaintiff,

- against -

**ANDREW BULLARO,**

Third-Party Defendant.

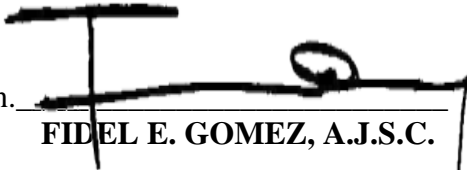
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The following papers numbered 1 to 3, read on this motion, noticed on 8/26/2022, and duly submitted as no. 2 on the Motion Calendar of 9/7/2022.

	<u>PAPERS NUMBERED</u>	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits	2	
Replying Affidavit and Exhibits	3	

Defendant/Third-Party Plaintiff Ledo, Inc. and Defendant Thomas P. Anselmo's motion is decided in accordance with the Decision and Order annexed hereto.

Dated:  
11/3/22

  
 Hon. **FIDEL E. GOMEZ, A.J.S.C.**

1. CHECK ONE.....  CASE DISPOSED     NON-FINAL DISPOSITION
2. MOTION IS.....  GRANTED     DENIED     GRANTED IN PART     OTHER
3. CHECK IF APPROPRIATE.....  SETTLE ORDER     SUBMIT ORDER     DO NOT POST  
 FIDUCIARY APPOINTMENT     REFEREE APPOINTMENT  
 NEXT APPEARANCE DATE: December 12, 2022, at 3:00 p.m.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX

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**ANDREW BULLARO,**

Plaintiff,

**DECISION AND ORDER**

- against -

Index No. **35022/2020E**

**LEDO, INC. AND THOMAS P. ANSELMO,**

Defendants.

-----X  
**LEDO, INC.,**

Third-Party Plaintiff,

- against -

**ANDREW BULLARO,**

Third-Party Defendant.

-----X

Defendant/Third-Party Plaintiff Ledo, Inc. (“Ledo, Inc.”) and Defendant Thomas P. Anselmo (“Mr. Anselmo”) (collectively “Defendants”) move for summary judgment pursuant to CPLR 3212(b) dismissing the third cause of action in the amended verified complaint, and for an award of attorney’s fees. Plaintiff/Third-Party Defendant Andrew Bullaro (“Plaintiff”) opposes.

For the reasons which follow, Defendants’ motion is granted.

**BACKGROUND:**

On December 11, 2020, Plaintiff commenced this action by summons with notice, and filed a verified complaint on December 24, 2020.<sup>1</sup> On May 9, 2022, Plaintiff amended his verified complaint (the “amended complaint”).<sup>2</sup>

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<sup>1</sup> On November 10, 2020, Ledo, Inc. commenced an action in the Supreme Court of the State of New York, Queens County, entitled *Ledo, Inc. v Bullaro*, under Index No. 721367/2020 (the “Queens Action”). Ledo, Inc. seeks money damages and a declaratory judgment arising out of the Contract at issue in this action.

On or around June 16, 2022, this Court so-ordered the parties’ stipulation to consolidate the Queens Action with the instant action.

<sup>2</sup> On or around May 3, 2022, the parties stipulated to allow Plaintiff to amend his complaint.

The amended complaint alleges that Plaintiff and Ledo, Inc. entered into a Contract of Sale dated January 6, 2020 (the “Contract”) for the purchase and sale of the premises located at 340-346 Coster Street, Bronx, NY 10474 (the “Premises”). The amended complaint alleges that pursuant to the terms of the Contract, Ledo, Inc. was required to convey the Premises to Plaintiff in exchange for the sum of \$3,400,000.00. Plaintiff alleges that the down payment in the sum of \$340,000.00 was tendered to Ledo, Inc.’s attorney and escrowee, Mr. Anselmo (Amended Compl. ¶ 2).

The amended complaint alleges that the Contract set forth a closing date of on or about February 27, 2020 (Amended Compl. ¶ 14). Plaintiff alleges that on April 3, 2020, Mr. Anselmo emailed Plaintiff’s attorney, Dominick A. DeRiso, Esq. (“Mr. DeRiso”), advising him that Ledo, Inc. was still in the process of obtaining the water meter reading in accordance with paragraph 12(c) of the Contract, and had no date as to when such a reading could or would occur (Amended Compl. ¶ 15). Plaintiff alleges that on April 10, 2020, Mr. DeRiso replied, stating that Plaintiff was unwilling to wait an indefinite period of time, provided notice of Plaintiff’s exercise of his right to terminate the Contract, and demanded a return of the down payment (Amended Compl. ¶ 16). Plaintiff alleges that on June 4, 2020, Mr. DeRiso again emailed Mr. Anselmo, confirming termination of the Contract (Compl. ¶ 17).

The amended complaint alleges that on June 5, 2020, Mr. Anselmo sent a letter to Mr. DeRiso acknowledging the termination and attempted to “resurrect” the Contract by selecting a June 24, 2020 “time of the essence” closing (Amended Compl. ¶ 18). Plaintiff alleges that on June 12, 2020, Mr. DeRiso again advised Mr. Anselmo that the Contract was terminated because of Ledo, Inc.’s failure to comply with paragraph 12(c) of the Contract (Amended Compl. ¶ 19). Plaintiff alleges that on June 23, 2020<sup>3</sup>, Mr. Anselmo unilaterally canceled the June 24, 2020 closing (Amended Compl. ¶ 20).

The amended complaint alleges that on August 6, 2020, Mr. Anselmo sent another letter to Mr. DeRiso, again scheduling the closing for August 20, 2020 (Amended Compl. ¶ 21). Plaintiff alleges that on August 19, 2020, Plaintiff’s co-counsel sent a letter reminding Mr. Anselmo that the Contract had been terminated, and demanded a return of the down payment (Amended Compl. ¶ 22). Plaintiff alleges that on September 2, 2020, Mr. Anselmo canceled the August 20, 2020 closing and set another closing date for September 17, 2020 (Amended Compl. ¶ 23). Plaintiff

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<sup>3</sup> The amended complaint states that Mr. Anselmo unilaterally canceled the June 24, 2020 closing on July 23, 2020. Presumably, Plaintiff meant to indicate June 23, 2020, not July 23, 2020.

alleges that on September 15, 2020, Plaintiff, via Mr. DeIorio, rejected the notice of a closing date and demanded a return of the down payment (Amended Compl. ¶ 24).

The amended complaint alleges five causes of action: breach of contract (first cause of action), declaratory judgment (second cause of action), specific performance as to the sale of the Premises (third cause of action), specific performance for a return of the down payment (fourth cause of action), and foreclosure of vendee's lien (fifth cause of action).

On August 1, 2022, Defendants filed the instant motion. The motion was marked fully submitted on September 7, 2022.

### DISCUSSION:

Defendants move for summary judgment dismissing the third cause of action in the amended complaint. Defendants argue, *inter alia*, that a party seeking specific performance must show that he substantially performed his contractual obligations and that he was ready, willing and able to perform his remaining obligations under the Contract. Defendants argue that by Plaintiff's own admissions in the complaint that he terminated the Contract, he was not ready, willing and able to close on the purchase of the Premises under the terms of the Contract.

In support of their motion, Defendants submitted, *inter alia*, an affirmation of Thomas A. Toscano, Esq., counsel for Defendants; an affidavit by Mr. Anselmo; an affidavit by Joseph Reitano, President of Ledo, Inc.; the pleadings; the Contract; and email and letter correspondence between the parties.

In his affidavit, Mr. Anselmo avers that he represented Ledo, Inc. in connection with the Contract (Affidavit of Thomas P. Anselmo, ¶ 3). Mr. Anselmo asserts that on April 2, 2020, Mr. DeRiso requested information regarding the status of a title water meter reading (Affidavit of Thomas P. Anselmo, ¶ 5). He asserts that on April 10, 2020, after he informed Mr. DeRiso that New York City was in the process of changing the water meters at the Premises and requested that the parties escrow for water charges at closing, Mr. DeRiso replied that Plaintiff wished to terminate the Contract, requested a return of the down payment and reimbursement for title and survey charges (Affidavit of Thomas P. Anselmo, ¶ 6). Mr. Anselmo asserts that thereafter, on June 12, 2020, August 19, 2020, and September 15, 2020, Plaintiff claimed that the Contract had been terminated (Affidavit of Thomas P. Anselmo, ¶ 10, 13, 15).

Mr. Anselmo asserts that on September 2, 2020, he sent a final notice to Plaintiff scheduling a closing for September 17, 2020 (Affidavit of Thomas P. Anselmo, ¶ 14). He asserts that on

September 17, 2020, Joseph Reitano, Ledo, Inc.’s president appeared at his office for the closing and was ready, willing and able to fulfill Ledo, Inc.’s obligations under the Contract (Affidavit of Thomas P. Anselmo, ¶ 16). He asserts that Plaintiff did not appear for the closing (Affidavit of Thomas P. Anselmo, ¶ 17).

Defendants submitted in Exhibits B through H email and letter correspondence between the parties, which demonstrate that Plaintiff terminated and confirmed termination of the Contract on April 10, 2020, June 4, 2020 (Defendants’ Exhibit B), June 12, 2020 (Defendants’ Exhibit D), August 19, 2020 (Defendants’ Exhibit F), and September 15, 2020 (Defendants’ Exhibit H), despite Defendants’ scheduling or attempt to schedule closing dates for June 24, 2020, August 20, 2020, and September 17, 2020 (Defendants’ Exhibits C, E, G), two of which were made time of the essence (Defendants’ Exhibits C, G).

“A party seeking specific performance must allege that it ‘substantially performed its contractual obligations and was willing and able to perform its remaining obligations, that defendant was able to convey the property, and that there was no adequate remedy at law’ (*M&E 73-75, LLC v 57 Fusion LLC*, 189 AD3d 1, 6 [1st Dept 2020]; *E&D Group, LLC v Violet*, 134 AD3d 981, 982-983 [2d Dept 2015]; *ADC Orange, Inc.* at 490; *EMF General Contracting Corp. v Bisbee*, 6 AD3d 45, 51 [1st Dept 2004]).

“A party seeking specific performance of a real estate contract must establish that it was ready, willing and able to perform its obligations under the contract ‘on the original law day or, if time is not of the essence, on a subsequent date fixed by the parties or within a reasonable time thereafter. The same rule applies with respect to claims for damages for breach of a contract for the sale of real property.’” (*Zeitoune v Cohen*, 66 AD3d 889, 891 [2d Dept 2009]; *Mendoza v Sterling Properties, Inc.*, 162 AD3d 879, 880 [2d Dept 2018]).

“An anticipatory breach by the party from whom specific performance is sought excuses the party seeking specific performance from tendering performance, but not from the requirement that the party seeking specific performance establish that he or she was ready, willing, and able to perform.” (*Zeitoune* at 891-892; *533 Park Avenue Realty, LLC v Park Avenue Building & Roofing Supplies, LLC*, 156 AD3d 744, 747 [2d Dept 2017]; *Huntington Min. Holdings, Inc. v Cottontail Plaza, Inc.*, 60 NY2d 997, 998 [1983]; *3801 Review Realty LLC v Review Realty Co., LLC*, 111 AD3d 509, 509-510 [1st Dept 2013]; *RBP Ventures, Ltd. v Concord Electronics, Inc.*, 69 AD3d 535, 536 [1st Dept 2010]).

Here, Defendants have demonstrated their prima facie entitlement to summary judgment dismissing the third cause of action for specific performance to close under the Contract for the sale of the Premises. It is undisputed that Plaintiff was not ready, willing and able to perform his obligations under the contract “on the original law day or, if time is not of the essence, on a subsequent date fixed by the parties or within a reasonable time thereafter” (*Zeitoune* at 891). After the original closing date of February 27, 2020, closing dates were scheduled by Defendants for June 24, 2020, August 20, 2020, and September 17, 2020.<sup>4</sup> Notably, the June 24, 2020 and September 17, 2020 were made time of the essence (Defendants’ Exhibits C, G). It is undisputed that Plaintiff did not appear on any of these closing dates. Rather, the undisputed evidence demonstrates that Plaintiff rejected the closing dates, terminated, and confirmed termination of the Contract on April 10, 2020, June 4, 2020, June 12, 2020, August 19, 2020, and September 15, 2020 (Affidavit of Andrew Bullaro, ¶ 13-15<sup>5</sup>; Affirmation of Jan A. Marcus, Esq., ¶ 7, 8, 10, 12, 14, 15; Plaintiff’s Exhibit C, D, F, H, J). Plaintiff’s refusal to appear at the closing dates and his termination and confirmation of his termination of the Contract demonstrates that he was not ready, willing and able to perform his obligations under the Contract. As such, he is not entitled to specific performance of the Contract.

Whether Plaintiff’s termination of the Contract and failure to appear on the Closing dates was due to Defendants’ alleged failure to provide a water meter reading, as urged by Plaintiff, is of no import. Plaintiff’s refusal to fulfill his obligations under the Contract still amounts to a failure

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<sup>4</sup> The amended complaint indicates that the Contract set forth a closing date “of on or about” February 27, 2020 (Amended Compl. ¶ 14). Section 3 and Schedule D of the Contract indicate that that was indeed the case (Defendants’ Exhibit A). The parties do not indicate that it was made time of the essence. There is no dispute that the closing did not occur on the original closing date. Plaintiff argues that the closing date was “delayed for months” because Ledo, Inc. “was unable to clear title” (Affirmation of Jan A. Marcus, Esq. ¶ 6). The amended complaint, as well as Defendants’ motion, begin with the events occurring on or around April 3, 2020, when Mr. Anselmo emailed Mr. DeRiso to advise him that Ledo, Inc. was “in the process of obtaining the water meter reading” (Amended Compl. ¶ 15). The email dated April 3, 2020, from Mr. Anselmo to Mr. DeRiso states that “NYC Is [sic] in the process of changing the meters. Will let you know when completed so a special reading can be ordered” (Compl., Exhibit C).

<sup>5</sup> Mr. Bullaro avers, in relevant part, that on April 10, 2020, “My attorney further advised Seller’s counsel that the Purchaser accordingly elected to terminate the Contract, and also demanded a return of the deposit from escrow, interest, and reimbursement for title and survey expenses as set forth in Section 13.07 of the Contract” (Affidavit of Andrew Bullaro, ¶ 13). He also avers that: “The Seller in fact attempted to then set closing dates for a closing which was no longer able to take place in view of Purchaser’s election to terminate the Contract” (Affidavit of Andrew Bullaro, ¶ 14), and that “[t]he result was a series of communications between the parties’ attorneys in which the Seller continually tried to schedule and conduct a closing, and to which Purchaser’s counsel repeated that the Contract was terminated, thereby rejecting Seller’s efforts to ignore the fact of termination” (Affidavit of Andrew Bullaro, ¶ 15).

to demonstrate that he was ready, willing and able to close (*M&E 73-75 LLC* at 7 [holding that plaintiff's conditioning of its performance upon defendant's satisfaction of its contractual obligations demonstrated that plaintiff was not ready, willing and able to close]; *3801 Review Realty LLC* at 509-510 [holding that plaintiff was not entitled to specific performance, because it was unable to demonstrate that it was ready, willing and able to fulfill its contractual obligations at closing. Even though there were issues of fact as to the seller's ability to satisfy its contractual obligations, there was no evidence that the seller frustrated the plaintiff's ability to satisfy its own contractual obligations]; *533 Park Ave. Realty, LLC v Park Ave. Bldg. & Roofing Supplies, LLC*, 156 AD3d 744, 747 [2d Dept 2017] ["On the question of specific performance, a purchaser seeking specific performance of a real estate contract must demonstrate that he or she was ready, willing, and able to perform on the contract, regardless of any anticipatory breach by the seller."]).

Plaintiff's argument that he is now ready, willing and able to perform under the Contract is irrelevant, as case law dictates that he had to have been ready, willing and able "on the original law day or, if time is not of the essence, on a subsequent date fixed by the parties or within a reasonable time thereafter" (*Zeitoune* at 891). Plaintiff's reliance on *S.E.S. Importers v Pappalardo*, 53 NY2d 455 [1981] and *Downe v Treadmill*, 173 AD2d 673 [2d Dept 1991] is without merit, as those cases do not discuss the issue of a plaintiff's readiness, willingness, and ability to perform under a contract. Those cases discuss whether a plaintiff may seek specific performance even though there is a provision in the parties' contract limiting a buyer's remedies in the event of a seller's inability to perform pursuant to the contract. Here, whether Plaintiff may seek a claim for specific performance despite the existence of a limited remedies provision in the parties' Contract is of no import, because Plaintiff cannot demonstrate his entitlement to specific performance even if he would be permitted to bring such a claim.

Plaintiff's argument that the motion is premature because the parties have not exchanged any discovery is without merit. Plaintiff has not demonstrated that "facts essential to justify opposition may exist" (CPLR 3212(f) ["Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just."]); *Planned Bldg. Services, Inc. v S.L. Green Realty Corp.*, 300 AD2d 89, 89-90 [1st Dept 2002] ["Plaintiff's contention that the motion should have been denied to afford it additional discovery is unavailing, no basis for plaintiff's belief that further discovery would yield evidence sufficient to raise a triable issue having been set

forth”]; *Pow v Black*, 182 AD2d 484, 485 [1st Dept 1992] [“The ‘mere hope’ of plaintiffs that they ‘might be able to uncover some evidence during the discovery process’ is insufficient to deny summary judgment”]; *Morales v Amar*, 145 AD3d 1000, 1003 [2d Dept 2016]). In any case, the relevant facts regarding whether Plaintiff was ready, willing and able to perform his obligations on the closing dates is not disputed by the parties. As such, no further discovery on that issue would raise an issue of fact to warrant a denial of the motion.

Accordingly, Defendants’ motion for summary judgment dismissing the third cause of action is granted. To the extent that Defendants’ motion seeks an award of attorney’s fees and costs, that portion of the motion is denied, as Defendants have not provided any basis or any arguments in support of that request.

It is hereby

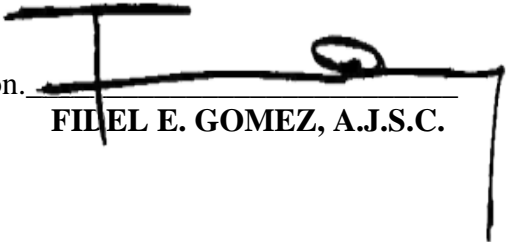
**ORDERED** that the Clerk dismiss the third cause of action in the amended complaint. It is further

**ORDERED** that the parties appear for a **Preliminary Conference** on **Monday, December 12, 2022, at 3:00 p.m.** It is further

**ORDERED** that Defendants serve a copy of this Decision and Order upon Plaintiff, with Notice of Entry, within thirty (30) days of the date hereof.

This constitutes the Decision and Order of this Court.

Dated: 11/3/22

Hon.   
**FILEL E. GOMEZ, A.J.S.C.**