New York Official Reports

Unreported Disposition
Slip Copy, 2022 WL 519219 (Table),
2022 N.Y. Slip Op. 50107(U)

***1** Abubacar Jawara and Aicha Triore, Plaintiff(s),
v.
Benedict E. Araka, Defendant(s).

Supreme Court, Bronx County
Index No: 35429/19E
Decided on February 18, 2022

Digest-Index Classification:Vendor and Purchaser--Contract for Sale of Real Property--In action for specific performance of parties' contract for sale of real property, defendant seller failed to establish prima facie entitlement to summary judgment, and questions of fact existed whether plaintiff purchasers breached contract

APPEARANCES OF COUNSEL

Counsel for plaintiffs: Ury, Abraham, Leid & Associates
Counsel for defendant: Law Office of Joseph N. Obiora, LLC

OPINION OF THE COURT

Fidel E. Gomez, J.

In this action for, *inter alia,* specific performance, defendant moves for an order granting him summary judgment. Defendant contends that insofar as plaintiffs breached the agreement between the parties by failing to tender the requisite down payment, the contract between the parties was terminated. Plaintiffs oppose the instant motion, asserting that they did, in fact, tender the requisite down payment required by the relevant agreement and otherwise fulfilled every other obligation under the contract. Accordingly, plaintiffs contend that defendant's motion must be denied. Plaintiffs also cross-move for an order granting them summary judgment, for the very same reasons they oppose defendant's motion. Plaintiffs' cross-motion is unopposed.

For the reasons that follow hereinafter, defendant's motion and plaintiffs' cross-motion are denied.

The complaint alleges that in May 2018, the parties entered into an agreement whereby defendant would sell the premises he owned, located at 1536 Jesup Avenue, Bronx, NY 10452 (1536) to plaintiffs. Pursuant to the terms of the agreement, plaintiffs tendered a $10,000 deposit to Kathleen Bradshaw, defendant's attorney. Despite plaintiffs' fulfilment of all obligations under the agreement, defendant refused to deliver the deed to 1536. Based on the foregoing, plaintiffs interpose a cause action for specific performance. Plaintiffs also interpose a cause of action for money damages, which they allege resulted from having to extend the mortgage commitment and in reapplying for a new mortgage. Lastly, plaintiffs interpose a cause of action for legal fees. Specifically, plaintiffs allege that in bringing this action, they have incurred $7,500 in legal fees and costs.

STANDARD OF REVIEW

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Thus, a defendant seeking summary judgment must establish prima facie ***2** entitlement to such relief by affirmatively demonstrating, with evidence, the merits of the claim or defense, and not merely by pointing to gaps in plaintiff's proof (*Mondello v DiStefano*, 16 AD3d 637, 638 [2d Dept 2005]; *Peskin v New York City Transit Authority*, 304 AD2d 634, 634 [2d Dept 2003]). There is no requirement that the proof be submitted by affidavit, but rather that all evidence proffered be in admissible form (*Muniz v Bacchus*, 282 AD2d 387, 388 [1st Dept 2001], *revd on other grounds* *Ortiz v City of New York*, 67 AD3d 21, 25 [1st Dept 2009]). Notably, the court can consider otherwise inadmissible evidence, when the opponent fails to object to its admissibility and instead relies on the same *(Niagara Frontier Tr. Metro Sys. v County of Erie*, 212 AD2d 1027, 1028 [4th Dept 1995]).

Once movant meets his initial burden on summary judgment, the burden shifts to the opponent who must then produce sufficient evidence, generally also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman* at 562). It is worth noting, however, that while the movant's

burden to proffer evidence in admissible form is absolute, the opponent's burden is not. As noted by the Court of Appeals,

> [t]o obtain summary judgment it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing summary judgment' in his favor, and he must do so by the tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must 'show facts sufficient to require a trial of any issue of fact.' Normally if the opponent is to succeed in defeating a summary judgment motion, he too, must make his showing by producing evidentiary proof in admissible form. The rule with respect to defeating a motion for summary judgment, however, is more flexible, for the opposing party, as contrasted with the movant, may be permitted to demonstrate acceptable excuse for his failure to meet strict requirement of tender in admissible form. Whether the excuse offered will be acceptable must depend on the circumstances in the particular case

(*Friends of Animals v Associated Fur Manufacturers, Inc.*, 46 NY2d 1065, 1067-1068 [1979] [internal citations omitted]). Accordingly, generally, if the opponent of a motion for summary judgment seeks to have the court consider inadmissible evidence, he must proffer an excuse for failing to submit evidence in admissible form (*Johnson v Phillips*, 261 AD2d 269, 270 [1st Dept 1999]).

When deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility. As the Court stated in *Knepka v Talman* (278 AD2d 811, 811 [4th Dept 2000]),

> [s]upreme Court erred in resolving issues of credibility in granting defendants' motion for summary judgment dismissing the complaint. Any inconsistencies between the deposition testimony of plaintiffs and their affidavits submitted in opposition to the motion present issues for trial

(*see also Yaziciyan v Blancato*, 267 AD2d 152, 152 [1st Dept 1999]; *Perez v Bronx Park Associates*, 285 AD2d 402, 404 [1st Dept 2001]). Accordingly, the Court's function when determining a motion for summary judgment is issue finding, not issue determination (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Lastly, because summary judgment is such a drastic remedy, it should never be granted when there is any doubt as to the existence of a triable issue of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). When the existence of an issue of fact is even debatable, summary judgment should be denied (*Stone v Goodson*, 8 NY2d 8, 12 [1960]).

Contract Law

It has long been held that absent a violation of law or some transgression of public policy people are free to enter into contracts, making whatever agreement they wish no matter how unwise they may seem to others (*Rowe v Great Atlantic & Pacific Tea Company, Inc.*, 46 NY2d 62, 67-68 [1978]). Consequently, when a contract dispute arises, it is the court's role to enforce the agreement rather than reform it (*Grace v Nappa*, 46 NY2d 560, 565 [1979]). In order to enforce the agreement, the court must construe it in accordance with the intent of the parties, the best evidence of which is the very contract itself and the terms contained therein (*Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 [2002]). Thus,"when the parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms" (*Vermont Teddy Bear Co., Inc. v 583 Madison Realty Company*, 1 NY3d 470, 475 [2004] [internal quotation marks omitted]). Moreover, "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield* at 569). Accordingly, courts should refrain from interpreting agreements in a manner which implies something not specifically included by the parties, and "courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing" (*Vermont Teddy Bear Co., Inc.* at 475). This approach, of course, serves to provide "stability to commercial transactions by safeguarding against fraudulent claims, perjury, death of witnesses [and] infirmity of memory" (*Wallace v 600 Partners Co.*, 86 NY2d 543, 548 [1995] [internal quotation marks omitted]).

Provided a writing is clear and complete, evidence outside its four corners "as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing" (*W.W.W. Assoc., Inc. v Giancontieri*, 77 NY2d 157, 162 [1990]; *see Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 [2002]; *Mercury Bay Boating Club Inc. v San*

Diego Yacht Club, 76 NY2d 256, 269-270 [1990]; *Judnick Realty Corp. v 32 W. 32nd St. Corp.*, 61 NY2d 819, 822 [1984]). Whether a contract is ambiguous is a matter of law for the court to decide (*id*. at 162; *Greenfield* at 169; *Van Wagner Adv. Corp. v S & M Enterprises*, 67 NY2d 186, 191 [1986]). A contract is unambiguous if the language it uses has "definite and precise meaning, unattended by danger of misconception in purport of the agreement itself, and concerning which there is no reasonable basis for a difference of opinion" (*Greenfield* at 569; *see Breed v Ins. Co. of N. Am.*, 46 NY2d 351, 355 [1978]). Hence, if the contract is not reasonably susceptible to multiple meanings, it is unambiguous and the court is not free to alter it, even if such alteration reflects personal notions of fairness and equity (*id*. at 569-570). Notably, it is well settled that silence, or the omission of terms within a contract are not tantamount to ambiguity (*id*. at 573; *Reiss v Financial Performance Corp.*, 97 NY2d 195, 199 [2001]). Instead, the question of whether an ambiguity exists must be determined from the face of an agreement without regard to extrinsic evidence (*id*. at 569-570), and an unambiguous contract or a provision contained therein should be given its plain and ordinary meaning (*Rosalie Estates, Inc. v RCO International, Inc.*, 227 AD2d 335, 336 [1st Dept 1996]).

Notably, while the parol evidence rule forbids proof of extrinsic evidence to contradict or vary the terms of a written instrument, it has no application in a suit brought where there are claims of fraud in the execution of an agreement or to rescind a contract on the ground of fraud (*Sabo v Delman*, 3 NY2d 155, 161 [1957]; *Adams v Gillig*, 199 NY 314, 319 [1910]; *Berger-Vespa v Rondack Bldg. Inspectors Inc.*, 293 AD2d 838, 840 [3d Dept 2002]).

Traditional notions of contract interpretation are no less applicable to real estate transactions ***3** inasmuch as

> [g]enerally, parties to the sale of real property, like signatories of any agreement are free to tailor their contract to meet their particular needs and to include or exclude those provisions which they choose. Absent some indicia of fraud or other circumstances warranting equitable intervention, it is the duty of a court to enforce rather than reform the bargain struck

(*Grace v Nappa*, 46 NY2d 560, 565 [1979]). Pursuant to General Obligations Law §5-703(3), however, contracts devising real property are void unless they are in writing (*443 Jefferson Holdings, LLC v Sosa*, 174 AD3d 486, 487 [2d Dept 2019]; *Walentas v 35-45 Front Street Co.*, 20 AD3d 473, 473-474 [2d Dept 2005]). Ordinarily, the law allows a party to a real estate contract reasonable time to perform his portion of a contract even if a date for such performance, a/k/a the closing, has been previously agreed to (*Grace* at 565). However, common to many real estate agreements are provisions which make time an essence in the performance of a contract. Such provision, a/k/a a "hell or high water" clause, makes the performance of a contract or a certain provision, by a specified date, absolute and unconditional (*1029 Sixth, LLC v Riniv Corp.*, 9 AD3d 142, 149 [1st Dept 2004]; *Kaplan v Scheiner*, 1 AD2d 329, 330 [1st Dept 1956]). When such a provision is made part of a contract each party must tender performance on the date specified to the detriment of default, unless the time for performance is mutually extended (*Grace* at 565; *Greto v Barker 33 Assoc.*, 161 AD2d 109, 110 [1st Dept 1990]).

In the absence of fraud or other wrongful act, a party who signs a written contract is presumed to know and have assented to the contents therein (*Pimpinello v Swift & Co.*, 253 NY 159, 162 [1930]; *Metzger v Aetna Ins. Co.*, 227 NY 411, 416 [1920]; *Renee Knitwear Corp. v ADT Sec. Sys.*, 277 AD2d 215, 216 [2d Dept 2000]; *Barclays Bank of New York, N.A. v Sokol*, 128 AD2d 492, 493 [2d Dept 1987]; *Slater v Fid. & Cas. Co. of NY*, 277 AD 79, 81 [1st Dept 1950]). In discussing this long standing rule the court in *Metzger* stated that

> [i]t has often been held that when a party to a written contract accepts it as a contract he is bound by the stipulations and conditions expressed in it whether he reads them or not. Ignorance through negligence or inexcusable trustfulness will not relieve a party from his contract obligations. He who signs or accepts a written contract, in the absence of fraud or other wrongful act on the part of another contracting party, is conclusively presumed to know its contents and to assent to them and there can be no evidence for the jury as to his understanding of its terms. This rule is as applicable to insurance contracts as to contracts of any kind.

(*id*. at 416 [internal citations omitted]).

The essential elements in an action for breach of contract "are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of his or her contractual obligations, and damages resulting from the breach" (*Dee v Rakower*, 112 AD3d 204, 209 [2d Dept 2013]; *Elisa Dreier Reporting Corp. v Global Naps Networks, Inc.*, 84 AD3d 122, 127 [2d Dept 2011]; *Brualdi v IBERIA Lineas Aeraes de España, S.A.*, 79 AD3d 959, 960 [2d Dept 2010]; *JP Morgan Chase v J.H. Elec. of NY, Inc.*, 69 AD3d 802, 803 [2d Dept 2010]; *Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). Unless expressly proscribed by the Statute of Frauds (General Obligations Law § 5-701), a contract or agreement need not be in writing (*see generally McCoy v Edison Price, Inc.*, 186 AD2d 442, 442-443 [1st Dept 1992] [Alleged oral agreement which, by its terms, was to last for as long as defendant remained in business was incapable of performance within one year, rendering it voidable under Statute of Frauds.]; ***4** *Karl Ehmer Forest Hills Corp. v Gonzalez*, 159 AD2d 613, 613 [2d Dept 1990] ["An oral promise to guarantee the debt of another is barred by the Statute of Frauds."]).

It is well settled that a breach of contract by one party relieves the other from obligations under it and renders the contract unenforceable by the one who has breached it (*Grace* at 565-566 ["In the instant case, therefore, plaintiff was well within his rights when he refused to consent to an adjournment of the closing and instead insisted upon immediate performance of defendant's obligations. Once the closing was aborted, moreover, it was not necessary for plaintiff to entertain further proposals from defendant, for if defendant had failed to satisfy a material element of the contract, he was already in default."]; *Perlman v M. Israel & Sons Co.*, 306 NY 254, 257 [1954]; *Isse Realty Corp. v Trona Realty Corp.*, 17 NY2d 763 [1966]; *Unloading Corp. v State of NY*, 132 AD2d 543, 543 [2d Dept 1987]; *Melodies, Inc. v Mirabile*, 7 AD2d 783, 783 [3d Dept 1958]; *Sherry v Fed. Terra Cotta Co.*, 172 AD 57, 61 [1st Dept 1916]; *Zadek v Olds, Wortman & King*, 166 AD 60, 63 [1st Dept 1915]; *Czerney v Haas*, 144 AD 430, 436 [1st Dept 1911]; *Hudson Riv. & W.C.M.R. Co. v Hanfield*, 36 AD 605, 610 [3d Dept 1899]). Indeed, under the foregoing circumstances, the non-breaching party is discharged from performing any further obligations under the contract and can terminate the contract, sue for damages, or continue the contract (*Awards.com, LLC v Kinko's, Inc.*, 42 AD3d 178, 188 [1st Dept 2007]["When a party materially breaches a contract, the non-breaching party must choose between two remedies: it can elect to terminate the contract or continue it. If it chooses the latter course, it loses its right to terminate the contract because of the default."], *affd*, 14 NY3d 791 [2010]; *Albany Med. Coll. v Lobel*, 296 AD2d 701, 702 [3d Dept 2002]; *Capital Med. Sys. Inc. v Fuji Med. Sys., U.S.A. Inc.*, 239 AD2d 743, 746 [3d Dept 1997]; *Emigrant Indus. Sav. Bank v Willow Builders*, 290 NY 133, 144 [1943]). Stated differently, "[a] party may unilaterally terminate a contract where the other party has breached and the breach is material" (*Lanvin Inc. v Colonia, Inc.*, 739 F Supp 182, 195 [SDNY 1990]; *see Exportaciones Del Futuro Brands, S.A. De C.V. v Authentic Brands Group, LLC*, 156 NYS3d 857, 858 [1st Dept 2022] ["As a result, plaintiff's breaches of the agreement substantially defeated the parties' contractual objective and constituted material breaches, thus justifying defendants' termination of the contract" (internal quotation marks omitted).]; *Valenti v Going Grain, Inc.*, 159 AD3d 645, 646 [1st Dept 2018] ["However, [defendants'] failure to make monthly payments under the promissory note and to place $60,000 in escrow in anticipation of the accounting constituted a material breach, justifying plaintiff's termination of the contract."]).

Notably, a party who has breached an agreement is not entitled to specific performance (*Stadtmauer v Brel Assoc. IV, L.P.*, 270 AD2d 59, 60 [1st Dept 2000] ["As a matter of equity, a party who has indicated that she will not abide by the terms of the contract will not be heard to demand its specific performance."]; *see DiBartolo v Battery Place Assoc.*, 84 AD3d 474, 475 [1st Dept 2011] ["As a matter of law, this unexplained delay in tendering performance is unreasonable and, in the absence of a timely tender of performance or readiness and willingness to go forward with the closing, the claim for specific performance should have been dismissed" (internal citations omitted).]; *Amarant v D'Antonio*, 197 AD2d 432, 434 [1st Dept 1993] ["The gravamen of plaintiff's position is that defendants are bound by the shareholders' agreement to sell their shares to the corporation. His brief, however, assiduously avoids any application of the same reasoning to the retirement agreement, which obligates plaintiff to sell his shares to the three employees. Plaintiff will not be heard to complain that defendants are to be restrained from an asserted violation of one agreement under circumstances in which their resort to its provisions was induced by plaintiff's violation of a subsequent agreement. Injunctive relief should have been denied on this ground ***5** alone."]; *Contro v White*, 176 AD2d 1052, 1053 [3d Dept 1991] ["Because plaintiff's

mortgage commitment had expired, the letter reflecting that commitment was inadequate proof of plaintiff's ability to purchase the property on the closing date or at any time thereafter. Additionally, plaintiff submitted no documentation or other proof substantiating his claim that he had the balance of the funds necessary to purchase the property. In the absence of such proof, plaintiff was not entitled to the relief of specific performance."]).

Defendant's Motion for Summary Judgment

Defendant's motion for summary judgment is denied. On this record, while defendant establishes that the parties executed an agreement for the sale of 1536, that plaintiffs never tendered the down payment required by the agreement between the parties, and that as a result, defendant had the right to terminate the agreement, defendant nevertheless fails to establish that he terminated the agreement in writing as required by the same. Thus, defendant fails to establish prima facie entitlement to summary judgment.

In support of his motion, defendant submits an affidavit [1] wherein he states, in pertinent part, that in 2018, the plaintiffs wanted to purchase 1536, which defendant owned, for $499,999. Pursuant to the agreement between the parties, the sale was conditioned on plaintiffs making a $10,000 down payment. Initially, the agreement, executed only by plaintiffs, was provided to Katherine Bradshaw (Bradshaw), defendant's attorney, along with a check for $10,000 from Citibank dated May 7, 2018. The check was made payable to Bradshaw. Because the parties were not in agreement with the terms in the contract, both the contract signed only by plaintiffs and the check were sent back to plaintiffs. Thereafter, plaintiffs contacted Bradshaw and indicated that they would agree to the terms in the agreement proposed by defendant's attorney, who by then was Silvia Metrena (Metrena). Plaintiffs' attorneys sent the agreement, already signed by plaintiffs, to Metrena, who asked defendant to execute the same while she waited for the down payment. Bradshaw notified plaintiffs' counsel that they needed to reissue the check for the down payment and that it should be made payable to Metrena. Defendant states that plaintiffs deposited the original down payment into their account and never provided the same after the contract was fully executed.

Defendant submits a document titled Residential Contract of Sale (Agreement 1), dated April 2018. The agreement is between defendant, as seller, and plaintiffs, as buyers, and is for the sale of 1536. Paragraph 3, titled Purchase Price, indicates that the purchase price is $499,990 and that the

> purchase price is payable . . . on the signing of this contract, by Purchaser's check payable to the Seller . . . subject to collection, the receipt of which is hereby acknowledged, and not to be held in escrow (the "Downpayment"): $10,000.00 . . . [and] by allowance for the principal amount unpaid on the existing mortgage on the date hereof, payment of which Purchaser shall assume by joinder in the deed . . . $489,990.

Paragraph 8, titled Mortgage Contingency, required that plaintiffs obtain a mortgage for $474,905. Paragraph 28 states that

> [a]ll prior understandings, agreements, representations and warranties, oral or written, between Seller and Purchaser are merged in this contract; it completely expresses their full agreement and has been entered into after full investigation, neither party relying upon any statement made by anyone else that is not set forth in & contract . . . [and that] Neither this contract nor any provision thereof may be waived, changed or cancelled except in writing.

As part of the exhibit containing the contract, defendant submits a copy of a certified check from Citibank in the amount of $10,000. The check is dated May 7, 2018 and is payable to Bradshaw. Also made part of the instant exhibit is a receipt from the United States Post Office, which is dated June 25, 2018, and which indicates that the contract and the check were mailed to plaintiffs' counsel.

Defendant submits a copy of the foregoing agreement (Agreement 2), which with the exception that it is fully executed by all parties, including defendant, is identical to Agreement 1 above.

Defendant submits an email chain between plaintiffs' counsel and Bradshaw. The first email, dated March 14, 2019, is sent by plaintiffs' counsel to Bradshaw, wherein he requests that Bradshaw return the check sent to Bradshaw in order for plaintiffs to obtain a new check so the same could be tendered to Metrena. The second email, also dated March 14, 2019, is a response by Bradshaw indicating that she would send the aforementioned check to plaintiffs' counsel's office. Attached to the instant exhibit is a letter from Bradshaw, dated March 14, 2019, sent to plaintiffs' counsel along with a copy of the

Citibank check for $10,000. The letter indicates that the check was being returned to plaintiffs' counsel.

Defendant submits plaintiff, ABUBACARR JAWARA's (Jawara) deposition transcript, wherein he testified, in pertinent part, as follows. Jawara sued defendant for breach of the contract for the sale of 1536. In connection with the contract he sent Bradshaw a bank check for $10,000. The check was thereafter returned to Jawara's lawyer, who gave it back to Jawara, who then deposited the check into his account. The check was never re-issued nor was he ever told to reissue the same.

Defendant submits plaintiff, AICHA TRAORE's (Traore) deposition transcript, wherein she testified, in pertinent part, as follows. With regard to the purchase of 1536, she and Jawara, her husband, provided a certified check from Citibank for the down payment. The check was returned and never reissued.

Based on the foregoing, defendant fails to establish prima facie entitlement to summary judgment, because he never - as required by the agreement-terminated the instant agreement in writing.

As noted above, when enforcing an agreement, the court must construe it in accordance with the intent of the parties, the best evidence of which being the very contract itself and the terms contained therein (*Greenfield* at 569). Significantly, "when the parties set down their agreement in ***6** a clear, complete document, their writing should be enforced according to its terms" (*Vermont Teddy Bear Co.* at 475). Here, on this record, the agreement between the parties indicates that defendant sought to sell 1536 to plaintiffs. Here, paragraph 3 of the agreement states that the purchase price was $499,990 to be paid via a $10,000 down payment "payable . . . on the signing of this contract, by Purchaser's check payable to the Seller" and "by allowance for the principal amount unpaid on the existing mortgage on the date hereof, payment of which Purchaser shall assume by joinder in the deed . . . $489,990."

According to defendant's affidavit, however, after initially refusing to execute Agreement 1 because plaintiffs would not assent to his terms, he executed Agreement 2. Thereafter, however, defendant and plaintiffs' deposition testimony establish that plaintiffs never provided the $10,000 required by the contract, such that they breached the agreement between the parties. Stated differently, the evidence establishes that plaintiffs provided a down payment in furtherance of Agreement 1, but never in furtherance of Agreement 2, the only agreement signed by defendant. Thus, defendant demonstrates that plaintiffs breached the terms of the agreement.

Indeed, it is well settled that a breach of contract by one party relieves the other from obligations under it and renders the contract unenforceable by the one who has breached it (*Grace* at 565-566; *Perlman* at 257; *Isse Realty Corp.* at 765; *Unloading Corp.* at 543; *Melodies, Inc.* at 783; *Sherry v* at 61; *Zadek* at 63; *Czerney* at 436; *Hudson Riv. & W.C.M.R. Co.* at 610). Under the foregoing circumstances, the non-breaching party is discharged from performing any further obligations under the contract and can terminate the contract, sue for damages, or continue the contract (*Awards.com, LLC* at 188; *Albany Med. Coll.* at 702; *Capital Med. Sys. Inc.* at 746; *Emigrant Indus. Sav. Bank* at 144). Here, because plaintiffs breached the agreement between the parties, defendant was not obligated to perform and had the right to terminate the agreement. While defendant contends that the agreement was terminated, unfortunately he is bound by the terms of the agreement between the parties, which requires that any cancellation of the agreement be in writing. To be sure, paragraph 28 of the instant agreement states that "[n]either this contract nor any provision thereof may be waived, changed or cancelled except in writing." Nothing submitted by defendant establishes that he or his attorneys ever terminated Agreement 2 after plaintiffs failed to tender the requisite $10,000 down payment. Accordingly, inasmuch as defendant fails to establish that subsequent to plaintiffs' breach of the agreement, he properly, as defined by Agreement 2, terminated the agreement, defendant fails establish prima facie entitlement to summary judgment. Thus, the instant motion is denied.

Because defendant fails to establish prima facie entitlement to summary judgment, the Court need not address the sufficiency of plaintiffs' opposition (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Plaintiffs' Cross-Motion for Summary Judgment

Plaintiffs' motion seeking an order granting them summary judgment is denied. On this record, while plaintiffs establish prima facie entitlement to summary judgment, defendant raises a material issue of fact - that plaintiffs breached the agreement thereby obviating defendant's obligation to perform under the agreement - sufficient to preclude summary judgment.

In support of the instant cross-motion, plaintiffs submit substantially identical affidavits from each of them. Traore states, in pertinent part, that she and Jawara became interested in purchasing 1536. They met with the defendant and initially entered into an agreement whereby they would rent ***7** a portion of 1536 and thereafter buy the entire building for not more than $500,000. Per the agreement, the defendant gave them a lease to rent the first floor and basement at a rate of $1,800 per month. Per the agreement, they would repair the first floor and basement at their expense. Thereafter, they requested that they be sold the property. Jawara and Traore executed the contract and as required by the agreement, provided a down payment by certified check. Despite defendant's attempt to obstruct the process, by impeding an inspection of the property, Jawara and Traore procured a mortgage commitment. The same was forwarded to defendant's attorney along with a title report. Because defendant's then counsel refused to communicate and agree on a closing date, plaintiffs' counsel scheduled a closing, which neither defendant nor his counsel attended. Despite defendant's assertion that he intended to consummate the sale of the property, defendant has failed to close on the sale of 1536.

Plaintiffs submit a copy of Agreement 2 and of the certified Citibank check for $10,000, which were also submitted by defendant and already discussed above.

Plaintiffs also submit a document dated August 13, 2019. The documents is from Intercontinental Capital Group and apprises Jawara that with regard to a loan application to purchase 1536, he was conditionally approved for a loan in the amount of $474,990. In order to receive the foregoing loan, the document indicates that Jawara had to comply with 19 conditions, including providing "a copy of deposit on contract check in the amount of $10,000 along with acceptable bank statement reflecting the withdrawal of the check."

Based on the foregoing, plaintiffs establish prima facie entitlement to summary judgment on their breach of contract and specific performance claims. Significantly, plaintiffs' affidavits establish that they performed all of the obligations under Agreement 2 - namely that they provided a $10,000 check for the down payment required by paragraph 3 of the agreement and procured a mortgage for $474,990 as required by paragraphs 3 and 8 of the same. Plaintiffs' affidavits also establish that despite the foregoing, defendant refused to attend the closing and has refused to sell them the house. Thus, since the essential elements in an action for breach of contract "are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of his or her contractual obligations, and damages resulting from the breach" (*Dee* at 209; *Elisa Dreier Reporting Corp.* at 127; *Brualdi* at 960; *JP Morgan Chase* at 803; *Furia* at 695), here, plaintiffs establish that defendant has breached the terms of the agreement and therefore, establish prima facie entitlement to summary judgment.

While defendant fails to oppose the instant cross-motion, the evidence he submits on his motion for summary judgement is before this Court. Upon consideration of the same, said evidence establishes, as discussed above, that plaintiffs breached Agreement 2, thereby obviating defendant's need to perform. Thus, defendant raises a material issue of fact on the issue of plaintiffs' breach, thereby precluding summary judgment.

Significantly, defendant in his affidavit, states that plaintiffs never provided a check for $10,000 - the down payment required by Agreement 2 - after said agreement was fully executed. More importantly, plaintiffs were deposed and testified that this is indeed what transpired. Both plaintiffs testified that after the first check was returned, they never had one re-issued. This, as noted above, is a material breach of Agreement 2, which obviates defendant's need to perform. This means that not only did defendant no longer have to make an effort to sell plaintiffs 1536, but that defendant now had the right to cancel the agreement and walk away. Again, it bears repeating that "[a] party may unilaterally terminate a contract where the other party has breached and the breach is material" (*Lanvin Inc.* at 195; *see Exportaciones Del Futuro Brands, S.A. De C.V.* at 858; ***8** *Valenti* at 646). As relevant here, defendant's evidence presents a complete defense to the complaint, because a party who has breached an agreement is not entitled to specific performance (*Stadtmauer* at 60; *see DiBartolo* at 475; *Amarant* at 434; *Contro* at 1053). Accordingly, questions of fact preclude summary judgment.

The Court notes that plaintiffs' counsel's affirmation is permeated with allegations that defendant's conduct was purposeful in an effort to sell the instant property to someone else. To that end, he seeks to have the Court examine evidence outside the four corners of the agreement to demonstrate the same and urges that the foregoing somehow militates in plaintiffs' favor. However, as noted above, however, provided a writing is clear and complete, evidence outside its four corners "as to what was really intended but unstated or

misstated is generally inadmissible to add to or vary the writing" (*W.W.W. Assoc., Inc.* at 162; *Greenfield* at 569; *Mercury Bay Boating Club Inc.* at 269-270; *Judnick Realty Corp.* at 822). While the foregoing is inapplicable in cases where the causes of action sound in fraud (*Sabo* at 161; *Adams* at 319; *Berger-Vespa* at 840), here, the complaint is bereft of such claims and the Court limits the obligations and intent of the parties to that which is evinced by the agreement between them. It is hereby

ORDERED the all parties appear for a Settlement Conference on February 28, 2022 at 12pm. It is further

ORDERED that plaintiffs serve a copy of this Decision and Order with Notice of Entry upon defendant within thirty (30) days hereof.

This constitutes this Court's decision and Order.

Dated : February 18, 2022

Bronx, New York

_____

HON. FIDEL E. GOMEZ, AJSC

FOOTNOTES

1 Because defendant's affidavit was notarized outside the United States, pursuant to CPLR § 2309(c), said affidavit must be accompanied by a certificate of conformity (*id*. [An oath or affirmation taken without the state shall be treated as if taken within the state if it is accompanied by such certificate or certificates as would be required to entitle a deed acknowledged without the state to be recorded within the state if such deed had been acknowledged before the officer who administered the oath or affirmation.]). Such certificate must contain language which attests that the oath administered in the foreign state was taken in accordance with the laws of thereat or the law of New York (*Midfirst Bank v Agho*, 121 AD3d 343, 348-349 [2d Dept 2014]). Here, defendant's affidavit did not contain a certificate of conformity. Nevertheless, the Court will consider the affidavit, since the absence of such certificate is not fatal insofar as such defect can be corrected *nunc pro tunc* (*id*. at 351; *Bank of New York Mellon v Vytalingam*, 144 AD3d 1070, 1071 [2d Dept 2016]; *U.S. Bank Nat. Ass'n v Dellarmo*, 94 AD3d 746, 748 [2d Dept 2012]).