NEW YORK SUPREME COURT - COUNTY OF BRONX
PART 32

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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MARK SONNENSCHEIN and 477 WILLIS AVE LLC,

Index No. **816525/2021E**

Plaintiffs,

Hon. **FIDEL E. GOMEZ**
Justice

- against -

1986-F&S OF NEW YORK, LTD., and NEW YORK DEFERRED EXCHANGE CORPORATION,

Defendants.

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The following papers numbered 1 to 3, read on this motion, noticed on 3/1/2022, and duly submitted as no. 1 on the Motion Calendar of 4/20/2022.

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits	2	
Replying Affidavit and Exhibits	3	
Notice of Cross-Motion - Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers-Order of Reference		
Memorandum of Law		

Defendant's motion is decided in accordance with the Decision and Order annexed hereto.

Dated:
6/8/22

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

1. CHECK ONE..... ☐ CASE DISPOSED X NON-FINAL DISPOSITION

2. MOTION IS..... ☐ GRANTED ☐ DENIED X GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE..... ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST
☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT
☐ NEXT APPEARANCE DATE: _____

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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MARK SONNENSCHEIN and 477 WILLIS AVE LLC,

Plaintiffs,

DECISION AND ORDER

- against -

Index No. **816525/2021E**

1986-F&S OF NEW YORK, LTD., and NEW YORK DEFERRED EXCHANGE CORPORATION,

Defendants.

----------X

Defendant 1986-F&S of New York, Ltd. ("Defendant") moves for an order: (1) dismissing the complaint pursuant to CPLR 3211(a)(1) and/or 3211(a)(7); and (2) canceling the notice of pendency dated November 30, 2021. Plaintiffs Mark Sonnenschein and 477 Willis Ave LLC ("Plaintiffs") oppose.

For the reasons which follow, Defendant's motion is granted, in part.

BACKGROUND:

On December 3, 2021, Plaintiffs commenced the instant action against Defendants 1986-F&S of New York, Ltd. and New York Deferred Exchange Corporation ("Defendants") by filing a summons and verified complaint, alleging causes of action for specific performance and breach of contract. On the same date, Plaintiffs filed a notice of pendency on the real property located at 477 Willis Avenue, Bronx, NY (the "Property").

The complaint alleges that in or around June 2021,[1] Plaintiff Mark Sonnenschein ("Mr. Sonnenschein"), as purchaser, and Defendant, as seller, entered into a contract of sale of the Property (the "Contract") (Compl. ¶ 5).

Plaintiffs allege that Mr. Sonnenschein assigned the Contract to Plaintiff 477 Willis Ave LLC ("477 LLC") (Compl. ¶ 6). Plaintiffs also allege that on or around October 29, 2021,

[1] The complaint alleges that the Contract was entered into in June 2020. However, copies of the Contract indicate that it was entered into in or around June 2021 (Plaintiff's Exhibit 1; Defendant's Exhibit C). Defendant also asserts that the parties executed the Contract on or around June 18, 2021 (Affidavit of Tracy Cohen, ¶ 21).

Defendant assigned the Contract to Defendant New York Deferred Exchange Corporation ("NY Deferred") (Compl. ¶ 7).[2]

Plaintiffs allege that paragraph 5 of the Contract requires Defendants to convey title to Plaintiffs on the later of: (a) September 15, 2021, or (b) 15 days after the purchaser receives notice from the seller that the premises is vacant and in broom clean condition (Compl. ¶ 11).

The complaint alleges that on or around September 25, 2020, Mr. Sonnenschein tendered the sum of $340,000.00 to Defendant's counsel as a deposit toward the purchase price for the Property in accordance with the terms of the Contract (Compl. ¶ 21). Plaintiffs allege that the deposit is presently maintained in the attorney escrow account of Defendant's counsel (Compl. ¶ 23).

Plaintiffs allege that they have been ready, willing and able to close title to the Property and comply with their obligations under the Contract. They allege that Defendants are in default of the Contract by refusing to convey title to the Property pursuant to the terms of the Contract (Compl. ¶ 8-10, 12-16). Plaintiffs allege that Defendants have refused to set a closing date for the conveyance of the Property (Compl. ¶ 29).

Plaintiffs also allege that Defendants failed to comply with the terms of the Contract by failing to permit 477 LLC the right to inspect the Property prior to the closing (Compl. ¶ 36), and by failing to comply with the seller representations set forth in paragraph 11 of the Contract (Compl. ¶ 37).[3]

The complaint alleges that on or around November 17, 2021, Defendants' counsel attempted to unilaterally and wrongfully terminate the Contract (Compl. ¶ 38).

On February 4, 2022, Defendant filed the instant motion. The motion was marked fully submitted on April 28, 2022.[4]

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[2] An affidavit of service filed with the Court on December 16, 2021, states that NY Deferred was served with the summons and verified complaint on December 9, 2021, by service upon the Secretary of State. Plaintiffs assert that NY Deferred has defaulted in answering or appearing in this action.

[3] Plaintiffs do not contest Defendant's arguments that it did not breach these terms of the Contract.

[4] The parties filed a stipulation dated April 24, 2022, adjourning the return date of the motion to April 28, 2022.

DISCUSSION:

Motion to Dismiss the Complaint:

Defendant moves pursuant to CPLR 3211(a)(1) and/or 3211(a)(7) to dismiss this action, arguing that: (1) Plaintiffs were not ready, willing and able to perform their obligations under the Contract as of the "time of the essence" closing date; and (2) a party cannot seek specific performance of a validly cancelled real estate contract.

In support of its motion, Defendant submitted the affidavit of Tracy Cohen, Defendant's president; the affirmation of William Mavrelis, counsel for Defendant; the affirmation of Joseph Kamelhar, counsel for Defendant; the Contract; the Time of the Essence Letter dated October 1, 2021; a 10-Day Notice of Default dated November 4, 2021; and emails.

CPLR 3211(a)(1):

CPLR 3211(a) provides that: "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 1. a defense is founded upon documentary evidence".

A document qualifies as "documentary evidence" for purposes of CPLR 3211(a)(1) if it is: (1) unambiguous, (2) of undisputed authenticity, and (3) its contents are essentially undeniable. (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019]; *Mehrhof v Monroe-Woodbury Cent. Sch. Dist.*, 168 AD3d 713, 715 [2d Dept 2019]). Documents such as judicial records, mortgages, deeds, contracts, and other papers, the contents of which are essentially undeniable, have been found to qualify as documentary evidence (*Mehrhof*, 168 AD3d 713 at 715; *Magee-Boyle v Reliastar Life Ins. Co. of N.Y.*, 173 AD3d 1157, 1159 [2d Dept 2019]). Courts have found that insurance policies qualify as documentary evidence (*Ralex Services, Inc. v Southwest Marine & General Ins. Co.*, 155 AD3d 800, 802 [2d Dept 2017]; *Randazzo v Gerber Life Ins. Co.*, 3 AD3d 485, 485-486 [2d Dept 2004]).

"A court may not dismiss a complaint based on documentary evidence unless 'the factual allegations are definitively contradicted by the evidence or a defense is conclusively established'" (*VXI Lux Holdco S.A.R.L.*, 171 AD3d 189 at 193; *Mehrhof*, 168 AD3d 713 at 715). "In considering the documents offered by the movant to negate the claims in the complaint, a court must adhere to the concept that the allegations in the complaint are presumed to be true, and that the pleading is entitled to all reasonable inferences. However, while the pleading is to be liberally construed, the

court is not required to accept as true factual allegations that are plainly contracted by documentary evidence" (*Dixon v 105 West 75th Street, LLC*, 148 AD3d 623, 626-627 [1st Dept 2017]).

Defendant argues that pursuant to the terms of the Contract, the closing was initially scheduled for September 15, 2021 ("Initial Closing Date") (Affidavit of Tracy Cohen, ¶ 9, 23; Affirmation of William Mavrelis, Esq., ¶ 16-18), but it did not include a provision that time was of the essence. Defendant argues that 6 days before the closing, Plaintiffs advised Defendant that they could not close on September 15, 2021, and needed a short adjournment. Defendant granted the adjournment (Affidavit of Tracy Cohen, ¶ 10; Affirmation of William Mavrelis, Esq., ¶ 20). Defendant argues that it then enforced its right to "unilaterally impose a condition that time be of the essence" by a notice dated October 1, 2021 ("TOE Closing Letter"), designating a "time of the essence" closing for November 1, 2021 ("TOE Closing Date") (Affidavit of Tracy Cohen, ¶ 11, 29; Affirmation of William Mavrelis, Esq., ¶ 23; Defendant's Exhibit D). Defendant's counsel asserts that on October 8, 2021, Plaintiffs' counsel confirmed that they would close by November 1, 2021 (Affirmation of William Mavrelis, Esq., ¶ 29). Defendant asserts that it was ready to close on the TOE Closing Date, as it had executed all required documents and provided all required documents to Plaintiffs' title company (Affidavit of Tracy Cohen, ¶ 33, 37; Affirmation of William Mavrelis, Esq., ¶ 40-44). However, Defendant asserts that Plaintiffs failed to close on the TOE Closing Date (Affidavit of Tracy Cohen, ¶ 13, 38; Affirmation of William Mavrelis, Esq. ¶ 45).

Defendant asserts that on November 4, 2021, it sent to Plaintiffs a 10-Day Notice of Default, notifying them that they were in default of the Contract for failing to close on the TOE Closing Date and notified them that it would give them another opportunity to close and the closing would take place on November 15, 2021 ("Final Closing Date") (Affidavit of Tracy Cohen, ¶ 39-41; Affirmation of William Mavrelis, Esq., ¶ 47-50; Defendant's Exhibit E). Defendant asserts that it was prepared to close on the Contract on the Final Closing Date (Affidavit of Tracy Cohen, ¶ 42-47). Defendant asserts that Plaintiffs indicated that they did not have the financial ability to close on that date (Affidavit of Tracy Cohen, ¶ 15, 48, 53; Affirmation of William Mavrelis, Esq., ¶ 63-65). Defendant asserts that as a result, it terminated the Contract (Affidavit of Tracy Cohen, ¶ 49; Affirmation of William Mavrelils, Esq., ¶ 79-80).

Defendant argues that the notice complied with all requirements. Defendant argues that the closing date of November 1, 2021 was reasonable as a matter of law, because the Plaintiffs did not object to the date, but expressly stated that they would close by that date. Moreover, Defendant

argues that it gave Plaintiffs ample time to close, as it gave them 45 days from the initial closing date, and 30 days after the notice was given.

First Cause of Action – Specific Performance:

Defendant seeks to dismiss the first cause of action, which seeks specific performance of the Contract. Defendant argues that documentary evidence demonstrates that Plaintiffs admitted that they were not ready, willing and able to close on the TOE Closing Date or the Final Closing Date. Defendant argues that in order to be demonstrate that they were ready, willing and able to perform their obligations, Plaintiffs must establish a financial ability to pay the balance of the purchase price at closing. Defendant argues that Plaintiffs admitted to Defendant on several occasions that they could not obtain financing to tender the purchase price on the TOE Closing Date or on the Final Closing Date (Defendant's Exhibits O, S).

"Generally, 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]).

Generally, in contracts for the sale of land, time of performance is not of the essence unless the contract so states or one of the parties has unequivocally declared it upon proper notice (*ADC Orange, Inc. v Coyote Acres, Inc.*, 7 NY3d 484, 486 [2006]). "When a provision that time is to be of the essence is inserted in a real property contract, the date established as the law day takes on especial significance. Ordinarily, the law will allow the vendor and vendee a reasonable time to perform their respective obligations, regardless of whether they specify a particular date for the closing of title." (*Grace* at 565; *ADC Orange, Inc.* at 489). "What constitutes a reasonable time to perform turns on the circumstances of the case" (*Point Holding, LLC v Crittenden*, 119 AD3d 918, 919 [2d Dept 2014]).

"Time may be made of the essence by clear, distinct, and unequivocal notice to that effect giving the other party a reasonable time in which to act. Moreover, notice must be given that, if the other party does not perform by the designated date, it will be considered in default. A party need not state specifically that time is of the essence, as long as the notice specifies a time on which to close and warns that failure to close on that date will result in default" (*Point Holding, LLC* at 919-920; *see also ADC Orange, Inc.* at 490). "What constitutes a reasonable time to close

depends on the facts and circumstances of the particular case. Among the factors to be considered are the nature and object of the contract, the previous conduct of the parties, the presence or absence of good faith, the experience of the parties and the possibility of hardship or prejudice to either one, as well as the specific number of days provided for the performance." (*Miller v Almquist*, 241 AD2d 181, 185 [1st Dept 1998]).

"When there is a declaration that time is of the essence, however, each party must tender performance on law day unless the time for performance is extended by mutual agreement." (*Grace* at 565). A party is not required to consent to the adjournment of a time-of-the-essence closing (*Id.*; *533 Park Avenue Realty, LLC v Park Avenue Building & Roofing Supplies, LLC*, 156 AD3d 744, 747 [2d Dept 2017]).

"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 Vialet*, 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].

Paragraph 5 of the Contract, entitled "Closing Date", provides, in relevant part, that: "The closing of title pursuant to this Agreement (the "closing") shall be held . . . on the later of (a)

September 15, 2021 or (b) 15 days after purchaser receives notice from seller that the premises is vacant and in broom clean condition (the "Closing Date")." (Defendant's Exhibit C).

Paragraph 12 of the Contract, entitled "Miscellaneous", provides, in relevant part, that:

> If Purchaser defaults under this Agreement, and such default continues after 10 days written notice from Seller, Seller as its sole remedy shall be entitled to receive and retain all sums paid by Purchaser hereunder as liquidated damages, whereupon this Agreement shall terminate and neither Seller nor Purchaser shall have any further claim against the other. The parties acknowledge that the actual damages of Seller in the event of such default are difficult, if not impossible, to ascertain. (Defendant's Exhibit C).

A letter dated October 1, 2021, entitled "Time of the Essence Letter", from Defendant's counsel to Plaintiffs' counsel and Mr. Sonnenschein, states, in relevant part, that:

> This letter shall serve as notice that, because the Closing did not take place on the Scheduled Closing Date [September 15, 2021], the Closing required under the Agreement shall take place on Monday, November 1, 2021 at 11 A.M. . . ., **TIME BEING OF THE ESSENCE WITH RESPECT TO PURCHASER'S OBLIGATION TO CLOSE ON SUCH DATE.**
>
> Please be advised that in the event Purchaser fails to attend and perform Purchaser's obligations on the TIME OF THE ESSENCE Closing on Monday, November 1, 2021 (or such earlier date as agreed), at the time and place as aforesaid, such failure shall be a material default by Purchaser under the Agreement, in which event Seller intends to exercise all of its rights and remedies under the Agreement, including, without limitation, the retention of the Down Payment. (Defendant's Exhibit D).

A letter dated November 4, 2021, entitled "10-Day Notice of Default", from Defendant's counsel to Plaintiffs' counsel and Mr. Sonnenschein, states, in relevant part, that:

> As you are aware, Purchaser did not attend the Closing on the TOE Closing Date and Purchaser did not close on the sale of the Property on the TOE Closing Date.
>
> . . .
>
> Purchaser's failure to attend the Closing on the TOE Closing Date (or the Scheduled Closing Date) and/or close on the sale [of] the Property on the TOE Closing Date (or the Scheduled Closing Date) is an express default under the Agreement and applicable law (the "Default").

> **Please take notice that,** pursuant to Section 12 of the Agreement, Purchaser is hereby required to cure the Default by closing on the sale of the Property on or before **November 15, 2021** (the "Cure Date"), that being not less than ten (10) days after the service of this written notice upon Purchaser (this "Notice"). (Defendant's Exhibit E).

The email chain beginning on October 28, 2021, indicates that Plaintiffs sought to adjourn the Final Closing Date to November 18, 2021, and then to November 22, 2021. Plaintiffs' counsel first seeks an adjournment to November 18, 2021, stating that "[w]e got word from Lender that they need those extra 3 days" (Defendant's Exhibit O). In the email chain beginning on November 11, 2021, Rick Stassa, of Emerald Commercial Properties, LLC, Plaintiffs' broker, also seeks an adjournment to November 18, 2021, and states that: "[t]he bank will not be ready on 11/15." (Defendant's Exhibit S).

In the email dated November 12, 2021, Mr. Stassa seeks a further adjournment to November 22, 2021 (Defendant's Exhibit O).

Defendant has established its entitlement to dismissal of the cause of action for specific performance pursuant to CPLR 3211(a)(1). By pointing to the relevant excerpts in the parties' Contract, the TOE letter, the 10-Day Notice of Default, as well as to various emails with Plaintiffs' counsel and broker, Defendant has conclusively demonstrated that the TOE Closing Date was scheduled for November 1, 2021, that a Final Closing Date was scheduled for November 15, 2021, and that Plaintiffs were not ready, willing and able to close on either date, as they did not have the requisite financing (*ADC Orange, Inc.* at 490 ["To obtain specific performance, it was necessary for ADC to show that it was ready, willing and able to fulfill its contractual obligations"]; *Huntington Min. Holdings, Inc.* at 998; *RBP Ventures, Ltd.* at 536; *533 Park Avenue Realty, LLC* at 747; *Mendoza* at 880). There is no dispute that the documents upon which Defendant relies on this motion are documentary evidence within the meaning of CPLR 3211(a)(1). (*See Mehrhof*, 168 AD3d 713 at 715 [holding that contracts qualify as documentary evidence]; *Seaman v Schulte Roth & Zabel, LLP*, 176 AD3d 538, 539 [1st Dept 2019] ["Emails may be considered as documentary evidence if those papers are 'essentially undeniable'"]; *Kolchins v Evolution Markets, Inc.*, 128 AD3d 47, 58 [1st Dept 2015] ["[W]e reject Supreme Court's conclusion that correspondence such as the emails here do not suffice as documentary evidence for purposes of CPLR 3211(a)(1). This Court has consistently held otherwise."]; *Langer v Dadabhoy*, 44 AD3d 425, 426 [1st Dept 2007] [finding documentary evidence in the form of emails to be sufficient on a CPLR 3211(a)(1) motion]; *WFB Telecommunications, Inc. v NYNEX Corp.*, 188 AD2d 257 [1st Dept 1992] [finding

documentary evidence in the form of a letter from plaintiff's counsel to be sufficient on a CPLR 3211(a)(1) motion]). As such, Defendant has demonstrated that the cause of action for specific performance must be dismissed.

Plaintiffs' argument that Defendant did not properly admit these documents into evidence is belied by the affirmation of Mr. Mavrelis, who authenticates the emails (Affirmation of William Mavrelis, ¶ 59, 63). He was Defendant's counsel for the transaction at issue, and was the sender and recipient of the emails in the email chains. The TOE Letter and 10-Day Notice of Default letter were authenticated by the affirmation of Joseph Kamelhar, Esq., who authored the letters (Affirmation of Joseph Kamelhar, ¶ 11, 14).

Plaintiff's argument that Defendant must demonstrate that it was ready, willing, and able to close on the TOE Closing Date and Final Closing Date in order to be successful on its motion is without merit (*See Zeitoune* at 891-892; *533 Park Avenue Realty, LLC* at 747 ["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"]; *Huntington Min. Holdings, Inc.* at 998; *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 whether 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]; *RBP Ventures, Ltd.* at 536).

The Court notes that Plaintiffs did not object to the TOE Letter, but rather, agreed to the TOE Closing Date. In an email dated October 8, 2021, from counsel for Plaintiffs, Jeffrey Zwick, Esq., to Mr. Mavrelis, Mr. Zwick stated that: "We will close by the November 1 date on the TOE letter which we received. If we can close earlier, I will let you know"] (Defendant's Exhibit I). As such, the notice provided a reasonable time within which to close as a matter of law (*Shimuro v Preston Taylors Prods., LLC*, 146 AD3d 729, 730 [1st Dept 2017] ["Defendant's failure to object prior to the closing date rendered the time reasonable as a matter of law"]).

Even if Plaintiffs' argument that Defendant's alleged failure to provide all requisite closing documents by the TOE Closing Date constitutes a waiver of the time of essence date, Plaintiffs are not freed of their obligation to demonstrate that they were ready, willing and able to perform on the Contract on the agreed upon closing dates or at a reasonable time thereafter. Whether the TOE Closing Date was time-of-the-essence or not, the parties agreed to close on that date. When the

closing did not occur, the closing date was adjourned to the Final Closing Date. There is no dispute that the closing also did not occur on that later date. (*Zeitoune* at 891 ["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"]; *Mendoza* at 880).

Moreover, case law is well-settled that even if Defendant had improperly declared a default and cancelled the Contract, Plaintiffs are obligated to demonstrate that they were ready, willing and able to close on the Property in order to be entitled to specific performance (*Del Pozo v Impressive Homes, Inc.*, 29 AD3d 620, 620 [2d Dept 2006]; *Internet Homes, Inc. v Vitulli*, 8 AD3d 438, 439 [2d Dept 2004] ["Here, even assuming that the defendants improperly cancelled the contract, the plaintiff still bore the burden to show that it had the financial capacity to purchase the property. The plaintiff's unsubstantiated assertions that a line of credit could be secured or that a closely-related corporation would supply the funds and the conclusory allegation that it was ready, willing, and able to perform were insufficient to satisfy its burden"]; *Ober v Bey*, 266 AD2d 441, 441-442 [2d Dept 1999] ["Before specific performance of a contract for the sale of real property may be granted, a plaintiff must demonstrate that he or she was ready, willing, and able to perform 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"]; *3M Holding Corp. v Wagner*, 166 AD2d 580, 581-582 [2d Dept 1990] ["notwithstanding the defendants' improper declaration of default, the plaintiff was not entitled to obtain specific performance. While the defendants' improper cancellation of the contract excused the plaintiff from its duty to tender its own performance, it was still the plaintiff's burden upon trial to show that it was ready, willing and able to perform its obligations under the contract in order to obtain the relief of specific performance. At trial, the plaintiff could not produce a mortgage application or commitment, or any other proof confirming that it had obtained the necessary financing. Thus, the trial court properly determined that the plaintiff had failed to meet its burden because it had failed to show that it was financially able to buy the property even through the date of trial"]).

Plaintiffs do not dispute that they were not ready, willing and able to perform on the TOE Closing Date or Final Closing Date. Plaintiffs' argument, based on Mr. Sonnenschein's conclusory assertion that while he was closing with a lender, that he was ready, willing and able to pay the purchase price in cash in the event the lender was not ready (Affidavit of Mark Sonnenschein, ¶ 18), is not sufficient to raise an issue of fact as to whether Plaintiffs were ready, willing and able

to perform on the TOE Closing Date or Final Closing Date (*LAIG v Medanito S.A.*, 139 AD3d 424, 424 [1st Dept 2016] ["plaintiff's conclusory allegation that it remained ready, willing and able to close on the purchase of the investment business on the scheduled closing date was factually insufficient in light of unrefuted documentary evidence that plaintiff's sources for the financing it required to make the purchase had abandoned the deal within 10 days of the scheduled closing"]). The Court notes that there is no indication that Plaintiffs conveyed to Defendant that it was able to perform on the TOE Closing Date or Final Closing Date by paying the purchase price in cash.

Moreover, Plaintiffs' assertion that it was ready, willing and able is inconsistent with their own arguments that the TOE Closing Date and Final Closing Date should have been adjourned (Affirmation of Jeffrey B. Zwick, Esq., ¶ 84 [affirming that Plaintiffs were "unable to meet the short and unreasonable demands set forth by Defendants and offered closing on a later date, but these requests were not entertained"]; ¶ 89 [affirming that he advised Defendant's counsel on November 18, 2021, by email that: "We are trying to fund today if we can. Seems we are very close"]; Plaintiffs' Exhibit 20; Compl. ¶ 30).

Furthermore, although Plaintiffs argue that the closing should have been adjourned 10 days from the Final Closing Date, Plaintiffs have not demonstrated that they would have been ready, willing and able to perform on the Contract on that later date.

Accordingly, Defendant's motion to dismiss the first cause of action for specific performance is granted.

Second Cause of Action – Breach of Contract:

Defendant seeks to dismiss the second cause of action, which seeks damages in the sum of $5 million based on Defendant's alleged breach of the Contract. Defendant argues that since Plaintiffs breached the Contract, the Contract was validly terminated.

Defendant has established its entitlement to dismissal of the cause of action for breach of contract pursuant to CPLR 3211(a)(1). As with the cause of action for specific performance, Plaintiffs must establish that they were ready, willing and able to perform on the Contract and close on the scheduled closing dates in order to recover on its cause of action for breach of contract (*Pesa v Yoma Dev. Group, Inc.*, 18 NY3d 527, 532 [2012] ["The rule requiring non-repudiating buyers to show their readiness, willingness and ability to perform is supported by common sense. It is axiomatic that damages for breach of contract are not recoverable where they were not actually caused by the breach – i.e., where the transaction would have failed, and the damage would have

been suffered, even if no breach occurred"]; *3801 Review Realty LLC* at 510 ["Plaintiff's inability to demonstrate that it was ready, willing and able to fulfill its contractual obligations at closing also precludes it from recovering money damages"]; *Reid v I Grant Inc.*, 94 AD3d 500, 501 [1st Dept 2012] ["A party to a contract of sale that alleges damages directly flowing from a breach of such contract must show that he or she was ready, willing and able to meet his or her obligations under such contract, but for the other party's breach"]; *Mendoza v Sterling Properties, Inc.*, 162 AD3d 879, 880 [2d Dept 2018] ["Even when a seller repudiates a contract, the buyer asserting a cause of action for specific performance or to recover damages for breach of contract must demonstrate that he or she was ready, willing, and able to perform"]). Here, as stated above, Defendant demonstrated that Plaintiffs were not ready, willing and able to close on the scheduled closing dates as they did not have the requisite financing. In opposition, Plaintiffs failed to demonstrate that they were ready, willing and able to close on the scheduled closing dates. Moreover, Plaintiffs do not argue that Defendant's alleged failure to provide the requisite documents prior to the closing frustrated Plaintiffs' ability to satisfy their own contractual obligations (*3801 Review Realty LLC* at 510).

Accordingly, Defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(1) is granted. In light of the foregoing, the Court need not reach Defendant's arguments for dismissal of the complaint pursuant to CPLR 3211(a)(7).

Motion to Cancel the Notice of Pendency:

Defendant argues that since the cause of action for specific performance must be dismissed, the notice of pendency should also be cancelled.

CPLR 6501 states, in relevant part, that: "A notice of pendency may be filed in any action in a court of the state or of the United States in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property, except in a summary proceeding brought to recover the possession of real property."

"A notice of pendency, commonly known as a 'lis pendens,' can be a potent shield to protect litigants claiming an interest in real property. The powerful impact that this device has on the alienability of property, when conjoined with the facility with which it may be obtained, calls for its narrow application to only those lawsuits directly affecting title to, or the possession, use or enjoyment of, real property." (*5303 Realty Corp. v O&Y Equity Corp.*, 64 NY2d 313, 315-316 [1984]).

"In entertaining a motion to cancel, the court essentially is limited to reviewing the pleading to ascertain whether the action falls within the scope of CPLR 6501. In conjunction with this concept, the complaint filed with the notice of pendency must be adequate unto itself; a subsequent, amended complaint cannot be used to justify an earlier notice of pendency." (*5303 Realty Corp.* at 320).

"The same considerations that require strict compliance with the procedural prerequisites also mandate a narrow interpretation in reviewing whether an action is one affecting 'the title to, or the possession, use or enjoyment of, real property'. Thus, a court is not to investigate the underlying transaction in determining whether a complaint comes within the scope of CPLR 6501. Instead, in accordance with historical practice, the court's analysis is to be limited to the pleading's face." (*5303 Realty Corp.* at 321).

Here, the cause of action for specific performance is the only cause of action that directly affects title to, or the possession, use or enjoyment of, real property. Generally, upon dismissal of a cause of action for specific performance, the notice of pendency must also be cancelled. (*Tsui v Chou*, 135 AD3d 597, 598 [1st Dept 2016] [holding that the motion court properly dismissed the notices of pendency, which were based on the trespass and constructive trust claims, which were properly dismissed]; *Jericho Group Ltd. v Midtown Development, L.P.*, 67 AD3d 431, 432 [1st Dept 2009] ["Since the motion court properly dismissed plaintiff's claims for specific performance, it properly granted Midtown's motion to cancel the notices of pendency that were filed with this action"]). Here, however, while the complaint has been dismissed against Defendant, it remains in place against NY Deferred.

Accordingly, Defendant's motion to cancel the notice of pendency dated November 30, 2021, filed on December 3, 2021, is denied.

It is hereby

ORDERED that the Clerk dismiss the complaint against Defendant 1986-F&S of NY, Ltd.; and it is further

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

This constitutes the Decision and Order of this Court.

Dated:
6/8/22

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