

PRESENT: \_\_\_\_\_

PART \_\_\_\_\_

Index Number : 603164/2005

Justice

PRIME INCOME ASSET MGMT, INC.

vs  
AMERICAN REAL ESTATE HOLDINGS

Sequence Number : 001

AMEND SUPPLEMENT PLEADINGS

INDEX NO. \_\_\_\_\_

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

MOTION SEQ. NO. \_\_\_\_\_

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

The following papers, numbered 1 to \_\_\_\_\_ motion to/for \_\_\_\_\_

PAPERS NUMBERED

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

Answering Affidavits -- Exhibits \_\_\_\_\_

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

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that ~~this~~ motion sequences 001, 002 and 003 are hereby consolidated for joint disposition and decided in accordance with accompanying memorandum decision.

FOR THE FOLLOWING REASON(S):

**FILED**  
DEC 06 2006  
NEW YORK COUNTY

Dated: November 30, 2006

Heg  
Helen E. Freedman, J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

----- X

PRIME INCOME ASSET MANAGEMENT,  
INC. and LIBERTY BANKERS LIFE  
INSURANCE CO.,

Index No. 603164/05

Plaintiffs,

- against -

AMERICAN REAL ESTATE HOLDINGS L.P.  
and AREH WINDSOR LOCKS, L.L.C.,

Defendants.

----- X

**FREEDMAN, J.:**

The motions with sequence numbers 001, 002, and 003 are consolidated for joint disposition.

Plaintiffs brought this action to, among other things, compel defendants to sell them two commercial properties. Defendants entered into a contract with plaintiff Prime Income Asset Management Inc. ("Prime") for the purchase and sale of three properties, but after the parties closed on one property, defendants refused to close on the others on the ground that the contract had automatically terminated on the scheduled closing date.

In motion # 001, plaintiffs move for leave to amend and supplement the complaint to add the unsold properties' tenants, First National Supermarkets, Inc. and Stone Container Corporation, as defendants.

In motion # 002, plaintiffs move pursuant to CPLR 2701 for an order directing defendants to deposit into court the rent and other payments received in connection with the two unsold properties. In the alternative, plaintiffs seek an order compelling defendants to deposit the

payments into a third-party escrow account. Defendants American Real Estate Holdings L.P. (“AREH”) and Arch Windsor Locks, L.L.C. cross-move for summary judgment dismissing the complaint.

In motion # 003, plaintiffs move for an order preliminarily enjoining defendants from transferring or encumbering the two unsold properties, from disbursing any rent payments they received in connection with them, and from taking any action that affects the status of the underlying leases with the properties’ tenants.

### **Factual Background and Allegations**

The complaint alleges as follows: plaintiff Prime Income Asset Management Inc. (“Prime”) and defendants entered into a Purchase and Sale Contract effective as of November 29, 2004 (the “Contract”) for properties located in Connecticut, Michigan, and Wisconsin.

The parties closed the transaction on the Michigan property. Thereafter, they amended the Contract five times in writing to re-schedule the closing date for the Connecticut and Wisconsin properties; the last written amendment extended the closing date to “no later than Monday, April 18, 2005, time being of the essence.”

The parties did not close by April 18. On June 15, 2005, defendants notified Prime by letter that they were terminating the Contract pursuant to its section 5(b), which afforded defendants the right to terminate if, as was the case, the lender that held the mortgage on the Connecticut property had failed to consent to Prime’s assumption of the loan. Plaintiffs’ central allegation is that defendants breached the contract by purportedly terminating and refusing to

perform, because after the last written amendment was executed, defendants orally agreed to extend the closing date to July 10, 2005 or later.

The complaint asserts five causes of action. The first alleges that defendants breached the Contract by purporting to terminate it. The second, for promissory estoppel, alleges that plaintiffs reasonably relied upon defendants' promises to adjourn the closing. The third, for negligent misrepresentation, alleges that AREH's president, acting on behalf of both defendants, negligently represented to plaintiffs that defendants would waive any time limitation, and that they would not require an extension in writing. The fourth seeks declarations voiding the purported termination of the Contract and holding that plaintiffs are entitled to specific performance. The fifth seeks an award of reasonable attorney's fees.

Moving for summary judgment, defendants argue that (1) pursuant to Section 12 (b) (iii) of the Contract, the Contract automatically terminated on April 18, 2005; (2) any oral agreement to extend the closing date is unenforceable, because the Contract provided that all amendments must be in writing and signed by the party to be charged; and (3) Prime's claim for specific performance is time-barred under section 12 (c) of the Contract, which provided that Prime had only thirty days after the scheduled closing date to sue for specific performance.

Plaintiffs argue that the Contract did not automatically terminate, because defendants orally agreed to a later closing date, and both sides of the transaction partially performed by preparing for the closing for months after April 18. They contend, moreover, that the equitable doctrines of waiver, part performance, and estoppel bar defendants from relying on the statute of frauds (General Obligations Law § 15-301) or the Contract's requirement of a writing.

## **Discussion**

Plaintiffs' three motions are denied, and defendants' cross-motion for summary judgment dismissing the complaint is granted. Defendants have made a *prima facie* showing that they are entitled to summary judgment on their cross-motion, and plaintiffs' opposition fails to raise a triable issue of fact. Consequently, plaintiffs' motions are not viable.

Section 12 (b) (iii) of the Contract provided that if Prime failed to pay the balance of the purchase price by the closing date, with time being of the essence, the Contract automatically terminated unless defendants elected otherwise. Prime did not pay the balance by the closing date of April 18, 2005, and plaintiffs do not assert that defendants were at fault. When, as here, the parties set down their agreement in a clear, complete document, as a rule their writing will be enforced according to its terms (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]; *Sikander v Prana-BF Partners*, 22 AD3d 242, 243 [1<sup>st</sup> Dept 2005]).

Plaintiffs argue that the Contract did not automatically terminate because the parties orally agreed to extend the closing date, but the merger provision contained in the Contract contradicts that claim. (See General Obligations Law § 15-301; *Cornhusker Farms v Hunts Point Coop. Mkt., Inc.*, 2 AD3d 201, 203-04 [1<sup>st</sup> Dept 2003]; *Gottlieb v Newton*, 253 AD2d 383, 384 [1<sup>st</sup> Dept 1998]). According to Section 13 of the Contract, the “[Contract] represents the entire [contract] among the parties with respect to the subject matter hereof” and “no consent to any departure by any party from the provisions of this [Contract] will be effective except pursuant to an instrument in writing signed by the party who is claimed to have so consented . . . .”

As further opposition, plaintiffs submit transcribed oral statements made by AREH's president to plaintiff's representative, which plaintiffs characterize as an oral extension. However, if the only proof of an alleged agreement to deviate from a written contract is an oral exchange between the parties, the writing controls (*Rose v Spa Realty Assoc.*, 42 NY2d 338, 343 [1977]). In any event, the transcribed statements do not constitute an extension or waiver. Rather, AREH's president expressed ambivalence about the parties' failure to consummate the transaction because "we never felt we were selling at a great price and never felt like we were selling at a bad price."

As for plaintiffs' claim that defendants orally waived the requirement of a writing, an oral waiver requires (1) partial performance by the party seeking to enforce the waiver or (2) estoppel. *Taylor v. Blaylock & Partners, L.P.*, 240 AD2d 289, 296 [1<sup>st</sup> Dept. 1997]. A party which claims partial performance must show that its performance unequivocally refers to the waiver. *Messner Vetere Berger McNamee Schmetterer Euro RSCG v. Aegis Group PLC*, 93 NY2d 229, 236-37 (1999).

As evidence of partial performance, plaintiffs merely assert that Prime "expended substantial sums and went to considerable effort in continuing to work toward closing the transactions contemplated by the [Contract]." That conclusory assertion does not create an issue of fact. "A shadowy semblance of an issue or bold conclusory assertions . . . are not enough to defeat a motion for summary judgment." (*Jeffcoat v Andrade*, 205 AD2d 374, 375 [1<sup>st</sup> Dept 1994]).

In addition, plaintiffs submit an e-mail from AREH attorney Alison Taylor stating: "Last I heard, the numbers needed for the opinion were coming in this week and hopefully we'll be in a

position to close next week,” and another from AREH employee Felicia P. Beubel that asks, “Are we going to close?” These e-mails are not evidence of conduct *by plaintiffs* that is unequivocally referable to the alleged oral modification. Also, neither e-mail contains the essential terms necessary for an enforceable signed writing for the sale of real property (*Saunds v Estate of Johnson*, 29 AD3d 670 [2d Dept 2006]). The first e-mail is a noncommittal statement about a possible closing, and the latter is an inquiry from a person who asks about a closing but apparently is not speaking on the defendants’ behalf. Moreover, the e-mails expressly state that the “e-mail is not intended to create a binding agreement” and that “[n]o contract shall be inferred or created until an actual written contract has been prepared, approved and executed by and delivered to each of the parties.”

The estoppel claim is untenable because plaintiffs have not shown that their conduct was unequivocally referable to the alleged oral modification. In addition, the plaintiffs’ reliance upon Hirsch’s alleged oral waiver was not reasonable or justified. (*See Marine Midland Bank, N.A. v Green*, 261 AD2d 340, 341 [1<sup>st</sup> Dept 1999]; *Gottlieb*, 253 AD2d at 384). Plaintiffs were sophisticated real estate investors who were represented by counsel, and the parties had already amended the Contract in writing five times. The estoppel claim also fails because it is based upon conclusory allegations (*see Tierney v Capricorn Invs., L.P.*, 189 AD2d 629 [1<sup>st</sup> Dept], *lv denied*, 81 NY2d 710 [1993]).

The negligent misrepresentation claim (third cause of action) fails because of the lack of any fiduciary or confidential relationship between the parties (*see Tradewinds Fin. Corp. v Refco Sec.*, 5 AD3d 229, 230 [1<sup>st</sup> Dept 2004]; *Gardianos v Calpine Corp.*, 16 AD3d 456, 456 [2d Dept 2005]).

Based upon the foregoing, defendants are entitled to summary judgment as to all causes of action. Defendants' contention that plaintiffs' specific performance is time-barred under the Contract will not be reached, because the entire complaint is dismissed. Furthermore, plaintiffs' motions are denied because they are based on a presumption that the Contract was not duly terminated.

Accordingly, it is

ORDERED that plaintiffs' motion (# 001) for leave to amend and supplement the complaint and to add parties is denied; and it is further

ORDERED that plaintiffs' motion (# 002) for an order directing the deposit into the court of the Property is denied; and it is further

ORDERED that plaintiffs' motion (# 003) for a preliminary injunction is denied; and it is further

ORDERED that defendants' cross-motion to motion # 002 for summary judgment is granted and the complaint is dismissed, and the Clerk is directed to enter judgment in favor of defendants, with costs and disbursements as taxed by the Clerk.

Dated: November 30, 2006

ENTER:

Helen E. Freedman  
Helen E. Freedman, J.S.C.

**FILED**  
DEC 06 2006  
NEW YORK  
COUNTY CLERK'S OFFICE