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payment. The contract set the closing date on November 30, 1999 and prohibited modification or cancellation of its terms, except in writing.

Plaintiff commenced this action alleging that it is ready, willing and able to close title and tender the full purchase price. It further alleges that its time to obtain a mortgage commitment had been extended beyond the sixty day period and that it obtained a mortgage commitment dated February 23, 2000, for less than the amount called for in the contract of sale. According to plaintiff, its request to schedule an inspection by the lender's appraiser was denied by defendant and defendant has wrongfully refused to close as is required under the contract.

Defendant served an answer denying certain allegations of the complaint and interposing a counterclaim for a judgment declaring that plaintiff is in breach of the contract and defendant is entitled to retain the down payment as liquidated damages. It is unclear from the papers submitted herein whether plaintiff has served a reply to the counterclaim.

In support of its motion for summary judgment dismissing the complaint, defendant asserts that plaintiff is not entitled to specific performance having notified its attorneys by letter dated October 4, 1999, that it deemed the contract null and void and demanded a refund of the down payment. Such notice, however, does not constitute a defense to the claim for specific performance. First, defendant did not assert estoppel, based upon such notice, as an affirmative defense in its answer. Second, defendant clearly did not rely upon the notice inasmuch as it sent the letter dated January 10, 2000 to plaintiff insisting upon performance of the contract. Third, plaintiff itself continued to insist on the fulfillment of the contract, insofar as it sent a letter to defendant dated January 6, 2000 informing defendant of the status of its mortgage application.

Defendant further asserts that plaintiff is not entitled to specific performance, having failed to close in accordance with the notice, dated January 10, 2000, sent by defendant's counsel to plaintiff's then counsel, fixing January 27, 2000 as the closing date.

To establish a claim for specific performance of a contract for the sale of real property, a plaintiff must show that it 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 (see, Provost v Off Campus Apts. Co., II, 211 AD2d 850). Where a contract for the sale of real property does not contain a specific declaration that time is of the essence, one party may unilaterally notify the other that time is of the essence, provided that the notice is clear, distinct, unequivocal, fixes a reasonable time in which to perform,

and informs the other party that a failure to perform will result in default (see, e.g., James v James, 205 AD2d 735; Mohen v Mooney, 162 AD2d 664; Sohayegh v Oberlander, 155 AD2d 436). The question of reasonableness of the time to perform turns on the facts and circumstances of the individual case (see, Zev v Merman, 134 AD2d 535, affd 73 NY2d 781).

The contract herein does not specify that time was of the essence. Once the November 30, 1999 closing date set forth therein passed, defendant was entitled to declare time of the essence by giving a clear, distinct and unequivocal notice along with a reasonable time to act (see, 3M Holding Corp. v Wagner, 166 AD2d 580, 581). The letter of January 10, 2000, likewise, does not specifically state that time is of the essence, but nevertheless, specifies the time, date and place for the closing and warns that failure to close on that date will result in a default and the retention of the down payment. Such notice constitutes a clear, distinct and unequivocal notification that time was to be of the essence with respect to the closing (see, Sohayegh v Oberlander, supra).

Plaintiff, however, contends that the January 10, 2000 letter was ineffective to make time of the essence insofar as it was served only upon its then attorney via facsimile transmission and ordinary mail in violation of the notice provisions of the contract of sale. Those notice provisions required notices to be sent by prepaid registered or certified mail to plaintiff, as well as its attorney.

The attorney, who represented plaintiff relative to the purchase, sent a letter dated January 13, 2000, responding to the January 10, 2000 letter, in which he failed to object to the method of service utilized by defendant. Furthermore, plaintiff has failed to aver that it was unaware of the letter or its contents, notwithstanding that it asserts it did not see the letter until after January 27, 2000. Under such circumstances, the failure by the then counsel for plaintiff to object to the method of service of the January 10, 2000 letter, constitutes a waiver of the defect (see, Rower v West Chamson Corp., 210 AD2d 7).

With respect to the issue of the reasonableness of the time to perform set forth in the January 10, 2000 letter, plaintiff argues that the January 27, 2000 date was unreasonable, inasmuch as it had yet to obtain the mortgage commitment as a result of delays caused by discrepancies relative to the amount of square footage recited in the property description set forth in the contract and the survey. The inability by plaintiff to secure a mortgage commitment in compliance with the terms set forth in the contract of sale by January 27, 2000, however, is not a basis for finding the 17 day period set forth in the January 10, 2000 letter to be unreasonable. Plaintiff, having failed, following the passage of the commitment date, to give notice of cancellation, or to accept a commitment in

compliance with the terms set forth in the contract of sale, waived its right to cancel and receive a refund of the down payment. In short, plaintiff bargained for and obtained a limited right to cancel which it failed to exercise within the time agreed.

To the extent that plaintiff contends such failure to provide timely notice of cancellation was in reliance upon defendant's alleged oral extensions of mortgage contingency provision, such contention is without merit. Such alleged oral modification of the parties' agreement is barred by the contract of sale and General Obligations Law § 15-301. The contract of sale at issue provides that waiver or modification of its provisions can only be effectuated in writing. Section 15-301 of the General Obligations Law specifically provides that changes to a written agreement which contains a provision to the effect that it cannot be changed orally, as here, may only be effected by an executory agreement in writing which is signed by the party against whom enforcement of the change is sought (see, Opton Handler Gottlieb Feiler Landau & Hirsch v Patel, 203 AD2d 72, 73; Levine v Trattner, 130 AD2d 462, 463). No such writing exists herein. In any event, plaintiff has failed to allege that defendant ever granted any extension of the mortgage commitment beyond December 2, 1999, when defendant sent a letter declaring plaintiff to have waived the contingency, or January 10, 2000, when defendant sent the letter declaring time to be of the essence.

The court, therefore, finds that the January 10, 2000 letter afforded plaintiff a reasonable time after the November 30, 1999 closing date set forth in the contract within which to perform (see, Zev v Merman, supra; Mohen v Mooney, supra; Sohayegh v Oberlander, supra). Accordingly, when plaintiff failed to appear for the scheduled closing, at which time defendant was present for the purpose of tendering the deed, it was in default (see, Lake Hills Swim Club, Inc. v Samson Development Corp., 213 AD2d 701, 702). The motion by defendant for summary judgment dismissing the complaint is granted.

Dated: September 27, 2000

J.S.C.