At an IAS Term, Part 47 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 23rd day of February, 2005

P R E S E N T:

HON. DAVID SCHMIDT,
Justice.

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ELIMELECH LEIFER, Index No. 13786/04

Plaintiff,

- against -

NORMAN RICH,

Defendant.

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The following papers numbered 1 to 6 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-4, 5-7
Opposing Affidavits (Affirmations)	8
Reply Affidavits (Affirmations)	9
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, plaintiff Elimelech Leifer, moves for an order, among other things, granting summary judgment in his favor pursuant to CPLR 3212 and the defendant Norman Rich cross-moves for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint herein and for a judgment in his favor on his counterclaim for declaratory relief.

FACTUAL BACKGROUND

In this action for specific performance, plaintiff alleges that on or about April 18, 2003, he, as purchaser, and, defendant, as seller, entered into a contract for the sale of real property located at 1019 Putnam Avenue in Brooklyn. The contract provided that a closing was to take place in or about sixty days. Thereafter, because of certain issues raised in the title report, plaintiff indicated that he would accept a $3,000 credit against the purchase price, that the sale would be subject to outstanding building violations, and that he would be ready to close in approximately 30 days. Plaintiff's attorney, Aaron Stein (Stein), ordered a title search which certified that defendant could convey marketable title to the subject premises. By letter dated March 12, 2004, Steven Gee (Gee), defendant's attorney, advised plaintiff and Stein that a closing would be held on March 26, 2004. The letter further stated that time was of the essence and that plaintiff's failure to appear on said date would be deemed a default of the contract and, in that event, defendant would retain the down payment as liquidated damages. The closing did not take place on March 26, 2004.

Thereafter, by letter dated April 2, 2004, Gee notified Stein that:

> "As a result of your failure to agree to close this week and instead leave [for] your trip to Israel, ignoring my time of the essence letter, you are deemed in default under the terms of the contract of sale.

> As a result, unless you cure the default and close this matter within five days of receipt of this letter, the contract of sale shall be deemed canceled and my client will retain the downpayment [sic] as liquidated damages as stated in paragraph 42[1] of the contract of sale.

On April 15, 2004, Stein faxed a letter to Gee, which, in relevant part, stated:

> "I am in receipt of your letter to me dated April 2, 2004 today. As you are aware my client and I were out of town until today and your request to close while we were away on a 5 day notice is hereby rejected as unreasonable. My client remains ready willing and able to close title on a mutually agreed closing date."

On April 20, 2004, Stein faxed Gee a letter stating that the closing would be held on Friday, April 23, 2004. When defendant did not appear, Stein telephoned his law office and found that, on the evening of on April 22, 2004, Gee had faxed him a letter which stated that plaintiff had failed to meet with defendant "to possibly reinstate [the] contract . . . [plaintiff] remains...in default." The closing did not take place on April 23, 2004.

Plaintiff commenced the instant action on April 30, 2004 by filing a notice of pendency, summons and complaint.

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[1] Paragraph 42 of the Rider to the contract provides:

> "In the event Purchaser shall default in the performance of the terms of this contract, this contract shall be considered canceled and the entire down payment hereunder, together with any interest thereon, shall be retained by Seller as liquidated damages, and neither party shall have any further rights against the other hereunder or by reason hereof, only after giving purchaser's attorney 5 days written notice of default during which time purchaser may cure."

CONTENTIONS

Plaintiff alleges that he is entitled to summary judgment on his claim for specific performance because a closing was scheduled to take place on March 26, 2004 and that the closing did not take place because defendant's attorney sought an adjournment. Plaintiff alleges that, prior to a rescheduled date of April 23, 2004, he was notified by defendant's attorney that defendant would not attend the closing, notwithstanding that plaintiff had been ready, willing and able to close. Plaintiff alleges that defendant has wrongfully terminated the agreement and retained the down payment of $82,500 which was paid upon execution of the contract.

Plaintiff also seeks dismissal of defendant's affirmative defenses which include an alleged lack of jurisdiction, as well as dismissal of defendant's counterclaim for a judgment declaring that defendant is entitled to retain the down payment as liquidated damages.

In support of the motion, plaintiff relies upon the affidavit of Aaron Stein, plaintiff's counsel in the real estate transaction. In his affidavit, Stein avers that prior to March 26, 2004, he was notified by defendant's attorney that he would not be available to close on March 26, 2004 since he would be on trial. Stein asserts that he consented to an adjournment and that it was his understanding that the closing would be rescheduled for after the Passover holiday. Stein further avers that Gee knew that both Stein and plaintiff would be away during the Passover holiday and that it was only when he returned to his office on April 15, 2004 that he read the April 2, 2004 letter from Gee which cancelled the contract and notified him (Stein) that the defendant would retain the down payment

unless plaintiff closed within five days, which period was during the Passover holiday.[2] Moreover, Stein avers that he sent a fax to Gee on April 20, 2004 to schedule a closing for April 23, 2004, at which time he and plaintiff appeared, but defendant did not. Moreover, plaintiff contends that, under the circumstances the provisions of paragraph "42" of the Rider are not a basis for terminating the contract or retaining the down payment as liquidated damages. He maintains that, as a result of defendant's wilful refusal to appear at the rescheduled closing on April 23, 2004, he commenced the instant action for specific performance. Plaintiff submits copies of five checks, totaling $742,500 (the balance of the purchase price) to show that he was ready, willing and able to perform his obligations under the contract. Plaintiff maintains that prior to scheduling a time of the essence closing on March 26, 2004, defendant never cancelled the contract pursuant to paragraph "51" of the Rider to the contract and, therefore, defendant waived his right to cancel the contract.

In opposition to the motion and in support of the cross motion, defendant argues that he properly exercised his right to cancel the contract pursuant to paragraph 51[3] of the Rider. According to defendant, after plaintiff agreed to accept a $3,000 credit and a closing which

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[2] The Passover holiday commenced on the evening of April 5, 2004. Plaintiff, in his affirmation, states that as an Orthodox Jew he does not transact business during the Passover holiday.

[3] Paragraph 51 of the Rider provides:

> "Prior to closing this transaction, the Seller reserves the right to cancel this agreement *at any time for any reason without further obligations to the Purchaser*, except returning the down payment, unless the reason for cancellation is due to the Purchaser's default calling for retainment of the down payment by the Seller as provided herein."[emphasis added]

was to be subject to any outstanding building violations, plaintiff agreed to close in approximately 30 days. Defendant maintains that after many attempts to schedule a closing, his attorney sent a "time of the essence" letter on March 12, 2004. Defendant adds that his attorney was unable to confirm a closing date and was told that a closing would have to wait until plaintiff's return from Israel in April 2004.[4] Gee allegedly suggested that the trip be postponed a few days so the closing could take place, but the suggestion was disregarded and he advised Stein that plaintiff would be deemed in default and the contract cancelled if closing were not held by March 26, 2004. Gee avers that on March 26, 2004, he and defendant were ready, willing and able to close, but the plaintiff and his attorney failed to appear. On April 2, 2004, to comply with the default requirements of paragraph 42 of the Rider, Gee sent a default letter to plaintiff and his attorney notifying plaintiff that he had five days to cure his default and close or the contract would be deemed canceled and defendant would keep the down payment as liquidated damages. Gee states that on April 15, 2004, he received a letter from Stein which claimed that plaintiff was now prepared to close, but that when he spoke to Stein later the same day, he was told that a closing date would have to be worked out with the attorney for plaintiff's lender. At that point, according to Gee, "defendant was no longer willing to close the matter and. . . based on the aforesaid was enforcing his right to cancel the contract of sale."[5] In his affidavit, defendant avers that "even after canceling the contract, on April 22, 2004, [he] had agreed to meet with the

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[4] Gee's Affirmation in Support of Cross Motion, ¶ 22.

[5] Gee's Affirmation in Support of Cross Motion, ¶ 28.

plaintiff to discuss possibly reinstating the contract but the plaintiff failed to show up at a scheduled meeting."[6] Defendant avers that he has "now simply exercised [his] negotiated right to cancel this contract of sale."[7] Defendant argues that plaintiff is not entitled to specific performance because defendant properly exercised his right to cancel the contract. Morever, defendant asserts that he is entitled to retain the deposit because plaintiff's failure to appear at the scheduled closing on March 26, 2004 is deemed a default under the contract. Defendant further maintains that plaintiff failed to cure his default in complaince with paragraph "42" of the Rider and did not respond until April 15, 2004 at which time plaintiff still did not indicate a specific date and time when he would be ready to close. Lastly, defendant argues that the checks which plaintiff has proffered to support his contention that he was ready, willing and able to close, are dated April 29, 2004, well beyond the date of the closing.

In opposition to the cross motion and in reply, plaintiff avers that the only reason he did not appear at the "time of the essence" closing was because Gee requested an adjournment and that on March 26, 2004 he and his attorney were in New York and prepared to close. He also asserts that the purported default letter of April 2, 2004 failed to refer to the scheduled closing of March 26, 2004 as a basis for his default, thereby demonstrating that the closing was cancelled. Plaintiff also avers that he and Stein were not present in New York during the week of April 5, 2004 because of the Passover holiday and that, as an

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[6] Rich's Affidavit in Support of Cross Motion, ¶ 18.

[7] Rich's Affidavit in Support of Cross Motion, ¶ 19.

Orthodox Jew, he does not engage in commercial transactions during a religious holiday. Plaintiff argues that Gee knew, when he sent the default letter, that both plaintiff and his attorney would be out of the country and, therefore, that plaintiff would be unable to comply. Further, plaintiff maintains that no meeting was ever scheduled with defendant to reinstate the contract because the contract was still in full force and effect.

In his reply papers and in further support of the cross motion, defendant states there was no reason to have called Stein on March 26, 2004 as there was no expectation that he and the plaintiff would appear, given the prior conversation with Stein.[8] Gee avers that he knew plaintiff and his attorney were Jewish but he:

> "had no idea that the dates set for the closing conflicted with their religious holiday. . . and if such an issue was raised by plaintiff's attorney he and defendant would have surely cooperated and figured out a closing date that worked around their holidays but defendant's objection was the fact that plaintiff refused to close before his trip to Israel and ignored his request to delay the trip a few days so the matter could close."[9]

DISCUSSION

According to paragraph "51" of the Rider to the contract, defendant reserved his right to cancel the agreement prior to closing *at any time for any reason.* It is well settled that, "[i]nterpretation of an unambiguous contract provision is a function for the court and matters extrinsic to the agreement may not be considered when the intent of the parties can be gleaned from the face of the instrument" (*Teitelbaum Holdings v Gold*, 48 NY2d 51, 56

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[8] Gee, Affirmation in Reply, ¶ 6-7

[9] Gee, Affirmation in Reply, ¶ 8-10.

[1979]; *see Chimart Assocs. v Paul*, 66 NY2d 570 [1986]; *Posh Pillows v Hawes*, 138 AD2d 472 [1988]). Here, paragraph "51" provided an unfettered right to defendant to cancel the contract prior to the closing without further obligation to the Purchaser and it appears that defendant validly exercised his right to cancel pursuant to the unambiguous and unequivocal language of the contract (*see e.g., Matter of Wallace v 600 Partners Co.*, 86 NY2d 543 [1995]; *Hadden v Consolidated Edison Co.*, 45 NY2d 466 [1978]).

Since the contract was cancelled by the letter of April 2, 2004, plaintiff's subsequent attempt to compel specific performance is without effect *(see generally Gulotta v Ippolito*, 296 AD2d 380 [2002] [defendant-seller was properly granted summary judgment dismissing plaintiffs' action for specific performance where the plaintiffs-purchasers failed to obtain a mortgage loan commitment within the time period specified in the contract and the defendant rightfully exercised the option to cancel the contract]). Given defendant's unconditional right to cancel at any time prior to closing, plaintiff's argument that there was a waiver of the right to cancel because defendant made time of the essence is without merit.

For time to be of the essence in a contract of sale of real property, "there must be a clear, distinct, and unequivocal notice to that effect giving the other party a reasonable time in which to act . . . the notice [must specify] a time on which to close and [a warning] that failure to close on that date will result in default" (*Zev v Merman*, 134 AD2d 555, 557 [1987], *aff'd* 73 NY2d 781 [1988]) (citations omitted). The March 12, 2004 letter provided such clear, distinct and unequivocal notice, along with a reasonable time for plaintiff to act (*Zev*, 134 AD2d at 557). While both sides contend that they were ready, willing and able

to perform on March 26, 2004, it is undisputed that plaintiff did not appear at the closing because defendant's counsel had requested an adjournment. The court makes no finding as to whether or not plaintiff was in default. However, the court notes that, before retaining the down payment as liquidated damages, defendant was required, pursuant to paragraph "42" of the Rider, to send a notice of default and give plaintiff five days to cure. A fair reading of the purported notice of default dated April 2, 2004 reveals that defendant did not expect the closing to proceed on March 26, 2004, but that "there was a failure to agree *to close this week* and instead leave [for a] trip to Israel." Moreover, the letter reveals that there were conversations between the attorneys and that the March 26, 2004 date was not clear, distinct and unequivocal. As such, there may have been an oral[10] waiver of the time of essence (*see e.g. Ring 57 Corp. v Litt,* 28 AD2d 548, 549 [1967]; *Clifton Park Affiliates v Howard*, 36 AD2d 984[1971]). Moreover, as a predicate to retaining the down payment as liquidated damages, pursuant to paragraph "42" of the Rider, the purported default letter must give five days for plaintiff to cure. A review of the April 2, 2004[11] letter reveals that Gee sent a notice of default with full knowledge that plaintiff had left for Israel. The courts have long been guided by the rule that "every contract contains an implied obligation by each party to deal fairly with the other and to eschew actions which would deprive the other party

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[10] Plaintiff's affidavits have raised the issue of whether defendant orally agreed to waive March 26, 2004 as the purported closing date. It is well settled, in New York, that an oral waiver of the time for the sale of real property will be given effect (*see Bacchetta v Conforti*, 108 Misc 2d 761 [1981]; *Royce v Rymkevitch*, 29 AD2d 1029 [1968]).

[11] The court notes that April 2, 2004 was a Friday. Morever, the Passover holiday began on Tuesday evening, April 6, 2004.

of the fruits of the agreement" (*Greenwich Vil. Assocs. v Salle*, 110 AD2d 111, 115 [1985]; *Gross v Neuman*, 53 AD2d 2, 5 [1976]), in furtherance of the covenant of good faith implied in every contract (*Dalton v Educational Testing Serv.*, 87 NY2d 384 [1995]). Here, Gee's letter, which recognized that plaintiff was going to be out of the country and could not receive the letter in a timely fashion, was not sent in good faith (*see Dalton*, 87 NY2d 384). Moreover, Gee's statement that he and defendant "would have surely cooperated and figured out a closing date that worked around [plaintiff's] holidays" is belied by the fact that on April 15, 2004, the date that plaintiff and his attorney first returned, he spoke to Stein who had rejected the April 2, 2004 notice as "unreasonable." Gee told Stein on April 15, 2004 that, "defendant was no longer willing to close the matter and. . . based on the aforesaid was enforcing his right to cancel the contract of sale."[12] This neither afforded plaintiff five days to cure, nor evidenced "cooperation to work around their holidays." For the foregoing reasons, the court finds that the April 2, 2004 letter was ineffective to comply with paragraph "42" of the Rider and, therefore, defendant is not entitled to retain the down payment. In view of defendant's failure give the plaintiff an opportunity to cure the alleged default, the contract is deemed cancelled pursuant to paragraph "51" of the Rider and defendant is directed to return the down payment of $82,500.

In summary, plaintiffs' motion for summary judgment is denied since he failed to meet his burden of establishing prima facie entitlement to judgment as a matter of law (see

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[12] Gee's Affirmation in Support of Cross Motion, ¶ 28.

Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853) and the notice of pendency is cancelled.

That portion of defendant's cross motion for summary judgment dismissing the complaint is granted, while that branch of the cross motion for summary judgment on the counterclaim is denied.

The foregoing constitutes the decision, order and judgment of this court.

E N T E R,

J. S. C.

HON. DAVID I. SCHMIDT