Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19
Justice

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NOVELTY CRYSTAL CORP.,

Plaintiff,

Index No: 6466/04
Motion Date: 2/22/06
Motion Cal. No: 15

-against-

PSA INSTITUTIONAL PARTNERS, L.P.,

Defendant.

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The following papers numbered 1 to 21 read on this motion for an order granting summary judgment to defendant; and upon the cross-motion by plaintiff for summary judgment, and in the alternative, amending the complaint.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits-Memorandum.....	1 - 6
Notice of Cross Motion-Affidavits-Exhibits-Memorandum.....	7 - 13
Answering Affidavits-Exhibits.....	14 - 18
Reply.....	19 - 21

Upon the foregoing papers, it is ordered that the motion and cross-motion are disposed of as follows:

This is a breach of contract action arising from the purchase of a warehouse facility by plaintiff from defendant pursuant to a Purchase and Sale Agreement dated September 23, 2003. Plaintiff, a plastic manufacturing company, alleges that it discovered after the closing on December 23, 2003, that defendant, a public storage company, failed to remove 252 storage containers measuring 5' x 7' x 8' in size, and comprising approximately 70,000 cubic feet of warehouse space. It is upon the foregoing that defendant moves for an order granting it summary judgment, and plaintiff cross-moves for summary judgment, and in the alternative, amending the complaint.

Summary judgment should be granted when there is no doubt as to the absence of triable issues. See, Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231 (1978); Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974); Taft v. New York City Tr. Auth., 193 A.D.2d 503, 505 (1st Dept. 1993). As such, the function of the court on the instant motion is issue finding and not issue determination. See, D.B.D. Nominee, Inc., v. 814 10th Ave. Corp., 109 A.D.2d 668, 669 (2nd Dept. 1985). The proponent of a summary judgment motion must tender evidentiary proof in admissible form

eliminating any material issues of fact from the case. See, Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position. See, Zuckerman v. City of New York, supra.

Here, defendant states, inter alia, that plaintiff's claims are barred under the merger doctrine expressly contained in paragraph 15(d) of the Purchase and Sale Agreement, which states that "the acceptance of the Deed shall be deemed to be a full performance of, and discharge of every agreement and obligation on Seller's part to be performed under this contract, except for those which this Contract specifically provides shall survive the Closing." Defendant further contends that plaintiff had the right to inspect the premises prior to the closing, and either failed to do so, or disregarded the findings of the inspection. It alleges that contrary to plaintiff's pleadings, the contract did not obligate it to remove the containers, as the language is permissive,[1] nor was it mandated to deliver the keys at closing. Consequently, defendant contends that if it was obligated to remove the containers at issue prior to the closing, which it claims that it was not, such obligation was merged into the deed upon the conveyance of the premises, and therefore, plaintiff's right to seek redress has been expunged.

Additionally, defendant contends that the merger doctrine is not overcome by the Further Assurances exception, which pertains to the conveyance of good title, and is inapplicable to this matter. Paragraph 25 of the contract, entitled "Further Assurances," states the following:

> The parties each agree to do such other and further acts and things, and to execute and deliver such instruments and documents (not creating any obligations additional to those otherwise imposed by this contract), and which may reasonably be requested from time to time, whether at or after the closing, in furtherance of the purposes of this Contract. The provisions of this Section shall survive the Closing.

Defendant asserts that contrary to plaintiff's contentions, the covenant of further assurances under Real Property Law § 253,[2] "is construed to obligate the seller to make any further conveyances necessary to vest in the purchaser the title to be conveyed; in other words, to make the title good."
As a result, defendant further asserts that there is nothing in this provision or the contract which obligates it to remove the storage containers after the closing, and "plaintiff cannot now contravene the explicit language of the very provision it relies upon, i.e., by seeking to create an additional obligation not otherwise imposed under the contract."

Moreover, defendant alleges that the second exception to the merger doctrine, collateral undertaking, is not implicated here. It states that there was no undertaking of any kind to remove the containers from the premises. Further, it states that even if there was an undertaking to do same, it pertained to the condition of the premises to be conveyed, and was not an agreement separate and apart from such conveyance that survived the closing. Consequently, defendant contends that there is no basis for plaintiff's claims as any rights that plaintiff may have had were eradicated at the time of the closing.

In opposition and support of the cross-motion for summary judgment, plaintiff contends, inter alia, that defendant's duty to remove the containers prior to the closing was not permissive, but a mandatory obligation to remove all personalty from the premises, pursuant to the As-Is provision of the agreement, which survived the closing. The relevant part of the "As-Is" provision, paragraph 7, states the following:

> The Premises will be delivered vacant and clean, free of all personalty, tenancies and occupancies; Purchaser expressly acknowledges that the Seller may remove any and all storage bins and containers and any and all other personalty in connection with the operation of the storage business[]. Seller may not remove any fixtures or improvements from the Premises unless the same are replaced with items of substantially similar quality.

Plaintiff contends that because of the enormous size of the containers and the amount of space that they consumed, the above provision clarified that the containers were deemed personalty to be removed, rather than fixtures. Plaintiff further contends that if the provision were to be read in the manner that defendant suggests, it would have been able to leave behind all personalty with impunity, including "garbage, debris and furniture." Plaintiff concludes that the provision clarified the distinction between personalty and fixtures, and defendant was obligated to remove the containers with "any and all other personalty."

Moreover, plaintiff asserts that the abovementioned further assurances provision contained in paragraph 25 of the contract is a much broader clause than defendant purports, " encompassing two separate obligations: a) to do such other and further acts and things... in furtherance of the purposes of this Contract; and b) to execute and deliver such instruments and documents... in furtherance of the purposes of this Contract." Plaintiff contends that the further assurances clause under Real Property Law § 253 relates specifically and exclusively to title, as is demonstrated by the example that the provision offers, stating that "a covenant that the grantor will execute or procure any further assurances of the title to said premises." Thus, plaintiff contends that paragraph 25 does not limit the further assurances to that of just title, and defendant's obligation to remove the containers survived the closing.

Further, plaintiff states that contrary to defendant's contentions, paragraph 15(d) of the Purchase and Sale Agreement, which states that "the acceptance of the Deed shall be deemed to be a full performance of, and discharge of every agreement and obligation on Seller's part to be performed under this contract, except for those which this Contract specifically provides shall survive the Closing,"does not merge all claims into the deed. Consequently, plaintiff asserts that defendant's obligation to remove the containers "is an act which survives the closing and which may be requested after the closing to further the purposes of this agreement." Additionally, plaintiff contends that the merger doctrine does not apply to a collateral undertaking, and defendant's obligation to remove the containers "was collateral to the main purpose of the agreement and survives the closing."

In the instant matter, pursuant to paragraph 7 of the contract, it is clear that defendant was obligated to remove the containers from the premises, as the provision mandated that the premises shall be "delivered vacant and clean, free of all personalty." Despite the apparent misdirection attempted to be employed by defendant in seizing on the permissive word "may," in describing its removal of the personalty, it is clear from the contextual substance of the paragraph, that the "may remove any and all storage bins and containers," grants defendant permission to remove those items as personalty, freeing those items from the prohibition of the removal of "any fixtures or improvements from the Premises." Moreover, it would defy logic to interpret this contract in a manner which would mandate that the premises be delivered vacant, yet allow the defendant, in its discretion, to leave behind 252 storage containers which occupy approximately 70,000 cubic feet of warehouse space. Consequently, despite defendant's contentions to the contrary, this Court finds that defendant was under an obligation to remove the containers pursuant to the contract. Also at issue, however, is whether such obligation was merged into the deed, and therefore expunged by the closing, or one that survived the closing.

"It is well settled that 'the obligations and provisions of a contract for the sale of land are merged in the deed and, as a result, are extinguished upon the closing of title' unless 'there is a clear intent evidenced by the parties that a particular provision shall survive delivery of the deed, or where there exists a collateral undertaking' [Davis v. Weg, 104 A.D.2d 617 (2nd Dept. 1984)]. " Dourountoudakis v. Alesi, 271 A.D.2d 640, 641 (2nd Dept. 2000); see, Crowley Marine Associates v. Nyconn Associates, L.P., 292 A.D.2d 334 (2nd Dept. 2002). "Further, a contract provision cannot be a collateral undertaking if it is 'an integral part of the principal purpose of the contract, namely a conveyance of title to real property'[Yaksich v. Relocation Realty Serv. Corp., 89 Misc.2d 410, 411 (N.Y. Sup. 1977); see, Summit Lake Assocs. v. Johnson, 158 A.D.2d 764 (3rd Dept.1990.)]." Alexy v. Salvador, 217 A.D.2d 877, 878 (3rd Dept. 1995).

Here, it is necessary to review again the relevant portions of the Purchase and Sale Agreement, namely paragraphs 7 (As-Is provision), 15 (Merger clause), and 25 (Further Assurances provisions) respectively, and the interplay between these sections. Paragraph 7 states:

> The Premises will be delivered vacant and clean, free of all personalty, tenancies and occupancies; Purchaser expressly acknowledges that the Seller may remove any and all storage bins and containers and any and all other personalty in connection with the operation of the storage business[]. Seller may not remove any fixtures or improvements from the Premises unless the same are replaced with items of substantially similar quality;

paragraph 15(d) states:

> The acceptance of the Deed shall be deemed to be a full performance of, and discharge of every agreement and obligation on Seller's part to be performed under this contract, except for those which this Contract specifically provides shall survive the Closing;

and paragraph 25 states:

> The parties each agree to do such other and further acts and things, and to execute and deliver such instruments and documents (not creating any obligations additional to those otherwise imposed by this contract), and which may reasonably be requested from time to time, whether at or after the closing, in furtherance of the purposes of this Contract. The provisions of this Section shall survive the Closing.

As stated previously, paragraph 7 obligated defendant to remove the containers and all additional personalty, and deliver the premises in a clean and vacant condition prior to the closing of title. A reading of paragraph 15 would indicate that defendant's failure to perform certain obligations under the contract would be extinguished, and therefore merged with the deed, unless those obligations survived the closing. Lastly, paragraph 25 provided the parties with an additional safeguard to ensure that the spirit of the contract was adhered to and preserved, and that the intentions of the parties were fulfilled. In this context, it is clear that the further assurances provision of the contract imposed a bilateral duty on the parties to fully perform each obligation to the letter of the contract, "whether at or after the closing." Contrary to defendant's assertion, this provision is broader in scope than the obligation to simply perfect title, and required the performance of "such other and further acts and things," such as the removal of all storage container and other personalty, pursuant to paragraph 7, "in furtherance of the purposes of this Contract." Consequently, it is this Court's determination that the obligation of defendant to remove the storage containers prior to closing is an obligation that survived the closing.

Arguendo, even if there were no contractual provision which preserved defendant's obligation to perform after the closing, such obligation would still exist as the provision is a collateral undertaking unrelated to the taking of title. See, Goldsmith v. Knapp, 223 A.D.2d 671 (2nd Dept. 1996). "Absent proof of an intentional waiver, such separate, collateral undertakings unassociated with questions of title, possession or quantity of land may be deemed to have survived acceptance of the deed (citations omitted)." Yaksich v. Relocation Realty Serv. Corp., 89 Misc.2d 410, 411 (N.Y. Sup. 1977) [stating that a Health Department inspection was admittedly called for by the terms of the contract. Its accomplishment has no bearing upon and is clearly collateral to the conveyance of title. The provision in question may therefore be said to be a collateral undertaking which, in the absence of waiver, survived the purchasers' acceptance of the deed. There has been no showing of an intended waiver in this case, nor may such a waiver be presumed (citation omitted). The inspection provision of this contract must be deemed to have survived the closing]; see, Metro Group Const. Corp. v. Town of Hempstead, 24 A.D.3d 632 (2nd Dept. 2005) [stating that the parties' undertakings with respect to the development of the property were collateral to the conveyance and, therefore, did not merge with the deeds]. As the provision is not an integral part, but secondary to the purpose of the contract which affects the conveyance of title, the obligation to remove the containers survive the closing under this theory as well. Accordingly, that branch of the motion for summary judgment on the basis of the merger doctrine is denied.

Defendant also moves, inter alia, for summary judgment and dismissal on the ground that

the damages asserted are consequential damages, and were not pled. "It is well established that in actions for breach of contract, the nonbreaching party may recover general damages which are the natural and probable consequence of the breach. []" Kenford Co., Inc. v. County of Erie, 73 N.Y.2d 312, 319 (1989). Moreover, "[i]t is well-settled law in this State that consequential damages are not recoverable in an action to recover damages for breach of contract in the absence of the plaintiff's 'showing that such damages were foreseeable and within the contemplation of the parties at the time the contract was made' (citations omitted)." Martin v. Metropolitan Property and Cas. Ins. Co., 238 A.D.2d 389, 390 (2nd Dept. 1997). "The rule that damages must be within the contemplation of the parties is a rule of foreseeability. The party breaching the contract is liable for those risks foreseen or which should have been foreseen at the time the contract was made. The breaching party need not have foreseen the breach itself, however, or the particular way the loss came about. It is only necessary that loss from a breach is foreseeable and probable." Ashland Management Inc. v. Janien, 82 N.Y.2d 395, 403 (1993). "In determining the reasonable contemplation of the parties, the nature, purpose and particular circumstances of the contract known by the parties should be considered (citations omitted), as well as what liability the defendant fairly may be supposed to have assumed consciously, or to have warranted the plaintiff reasonably to suppose that it assumed, when the contract was made (citations omitted)." Kenford Co., Inc. v. County of Erie, 73 N.Y.2d 312, 319 (1989).

Here, in plaintiff's Answers to Defendant's Interrogatories dated May 10, 2005, plaintiff quantifies its alleged damages in the following manner:

Loss of rental income for 4 months:	$200,000.00
Financing of Premises for 4 months:	$ 33,000.00
Insurance costs for Premises for 4 months:	$ 20,000.00
Real estate taxes for Premises for 4 months:	$ 44,000.00
Heating and lighting for 4 months:	$ 20,000.00
Crate Removal:	$ 17,000.00
Penalties to customers:	$ 37,000.00
Total:	$371,333.00

Based upon the foregoing, it cannot be said that the damages claimed are general damages directly and naturally flowing from defendant's breach of the contract. As a result, this Court finds the damages consequential damages which must be pled. See, Atkins Nutritionals, Inc. v. Ernst & Young, LLP, 301 A.D.2d 547 (2nd Dept. 2003). In opposition and in support of the cross-motion, however, plaintiff seeks, in the alternative, to amend its complaint to replead.

Plaintiff's motion for leave to amend the complaint is granted. It is well settled that leave to amend or supplement pleadings "shall be freely given," unless the amendment sought is palpably improper or insufficient as a matter of law, or unless prejudice and surprise directly result from the delay in seeking the amendment. Adams v. Jamaica Hosp., 258 A.D.2d 604 (2nd Dept. 1999); East Patchogue Contr. Co. v. Magesty Sec. Corp., 181 A.D.2d 714 (2nd Dept. 1992); Nissenbaum v. Ferazzoli, 171 A.D.2d 654 (2nd Dept. 1991). See McCaskey, Davies & Assocs. v. New York City Health & Hosps.Corp., 59 N.Y.2d 755 (1983); CPLR 3025(b). Accordingly, plaintiff is granted leave to amend the complaint in the form annexed to the

cross-moving papers as Exhibit "D." Plaintiff is directed to serve a supplemental summons and an amended complaint upon defendant within twenty (20) days of service of a copy of this order with notice of entry. Defendant has the statutorily prescribed time to interpose responsive papers.

Additionally, plaintiff cross-moves for summary judgment as to its claim for trespass. "It is well settled that 'a person entering upon the land of another without permission, whether innocently or by mistake, is a trespasser." Kaplan v. Incorporated Village of Lynbrook, 12 A.D.3d 410, 412 (2nd Dept. 2004). "The essence of trespass is the invasion of a person's interest in the exclusive possession of land (citation omitted)." Zimmerman v. Carmack, 292 A.D.2d 601, 602 (2nd Dept. 2002). As the very definition of trespass requires an act by a person, and the plaintiff has failed to proffer any evidence which would remotely compel this Court to extend such a claim to an inanimate object, that branch of the cross-motion for summary judgment is denied as frivolous.

It is axiomatic that summary judgment is a drastic remedy which should only be granted if it is clear that no material issues of fact have been presented. Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). In order to defeat a motion for summary judgment, a party must lay bare its proof of evidentiary facts showing there is a bona fide issue requiring a trial. Zuckerman v. City of New York, supra. Here, a review of the evidence presented by defendant on the motion, and plaintiff on the cross-motion, establish that there are no issues of fact to be determined with respect to plaintiff's cross-motion. Accordingly, the motion for summary judgment and dismissal is granted to the extent that the claim for trespass hereby is dismissed. The cross-motion for summary judgment on the issue of liability is granted in its entirety except with respect to the branch that seeks judgment on the trespass cause of action. All other claims set forth in the motion and cross-motion were considered by this Court and deemed without merit. A trial shall be held on the issue of damages following the completion of discovery, and the filing of a note of issue with statement of readiness.

Dated: May 5, 2006

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J.S.C.

[1] Defendant relies on the language in paragraph 7 which states that it "may remove any and all storage bins."

[2] The statutory section states that "[i]n grants of freehold interests in real property, the following or similar covenants must be construed as follows:

> 4. Further assurance.--A covenant that the grantor will "execute or procure any further necessary assurance of the title to said premises," must be construed as meaning that the grantor and his heirs, or successors, and all and every person or persons whomsoever lawfully or equitably deriving any estate, right, title or interest of, in, or to the premises conveyed by, from, under, or in trust for him or them, shall and will at any time or

times thereafter upon the reasonable request, and at the proper costs and charges of the grantee, his heirs, successors and assigns, make, do, and execute, or cause to be made, done and executed, all and every such further and other lawful and reasonable acts, conveyances and assurances in the law for the better and more effectually vesting and confirming the premises thereby granted or so intended to be, in and to the grantee, his heirs, successors or assigns forever, as by the grantee, his heirs, successors or assigns, or his or their counsel learned in the law, shall be reasonably advised or required.