To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
----------X
MAIN STREET XATA, LTD.,

Plaintiff,

- against -

VALINE REALTY CORP.,

Defendant.
----------X

DECISION/VERDICT

Index No.
5103/04

INTRODUCTION

This is an action by plaintiff for specific performance of a real estate sales contract. A non-jury trial was conducted in the above matter on December 8, 2005 and December 13, 2005. Based upon the credible evidence adduced thereat, and upon consideration of the concluding arguments of respective counsel on December 13th and the post trial submissions of the parties[1], and upon due deliberation, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

On or about July 20, 2003, defendant Valine Realty, as the seller, and plaintiff, Main Street Xata, as the buyer, entered into a contract, for the purchase price of $950,000, for the sale of a multi-family residential building located at 50-52 Main Street, in the City of Yonkers, New York. In late July, 2003, plaintiff made a deposit of $47,500, which was to be held by defendant's attorney in a non-interest bearing account. The remaining balance of $902,500 was to be paid by plaintiff at the closing by a purchase money note and mortgage. The closing was scheduled, according to the Contract, to take place on September 13, 2003.

The mortgage contingency clause, set forth in paragraph 8 of the Contract (see plaintiff's #1), required the plaintiff to obtain a written commitment, on or before September 5, 2003, from an institutional lender for the issuance of a first mortgage loan to purchaser (plaintiff) in the amount of $855,000. After setting

forth other requirements, it reads as follows:

> ...If such commitment is not issued on or before the Commitment Date then, unless purchaser has accepted a commitment that does not comply with the requirements set forth above, purchaser may cancel this contract by giving notice to seller within 5 business days after the Commitment Date, in which case this contract shall be deemed cancelled and therefore neither party shall have any further rights against, or obligations or liabilities to, the other by reason of this contract, except that the down payment shall be promptly refunded to purchaser...If purchaser fails to give notice of cancellation or if purchaser shall accept a commitment that does not comply with the terms set forth above, then purchaser shall be deemed to have waived purchaser's right to have cancelled this contract and to receive a refund of the down payment by reason of the contingency contained in this paragraph.

On July 30, 2003 Plaintiff's attorney ordered a Title Report through Statewide Abstract (see plaintiff's #2), and on August 15, 2003 a DHCR Report was ordered through DHCR Fact Finders, Inc (see plaintiff's #3).

On August 19, 2003 plaintiff's attorney wrote to defendant's attorney requesting an extension of the inspection and mortgage contingency dates since the seller's principal was expected to be out of town until September 5, 2003 and therefore unable to provide access to the defendant's engineer. The defendant agreed to extend the inspection and mortgage contingency dates in the Contract until September 25, 2003, and to extend the closing date until October 8, 2003 (see plaintiff's #4). On September 25th, plaintiff's attorney again sought and was granted a further extension of the Mortgage Contingency until October 22nd, and of the closing date until October 28th (see plaintiff's #6).

On November 3, 2003, defendant's attorney wrote to plaintiff's counsel indicating that since the October 28th closing date had passed, his client had elected to grant no further extensions and to deem the contract of sale to be cancelled and of no further force and effect. His IOLA check in the amount of $47,500 (the amount of the deposit) was enclosed in the letter (see plaintiff's #7). On November 4th, plaintiff's counsel wrote back to

defendant's attorney and indicated that their position was that the seller could not unilaterally cancel the Contract of Sale based upon the fact that the purchaser had not yet obtained a mortgage commitment. The letter explained that the mortgage contingency clause (paragraph 8) provides the purchaser with the option to cancel the Contract should he be unable to obtain a mortgage commitment, and that the plaintiff had not elected to waive the mortgage contingency and give notice of cancellation. The plaintiff thus considered the Contract to remain in full force and effect, and the deposit escrow check was accordingly being returned. The letter further indicated that plaintiff remained ready, willing, and able to close the sale as soon as the defendant fulfilled its contractual obligations to obtain a Certificate of Occupancy from the City of Yonkers and to provide proof that the building was registered with DHCR from 1984 through 2003 and that the Operation and Maintenance reports were filed with the City of Yonkers and the Westchester Rent Guidelines Board for the above years (see plaintiff's #8; also see plaintiff's #1, [a] paragraph 16 of the Contract, [b] paragraph18 of Rider to the Contract, and [c] paragraph 1 of Second Contract Rider).

On November 14, 2003, defendant's counsel wrote to plaintiff's attorney and reiterated that his client still elected to cancel the contract, but further indicated that should plaintiff wish to close, defendant would deliver a deed and the requisite papers, upon full and complete payment of all of the monies due under the contract at a closing scheduled for 3:00 p.m. on November 25th. A "Time is of the essence" notice (which neglected to include the actual date) was enclosed with the letter (see plaintiff's #9).

On November 14, 2003, defendant obtained a loan commitment (with an expiration date of November 28, 2003) from the Astoria Federal Savings and Loan Association (see plaintiff's exhibit #10). On November 21, 2003, plaintiff obtained a fixed rate mortgage commitment (with an expiration date of January 15, 2004) from the SUMA (Yonkers) Federal Credit Union. The loan was for the amount of $712,500 and issued in the name of William Krewec (as Borrower) for a 14 unit premises located at 50-52 Main Street, in Yonkers (see plaintiff's #11). Mr. Krewec is the President and sole shareholder of Main Street Xata, LTD, the plaintiff in the instant matter.

The trial record is silent as to what, if anything, occurred on November 25th. As to subsequent events, plaintiff's attorney, Andrij Cichowlas, testified that he and defendant's attorney, Herbert Posner, spoke on the phone several times during the next two or three months. The defendant had taken several trips to California, during the period, and Mr. Posner himself was in

Florida most of the winter according to Cichowlas. The defendant's principal did not testify at the trial, nor did defendant call any witnesses to testify. Mr. Krewec testified that he indicated to his lawyer in March, 2004 that he was prepared to purchase the property "as is" and that he had the necessary funds to close the transaction. More specifically, Mr Krawec testified that he had $190,000 in a SUMA Federal Credit Union account at the time, in addition to the $712,500 SUMA mortgage commitment, and the already tendered $47,500 down payment, for a total of $950,000, the agreed to purchase price in the Contract.

On March 1, 2004, plaintiff's counsel wrote to defendant's attorney indicating that his client was in default by not providing, or even applying for certificates of occupancy, and for not repairing water leaks in the basement as agreed to in the Rider to the Contract. The letter went on to recite the following:

> We have requested your office on many occasions to set a closing date. We have also informed you that our client is at risk of having his mortgage interest rate increase(d) if we do not close this transaction soon. The only response we have had from your office was that you are not able to contact your client, or that your client is in California, or that you are in Florida. Such responses are insufficient, inadequate and do not diminish your client's contractual responsibilities, nor do they excuse his refusal to set a closing date. Accordingly, let this letter serve as notice that the closing for the above listed transaction is hereby scheduled for March 18, 2004, ***TIME BEING OF THE ESSENCE***, at 11:00 a.m. at the offices of SUMA (Yonkers) Federal Credit Union, 125 Corporate Boulevard, Yonkers, New York 10701.
>
> We fully expect your client will be prepared to close this transaction, and that he will have the required Certificate of Occupancy for the premises and that the basement water leaks shall be repaired by such date. Should your client not be prepared to close on the said date, **TIME BEING OF THE ESSENCE**, please be advised that our client has instructed us to prepare and file a Lis Pendens against the property and to commence an action for Specific Performance. (plaintiff's #12).

On March 2, 2004, defendant's counsel wrote to plaintiff's attorney that it was his understanding that plaintiff had waived the requirement of obtaining a Certificate of Occupancy and assured that the water leaks would be repaired as needed. He indicated that he and his client were not available on March 18th, and suggested that in light of that fact plaintiff re-think its position concerning time of the essence. Mr. Posner concluded his letter by stating "...I also told you that I cannot force anyone to close and do not intend to do so." (see plaintiff's #13).

On March 17, 2004, plaintiff's attorney responded in a final letter as follows:

> Please be advised that my client has been granted an extension on his mortgage commitment until March 31, 1004. **WE MUST CLOSE THIS TRANSACTION ON OR BEFORE MARCH 31,2004.**
>
> To that end, our client will agree to close this transaction, notwithstanding that your client has not obtained a Certificate of Occupancy, as required by the Contract of Sale, **PROVIDED THAT** we close on or before March 31, 2004, *TIME BEING OF THE ESSENCE.*
>
> Please note that your client must fix the water problem in the basement of the building (s) as called for in the Contract.
>
> Please contact this office upon your receipt of this letter to schedule a closing date. Please be advised, that should your client be unwilling to close this transaction by March 31, 2004, we will file a Lis Pendens against the premises and commence an action for Specific Performance. (see plaintiff's #14).

The instant action was filed on April 8, 2004.

DISCUSSION

The defendant argues that plaintiff is not entitled to specific performance in that it failed to prove that it had the funds to close the transaction. In support of this, defendant argues that the SUMA commitment was issued to William Krewec individually as borrower, and not to Main Street Xata, Inc., the actual Contract purchaser of the property. In addition, defendant argues that plaintiff did not prove at trial, that Mr. Krewec had withdrawn, or for that matter had available, the $190,000 cash necessary to pay the gap between the mortgage and the down

payment. Along these lines, defendant had the right to expect performance under the exact terms of the Contract, and to reject any non- conforming performance. Since there is a provision in the Contract prohibiting assignment (Rider to Contract ¶8) the buyer would remain Main Street, not Krewec, and the mortgage, in Krewec's name, would not benefit Main Street.

Defendant further argues that Plaintiff did not tender performance on the closing date or within a reasonable time there after. Since a closing date was never scheduled, plaintiff cannot demonstrate that it attended a closing and that it produced payment of the balance of the purchase price in acceptable funds. No tender was made by the date set forth in the Contract, nor was any closing date scheduled, or tender made, within a reasonable time thereafter. In addition, Plaintiff did not prove that it was, at any time, ready, willing, and able to tender performance regardless of any claimed breach or anticipatory breach by the defendant. Claimed, or anticipatory breaches, such as the failure to obtain a certificate of occupancy, failure to produce the rent registration documents, or to fix leaks in the basement are irrelevant to plaintiff's obligation to prove that it was ready, willing and able to perform, because defendant was only obligated to produce or show proof of correction of these items at closing.

Plaintiff argues that the mortgage contingency clause in the Contract was included for the purchaser's benefit. Paragraph 8 did not give the seller the right to cancel the Contract in the event that the buyer was not able to obtain the specified mortgage commitment, but rather gave that right to the plaintiff as purchaser. The only penalty that could befall a purchaser who was unable to obtain a mortgage commitment at the closing date, or within a reasonable time thereafter, is a waiver of the right to cancel. Delays caused by bank requirements, absent a showing of substantial prejudice or injury, do not justify seller's attempt to cancel the Contract. There was no such showing of substantial prejudice or injury caused by the delay in obtaining financing in this case.

When the defendant/seller no longer wanted to give additional time to the plaintiff to obtain a mortgage, the only recourse available was to set a closing date. This was never done. Extensions of time granted by plaintiff to clear water damage, gather DHCR reports, and obtain a certificate of occupancy do not affect the mortgage contingency issue, nor do they amount to a reformation of the Contract. Finally, plaintiff was willing and able to perform. A tender is an offer to do or to perform an act. Plaintiff tendered the money by offering to close the transaction, and by setting a specific time is of the essence closing date and/or by offering to close on a date prior to March 31, 2004 that was convenient to the defendant's availability or travel schedule.

CONCLUSIONS OF LAW

The Court finds that the mortgage contingency clause in the Contract was included for the purchaser's benefit. It did not grant seller the right to cancel the Contract in the event that Purchaser was unable to obtain the specified mortgage commitment within the time provided.

The parties by agreement extended the mortgage commitment until October 22, 2003 and the closing date until October 28th. Defendant's November 3rd letter attempting to cancel the Contract and return the down payment due to plaintiff's inability to obtain a mortgage commitment was without effect. By November 14th, defendant had obtained a loan commitment from Astoria Federal and a SUMA fixed rate mortgage commitment by November 21st. The attempt by defendant to set a Time of the Essence Closing date on November 25th appears to be facially defective because of the failure to include a date in the Notice. Even if the notice were to be considered valid, there was no proof or evidence in the record showing that the closing occurred on that date, that the defendant actually appeared for the closing, or that the purchaser defaulted, or failed to appear at the scheduled closing. Indeed, the defendant was apparently in default with regard to several obligations required by the Contract or its riders including proof of compliance with DHCR regulations and the obtaining of a Certificate of Occupancy and the plaintiff was insisting on compliance with same.

To the contrary, the evidence shows that the attorneys for the parties continued to communicate with each other regarding the sale from December, 2003 through February, 2004. On March 1, 2004, Plaintiff clearly set a March 18, 2004 Time of the Essence closing date which was communicated to defendant. In doing so, plaintiff tendered payment by offering to close the transaction. A tender has been defined as an offer of performance coupled with the present ability to perform (13-67 Corbin on Contracts Section 67.5). Moreover, the evidence shows that at the time of the setting of the March 18th closing date, plaintiff was ready and able to perform. The offer to perform is sufficient to put the other party in breach. Plaintiff's testimony established that he had the $190,000 gap money in a personal SUMA account. Although defendant argues that plaintiff was unable to perform since the mortgage commitment was in Mr. Krewec's name and not in Main Street's, and therefore contrary to the provisions of the Contract prohibiting assignment, the Court disagrees. First, paragraph 8 of the Rider prohibits assignment of *the Contract* (emphasis added) and does not restrict the provisions of any necessary *mortgage commitment* (emphasis added) in any way.

Secondly, although the SUMA commitment is issued to Mr. Krewec, it specifically provides that the purpose of the loan is for the purchase of the premises located at 50-52 Main Street. There is no prohibition that this Court is aware of which would prohibit Mr. Krewec, at the scheduled closing, from endorsing over to defendant the funds (presumably in the form of a bank or certified check) obtained through the SUMA commitment for the purchase of the subject premises. When the defendant indicated an inability or unwillingness to attend the scheduled closing on March 18th, plaintiff gave the defendant the option of, in essence, setting whatever date was convenient to the defendant for the closing, as long as it was on or before March 31st, when the extension of the mortgage commitment expired. It should be noted that plaintiff had by this time abandoned or waived the requirement of the obtaining of a Certificate of Occupancy, and only was demanding that the defendant fix the water problem in the basement, which defendant's counsel had agreed to in the March 2, 2004 letter.

Based upon the foregoing, defendant's failure to close constituted breach of the Contract and, under the circumstances presented, plaintiff is entitled to specific performance (see *Leishman v. S&B Realty of Orange County*, 218 A.D. 2nd 687 (2nd Dept. 1995).

Any request for additional damages is denied based upon the lack of proof adduced at trial.

Submit Judgement.

This shall constitute the Opinion, Decision, and Verdict of the Court.

Dated: White Plains, New York
March 21 , 2006

S/_____

HON. JOHN R. LaCAVA, J.S.C.

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[1] The Court agrees with Mr. Posner's letter complaint of February 23, 2006 that the attachment to Mr. Kosterich's Memorandum of Law, denominated as "Important Information for members...", was never marked into evidence at the trial of the instant matter. The attachment and any reference to it in the memorandum (e.g. point 6 - relating to alleged contractual obligation with SUMA) will be accordingly disregarded by the Court and not considered in the decision.