SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE PETER J. KELLY** IAS PART 16
Justice

DONALD MAXWELL, et al.,

Plaintiffs,

- against -

NELLIE DONALDSON, et al.,

Defendants.

INDEX NO. 22343/2006

MOTION DATE MARCH 20, 2007

MOTION CAL. NO. 11

The following papers numbered 1 to 10 read on this motion by the defendant for, inter alia, summary judgment dismissing the complaint and all of the cross claims asserted against her.

	PAPERS NUMBERED
Notice of Motion/Affid(s)-Exhibits.....	1 - 5
Affid(s) in Opp.-Exhibits.....	6 - 8
Reply Affid(s).....	9 - 10

Upon the foregoing papers the motion and cross-motion are decided as follows:

Defendant Nellie Donaldson has moved for, inter alia, summary judgment dismissing the complaint and all of the cross claims asserted against her. Plaintiff Donald Maxwell and plaintiff Gary Pearson have cross-moved for, inter alia, summary judgment on their complaint.

Defendant Nellie Donaldson owns real property known as 138-88 Francis Lewis Boulevard, Rosedale, New York (the subject property). Pursuant to a contract of sale entered into on or about February 16, 2006, defendant Donaldson agreed to sell the subject property to plaintiff Donald Maxwell for a price of $850,000. The contract had a mortgage contingency clause which provided in relevant part: "The purchasers agree to make prompt and diligent application to a lending institution of their selection for a mortgage loan. . . In the event a firm written commitment on the terms herein above described is not received by the Seller's attorney, within the time stated above, either party can cancel this contract. . ." The plaintiff purchasers had 45 days from the execution of the contract (April 3, 2006) to obtain a "conventional mortgage in the sum of $575,000 at the prevailing rate of interest." The plaintiffs made a down payment of $50,000.

Defendant Donaldson extended the mortgage contingency period twice before sending a "time of the essence" letter dated May 1, 2006 fixing a closing date for May 16, 2006, which was later extended to June 11, 2006. Thereafter, the parties amended the contract of sale to name plaintiff Gary Pearson as an additional purchaser, and the defendant's attorney sent another letter fixing a "final" closing date of June 16, 2006. By letter dated June 22, 2006, the defendant's attorney declared the plaintiff purchasers to be in default, and he claimed a forfeiture of the $50,000 down payment, based upon the plaintiffs delay in the closing of title and their failure to cooperate with the lender in obtaining a mortgage. Nevertheless, by letter dated November 10, 2006, the defendant's attorney offered to return the $50,000 down payment on condition that the plaintiffs cancel the notice of pendency filed against the property. The plaintiffs refused the offer.

The plaintiffs allege that they obtained a "conditional" mortgage approval in a timely manner, but could not obtain a "final" approval from the lender because of the defendant's actions.

First, plaintiffs state that when the lender discovered that the defendant had purchased the subject property for $459,000 only about two months before entering into this contract with the plaintiffs for $845,000, the sharp, sudden increase in price made the lending bank suspicious of the transaction. Although the plaintiffs allegedly acted diligently to obtain the mortgage, the bank questioned the "seasoning of title" and wanted time to elapse for there to be a "seasoning of title." Only once title had seasoned, would the bank make a second appraisal of the property.

Second, the appraiser who inspected the property on June 2, 2006, had concluded that the property was "predominantly commercial in nature." He did not complete his assignment as he was licensed only to do residential appraisals and recommended the hiring of a licensed commercial appraiser. The attorney for the plaintiffs sent a letter dated June 13, 2006 to the defendant's attorney stating that the appraiser for the bank had concluded that "the property was more inclined to be than not, a commercial property," which had also caused a delay in obtaining the mortgage.

Third, it is alleged defendant caused further delay in obtaining a mortgage since she had made changes to the subject property without proper building permits so that the subject property did not conform to the certificate of occupancy.

The plaintiffs began this action for specific performance and damages by the filing of a summons and complaint on October 12, 2006. The defendant served an answer with counterclaims, the first for a judgment declaring the contract terminated and allowing her to retain the down payment, the second for damages arising from breach of contract, and the third for the recovery of attorney's fees.

Turning to that branch of the defendant's motion for summary judgment dismissing the complaint "[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. . ." (Alvarez v Prospect Hospital, 68 NY2d 320, 324). "The elements of a cause of action for specific performance of a contract are that the plaintiff substantially performed its contractual obligations and was willing and able to perform its remaining obligations, that defendant was able to convey the property, and that there was no adequate remedy at law. . ." (EMF General Contracting Corp. v Bisbee, 6 AD3d 45, 51; see, Piga v Rubin, 300 AD2d 68).

In the case at bar, the defendant showed prima facie that the plaintiffs had not performed their contractual obligation to obtain a mortgage and that they were not able to pay the contract price by the date set for closing of title. The defendant also established her prima facie right to summary judgment by submitting proof that the contract entered into by the parties permitted her to cancel the contract in the event that the plaintiffs failed to obtain financing within a specified time (See, D'Agnese v Spinelli, 29 AD3d 851; Suarez v Ingalls, 282 AD2d 599). Consequently, the burden on this motion shifted to the plaintiffs to show that there is an issue of fact which must be tried (See, Alvarez v Prospect Hospital, supra).

In this regard, defendant cannot assert the failure of plaintiffs to perform if defendant has frustrated or prevented the performance (See, Steven Strong Development Corp. v Washington Medical Associates, 303 AD2d 878; A-1 General Contracting Inc. v River Market Commodities Inc., 212 AD2d 897; Hidden Meadows Development Co. v Parmelee's Forest Products Inc., 289 AD2d 642; Young v Whitney, 111 AD2d 1013). Moreover, where the delay in the completion of a contract is caused by a party, that party will not be allowed to assert to its advantage the other party's failure to perform in a timely manner (See, Staten Island Supply Co., Inc. v Beverly-Glenwood Richmond Corp., 96 AD2d 553; Janowitz Bros. Venture v 25-30 120th Street Queens Corp., 75 AD2d 203). In the case at bar, plaintiffs have successfully raised issues of fact concerning whether, under all of the circumstances of this case, the actions of the defendant, especially in allegedly improperly altering the premises, prevented the plaintiffs from obtaining a firm mortgage commitment in a timely manner.

To the extent that the plaintiffs' in their opposition papers seek to cross-move for summary judgment on their causes of action for specific performance, that application is denied as procedurally improper as no notice of cross motion was ever served and since the requisite monetary fee was not paid. These procedural defects notwithstanding, if the court were to address the "cross-motion" on its merits, it would nevertheless be denied.

A mortgage contingency clause in a contract for the sale of realty is ordinarily a condition precedent for the benefit of both parties, and ordinarily a seller can cancel the contract and return the down payment in

the event the buyer does not obtain a mortgage commitment within the contractually specified time period (See, Degree Sec. Systems, Inc. v F.A.B. Land Corp. 17 AD3d 402; Dann v King Associates, LLC, 303 AD2d 539). However, "[a] party to a contract cannot rely on the failure of another to perform a condition precedent where he has frustrated or prevented the occurrence of the condition. . ." (Sunshine Steak, Salad & Seafood, Inc. v W.I.M. Realty, Inc., 135 AD2d 891, 892. "[A] promisor is not discharged by the nonperformance of a condition precedent. . .which the promisor prevented or hindered. . ." (Simon v Electrospace Corp., 28 NY2d 136, 142). Under all of the circumstances of this case, there are corresponding issues of fact concerning whether the plaintiffs made a good faith attempt to obtain a mortgage (See, D'Agnese v Spinelli, supra; Kapur v Stiefel, 264 AD2d 602; Sbordone v Clouse, 207 AD2d 337) and whether the actions of the defendant, as highlighted above, actually prevented the plaintiffs from obtaining a firm mortgage commitment in a timely manner.

That branch of the defendant's motion which is for summary judgment on her counterclaims is denied. There are issues of fact pertaining to, inter alia, whether the plaintiffs breached the contract by failing to make a good faith attempt to obtain a mortgage commitment (See, D'Agnese v Spinelli, supra; Kapur v Stiefel, supra; Sbordone v Clouse, supra).

That branch of the defendant's motion which is for summary judgment dismissing all of the cross claims against her is denied. The defendant did not show that another party has asserted cross claims against her, and, if such exist, she did not carry her burden of showing a prima facie entitlement to judgment as a matter of law (See, Alvarez v Prospect Hospital, supra).

That branch of the defendant's motion brought pursuant to CPLR Secs. 3001 and 3017 which is deemed to be for summary judgment declaring the contract void ab initio is denied. The failure of a condition precedent does not render a contract void ab initio.

That branch of the defendant's motion again brought pursuant to CPLR Secs. 3001 and 3017 which is deemed to be for summary judgment directing the release of the down payment being held in escrow to the defendant is denied. While it is true that the seller can retain the down payment where a purchaser defaults on a real estate contract without lawful excuse (See, DiScipio v Sullivan, 30 AD3d 660; Micciche v Homes by Timbers, Inc., 18 AD3d 833), in the case at bar, there are issues of fact pertaining to which party breached the contract.

That branch of the defendant's motion which is for an order cancelling the notice of pendency filed by the plaintiffs is denied. The defendant did not show that there are grounds for cancelling the notice of pendency. (See, CPLR §6514).

Dated: JUNE 18, 2007

Peter J. Kelly, J.S.C.