SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 4
NASSAU COUNTY

FIR-JAY CORP.,

Plaintiff,

INDEX No. 017439/07

MOTION DATE: May 7, 2008
Motion Sequence # 001, 002

-against-

THE REALTY ASSET GROUP, LTD.,

Defendant.

The following papers read on this motion:

Notice of Motion..... X
Amended Cross-Motion..... X
Affirmation in Opposition..... X
Reply Affirmation X
Memorandum of Law..... XXX
Reply Memorandum of Law..... XX

This motion, by plaintiff, for summary judgment pursuant to CPLR §3212, granting to plaintiff an Order declaring its rights under the Contract and further granting the plaintiff a monetary judgment in the amount of $250,000.00, representing liquidated damages together with such other and further relief as this Court may deem just and proper; and an amended cross-motion, by defendant, for an order pursuant to CPLR §3212, granting summary judgment to RAG dismissing the Complaint and granting judgment to RAG on its counterclaim, together with such other and further relief that the Court may deem just and proper, are **both** determined as hereinafter set forth.

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FACTS

This action arises out of an alleged breach of contact in a real estate transaction between plaintiff, Fir-Jay, Corp, (hereinafter as "Fir-Jay") and defendant, The Realty Asset Group, Ltd. (herein after as "RAG"). On June 22, 2007, the parties entered into a Contract of Sale wherein RAG agreed to purchase from Fir-Jay a parcel of real property located in Freeport, New York for the sum of five million seven hundred seventy-five thousand dollars ($5,775,000.00).

Prior to the execution of the contract, an environmental survey of the subject property was conducted that revealed the existence of a buried, leaking fuel tank. The parties were aware of said defect at the time they entered into the contract. In order to address the environmental contamination on the subject property, Fir-Jay and RAG provided in § 4.16 of the contract that Fir-Jay would assume responsibility to remediate what the parties referred to as the "Spill". Fir-Jay promised to "clean up and remediate the gasoline spill ("Spill") and upon completion, deliver to RAG at or prior to closing, from the New York State Department of Environmental Conservation ("DEC"), "a letter indicating that the Spill file has been closed". (**Contract of Sale**, § 4.16) The parties provided in the contract that closing would take place between August 27, 2007 and August 30, 2007.

To remediate the "Spill", Fir-Jay hired Freuenthal & Elkowitz Consulting Group, Inc., (hereinafter as "Freuenthal & Elkowitz"), and on July 27, 2007 they excavated the leaking fuel tank and stained soil, which were later disposed. Soil and ground water samples were extracted and analyzed at a testing facility. On August 29, 2007, attorneys for Fir-Jay received correspondence from Freuthenthal & Elkowitz wherein they indicated that the "Spill" was cleaned and remediated; however, the DEC would not issue a "No Further Action" letter; and would not close the file for six months pending surveillance of the groundwater. Subsequently, the parties modified the contract to extend the closing date to on or before September 7, 2007 with Time of the Essence as to such date.

Fir-Jay has yet to receive the closing letter from the DEC because further remediation on the subject property was found to be required. Based upon the foregoing information, attorneys for RAG notified Fir-Jay 's counsel by correspondence dated September 5, 2007 that RAG was not in a position to proceed to closing.

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PLAINTIFF'S CONTENTIONS

Counsel for plaintiff contends that summary judgment is warranted because based upon the clear and unambiguous terms of the contract it is evident that RAG is in breach. Fir-Jay purports that it has fulfilled its obligations pursuant to the terms of the contract. Specifically, Fir-Jay claims that pursuant to § 4.16 of the contact, it remediated the environmental contamination on the subject property to the extent that § 13.02 of the contract limits the amount of money that it can expend to cure the defect. Fir-Jay's attorney argues that the aforementioned terms are not contradictory in nature. Moreover, the closing date set forth in the contract including the Time of the Essence clause serves as a temporal limitation on Fir-Jay's performance of its contractual obligations. Therefore, Fir-Jay's obligation to remediate the environmental defect has ceased. Notwithstanding Fir-Jay's inability to obtain a closing letter from the DEC, pursuant to § 13.02, RAG was obligated to elect either to accept title as is and receive a credit against the cost of the sale to cure the defect, or terminate the contract and be refunded the down payment. Accordingly, Fir-Jay contends that it is entitled to retain RAG's down payment as liquidated damages and their liability with respect to the "Spill" is restricted to the maximum expense designated by § 13.02 of the contract.

DEFENDANT'S CONTENTIONS

Counsel for RAG agrees that the contract terms are clear and unambiguous. However, RAG alleges that Fir-Jay breached the contract by failing to perform its obligation to remediate the environmental contamination on the subject premises and deliver the closure letter from the DEC prior to or at closing. Therefore, RAG is entitled to summary judgment in addition to specific performance and monetary damages. Attorney for RAG contends that § 4.60 of the contract that contemplates Fir-Jay's duty to clean the "Spill" is a fundamental term of the contract. As such, the extent of Fir-Jay's obligation is not limited monetarily by § 13.02 of the contract, or temporally by the closing date set forth in the contract. Moreover, even if the Court finds the language to be ambiguous, negotiations and agreements that occurred prior to the execution of the contract shows that Fir-Jay's obligation to remediate the "Spill" was not limited to the maximum expense set forth by § 13.02.

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DECISION

The rule in motions for summary judgment has been succinctly re-stated by the Appellate Division, Second Dept., in (**Stewart Title Insurance Company, Inc. v Equitable Land Services, Inc.**, 207 AD2d 880, 616 NYS2d 650, 651, 1994):

> "It is well established that a party moving for summary judgment must make a **prima facie** showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (**Winegrad v New York Univ. Med. Center**, 64 NY2d 851, 853, 487 NYS2d 316, 476 NE2d 642; **Zuckerman v City of New York**, 49 NY2d 557, 562, 427 NYS2d 595, 404 NE2d 718). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (**State Bank of Albany v McAuliffe**, 97 AD2d 607, 467 NYS2d 944), but once a **prima facie** showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (**Alvarez v Prospect Hosp.**, 68 NY2d 320, 324, 508 NYS2d 923, 501 NE2d 572; **Zuckerman v City of New York**, **supra**, 49 NY2d at 562, 427 NYS2d 595, 404 NE2d 718)".

Applying the foregoing legal principles to the facts of the case at bar has warranted an intensive examination of the record as presented to the court, including pleadings, affidavits, the Contract of Sale of the subject property, and other relevant proof.

The vital issue herein is one of interpretation. The question of ambiguity in a writing is within the discretion of the courts to resolve. (**Wallace v. 600 Partners Co.**, 86 NY2d 543, 548, 634 NYS2d 669, 1995). It is well settled that when a contract is clear and complete it should be enforced according to its terms. (**Vermont Teddy Bear v. Madison Realty**, 1 NY3d 420, 475, 775 NYS2d 765, 2004; **W.W.W. Assoc. v. Giancontieri**, 77 NY2d 157, 565 NYS2d 440, 1990). This legal principle is especially significant "in the context of real property transactions, 'where commercial certainty is a paramount concern' (**W.W.W. Assoc.**

v. Giancontieri, supra), and where, as here, the instrument was negotiated between sophisticated, counseled business people negotiating at arms length." (Wallace v. 600 Partners Co., supra).

At bar, the terms of the Contract of Sale in question are definite and unequivocal. It is evident from the language set forth in § 4.16 of the contract that the parties contemplated the necessity to clear the subject premises of environmental contamination and as a result incorporated the provision into the contract to treat this matter. Additionally, it was their intention for Fir-Jay, as seller, to assume the duty to clean the "Spill". While said provision does not mention any monetary or temporal limitation on Fir-Jay's obligation to perform, counsel for Fir-Jay purports that § 13.02 of the contract enforces a monetary restriction on Fir-Jay's duty.

However, the subject portions of the contract are separate and distinct. Even when the provisions are read together, it is apparent that the purpose of §13.02 contemplates the seller's inability to convey title to the purchaser whereas § 4.16 imposes the duty on Fir-Jay to clean the "Spill" on the subject property and to tender a letter from the DEC reflecting that their file is closed prior to or at closing. As it is Fir-Jay's obligation to clean the "Spill", they are thus liable for the expenses required to clean the "Spill". Therefore, Fir-Jay has not satisfied its initial burden to warrant the court to grant summary judgment. (see, Zuckerman v. City of New York, 49 NY2d 557, 562, 427 NYS2d 595, 1980).

With respect to counsel for Fir-Jay's argument that RAG's attorneys' introduction of evidence concerning negotiations and agreements that occurred prior to the contract is barred by parole evidence is immaterial. Even if the plaintiff had notice about the cost to cure the defect, the provision in the contract that expressly deals with the Spill does not establish a monetary limitation, and nonetheless the plaintiff is responsible.

Turning now to RAG's cross motion for summary judgment, counsel for Fir-Jay argues that affidavits by RAG's attorneys that were submitted in support of their motion are not in admissible form as the attorneys would not have personal knowledge of the facts. However, the attorneys have knowledge of the transaction and its surrounding circumstances as they were involved in the negotiations and the drafting of the contract in question. Additionally, annexed to the affidavits was documentation that substantiated the facts attested to by the attorneys including correspondence between the parties referencing the contract and the "Spill". It has been established that even if an attorney lacks personal knowledge, the attorney's affidavit or affirmation is in admissible form

when it is proffered with other proof. (**Zuckerman**, **supra** at 562-563; **Alvarez v. Prospect Hosp.**, 68 NY2d 320, 508 NYS2d 923, 1986 (citing **Olan v. Farrell Lines**, 64 NY2d 1092, 484 NYS2d 884). Therefore, defendant's cross motion for summary judgment is supported by evidence in admissible form.

Counsel for RAG contends that RAG is entitled to a declaratory judgment directing Fir-Jay to specifically perform the Contract of Sale by appearing at a closing and delivering to RAG the "Spill" closure letter and a deed to the premises, and to be awarded monetary relief. It is well settled that "[b]efore specific performance of a contract for the sale of real property may be granted, a buyer must demonstrate that he or she was ready willing and able to perform under the contract regardless of any alleged anticipatory breach by the defendant." (**McCabe v. Witteveen**, 34 AD3d 653, 827 NYS2d 73, 2nd Dept., 2006). The record herein is devoid of any evidence that RAG was ready, willing and able to purchase the property at the time and date set in the contract, as modified. (see, **Singh v. Gopaul**, 26 AD3d 370, 809 NYS2d 549, 2nd Dept., 2006; **Tsabari v. Haye** 13 AD3d 360, 786 NYS2d 102, 2nd Dept., 2004). Furthermore, RAG's attorney has not established that RAG has been damaged by Fir-Jay's inability to perform its contractual obligation. Therefore, RAG has not made a prima facie showing of entitlement to specific performance or monetary relief.

Accordingly, Fir-Jay's motion and RAG's cross motion for summary judgment are both **denied**.

A Preliminary Conference has been scheduled for September 11, 2008 at 9:30 a.m. in Chambers of the undersigned. Please be advised that counsel appearing for the Preliminary Conference **shall** be fully versed in the factual background and their client's schedule for the purpose of setting **firm** deposition dates.

Dated JUL 10 2008

J.S.C.

ENTERED
JUL 14 2008
COUNTY CLERK'S OFFICE