

**1111 Myrtle Avenue Realty, LLC v Redstone USA,
Corp.**

2008 NY Slip Op 33509(U)

December 30, 2008

Supreme Court, Kings County

Docket Number: 5311/08

Judge: David Schmidt

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At an IAS Term, Commercial Part 2 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 30th day of December, 2008.

P R E S E N T:

HON. DAVID I. SCHMIDT

Justice.

-----X

1111 MYRTLE AVENUE REALTY, LLC,

Plaintiff,

- against -

Index No. 5311/08

REDSTONE USA, CORP., DANIEL LEE
AND EVA LEE,

Defendants.

-----X

The following papers numbered 1 to 8 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	_____ 1-5, 6-8 _____
Opposing Affidavits (Affirmations) _____	_____ 7 _____
Reply Affidavits (Affirmations) _____	_____
_____ Affidavit (Affirmation) _____	_____
Other Papers _____	_____

Upon the foregoing papers, plaintiff, 1111 Myrtle Avenue Realty, LLC (plaintiff) moves for an order, pursuant to CPLR 3212 and 3211, granting partial summary judgment on its first cause of action for specific performance against defendants Redstone USA, Corp. (Redstone) and Daniel and Eva Lee (the Lees) (collectively, defendants) and for dismissal of defendants' first, second, third and eighth counterclaims. Defendants cross-move for an

order, (1), pursuant to CPLR 3212, granting summary judgment dismissing plaintiff's complaint and granting their first, second, third and eighth counterclaims, and (2), pursuant to CPLR 5015, vacating the judgments by confession entered by plaintiff against defendants.

Background Facts

(a)

Redstone and Daniel Lee, president of Redstone, entered into a contract of sale (the original contract) on January 29, 2007 for certain real property located at 1103-1123 Myrtle Avenue in Brooklyn (the subject premises). Redstone and Daniel Lee agreed in the original contract, prepared by plaintiff's attorney, Aaron Boukhov (Boukhov), among other points, that they would convey the premises to plaintiff for an \$11.2 million purchase price; that plaintiff would pay defendants a \$600,000 direct down payment; that a time of the essence closing would occur on May 31, 2007; and that the parties could pursue specific performance upon default. Attorneys, present for execution of the original contract, represented both parties. Two mortgages totaling \$10.225 million indisputably existed against the subject premises when the parties executed the original contract.

(b)

Plaintiff, Redstone and Daniel Lee first amended the contract (the first amendment) on or about April 17, 2007. That first amendment, among other items, extended the closing date to July 31, 2007, time being of the essence, reduced the purchase price to \$10.7 million

and provided for specific performance upon defendants' default.¹ Plaintiff also added \$900,000 to his down payment. The first amendment further provided that if defendants failed to deliver title to the premises on the time of the essence closing date, then defendants would pay plaintiff liquidated damages of \$10,000 for every delayed delivery day after July 31, 2007. The signing of the first amendment occurred in the absence of defendants' counsel.

(c)

Plaintiff, Redstone and Daniel Lee entered into the (now-void) second amendment to the contract on or about June 11, 2007. That second amendment, among other points, reduced the purchase price to \$10.1 million and extended the time of the essence closing date to January 1, 2008. Execution of the second amendment also occurred without defendants' counsel being present.

Plaintiff, Redstone and Daniel Lee entered into a replacement second amendment to the contract (replacement second amendment) on June 18, 2007. That replacement second amendment cancelled, nullified and voided the second amendment and set the new closing date as July 31, 2007, but allowed an extension to October 31, 2007 upon written notice. The replacement second amendment provided for a purchase price of \$10.1 million and obligated

¹Plaintiff alleges that its counsel sent a copy of the draft first amendment to the original contract to defendants' counsel, Peter Jeon, on or about April 17, 2007, prior to execution of the first amendment. Jeon alleges in his affidavit opposing plaintiff's motion that he never consented to Boukhov communicating with his clients regarding the contract, and that the draft of the first amendment was dated April 12, 2007, four days before it was sent to him.

plaintiff to pay defendants a \$500,000 third direct down payment. This increased the total down payment from plaintiff to \$2 million. The replacement second amendment also stated that if defendants failed to deliver title to plaintiff on the closing date (either July 31, 2007 or October 31, 2007, if defendants extended in writing), then defendants would pay plaintiff liquidated damages of \$10,000 per day for every day delaying closing. In addition, the replacement second amendment provided for the contract's specific performance upon default. Again, execution of the replacement second amendment occurred without defendants' counsel being present.

Daniel Lee (in his personal capacity and in his capacity as president of Redstone) and Eva Lee thereafter signed confession of judgment affidavits on June 18, 2007, the same day execution of the replacement second amendment occurred. These affidavits acknowledged their liability to plaintiff for \$1.2 million of the \$2 million down payments previously made. Plaintiff further alleges that defendants, on the same day, signed a letter drafted by plaintiff's counsel (the June 18 letter) which indicated that defendants refused to require the presence of counsel even after being advised by plaintiff's counsel of the need to retain counsel. Defendants in said letter waived "any claim or defense of lack of counsel for their independent decision not to retain counsel in connection with this transaction in any action or proceeding in any way related to this transaction."

Defendants' counsel, on or about July 31, 2007, provided plaintiff with a written notice requesting adjournment of the closing date until October 31, 2007, the maximum time

period allowed under the replacement second amendment to the contract.² Plaintiff's attorney sent a letter to defendants' attorney on or about October 25, 2007 confirming the closing arrangements. Redstone, according to Lee, indicated to plaintiff in October 2007 that it would not close by November 1, 2007. Lee alleges that plaintiff agreed to extend the closing date to February 15, 2008, time being of the essence, in exchange for a simultaneous payment of \$300,000 as consideration.

(d)

Plaintiff, Redstone, Daniel Lee, Eva Lee and Speed Group, Inc. (Speed Group), a real estate company founded and operated by Daniel Lee),³ reflected this agreement on or about November 7, 2007 by executing the third amendment (third amendment)⁴ to the contract. That third amendment extended the closing date to February 15, 2008, time being of the essence with respect to defendants only, in exchange for defendants' payment of \$300,000 to plaintiff. The parties also agreed that defendants' failure to tender the \$300,000, would

²Plaintiff also caused recording of the judgments of confession executed by defendants on June 18, 2007 in the amount of \$1.2 million each against Redstone, Daniel Lee and Eva Lee to occur on or about August 29, 2007.

³Plaintiff alleges that Daniel Lee is a highly sophisticated real estate developer who owns numerous properties in the United States and Canada and that Speed Group, according to its website, is a "multi-national organization overseeing over \$500 million in real estate ventures and transactions."

⁴Plaintiff alleges that its counsel sent a copy of the draft third amendment to the original contract to defendants' counsel, Peter Jeon, on or about November 8, 2007. Such issuance, plaintiff alleges, occurred before the meeting between defendants and plaintiff when they executed the third amendment. Jeon argues that plaintiff's attorney sent him the copies at 5:00 PM for a 6:00 PM meeting on November 8, 2007, and that he had no role in the execution of the third amendment, nor did he consent to plaintiff's counsel communicating with his clients regarding the third amendment.

deem the third amendment null, void and terminated “for all purposes.” Redstone, Daniel Lee and Speed Group at the same time each executed ancillary documents in connection with the third amendment, including affidavits of confession of judgment for \$2 million against each one of them. Defendants’ attorney was not present during the execution of the third amendment and ancillary documents. Defendants never effectively tendered the \$300,000 to plaintiff, as their checks to plaintiff were purportedly returned for insufficient funds thereby indisputably making the third amendment null and void.

(e)

Defendants’ counsel sent plaintiff’s prior counsel a letter, dated February 7, 2008, on February 14, 2008 which indicated defendants’ willingness to close provided that plaintiff take the premises subject to “title issues,” specifically, the \$10.225 million mortgage loan. Defendants noted that Article 3 of the contract limited their obligation to spend no more than \$1000 to clear any defects in title. Defendants also indicated that if plaintiff did not accept the stated terms, then defendants would exercise their termination rights under Article 3 and refund the \$2 million down payment to plaintiff, without interest. Defendants sent plaintiff a letter on February 20, 2008 purporting to terminate the contract due to plaintiff’s failure to respond to defendants’ “offer” to close on the premises.

Plaintiff’s counsel sent a letter to defendant’s counsel on February 26, 2008 stating that “[o]n February 20, [s]eller agreed to a closing . . . on March 15, 2008, time being of the essence.” Plaintiff’s counsel stated that plaintiff had agreed to close on that date and that plaintiff rejected defendants’ “unilateral attempt to cancel the contract among the parties”

by defendants' February 7, 2008 letter.

Plaintiff's counsel sent a letter to defendants' counsel on March 3, 2008 confirming the closing on March 15, 2008, time being of the essence, and confirming other details regarding the closing. Plaintiff's counsel sent another letter to defendants' counsel on March 5, 2008 indicating that he had received no response to his March 3, 2008 letter and, therefore, giving notice that the closing would occur on March 14, 2008, time being of the essence.

Defendants' attorney sent a letter to plaintiff's attorney, also on March 5, 2008, indicating that the February 26, 2008 letter was incorrect in stating that March 15, 2008 was an agreed upon date by the parties. Defendants' attorney denied any communication on February 20, 2008 in this regard and reiterated that he considered the contract cancelled.

Defendants' attorney additionally sent a letter to plaintiff's attorney on March 24, 2008 demanding plaintiff refrain from filing any confessions of judgment against defendants and remove any confessions of judgment already filed. Plaintiff, nevertheless, filed the judgments by confession on March 24, 2008 that Redstone, Daniel Lee and Speed Group had executed at the time of the third amendment for \$2 million, plus interest.

The Pleadings

(a)

Plaintiff commenced the instant action with the filing of a summons and complaint on or about February 19, 2008, after defendants announced the contract's termination and before plaintiff requested the March 15, 2008 time of the essence closing date. Defendants filed a verified answer, affirmative defenses and counterclaims on or about March 28, 2008.

Plaintiff sets forth four separate causes of action in its complaint against defendants, including (1) specific performance of the contract and transfer of title to the subject premises from Redstone to plaintiff; (2) breach of contract against Redstone for its refusal to deliver title to the premises on or before July 31, 2007, but in no event later than October 31, 2007, and liquidated damages of \$10,000 per day after November 1, 2007 (in an amount to be determined at trial, but not less than \$1,090,000); (3) breach of contract against Daniel and Eva Lee, who personally guaranteed performance of the contract, as well as damages (in an amount to be determined at trial but not less than \$1,090,000); and (4) reimbursement of attorneys fees and costs against Daniel and Eva Lee (in an amount to be determined at trial).

(b)

Defendants' verified answer sets forth eighteen affirmative defenses and ten counterclaims, with the first, second, third and eighth counterclaim relevant herein. The first and second counterclaim state that defendants are entitled to a judgment declaring the contract of sale terminated and directing removal of any and all instruments, notices and other documents that plaintiff has caused to be recorded against the subject premises. The first and second counterclaim rely on defendants' contention that Article 3 of the contract allows defendants to terminate the agreement if they choose not to expend more than a \$1000 threshold amount to clear defects in title. Defendants argue that the \$10.225 million mortgage on the premises constitutes "title issues" and that plaintiff's failure to take the property subject to such "title issues" represents plaintiff's election to accept refund of the down payments and termination of the contract.

The third counterclaim states that defendants are entitled to a judgment declaring

plaintiff estopped, legally and equitably, from enforcing any of the amendments or the June 18 letter, and that the amendments and the June 18 letter are rescinded, null and void *ab initio*. The third counterclaim relies on defendants' allegation that Borukhov, plaintiff's attorney regarding the purchase, knew defendants were represented by Jeon and yet met with defendants to execute the amendments and the June 18 letter without first obtaining Jeon's consent. Hence, defendants claim that the amendments and the June 18 letter were procured in violation of 22 NYCRR § 1200.35 (DR 7-104 [a] [1])⁵ and should not be enforced.

The eighth counterclaim states that defendants are entitled to a judgment declaring that any enforceable interest, damages, or other charge to the defendants as the result of Redstone's failure to close on the subject premises' sale has not yet accrued (because plaintiff did not demand that plaintiff close prior to defendants' termination of the contract).

Plaintiff's Partial Summary Judgment Motion

Plaintiff contends in its 19-a statement of facts⁶ that the contract required it to "(1) arrange a title search by, and title insurance from, a reputable title insurance company; (2) to make certain down payments; and (3) to pay the purchase price." Plaintiff alleges having

⁵DR 7-104, entitled "[c]ommunicating with represented and unrepresented parties," pertinently states that: (a) [d]uring the course of the representation of a client a lawyer shall not: (1) [c]ommunicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so"

⁶Rule 19-a of the Rules of the Commercial Division of the Supreme Court (22 NYCRR 202.70) pertinently provides that "[u]pon any motion for summary judgment . . . there shall be annexed . . . a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried."

sent its comments regarding the “already-completed” title report to defendants on September 25, 2007. In addition, plaintiff, indisputably, directly delivered \$2 million in down payments to seller. Further, plaintiff alleges that “for the closing date set in the Original Contract, [it] secured financing for the original purchase price.” Plaintiff also asserts that, “upon each closing date set thereafter, [it] continued to secure financing for the applicable purchase price.” Moreover, plaintiff contends that defendants “refused to close each time and failed to meet its obligations in order to extend the closing date to January 31, 2008.” Plaintiff avers in this regard that “all the while, [defendants] [have] kept the \$2 million in down payments for [themselves] and reaped the benefits generated by the premises.”

Plaintiff submits Boukhov’s affidavit in support of its motion for partial summary judgment on its first cause of action for specific performance. Defendants’ counsel, Peter Jeon (Jeon), according to Boukhov, was present for execution of the original contract, and was “kept informed of the ongoing negotiations” between the parties that resulted in multiple amendments to the original contract. Boukhov also noted that “while many of these meetings occurred on short notice, [defendants’] counsel was always invited to participate.” Boukhav further alleges that he sent a draft of the first amendment to Jeon on or about April 16, 2007 in advance of a meeting between defendants and plaintiff. Boukhav additionally notes that he sent a draft of the third amendment to Jeon on or about November 8, 2007 in advance of a meeting between defendants and plaintiff.

Boukhav affirms regarding the June 18, 2007 letter wherein Daniel and Eva Lee purport to waive their right to the defense of lack of counsel that the Lees “wanted to sign

an amendment without their counsel present[,] or having seen the amendment in advance, [and] I advised defendants to have their counsel review the document.” In addition, Boukhov states that “[w]hen they refused, I asked defendants to sign a waiver setting forth the advice they had received and their decision not to heed that advice.”

Plaintiff also submits the affidavit of Ruben Jusupov (Jusupov), a member of 1111 Myrtle Realty, LLC, in support of its motion for summary judgment. Jusupov states therein that “[n]otwithstanding more than a year of amendments and extensions of the closing date under the Contract, Defendants refuse to honor their contractual obligation to convey the premises to plaintiff.” Jusupov alleges concerning the June 18, 2007 letter that defendants were advised that they should be represented by counsel and that they refused. Jusupov also contends that plaintiff has remained ready, willing, and able to close on the premises and secured financing regarding the original purchase price for the closing date set in the original contract. Jusupov also affirms that plaintiff continued to secure financing regarding the applicable purchase price for each closing date thereafter.

Plaintiff argues in its memorandum of law supporting its motion for partial summary judgment and to dismiss some of defendants’ counterclaims that defendants refuse to sell the subject premises because “they are in the unusual position of having to raise money before they can sell the property.” Plaintiff notes that an \$8.1 million purchase price balance remains after \$2 million in down payments directly to defendants. Plaintiff asserts that the contract requires that defendants remove the \$10.225 million mortgage before closing and,

therefore, defendants must raise \$2.15 million before they close. Plaintiff argues that defendants are nonetheless obligated to honor the contract between the parties despite defendants' alleged financial position. Plaintiff contends that it has no obligation to waive or assume the \$10.225 million mortgage on the premises because the contract expressly provides for the delivery of marketable title, and because Article 7 of the contract explicitly obligates defendants to deliver the premises free of any mortgages.⁷

Plaintiff further argues that Article 3 of the contract concerning "title defects,"⁸ does not excuse defendants from having to satisfy the \$10.225 million mortgage on the premises. Words of general description, according to plaintiff, yield to more specific words in contract interpretation, and adopting defendants' understanding of the agreement would render Article 7 meaningless. Additionally, plaintiff rejects rescission as a required remedy even if there were a violation of DR 7-104 (a) (1), nor would such a violation void the original contract, it contends, considering that all parties were represented during the execution of the original contract. Plaintiff further contends that defendants, in any event, waived any claim or defense for their lack of counsel in the June 18 letter.

Plaintiff argues regarding dismissal of the first three and eighth counterclaim that New York law and documentary evidence contracts each one. The first and second counterclaims,

⁷Article 7 of the original contract pertinently provides that "[m]ortgages shall be removed by seller."

⁸Article 3 of the contract relevantly states that: "[n]otwithstanding any other provisions of this Agreement, Seller shall not be obligated to . . . spend any money in excess of [\$1000] to remove any objection to or defect in title."

according to plaintiff, rely on defendants' "faulty argument" that the \$1000 cap on removal of title defects "somehow trumps the express mandate under Article 7." Plaintiff further alleges that the third counterclaim rests upon defendants' incorrect position that the contract is voidable under DR 7-104 (a) (1). Finally, plaintiff argues that defendants' purported termination of the contract rendered futile any attempt by defendants to schedule a formal closing and negated defendants' request for a declaration that any interest or damages awarded to plaintiff have not accrued.

Defendants' Cross Motion

Daniel Lee argues in his affidavit opposing plaintiff's motion and supporting defendants' cross motion that Redstone had "every right to terminate the original contract of sale pursuant to its terms." He cites the alleged multiple and repeated ethical violations by plaintiff's counsel as rendering the amendments and ancillary documents unenforceable. Lee alleges regarding the second replacement amendment that the execution of the documents occurred "late in the evening" without the presence of defendants' counsel in violation of DR 7-104 (a) (1). Lee adds that the \$300,000 failed payment voided the third amendment, and that this same failure should also void the ancillary documents executed with the third amendment. Defendants also argue that plaintiff wrongfully filed the judgments by confession in excess of the amount of the down payments, and that defendants would never have signed any confessions of judgment if they had received the advice of counsel.

Defendants argue, among other points, in their memoranda of law opposing the motion and supporting the cross motion that the contract provided Redstone with the right

to terminate under Article 3, and that Redstone properly exercised this right. Specifically, defendants argue that the mortgages do constitute a “title defect” and that plaintiff had the option of closing subject to “title issues” but failed to take this approach. Defendants argue, pursuant to their understanding of Articles 3 and 7 of the contract, that no inconsistencies exist, and, it, therefore, does not matter that Article 7 is more specific than Article 3 regarding mortgages. Article 3, according to defendants, provides for a threshold amount which relieved Redstone of the obligation to satisfy the subject mortgage and instead allowed Redstone to terminate the contract. Defendant also alleges that the “notwithstanding” language of Article 3 indicated that the parties intended for Article 3 to control even if there were contradictions between Articles 3 and 7.

They further argue that the subject property represents Redstone’s sole asset. However, various amendments to the contract, defendant notes, resulted in a \$1.1 million aggregate reduction in the purchase price and \$2 million in advanced down payments. These changes further reduced the cash amount Redstone would receive at closing thereby leaving Redstone unable to satisfy the mortgages from the balance due at closing.

Defendants clarify that they do not seek to void the entire contract as a result of the alleged violations of DR 7-104 (a) (1). Instead, they seek declaratory relief only with respect to the amendments and the June 18 letter. Defendants contend that the purported violations of DR 7-104 (a) (1) by plaintiff’s counsel provide ample basis for invalidating the amendments and June 18 letter.

They further argue that the ancillary documents associated with the execution of the third amendment are equally void, and that the confessions of judgment signed to secure the down payment are also invalid. Purported violations of DR 7-104 (a) (1), according to defendants, voided the first confessions of judgment signed on June 18. The second confessions of judgment signed in conjunction with the third amendment are also void, they claim, because of alleged violations of DR 7-104 (a) (1) and because the third amendment itself is void. Defendants also note that the judgments of confession filed against Redstone and Daniel Lee, totaling \$3.2 million, exceed the down payment, and, therefore, they urge vacating them.

Plaintiff's Response Regarding The Motion and Cross Motion

Plaintiff submits a memoranda of law opposing defendants' cross motion and further supporting its motion for summary judgment that advocates specific performance of the contract as warranted. The memorandum argues, among other points, that accepting defendants' interpretation of the contract,⁹ would render it and many of its key provisions illusory⁰ including defendants' obligation to remove the \$10.225 million mortgage. Plaintiff argues that Article 1 of the contract provides for a \$10.1 million purchase price, not \$10.1 million *plus* the assumption of the \$10.225 million mortgage. Plaintiff views the

⁹Namely, that Article 3 was designed to enable the seller to unilaterally terminate the contract at any time.

¹⁰Plaintiff avers that the \$10.225 million mortgage was always more than \$1000 worth of expenses outlined in Article 3. Plaintiff notes in this regard that New York courts avoid interpreting a contract to render its provisions meaningless.

judgments by confession as securing the \$2 million down payment and thus defends these ancillary documents associated with the third amendment as valid. Finally, plaintiff notes regarding defendants' eighth counterclaim that no requirement compelled plaintiff to request a closing date once defendants' purported early termination rendered plaintiff's performance futile.

Defendants' Reply Regarding The Motion and Cross Motion

Defendants reply that Redstone properly exercised its Article 3 termination rights in deciding not to convey the subject property to plaintiff and that Article 3 comports with other provisions. They posit that if Redstone had not exercised its purported termination rights under Article 3 and had instead conveyed the subject property to plaintiff, then plaintiff would only bear responsibility for paying the Article 1 purchase price and would not also have the obligation to assume the property subject to the mortgages.

Defendants contend regarding plaintiff's claim of conflict between Articles 3 and 7 that Article 7 merely renders Article 3 less powerful for the plaintiff, and, that no conflict exists between the provisions to allow a more specific term to necessarily trump a more general one. They see limited impact regarding the purported violations of DR 7-104 (a) (1). Defendants believe that, even without these purported violations, the express language of the third amendment should still result in declaring it and the ancillary documents null and void. That language, they maintain, provides that any failed payment under the contract requires that "the [Third] Amendment shall be deemed null and void and terminated for all purposes." Finally, defendants contend regarding the eighth counterclaim that no default by defendants

occurred that would trigger damages since plaintiff has not demanded the down payments.

Discussion and Analysis

Defendants' Summary Judgment Cross Motion and Plaintiff's Complaint

(a)

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The burden shifts to the party opposing a motion for summary judgment, after a prima facie showing, “to produce evidentiary proof in admissible form sufficient to establish . . . material issues of fact which require a trial of the action” (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d at 562). Summary judgment stands as a drastic remedy depriving a litigant of his or her day in court, and it “should only be employed when there is no doubt as to the absence of triable issues” (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). “The court's function on a motion for summary judgment is not to resolve issues of fact or to determine matters of credibility but merely to determine whether such issues exist” (*Roth v Barreto*, 289 AD2d 557, 558 [2001]).

Defendants' cross motion to dismiss plaintiff's complaint requires viewing the evidence in the light most favorable to plaintiff, and defendants fail to make a prima facie case of entitlement to such relief. Their contentions regarding their right to terminate the

contract under Article 3 rely on an interpretation of the contract unsupported by the plain meaning of its terms and provisions. Inquiring whether ambiguity exists in a writing and interpreting terms of a facially clear and unambiguous written agreement constitutes a matter of law for the court, which should construe the words and phrases used according to their plain meaning (*see W.W.W. Assocs., Inc., Giancontieri*, 77 NY2d 157, 162 [1990] [internal citation omitted]; *Tikotzky v City of New York*, 286 AD2d 493, 494 [2001]; *Greater Johnstown School Dist. v Frontier Ins. Co.*, 252 AD2d 615, 616 [1998]; *Weisberger v Goldstein*, 242 AD2d 622, 623 [1997]). “Where possible, a contract should be interpreted to avoid inconsistencies and to give meaning to all its provisions, giving a practical and reasonable interpretation to the language employed and the parties’ reasonable expectations with respect thereto” (*Malleolo v Malleolo*, 287 AD2d 603, 603-604 [2001] [internal citations omitted]).

In addition, gleaning the intent of the parties to a contract comes from within the four corners of the instrument, not from extrinsic evidence (*see Rainbow v Swisher*, 72 NY2d 106, 109 [1988]). “[T]here is a ‘heavy presumption that a deliberately prepared and executed written instrument manifest[s] the true intention of the parties’” (*Chimart Assoc. v Paul*, 66 NY2d 570, 574 [1986], *quoting George Backer Mgt. Corp., v Acme Quilting Co.*, 46 NY2d 211, 219 [1978]). Here, no ambiguity affects Article 7 of the contract which expressly provides that the seller will remove any mortgages prior to closing. The parties clearly did not intend to provide for defendants’ unilateral right to cancel under Article 3 since the

mortgage on the property always exceeded the purported \$1000 cap on defendants' required expenses to clear title defects. Therefore, plaintiff's refusal to close on the property "subject to" the \$10.225 million mortgage provides no ground for defendants' termination of the contract.

(b)

Defendants also argue in seeking to dismiss plaintiff's complaint that the purported violations of DR 7-104 (a) (1) by plaintiff's counsel in communicating with defendants without obtaining the consent of their attorney invalidates both the contract amendments and the June 18 letter. Defendants' counsel indisputably was not present during execution of the amendments and the June 18 letter. However, defendants' counsel was present for execution of the original contract and was at least aware of further amendments to the contract. Defendants, in any event, signed a written waiver of their lack of counsel defense on June 18, 2007, and thus acknowledged their choice not to have counsel present.

In addition, defendants' counsel sent a letter to plaintiff's counsel on February 14, 2008 in an attempt to reach a closing as provided in the replacement second amendment, thereby acknowledging and accepting the terms of the replacement second amendment. The evidence thus shows that defendants' waived their lack of counsel defense through written consent, and defendants' counsel waived his objections to lack of counsel by attempting to reach a closing pursuant to the terms of the second replacement amendment. Consequently, defendants fail to establish a prima facie case to void and not enforce the amendments and

the June 18 letter.

Defendants' arguments for dismissing plaintiff's specific performance, breach of contract, and liquidated damages causes of action, therefore, rely on an inappropriate contract interpretation for terminating the agreement, and the mistaken argument that alleged ethical violations on the part of plaintiff's counsel void the amendments and the June 18 letter. Hence, a substantial basis supports denying that branch of defendant's cross motion seeking summary judgment dismissing plaintiff's complaint.

Plaintiff's Summary Judgment Motion Regarding Specific Performance

Plaintiff also moves for partial summary judgment granting its first cause of action for specific performance. Granting specific performance of a real property sale contract requires a plaintiff to demonstrate readiness, willingness and ability to perform on the original law day or, if time is not of the essence, on a subsequent date fixed by the parties or within a reasonable time thereafter (*see Nuzzi Family Ltd. Liab. Co. v Nature Conservancy*, 304 AD2d 631, 632 [2003]; *Ferrone v Tupper*, 304 AD2d 524, 525 [2003]). "An 'able' purchaser is one who has the financial ability to perform" (*AA Frontier v Silverman*, 1 Misc 3d 1, 2 [2003]).

A party may make time of the essence, when the original contract contains no such imperative,¹¹ by providing "a clear, distinct and unequivocal notice to that effect giving the

¹¹ "It is fundamental that time is never of the essence of a contract for the sale of real property unless the contract specifically so provides or special circumstances surrounding its execution so require" (*Tarlo v Robinson*, 118 AD2d 561, 565 [1986] [internal citations omitted]).

other reasonable time to act. The notice should specify a time on which to close and warn that the failure to close on that date will result in default (*see Zev v Merman*, 134 AD2d 555, 557 [1987] *affd* 73 NY2d 781 [1988]; *see also Cave v Kollar*, 296 AD2d 370, 371 [2002] [where indisputably the contract contains no provision that time was of the essence, the mutual consent of the parties waived the closing date, and an indefinite adjournment of the closing date occurs, then “some affirmative act has to be taken by one party before he [or she] can claim the other party is in default; that is, one party has to fix a time by which the other must perform, and he [or she] must inform the other that if he [or she] does not perform by that date, he [or she] will be considered in default”] [internal citations omitted]).

In addition, a real property seller may not consider a purchaser in default without having made a tender of performance (*Gargano v Rubin*, 200 AD2d 554 [1994], “unless tender was waived or the necessity for such a tender was obviated by acts of the other party amounting to an anticipatory breach of the contract or establishing that such party would be unable to perform (*Madison Invs. v Cohoes Assoc.*, 176 AD2d 1021, 1021-1022 [1991], *lv denied* 79 NY2d 1040 [1992] [internal citations omitted]). However, a plaintiff still retains the burden to show readiness, willingness and ability to perform contractual obligations to obtain specific performance relief even where a defendant improperly cancelled the sale contract and thus excused plaintiff from the duty to tender performance (*see Internet Homes, Inc., v Vitulli*, 8 AD3d 438, 439 [2004]; *3M Holding Corp. v Wagner*, 166 AD2d 580, 581 [1990]).

Here, plaintiff indisputably made no tender of performance after defendants failed to

meet their obligations under the third amendment, but contends essentially that defendants' unilateral attempt to cancel the contract excused its duty to tender performance. Nevertheless, plaintiff needed to establish its readiness, willingness and ability to purchase the property even accepting the contention that defendants' February 20 letter terminating the agreement relieved plaintiff of its obligation to tender performance.

Plaintiff makes the required showing by noting that it completed a title report, paid \$2 million in down payments and secured financing for purchasing the subject premises. Specifically, plaintiff states that "for the closing date set in the Original Contract, [it] secured financing for the original purchase price." Plaintiff also asserts that, "upon each closing date set thereafter, [it] continued to secure financing for the applicable purchase price."

Defendants failed to close on October 31, 2007, the extended closing date set forth in the second replacement amendment. They also failed to make the \$300,000 payment, provided in the third amendment, which would have extended the closing date to February 15, 2008. Plaintiff, in contrast, was ready, willing and able to purchase the property before the October 31, 2007 date set forth in the second replacement amendment and agreed to a new time of the essence closing date provided that defendants pay \$300,000 as consideration.

The terms of the second replacement amendment did not provide for a time of the essence closing date and either party could thus request rescheduling closing reasonably after the original October 31, 2007 closing date. However, defendants' attempt to terminate the contract excused any tender of performance by plaintiff, who, nonetheless, requested another time of the essence closing date on March 15, 2008. Defendants, though, again failed to

close on this date, thereby breaching their obligation to convey the subject premises' title to plaintiff. The defendants' failure to raise a factual issue to refute plaintiff's prima facie showing of entitlement to specific performance warrants granting that branch of plaintiff's motion seeking partial summary judgment on its first cause of action for specific performance.

Defendants' Summary Judgment Cross Motion and The Third Counterclaim

Defendants also move for summary judgment granting their first three counterclaims asserted against plaintiff. The first and second counterclaims seek a judgment declaring the contract terminated and directing removal of all instruments recorded against defendants. However, defendants fail to make a prima facie case for summary judgment on their contract termination as they rely on an interpretation of the contract unsupported by the plain meaning of its terms and provisions. More specifically, Article 3 of the contract, as already noted, provided no right for defendants to terminate the contract for plaintiff's failure to close on the property "subject to" the \$10.225 million mortgage. Therefore, defendants present no viable basis to terminate the contract.

Defendants also seek a declaration to remove any instruments that plaintiff recorded against them relating to the subject premises' sale (namely, the judgments by confession entered against defendants in conjunction with the replacement second amendment and the third amendment). The court declines making such a declaration for the reasons discussed below regarding defendants' motion to vacate the judgments by confession.

Defendants' third counterclaim seeks a separate declaration estopping plaintiff from enforcing any of the amendments or the June 18 letter and declaring them null and void. Defendants contend that the purported violations of DR 7-104 (a) (1) by plaintiff's counsel in communicating with defendants without obtaining the consent of their attorney invalidates both amendments to the contract and the June 18 letter. However, the court declines, as stated above, to rescind the amendments and the June 18 letter as defendants have waived their lack of counsel defense. Defendants again provide no viable basis for nullifying and voiding the stated documents nor estopping plaintiff from enforcing them. The branch of defendants' cross motion seeking summary judgment granting the first three counterclaims, therefore, warrants denial.

Plaintiff's Dismissal Motion Regarding Defendants' Counterclaims

(a)

Plaintiff also moves, pursuant to CPLR 3211, to dismiss defendants' first three and eighth counterclaims on the basis that New York law and documentary evidence contradict such counterclaims. Generally, "[o]n a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), the court must afford the complaint a liberal construction, accept all facts as alleged in the complaint to be true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Fishberger v Voss*, 51 AD3d 627, 628 [2008] [internal citation omitted]).

However, “where evidentiary material is submitted, the court is required to determine whether the proponent of the pleading has a cause of action, not whether he or she has stated one” (*Town of Riverhead v County of Suffolk*, 39 AD3d 537, 539 [2007] [internal citation omitted]); *see also Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977] [“(w)hen evidentiary material is considered, . . . unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, . . . dismissal should not eventuate”] [internal citation omitted]). In addition, “[b]are legal conclusions and factual claims which are flatly contradicted by the evidence are not presumed to be true on such a motion” (*Peter F. Gaito Architecture, LLC v Simone Dev. Corp.*, 46 AD3d 530, 530 [2007], *quoting Palazzolo v Herrick, Feinstein, LLP*, 298 AD2d 372, 372 [2002]). A complaint is also subject to dismissal pursuant to CPLR 3211 (a) (1) “if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law” (*Leon v Martinez*, 84 NY2d 83, 88 [1994] [internal citations omitted]).

In addition, appropriately declaring the parties’ rights and obligations regarding the subject matter of litigation represents the proper remedy in a declaratory judgment action rather than dismissal (*see Sweeney v Cannon*, 30 NY2d 633 [1972]; *Lanza v Wagner*, 11 NY2d 317, 334 [1962], *appeal dismissed* 371 US 74 [1962], *cert denied* 371 US 901 [1962]). The court’s interpretation of the subject premises’ sale contract and the prior determination that the purported violation of DR 7-104 (a) (1) by plaintiff’s counsel does not void the

amendments leads to finding plaintiff entitled to a declaration that no contract termination occurred herein. Such declaration will also properly state that the amendments and the June 18 letter are not null and void and that no estoppel exists against enforcing them.

(b)

Plaintiff also moves to dismiss the eighth counterclaim where defendants seek a declaration that any enforceable interest, damages, or other charge against them as the result of Redstone's failure to close on the sale of the subject premises has not yet accrued. Plaintiff seeks, among other items, liquidated damages arising out of defendants' failure to close on the October 31, 2007 date set forth in the second replacement amendment. The court found specific performance warranted under the circumstances due to defendants' repeated failures to close, but issues of fact remain about the reasonableness of plaintiff's delay until March of 2008 to request a time of the essence closing date and whether plaintiff sat on its rights to increase any awardable damages. Such issues make a declaration that plaintiff's damages have accrued presently premature.

Defendants' Motion To Vacate

Finally, defendants move, pursuant to CPLR 5015 (a) (3), to vacate the judgments by confession entered against them. A court which "rendered" a judgment may vacate it upon

motion based on fraud, misrepresentation or misconduct.¹² “However, the words ‘render . . . judgment’ refer generally to the pronouncement of the court’s judgment on a given state of facts and are ‘not used with reference to judgments by confession’” (*Scheckter v Ryan*, 161 AD2d 344, 345 [1990], *citing* Black’s Law Dictionary, 4th ed., p. 1460). “In any event, CPLR 5015, even if applicable, provides only that a court *may* relieve a party from a judgment in the circumstances specified” (*Scheckter*, 161 AD2d at 345).

“However, where there are numerous factual issues raised, rather than vacate the judgment, the court properly exercises its discretion by denying the motion with leave to commence a plenary action to vacate the judgment” (*Scheckter* at 345; *see also Engster v Passonno*, 202 AD2d 769, 769 [1994] [“the claim that the affidavit of confession of judgment was obtained through coercion may only be asserted in a plenary action, thereby permitting development and evaluation of the pertinent facts”] [internal citations omitted]; *McCabe v Allboro Excavation Co.*, 31 Misc 2d 721, 722 [1961] [“(i)f by means of fraud or undue influence the plaintiff induced the defendants to sign the confession believing that judgment would be entered only upon their default, their remedy lies in a plenary action to set aside the judgment and not by motion”] [internal citations omitted]).

Defendants contend that they would not have executed the judgments if represented

¹²CPLR 5015 concerns relief from judgments or orders. Subsection (a) (3), entitled “[o]n motion,” provides that: “[t]he court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of . . . (3) fraud, misrepresentation, or other misconduct of an adverse party . . .”

by their attorney, and that the judgments were obtained in violation of DR 7-104 (a) (1). Defendants do not specifically argue the presence of fraud or undue influence, but at least allege misconduct by plaintiff's counsel. Defendants are required under these circumstances, as mentioned above, to bring a separate plenary action to challenge the confessions of judgment.

However, the court notes that the judgments by confession at issue were entered in Queens and Nassau Counties. Kings County, therefore, is not the appropriate venue for the motion to vacate or a plenary action to vacate. The New York County Supreme Court noted in *Terezakis v Goldstein* (168 Misc 2d 298, 300 [1996]) that “[t]he conclusion that venue is proper in the county in which the underlying judgment by confession was entered is supported by statutory and policy considerations as well as relevant case law in analogous situations, i.e., where a plenary action is commenced which seeks enforcement or some other relief relative to an existing action or judgment.” The need for a plenary action venued in a different county regarding the judgments by confession herein thus warrants denying this branch of defendants’ motion with leave to commence such an appropriately venued plenary action.

The court has considered the parties’ remaining contentions and finds them without merit.

Summary

Overall, the court has denied the branch of defendants' cross motion for summary judgment to dismiss plaintiff's complaint; granted the branch of plaintiff's motion seeking partial summary judgment on its first cause of action for specific performance; denied the branch of defendants' cross motion for summary judgment to grant their first three counterclaims; granted the branch of plaintiff's dismissal motion regarding defendants' first and second counterclaims thereby entitling plaintiff to declarations that no contract termination occurred herein, that the contract amendments and the June 18 letter are not null and void and that no estoppel exists against enforcing them; denied the further branch of plaintiff's dismissal motion regarding the eighth counterclaim; and denied the branch of defendants' motion to vacate the judgments by confession herein with leave to commence an appropriately venued plenary action regarding them. An ensuing series of formal decretal paragraphs express these rulings. Accordingly, it is

ORDERED that the branch of defendants' cross motion for summary judgment to dismiss plaintiff's complaint is denied; and it is further

ORDERED that the branch of plaintiff's motion seeking partial summary judgment on its first cause of action for specific performance is granted; and it is further

ORDERED that the branch of defendants' cross motion for summary judgment to grant their first three counterclaims is denied; and it is further

ORDERED that the branch of plaintiff's dismissal motion regarding defendants' first and second counterclaims is granted; and it is further

ORDERED and ADJUDGED that no contract termination occurred herein, that the contract amendments and the June 18 letter are not null and void and that no estoppel exists against enforcing them; and it is further

ORDERED that the branch of plaintiff's dismissal motion regarding the eighth counterclaim is denied as premature; and it is further

ORDERED that the branch of defendants' motion to vacate the judgments by confession herein is denied with leave to commence an appropriately venued plenary action regarding them.

The foregoing constitutes the decision and order of this court.

E N T E R,

J. S. C.

CLERK OF COURT