SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN PART 7
Justice

GEORGE DIMOU, LAMBROS PANAGIOTOPOULOS and LISA PANAGIOTOPOULOS,

Plaintiffs,

- v -

125 FULTON LLC,

Defendant.

(And a third-party action).

INDEX NO. 108461/2007

MOTION DATE 6/26/08

MOTION SEQ. NO. 001

MOTION CAL. NO. 5

The following papers, numbered 1 to 8 were read on this motion for summary judgment

	PAPERS NUMBERED
Notice of Motion— Affirmation –Affidavit — Exhibits 1 to	1-3
Answering Affirmation — Exhibits A-I	4
Replying Affirmation—Affidavit — Exhibits [untabbed]	5-6
Supplemental Affirmation	7
Supplemental Affirmation	8

Cross-Motion: ☐ Yes X No

Upon the foregoing papers, it is ordered that this motion to dismiss, previously converted to a motion for summary judgment pursuant to CPLR 3211 (c), is decided in accordance with the annexed memorandum decision and order.

HON. MICHAEL D. STALLMAN

Dated: 4/13/09
New York, New York

J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION
Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 7

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GEORGE DIMOU, LAMBROS PANAGIOTOPOULOS and LISA PANAGIOTOPOULOS,

Plaintiffs,

Index No. 108461/07

-against-

125 FULTON LLC,

Defendant,

----------X

125 FULTON LLC,

Third-Party Plaintiff,

-against-

Third-Party Index No. 590645/07

GRECIAN MANAGEMENT CO. LLC,

Third-Party Defendant,

-and-

NICOLA G. PETRAS, ESQ., solely in his capacity as Escrow agent,

Nominal Third-Party Defendant.

----------X

HON. MICHAEL D. STALLMAN, J.:

This matter arises out of an unconsummated sale of real property located at 125 Fulton Street, New York, New York on Block 91, Lot 11 on the tax map of Manhattan. Plaintiffs, the alleged assignees of the original seller under the contract of sale, seek a declaration that they are entitled to keep a down payment of defendant, the alleged assignee of the original buyer, because defendant allegedly did not proceed to the closing. Plaintiffs and the third-party defendant, the original seller,

now move to dismiss defendant's affirmative defenses and counterclaims and third-party claims. By order dated April 15, 2008, the Court converted plaintiffs' motion to dismiss to a motion for summary judgment pursuant to CPLR 3211 (c) and permitted the parties to submit additional papers.

BACKGROUND

By a contract of sale dated March 9, 2006 (Contract), Grecian Management Co., LLC (Grecian) agreed to sell real property situated on Block 91, Lot 11 in Manhattan, known as 125 Fulton Street to New York Law School. Petras Aff., Ex 3 [Contract]. The Contract requires Grecian, as seller, to empty the building of tenants prior to the closing. Paragraph 51 in a rider to the Contract set an initial closing date of "on or about October 15, 2006." Ibid. and specifically provided that, "Notwithstanding the foregoing, if the Premises are not fully vacated, (x) Seller shall have the right to adjourn the closing to a date on or about January 31, 2007." Ibid. Third-party defendant Nicolas G. Petras, Esq. acted as Grecian's attorney and is the escrow agent holding a $350,000 down payment on the purchase of the property.

It is undisputed that, as of May 12, 2006, New York Law School assigned its interest as buyer in the Contract to defendant 125 Fulton LLC (125 Fulton). Grecian purported to assign its rights in the Premises and the Contract to the plaintiffs George Dimou, Lambros Panagiotopoulos, and Lisa Panagiotopoulos, the alleged members of Grecian, pursuant to an assignment effective as of September 15, 2006. Petras Aff., Ex 5.

It is undisputed that the closing did not occur on October 15, 2006, as provided in the Contract. In letters of January 16, 2007 and January 29, 2007 to 125 Fulton's attorney, Petras stated that the premises would be vacant by January 31, 2007, and wanted to know if 125 Fulton would be ready to close during the week of February 12, 2007. Korotkin Affirm., Exs B, C. However, in a

letter of February 21, 2007, Petras stated that the premises was totally vacant, except for the second floor, which would be by February 28, 2007, and wished to know 125 Fulton's intention as to the closing date. Id., Ex D. By letter of March 5, 2007, Petras indicated that the premises were vacant and they were ready to close. Id., Ex E. There is no evidence that 125 Fulton ever responded to any of the letters in writing.

By letter of March 28, 2007, Petras notified 125 Fulton's attorney that the premises were vacant, and set "Wednesday, May 2, 2007, as the Closing Date, with TIME BEING OF THE ESSENCE." Petras Aff., Ex 2-F (the Closing Letter). The Closing Letter also noted that failure of 125 Fulton to close would be considered a breach of the Contract, for which Grecian would prosecute its remedies.

By letter of April 26, 2007, 125 Fulton's attorney responded to the Closing Letter, rejecting Seller's "attempt to unilaterally declare a 'time is of the essence' closing on May 2, 2007 under the Contract." Petras Aff., Ex 2-G (the Rejection Letter). The Rejection Letter states that: i) the timing of the sale was a crucial component of the Contract; ii) 125 Fulton's attorney informed Petras by phone that Grecian was in default under the Contract near the end of February or the beginning of March; iii) Grecian never properly exercised any adjournment rights in a legitimate, prescribed way with respect to the original closing date; and 4) Grecian must return Purchaser's deposit.[1] The Rejection Letter states, in relevant part:

> "Because of the continued uncertainty of the ability (or desire) of Seller and you to ever properly perform under the Contract and properly convey the Premises to Purchaser, Purchaser, at considerable cost and expense, was compelled to consider

[1] The Rejection Letter also states that Seller never indicated that the Premises were vacant before the Closing Letter; that allegation is disputed by the March 5, 2007 letter indicating that the Premises is vacant, and Seller is ready to close. Petras Aff., Ex 2-E

> alternative transactions that would satisfy the monumental needs, commitments and time constraints it had – and, at great, additional expense, we have done that. . . .
>
> . . . Because of the acts of Seller and you, Seller's rights under the contract died long ago, and you failed to reach redemption within any time frame that could be termed 'reasonable.'"

Petras Aff., Ex 2-G.

125 Fulton did not appear at the May 2, 2007 closing, and by letter of May 2, 2007, Petras declared 125 Fulton in default. Petras Aff., Ex 9. The letter states, "I have discussed the contents of your letter with my clients, and they contest the accuracy of the statements in your letter of April 26, 2007. Furthermore, your client is in default by your failure to close the subject transaction on this date." Ibid. Subsequently, by letter dated May 10, 2007, Petras declared that his client instructed him not to return any down payment. Petras Aff., Ex 10.

On June 19, 2007, plaintiffs commenced this action to declare their rights to the down payment. 125 Fulton answered the complaint, asserting eight affirmative defenses, counterclaims and third-party claims against Grecian and Petras. The first counterclaim and third-party claim is for return of the down payment against plaintiffs, Grecian, and Petras; the second is for breach of contract against plaintiffs and Grecian; the third is for fraud against plaintiffs and Grecian, for falsely representing that Grecian was the seller under the Contract when Grecian had assigned the Contract to plaintiffs.

ANALYSIS

Summary judgment is to be used sparingly, and should only be granted if Seller establishes that there are no triable issues of fact (Andre v Pomeroy, 35 NY2d 361 [1974]; Mosheyev v Pilevsky, 283 AD2d 469 [2nd Dept 2001]) and makes a prima facie showing of entitlement to judgment as a matter of law (Alvarez v Prospect Hosp., 68 NY2d 320 [1986]; Zuckerman v City of

New York, 49 NY2d 557 [1980]).

Only if the movant makes such a showing is the party opposing summary judgment then required to come forward with proof in evidentiary form establishing the existence of triable issues of fact, or an acceptable excuse for its failure to do so. Zuckerman, 49 NY2d at 557; Davenport v County of Nassau, 279 AD2d 497 (2nd Dept 2001). Finally, the party opposing summary judgment is entitled to the benefit of every favorable inference, and, in any event, the evidence shall be viewed in a light most favorable to the non-movant. Louniakov v M.R.O.D. Realty Corp., 282 AD2d 657 (2nd Dept 2001).

Summary Judgment Dismissing the Affirmative Defenses

The eight affirmative defenses are: 1) failure to state a cause of action; 2) lack of standing; 3) documentary evidence; 4) the doctrines of unjust enrichment, estoppel, and/or unclean hands; 5) the lack of indispensable parties; 6) plaintiffs' failure to satisfy conditions precedent; 7) plaintiffs' comparative fault; and 8) set-off.

As plaintiffs indicate, the first and third affirmative defenses, failure to state a cause of action and documentary evidence are not affirmative defenses, but ordinary defenses. See e.g. Bentivegna v Meenan Oil Co., 126 AD2d 506 (2d Dept 1987) (holding that the defense must be raised in a 3211 motion, not interposed in an answer). The fact that these defenses were pleaded unnecessarily does not mandate its dismissal. Accordingly, the Court disregards them as surplusage.

As to the second affirmative defense, lack of standing, plaintiffs submit a copy of an assignment of the Contract, effective as of September 15, 2006, between Grecian and George Dimou, Lambros Panagiotopoulos, and Lisa Panagiotopoulos. Petras Aff., Ex 5. Plaintiffs also submit a copy of a deed made as of September 15, 2006 from Grecian to plaintiffs of the premises known as

125 Fulton Street, along with a copy of the recording and endorsement cover page from the City Register. Petras Aff., Ex 6. The recording and endorsement cover page indicates that a deed was recorded on November 24, 2006. Ibid.

However, it appears that an issue may arise as to whether the assignment is valid under the Contract. Section 17.05 of the Contract provides that it "shall be binding upon and shall inure to the benefit of the parties hereto and their respective heirs or successors and permitted assigns." Petras Aff., Ex 3 (emphasis added). Section 47 in the rider the Contract states, in pertinent part: "This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and permitted assigns. Purchaser may assign this Agreement and its rights and obligations hereunder, in whole or in part, without the prior consent of Seller." Ibid. (emphasis added). Thus, the Contract first establishes that its assignment requires permission, and then provides that the Purchaser is allowed to freely assign the Contract without the Seller's prior consent. It would appear, under the canon of construction inclusio unius est exclusio alterius, that Seller's right to assign the Contract required the consent of 125 Fulton.

Plaintiffs do not contend that 125 Fulton consented to Grecian's assignment of the Contract to plaintiffs. Indeed, 125 Fulton's third counterclaim, for fraud, is based on the allegations that Grecian misled 125 Fulton into believing that it was the seller even though Grecian assigned the Contract to plaintiffs. Because the validity of the Grecian's assignment of the Contract to plaintiffs appears to require 125 Fulton's permission, and the parties did not address interpretation of the Contract on this issue, plaintiffs are not entitled to summary judgment dismissing this defense as a matter of law.

However, the Court grants the parties leave to renew a motion for summary judgment on the

issue of whether Grecian's assignment of the Contract to plaintiffs is valid. As discussed below, this particular issue affects the arguments that the parties raised here, and may be outcome determinative of the issues in this action.

The fourth affirmative defense, which asserts three different defenses of unjust enrichment, estoppel and/or unclean hands is dismissed. Unjust enrichment is not an affirmative defense, but rather a theory of recovery. "The theory of unjust enrichment lies as a quasi-contract claim. It is an obligation the law creates in the absence of any agreement." Goldman v Metropolitan Life Ins. Co. 5 NY3d 561, 572 (2005). In any event, the theory of unjust enrichment cannot be asserted because the matter is controlled by contract. Ibid. Plaintiffs seek a declaration that they are entitled to keep the down payment on the sale of the property, an obligation created under the Contract. Neither may 125 Fulton invoke the equitable defense of unclean hands, where plaintiffs seek adjudication of a claim exclusively at law. See Hasbro Bradley, Inc. v Coopers & Lybrand, 128 AD2d 218, 220 (1st Dept 1987).

As to estoppel, 125 Fulton argues that it refrained from sending Petras written notice terminating the Contract because Petras stated that he was having open heart and hip replacement surgeries. Opp Mem. at 10; see Korotkin Affirm., Ex E.

> "The purpose of equitable estoppel is to preclude a person from asserting a right after having led another to form the reasonable belief that the right would not be asserted, and loss or prejudice to the other would result if the right were asserted. The law imposes the doctrine as a matter of fairness. Its purpose is to prevent someone from enforcing rights that would work injustice on the person against whom enforcement is sought and who, while justifiably relying on the opposing party's actions, has been misled into a detrimental change of position."

Matter of Shondel J. v. Mark D., 7 NY3d 320, 326 (2006). Here, 125 Fulton does not allege that Petras had misled 125 Fulton into believing that his client was refraining from exercising a right

under the Contract. Equitable estoppel does not apply to the allegations. Therefore, the fourth affirmative defense is dismissed.

The fifth affirmative defense of lack of indispensable parties is dismissed. The original seller under the Contract and the escrow agent are named as third-party defendants, and plaintiffs are the assignees of the original seller. 125 Fulton's answer does not indicate what other parties need to be joined to the action in order to award complete relief to the parties, or that another party's rights would be inequitably affected by a judgment in this action, given that 125 Fulton is the undisputed assignee of the original buyer.

The seventh affirmative defense of comparative negligence is also dismissed, because it has no applicability to this issues in this action.

The sixth and eighth affirmative defenses are intertwined with 125 Fulton's counterclaims for breach of the Contract. The sixth affirmative defense is that plaintiffs did not comply with conditions precedent of the Contract, and the eighth affirmative defense asserts an offset. These defenses touch upon whether Grecian (or plaintiffs, assuming that they are valid assignees) performed their obligations under the Contract. Therefore, they are addressed in the next section of this decision discussing 125 Fulton's counterclaims.

Counterclaims

125 Fulton asserts three counterclaims, seeking return of the down payment, alleging wilful and deliberate breach of the Contract in bad faith, and alleging fraud.

In seeking return of the down payment, 125 Fulton alleges that Grecian (i) failed to comply with timing-sensitive obligations under the Contract; and (ii) failed to execute correction deeds for the Premises. 125 Fulton maintains that it entered the Contract to obtain land-use credits that would

be available upon redevelopment of the Premises. Those credits were allegedly transferable for increased development rights at 125 Fulton's nearby construction project, and accordingly had value greatly dependent upon the timing of the transfer under the Contract.

The Contract contains no "time of the essence" clause. "[T]he mere designation of a particular date upon which a thing is to be done does not result in making that date the essence of the contract." Ballen v Potter, 251 NY 224, 228 (1929) (citation omitted). "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 (2nd Dept 1986). The Contract originally used the phrase "no later than" with reference to the seller's right to adjourn the closing to January 31, 2007. That phrase was excised and substituted with "on or about." This is a clear indication of the intent that time not be of the essence.

However, "it is possible for the seller to convert a non-time-of-the-essence contract into one making time of the essence by giving the buyer 'clear, unequivocal notice' and a reasonable time to perform." ADC Orange v Coyote Acres, 7 NY3d 484, 490 (2006); Sohayegh v Oberlander, 155 AD2d 436, 438 (2nd Dept 1989) (contract may be converted to "time is of the essence" by letter); Woodwork Display Corp. v Plagakis, 137 AD2d 809 (2nd Dept 1988); see also Zev v Merman, 134 AD2d 555 (2nd Dept 1987), affd 73 NY2d 781 (1988); Tarlo v Robinson, 118 AD2d at 566-567.

Petras's letter of March 28, 2007 purported to set Wednesday, May 2, 2007 as the Closing Date, with "TIME BEING OF THE ESSENCE." The letter states, in pertinent part:

> "Please take notice that the Contract of Sale dated March 9, 2006 (the **"Agreement"**), by and between Grecian Management Co., LLC, as Seller (the **"Seller"**), and New York Law School, as assigned to 125 Fulton LLC, as Purchaser (the **"Purchaser"**), covering the referenced Premises, provides for a Closing Date

> "*on or about January 31, 2007*" . . .
>
> Accordingly, the Seller hereby sets a reasonable time in which to close on ***Wednesday May 2, 2007, as the Closing Date, with "TIME BEING OF THE ESSENCE"*** at my offices . . ."

Petras Aff., Ex 2-F (emphasis in original). As 125 Fulton indicates, Petras's letter clearly identifies the Seller as Grecian, not the individual plaintiffs. Because the Contract was purportedly assigned to plaintiffs on September 15, 2006, 125 Fulton argues that Petras's letter is of no force and effort, insofar as Grecian no longer had any rights under the Contract. The record of correspondence indicates that Petras consistently referred to Grecian as the Seller in correspondence with 125 Fulton's attorney. Only in the letter of May 2, 2007, which purports to declare 125 Fulton in default, does Petras state, "I have discussed the contents of your letter [dated April 26, 2007] with my **clients** and **they** contest the accuracy of the statements in your letter of April 26, 2007." Petras Aff., Ex 9 (emphasis added). In letter of May 10, 2007, Petras then states, "My client has instructed me not to return any down payment. . . My client has informed me that he is engaging office counsel." Petras Aff., Ex 10.

Plaintiffs contend that Petras represented both plaintiffs and Grecian, but do not directly address 125 Fulton's argument. The issue is not limited to the question of whether plaintiffs authorized the Petras to act on their behalf; the question is whether Petras's letter should constitute notice to 125 Fulton sent by the assignees.

As discussed above in the context of the second affirmative defense of standing, there is an unresolved issue as to the validity of Grecian's assignment of the Contract to plaintiffs. If the assignment is not valid, then that would render academic 125 Fulton's argument that it could have disregarded Petras's letter of March 9, 2006. Thus, resolution of this argument must await a

determination as to whether Grecian's assignment of the Contract to plaintiffs is valid.

125 Fulton has taken the position that it was unaware of Grecian's assignment. Thus, assuming that Grecian's assignment is invalid, 125 Fulton must therefore explain why it was not required to attend the closing on May 2, 2007. According to 125 Fulton, its attorney orally indicated that Grecian was in default under the Contract prior to the Closing Letter. However, the Contract requires notices in writing. See Contract, §§ 15.01 ("[a]ll notices shall be in writing ... .") and 28 ("[a]ny notice or demand pursuant to the provisions of this Contract shall be in writing ... ."). The Rejection Letter purports to terminate the Contract because Grecian "breached and failed to abide by the provisions of the Contract in any real way." Petras Aff., Ex 2-G. In this regard, the Contract provides that "[i]f Seller fails or refuses to perform any of Seller's obligations hereunder prior to the Closing, Purchaser may either (A) terminate the [Contract], . . . or (B) pursue an action against Seller for specific performance." Contract, § 48. The issue presented is whether the Rejection Letter exercised a valid basis to terminate the Contract.

The Court rejects 125 Fulton's argument that, as a matter of law, it may terminate the Contract based on Grecian's alleged failures to comply with the Contract prior to the date of the Closing Letter, in which Petras indicated that the seller was ready to proceed to closing. "[M]ere delay in performance will not be considered as grounds for rescission unless time is of the essence.". Gupta v 211 St. Realty Corp., 16 AD3d 309, 311 (1st Dept 2005); Luo v. Main Street Associates 212 A.D.2d 675, 676 (2d Dept 1995).

In Gupta, the plaintiff entered into a contract as purchaser with defendant as seller for the purchase of real property located in the Bronx. The contract also contained a mortgage contingency that obligated the purchaser to obtain a conventional mortgage commitment in the amount of

$600,000 on or before October 15, 2002 and provide the seller with a copy of the written commitment when received. The mortgage contingency clause further provided that: "In the event that such a commitment is not issued on or before the date set forth above, and unless such date is extended in writing by the parties hereto or unless Purchaser has accepted a commitment that does not comply with the [above terms], the Purchaser may cancel this contract." Gupta, 16 AD3d at 310. The October 15 date passed, but no action was apparently taken by either party. By letter dated December 10, 2002, defendant's counsel advised plaintiff's counsel that, since no mortgage commitment had been received, his client elected to cancel the contract and return the down payment. Plaintiff's counsel responded that a mortgage commitment dated December 5, 2002 had been received, and later sent another letter demanding the scheduling of a closing, followed by a time of the essence letter.

The Appellate Division reversed the Supreme Court's denial of plaintiff's motion for summary judgment for specific performance. Plaintiff undisputedly failed to comply with the requirements of the mortgage contingency clause within the time limits imposed by the contract. Neither did plaintiff seek an extension of time within which to comply or invoke his right to cancel the contract. The Appellate Division reasoned, "However, as time was not of the essence when defendant attempted to cancel the contract in December 2002, there was no basis to hold plaintiff in default. Indeed, mere delay in performance will not be considered as grounds for rescission unless time is of the essence." Gupta, 16 AD3d at 311.

Yitzhaki v Sztaberek (38 AD3d 535 [2d Dept 2007]) is also instructive. There, the plaintiff commenced an action seeking specific performance of a contract for the sale of real property. Under the contract, the plaintiff had 45 days from receipt of a fully executed contract to provide the

defendant's attorney with a firm written mortgage commitment. The contract recited that time was of the essence. The plaintiff asked for an extension of time to secure a mortgage commitment, but the defendant's attorney, while acknowledging the request, did not respond to it because the attorney was unable to reach the defendant. The defendant claimed that he never extended the plaintiff's time to secure a mortgage commitment, and instead elected to cancel the contract. The Appellate Division, Second Department, affirmed the Supreme Court's decision granting the plaintiff's motion for summary judgment directing specific performance. The Appellate Division reasoned

> "Despite the provisions of the mortgage contingency clause, the defendant neither cancelled the contract nor extended the plaintiff's time to secure a mortgage commitment. His purported cancellation, contained in his answer to the plaintiff's complaint, was untimely since the cancellation was made after plaintiff tender the mortgage commitment and sought to close title."

Yitzhaki, 38 AD3d at 536. Thus, the Appellate Division ruled that "the fact that the defendant refused to close title constituted an anticipatory breach of the contract, obviating the need by plaintiff to tender performance prior to the commencement of the instant action" Id. at 537.

At the time the Rejection Letter was sent, the premises were allegedly vacant, and it would appear that the only remaining obligation of Grecian under the Contract is to cause George Dimou, Maria Dimou, Lambros Panagiotopoulos and Lisa Panagiotopoulos to execute correction deeds. Following Gupta, 125 Fulton had no basis to hold Grecian in default for Grecian's alleged delay in performance, which would have occurred during a period when time was not of the essence. Like the defendant in Yitzhaki, 125 Fulton purported to terminate the Contract after Petras claimed that the premises were vacant and sought to close title. If Petras's letter validly set the closing date, then the Rejection Letter purporting to cancel the Contract is untimely, following Yitzhaki.

125 Fulton contends that Grecian was not ready to close on May 2, 2007, because Grecian

failed to meet the condition precedent of providing correction deeds for the Premises. Maria Dimou, who was not present at the closing, claims that she was "available to immediately travel to the closing if necessary to sign any papers which needed to be signed" and "was willing the sign the confirmatory/correction deeds, if they were required to be signed at the closing." Dimou Aff.

Section 36 of the rider to the Contract states, in pertinent part:

> "If the Seller shall be unable to convey title subject to only the Permitted Exceptions and otherwise in accordance with the terms of this Contract, the sole obligation of the Seller shall be to refund Purchaser's Deposit made hereunder, and to reimburse the Purchaser for the cost of title examination, and upon making such refund and reimbursement, this Contract shall wholly cease and terminate and neither party shall have any further claims against the other by reason of this Contract . . . Notwithstanding anything contained herein to the contrary, Seller shall be obligated to (v) cause George Dimou, Maria Dimou, Lambros Panagiotopoulos and Lisa Panagiotopoulos to execute correction deeds in the form request by Purchaser or Purchaser's title company . . . ."

Petras Aff., Ex 3. There is no indication in the Contract that the correction deeds had to be provided before, and not at, the closing. Furthermore, evidence has been proffered that Purchaser's title company, in March of 2006, removed the correction deed as an objection on its title report. See Petras Aff., Ex 4.

Second, although the Contract places an obligation on Seller to provide correction deeds, it also, in the same paragraph cited by Purchaser, goes on to state that "Purchaser may nevertheless accept such title as the Seller may be able to convey . . . ." Contract § 36. Having included the potential for mitigating factors related to the occurrence, including Purchaser's potential excusing of the requirement entirely, the condition must be deemed a constructive, and not an express, condition. Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co., 86 NY2d 685, 692 (1995) (express conditions typically employ "unless and until" language, and in the case of doubt, constructive condition is to be assumed); Restatement [Second] of Contracts §237, comment d, at

220 (only express conditions have no mitigating standard of materiality or substantiality applicable to the non-occurrence of the event).

The failure of an express condition precedent releases an obligation to proceed to closing. See Bradenton Realty Corp. v United Artists Props. I Corp., 264 AD2d 405 (2nd Dept 1999). As the alleged condition precedent was not an express condition precedent, 125 Fulton cannot invoke Grecian's purported failure to deliver correction deeds as a reason not to proceeding to closing.[2] However, this assumes that Petras's letter of March 28, 2007 validly set the closing date. If the Grecian's assignment to plaintiff is valid, an unresolved issue arises as to whether Petras's letter should be construed as an indication by Grecian's assignees to set the closing. The issue might require discovery as to whether 125 Fulton's attorney was aware that the Contract had been assigned to plaintiffs. The unresolved question of validity of Grecian's assignment affects whether Petras's letter effectively set the closing date.

Given all the unresolved issues, plaintiffs have not established entitlement to summary judgment dismissing the first counterclaim and the sixth affirmative defense of failure to comply with a condition precedent. The Court does not reach whether the record establishes, as a matter of law, that Grecian was ready to deliver the correction deeds at closing.

The second counterclaim seeks 125 Fulton's costs and fees in negotiating the contract, due to plaintiffs' and/or Grecian's alleged wilful delays and bad faith in proceeding to closing. As plaintiffs indicate, section 48 of the Contract rider limits damages recoverable by reason of the Seller's breach to either return of the down payment or specific performance, and if specific

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[2]Alternatively, 125 Fulton could have given notice, as required by the Contract, that the expected proffered title was unacceptable.

performance is unavailable, to damages as a result of the Seller's default, including the recovery of all actual, out-of-pocket expenses incurred by 125 Fulton in connection with such default. However, plaintiffs acknowledge that,

> "New York follows the rule that where the proof establishes that the vendor of real property failed to perform in bad faith, the purchaser may recover the loss of its bargain [citations omitted], and those expenses and disbursements reasonably and necessarily incurred in preparation for its performance which were within the contemplation of the parties when the contract was made [citations omitted]"

BGW Development Corp. v. Mount Kisco Lodge No. 1552 of Benev. and Protective Order of Elks of the United States of America, Inc.,247 AD2d 565, 568-569 (2d Dept 1998)(collecting cases). Thus, contrary to plaintiffs' argument, the second counterclaim is not duplicative of the first counterclaim, because the first counterclaim seeks only return of the downpayment.

Plaintiffs argue that the bad-faith rule does not apply when the buyer is in default. Whether 125 Fulton is in default depends on whether Grecian's assignment of the Contract to plaintiffs is valid, whether Petras's letter effectively set the closing date, whether the premises were vacant prior to closing, and whether correction deeds could have been conveyed to 125 Fulton at closing. The last two questions require discovery. The General Affidavit dated May 2, 2007 of George Dimou, Lisa Panagiotopoulos, and Lambros Panagiotopoulos, who state that there are presently no tenants in said premises (see Bush Affirm., Schedule A [not tabbed]), does not establish a prima facie case that Seller was ready to deliver possession of the premises "vacant, free of all tenancies and occupants," pursuant to Section 36 (y) of the Contract rider. Petras Aff., Ex 3. The General Affidavit does not state that the affiants have personal knowledge of those facts. Therefore, summary judgment dismissing the second counterclaim, and the eighth affirmative defense of set off, is denied.

As to the third counterclaim, for fraud, 125 Fulton alleges that Grecian and plaintiffs did not reveal that Grecian had assigned the Contract to plaintiff, even though Petras continued to represent in correspondence that Grecian was the seller under the Contract.

Nevertheless, as plaintiffs indicate, the element of justifiable reliance is lacking.

> "It is well settled that with respect to a real property contract, unless the facts represented are matters particularly within one party's knowledge, the other party must make use of the means available to learn, by the exercise of ordinary intelligence, the truth of such matters 'or he [or she] will not be heard to complain that he [or she] was induced to enter into the transaction by misrepresentation.'"

Culver & Theisen, Inc. v Starr Realty Co., 307 AD2d 910, 910 (2d Dept 2003), citing Danann Realty Corp. v. Harris, 5 NY2d 317, 322 (1959); see Stuart Silver Assocs. v Baco Dev. Corp., 245 AD2d 96, 98-99 (1st Dept 1997). Plaintiffs have demonstrated that Grecian's conveyance of the property to the individual plaintiffs was recorded with City Register. Because the identity of the seller could have been discovered through the exercise of due diligence, such as by a title report, 125 Fulton cannot claim justifiable reliance. Therefore, summary judgment is granted dismissing the third counterclaim.

Accordingly, it is hereby

ORDERED that the motion of plaintiffs for summary judgment is granted to the extent that the first and third affirmative defenses are disregarded as surplusage, the fourth, fifth, and seventh affirmative defenses are dismissed, and the third counterclaim is dismissed, and the motion is otherwise denied; and it is further

ORDERED that the parties are granted leave to renew a motion for summary judgment on the issue of whether Grecian Management Co. LLC's assignment of the Contract to plaintiffs required the consent of 125 Fulton LLC, and if so, whether such consent was obtained; and it is

further

ORDERED that the action shall otherwise continue; and it is further

ORDERED that the parties are directed to appear at a preliminary conference on June 11, 2009 at 9:30 A.M. in IAS Part 7, 111 Centre St Rm 949, New York, New York.

Copies to counsel.

Dated: April 13, 2009
New York, New York

ENTER:

J.S.C.

HON. MICHAEL D. STALLMAN

FILED
APR 17 2009
COUNTY CLERK'S OFFICE
NEW YORK