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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:

HON. DANIEL PALMIERI
Acting Justice Supreme Court

----------x **TRIAL TERM PART: 47**

NATHAN GRAMA, as Trustee,

INDEX NO.:009428/08

Plaintiff,

MOTION DATE:4-20-09
SUBMIT DATE:4-20-09
SEQ. NUMBER - 001

-against-

DENA S. FRUCHT and RUSSO, DARNELL & LODATO, LLP

Defendants.

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The following papers have been read on this motion:

Notice of Motion, dated 3-17-09.....1
Affirmation in Opposition, dated 4-3-09.....2
Affirmation in Support, dated 4-13-09.....3
Reply Affirmation, dated 4-16-09.....4

The motion by plaintiff for summary judgment pursuant to CPLR §3212 is granted, and judgment is rendered in favor of plaintiff in the amount of the contract down payment of $50,000.00, as liquidated damages with interest from February 11, 2008. The counterclaim and cross claim of defendant Frucht for return of the above mentioned down payment is dismissed.

Plaintiff and defendant entered into a contract (the Contract) pursuant to which the plaintiff was to sell and defendant was to buy premises located in Woodmere, New York (the

Premises). Defendant made a contract down payment (Deposit) of $50,000.00 which has been held in escrow by the plaintiff's then attorneys, the co-defendant. It is undisputed that the Contract called for a closing "on or about January 30, 2008 but no later then February 8, 2008", and that "at closing, there will be Certificates of Occupancy for all structures, additions and improvements".

In this action by plaintiff contract vendor against the defendant contract vendee, plaintiff seeks payment to it of the Deposit. That remedy is stated in the Contract to be the seller's sole and exclusive remedy in the event of a default by the defendant purchaser. The defendant buyer has counterclaimed for breach contract and a refund of the Deposit.

This dispute is whether the defendant should be permitted to cancel the Contract based on the alleged inability of the seller plaintiff to satisfy objections raised by the defendant purchaser with respect to municipal approvals for the Premises. The Deposit of $50,000.00 was to be held in escrow pending the closing by defendant Russo, Darnell and Lodato. Neither plaintiff nor defendant makes any claim against this defendant except for the return or payment of the Deposit. Reference herein to defendant shall mean defendant Frucht.

Pending the closing, the attorneys for the parties exchanged letters with respect to the municipal approvals requested by defendant and defendants's attorney established Monday February 11, 2008 as the closing date, provided that the "sign-offs are in place". Defendant does not dispute that the change of date from Friday February 8, 2008, to Monday February 11, 2008, was agreed upon to accommodate the religious requirements of defendant buyer.

Although the plaintiff was prepared to deliver a deed, a satisfaction of an existing mortgage and the required "sign-offs", defendant did not appear at the closing, preferring

rather to rely on a letter sent on Friday, February 8, 2008, that since the sign-offs had not yet been received, the defendant "deems that your client cannot deliver title according to the Contract... ." In fact, the sign-offs were faxed to defendant's attorney the afternoon of Friday February 8, 2008, and were available for delivery on the closing day.

A representative of the Town of Hempstead has testified at an examination before trial that he made an inspection of the Premises a month prior to the scheduled closing, identified Certificates of Completion for all work at the Premises and concluded that the Premises were in compliance with all local and state codes. The testimony of the Town representative is not challenged, contradicted or disputed. An examination of the exhibits submitted by plaintiff reveals that they satisfy the requirements set forth by the defendant pursuant to the letters of her attorney.

It is well settled that summary judgment is a drastic remedy which should not be granted where there is any doubt about the existence of a triable issue of fact. *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957); *Bhatti v. Roche*, 140 AD2d 660 (2d Dept. 1988). It is nevertheless an appropriate tool to weed out meritless claims. *Lewis v. Desmond*, 187 AD2d 797 (3d Dept. 1992); *Gray v. Bankers Trust Co. of Albany, N. A.*, 82 AD2d 168 (3d Dept. 1981). Even where there are some issues in dispute in the case which have not been resolved, the existence of such issues will not defeat a summary judgment motion if, when the facts are construed in the nonmoving party's favor, the moving party would still be entitled to relief *Brooks v. Blue Cross of Northeastern New York, Inc.*, 190 AD2d 894 (3d Dept.1993).

Generally speaking, to obtain summary judgment it is necessary that the movant establish its claim or defense by the tender of evidentiary proof in admissible form sufficient to warrant the court, as a matter of law, in directing judgment in its favor (CPLR 3212 [b]), which may include deposition transcripts and other proof annexed to an attorney's affirmation. *Olan v Farrell Lines,* 64 NY2d 1092 (1985). Absent a sufficient showing, the court should deny the motion, irrespective of the strength of the opposing papers. *Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851 (1985).

If a sufficient *prima facie* showing is made, however, the burden then shifts to the non-moving party. To defeat the motion for summary judgment the opposing party must come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. CPLR 3212 (b); *see also GTF Marketing, Inc. v. Colonial Aluminum Sales, Inc.*, 66 NY2d 965 (1985); *Zuckerman v. City of New York*, 49 NY2d 557 (1980). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion. *Mgrditchian v. Donato*, 141 AD2d 513 (2d Dept. 1988). Conclusory allegations are insufficient (*Zuckerman v. City of New York, supra*), and the defending party must do more than merely parrot the language of the complaint or bill of particulars. There must be evidentiary proof in support of the allegations. *Fleet Credit Corp. v. Harvey Hutter & Co., Inc.*, 207 A.D.2d 380 (2d Dept. 1994); *Toth v. Carver Street Associates*, 191 AD2d 631 (2d Dept. 1993). If a party defends a motion by resort to CPLR 3212(f), that is, the party has a defense sufficient to defeat the motion but that the facts cannot yet be stated, that party must be able to make some showing that such facts do in fact exist; mere hope that discovery may reveal those facts is insufficient. *Companion Life Ins. Co. v All State Abstract Co.*, 35 AD3d

519 (2d Dept. 2006). Nor can mere speculation serve to defeat the motion. *Pluhar v Town of Southhampton,* 29 AD3d 975 (2d Dept. 2006); *Ciccone v Bedford Cent. School Dist.,* 21 AD3d 437 (2d Dept. 2005).

However, the Court must draw all reasonable inferences in favor of the nonmoving party. *Nicklas v Tedlen Realty Corp.,* 305 AD2d 385 (2d Dept. 2003); *Rizzo v. Lincoln Diner Corp.,* 215 AD2d 546 (2d Dept. 1995). The role of the Court in deciding a motion for summary judgment is not to resolve issues of fact or to determine matters of credibility, but simply to determine whether such issues of fact requiring a trial exist. *Dyckman v. Barrett,* 187 AD2d 553 (2d Dept. 1992); *Barr v County of Albany,* 50 NY2d 247, 254 (1980); *James v. Albank,* 307 AD2d 1024 (2d Dept. 2003); *Heller v. Hicks Nurseries,* Inc., 198 AD2d 330 (2d Dept. 1993).

The Court need not, however, ignore the fact that an allegation is patently false or that an issue sought to be raised is merely feigned. *See Village Bank v Wild Oaks Holding, Inc.,* 196 AD2d 812 (2d Dept. 1993); *Barclays Bank of N.Y. v Sokol,* 128 AD2d 492 (2d Dept. 1987), such as when the affidavit in opposition clearly contradicts earlier deposition testimony. *Central Irrigation Supply v Putnam Country Club Assocs., LLC,* 27 AD3d 684 (2d Dept. 2006).

Plaintiff as seller had an obligation to act in good faith in connection with his obligation to provide whatever municipal approvals were necessary in connection with the Contract and the evidence submitted establishes that the plaintiff made appropriate and successful efforts to comply. *Cf Karl v. Kessler,* 47 AD3d 681 (2d Dept. 2008).

The letter from defendant's attorney establishing the February 11, 2008, closing date did not make time of the essence, however, even if it produced such an effect, plaintiff was nevertheless in compliance.

When a provision that time is to be of the essence is inserted in a real property contract, each party must tender performance on law day and failure to so perform constitutes a default. *Greto v. Barker 33 Associates*, 161 AD2d 109 (1st Dept. 1990) Absent such a provision, once the law date has passed, either party can, by clear distinct, unequivocal notice, coupled with a reasonable time to perform, declare time to be of the essence. *Alirkan v. Garcia*, 162 AD2d 571 (2d Dept. 1990); *3M Holding Corp., v. Wagner*, 166 AD2d 580 (2d Dept. 1990). A party may establish a time of the essence date by giving notice, a reasonable time for the counter party to act and a warning that failure to close will result in a default.

Here, there was no time of the essence provision in the contract and the letter from defendant's attorney did not make it so. *See Mohen v. Mooney*, 162 AD2d 664 (2d dept. 1990); *Knight v. McLean*, 171 AD2d 648 (2d Dept. 1991).

Further, if the letter of defendant's attorney was properly in compliance with the time fo the essence requirements, it would have been ineffective since the law day established by the Contract had not passed and the defendant did not give plaintiff a reasonable time to comply with the Contract. Moreover, the evidence is beyond dispute that plaintiff was in a position to comply with the Contract and defendant did not appear. *See Miller v. Almquist*, 241 AD2d 181 (1st Dept. 1998).

Thus, defendant's contention that since plaintiff was not in a position to close on February 8, 2008, the Contract was breached on that date is without merit.

Although it is arguable that defendant anticipatorily breached the Contract, thus relieving plaintiff of the need to demonstrate that he had the ability to perform the Court need not make such a finding in light of the evidence of ability to perform. *Peek v. Scialdone*, 56 AD3d 743 (2d Dept. 2008).

Plaintiff has made a *prima facie* showing of entitlement to summary judgment by submitting facts in evidentiary form which lead to the conclusion that plaintiff was in compliance with the Contract and defendant breached the Contract by failing to complete the purchase.

Defendant has failed to raise an issue of fact demonstrating that the plaintiff was not able to comply with the conditions of the Contract on the date set by her own attorney for the closing. Specifically, defendant has failed to make a showing that plaintiff was not able to consummate the sale in compliance with his contractual commitments. *Correnti v. Allstate Properties, LLC*, 38 AD3d 588 (2d Dept. 2007); *Costello v. Casale*, 281 AD2d 581 (2d Dept. 2001). Based on the foregoing, the evidence of breach by defendant of her contractual obligation has not been rebutted, and defendant has failed to demonstrate the existence of any triable issues of fact.

Where as here, a contract contains a clause permitting the retention of the contract down payment, courts will enforce such a provision. *Texter v. Trotta*, 48 AD3d 455 (2d Dept. 2008); *Rivera v. Konkol*, 48 AD3d 347 (1st Dept. 2008). Since plaintiff was entitled to a refund of the down payment from the day of defendant's breach, February 11, 2008,

plaintiff is entitled to interest at the statutory rate on the Deposit from that date. Judgment may be entered against the defendant for the amount by which interest, statutory costs and statutory disbursements exceed the amount of the Deposit. *Olcott Lakeside Development, Inc., v. Krueger*, 207 AD2d 1032 (4th Dept. 1994). Hence, plaintiff is awarded summary judgment for retention of the Deposit, the defendant Russo, Darnell & Lodato, LLP, as escrow agent, is authorized and directed to immediately turn over the Deposit and any interest accrued thereon to the plaintiff upon service on them of Notice of Entry of this Decision and Order.

Statements of an attorney who is also a party should be in affidavit form (CPLR §2106), and, if not, may be excluded from consideration. *Lesoff v. 26 Court Street Assoc., LLC*, 58 AD3d 610 (2d Dept. 2009); *LaRusso v. Katz*, 30 AD3d 240 (1st Dept. 2006); *Samuel & Weininger v. Belovin & Franzblau*, 5 AD3d 466 (2d Dept. 2004). The Court has not considered the affirmation of Glenn H. Darnell because an attorney who is a party, may not submit an affirmation CPLR §2106, however, even if the Court had considered the affirmation, the result would not be changed.

Plaintiff's motion is granted, the counterclaim and cross claim are dismissed.

This shall constitute the Decision and Order of this Court.

Submit Judgment to the Clerk.

ENTER

DATED: April 24, 2009

HON. DANIEL PALMIERI
Acting Supreme Court Justice

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