

<b>6086 Strickland Assoc., LLC v SSJ Dev. of Mill Basin VIII, LLC</b>
2009 NY Slip Op 31230(U)
June 3, 2009
Supreme Court, New York County
Docket Number: 601890/08
Judge: Walter B. Tolub
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **WALTER B. TOLUB**

PART \_\_\_\_\_

*Justice*

Index Number : 601890/2008

**6085 STRICKLAND ASSOCIATES LLC**

vs.

**SSJ DEVELOPMENT OF MILL**

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION**

**FILED**

JUN 08 2009

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 6/03/09

**WALTER B. TOLUB** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 15

-----X  
6086 STRICKLAND ASSOCIATES, LLC,

Plaintiff,

-against-

Index No. 601890/08

SSJ DEVELOPMENT OF MILL BASIN VIII, LLC,  
STEFAN JEMAL and THE LAW OFFICE OF ALAN  
L. TAUBER, P.C., as escrow agent,

Defendants

-----X  
TOLUB, J. :

**FILED**  
JUN 08 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

This is an action for breach of a contract between plaintiff 6085 Strickland Associates, LLC and defendant SSJ Development of Mill Basin VIII, LLC (SSJ) for the purchase and sale of commercial real estate. Plaintiff moves for summary judgment on its second and third causes of action, and for an order awarding it \$250,000 as liquidated damages, pursuant to a personal guaranty executed by defendant Stefan Jemal (Jemal), plus costs and attorney's fees.

Defendants SSJ and Jemal cross-move for an order, pursuant to CPLR 3025 (b), granting them leave to serve an amended answer with affirmative defenses and counterclaims, and an order extending their time to serve a document demand upon plaintiff, scheduling depositions of all parties in this action, and extending the note of issue filing date to June 30, 2009.

For the reasons set forth below, plaintiff's motion for summary judgment is denied, and defendants' cross motion is granted.

**FACTS**

In February 2008, plaintiff and SSJ entered in a Purchase and Sale Agreement (the Contract), pursuant to which plaintiff agreed to sell SSJ certain commercial real property, as well

as all improvements and fixtures, located at 6085 Strickland Avenue, Brooklyn, New York (the Property), for the purchase price of \$15,500,000.00 (Complaint, ¶ 6). The Contract provides for a time of the essence closing date of March 1, 2008:

(a) Except as otherwise specifically set forth in this Agreement, the closing (the "Closing") of the transaction contemplated by this Agreement (the "Transaction") shall be conducted at 10:00 a.m., on Thursday, March 1, 2008 (the "Closing Date") ... It is hereby agreed that the time and date for the closing is Time of the Essence. In the event that Buyer does not close on this date, Seller shall have the right to cancel this Agreement, retain the Deposit and Additional Deposit if any and no party shall have any further claims against the other except for those rights outlined in subparagraph (b) below and except for any obligations that expressly survive termination hereof.

(b) Notwithstanding anything to the contrary, it is hereby agreed that in the event Buyer is not prepared to close on March 1, 2008, Buyer shall have the right upon notice served upon Seller no later than February 20, 2008, time being of the essence as to such date, to extend the Closing date to a date specified in such notice, which date shall not be later than April 1, 2008, by placing an additional FIVE HUNDRED THOUSAND DOLLARS (\$500,000) in escrow with Seller to be held in accordance with the same terms and conditions outlined for the Contract Deposit in Paragraph 3(a)(i) below. In the event that Buyer shall timely exercise its right to extend the Closing date pursuant to this Section 2(b), Seller shall have the right to adjourn such new Closing Date for up to 5 business days and the new scheduled closing date, as selected by Buyer and as adjourned by Seller, if applicable, shall be TIME IS OF THE ESSENCE

(Contract, ¶¶ 2 [a] and [b] [Aff. of Alan Tauber, plaintiff's managing agent, Exh 1]).

With respect to title, the Contract provides that:

Buyer shall promptly order an examination of Title and shall cause a copy of the Title Report to be forwarded to Seller's Attorney. Seller shall be entitled to a reasonable adjournment, not to exceed ninety (90) days, of the Closing to remove any defects to Title not otherwise deemed permitted encumbrances excepted in this

Agreement. Seller shall have no obligation to remove said defects. In the event that Seller cannot or will not remove said defects that are not Permitted Encumbrances hereunder, Buyer shall have the right to accept title as is with no reduction in the Purchase Price or to cancel this Contract. In the event this Contract is canceled pursuant to this Paragraph, Seller's sole obligation to Buyer shall be the return of the Contract Deposit along with interest earned thereon. There shall be no further claims between the parties

(*id.*, ¶ 5 [a]).

The Contract also set forth certain conditions precedent that plaintiff had to fulfill prior to closing:

[T]he obligation of Buyer to purchase and accept title to the Property under this Agreement at the time of Closing is subject to the satisfaction of each and every one of the following conditions precedent or conditions concurrent no later than the Closing Date, the satisfaction of which may be waived, in whole or in part, only in writing by the Buyer:

(i) Seller delivers marketable fee simple title to the Property to Buyer, subject only to the Permitted Encumbrances

(*id.*, ¶ 11 [b] [i]).

The Contract also required plaintiff to attempt to settle a pending personal injury lawsuit against the Property, entitled *James Lazier v 6085 Strickland Associates* (Index No. 2302/06, Sup Ct, Kings County) (the *Lazier* action):

Seller has advised buyer that there is a lawsuit pending against the Property entitled James Lazier v. 6085 Strickland Associates, LLC ("Pending Lawsuit"). Seller shall make commercially reasonable efforts to settle the Lawsuit prior to Closing. In the event that the Lawsuit is not settled, and there is anything on record or any reason pertaining to said Pending Lawsuit that shall cloud title, Seller's sole obligation shall be to deposit with the Title Company at Closing an amount equal to the sum of the Plaintiff's award under the Pending Lawsuit, plus statutory interest through December 31,

2008. In the event that despite the aforementioned deposit, the title company will not be willing to issue title free of any defects regarding said lawsuit, Seller's sole obligation shall be to return the deposit and Additional Deposit, if any, and this Contract shall be deemed canceled and neither side shall have any claim against the other ...

(*id.*, ¶ 17).

In January of 2008, Madison Title Company LLC (Madison) issued a Title Report which contained a Schedule "B" enumerating 30 exceptions to title which were required to be disposed of prior to the issuance of title insurance (Aff. of Stephen Jemal, ¶ 17; *see* Exh B). Plaintiff was required to remove the objections set forth in Schedule B to the Title Report for plaintiff to be in a position to deliver insurable and marketable title, as required under paragraph 11 (b) (i) of the Contract.

Objection No. 26 of Schedule B to the Title Report disclosed that there existed a Notice of Pendency filed against the Property in the *Lazier* action, seeking a judgment of partition against the Property (*see* Jemal Aff., Exh B). Objection No. 26 of the Title Report provided that the *Lazier* action must be discontinued, judgment, if any, vacated, and the Notice of Pendency canceled by the court, in order for title to be issued (*see id.*).

The Contract provided for a \$100,000 down payment to be held in escrow by nominal defendant The Law Office of Alan L. Tauber, P.C., as escrow agent ( Jemal Aff., ¶ 9). In accordance with the Contract, SSJ deposited \$100,000 into the escrow account (Complaint, ¶ 8). However, SSJ failed to close title to the Property on or before March 1, 2008, and did not serve notice upon plaintiff, in accordance with paragraph 2 (b) of the Contract, to adjourn the Closing Date (Complaint, ¶ 9).

On March 25, 2008, plaintiff and SSJ entered into a new agreement (the Modification Agreement [Tauber Aff., Exh 2]), pursuant to which the parties agreed to amend and modify the Contract (Complaint, ¶ 11). Plaintiff asserts that, because it wished to complete the transaction, it modified the terms of the Contract requiring SSJ to deposit \$500,000 into the escrow account, to now require SSJ to deposit only an additional \$150,000 into the escrow account (Tauber Aff., ¶ 12). In addition, a provision was added requiring Jemal to guarantee the payment of an additional \$250,000 as liquidated damages if SSJ did not close title:

1. Buyer hereby acknowledges and agrees that the closing of the transaction contemplated by the Contract ("Closing") was required to be consummated on March 1, 2008. Buyer has requested that, and the parties hereby agree to, extend the date for the Closing to April 15, 2008 TIME BEING OF THE ESSENCE. In consideration therefore, Buyer has delivered to Escrow Agent additional deposits in the aggregate amount of \$150,000, which sums shall for all purposes be deemed a part of the Deposit under the Contract.
2. In addition, Stefan Jemal ("Jemal") hereby acknowledges and agrees that he will materially benefit from the extension granted in paragraph 1 above and in consideration therefore, Jemal hereby agrees that, in the event Buyer fails to timely consummate the Closing for any reason other than a default of Seller, Jemal shall immediately pay to Seller the amount of \$250,000 in immediately available funds by wire transfer to an account identified by Seller to Jemal at the address set forth above. If said sum is not paid to Seller within five days of demand, then the sum shall accrue at the prime rate of interest announced from time to time by Citibank, N.A., plus 5% per annum until so paid and Jemal shall pay to Seller any and all closing costs (including attorneys' fee and expenses) including and enforcing Seller's right under this Section 2 ...

(Modification Agreement, ¶¶ 1, 2).

However, SSJ did not attempt to schedule a closing and did not close title to the Property

on or before April 15, 2008 (Complaint, ¶ 14). On April 16, 2008, Jemal acknowledged, in an e-mail to Tauber, that he did not have the funds to close title on April 15, 2008, but stated that SSJ was about to be wired \$4 billion by a European bank (*see* Tauber Aff., Exh 3).

On April 24, 2008, plaintiff sent to SSJ and Jemal notice of SSJ's default pursuant to the terms and conditions of the Modification Agreement (Complaint, ¶ 15). On May 14, 2008, plaintiff sent SSJ and Jemal a Notice of Termination of the Contract and the Modification Agreement (*id.*, ¶ 16; *see* Tauber Aff., Exh 10). The Termination Notice demanded the release of the escrow deposit of \$250,000, and that Jemal wire \$250,000 to an account held by plaintiff in accordance with paragraph 2 of the Modification Agreement (*see id.*). Jemal, however, never wired any of the money that he personally guaranteed to plaintiff pursuant to the Modification Agreement (Tauber Aff., ¶ 24).

On May 19, 2008, in his capacity as escrow agent, Tauber sent a notice to SSJ informing it of his intention to release the escrow deposit to plaintiff (*see id.*, Exh 11). On May 28, 2008, SSJ's counsel sent an e-mail to Tauber asserting that SSJ had a huge financing commitment in place, and agreeing to make a second deposit of \$250,000, and to guarantee payment to plaintiff of \$80,000 a month in return for a three-month closing date extension (*see id.*, Exh 12).

On June 23, 2008, plaintiff commenced this action. In its first cause of action, plaintiff seeks a judgment against SSJ declaring that it is entitled to retain the contract deposit of \$250,000 in accordance with the terms and conditions of the Contract, and declaring that the escrow agent pay the contract deposit to plaintiff, pursuant to the terms and conditions of the Contract and the Modification Agreement. In its second cause of action, plaintiff seeks a money judgment against Jemal in the amount of \$250,000 based upon his personal guarantee to pay

\$250,000, as set forth in the Modification Agreement, if SSJ did not close title to the Property on or before April 15, 2008. In its third cause of action, plaintiff seeks a money judgment awarding it its costs, including reasonable attorneys' fees and expenses, with interest thereon, based upon the terms of the Contract and the Modification Agreement.

Plaintiff asserts that, despite commencing this action, it still wished to close the transaction, but was not willing to relieve SSJ of its default unless there was an actual closing of title (Tauber Aff., ¶ 36). On July 25, 2008, plaintiff entered a new agreement (the Final Agreement) with SSJ and Jemal, in which the following essential terms were stipulated and agreed to:

1. Buyer hereby acknowledges and agrees that the closing of the transaction contemplated by the Contract (the "Closing") was required to be consummated on or before April 15, 2008 TIME BEING OF THE ESSENCE with respect to such date and that Seller is and has been ready, willing and able to close the transaction since that date. Buyer further acknowledges that Seller has properly terminated the Contract and Amendment pursuant to notice served on Buyer on or about May 15, 2008. Buyer has requested that, and the parties hereby agree to reinstate the Contract as of this Date and to extend the date for the Closing to August 25, 2008 TIME BEING OF THE ESSENCE. In consideration therefor, Buyer has agreed to immediately release from Escrow the Deposit and Additional Deposit in the amount of \$250,000 to the Seller and Buyer hereby relinquishes any rights to that sum except for the terms contained herein.

\* \* \*

3. Buyer shall have up to and including August 25, 2008, TIME BEING OF THE ESSENCE, to close the sale of the Property. Buyer shall provide Seller with at least five (5) business days advance notice of Closing. In the event the parties close pursuant to the terms contained herein anytime up to and including the August 25, 2008 closing date, Seller hereby agrees to apply the Deposit in the amount of \$250,000.00 to the Purchase Price. In the

event that Buyer fails to close by the aforesaid August 25, 2008 closing date, it is hereby agreed between the parties that the Contract and any subsequently amendments shall be null and void and of no force and effect

(Final Agreement, ¶¶ 1, 3).

On July 25, 2008, SSJ authorized Tauber, as escrow agent, to release the \$250,000 down payment to plaintiff (Tauber Aff., ¶ 39; *see* Exh 16). Tauber then released the \$250,000 deposit to plaintiff (*id.*). However, SSJ and Jemal did not even attempt to schedule a closing by August 25, 2008 (*id.*, ¶ 40). Plaintiff alleges that it was ready, willing, and able to close title to the Property since March 1, 2008 (Complaint, ¶¶ 10, 13; Tauber Aff., ¶¶ 14, 28).

On August 26, 2008, one day after SSJ and Jemal failed to close title, SSJ and Jemal interposed an answer to complaint, in which they pleaded general denials, but no affirmative defenses or counterclaims (*see* Answer).

### DISCUSSION

In support of its motion for summary judgment on its second and third causes of action, plaintiff contends that the documentary evidence establishes that it was ready, willing and able to close title to the Property at all relevant times; SSJ is in default for failing to close title to the Property on the relevant law dates as set forth in the Contract, the Modification Agreement and the Final Agreement; plaintiff is entitled to enforce Jemal's personal guarantee in the amount of \$250,000, given as liquidated damages for SSJ's default in closing the Contract; and plaintiff is entitled to costs, including reasonable attorney's fees, for prosecuting this action to enforce the personal guarantee, as set forth in paragraph 2 of the Modification Agreement. As such, plaintiff argues, its motion for summary judgment must be granted.

Defendants oppose the motion on the ground that plaintiff committed an anticipatory breach of the Contract by wrongfully declaring that SSJ was in default of the Contract, since plaintiff was not ready or able to close on the March 1, 2008 time of essence closing date set forth in the Contract. According to defendants, plaintiff could not have closed title on March 1, 2008, because the *Lazier* action had not been discontinued as of March 1, 2008, and there was a notice of pendency filed in the *Lazier* action that remained in effect on March 1, 2008.

It is axiomatic that a seller cannot place a purchaser in default without first tendering his or her own performance (*Lawrence v Miller*, 86 NY 131 [1881]; *1776 Assocs. Corp. v Broadway W. 57<sup>th</sup> St. Assocs.*, 181 AD2d 601 [1st Dept], *appeal dismissed* 80 NY2d 824 [1992]). Thus, “[w]here, as here, a real estate contract states that the seller shall tender title at closing that a reputable title company will insure, the burden of producing insurable title has been construed as a condition precedent to the seller holding the purchaser in default” (*Gargano v Rubin*, 200 AD2d 554, 555 [2d Dept 1994]; *accord Lisenenkov v Kasztrer*, 41 AD3d 282 [1<sup>st</sup> Dept 2007]). The general rule when a contract provides for the seller “to deliver a title that a reputable insurance company would approve and insure” is that the seller “breaches his contract when the title company refuses to insure title unconditionally and without exception ... unless the exceptions are those contemplated by the contract” (*Laba v Carey*, 29 NY2d 302, 307-308 [1971]).

Thus, in order to prevail on its motion for summary judgment, “it is incumbent upon [plaintiff] to demonstrate that at the time fixed for closing, it was prepared to deliver insurable title in accordance with the [Contract]” (*Gindi v Intertrade Intl. Ltd.*, 12 Misc 3d 1182[A], 2006 NY Slip Op. 51380[U], \* 3 [Sup Ct, NY County 2006], *affd* 50 AD2d 575 [1<sup>st</sup> Dept 2008]). For

the reasons stated below, plaintiff has failed to demonstrate that it could deliver insurable title on the March 1, 2008 time of the essence closing date as set forth in the Contract, and thus, its motion for summary judgment must be denied.

In opposition to plaintiff's motion for summary judgment, defendants maintain that plaintiff was not ready to close because it failed to cure title exceptions, and thus could not deliver insurable or marketable title as required by the Contract. In attempting to establish that plaintiff could not deliver insurable title without exceptions, defendants submit the affidavit testimony of Elliot Schon, counsel to Madison, an agent for Stewart Title Insurance Company (Stewart). In that affidavit, Schon attests that the 30 exceptions set forth in Schedule B to the Title Report "had to be disposed of in a satisfactory manner to Madison and Stewart prior to delivery of the Title Insurance Policy" (Schon Aff., ¶ 4). According to Schon, Madison's records indicate that, as of the March 1, 2008 law date, plaintiff had not disposed of the title exceptions to coverage applicable to it, which was necessary for Madison to insure title and issue a title insurance policy on the Property (*id.*, ¶ 5).

Schon asserts that Exception No. 26, which related to the *Lazier* action, was disposed of for the first time and omitted as an exception on February 12, 2009, as a result of a continuation search requested by SSJ, which indicated that a stipulation of discontinuance was made on July 30, 2008, and filed on August 29, 2008, and that a stipulation cancelling the *lis pendens* was made in September 2008, and filed on September 12, 2008 (*id.*, ¶ 10; Exh B). Schon also asserts that a building violation search disclosed two elevator violations against the property (*id.*, ¶ 11, Exh D). Madison issued a letter dated February 12, 2009 amending the title report to indicate that Objection No. 26 was omitted due to the stipulation of discontinuance and the stipulation

canceling the lis pendens, but that the two elevator violations still remained of record (*id.*, ¶ 12). Thus, Schon concludes, "Madison and Stewart could not issue title insurance insuring title on this Property on March 1, 2008 and up to July 30, 2008" (*id.*, ¶ 13).

Defendants also submit several documents relating to the *Lazier* action which demonstrate that the plaintiff was not ready to close on the March 1, 2008 time of essence closing date, including a December 6, 2007 court order staying and adjourning the action until September 17, 2008 (*see* Aff. of Arnold Ludwig, Exh D), the stipulation of discontinuance, dated July 30, 2008 (*see id.*, Exh E), and the stipulation canceling the notice of pendency, dated September 4, 2008 (*see id.*, Exh F).

Although plaintiff submits an April 14, 2008 Stipulation Cancelling Notice of Pendency (*see* Sur-reply Affirmation of Edward G. McCabe, Exh 26) in further support of its motion for summary judgment, this document only serves to further prove that plaintiff was not ready or able to close on the March 1, 2008 time of the essence closing date in the Contract. In any event, this stipulation was never filed with the Kings County Clerk.

Moreover, this court rejects plaintiff's argument that it was not aware of Exception No. 26 because it never received a copy of the Title Report, as paragraph 17 of the Contract required plaintiff to resolve the *Lazier* action as part of its obligations thereunder. Plaintiff's additional argument that its motion for summary judgment must be granted because defendants did not have the required funds to close on March 1, 2008 is also rejected, as established case law requires that plaintiff, the seller, must first demonstrate that it was ready, willing and able to close on March 1, 2008, before it can hold defendants in default.

As indicated in Exception No. 26 to Schedule B to the Title Report, the title company

would not issue title insurance until the *Lazier* action was discontinued, the judgment vacated, and the notice of pendency canceled by order of the court. As the evidence submitted by the parties reveals, none of the foregoing exceptions to title insurance were resolved by March 1, 2008. In fact, Exception No. 26 was omitted, as an exception to insurable title, for the first time on February 12, 2009. Accordingly, plaintiff has failed to demonstrate that it could deliver insurable title on March 1, 2008, and thus could not hold SSJ in default. As such, its motion for summary judgment on its second and third causes of action, and for an order awarding it \$250,000 as liquidated damages, must be denied (*see e.g. Gindi v Intertrade Intl., Ltd.*, 50 AD2d at 575 [as defendant “failed to demonstrate that it could deliver insurable title at the time fixed for closing,” “(s)ummary judgment was thus properly denied on its counterclaim for a declaration of entitlement to retain plaintiff’s down payment as liquidated damages”]).

Defendants also cross-move for an order permitting them to amend the answer to add a first affirmative defense and first counterclaim canceling the Contract pursuant to paragraph 17, and granting SSJ a money judgment against plaintiff in the amount of \$250,000, which represents SSJ’s down payment, on the ground that plaintiff committed an anticipatory breach of the Contract by wrongfully declaring that SSJ was in default of the Contract, since plaintiff was not ready or able to close on the March 1, 2008 time of essence closing date set forth in the Contract. Defendants also seek to add a second affirmative defense and second counterclaim for a judgment declaring the Modification Agreement and the Final Agreement to be null and void, as well as the return of the \$250,000 deposit and title expenses, on the ground that plaintiff fraudulently induced them into agreeing to two time of essence closing dates in the Modification Agreement and the Final Agreement, by falsely representing that it was ready and able to close

on March 1, 2008, which defendants relied upon in paying an additional deposit of \$150,000, and Jemal agreeing to personally guarantee an additional \$250,000 in the event of a default.

It is well settled that, pursuant to CPLR 3025 (b), leave to amend will be freely granted, absent prejudice or surprise to the opposing party (*Sheets v Liberty Alliances, LLC*, 37 AD3d 170 [1<sup>st</sup> Dept 2007]; *Zaid Theatre Corp. v Sona Realty Co.*, 18 AD3d 352 [1<sup>st</sup> Dept 2005]). However, in order to conserve judicial resources, examination of the underlying merit of the proposed amendment is mandated (*see Watts v Wing*, 308 AD2d 391 [1<sup>st</sup> Dept 2003]; *Davis & Davis, P.C. v Morson*, 286 AD2d 584 [1<sup>st</sup> Dept 2001]). Leave will be denied where the proposed pleading fails to state a cause of action, or is palpably insufficient as a matter of law (*Ancrum v St. Barnabas Hosp.*, 301 AD2d 474 [1<sup>st</sup> Dept 2003]; *Davis & Davis, P.C. v Morson*, 286 AD2d 584, *supra*). In evaluating the merits of the amended pleading, the court's purpose is not to resolve disputed factual issues, but simply to ensure that the amended allegations establish a prima facie cause of action (*Tapps of Nassau Supermarkets, Inc. v Linden Blvd., L.P.*, 269 AD2d 306 [1<sup>st</sup> Dept 2000]).

Here, the proposed amended answer and counterclaims clearly have merit. On this motion, defendants' pleading is entitled to a "heavy presumption" of validity (*Otis Elevator Co. v 1166 Avenue of Americas Condominium*, 166 AD2d 307, 307 [1<sup>st</sup> Dept 1990]), and defendants need only come forth with facts establishing a prima facie right to relief (*see Daniels v Empire-Orr, Inc.*, 151 AD2d 370 [1<sup>st</sup> Dept 1989]; *accord Caribbean Constr. Services & Assoc., Inc. v Zurich Ins. Co.*, 267 AD2d 81 [1<sup>st</sup> Dept 1999]). Defendants have easily satisfied these standards through their allegations that plaintiff committed an anticipatory breach of the Contract, since it was not ready to close on the March 1, 2008 time of essence closing date, and that plaintiff had

misrepresented its readiness to close on that date, upon which defendants relied in signing the Modification Agreement and the Final Agreement, in agreeing to pay an additional \$150,000 deposit, and in Jemal agreeing to personally guarantee an additional \$250,000. Indeed, Jemal asserts that he would never had agreed to these conditions had he known that plaintiff was not ready to close on March 1, 2008.

In opposition to the motion, plaintiff does not claim that it would be prejudiced by the amendment. Rather, plaintiff appears to argue that the cross motion is untimely, because defendants never responded to any discovery demands, and failed to assert any affirmative defenses or counterclaims in the original answer. Thus, plaintiff argues, the cross motion should be denied, because of defendants' "dilatatory" conduct, and its motion for summary judgment should be granted.

However, a motion for summary judgment can be defeated based upon an unpleaded affirmative defense (*see Rizzi v Sussman*, 9 AD2d 961 [2d Dept 1959] [contention that a fraud was committed must be considered on a motion for summary judgment motion even though it has not been pleaded in the answer to the complaint]; *accord Denburg v Parker Chapin Flattau and Kltmpl*, 213 AD2d 297 [1<sup>st</sup> Dept 1995]). Moreover, defendants contend that, at the time they interposed the original answer, they were not aware that plaintiff was not ready, willing and able to close on the March 1, 2008 closing date, and only discovered this information in February 2009 from the title company (3/11/09 Jemal Aff., ¶ 3).

Accordingly, because the allegations in the proposed amended answer and counterclaims "are sufficient for pleading purposes ... at this procedural juncture" (*Thompson v Cooper*, 24

Defendants' cross motion for an order extending the time to complete discovery and to file a note of issue of this action is also granted.

The court has considered the remaining arguments, and finds them to be without merit.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that defendants' cross motion for leave to amend the answer is granted, and the amended answer in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further


ORDERED that plaintiffs shall serve a reply to the counterclaims contained in the amended answer within 20 days from the date of said service; and it is further

ORDERED that defendants' cross motion for an order extending the time to complete discovery and to file a note of issue of this action is granted.

Counsel for the parties are directed to appear for a conference on June 19, 2009 at 11:00AM in room 335 at 60 Centre Street.

Dated: 6/3/09

ENTER:

  
WALTER B. TOLUB J.S.C.

**FILED**  
JUN 08 2009  
COUNTY CLERK'S OFFICE  
NEW YORK