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

PRESENT: Hon. MICHAEL D. STALLMAN PART 7
Justice

Index Number : 115200/2008
ARON, TRACY S.
VS.
DONNELLEY, INANNA H.
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. 115200/08
MOTION DATE 2/11/09
MOTION SEQ. NO. 001
MOTION CAL. NO. 9

The following papers, numbered 1 to 6 were read on this motion for summary judgment; cross motion for summary judgment

	PAPERS NUMBERED
Notice of Motion— Affidavit — Exhibits A, B Affidavit – Exhibits A-C	1-3
Notice of Cross Motion — Answering Affidavit — Exhibits A-G	4-5
Replying Affidavit	

Cross-Motion: X Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and cross motion are decided in accordance with the annexed memorandum decision, order, and judgment.

MICHAEL D. STALLMAN
J.S.C.

Dated: 7/7/09
New York, New York

J.S.C.

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

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK; PART 7

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TRACY S. ARON,

Plaintiff,

-against-

Index No.: 115200/2008

INANNA H. DONNELLEY and
JEFFREY E. TABACK,

Decision, Order and Judgment

Defendants.

HON. MICHAEL D. STALLMAN, J.:

This action arises from a failed residential real estate closing. Plaintiff Tracy Aron is the seller of a townhouse located on the Upper West Side of Manhattan (the Premises), and defendants Inanna Donnelley and Jeffrey Taback (wife and husband) are the buyers. Plaintiff seeks a judgment declaring that defendants breached the contract of sale for the Premises (the Contract) by failing to close, which entitles her to keep the down payment as liquidated damages. In response, defendants argue that plaintiff breached the Contract by failing to deliver the Premises in accordance with its Certificate of Occupancy, and is therefore not entitled to keep the down payment.

After plaintiff started this action, defendants filed a separate action with this court bearing index number 115337/08 (the Defendants' Action), arising out of the same transaction. Because neither side filed a Request for Judicial Intervention, the Defendants' Action has not been assigned to any judge.

In this action, plaintiff moves for summary judgment on the claims asserted in her complaint. In response and in opposition, defendants cross move for summary judgment in their favor.

Background

The Premises is a five-story townhouse located at 627 West End Avenue, New York City. According to plaintiff's affidavit filed in support of the motion for summary judgment, she has used the Premises as a single-family home since 1996, even though the Certificate of Occupancy (C of O) permits the Premises to be used as a two-family dwelling. Aron Affidavit, ¶ 32. By Contract dated July 22, 2008, a copy of which is annexed as "Exhibit A" to the Complaint, plaintiff agreed to sell, and defendants agreed to buy, the Premises at a price of $6,850,000. The Contract does not contain any financing contingency, and requires defendants to accept the Premises in its "as is" condition. Pursuant to the Contract, defendants paid $685,000 as a down payment upon signing, which amount is to be held by plaintiff's attorney in escrow. Pursuant to the Contract, the closing was to take place 60 days from the day of contract execution, but in no event later than 65 days from the day when defendants delivered the contract to plaintiff. Because the fully executed Contract was delivered to plaintiff's attorney on July 15, 2008, the closing was to occur on or about September 18, 2008. Aron Affidavit, ¶ 9.

On plaintiff's request, the parties agreed to adjourn the closing date to October 2, 2008, as plaintiff indicated that she needed more time to make arrangements to vacate the Premises and move into her new residence, the lease on which was to commence on October 1, 2008. Thereafter, on September 30, 2008, based on defendants' request, the parties agreed to further adjourn the closing date to October 15, 2008. By letter dated October 6, 2008, a copy of which is annexed as "Exhibit B" to the Complaint, plaintiff's attorney wrote to defendants' attorney and stated, inter alia, that "any further adjournments would be unreasonable in light of the circumstances." On October 10, 2008, defendants requested a "brief adjournment" of the closing date, in light of the "unprecedented

conditions in the global credit and equities markets which occurred shortly after Lehman Brothers filed for bankruptcy protection," [1] and they "simply needed more time to take stock of [their] finances and juggle accounts before closing on the Premises." Taback Affidavit, ¶ 8.

By letter dated October 15, 2008, plaintiff's attorney advised defendants that, due to their attorney's unwillingness to set a firm closing date, the new closing date would be October 31, 2008, and that "time [was] of the essence" to close the transaction under the Contract. Complaint, Exhibit D. On the same day, plaintiff's attorney sent an e-mail to defendants' attorney, stating that plaintiff "understands your clients' situation and is hopeful that we can get this closed within a reasonable time." Taback Affidavit, Exhibit B. On or about October 21, 2008, defendants' attorney wrote to plaintiff's attorney stating, inter alia, that plaintiff's unilaterally fixed October 31, 2008 closing date was "unwarranted and unreasonable," because "there is no time of the essence provision in the Contract of Sale." Complaint, Exhibit E.

On October 22, 2008, defendants' attorney wrote an e-mail to plaintiff's attorney stating that: "I suggest to my clients that they compensate the seller for carrying the house in exchange for extending the close date. Accordingly, they would like to know how much the monthly carrying costs ... of the house are." Aron Affidavit, Exhibit A. In response, by e-mail dated October 23, 2008, plaintiff's attorney wrote to defendants' attorney stating that: "my client is willing to give your clients up to 30 days from today to close if they agree to the immediate release of ½ of the down payment to my client and the forfeiture of the balance of the deposit if they fail to close within 30 days." *Id.* Apparently, defendants' attorney did not respond to this e-mail. By followup e-mail dated October

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[1] The court takes judicial notice that in mid-September of 2008, Lehman Brothers filed for chapter 11 protection.

28, 2008, plaintiff's attorney wrote to defendants' attorney: "I have not heard back from you. In the absence of a proposed closing date, or serious offer with respect to either negotiating a reduction of the purchase price, or a partial return of the deposit, neither of which my client believes she is legally obligated to do, we intend to go ahead with the closing as scheduled on [October 31, 2008.]" *Id.* Thereafter, plaintiff's attorney sent several e-mails to defendants' attorney that provided, among other things, instructions as to how the balance of the purchase price should be paid, and confirmation of the October 31st closing date. *Id.*

On October 31, 2008, neither defendants nor their attorney showed up for the closing. Notwithstanding, plaintiff appeared at the closing and executed documents necessary to convey title of the Premises to defendants. Aron Affidavit, ¶ 19; Complaint, Exhibit F. By letter dated November 3, 2008, plaintiff's attorney advised defendants that due to their failure to close the transactions for the Premises, the Contract was canceled and the down payment would be paid over to plaintiff as liquidated damages. Complaint, Exhibit G. In response, by letter dated November 4, 2008, defendants' attorney argued that defendants were not in default, and plaintiff was not entitled to cancel the Contract and retain the down payment. Complaint, Exhibit H. In the letter, the argument in support of defendants' position was that plaintiff's unilateral setting of October 31, 2008 as the closing date was "unreasonable and unwarranted," and defendants' failure to close on the "invalid closing date does not constitute a default under the Contract." *Id.* Notably, the letter did not propose any alternative closing date, nor did it raise any issue regarding the C of O, which defendants now contend in their cross motion that the Premises is not in conformity with the C of O, as more fully discussed below.

In light of defendants' objection to the release of the down payment, plaintiff's attorney, as

escrowee, has been holding the down payment until there is a final resolution or settlement of the parties' dispute. Aron Affidavit, ¶ 26. By Complaint dated November 12, 2008, plaintiff commenced the instant action seeking a declaratory judgment that defendants breached the Contract, which entitled her to terminate the Contract and retain the down payment as liquidated damages. Thereafter, plaintiff made the instant motion seeking summary judgment in her favor, pursuant to CPLR 3212, on the causes of action asserted in the Complaint.

Discussion

In stating the standards for granting or denying a summary judgment motion pursuant to CPLR 3212, the Court of Appeals noted in *Alvarez v Prospect Hospital* (68 NY2d 320, 324 [1986]}:

> As we have stated frequently, the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such ... showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary support in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action [internal citations omitted].

Adhering to the guidance of the Court of Appeals, the lower courts uniformly scrutinize motions for summary judgment, as well as the facts and circumstances of each case, to determine whether relief should be granted or denied. *Giandana v Providence Rest Nursing Home,* 32 AD3d 126, 148 (1st Dept 2006)(because summary judgment "deprives the litigant of his day in court, it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues")(citations omitted); *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997)(in considering a summary judgment motion, "evidence should be analyzed in the light most favorable

to the party opposing the motion")(citations omitted). However, general allegations of a conclusory nature unsupported by competent evidence are insufficient to defeat a summary judgment motion. *Alvarez*, 68 NY2d at 324-325.

Breach of the Contract of Sale

Plaintiff contends that defendants breached the Contract by failing to close on October 31, 2008. Because the Contract does not contain a "time is of the essence" clause, defendants argue that the October 31st closing date unilaterally picked by plaintiff, which provided merely sixteen (16) additional days from the prior mutually agreed-to adjourned closing date of October 15th, was unwarranted and unreasonable. In particular, defendants argue, without citing any caselaw support, that the "contract sum of $6,850,000 alone demands an extended notice period, especially considering the unprecedented disruption in the global and equities market in October 2008." Defendants' Brief, at 17.

The law is clear that "[w]here time is not made of the essence in the original contract, one party may, unilaterally, give subsequent notice to that effect and avail himself of forfeiture on default, provided such notice is clear, distinct and unequivocal, fixes a reasonable time within which to perform, and informs the other party that a failure to perform by that date will be considered a default." *Liba Estates, Inc. v Edryn Corp.*, 178 AD2d 152, 153 (1st Dept 1991). "What constitutes a reasonable time for performance depends upon the facts and circumstances of the particular case." *Zev v Merman*, 73 NY2d 781, 783 (1988). The factors that a court may consider in its determination of a "reasonable time for performance" include "the nature and object of the contract, the previous conduct of the parties, the presence of absence of good faith, the experience of the parties and the possibility of prejudice and hardship to either one, as well as the specific number of days provided

for performance." *Id.* (citations omitted).

In the instant case, the parties had mutually agreed to adjourn the closing date twice: from September 18th to October 2nd (15 days), and from October 2nd to October 15th (13 days). Thus, the October 31st closing date chosen by plaintiff (16 days) does not appear to be unreasonably brief in light of the prior conduct and agreement of the parties. Indeed, even after stating that time was of the essence for the October 31st closing, on October 23rd plaintiff's attorney wrote an e-mail to defendants' attorney indicating that plaintiff would be willing to further adjourn the closing to November 23rd (30 days), if defendants would agree to certain proposed terms for the release of the down payment to plaintiff. Aron Affidavit, Exhibit A. This shows that plaintiff was trying to negotiate, in good faith, the terms for a further adjournment of the closing, given that she was incurring expenses in maintaining both the Premises, after she moved out, and the new residence that she moved into, in anticipation of the previously agreed-to closing date of October 2nd. Neither defendants nor their attorney responded to such e-mail. In fact, they did not propose or agree to any alternative closing date, despite the assertion that they needed only a "brief adjournment" to coordinate their finances. Taback Affidavit, ¶ 8. However, defendants' financial condition was not an excuse to the non-performance of the Contract, and they failed to cite any law in support of their position, particularly where, as here, the Contract contains no financing contingency. Indeed, "[w]here impossibility or difficulty of performance is occasioned only by financial difficulty or economic hardship ... performance of a contract is not excused." *Di Scipio v Sullivan*, 30 AD3d 660, 661 (3rd Dept 2006)(citations omitted).

Because the October 31, 2008 closing date unilaterally chosen by plaintiff was not an unreasonably brief extension of the closing, and because defendants failed to present a "legally

cognizable excuse" for their failure to perform the Contract on the scheduled closing date, plaintiff establishes a prima facie case for summary judgment that defendants breached the Contract by failing to close.

In opposition, defendants argue that they did not breach the Contract because plaintiff herself failed to perform the Contract by not delivering the Premises in conformity with the C of O. Specifically, defendants argue that, pursuant to paragraph 16 (b) of the Contract, a condition precedent to closing is "[t]he delivery by Seller to Purchaser of a valid and subsisting Certificate of Occupancy or other required certificate of compliance, or evidence that none was required, covering the building(s) and all of the other improvements located on the property authorizing their use as a two (2) family dwelling at the date of Closing." In particular, defendants argue that the C of O for the Premises, which permits the use of the Premises as a 2-family dwelling, was not "valid and subsisting" as of the closing date because it does not accurately describe its conditions, to wit: plaintiff had made substantial alterations to the Premises such that "the Premises cannot be used as a duplex apartment over a triplex because there is no means of egress from the duplex." Defendants' Brief, p. 12. In effect, defendants argue that since plaintiff had extensively renovated the Premises and used it as a single-family dwelling, the C of O for the Premises, which was issued in or about 1967, was no longer valid and subsisting as of October 31, 2008.

Defendants' arguments are unpersuasive for various reasons. First, in the Contract, defendants represented that they were fully aware of the physical condition and state of repair of the Premises, and that they would accept the same "as is" in its present condition and state of repair. Contract, ¶ 12. Further, in the "Rider" annexed to the Contract, defendants acknowledged that neither plaintiff, nor any broker, agent or representative of plaintiff, has made any representation as to the condition

of the Premises, and that they "shall accept the Premises in its 'as is' condition." Rider, ¶ 30. Also, defendants do not contest plaintiff's assertion that "Purchasers and/or their architect visited the Premises on approximately ten occasions before I moved out, and were aware of the layout of the Premises and the manner in which I was using it [as a single-family dwelling] before they entered into the Contract." Aron Affidavit, ¶ 33. Indeed, they acknowledged that they, and their two young children, intended to use the Premises as their personal residence. Taback Affidavit, ¶ 4, 8 and 18. Importantly, even though the parties agreed to several adjournments of the closing date, defendants never raised any issue about the C of O, until termination of the Contract and commencement of the instant action by plaintiff. Instead, the sole reason asserted by defendants for a "brief adjournment" of the closing was that they needed more time in light of the "unprecedented global market conditions," and that they had to "coordinate [their] financing of the purchase of a nearly seven million dollar personal residence ... ." Taback Affidavit, ¶ 8.

The primary, if not the sole, case relied by defendants in support of their position, *Costello v Casale* (281 AD2d 581 [2nd Dept 2001]), is distinguishable and inapposite. In that case, the contract of sale between the seller and the buyer required the seller to provide "a valid and subsisting Certificate of Occupancy ... or evidence that none was required, covering the building(s) and all improvements ... authorizing the use as a one (1) family dwelling at the date of Closing." *Id.* at 582. The seller was unable to produce a certificate of occupancy because the house was built in 1923, and the municipality where the house was located did not begin issuing certificates of occupancy until 1930. *Id.* Ruling in favor of the buyer-plaintiff who sought to recover her down payment, the court (in a majority opinion) held:

> [R]eading the contract as a whole, a practical interpretation of the clause at issue, and one that would give effect to the parties' reasonable

> expectations, is that the clause required Casale to produce either a certificate of occupancy for the dwelling and property as it existed at the time of closing, or proof that no such certificate was needed. *Casale did neither*. Thus, Casale breached a condition precedent to the closing of title and Costello is entitled to the return of her down payment.

Id. at 583 (emphasis added).

Defendants' reliance on *Costello* is misplaced. The court specifically indicated that the seller in that case neither produced a certificate of occupancy nor any proof that no certificate was needed, as required by the contract. In the instant case, however, it is undisputed that defendants were provided with the C of O for the Premises, which authorized (but not required) its use as a two-family (as opposed to a one-family) dwelling.

The current configuration of the townhouse is not in violation of the C of O, because the dwelling is not being occupied as a two-family dwelling, and defendants did not intend to occupy the townhouse as a two-family dwelling. Also, as noted, plaintiff had used the Premises as a one-family dwelling for ten years (and defendants were aware of this), and defendants have indicated that they intended to use same as a personal residence for their single family of two adults and two young children. Taback Affidavit, ¶ 17-18. Indeed, defendants have acknowledged that "the Premises could be converted into a two family dwelling," albeit it allegedly would require "substantial work, time and expense." *Id.* at ¶ 18. The C of O does not require that the townhouse be configured as a two-family dwelling. Given that the parties agreed in the Contract to buy the Premises in its "as is condition," defendants had no contractual obligation to reconvert the house into a two-family dwelling. *See also Kaltsas v Holender*, 163 AD2d 357 (2nd Dept 1990) (sellers who had removed upstairs dwelling unit were not required under contract to restore house to two-family dwelling, as reflected in the certificate of occupancy, where contract required sellers to convey the premises "as

is"). Thus, defendants would have assumed the expense of making physical changes to convert the building to two-family use, should defendants have wished to do so in the future.

Accordingly, defendants breached the Contract by failing to close on October 31, 2008, as scheduled by plaintiff, which entitled her to cancel the Contract and retain the down payment. Therefore, the Court grants plaintiff's motion for summary judgment in her favor against defendants.

Joint Trial With Defendants' Action

As noted above, defendants have commenced a separate action in this court (Index No. 115337/08) arising out of the same facts that underlie this action. Because defendants have not filed a "request for judicial intervention," Defendants' Action has not been assigned to any judge. Notwithstanding, plaintiff and defendants, in their papers filed with this court, agreed to a joint trial of the issues raised in the instant action and the Defendants' Action. In light of this decision, which finally determines the issues arising from the transaction, the request for a joint trial is unnecessary and is denied as moot.

Accordingly, it is

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

ORDERED that defendants' cross motion for summary judgment is hereby denied; and it is further

ADJUDGED and DECLARED that defendants breached the parties' contract of sale made

as of July 22, 2008, and that plaintiff is entitled to keep defendants' down payment of $685,000 as liquidated damages.

Dated: July 7, 2009
New York, New York

ENTER:

J.S.C.

MICHAEL D. STALLMAN
J.S.C.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).