Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, **ALLAN B. WEISS** IAS PART 2
Justice

CHI YUNG SZE

Plaintiff,

-against-

JOGINDER SINHG, SURIT SINGH,
MOHINDER SINGH and WILLIAM MAVRELIS

Defendants.

Index No: 19940/06

Motion Date:7/22/09

Motion Cal. No.: 21

Motion Seq. No.: 1

The following papers numbered 1 to 19 read on this motion by the Singh defendants dismissing the complaint; and cross-motion by plaintiff for summary judgment in his favor

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits	1 - 5
Notice of Cross-Motion-Affidavits-Exhibits	6 - 11
Answering Affidavits-Exhibits.....	12 - 16
Replying Affidavits.....	17 - 19

Upon the foregoing papers it is ordered that the defendants' motion for summary judgment dismissing the complaint is denied. The plaintiff's cross-motion for summary judgment on the first cause of action for specific performance and the second cause of action for special damages is granted.

A hearing to determine the amount of the plaintiff's special damages resulting from the defendants' breach shall be scheduled at a conference to be held on October 21, 2009 at 11:00 a.m. in courtroom 46, Part 2, of the courthouse located at 88-11 Sutphin Blvd., Jamaica, N.Y.

The underlying facts, which are essentially undisputed, are as follows. The plaintiff by a contract dated October 11, 2005 agreed to purchase from the defendants the real property located at 29-28 30th Avenue, Long Island City, Queens, N.Y., a mixed use property comprised of a store on the first floor and four

apartments above, for $1,500,000.00 (one million five hundred thousand dollars). On signing the contract, the plaintiff deposited $75,000.00 as down payment with the seller's attorney, the co-defendant Mavrelis.

The contract contained a mortgage contingency clause (¶8[a-j] & ¶¶ 2,3,4 of Rider) which provided, that the plaintiff had 60 days from receipt of a fully executed contract, the commitment date, to obtain and provide the defendants with a firm written mortgage commitment or to cancel the contract. The contract further provided that if the defendant did not receive a copy of a commitment by the commitment date, then the defendants could, within 5 days of the commitment date, cancel the contract which would become effective and terminate the contract unless the plaintiff delivered a commitment to the defendants within 10 days of the commitment date. The clause also provided that if the plaintiff failed to give a proper notice of cancellation, or if he accepted a commitment on terms other than those provided in the contract, he is deemed to have waived the right to cancel based upon the mortgage contingency clause. In addition, the contract also provided for a closing to take place on or about January 30, 2006 at the lender's attorney's office or, upon reasonable notice, at the seller's attorney's office.

January 30, 2006 passed, without a closing and, apparently without any communication between the parties. Thereafter, by letter dated March 14, 2006 the plaintiff's attorney notified the defendants' attorney that the plaintiff waived the mortgage contingency clause and requested that defendants' attorney contact him to schedule a closing date because the plaintiff is ready willing and able to close. When the defendants' attorney failed to respond, plaintiff's attorney, by letter dated March 24, 2006, notified the defendants' attorney that he and plaintiff, together with the title company, would appear for a closing at the "seller's counsel's" office at 2:00 p.m. on Wednesday, April 12, 2006.

On or about April 4, 2006 the defendants' attorney called plaintiff's attorney and left a message cancelling the April 12, 2006 closing, without an adjourned date, claiming that the defendants were ill. In response, plaintiff's attorney called the defendants' attorney on April 4, 2006, and when there was no answer at counsel's office, plaintiff's attorney, that same day, faxed a letter to defendants' attorney acknowledging the defendants' cancellation and requesting defendants' attorney to call to schedule a closing date ASAP. Defendants' attorney did not respond. As a result, plaintiff's attorney sent a letter dated April 11, 2006 requesting that defendants' attorney contact

him within three days to schedule the closing. Defendants' attorney again did not respond.

Approximately six weeks after the aborted April 12, 2006 closing, plaintiff's attorney, by letter dated May 25, 2006 notified the defendants that the closing was scheduled for 1:00 p.m., Monday, June 12, 2008, at the offices of Masone, White Penkava & Cristofari and that, "The failure to attend shall constitute a default under the contract with the consequent result that my client shall pursue all remedies available at law and in equity." Neither the defendants nor their attorney responded to the letter or appeared for the closing on June 12, 2006. Consequently, the plaintiff declared the defendants in default and, on September 12, 2006, commenced this action for, inter alia, specific performance.

The defendants now move for summary judgment dismissing the complaint and submitted in support the affirmation of their attorney, the affidavit of Joginder Singh, one of the owners of the subject property, the contract and four letters dated March 14, 2006, March 24, 2006, April 11, 2006 and May 25, 2006, which plaintiff's attorney sent to the defendants' attorney. Defendants assert that their failure to appear for the closing on June 12, 2006 cannot constitute a default because the plaintiff's May 25, 2006 letter was insufficient to declare the June 12, 2006 closing date "time of the essence", as it was unilaterally made, designated a location for the closing which was not in accordance with the contract and failed to afford the defendants a reasonable time to perform. Defendants further assert that the plaintiff is in default by commencing this action, filing the contract and filing a lis pendens which entitles them to dismissal of the complaint and to retain the down payment.

The plaintiff opposes and cross-moves for summary judgment on the first cause of action for specific performance and second cause of action for special damages. Relying upon his own affidavit, the affirmation of Wen-Chi Wei, Esq, plaintiff's real estate attorney and documentary evidence the plaintiff asserts that the May 25, 2006 letter properly declared the closing date "time of the essence", that the plaintiff appeared on June 12, 2006 ready willing and able and in possession of sufficient funds to close, that the defendants' failed to appear and that such failure constitutes a default under the contract entitling the plaintiff to specific performance and recovery of special damages.

A party moving for summary judgment must tender proof in admissible form sufficient to warrant judgment in the movant's favor as a matter of law (see CPLR 3212[b]; Zukerman v. City of New York, 49 NY2d 55 [1980]).

Initially, it is noted that the purported affidavit of Joginder Singh was not considered as it was neither signed nor notorized (see Grasso v. Angerami, 79 NY2d 813 [1991]). The affirmation of defendants' attorney, who is without personal knowledge of the facts and containing conclusory assertions unsupported by competent evidence, is without probative value (see JMD Holding Corp. v. Congress Fin. Corp., 4 NY3d 373, 384 [2005]; Bates v. Yasin, 13 AD3d 474 [2004]). Counsel's affirmation was considered only insofar as it served to submit documentary evidence (see Ellman v. Village of Rhinebeck, 41 AD3d 635 [2007]) and to present legal arguments thereon.

The defendants have failed to submit competent evidence to establish their entitlement to summary judgment. When a contract for the sale of real property does not make time of the essence, either party may, unilaterally (Zev v. Merman, supra at 557; EC, L.L.C. v. Eaglecrest Manufactured Home Park, Inc., 275 AD2d 898 [2000], lv denied 96 NY2d 709 [2001]; Tarlo v Robinson, supra; Sohayegh v. Oberlander, 155 AD2d 436 [1989]), declare the time of the essence by giving clear, distinct and unequivocal notice which informs the other party that if he does not perform by that date, he will be considered in default and fixes a reasonable time within which to perform (see Zev v. Merman, 134 AD2d 555, 557 [1987], aff'd 73 NY2d 781 [1988]; Grace v. Nappa, 46 NY2d 560, 415 [1979]; Cave v. Kollar, 296 AD2d 370, 371-372 [2002]; Knight v. McClean, 171 AD2d 648, 649-650 [1991]). It does not matter that the date is unilaterally set or that the notice does not use the words "time of the essence", as long as the notice specifies a time for the closing and warns that the failure to close on that date will result in default (Zev v. Merman, supra).

Contrary to the defense counsel's claim, the plaintiff's May 25, 2006 letter was sufficient to make June 12, 2006 "time of the essence". The letter informed defendants in clear, distinct and unequivocal language that their failure to appear and close on June 12, 2006 shall constitute a default under the contract (see Bowery Boy Realty, Inc. v. H.S.N. Realty Corp., 55 AD3d 766, 768-769 [2008]; Zahl v. Greenfield, 162 AD2d 449 [1990], lv denied 76 NY2d 709 [1990]). In addition, the plaintiff submitted competent evidence to establish that Masone, White, Penka & Cristofari was the lender's attorneys, therefore, a closing at their office conformed with the terms of the contract. Finally, under the circumstances of this case the defendants were afforded a reasonable time to perform.

The determination of what constitutes a reasonable time to perform depends on the facts and circumstances of the case (see, Zev v. Merman, 73 NY2d 781, 783 [1988]; Klein v. Opert, 218 AD2d

784, 785 [1995]) and a consideration of the nature and object of the contract, the prior conduct of the parties, the presence or absence of good faith, the experience of the parties and the possibility of prejudice or hardship to either one, as well as the specific number of days provided for performance (Zev v. Merman, supra; Oregon Mountain, Inc. v. Soules, 6 AD3d 1193; Hegeman v. Bedford, 5 AD3d 632 [2004]; Klein v. Opert, 218 AD2d 784 [1995]). Generally, what constitutes a reasonable time is a question of fact. However, where, as here, the relevant facts are undisputed, what is a reasonable time becomes a question of law which may be determined on a motion for summary judgment (see Hegeman v. Bedford, 5 AD3d 632 [2004]; Spagna v. Licht, 87 AD2d 626 [1982]).

The defendants' claim that the May 25, 2006 letter did not afford the three defendants a reasonable time to perform because they could not vacate the premises on such short notice, is without merit. The defendants' obligation under the contract was not contingent upon all of the defendants' vacating the premises. The contract required the defendants to deliver the premises with at least one apartment, including basement common areas, in a vacant condition, however, the contract clearly shows that there are four apartments in the building. Moreover, the defendants had more than sufficient time between October 11, 2005 and June 12, 2006 to vacate one or more of the three apartments they allegedly occupy. "[I]f a promissor himself is the cause of the failure of performance of a condition upon which his own liability depends, he cannot take advantage of the failure." Amies v. Wesnofske, 255 NY 156, 162 [1931]; Kaplon-Belo Associates, Inc. v. Tae Hee Kim; 145 AD2d 413 [1988], appeal denied 74 NY2d 615 [1988]). Defendants have failed show that they made any effort to move out and did not submit any evidence to support their attorney's allegation that defendants were ill, or to demonstrate any justifiable excuse for their apparent failure to act diligently to fulfil their contractual obligations (see e.g. Zev v. Merman, supra at 558; Lake Hills Swim Club v Samson Dev. Corp., 213 AD2d 701 [1995]). In addition, this provision was inserted in the contract solely for the plaintiff's benefit, which he could waive (see Laxrand Constr. Corp. v. R.S.C.A. Realty Corp., 135 AD2d 685 [1987]; BPL Dev. Corp. v. Cappel, 86 AD2d 591 [1982], lv denied 56 NY2d 506 [1982]).

Nor was the May 25th letter the first notice of plaintiff's readiness to close. Plaintiff attempted to set a mutually convenient closing date several times beginning on March 14, 2006, however, the defendants ignored the plaintiff's communications. Finally, since the defendants never objected to the June 12, 2006 closing date, as a matter of law, they have acquiesced in the reasonableness of that date (see Zev v. Merman,

supra at 558) and the defendants' failure to appear and perform on June 12, 2006, constitutes a wilful default

Accordingly, the defendants' motion for summary judgment dismissing the complaint is denied.

The plaintiff's cross-motion for summary judgment is granted. To obtain specific performance, the plaintiff/purchaser must demonstrate not only the defendants' default, but also that plaintiff was ready willing and able to perform (see Huntington Mining Holdings v. Cottontail Plaza, 60 NY2d 997 [1983], aff'g 96 AD2d 526 [1983]; Dairo v. Rockaway Blvd. Properties, LLC, 44 AD3d 602 [2007]; Chavez v. Eli Homes, Inc., 7 AD3d 657, 659 [2004]; Ferrone v. Tupper, 304 AD2d 524 [2003]).

The plaintiff's competent evidence, including his affidavit, the affirmation of Wen-Chi Wei, Esq, his attorney on the real estate transaction, the letters Wei sent to the defendants' attorney and the other documentary evidence, established, prima facie, that the plaintiff appeared on June 12, 2006 ready, willing and able and in possession of sufficient funds to consumate the sale, and that the defendants defaulted by failing to appear(see Cheemanlall v. Toolsee, 17 AD3d 392 [2005]; see Nuzzi Family Ltd. Liab. Co. v. Nature Conservancy, 304 AD2d 631, 632 [2003]; Ferrone v. Tupper, 304 AD2d 524, 525 [2003]).

In opposition, the defendants have failed to submit any competent evidence to raise a triable issue of fact (Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]; Zuckerman v. City of New York, 49 NY2d 557, 562 [1980]). In opposition, defendants assert that it would be a hardship for the defendants to have to move from their home because of a change in their personal and health situation and beg the court to exercise its equitable power and allow them to remain in their home.

Although the court has the discretion to deny specific performance where such an award "would cause unreasonable hardship or injustice" (Concerto Radio v. GAF Corp., 108 AD2d 273, 278 [1985], aff'd 73 NY2d 766 [1988]; see Da Silva v. Musso, 53 NY2d 543 [1981]; Cheemanlall v. Toolsee, supra) no such circumstances have been shown to exist here. The defendants' attorney's vague, unsubstantiated allegations of hardship due to some unspecified change in defendants' personal and health situation is insufficient under the facts of this case to warrant denying specific performance.

With respect to plaintiff's claim for damages, a plaintiff/purchaser who is awarded specific performance may also recover as special damages any direct and consequential loss

sustained as a result of the seller's breach, which was in the contemplation of the parties and which can be proven to a reasonable degree of certainty (Haffey v. Lynch, 193 NY 67 [1908]; Regan v. Lanze, 47 AD2d 378 [1975], rev'd on other grounds 40 NY2d 475 [1976]). The purpose of such an award is to try to place the parties in the same position they would have been in had the seller performed in accordance with the contract (see Worrall v. Munn, 38 NY 137, 142 [1868]; 4200 Ave. K Realty Corp. v. 4200 Realty Co., 123 AD2d 419, 421 [1986].

Accordingly, the plaintiff motion for summary judgment is granted on his cause of action for specific performance and special damages. The amount of such damages shall be determined at a hearing to be scheduled at the above scheduled conference.

Dated: October 1, 2009
D# 39

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J.S.C.