5

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DANIEL MARTIN
Acting Supreme Court Justice

LEO E. CERRUTI,

Plaintiff,

- against -

1876 MUTTONTOWN LLC,

Defendant.

TRIAL/IAS PART 30
NASSAU COUNTY

Index No.: 19378/07
Motion Seq. No.: 2

The following papers have been read on this motion:

	Papers Numbered
Defendant's Notice of Motion for Summary Judgment	1
Plaintiff's Affirmation in Opposition	2
Defendant's Reply Affirmation	3

Motion by defendant 1876 Muttontown LLC ("1876") for summary judgment dismissing the complaint and granting its counterclaim for possession of the subject property, a money judgment, and attorneys' fees, is granted as to liability, and shall be set down for a hearing on the issue of damages.

This action arises from a sale of property on December 30, 1999. Plaintiff sold to Millenium Land Partners Inc. ("Millenium"), defendant's assignor, property known as 1876 Muttontown Road in Syosset, New York for $465,000. Simultaneously, with the sale of the property, the parties executed two agreements: The Option Agreement (Exhibit F to the moving papers), and the Occupancy Agreement (Exhibit E). The record contains an assignment by Millenium to 1876, and a deed of the property from plaintiff to 1876, both dated May 4, 2000. Apparently the six-acre property has an odd configuration, and subdivision of the property would yield the best value for sale of the property. Millenium, and then 1876, were to use their "best efforts" to have the property

subdivided into two parcels, while plaintiff continued to reside at the property.

In the Option Agreement, plaintiff was granted the option to repurchase the property for $465,000 in the event that subdivision approval was not granted. It is undisputed that subdivision approval was not granted by the Village of Muttontown. The Option Agreement provided for a 24-month period to obtain the approval, and a 6-month extension. 1876 sent the Subdivision Notice, as set forth in Paragraph 2 of the Option Agreement, to plaintiff by letter dated March 22, 2006 (Exhibit I) . The Subdivision Notice triggered the option to purchase, which according to the Option Agreement extended for 10 days. When plaintiff failed to exercise his option to repurchase the property, defendant requested that he vacate the property by July 6, 2006 (Exhibit J).

By letter dated October 18, 2006, plaintiff's attorney advised 1876 that plaintiff was exercising his option to purchase (Exhibit L). 1876 rejected the letter (Exhibit M). Plaintiff commenced this action in October, 2007, seeking specific enforcement of the Option Agreement.

1876 denied the allegations of the complaint, alleged two affirmative defenses based on untimeliness, and alleged a counterclaim based upon both the Occupancy Agreement and the Option Agreement for possession of the property, money damages based upon plaintiff's failure to pay taxes for the years he occupied the property, and attorneys' fees.

On this motion defendant seeks summary judgment dismissing plaintiff's cause of action, awarding it possession of the property, and setting the case down for a trial on the issue of damages. 1876 argues that plaintiff had only 10 days to exercise the option to purchase, and his attempt to do so in October, 2006, was untimely. Consequently, according to 1876, plaintiff's continued possession of the premises is wrongful.

In opposition, plaintiff claims that plaintiff has failed to make out a *prima facie* case, and that in any event, the material breach of the Option Agreement by 1876 relieves him from the obligation to pay taxes pursuant to the Occupancy Agreement.

Summary judgment is the procedural equivalent of a trial [*SJ Capelin*

Associates, Inc. v Globe Mfg. Corp., 34 NY2d 338, 341 (1974)]. A party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact [*Alvarez v Prospect Hospital*, 68 NY2d 320 (1986); *Zuckerman v City of New York*, 49 NY2d 557(1980)]. Summary judgment will not be defeated by mere conclusions or unsubstantiated allegations [*Zuckerman*], or conjecture and surmise [*Singer v Neri*, 31 AD3d 738, 740(2nd Dept. 2006)].

"A written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" [*MHR Capital Partners LP v Presstek, Inc.*, 12 NY3d 640, 645 (2009) quoting *Greenfield v Philles Records Inc.*, 98 NY2d 562, 569 (2002)]. A valid exercise of an option to purchase real estate requires strict adherence to the terms of the option agreement [*Parker v Booker*, 33 AD3d 602 (2006), lv app den 8 NY3d 811 (2007)].

Review of the Option Agreement herein reveals that the time constraints for the exercise of the option are clear and unambiguous. Plaintiff had ten business days to exercise the option, commencing upon receipt of the Subdivision Notice from 1876. On this record, where the Subdivision Notice was sent by plaintiff in March, 2006, and plaintiff did not respond until months later in October, 2006, there is no question that plaintiff's attempted exercise of the option was untimely, and therefore invalid.

The Option Agreement further provides, that in the event plaintiff does not purchase the property, he may continue to occupy the property for 90 days (par. 5), and agrees to vacate the property within 100 days (par.6), after receipt of the Subdivision Notice. As plaintiff failed to vacate the property for months after receipt of the Subdivision Notice, 1876 has made out a *prima facie* case that it is entitled to a judgment dismissing the complaint and granting it possession of the property pursuant to its counterclaim [*Alleyne v Townsley*, 110 AD2d 674 (2nd Dept. 1985)].

Plaintiff argues that 1876 did not use its "best efforts" to pursue subdivision approval, that this is a material breach of the Option Agreement, and it excuses plaintiff from his responsibility for paying the real estate taxes under the Occupancy Agreement. This argument does not suffice because a contract

provision calling for "best efforts" is unenforceable in the absence of guidelines or objective criteria against which a party's efforts can be measured [*Strauss Paper Co., Inc. v RSA Executive Search, Inc.*, 260 AD2d 570 (2nd Dept. 1999); see also *Timberline Development LLC v Kronman*, 263 AD2d 175 (1st Dept. 2000)]. No such guidelines or objective criteria are provided in the Option Agreement. Consequently plaintiff cannot raise a triable issue of fact as to a material breach of the Option Agreement in connection with the "best efforts" clause.

Plaintiff further objects to paying the real estate taxes for the period that he remained in possession of the property, as provided in the Occupancy Agreement, because he claims that no demand for such payment was made (Cerruti affidavit, par. 12), and because the tax bills allegedly included taxes for more than the parcel which plaintiff possessed (Cerruti transcript, p. 41). However, the parties' obligations under the Occupancy Agreement are governed by the unambiguous terms of that contract which expressly called for payment of the taxes by plaintiff [*Parker v Booker* at 603]. There is nothing in the Occupancy Agreement that obligated 1876 to provide plaintiff with notice of the tax amount or the day on which payment was due [*Id.*]. Based on the foregoing, defendant is entitled to summary judgment on its counterclaim for payment of taxes by plaintiff for the time that he remained in possession of the property. The amount of such real estate taxes shall be set down for a hearing before a court attorney/referee.

Finally, an award of "reasonable attorneys' fees" is expressly authorized in the Occupancy Agreement (par. 3) in the event of a legal action to recover possession, and therefore defendant is entitled to recover its attorneys' fees. In recognition of the courts' inherent power to supervise the charging of fees for legal services rendered [*Matter of First Nat. Bank of East Islip v Brower*, 42 NY2d 471, 474 (1977); *Key Equipment Finance, Inc. v South Shore Imaging Inc.*, 39 AD3d 595 (2nd Dept. 2007)], the amount of 1876's reasonable attorneys' fees shall also be determined at the hearing.

Settle judgment dismissing the complaint and awarding defendant judgment on its counterclaims, subject to the hearing directed herein.

SO ORDERED.

ENTERED

A.J.S.C.

Dated: December 21, 2009

DEC 23 2009

NASSAU COUNTY
COUNTY CLERK'S OFFICE