

**Christopher St. Operating, Inc. v 189 E. Third St.  
Realty, LLC**

2010 NY Slip Op 30141(U)

January 19, 2010

Supreme Court, New York County

Docket Number: 603296/08

Judge: Joan A. Madden

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

PRESENT: HON. JOAN A. MADDEN  
J.S.C.

PART 11

Index Number : 603296/2008  
**CHRISTOPHER ST.**  
VS.  
**189 EAST THIRD STREET**  
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 *and cross-motion are*  
*determined in accordance with the annexed*  
*decision and order.*

**FILED**  
JAN 25 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: January 19, 2010

[Signature]  
J.S.C.  
**HON. JOAN A. MADDEN**

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 11

-----X  
CHRISTOPHER ST. OPERATING, INC.,

Plaintiff,

-against-

Index No. 603296/08

189 EAST THIRD STREET REALTY, LLC,

Defendants.

-----X  
MADDEN, J.:

This case arises out an aborted real estate transaction. Plaintiff Christopher St. Operating, Inc. agreed to purchase, and defendant 189 East Third Street Realty, LLC agreed to sell, the building and property known as 189 East Third Street, New York, New York (the Premises) for the agreed price of \$4,750,000.00. Plaintiff alleges that the transaction did not close due to: (1) defendant's failure, in advance of the closing, to resolve numerous clouds on title, as well as encumbrances, liens, violations, and other exceptions and violations to closing; (2) defendant's repudiation of the parties' contract of sale prior to closing; and (3) defendant's failure to appear at the time and date set by defendant for the closing and to tender a deed.

Defendant now moves for an order granting it summary judgment on its counterclaims for the down-payment of \$475,000.00, and dismissing the complaint with prejudice. In the event that summary judgment is not granted, defendant also seeks an order disqualifying Leonard A. Scalfani as attorney for plaintiff, on the ground that he ought to be called as a witness for plaintiff.

Plaintiff cross-moves for summary judgment on the second and fourth causes of action for a declaration that it is entitled to the return of its contract deposit, and directing that the

contract deposit and all interest thereon be remitted to plaintiff. Plaintiff also cross-moves for summary judgment as to liability only on the first and third causes of action for breach of contract, and for summary judgment dismissing defendant's counterclaims.

For the reasons set forth below, both the motion and the cross motion for summary judgment are denied, as is the motion to disqualify.

### ***BACKGROUND***

In support of its motion for summary judgment, defendant submits the affidavit of Charles Gambetta, the sole member of defendant and the person who negotiated the sale of the Premises; the affirmation of Bruce Feffer, Esq., who was the attorney for Charles Gambetta and defendant in the transaction; the affidavit of Lawrence H. Hochberg, C.P.A., the accountant for Charles Gambetta, his father and mother, and defendant; the affidavit of Marie Gambetta, Charles Gambetta's mother; and the affirmation of Mark Hochberg, Esq., the attorney for the estate of Thomas Gambetta, Charles Gambetta's late father.

In support of its cross motion for summary judgment, plaintiff submits the affidavits of Neil Binder, a principal of plaintiff; Susan Levine, Esq., plaintiff's counsel who was involved in the negotiation of the transaction; Daniel Krimmer, chief counsel for the title company; and Lawrence Mongelli, the title closer who attended the closing on behalf of the title company.

The following factual background is derived from both the complaint and the answer, as well as from the affirmations and affidavits submitted by the parties. Defendant is a limited liability company, whose sole asset is the Premises (Aff. of Charles Gambetta, ¶ 3). Defendant was formed by Thomas and Marie Gambetta, Charles Gambetta's parents, in February

1995 (*id.*, ¶ 4). From the time of its formation in 1995, defendant was owned 75% by Thomas Gambetta and 25% by Marie Gambetta (*id.*, ¶ 5). They were the sole members of defendant until 2002, when they gifted their combined interests of 100% to Charles Gambetta (*id.*).

On August 19, 2008, plaintiff entered into a written contract with defendant (the Contract), pursuant to which plaintiff agreed to purchase the Premises for \$4,750,000.00 (Complaint, ¶ 8; Exh A). At the same time, plaintiff and defendant also executed a Letter Agreement (*see id.*, Exh B), which supplemented the terms and conditions of the Contract (*id.*, ¶ 11). Pursuant to section 2.01 and Schedule C of the Contract, plaintiff deposited the amount of \$475,000.00 with Bruce Feffer & Associates, LLC, as escrow agent, representing the down-payment under the Contract (*id.*, ¶ 12).

Under the terms of the Contract and the Letter Agreement, defendant was required to transfer at closing, good, insurable and marketable title to the Premises free of all liens and encumbrances, including any mortgages of record against the Premises (Contract, §§ 1.01, 1.02; Letter Agreement, ¶ 2). Likewise, under the terms of the Letter Agreement, defendant expressly agreed to “satisfy, cure and have removed of record, prior to the closing, all notes or notices of Violations, as defined in paragraph 7.01 of the Contract,” which were noted or issued prior to closing (Letter Agreement, ¶ 3). Defendant was also to have obtained, prior to closing, “all final sign-offs and Letters of Completion for any open Building Department applications including, but not limited to, Department of Buildings Job 103620477 referenced in Purchaser’s Title Report #20607NY” (*id.*).

Susan Levine, plaintiff’s attorney, commissioned Class Abstract Title Services, Inc. (Class Abstract) to conduct a title search on the Premises (Levine Aff., ¶ 14). In June of

2008, Class Abstract issued a title report (*see id.*, Exh C). The title report, at Schedule B thereof, included an itemized statement of the matters, issues and exceptions that needed to be addressed before the title company would provide a policy of title insurance (Aff. of Daniel Krimmer, ¶ 4). Some of the items listed in Schedule B identified interests, encumbrances, liens, defects and clouds on title of record, such as an open mortgage of record, and multiple apparently inconsistent recorded assignments of that mortgage (*see e.g.* Schedule B, Exception No. 4); other items set forth instructions for the production of documents and information that were required prior to the closing in order to address questions and issues that arose during the search, such as who had authority to act and sign documents on behalf of defendant (*see e.g.* Schedule B, Exception No. 16); and other items provided instruction as to what documents, proof, information and actions would be required at or prior to closing (*see e.g.* Schedule B, Exception Nos. 11 and 12).

In August of 2008, Levine requested that Daniel Krimmer of Class Abstract forward a copy of the title report and all of its amendments to Bruce Feffer, defendant's attorney (Levine Aff., ¶ 17). Levine was informed by Krimmer that the report was sent, and she confirmed with Feffer's office that it was received (*id.*). All subsequent amendments to the report were also forwarded by Class Abstract to Feffer (Krimmer Aff., ¶ 5).

Although plaintiff's obligation to close on the purchase of the Premises under the terms of the Contract was not contingent on plaintiff obtaining financing for its purchase, under section 2 (c) of the rider to the Contract, defendant expressly acknowledged that plaintiff would apply for such financing (Complaint, ¶ 14). Under paragraph 1 of the Letter Agreement, defendant also expressly acknowledged that the financing that plaintiff would seek would be in

the principal amount of \$2,650,000.00 (*id.*, ¶ 15). Plaintiff applied to Commerce Bank for such financing (*id.*, ¶ 16).

Pursuant to paragraph 3 of the Contract, the closing of title was to occur “on or about October 1, 2008” (*id.*, ¶ 17). However, the agreement to close on that date was not a substantial or essential term of the Contract, and thus, time was not of the essence under the Contract with respect to the closing date of October 1, 2008 (*id.*, ¶ 18).

Plaintiff contends that, as of October 1, 2008, it was not ready, willing or able to close title pursuant to the Contract because it had not yet obtained financing for which it applied for its purchase of the Premises (*id.*, ¶ 19). Plaintiff further contends that, on October 1, 2008, defendant was not ready, willing or able to close title under the Contract because there remained several significant matters clearly identified in Schedule B of the title report that had not been addressed by defendant (*id.*, ¶ 18). Indeed, Krimmer asserts that, from the date that his firm issued the title report in June 2008 until early October 2008, he heard nothing from defendant or its counsel that would clear the clouds on title against the Premises and the impediments to closing identified by the title report (Krimmer Aff., ¶ 7).

According to Krimmer, among those matters were questions as to whether defendant, which was identified in the Contract as a limited liability company, had been properly formed and remained in good standing, and who had the authority to act on behalf of defendant to transfer title to the Premises and/or to execute the documents that defendant was required to sign in order for title to be certified (*id.*, ¶ 8). An issue also existed as to whether estate and/or gift taxes were due or could be collected out of the Premises as a result of the death and/or transfers of membership interest in defendant (Complaint, ¶ 18). Krimmer asserts that, in order

[\* 7]

for the title company to resolve these matters, it included, as Exception No. 16 of the Schedule B to the title report, a requirement that defendant provide: proof of defendant's due formation; proof of filing of defendant's Articles of Organization with the New York Secretary of State; pre-closing production of defendant's Articles of Organization and Operating Agreement; proof that there had been no change in the composition or make-up of defendant, and that there had been no amendments made to the Articles of Organization or Operating Agreement; and proof that the party executing any documents on behalf of defendant in connection with the closing had due authority to act for defendant (*id.*, ¶ 9; Krimmer Aff., ¶ 8).

Krimmer also asserts that, as of October 2008, there also remained of record and not cleared or addressed by defendant or its counsel a mortgage in the principal amount of \$300,000, no part of which had been satisfied of record, and which, according to the County Clerk's records, was assigned on three separate occasions by the same assignor to different assignees (*id.*, ¶ 10; *see* Title Report, Schedule B, Exception No. 4).

According to Krimmer, also open of record as of October 2008 were a notice of sidewalk violation, numerous Emergency Repair liens, New York City Building Department violations, New York City Fire Department violations, and an open permit for the conversion of the ground floor and cellar space of the Premises as a restaurant (*id.*, ¶ 12).

However, Bruce Feffer, defendant's counsel, contends that, as of October 2008, there were no impediments to closing, and that, in fact, Levine was being evasive about setting a closing date (Feffer Aff., ¶ 13). Accordingly, on October 10, 2008, Feffer sent a letter to Levine in which Feffer "formally request[ed] a date on which your client will be available to close on the sale of the above referenced property" (*see* Aff. of Richard E. Hershenson, Exh C). Feffer also

stated that “[i]f there are any outstanding issues of which you are aware that are preventing your client from closing, please notify me so that we can resolve them expeditiously” (*id.*). Feffer contends that he heard nothing from Levine indicating that there were any outstanding issues that might prevent a closing (Feffer Aff., ¶ 24; *see also* Answer, ¶ 41).

By letter dated October 24, 2008 (the October 24th Letter [*see* Complaint, Exh C]), defendant gave written notice that it was declaring Friday, November 7, 2008, at 10:00 a.m. to be the time, date and place of the closing of title under the Contract (Complaint, ¶ 22). Defendant also declared that the time of the closing set forth in the letter was “of the Essence,” that “[n]o further delays and no further requests for adjournments by [plaintiff] will be accepted or agreed upon by [defendant],” and that “[i]n the event [plaintiff] is not present at the closing, ready, willing and able to complete the transaction, [plaintiff] will be deemed to be in default and [defendant] will exercise all of its rights and remedies under contract, including but not limited to terminating the contract and retaining the Downpayment” (*id.*). Feffer contends that, following this letter, he “heard nothing from Ms. Levine to indicate whether the Buyer had obtained financing and would be ready to close” (Feffer Aff., ¶ 16).

Plaintiff asserts that, as of the date of the October 24<sup>th</sup> Letter, defendant had still not resolved any of the impediments to closing, and had not secured the documents, evidence and information that it required to satisfy its contractual closing obligations, such that defendant was not then ready, willing or able to close title on the Contract (Complaint, ¶ 25; Levine Aff., ¶ 48).

By letter dated October 28, 2008, plaintiff objected to the time of essence closing unilaterally set by defendant (*see* Complaint, Exh D), but asserts that defendant failed to rescind its demand that the closing take place on November 7, 2008 (Complaint, ¶ 30).

By letter dated November 4, 2008 from Feffer to Levine (*see id.*, Exh E), Feffer stated that Levine's October 28<sup>th</sup> letter "provides no explanation as to why your client is not ready to close more than one month after the contractual closing date," and that "[t]he complete failure of your client to either be ready to close or to explain why it is not ready leaves my client no choice but to declare your client in default." Consequently, Feffer "formally notified" plaintiff that unless he received "written confirmation" by "no later than 5:00 pm on Wednesday November 5, 2008, that [plaintiff] will proceed to close on November 7, the contract will be deemed terminated and the deposit funds shall be forfeited and released to the Seller" (*id.*).

By letter dated November 5, 2008 (*see Levine Aff.*, Exh L), Levine responded that "[y]ou have no basis or right to declare my client in default," and that "the factual allegations in your letter are not true." Defendant asserts that plaintiff and its attorney ignored the request to confirm their appearance at the forthcoming closing (*Answer*, ¶ 47).

Plaintiff alleges that, as of 5:00 p.m. on Wednesday, November 5, 2008, it was unable to confirm that it would close title on November 7, 2008 because Commerce Bank had not completed its processing of its application for financing, and plaintiff had not yet been able to secure alternate financing (*Complaint*, ¶ 36). However, by November 6, 2008, plaintiff did secure alternate financing for its purchase under the Contract and thus, plaintiff alleges, it became ready, willing and able to close on the Contract as of that date (*id.*, ¶ 37).

Feffer asserts that, because he did not hear anything from Levine by the end of the day on November 5<sup>th</sup>, he assumed that the closing would not occur on the scheduled date of November 7<sup>th</sup> (*Feffer Aff.*, ¶ 17; *see also Answer*, ¶ 48). Accordingly, he advised his client, Charles Gambetta, the sole member of defendant, that he did not have to appear on November 7<sup>th</sup>

(*id.*). By letter dated November 6, 2008 (*see* Levine Aff., Exh M), Charles Gambetta wrote to Feffer in his capacity as escrow agent and demanded that Feffer remit to him the Contract deposit.

Plaintiff alleges that, on November 7, 2008, it appeared, through its principals, at 10:00 at the offices of counsel for defendant, ready, willing and able to close title on the Contract, and that it tendered certified checks made payable to defendant for the full amount due (Complaint, ¶¶ 38, 40). Also present at the closing were Leonard Scalfani, plaintiff's attorney, a representative of plaintiff's lender, and Lawrence Mongelli, the title closer (*id.*, ¶¶ 38-39). However, plaintiff alleges, defendant was unable, unwilling and not ready to close, because none of the impediments to closing had been resolved by defendant (*id.*, ¶¶ 41-42).

Plaintiff presents the following version of events that it alleges occurred during the closing on November 7, 2008. At 10:30 a.m., Feffer left the conference room where the closing was to take place, and represented that he was going to his own office to look for some of the documentation that defendant was required to produce in order for the closing to occur (*id.*, ¶ 51). However, as of 11:15 a.m., Feffer had not returned, and plaintiff had not been provided with any of the documents, evidence or information required for closing (*id.*, ¶ 52; Mongelli Aff., ¶ 41). Likewise, as of 11:15 a.m., no representative of defendant had appeared at the closing (Complaint, ¶ 53). Plaintiff's counsel, through Feffer's receptionist, requested that Feffer return to the conference room and advise all present as to when a representative of defendant with authority to act for that entity was expected to arrive, when defendant would be able to produce a properly executed deed and other transfer documents and evidence necessary for delivery of title of the Premises to plaintiff, and whether defendant would be able to resolve the impediments to

closing (*id.*, ¶ 54).

However, as of 11:35 a.m., Feffer had not returned to the conference room, and Mongelli, the title closer, concluded that defendant was not ready, willing or able to close title on the Contract at that time (Mongelli Aff., ¶ 45; Complaint, ¶¶ 55-56). According to Mongelli, as of that time, not only did defendant lack virtually all of the “deed, other closing documents, proofs, evidence and information, signatures and funds required for the closing to occur,” neither plaintiff nor Mongelli had been offered any reasons to expect, or information from which they could conclude that, if they waited any longer, the necessary documents, information and evidence would arrive so that defendant would be ready to close (Mongelli Aff., ¶ 46).

Specifically, according to plaintiff, no person with authority to act for defendant was present at the closing (Complaint, ¶ 43); none of the deed and other required transfer documents had been executed by defendant (*id.*, ¶ 44); and defendant was not ready or able to satisfy any of the other conditions and requirements set forth as “seller’s” obligations for closing under the Contract (*id.*, ¶ 45). Moreover, plaintiff asserts, defendant could not establish who had the right or authority to act for it, who owned the membership interest in defendant, and/or whether the Premises was free from potential tax liens or from collection of estate or other taxes arising out of the death of Thomas Gambetta (*id.*, ¶ 46); defendant could not produce an original satisfaction of the outstanding mortgage that encumbered the Premises (*id.*, ¶ 47); defendant could not produce any evidence that the violations of record against the Premises had been removed and/or the open permits closed (*id.*, ¶ 48); defendant could not produce its operating agreement, or assignments of defendant’s membership interests or other evidence of their transfer, which the title company had required as a condition to providing title insurance to

plaintiff (*id.*, ¶ 49); and defendant could not produce an original affidavit of heirship identifying the heirs and distributees of Thomas Gambetta, as required by the title insurance company (*id.*, ¶ 50; *see also* Mongelli Aff., ¶¶ 16-37). Thus, Neil Binder, plaintiff's representative, and Mongelli reached the conclusion that defendant would not be able to close on that day no matter how long they waited (Binder Aff., ¶ 54).

Defendant offers a completely different version of events. Feffer asserts that, on the morning of November 7<sup>th</sup>, he was surprised when plaintiff's two principals showed up at his office without any advance warning (Feffer Aff., ¶ 18). They appeared with Leonard Scalfani, who represented that he was the attorney for plaintiff (*id.*). However, Scalfani was not involved in the previous negotiations between plaintiff and defendant and Feffer and Levine (*id.*). Levine did not appear at the closing (*id.*). Feffer called Gambetta, who started to make arrangements to deal with the closing (*id.*, ¶ 20; Gambetta Aff., ¶ 27-29). Feffer informed plaintiff that he had contacted Gambetta, and that he would be coming to the closing (Answer, ¶ 50).

Feffer asserts that the title closer asked him for copies of certain documents, such as the proposed deed, Articles of Organization of defendant, and a copy of the satisfaction of mortgage (*id.*, ¶ 21). Feffer contends that he provided him with those documents, as well with gift tax returns from 2002 demonstrating that Charles Gambetta was the sole owner of defendant (*id.*, ¶¶ 21-22). Feffer asserts that "[t]here was never any thought that the closing would not be completed," and that "[n]o objections or requests of any kind had been previously brought to my attention that might be obstacles to closing" (*id.*, ¶ 24).

According to Feffer, Scalfani acted in a hostile and aggressive manner, and "kept insisting that there was a problem with violations and that would keep us from closing" (*id.*,

¶ 26). Feffer asserts that, however, “this was the exact opposite of what the respective clients and attorneys had already agreed upon many weeks before this,” i.e., that “the violations were de minimis and that we could escrow for them” (*id.*). Feffer contends that he was astonished when Scalfani and plaintiff’s principals left at 11:35 (*id.*, ¶ 28), because he had repeatedly assured them that Gambetta was on his way, and during the entire time they were in the conference room, he was shuttling between his office and the conference room to collect and provide the documentation required by the title closer (*id.*, ¶ 29).

Plaintiff contends that, after the aborted closing, Levine received a letter from Feffer enclosing Gambetta’s November 6, 2008 letter, and stating:

Enclosed please find Seller’s demand for the release of the contract deposit held by me in escrow. Such funds will be released to Seller in accordance with the terms of the contract of sale

(Levine Aff., Exh N).

Within two business days of the aborted closing, plaintiff brought this action, in which it asserts causes of action for breach of contract and anticipatory repudiation (first and third causes of action), and in which it seeks a judgment that defendant breached the Contract, and that, as a result, it is entitled to a return of its downpayment (second, fourth and fifth causes of action).

In its first counterclaim, defendant seeks specific performance of the Contract on the ground that plaintiff “defaulted under the Contract of Sale by failing and refusing to close on the originally scheduled closing date, and refusing to confirm that it would appear for a closing already re-scheduled time being of the essence, and by suddenly appearing at the closing after having failed to notify [defendant] that they would be appearing and then suddenly leaving while

the closing was going on before [defendant's] representative could appear at the closing” (Answer, ¶ 60). In its second counterclaim, defendant asserts that, “[b]y reason of the foregoing default,” it is entitled to the \$475,000.00 downpayment (*id.*, ¶ 65). In its third counterclaim, defendant asserts that “[b]y reason of the foregoing default and bad faith and unclean hands by [plaintiff],” it is entitled to recover “the amount that the value of the Property has decreased from the time [plaintiff] agreed to purchase it to date,” plus attorney’s fees (*id.*, ¶ 68).

### **ANALYSIS**

#### **THE SUMMARY JUDGMENT MOTIONS**

“[T]he 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 [citation omitted]” (*Ayotte v Gervasio*, 81 NY2d 1062, 1062 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

“Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at 853; *see also Lesocovich v 180 Madison Ave. Corp.*, 81 NY2d 982 [1993]).

The party opposing summary judgment has the burden of presenting evidentiary facts sufficient to raise triable issues of fact (*Rinaldi v Holt, Rinehart & Winston, Inc.*, 42 NY2d 369, *cert denied* 434 US 969 [1977]; *Indig v Finkelstein*, 23 NY2d 728 [1968]). Such facts must be in admissible form and “mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

“[S]ummary judgment should not be granted where there is any doubt as to the existence of a triable issue” of fact (*American Home Assur. Co. v Amerford Intl. Corp.*, 200 AD2d 472, 473 [1st

Dept 1994]).

As set forth below, because of the numerous triable issues of material fact that exist in this action, neither party has demonstrated its entitlement to summary judgment.

1. ***Defendant's Motion for Summary Judgment***

Defendant contends that it is entitled to summary judgment on its counterclaims for the down payment of \$475,000.00 and for an order dismissing the complaint because plaintiff defaulted on the Contract by walking out on the closing after an hour and a half. According to defendant, by reason of this default by plaintiff, evidencing that it was not ready, willing and able to close, plaintiff forfeited its downpayment.

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 Kaszirer*, 41 AD3d 282 [1<sup>st</sup> Dept 2007]). Thus, in order to prevail on its motion for summary judgment, “it is incumbent upon [the seller] 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], \* 4 [Sup Ct, NY County 2006], *affd* 50 AD3d 575 [1<sup>st</sup> Dept 2008]). For the reasons stated below, material issues of fact exist as to whether defendant could deliver insurable title on the November 7, 2008 time of the essence closing date, and thus

whether it was ready, able and willing to close on that date. As such, its motion for summary judgment must be denied.

In support of its motion for summary judgment, defendant contends that plaintiff had no justification to walk out of the closing after an hour and a half, because, as set forth in *Gray v Wallman & Kramer* (184 AD2d 409 [1<sup>st</sup> Dept 1992]) and *Wolf v Atai* (139 AD2d 729 [2<sup>d</sup> Dept 1988]), even where time is of the essence, a seller or buyer has the entire day to close, if necessary.

According to defendant, there were no problems preventing a closing, and every issue raised by plaintiff was either a non-issue, or something that could have eventually been resolved at closing if plaintiff had waited for Gambetta to arrive. For example, although plaintiff complains that it failed to provide an original satisfaction of mortgage on the Property, defendant contends that it had already provided a copy of the satisfaction of mortgage, and that Gambetta was bringing the original to the closing (*see Gambetta Aff.*, ¶ 41; *Feffer Aff.*, ¶ 34). Moreover, although plaintiff claims that there was no proof that Gambetta had authority to sign the deed on behalf of defendant, defendant contends that, right after plaintiff walked out of the closing, Feffer received a fax from defendant's accountant, Lawrence Hochberg, which contained the gift tax returns from Gambetta's parents in 2002, demonstrating that they had gifted their 100% interest in defendant to Gambetta (*see Feffer Aff.*, 36; *see also Hochberg Aff.*, ¶ 3). Finally, defendant contends, the de minimis violations about which plaintiff complains – the old building permit and all Building Department and Fire Department violations – were already dealt with prior to the closing, when Levine specifically agreed that those violations would be covered by a maximum escrow of \$15,000 (*see Feffer Aff.*, ¶ 35).

However, in its opposition to the summary judgment motion, plaintiff sets forth, via the affidavits of Mongelli, the title closer, and Binder, plaintiff's representative who attended the closing, a long list of exceptions and impediments to closing that, it contends, defendant failed to address either before or during the closing. Thus, according to Mongelli and Binder, almost two hours after the time that the closing set by defendant was to have occurred, no person purporting to have authority to act for the seller had appeared at the closing. Moreover, although defendant had represented that Charles Gambetta had the authority to act and/or sign documents on behalf of defendant, defendant had provided none of the proofs or documents required by the title company for defendant to prove that such was the case, including the defendant's Articles of Organization and Operating Agreement. In addition, defendant failed to provide originals of the satisfaction of mortgage duly executed by each heir of Thomas Gambetta, Thomas Gambetta's last will and testament, and an affidavit of heirship; defendant produced only a blank form of a deed, unsigned, and not in recordable form; there remained open of record numerous Building Code and Fire Code violations and numerous Emergency Repair liens; defendant failed to obtain the sign-off of the open building permit; defendant failed to tender the transfer taxes due in connection with a transfer of title to plaintiff; defendant did not tender an executed NYC Real Property Transfer Tax Return; defendant did not tender an executed NYC Equalization Form; defendant did not tender a NYS transfer tax return or credit line mortgage affidavit; defendant failed to provide a smoke alarm affidavit; defendant failed to provide original leases for several tenancies at the Premises; defendant failed to turn over the security deposits of remaining tenants; defendant failed to provide a certified rent roll; and defendant failed to provide duly executed tenant estoppel letters (*see* Mongelli Aff., ¶¶ 16-20, 27-31; Binder Aff., ¶¶ 42-43).

Significantly, both Krimmer and Mongelli attest that, given the nature and number of outstanding exceptions and impediments to closing that defendant failed to address the morning of the closing, even if Gambetta had appeared at some point after plaintiff's representatives left the closing, the closing would not have occurred that day (*see* Krimmer Aff., ¶ 37. ["In light of the circumstances, I agreed with the assessment of Mr. Mongelli and Mr. Scalfani that a closing would not occur that day because the Seller was not present and so many major issues had not been addressed by Seller's counsel with concrete proofs and resolutions"]; Mongelli Aff., ¶¶ 45-46 ["As of 11:35 a.m. ... it became clear to your affiant that ... the Seller was not, and likely would not be, ready, willing or able to close that morning ... [because] not only did the Seller lack virtually all of the deed, other closing documents, proofs, evidence and information, signatures and funds required in order for the closing to occur but neither Purchaser nor your affiant had been offered any reason to expect or any information from which we could reasonably conclude that, if we waited any longer, the necessary documents, information, proofs, evidence and persons would arrive so that the Seller would be ready or able to close"]]).

For instance, defendant contends that Gambetta was authorized to act for defendant and could have signed the deed and other documents at closing had plaintiff waited for him to arrive. In support of this contention, defendant submits copies of two gift tax returns purporting to report transfers of the membership interests in defendant, a limited liability company, to Gambetta from his father, as proof of Gambetta's authority. However, Krimmer attests that, even if those documents had been produced at closing, "they would not have served to prove Mr. Gambetta's authority to act or sign for the Seller, or otherwise to have cleared any of the outstanding impediments to closing," as there "is no proof that they were ever filed or are

genuine” (Krimmer Aff., ¶¶ 39-40). Krimmer further attests that, even if those documents were genuine, “they would not suffice because the Seller had not provided proof that Thomas Gambetta ever owned any interests in the Seller, or did so at the time that it is alleged he made the gifts indicated in the returns” (*id.*, ¶ 40).

Moreover, Exception No. 16 of Schedule B of the title report required defendant to produce, prior to closing, defendant’s Articles of Organization, Operating Agreement, proof of due formation and current good standing to resolve the question of who could act for the seller. Plaintiff contends that defendant, to date, has not produced those documents, and, other than the Operating Agreement (*see* Gambetta Aff., ¶ 48), defendant does not claim in its papers that Gambetta would have brought them to the closing.

Although defendant also suggests that it should have been permitted to escrow funds to secure its post-closing satisfaction of the open violations, Emergency Repair Liens and open building permit, however, under the Letter Agreement, plaintiff’s lender had the right to refuse such escrow (*see* Letter Agreement, ¶ 3 [“if acceptable to Purchaser’s Lender, Seller will escrow funds at closing as required by Purchaser’s Lender” to satisfy the violations]). Binder alleges that his lender, Bryan Kornreich, a “hard money lender,” refused to permit the escrow (Binder Aff., ¶¶ 36, 46). Binder further alleges that, in any event, “[d]efendant could not have cured the violations and open permit that day” (*id.*, ¶ 45).

Defendant also claims that it was unaware that there existed exceptions and impediments to closing because plaintiff failed to respond to the October 10, 2008 letter in which it sought plaintiff’s advice as to what matters defendant was required to resolve before a closing could occur. Defendant claims that, because plaintiff did not provide the information sought,

defendant was led to believe that there existed no issues that it needed to resolve. However, plaintiff presents evidence that defendant's counsel had been provided with copies of the title report, in which all of the exceptions and impediments to closing that defendant was required to resolve were identified and that, contrary to defendant's claims, on numerous occasions both before and after October 10, 2008, both the title company and plaintiff's counsel urged defendant's counsel, both orally and in writing, to contact the title company to address and/or resolve the outstanding exceptions and impediments to closing identified in the title report (*see* Levine Aff., ¶¶ 17-18; Krimmer Aff., ¶¶ 5, 15-24).

Thus, even though defendant may have had the right to close at any time on the day of November 7, 2008, material issues of fact exist as to whether it would have been able to cure the outstanding exceptions to title by the end of the day, and thus, whether it was ready, able and willing to close on the time of essence closing day. Consequently, its motion for summary judgment must be denied (*see Gray v Wallman and Kramer*, 184 AD2d 409, *supra* [question of fact as to whether vendor could have obtained satisfaction of mortgage as required under purchase agreement before end of law day precluded summary judgment for purchaser in vendor's action for breach of contract]).

## **2. Plaintiff's Motion for Summary Judgment**

In support of its motion for summary judgment on the second and fourth causes of action, plaintiff contends that defendant anticipatorily breached the Contract by declaring, in Feffer's November 4, 2008 letter, that plaintiff was in default, and seeking to recover the downpayment. Plaintiff, however, has failed to establish its entitlement to summary judgment on its anticipatory breach causes of action.

“[U]nder [the doctrine of anticipatory breach] if one party to a contract repudiates his duties thereunder prior to the time designated for performance and before he has received all of the consideration due him thereunder, such repudiation entitles the nonrepudiating party to claim damages for total breach” (*Long Island R.R. Co. v Northville Indus. Corp.*, 41 NY2d 455, 463 [1977]; accord *Norcon Power Partners, L.P. v Niagara Mohawk Power Corp.*, 92 NY2d 458 [1998]).

Plaintiff contends that, days before the time of essence closing was to have occurred, defendant wrongfully repudiated the parties’ Contract by declaring it terminated without any legitimate basis to do so. According to plaintiff, the November 4, 2008 letter set forth an untenable interpretation of the Contract in reading into it a duty on plaintiff’s part to advise defendant in writing as to whether it would close after defendant declared the time of the closing to be of the essence. Defendant also unequivocally communicated its intent not to perform its obligation to close unless plaintiff satisfy the condition that it notify defendant, in advance of the time of essence closing, that plaintiff would actually close at that time. Thus, plaintiff contends, this letter constituted an anticipatory breach and repudiation of the Contract that excused plaintiff from further performance.

However, it is well-settled that when a party claims that the other party has committed an anticipatory breach, if the complaining party continues to treat the contract as in full force, it has waived any alleged anticipatory breach:

Where a contract is broken in the course of performance, the injured party has a choice presented to him of continuing the contract or of refusing to go on. If the injured party chooses to go on, he loses his right to terminate the contract because of the default

(*Emigrant Indus. Sav. Bank v Willow Bldrs., Inc.*, 290 NY 133, 144 [1943] [citations and quotation marks omitted] [finding that “the failure of the plaintiff to object to the assignments or orders for payment of moneys to become due, coupled with the continuation of discussions by the plaintiff and defendant of possible increase of the building loan, and other acts of the plaintiff showing that the plaintiff considered the contract still in existence, is compelling evidence of choice by the plaintiff to continue the contract,” and concluding that “the plaintiff cannot thereafter elect to foreclose its mortgage for a default which apparently it chose to disregard as a ground for termination of the contract”]; accord *El-Ad West LLC v 30 Hubert St. LLC*, 67 AD3d 520 [1<sup>st</sup> Dept 2009]).

Here, plaintiff clearly waived the alleged anticipatory breach by treating the contract as if it were in full force and effect, and by showing up at the closing (*see North Country Rocky Point, Inc. v Lewyt-Patchogue Co.*, 60 AD2d 866, 866 [2d Dept 1978] [“The alleged anticipatory breach by (defendant) was waived by (plaintiff) when it chose to treat the contract as valid and subsisting”]; *see also Limited Inc. v RSR Corp.*, 2002 WL 34192042 [Sup Ct, NY County 2002] [because plaintiffs continued to pay on the loans given by defendant Chase “well past the time of Chase’s alleged breach,” plaintiff “cannot now avoid the continuing obligation to pay back those loans by asserting some prior breach of Chase”]). Accordingly, plaintiff’s motion for summary judgment on its causes of action for anticipatory breach is denied.

Plaintiff also contends that it is entitled to summary judgment on its breach of contract causes of action on the ground that defendant breached the Contract by its failure to close on the time of essence closing date and tender a deed, and by its failure to cure the numerous exceptions and impediments to closing identified in the title report. However, because

material issues of fact exist as to whether defendant could have cleared the exceptions to title by the end of the law day, especially given the fact that plaintiff failed to confirm that it would appear at the closing, plaintiff has not demonstrated its entitlement to summary judgment on its breach of contract causes of action and hence, the motion is denied.

#### ***DEFENDANT'S MOTION FOR DISQUALIFICATION***

Defendant also moves to disqualify Scalfani as attorney for plaintiff on the ground that he will be a necessary witness in this case. According to defendant, "[t]he only possible excuse for [plaintiff] to avoid summary judgment would be that certain events took place at the closing that somehow 'justified' them in leaving the closing after an hour and a half," and "[t]he major witness who would testify to those events on behalf of [plaintiff] is Scalfani," who represented plaintiff at the closing (Hershenson Aff., ¶¶ 26-27).

As the party seeking disqualification, defendant bears the burden on this motion (*S & S Hotel Ventures Ltd. Partnership v 777 S.H. Corp.*, 69 NY2d 437 [1987]; *NYK Line [N. Am.] Inc. v Mitsubishi Bank, Ltd.*, 171 AD2d 486 [1st Dept 1991]). A determination as to whether an attorney ought to be called as a witness (Code of Professional Responsibility DR 5-102[A]), and therefore should be disqualified, is based on whether the attorney's testimony is "necessary" (*S & S Hotel Ventures Ltd. Partnership v 777 S.H. Corp.*, 69 NY2d 437, *supra*). The mere possibility that the attorney may be called to testify is an inadequate excuse to justify disqualification (*id.*; *NYK Line [N. Am.] Inc. v Mitsubishi Bank, Ltd.*, 171 AD2d 486, *supra*). Moreover, "the mere fact that an attorney was involved in the transaction at issue, or that his proposed testimony would be relevant or highly useful, is insufficient to warrant disqualification" (*Brooks v Lewin*, 48 AD3d 289, 291-292 [1st Dept] , *lv dismissed in part, denied in part* 11 NY3d 826 [2008]).

Here, there is nothing to support defendant's contention that Scalfani ought to be called as a witness on behalf of plaintiff. Contrary to defendant's argument, the events that occurred at the closing are not determinative to either party's recovery in this case. Rather, the major issue in this case is whether defendant was able to cure the title exceptions on the day of closing. Thus, defendant's conclusory assertion that Scalfani will be needed as a witness is insufficient by itself to overcome the rule that strongly favors allowing a litigant to be represented by the counsel of choice (*NYK Line [N. Am.] Inc. v Mitsubishi Bank, Ltd.*, 171 AD2d 486, *supra*).

Disqualification is also unwarranted because defendant has not shown that Scalfani's testimony would be prejudicial to plaintiff (*S & S Hotel Ventures Ltd. Partnership v 777 S.H. Corp.*, 69 NY2d 437, *supra*; *Vecchiarelli v Continental Ins. Co.*, 216 AD2d 909 [4th Dept 1995]; *Kaplan v Maytex Mills, Inc.*, 187 AD2d 565 [2d Dept 1992]). Because defendant has not met its burden of demonstrating either that Scalfani was a necessary witness, or that he would testify adversely to plaintiff's interest, the disqualification motion must be denied (*S & S Hotel Ventures Ltd. Partnership v 777 S.H. Corp.*, 69 NY2d 437, *supra*; *Transcontinental Constr. Services, Ltd. v McDonough, Marcus, Cohn & Tretter, P.C.*, 216 AD2d 19 [1st Dept 1995]).

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

Accordingly, it is

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

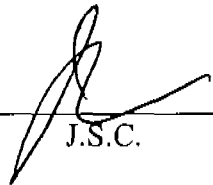
further

ORDERED that defendant's motion for disqualification is denied; and it is further  
ORDERED that plaintiff's cross-motion for summary judgment is denied; and it  
is further

ORDERED that the parties are directed to appear for a status conference on  
February 11, 2010 at 9:30 a.m., in Part 11, Room 351, 60 Centre Street.

Dated: January 7, 2010

ENTER:

  
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J.S.C.

**FILED**  
JAN 25 2010  
NEW YORK  
COUNTY CLERK'S OFFICE