Venne v 96 Rockwell Place LLC
2010 NY Slip Op 31136(U)
May 7, 2010
Supreme Court, Kings County
Docket Number: 22363/09
Judge: Lawrence S. Knipel
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At an IAS Term, Part 57 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 7th day of May, 2010.

PRESENT:

HON. LAWRENCE S. KNIPEL,
JUSTICE.

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ROBERT VENNE,
Plaintiff,

- against -

Index No. 22363/09

96 ROCKWELL PLACE LLC AND DAVIDOFF MALITO & HUTCHER LLP, AS ESCROW AGENT,

Defendants.

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The following papers numbered 1 to 6 read on these motions:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2 3-4
Opposing Affidavits (Affirmations)	
Reply Affidavits (Affirmations)	
______ Affidavit (Affirmation)	
Other Papers Memoranda of Law	5-6

Upon the foregoing papers, plaintiff Robert Venne (plaintiff) moves, pursuant to CPLR 3212, for summary judgment on his cause of action for breach of contract against defendant 96 Rockwell LLC (Rockwell or the sponsor) in the amount of $54,500, together with pre-judgment and post-judgment interest, costs and attorney's fees, on his causes of action for breach of contract and breach of fiduciary duty against defendant Davidoff Malito

& Hutcher LLP (DMH), as escrow agent, in the amount of $54,500, together with pre-judgment and post-judgment interest, costs and attorney's fees, and for dismissal of the counterclaims of Rockwell. DMH and Rockwell cross-move, pursuant to CPLR 3211(a)(1) and (7) and CPLR 3212, for an order dismissing the complaint based upon documentary evidence, granting summary judgment on Rockwell's counterclaims in favor of Rockwell and DMH, and declaring that plaintiff's uncured default entitles Rockwell, at its election, to (a) compel specific performance of plaintiff under the Purchase Agreement or (b) terminate the Purchase Agreement and retain the down payment held in escrow by DMH.

Plaintiff commenced the instant action for breach of contract and breach of fiduciary duty against Rockwell, sponsor of a condominium development project with respect to real property located at 96 Rockwell Place in Brooklyn, New York, and against law firm and escrow agent DMH, seeking to recover his down payment of $54,500. Plaintiff made this down payment pursuant to a Purchase Agreement entered into between him and Rockwell on or about July 6, 2007 (the Purchase Agreement) toward the purchase of condominium apartment Unit 5D, located at 96 Rockwell Place. The purchase price of the condominium was $545,000. The Purchase Agreement was also signed by Snow Becker Krauss, P.C., the predecessor escrow agent to the present escrow agent, DMH. The intended sale of Unit 5D to plaintiff was also made pursuant to a Condominium Offering Plan, dated March 5, 2007 (the Offering Plan). Pursuant to Section 1 of the Purchase Agreement, the Offering Plan "is incorporated . . . [into the Purchase Agreement] by reference and made a part hereof with the

same force and effect as if set forth at length. In the event of any inconsistency between the provisions of this [Purchase] Agreement and the [Offering] Plan, the provisions of the [Offering] Plan will govern and be binding."

The Offering Plan states that based upon its construction schedule, the sponsor contemplated that unless delayed by force majeure, "the construction of the building will be sufficiently completed to permit Closings of Residential Units to begin on or about September 1, 2007."

On or about November 2, 2008, the $54,500 down payment was transferred to an escrow account maintained by DMH. Thereafter, it appears that the 96 Rockwell condominium apartment building experienced extensive construction delays and related problems. The closing of the sale to plaintiff of Unit 5D could not be scheduled until the first half of 2009.

On June 9, 2009, DMH advised plaintiff by certified mail, return receipt requested, that the closing of Unit 5D had been scheduled for July 14, 2009.

After receiving this notification, plaintiff's attorney arranged for a title search with a title insurance company of plaintiff's own choosing (Professional Abstract), as permitted under Section 8 of the Purchase Agreement, for Unit 5D. Section 8 of the Purchase Agreement, entitled, "MARKETABLE TITLE" provides that:

> "At the closing of title, Sponsor shall convey to Purchaser fee simple title to the Unit, free and clear of all encumbrances other than those expressly agreed to by Purchaser or set forth in Schedule A annexed hereto and made a part hereof. Any

> encumbrance to which title is not to be subject shall not be an objection to title if (a) the instrument required to remove it of record is delivered at or prior to the closing of title to the proper party or to Purchaser's title insurance company, together with the attendant recording or filing fee, if any, or (b) Register Abstract Co., Inc., having an address at 38-50 Bell Boulevard, Bayside, New York 11361, (Tel: (718) 423-5333; Fax: (718) 423-5373 (*or such other title insurance company as Purchaser may utilize*), is or would be willing, in a fee policy issued by it to the Purchaser, to insure Purchaser that it will not be collected out of the Unit if it is a lien, or will not be enforced against the Unit if it is not a lien" (emphasis added).

The search was conducted by Professional Abstract on behalf of Washington Title Insurance Company. In the title report dated June 16, 2009, Professional Abstract advised the attorneys for plaintiff and the sponsor that the property was subject to various liens and encumbrances. In this regard, the total amount of the mechanic's liens and encumbrances, as reported by Professional Abstract, as of June 7, 2009, was $968,407.71. According to Professional Abstract, these liens first had to be satisfied or otherwise removed prior to closing. Further, Professional Abstract advised plaintiff's attorney that Washington Title Insurance Company would not issue plaintiff a fee title policy which would insure Unit 5D without exceptions unless the aforementioned liens and encumbrances were first satisfied or otherwise removed prior to closing.

On July 7 and July 10, 2009, plaintiff inspected the Unit. He observed that the Unit and the entire apartment building were in an unfinished condition with incomplete construction. Plaintiff compiled a "punch list" of these deficiencies after each walk-through inspection.

July 10, 2009 emails

On July 10, 2009, DMH advised plaintiff by email that Rockwell, the sponsor, was adjourning the closing to July 21, 2009, at 10:30 A.M. By email that same day, plaintiff's attorney acknowledged the adjournment.

July 16, 2009 emails

Thereafter, by email dated July 16, 2009, plaintiff's counsel asked DMH's employee, Ms. Josephine Vitello, "if the liens and other exceptions to the title report are now close to resolution, so we can close as scheduled on July 21 [, 2009]." Ms. Vitello responded by email that day, stating that:

> "Sponsor is working diligently to resolve all liens and other exceptions, including real estate taxes *before closing*. Should these not be resolved by Closing, Sponsor will provide purchaser with an indemnification for these at closing" (emphasis added).

Thereupon, plaintiff's counsel asked Professional Abstract whether, "[w]ith respect to this condo transaction, would the [indemnification] proposal . . . by sponsor cause the title company to issue a title policy free of exceptions?"

July 17, 2009 correspondence

By email dated July 17, 2009, plaintiff's title company, Professional Abstract, replied that the indemnification proposal by the sponsor would not enable it to issue a title policy free of exceptions. Specifically, Professional Abstract stated:

> "Mechanic Liens must be satisfied *prior to closing* - indem[nification] from sponsor will not suffice - either satisfied

> or bond proof. *I will need to see this prior to closing*. Taxes must be current - indemnification from sponsor will not be acceptable" (emphasis added).

That same day, plaintiff's counsel forwarded the above response to Ms. Vitello, informing her that the sponsor's indemnification proposal was unacceptable to plaintiff's title company. Plaintiff's counsel also advised Ms. Vitello that plaintiff requested cancellation of the contract and the return of his down payment, plus interest. Plaintiff's counsel also stated:

> "Whether or not the purchaser's request is immediately honored, you advised me there will be no July 21 closing, since the liens and encumbrances will not be resolved to the satisfaction of the title company in time for the closing to take place. You also advised me that Mr. Wolman [Rockwell's principal] would be advised of the request to cancel the contract. You told me that Mr. Wolman was out today, but that he would call me on Monday with respect to this request. We look forward to receiving your firm's response to the foregoing."

Thereafter, by email that same day, Rockwell's attorney, DMH, advised plaintiff's attorney: "Please be advised that the title exceptions will all be cleared *prior to clo[s]ing*. The adjournment was not made on account of same. I look forward to completing the transaction on the closing date as modified" (emphasis added).

Later that day, plaintiff's counsel sent DMH an email and a letter inquiring as to how the sponsor would clear the exceptions. In the same email and letter, he also notified DMH that plaintiff was terminating the Purchase Agreement. Specifically, plaintiff's counsel asked:

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> "how the sponsor proposes to clear the exceptions, including giving us a realistic timetable as to how and when such clearance will be accomplished and when the closing will be held without further adjournment. There have already been 2 [sic] adjournments of the closing.
>
> The explanations for clearance given to date have not been sufficiently specific. The purchaser has been patient but is entitled to an explanation that gives him a reasonable explanation that a closing consistent with the terms of the Purchase Agreement will in fact take place.
>
> Section 19 of the [Purchase] Agreement provides that if the sponsor can not [sic] cure an inability to close, purchaser's remedy includes terminating the [Purchase] Agreement. Purchaser hereby elects to terminate. Section 19 requires the sponsor to refund the sums deposited by the purchaser within 30 days of such written notification, which is by August 16. Purchaser is not waiving sponsor's obligation to cure the inability to close.
>
> Please provide us with the sponsor's response to purchaser's election to terminate."

July 21, 2009 correspondence

By letter dated July 21, 2009, DMH advised plaintiff's attorney that Rockwell rejected plaintiff's attempt to terminate the Purchase Agreement. The letter provides, in relevant part, that:

> "Sponsor is neither unable to deliver title to the Unit to Purchaser in accordance with the provisions of the Agreement and the Plan; nor has Sponsor given notice of its refusal to cure any alleged inability. Accordingly, Purchaser is obligated to close on the Unit pursuant to the terms of the Purchase Agreement and the Plan.
>
> Additionally, pursuant to Purchaser's inspection of the Unit,

> Sponsor and purchaser have in good faith produced an Inspection Statement 'punch list' which Purchaser has wrongfully refused to sign . . . Pursuant to the Plan, Purchaser is required to Close subject to this work being completed by Sponsor after Closing. Accordingly, your claim in your email today that Sponsor is not in compliance with his obligations in this regard is incorrect. Please govern yourself accordingly."

August 19, 2009 emails

On Wednesday, August 19, 2009, plaintiff's attorney emailed DMH confirming Rockwell's desire to close the transaction on August 26th or 27th, 2009. Plaintiff's attorney also stated that he wanted to confirm his August 19th telephone conversation with DMH about the "status of the liens," as follows:

> "You told me that you had obtained Releases on approximately five liens, and that the remaining liens would be either bonded or escrowed in a manner satisfactory to the Title Company by the date of the closing. I advised you that I was pleased with this development, but that I would need specific documentation as to each lien, and that I expected the documentation to then be submitted to the Title Company we have retained [Professional Abstract]). You appeared to have some objection to this procedure . . . The Title Company will probably not appear for the closing unless they pre-approve the sponsor's proposals with respect to eliminating the liens. I would expect this procedure to be followed in this instance. Please confirm to me in writing as soon as possible that this is acceptable and also provide me with copies of the Releases so I can send them to the Title Company. Also send me whatever other draft documents may be in preparation that might eliminate the liens."

Plaintiff's counsel also stated that the sponsor's representative should contact plaintiff, so he could inspect the punch list items at the premises and confirm that appropriate corrective action had been taken. In addition, plaintiff's counsel asked when plaintiff's engineer could

inspect the Unit. By email that same day, DMH advised plaintiff's counsel of the following:

> "To clarify I called you only to see if you[r] client was available next [W]ednesday or [T]hursday. I did not confirm any closing date for your client and none has been set. Once I hear from you confirming your client[']s availability I will check to see if a closing can be set for that day.
>
> * * *
>
> To be clear, I advised you only that sponsor has cleared many liens on the premises and at the time of closing sponsor will deliver title as required by the offering plan and the purchase agreement. We will deliver title as required by the offering plan and the purchase agreement. We will continue to work with your title agent con[c]erning all title issues and endeavor to keep you informed in this regard."

In response by email that same day, plaintiff's counsel agreed that a closing date had not yet been confirmed. However, he replied:

> "As to the second paragraph [of the email noted immediately above] you did mention 5 releases. They should be shown to us. If you claim you did not say this to me, you should specifically state where you think I am in error, so the record is clear. I will therefore stand by what is stated in my prior message [email] and await whatever specific response you wish to make with respect to each item recited in my message.
>
> Please let me know when Mr. Venne [plaintiff] can inspect the punch list items at the premises, and when I can schedule the inspection by the engineer. These do not depend on scheduling the closing date."

August 27th 2009 emails

By certified mail, return receipt requested, as well as hand-delivery, by correspondence dated August 27, 2009, DMH advised plaintiff that the sponsor had

scheduled August 31, 2009, at 2:00 P.M. as the adjourned closing date. DMH stated therein that "[w]e will provide you with a breakdown of closing costs and adjustments prior to the Closing Date. We remind you that Purchaser's failure to close title on the Closing Date will constitute an event of default entitling Sponsor to all remedies under the Purchase Agreement, including the collection of penalties."

By email dated August 27, 2009, plaintiff's counsel referenced three "faxed letters" sent to him by DMH. These letters are not identified and have not been included in the record. In any event, the email indicates that plaintiff's counsel contacted what appears to be the sponsor's title company, but had not yet received a response. Plaintiff's counsel also indicated that he would:

> "need to see the title policy and the identity of the title company who will issue the policy . . . This information has not yet been furnished. So far, paragraph 6 of the Purchase Agreement is not yet satisfied and Sponsor remains in default, as stated in the termination letter we sent you dated July 17, 2009."[1]

Plaintiff's counsel also stated the following:

> "Please be advised . . . that the Sponsor has not cured it[]s breaches and defaults, and that the Purchaser will not close on August 31 or on any date thereafter unless an adequate response

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[1]Paragraph 6.1 of the Purchase Agreement provides, in relevant part, that:

> "Sponsor, from time to time, may adjourn the date and hour of closing on written notice to Purchaser, which notice shall fix a new date, hour and place for the closing of title and will be given not less than two (2) business days prior to the new scheduled date and time for closing."

> is received from the title agent, and we can inspect a written proposal by the title insurer with respect to the liens. I have repeatedly asked you to provide a written explanation as to how the liens would be cured, but you have not provided me with a written explanation."

Plaintiff's counsel also addressed plaintiff's request for a walk-through, a review of open items on the punch list, and the inspection by his architect or engineer.

By email that same day, DMH, in response, directed plaintiff's counsel to contact Register Abstract, the sponsor's title company. Further, DMH rejected the notion that Rockwell was in default, stating that "title in accordance wit[h] the purchase agreement paragraph 8 [Marketable Title], will be delivered at closing." DMH also advised that plaintiff would be permitted to conduct a walk-through on the morning of the August 31, 2009 closing.

In an email that same day, plaintiff's counsel responded to the issue of the unit inspection.

August 31, 2009 emails

On the morning of the scheduled 2:00 P.M. closing date (Monday, August 31, 2009), DMH emailed plaintiff's counsel stating, in part, that:

> "Sponsor has attempted in good faith to address the numerous issues that you have raised regarding the above referenced transaction in order to reach agreement to proceed with Closing on your client's Unit. In doing so, we have provided you, pursuant to paragraph 8 of the Purchase Agreement, with the proposed title policy available through Register Abstract which omits all exceptions for mechanics liens."

In response, plaintiff's counsel emailed DMH that he did not agree with the sponsor's claims, and that it was the sponsor which had defaulted; that plaintiff had conducted another inspection in which he found serious deficiencies in the condition of the Unit; that plaintiff demanded the return of the contract deposit; that if the sponsor would not do so, plaintiff would bring suit for its return. Counsel also stated that there would be no closing. No closing was held on August 31, 2009.

By summons and verified complaint dated September 2, 2009 and July 31, 2009, respectively, plaintiff commenced the instant action against Rockwell and DMH seeking, as relevant here, the return of his down payment, attorney's fees, costs and expenses incurred in connection with the condominium purchase, as well as pre-judgment and post-judgment interest. Rockwell and DMH interposed a verified answer generally denying the allegations of the complaint, and asserted a counterclaim for breach of contract (failure to close on August 31, 2009) which sought to compel specific performance or retention of plaintiff's down payment, and a second counterclaim for attorney's fees pursuant to Section 32 of the Purchase Agreement. Thereafter, the parties brought the instant motions, which are presently before the court.

Analysis

In moving for summary judgment to obtain the return of his down payment, plaintiff argues, in substance, that Rockwell was unable to deliver marketable title; that the "punch list" items constituted a substantial breach by Rockwell; and that Rockwell misrepresented

its financial condition, which, in each case, constituted a default under the Purchase Agreement and the Offering Plan, entitling him to terminate the Purchase Agreement and to the return of his down payment.

In its cross motion, Rockwell argues that it was prepared to convey marketable title to plaintiff at the proposed August 31, 2009 closing; that according to Section 1 of the Offering Plan, upon substantial completion of Unit 5D, incomplete punch list items do not constitute grounds by the plaintiff to delay the closing; that plaintiff's failure to close constituted a default; and that Rockwell accurately represented its financial condition.

As to plaintiff's first argument that Rockwell failed to provide marketable title, it is settled that "in New York, a vendor is 'under a duty to take affirmative action to convey a marketable title according to the contract'" (*Harris v Hosten*, 2007 NY Slip Op 52122U, *4 [Sup Ct, Kings County 2007], quoting *Barnett v Star Mechanical Corp.*, 171 AD2d 142, 145-146. [1991]; *see also Green Point Sav. Bank v Litas Investing Co.*, 124 AD2d 555, 557, 507 [1986], *lv denied* 70 NY2d 693 [1987]; *Pamerqua Realty Corp. v Dollar Serv. Corp.*, 93 AD2d 249 [1983]; *Mokar Props. Corp. v Hall*, 6 AD2d 536, 539 [1958]). An "unwillingness to pursue all reasonable methods to obtain marketable title is not the same as being unable to convey title in accordance with the terms of the contract" (*Barnett,* 171 AD2d at 146; *see also Meisels v 1295 Union Equities Corp.*, 306 AD2d 144, 145 [2003]; *Naso v Haque*, 289 AD2d 309, 310 [2001]).

Here, plaintiff has made a prima facie showing that Rockwell breached its obligation

to tender marketable title. The record reveals that despite its express assurances to the contrary and its contractual obligations requiring it to do so, Rockwell consistently failed to demonstrate to plaintiff, by the time of closing, that Rockwell had a free and clear title to convey at closing. In this regard, the Offering Plan provides that:

> "The existence of mortgages, liens and encumbrances other than Permitted Encumbrances shall not be objections to title, provided bonds or properly executed instruments in form for recording necessary to satisfy or release Units from such impermissible liens or encumbrances or otherwise enable the Title Company to omit such title exceptions from Purchaser's title insurance policy are delivered at Closing and proper adjustments are made for the cost of recording or filing such instruments. Sponsor will bear the responsibility and cost of recording or filing such instruments."

On the other hand, Section "s" of the Offering Plan provides that Rockwell must discharge any mechanic's liens "promptly after the filing of such liens," namely:

> "Sponsor will pay or cause to be paid all contractors, subcontractors and materialpersons and all others involved in the construction and equipping of the Building in accordance with the New York Lien Law, for work performed and fixtures, material and equipment supplied or installed during Sponsor's construction thereof and *will cause any and all mechanics' [sic] liens arising out of such construction and equipping, if any, to be discharged by bonding, or otherwise, promptly after the filing of any such liens,* unless the title company is willing to insure title over such liens at no additional cost to Purchaser" (emphasis added).

Further, Section "q" of the Offering Plan provides that Rockwell:

> "*[p]rior to the Closing of Title for each Unit . . . will cause such Unit and its Common Interest, benefits, rights and easements as described in the Declaration and By-laws to be released from the lien of any*

> *mortgages or security agreements encumbering the Unit* (other than any mortgage or security agreements obtained by the Purchaser)" (emphasis added).

As noted above, after plaintiff elected to use his own title company, as permitted under Section 8 of the Purchase Agreement, the first title search performed by Professional Abstract on June 16, 2009 revealed over $950,000 in mechanic's liens, significantly in excess of the purchase price of the Unit. As such, Professional Abstract stated that these liens had to be satisfied or otherwise removed prior to closing.

Thereafter, the record reveals that plaintiff's counsel repeatedly inquired of DMH if the mechanic's liens and other encumbrances were close to resolution. As noted above, after the first inquiry, DMH merely replied that the sponsor was "working diligently to resolve all liens and other exceptions . . . Should these not be resolved by Closing, Sponsor will provide purchaser with an indemnification for these at closing." However, the option of post-closing indemnification was not provided for in either the Offering Plan or the Purchase Agreement. Notably, when plaintiff's counsel informed DMH that Professional Abstract rejected this option, and that the mechanic's liens had to be satisfied or removed before closing, DMH reassured plaintiff's counsel that "the title exceptions will all be cleared *prior to clo[s]ing*. The [July 10, 2009] adjournment was not made on account of same" (emphasis added). In response, plaintiff's counsel again inquired how "the sponsor propose[d] to clear the exceptions," and requested "a realistic timetable as to how and when such clearance [would] be accomplished and when the closing [would] be held without further adjournment,"

justifiably protesting that "[t]he explanations for clearance given to date have not been sufficiently specific."

Even after plaintiff terminated the Purchase Agreement pursuant to Section 19 of the Purchase Agreement, Rockwell's counsel rejected the attempt at termination, and merely stated that it was "neither unable to deliver title to the Unit to Purchaser in accordance with the provisions of the Agreement and the Plan; nor has Sponsor given notice of its refusal to cure any alleged inability," without providing any specific explanation as to how the sponsor intended to clear mechanic's liens.

In at least two subsequent emails, plaintiff's counsel continued to express concern as to whether and how the mechanic's liens, totaling well in excess of the purchase price, would be satisfied or otherwise removed, but only received conclusory responses from DMH, stating that Rockwell would deliver title as required under the Offering Plan and Purchase Agreement.

Finally, in an email sent by plaintiff's counsel to DMH three days before the August 31st closing, plaintiff's counsel continued to express concern that Rockwell had not "cured it[s] breaches and defaults"; that plaintiff would not close on August 31, 2009, or any date thereafter unless it received an adequate response from the title company; and that plaintiff needed to review a written proposal by the title insurer with respect to the mechanic's liens. Despite the justified concerns of plaintiff's counsel, DMH rejected the characterization that Rockwell was in default, and merely stated, without any documentary support therefor, that "title in accordance wit[h] the purchase agreement paragraph 8

[Marketable Title], will be delivered at closing," *i.e.*, free and clear of all mechanic's liens.

But for Rockwell's conclusory representations that it was "working diligently to resolve all liens and other exceptions," no evidence of such purported efforts is contained in the record. As noted above, as early as June 16, 2009, Rockwell had been apprised through plaintiff's title company that mechanic's liens were filed in excess of the Unit's purchase price. Moreover, an updated title report obtained by plaintiff's title company, current as of August 19, 2009, listed over $600,000 in mechanic's liens – an amount still in excess of the purchase price.[2] As plaintiff notes, while certain mechanic's liens were resolved, approximately $350,000 in extant mechanic's liens remained outstanding more than one month since he had sent Rockwell his cancellation letter. Equally significant, it appears, according to Professional Abstract's updated title search, that at least three new mechanic's liens had been filed since the June 16, 2009 title report.

Despite the foregoing, Rockwell made no good faith attempt to address the mechanic's liens in any earnest manner or to satisfy or otherwise remove these liens. While Rockwell obtained a title search from Register Abstract, its own title company, this report was only effective as of July 1, 2009 (although the cover sheet is dated August 28, 2009), and Rockwell does not dispute that the additional mechanic's liens set forth in plaintiff's updated August 19, 2009 report do not appear in Register Abstract's title report.

Based upon the record, the court finds that Rockwell failed to take affirmative action to ensure that it would be able to convey marketable title to plaintiff on August 31, 2009. In

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[2]Professional Abstract also issued two interim amended reports, both dated July 10, 2009.

fact, Rockwell evidenced a recalcitrance to obtain marketable title, yet scheduled the August 31st closing in spite of its failure (*see Harris,* 2007 NY Slip Op 52122U [Sup Ct, Kings County 2007], quoting *Barnett*, 171 AD2d at 145-146; *Green Point Sav. Bank v Litas Investing Co.*, 124 AD2d at 557; *Pamerqua Realty Corp.*, 93 AD2d at 249; *Mokar Props. Corp.,* 6 AD2d at 539; *Meisels,* 306 AD2d at 145; *Naso*, 289 AD2d at 310; *see also Arzumamyants v Fragetti*, 2008 NY Slip Op 51002U, *9 [Civ Ct, Richmond County 2008]). There is no evidence in the record that Rockwell acted in good faith in its efforts to convey title to plaintiff (*see Cipriano v Glen Cove Lodge #1458, B.P.O.E.,* 1 NY3d 53, 62 [2003]). Rockwell ignored plaintiff's "repeated entreaties" for a copy of the releases or other written assurances evidencing discharge of the mechanic's liens (*id.* at 63). Inasmuch as Rockwell repeatedly failed to take affirmative action to ensure that it had a marketable title to convey, plaintiff had "a lawful excuse for his failure to appear" on the August 31 closing date (*id.*; *see Calverton Assocs., Inc. v Kempermann*, 262 AD2d 262 [1999] [vendor "failed to show that it was able to convey marketable title to the defendants (purchasers) on the final day set by it for the closing"]; *Empire Career Ctr. v Town of Schuyler,* 203 AD2d 906, 906 [1994] ["Because plaintiff breached its obligation to tender marketable title, defendant was not required to perform under the contract"]).

In addition, plaintiff is entitled to the return of his down payment, with pre-judgment interest, pursuant to Section 19 of the Purchase Agreement, entitled "Sponsor's Inability to Convey The Units." This section provides that:

"If Sponsor is unable to deliver title to the Unit to Purchaser in

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accordance with the provisions of this Agreement and the Plan, Sponsor shall not be obligated to bring any action or proceeding or otherwise incur any cost or expense of any nature whatsoever in excess of its obligations set forth in the Plan in order to cure such inability, and, in such case, if Sponsor notifies Purchaser of its refusal to cure such inability and if Purchaser is not in default hereunder, *Purchaser's sole remedy shall be to either (a) take title to the Unit subject to such inability (without any abatement in, or credit against, the Purchase Price, or any claim or right of action against Sponsor for damages or otherwise) or (b) terminate this Agreement. If Purchaser so elects to terminate this Agreement, Sponsor shall, within thirty (30) days after receipt of notice of termination from Purchaser, return to Purchaser all sums deposited by Purchaser hereunder, together with interest earned thereon, if any, and, upon making such payment, this Agreement shall be terminated and neither party hereto shall have any further rights, obligations or liability to or against the other under this Agreement or the Plan.* The foregoing remedy must be exercised by notice of Purchaser in writing to Sponsor within fifteen (15) days after the giving of Sponsor's notice of refusal to cure such inability, failing which it shall be conclusively deemed that Purchaser elected the remedy described in clause (a) above (i.e., to acquire title subject to such inability)."

Here, contrary to Rockwell's contention, its failure to take affirmative action in tendering marketable title to plaintiff constituted unambiguous notice to plaintiff that it was unable to "deliver title to the Unit to Purchaser in accordance with the provisions of this Agreement." Moreover, the affidavit of Mr. Horowitz, founder and Chief Executive of Register Abstract Company, which is relied upon by Rockwell and DMH in support of their cross motion, fails to rebut the prima facie showing made by plaintiff. Mr. Horowitz asserts that:

"[b]ased on the searches conducted and the title report obtained, Register Abstract was willing to issue a fee policy to the Purchaser, without additional premium, to insure Purchaser that it will not be collected out of the Unit if it is a lien, or will not

> be enforced against the Unit if it is not a lien.
>
> On August 28, 2009, Register Abstract notified purchaser's counsel of its willingness to issue the policy as set forth above.
>
> An updated title report, which would have been ordered in the ordinary course of business prior to closing, would not have changed Registered Abstract's willingness to issue the policy under the same terms, without additional premiums.
>
> Despite its willingness to do so, Register Abstract never issued the policy referenced above because Mr. Venne never requested that we issue a fee policy to him.
>
> Register Abstract did issue a fee policy to the Purchaser of another unit at 96 Rockwell Condominium, without additional premium, for a closing which took place on September 11, 2009."

As an initial matter, plaintiff correctly notes that Schedules A and B annexed to Mr. Horowitz's August 28th, 2009 cover letter, referenced in his affidavit, are both dated July 1, 2009, and thus were two months old, and included several unpaid liens and encumbrances. In any event, whether an updated title report could have been ordered and would have shown that a closing could have taken place is mere speculation, and fails to rebut plaintiff's evidence and proof of unmarketable title as demonstrated in plaintiff's August 19, 2009 updated title report, which stated that nearly $600,000 in mechanic's liens was still encumbering the property.

Finally, plaintiff gave sufficient notice pursuant to Section 19 of the Purchase Agreement that he intended to pursue the remedy of the return of his down payment on August 31st, 2009, within 15 days after it was clear that Rockwell could not cure its inability

to convey marketable title. As such, plaintiff has made a prima facie showing that he is entitled to the return of his down payment, with pre-judgment interest (*see Empire Career Ctr.*, 203 AD2d at 906; *Arzumamyants,* 2008 NY Slip Op 51002U, *14; *Gindi v Intertrade Intl. Ltd.*, 2006 NY Slip Op 51380U, *4-5 [Sup Ct, New York County 2006], *affd* 50 AD3d 575 [2008]). Plaintiff, however, has failed to establish that he is entitled to costs and attorney's fees. The cases upon which plaintiff relies are inapplicable to the instant matter and plaintiff does not cite to any provision in either the Offering Plan or Purchase Agreement entitling him to costs and attorney's fees.

The court has reviewed the other grounds plaintiff has asserted for the return of the down payment, namely purported defaults by Rockwell in failing to set a definite date and time for the closing on July 17, 2009, and ailing to cure deficiencies in the Unit, but finds they do not provide additional bases for the relief requested.

Accordingly, that branch of plaintiff's motion is granted to the extent it seeks summary judgment on its cause of action for breach of contract against Rockwell for $54,500 plus pre-judgment interest, and for dismissal of the counterclaims of Rockwell and DMH. In light of the foregoing, and inasmuch as defendants have failed to rebut plaintiff's prima facie showing, the cross motion of Rockwell and DMH is denied in its entirety.

This constitutes the decision and order of the court.

ENTER,

J.S.C.