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SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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THE THREE J.V. ASSOCIATES, LLC,

Plaintiff,

-against-

OMID TASHKHISSI, TASHKISSI ENTERPRISES, LLC, RGR HOWARD BEACH DEVELOPMENT, LLC, and DYNAMIC REAL ESTATE GROUP, LTD.,

Defendants.

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TRIAL/IAS PART: 22
NASSAU COUNTY

Index No: 002867-10
Motion Seq. Nos: 1 & 2
Submission Date: 8/9/10

The following papers have been read on these motions:

Notice of Motion, Affirmation in Support,
Affidavits in Support (2) and Exhibits.....x
Notice of Cross Motion, Affirmation in Opposition/Support,
Affidavit in Opposition/Support and Exhibits.....x
Affirmation in Opposition/Further Support,
Affidavit in Opposition/Further Support and Exhibits.....x
Reply Affirmation in Opposition/Further Support and Exhibits.....x

This matter is before the Court for decision on 1) the motion filed by Plaintiff The Three J.V. Associates, LLC ("Plaintiff" or "Seller") on May 20, 2010, and 2) the cross motion filed by Defendants on June 16, 2010, both of which were submitted on August 9, 2010. For the reasons set forth below, the Court 1) grants Plaintiff's motion and directs that a) Plaintiff may retain the $160,000 down payment provided by Defendants; b) Defendants are ordered to pay an additional $100,000 to Plaintiff, pursuant to the applicable liquidated damages provision in the parties' agreement; and c) Defendants' counterclaims are dismissed; and 2) denies Defendants' cross

motion in its entirety.

BACKGROUND

A. Relief Sought

Plaintiff moves for an Order, 1) pursuant to CPLR § 3212, granting Plaintiff summary judgment entitling it to retain the $160,000 contract down payment being held in escrow, and ordering the Defendants to pay the $100,000.00 balance due as liquidated damages arising from Defendants' default; and 2) dismissing the counterclaims contained in Defendants' Verified Answer with Counterclaims.

Defendants cross move for an Order 1) pursuant to CPLR § 3212, granting Defendants summary judgment dismissing the Plaintiff's action in its entirety and granting summary judgment in favor of Defendant RGR Howard Beach Development, LLC ("RGR") on its First Counterclaim in the amount of $160,000.00 plus interest from November 17, 2008; and 2) severing the Defendants' Second and Third Causes of Action against Plaintiff and directing them to proceed.

B. The Parties' History

This action arises from an unconsummated real estate transaction between "The Three J.V. Associates" [1] and "Tashkissi Enterprises, LLC, RGR Howard Beach Development LLC, or newly formed entity having Omid Tashkhissi as principal" as purchaser. The contract ("Contract"), dated December 26, 2007 (Ex. D to Rothkrug Aff. in Supp.), involved the sale of property located at 149-19 through 149-39 78th Street, comprised of ten vacant lots, in Howard Beach, New York for the purchase price of $2,600,000.[2] The Contract states that it was an "all cash" transaction and was not contingent on any financing. The parties agreed, however, in the second rider to the Contract ("Second Rider") (Ex. D to Rothkrug Aff. in Supp.), executed in

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[1]Due to a purported scrivener's error, the seller on the contract is incorrectly shown as "3 J.V. Associates." The full and correct name of Plaintiff seller is "The Three J.V. Associates, LLC."

[2] Plaintiff affirms that, at the time the Contract was executed, Plaintiff had obtained a fully approved plan for the ten home project, including a Builder's Pavement Plan (Vardouniotis Aff. in Supp. at ¶¶ 3-5).

December, 2007, that the purchaser ("Purchaser") might apply and procure financing in connection with the purchase. A third rider ("Third Rider") was executed on April 10, 2008 (Ex. H to Rothkrug Aff. in Supp.).

As provided by the Contract, Purchaser tendered a check in the amount of $160,000, drawn on the account of RGR Howard Beach Development, LLC ("RGR"), as a down payment to be held in escrow by Plaintiff's transaction attorney pending the closing of title.

Pursuant to Section 2 of the Second Rider, the Contract and the Purchasers' obligation to purchase the premises were subject to and predicated upon the fulfillment of the following conditions precedent:

> (a) Certified approved plans from the New York City Building Department, for construction of ten (10) three-family homes under a homeowners association. The plans, prepared by Seller's architect, Alan Weinstein and/or current Architect Chris Papa.
>
> (b) Architect's letter stating that services rendered were fully paid and there is no charge for assigning the file in the building department to Purchaser.
>
> (c) Certified approved plans from the New York City Building Department, for construction of four (4) detached garages.
>
> (d) Seller to file with NYCDOT approved builders' pavement plan, which establishes that the frontage of the new development project has a positive drainage into an existing and/or proposed catch basin, in front of the new development which concerns Lots 1, 12, 50, 51, 65, 66 and 67.
>
> (e) The Site shall be delivered vacant, free of debris, and free of tenancies.

In the event that Plaintiff seller ("Seller") failed to meet all of the conditions within one hundred eighty days from the date of the Second Rider, the Purchaser had the option of extending the time within which the Seller was required to comply, if requested, or to cancel the Contract and seek return of the down payment and out-of-pocket expenses for survey, flood zone map and permit fees.

The Third Rider provides that, in the event of a conflict between the Third Rider and the

Contract, First Rider or Second Rider, the provisions of the Third Rider shall govern. The Third Rider further states:

> 1) Purchaser shall be responsible for making all necessary filings with the New York City Department of Buildings in consideration of a credit of twenty-nine thousand and 00/100 dollars ($29,000.00) towards the purchase price at closing.
>
> 2) The new site plan and new building plan shall not exceed the plans filed by the Seller in 2005. Seller shall approve all new building, garage and site plans prior to submittal to the New York City Department of Buildings. Seller shall submit to Purchaser approval or disapproval of same [within] forty-eight (48) hours of Seller's receipt. Upon approval, plans shall be executed by both parties and immediately thereafter submit[ted] to New York City Department of Buildings by Purchaser. Modifications and/or changes to the plans shall be submitted in writing to the Seller prior to submission to the New York City Department of Buildings.
>
> 3) At any time, Seller may review filed documents within forty-eight (48) hours [of a] request to Purchaser through Purchaser's architect.
>
> 4) The closing date shall be on and no later than six months after April 10, 2008 or sixty (60) days from the date in which the file is reinstated.

In a letter dated December 29, 2008 (Ex. L to Rothkrug Aff. in Supp.), Plaintiff's transaction attorney sought to schedule a time of the essence closing for January 30, 2009, and informed the Purchaser's attorney that if the Purchaser failed to deliver the balance of the purchase price in accordance with the Contract on that date, "your clients will be in default of the Contract and subject to forfeiture of their down payment." By letter dated December 29, 2008 (Ex. M to Rothkrug Aff. in Supp.), Defendants "rejected" the letter and demanded the return of their down payment and cancellation of the Contract in accordance with their letter of November 17, 2008. In that letter (Ex. J to Rothkrug Aff. in Supp.), Purchaser informed the Seller that the Purchaser "no longer wishes to pursue this transaction" based on the Seller's alleged lack of compliance with the terms of the Contract. Specifically, the Purchaser claimed that it "reviewed the assumed approvals for the referenced premises and found the same not to be BPP approved."

Plaintiff filed this action to retain the $160,000 Contract down payment tendered by the Purchaser, plus the $100,000 balance due as liquidated damages arising from Defendants' alleged

default. Defendants have asserted Counterclaims (Ex. B to Rothkrug Aff. in Supp.) seeking return of the down payment, reimbursement of "out of pocket expenses" and damages arising from Plaintiff's alleged failure to act in good faith with respect, *inter alia*, to Plaintiff's obligation "to advise RGR of the requirement to build all structures at the premises upon pilings."

C. The Parties' Positions

Plaintiff contends that it performed its obligations under the Contract, and was ready, willing and able to close title in accordance with the time of the essence closing date. Thus, in light of Defendants' failure to close, Plaintiff is entitled to recover $260,000 in liquidated damages, constituting 10% of the $2.6 million Contract price, pursuant to paragraph 5 of the Rider which provides as follows:

> It is understood and agreed between the parties that if the purchaser defaults under the terms of this contract, all payments hereunder shall become the sole property of the seller, provided the seller is not then in default, as and for liquidated damages, which, it is hereby agreed, are difficult to establish. In such event, the purchaser shall have no further claim to such payments. If the down payment accepted on contract is less than 10% of the selling price, Purchaser shall be responsible for the value of a full 10% deposit as liquidated damages.

In opposing Plaintiff's motion for summary judgment, and in support of their cross-motion, Defendants maintain that, pursuant to the Third Rider, the parties agreed to obtain a new site plan and building plan for construction of ten (10) three-family homes under an approved homeowners association. They further argue that nothing in the Third Rider relieved or excused Plaintiff from satisfying all of the conditions precedent to closing set forth in paragraph 2(a) through 2(f) of the Second Rider. Based on Plaintiff's purported failure to comply with the conditions precedent set forth in the Second Rider, Defendants maintain that they exercised their right to terminate the contract by letters dated November 17, 2008 and December 28, 2008, entitling RGR to the return of its down payment.

Defendants also submit that Tashkissi Enterprises, LLC was mistakenly identified on the Contract as purchaser. They maintain that the proper parties to the action, therefore, are Three J.V. as seller and RGR as purchaser. Moreover, Defendants argue that Dynamic Real Estate

Group, Ltd. is a real estate brokerage company with no involvement in the matter, and that Omid Tashkhissi, who denies signing the Contract and Second Rider, were improperly named in this action. In an affidavit submitted in support of Defendants' cross-motion, Defendant Omid Tashkhissi attests that RGR and not he or Defendant Dynamic Real Estate Group, Ltd. (allegedly a real estate company with no involvement in this matter) was the intended purchaser under the contract of sale. He further avers that the signatures on the Contract and Second Rider are not his signature.

RULING OF THE COURT

A. Summary Judgment Standards

To grant summary judgment, the court must find that there are no material, triable issues of fact, that the movant has established his cause of action or defense sufficiently to warrant the court, as a matter of law, directing judgment in his favor, and that the proof tendered is in admissible form. *Menekou v. Crean*, 222 A.D.2d 418, 419-420 (2d Dept 1995). If the movant tenders sufficient admissible evidence to show that there are no material issues of fact, the burden then shifts to the opponent to produce admissible proof establishing a material issue of fact. *Id.* at 420. Summary judgment is a drastic remedy that should not be granted where there is any doubt regarding the existence of a triable issue of fact. *Id.*

B. Relevant Contract Principles

A contract is to be interpreted so as to give effect to the intention of the parties as expressed in the unequivocal language employed. *Highland Sand & Gravel, Inc. v. Squicciarini*, 272 A.D.2d 375, 376 (2d Dept. 2000), quoting *Morlee Sales Corp. v. Manufacturers Trust Co.*, 9 N.Y.2d 16, 19 (1961). When the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving practical interpretation to the language employed and the parties' reasonable expectations. *Willsey v. Gjuraj*, 65 A.D.3d 1228, 1230 (2d Dept. 2009), citing *Franklin Apartment Associates, Inc. v. Westbrook Tenants Corp.*, 43 A.D.3d 860 (2d Dept. 2007), quoting *Greenfield v. Philles Records*, 98 N.Y.2d 562, 569 (2002). A written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms. *Lobacz v. Lobacz*, 72 A.D.3d 653, 654 (2d Dept. 2010), citing *Willsey v. Gjuraj*, *supra*, at 1230, quoting

Greenfield, supra, at 569. A contract is unambiguous if the language it uses has a definite and precise meaning, unattended by danger of misconception in the purport of the agreement itself, and concerning which there is no reasonable basis for a difference of opinion. *Greenfield v Philles Records, Inc., supra*, at 569, quoting *Breed v. Insurance Co. of N. Am.*, 46 N.Y.2d 351, 355 (1978), *rearg. den.*, 46 N.Y.2d 940 (1979). If the contract, on its face, is reasonably susceptible of only one interpretation, the contract is unambiguous and the court is not free to alter the contract to reflect its personal notions of fairness and equity. *Greenfield, supra*, at 569-570.

When considering a motion for summary judgment, the construction and interpretation of an unambiguous written contract is an issue of law within the province of the court as is the inquiry of whether the writing is ambiguous in the first instance. If the language is free from ambiguity, its meaning may be determined as a matter of law on the basis of the writing alone, without resort to extrinsic evidence. Thus the objective is to determine the parties' intentions as derived from the language employed. *Hindes v. Weisz*, 303 A.D.2d 459, 460-461 (2d Dept. 2003) (citations omitted).

A condition precedent is an act or event, other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the agreement arises. *Klewin Bldg. Co., Inc. v. Heritage Plumbing & Heating, Inc.*, 42 A.D.3d 559, 560 (2d Dept. 2007), quoting *Argo Corp. v. Greater N.Y. Mut. Ins. Co.*, 4 N.Y.3d 332, 337, n. 2 (2005).

When the parties' original contract for the sale of real property does not make time of the essence, one party may make time of the essence by giving proper notice to the other party. *Decatur (2004) Realty, LLC v. Cruz*, 73 A.D.3d 970, 971 (2d Dept. 2010). The notice setting a new date for the closing must 1) give clear, distinct and unequivocal notice that time is of the essence; 2) give the other party a reasonable time in which to act; and 3) inform the other party that if it does not perform by the designated date, it will be considered in default. *Id.*, quoting *Nehmadi v. Davis*, 63 A.D.3d 1125 (2d Dept. 2009).

When a contract expressly provides that time is of the essence, the failure to close by the date designated in the contract constitutes a default, entitling either party to rescind the contract. *Sherman v. Real Source Charities,* Inc., 41 A.D.3d 946, 947 (3d Dept. 2007). A vendee who

defaults on a real estate contract without lawful excuse cannot recover its down payment. *Cipriano v. Glen Cove Lodge No. 1458*, 1 N.Y.3d 53, 62 (2003), quoting *Maxton Builder, Inc. v. Lo Galbo*, 68 N.Y.2d 373, 378 (1986).

C. Application of these Principles to the Instant Action

Here, the Contract and Riders are unambiguous and do not support Defendants' contention that the language of the Third Rider did not excuse Plaintiff from complying with the conditions set forth in paragraph 2(a) through 2(f) of the Second Rider, including affording the purchaser the right to conduct due diligence. Indeed, Defendants' contention is belied by the plain language of the Third Rider.

In a letter dated February 8, 2008 (Ex. F to Rothkrug Aff. in Supp.), Defendants' attorney advised Plaintiff's attorney that, because twenty-four months had elapsed since the "original approval of the plans," and no permits had been issued during that time,

> the job for drainage clearance from the fire department and water and sewer needs to be reinstated so that my client could pull a permit without any issues immediately following the closing.

In a subsequent letter dated March 24, 2008 (Ex. G to Rothkrug Aff. in Supp.), Defendants' attorney advised Plaintiff's attorney that his client would "make all necessary filings at the start of next week in consideration of the credit of $29,000 toward the purchase price" and the closing date would be "no later than six months" from March 24, 2008.

The plain language of the Third Rider, executed on April 4, 2008 in apparent conformity with the aforementioned letters, establishes that the subject conditions, and Defendants' option to cancel the Contract and regain the down payment upon Plaintiff's default, were replaced by the Purchaser's obligation to make "all necessary filing[s] with the New York City Department of Buildings in consideration of a credit of twenty-nine thousand and 00/100 ($29,000) towards the purchase price at closing."

The Court notes that, while Defendant Omid Tashkhissi asserts that the signatures on the Contract and Second Rider are not his signatures, he makes no such claim as to the Third Rider which bears his signature below the typewritten name " Tashkissi Enterprices, LLC, purchaser" and controls in this matter. Thus, Defendants' argument regarding his signatures on the Contract

and Second Rider are unavailing.

Accordingly, as Purchaser failed to close on the subject property in accordance with the terms of the parties' agreement, the Court grants Plaintiff's motion for summary judgment and directs that 1) Plaintiff may retain the contract down payment of $160,000; and 2) Defendants shall pay the additional sum of $100,000 as liquidated damages pursuant to the parties' agreement. In addition, the Court dismisses all counterclaims.

The Court denies Defendants' cross motion in its entirety.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

Submit judgment on notice.

ENTER

DATED: Mineola, NY
September 23, 2010

HON. TIMOTHY S. DRISCOLL
J.S.C.

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ENTERED
SEP 30 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE