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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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VISION ENTERPRISES, LLC,

Plaintiff,

- against -

111 EAST SHORE, LLC and
GOLD & ROSENBLATT, LLC,

Defendants.

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TRIAL/IAS PART: 22

NASSAU COUNTY

Index No: 9964-09
Motion Seq. Nos: 1, 2 and 3
Submission Date: 5/3/10

The following papers have been read on these motions:

Notice of Motion, Affidavit in Support,
Affirmation in Support and Exhibits.....x
Notice of Motion, Affidavit in Support,
Affirmation in Support and Exhibits.....x
Notice of Cross Motion and Opposing/Cross Moving Affidavits (2)....x
Index to Defendants' Opposing and Cross Motion Exhibits.....x
Defendants' Memorandum of Law in Opposition/Support.....x
Plaintiff's Reply Affirmation and Reply Affidavit.....x
Defendants' Reply Affidavit.....x
Defendants' Reply Memorandum of Law.....x
Plaintiff's Supplemental Affirmation.....x

This matter is before the Court for decision on 1) the motion filed by Plaintiff Vision Enterprises, LLC ("Vision," "Buyer" or "Plaintiff") on December 15, 2009, 2) the motion filed by Plaintiff Vision on January 20, 2010, and 3) the cross motion filed by Defendants 111 East Shore, LLC and Gold & Rosenblatt, LLC on February 9, 2010, all of which were submitted on

May 3, 2010. The Court subsequently directed a conference in aid of disposition which was conducted on August 10, 2010 but the matter was not resolved at that time.

For the reasons set forth below, the Court 1) denies Plaintiff's motions; and 2) grants Defendant's cross motion to the extent that the Court dismisses the Verified Complaint and directs that Defendant 111 East Shore, LLC ("Seller") is entitled to retain Vision's $750,000 down payment as liquidated damages.

BACKGROUND

A. Relief Sought

In Motion Sequence Numbers 1 and 2, Plaintiff seeks identical relief. In those motions, Plaintiff moves for an Order, pursuant to CPLR § 3212, awarding summary judgment in favor of Plaintiff for the relief demanded in the Verified Complaint ("Complaint").

In Motion Sequence Number 3, Defendants cross move for an Order, pursuant to CPLR § 3212, for an Order 1) granting summary judgment to Defendants dismissing the Complaint; 2) awarding Defendants judgment for the $250,000.00 portion of the agreed contract deposit not paid by Plaintiff; and 3) declaring that Defendants may retain, as liquidated damages, the $750,000.00 portion of the contract down payment deposited by Plaintiff with Defendants.

B. The Parties' History

This action arises out of a twenty-three page contract of sale ("Contract") dated March 28, 2007 (Ex. A to Zangas Aff. in Supp.) pursuant to which Buyer agreed to purchase commercial real property comprised of an office building and one additional unattached parking lot located at 111 East Shore Road and 33 East Shore Road, Great Neck, New York for the agreed price of $14,200,000 of which Buyer paid $750,000 to Seller as a down payment. The down payment is held in a special interest bearing escrow account maintained pursuant to § 2.05(a) of the Contract of sale by seller's attorney, Defendant Gold & Rosenblatt, LLC ("Escrowee").

Schedule C of the Contract, titled "Purchase Price," reflects Seller's receipt of the required $500,000 down payment and provides for additional payments of $250,000 on March 29, 2008 and $250,000 on September 29, 2008. Buyer made the first $250,000 payment, but did not pay the final installment. Section C of the Contract also provides, in pertinent part, as follows:

> In the event that any of the payments to be made hereunder are not timely made or in the event purchaser[']s checks do not clear the seller[']s bank or that of their attorneys then upon 3 days written notice if the funds are not made good the seller can cancel this contract and retain such deposits that have actually been paid.

The Contract, which provided for a closing date of May 31, 2009 followed by the language "time being of the essence" in capital letters, never closed. By letter dated February 6, 2009, Buyer notified Seller that the mezzanine area of the building could not be occupied legally. Based on its allegation that Seller's representations regarding square footage and the legality of the building were "substantially inaccurate," (Ex. C to Zangas Aff. in Supp.), rather than tender performance, Buyer elected to terminate the Contract pursuant to § 13 of the rider ("Rider") to the Contract and demanded return of the deposit. Seller rejected the letter of termination by letter of the same date (Ex. D to Zangas Aff. in Supp.) which advised Buyer that "the deposit paid by [Buyer] is hereby forfeited" and advising Buyer that Seller would pursue its right to the deposit, and any damages sustained. In response to Buyer's second demand for return of its down payment by letter dated March 9, 2009 (Ex. E to Zangas Aff. in Supp.), Seller reminded Buyer, by letter dated May 19, 2009 (Ex. F to Zangas Aff. in Supp.) of a June 1, 2009 time of the essence closing date. [1] Seller's letter of May 19, 2009 also stated that:

> If the buyer does not appear with sufficient funds to complete this transaction the buyer will be deemed in default and their deposit will be forfeited (§ 13.04 of the contract).

In its Complaint, Buyer seeks judgment declaring the Contract null and void and the return of its $750,000 down payment as well as damages arising from Seller's alleged false and fraudulent misrepresentation that the premises was in compliance with all laws and the required certificates of occupancy were issued.

In their Second Amended Verified Answer ("Answer"), Defendants assert numerous affirmative defenses and three alternative counterclaims. Defendants seek dismissal of Plaintiff's first and second causes of action. Defendants also seek an Order 1) declaring that Buyer is no longer entitled to limit Seller's damages to the contractual liquidated damages and

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[1] As the original time of the essence closing date of May 31, 2009 was a Sunday, the closing was moved to Monday, June 1, 2009.

awarding Seller its actual contract damages of $4,450,000.00; 2) declaring that, if Seller is not awarded its contract damages, Seller is entitled to the $750,000.00 escrow portion of the $1,000,000.00 required full contract down payment; 3) declaring that, if Seller is not awarded its contract damages, Seller is entitled to judgment against Buyer in the amount of the $250,000.00 unpaid portion of the full required contract down payment; 4) declaring that Defendant Escrowee is required to pay to Seller, free of any claim of Buyer, the entire $750,000.00 escrow deposit with accumulated interest and is entitled, thereon, to be discharged as Escrowee; 5) awarding Escrowee the costs and expenses of defending this action, including reasonable attorney's fees; 6) declaring the Contract to be of no further force and effect based on Buyer's breach and default or, alternatively, if the Contract was not thereby terminated; 7) declaring that, if Seller does not prevail on its defenses and counterclaims, that Seller's time to cure a contract default on its part, if any, has not yet expired and Seller still has a reasonable time in which to cure any such default; and 8) awarding Defendants allowable disbursements and taxable costs of this action.

C. The Parties' Positions

Buyer contends that it is entitled to the return of its down payment because of Seller's breach of contract and false representations. In paragraph 18 of the Rider, Sellers represented:

> that the premises are improved by an office building and parking spaces for 213 units. Copies of the relevant and available certificate of occupancies are annexed hereto on pages 21, 22 and 23.

No certificate of occupancy was in effect for the mezzanine area of the building until after the scheduled time of the essence closing date of June 1, 2009. Buyer maintains that, given that no certificate of occupancy/completion for the mezzanine area of the building was in effect at the time of its February 6, 2009 termination letter, Buyer was not obligated to close and accept title to the premises notwithstanding Seller's scheduling of the time of the essence closing for June 1, 2009. Buyer contends that under § 1.02 of the Contract, Buyer was required to accept transfer of title subject to the permitted exceptions set forth in schedule B which include "[z]oning regulations and ordinances which are not violated by the existing structures or present use thereof and which do not render title uninsurable."

Section 1.02 of the Contract provides as follows:

> Seller shall convey and Purchaser shall accept fee simple title to the Premises in accordance with the terms of this contract, subject only to:
> (a) the matters set forth in Schedule B attached hereto (collectively, "Permitted Exceptions"); and
> (b) such other matters as (i) the title insurer specified in Schedule D attached hereto (or if none is so specified, then any member of the New York Board of Title Underwriters) shall be willing, without special premium, to omit as exceptions to coverage or to except with insurance against collection out of or enforcement against the Premises.

Buyer asserts that Seller did not request an extension of the closing date in order to cure the purported illegality. Instead, Seller insisted that Buyer proceed with the closing on June 1, 2009 or forfeit its down payment, as reflected in Seller's letter dated February 6, 2009, notwithstanding Buyer's assertion that Seller itself was not able to perform on the purported time of the essence closing date. The record, however, establishes that Seller did, in fact, retain a licensed architect in or about February, 2009 to address the issue of the outstanding certificate of occupancy.

In opposition to Buyer's motion, and in support of its cross motion, Seller submits that the time within which Buyer was permitted to cancel the Contract based on the physical or record conditions of the premises was expressly limited by the plain language of paragraph 12 of the Rider which provides that:

> The Contract is subject to and conditioned upon the satisfactory review of the engineering inspection report ("The Engineering Report"), by April 11, 2007. The Purchasers represent that they have conducted an engineering inspection with a licensed engineer on the 23rd day of March, 2007. It is agreed and understood that the Purchasers shall have the right to unilaterally terminate the within contract at any time up to and including midnight on April 11, 2007 (Time Being of the Essence). It is agreed and understood that said right to terminate shall be based solely upon the Purchasers' review and consideration of factors that are addressed in "The Engineering Report." The Purchasers represent that they shall forward a copy of the Engineering Report to the Seller upon receipt thereof. In the event that the Purchasers elect to terminate said contract in accordance with this paragraph, they must do so by forwarding a written notification to the Seller's attorney setting

> forth said termination, with said Notification to be delivered to the Seller's attorney not later than midnight on April 4, 2007 (Time Being of the Essence).

Although the provision calls for Buyer to do so, Buyer never provided Seller with a copy of the Engineering Report. Moreover, Seller contends that Buyer's purported February 6, 2009 termination of the contract was impermissibly untimely and contractually barred. Further, Seller characterizes the open permit related to alteration work performed on the premises' mezzanine in 1985-1986 (before Seller acquired ownership of the premises) and lack of a certificate of occupancy, technical irregularities rather than matters of title or violations of applicable laws and codes to which Buyer might object. Buyer proffers no evidence to show that Seller was unable to provide marketable or insurable title. Even if the open permit did, in fact, constitute a valid objection, Seller argues that Buyer's time within which to assert the objection expired on April 11, 2007.

Seller further maintains that Buyer's first cause of action, based on alleged false representations and warranties, is not viable given the plaintiff purchaser's acknowledgment in § 5.01 of the contract of sale that it was fully familiar with the physical condition and state of repair of the premises which Buyer agreed to accept "as is" and in their present condition "subject to all violations whether or not of record." Further, Section 5.02 of the Contract states in pertinent part, that:

> In entering into this Contract, Purchaser has not been induced by and has... not relied upon any representations, warranties or statements, whether express or implied made by Seller ...which are not expressly set forth in this contract, whether or not any such representations, warranties or statements were made in writing or orally.

RULING OF THE COURT

A. Summary Judgment

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. Applicable Contract Principles

When the parties have set down their agreement in a clear, complete document, their writing should be enforced according to its terms, *Vermont Teddy Bear Co., Inc. v. 538 Madison Realty Co.,* 1 N.Y.3d 470, 475 (2004), quoting W.W.W. Assoc. v. Giancontieri, 77 N.Y.2d 157, 162 (1990), particularly where the instrument was negotiated between sophisticated counseled business people negotiating at arm's length. *Wallace v. 600 Partners Co.*, 86 N.Y.2d 543, 548 (1995). This principle is especially important in the context of real property transactions, where commercial certainty is a paramount concern. *Roca v. Realty Northeast, Inc. v. Jefferson Valley Mall Ltd. Partnership*, 38 A.D.3d 744, 746 (2d Dept. 2007), quoting *Vermont Teddy Bear Co. v 538 Madison Realty Co., supra* at 475 (internal quotation marks omitted).

C. Default by Buyer

A prospective purchaser may not recover its down payment where it wrongfully fails to go to closing. *Maxton Builders Inc. v. LoGalbo*, 68 NY2d 373, 381 (1986). A purchaser who defaults on a real estate contract without lawful excuse cannot recover the down payment. *Willsey v. Gjurah, 65 A.D.3d 1228, 1230 (2d Dept. 2009), citing Cipriano v. Glen Cove Lodge No. 1458*, 1 NY3d 53, 62 (2003), quoting *Maxton Builders*, *supra*, at 378. When the buyer fails to close on a "time of the essence" closing date, and the seller is ready, willing and able to perform, the buyer has defaulted and the seller may retain any funds deposited. *See Capece v. Robbins,* 46 A.D.3d 589, 590 (2d Dept. 2007. In *Capece*, the Second Department held that where the sellers were ready, willing and able to perform on the closing date and the buyers defaulted by failing to appear, the sellers established their prima facie entitlement to summary judgment. *Id.* The Second Department affirmed the trial court's decision to grant sellers' motion for summary judgment dismissing the complaint, in which buyers sought recovery of their down payment, and to cancel the notice of pendency. *Id.*

To place a seller of realty under a contract of sale in default for a claimed failure to provide clear title, the purchaser normally must first tender performance itself and demand good

title. *Ilemar Corp. v. Krochmal*, 44 N.Y.2d 702, 703 (1978). The tender of performance by the purchaser is excused only where the title defect is not curable because, in such a case, the tender of performance would be an exercise in futility. *R.C.P.S. Assocites v Karam Developers*, 258 AD2d 510, 511 (2d Dept. 1999). Where, however, a title defect is curable, the seller is entitled to a reasonable time beyond law day to make its title good. *Cohen v Kranz,* 12 NY2d 242, 246 (1963).

In *Pinhas v. Comperchio*, 50 A.D.3d 1117 (2d Dept. 2008), the Second Department affirmed the trial court's decision to grant the defendant-seller's motion for summary judgment dismissing the complaint, and for judgment on the counterclaim for the amount of the buyer's down payment. In so holding, the Second Department concluded that seller established her *prime facie* entitlement to judgment as a matter of law by establishing that she was ready, willing and able to perform on the law day, while purchasers failed to proceed with the closing. *Id.* The Court held that the buyers failed to raise a triable issue of fact as to whether they tendered performance and allowed the seller an opportunity to cure any alleged default. *Id.* Pursuant to the contract of sale, the seller was entitled to the amount of the down payment as liquidated damages. *Id.*

C. Application of these Principles to the Instant Action

In light of the foregoing principles, and the submissions of the parties, the Court concludes that Defendant-Seller has established *prima facie* entitlement to judgment on its counterclaim for liquidated damages by submitting the terms of the parties' Contract and Rider and demonstrating Plaintiff-Buyer's default.

While Buyer maintains that it was only required to accept the transfer of title subject to the permitted exceptions set forth in schedule B, under § 5.01 of the Contract Buyer agreed to purchase the property in "as is" condition subject to all violations whether or not of record. Moreover, as previously noted, paragraph 12 of the Rider specifically provides that the factors addressed in the Engineering Report constitute a basis on which Buyer might elect to terminate the Contract and reflects that the deadline for doing so expired on April 11, 2007, time being of the essence. Buyer bargained for and obtained a limited right to cancel, which it failed to exercise within the time agreed on by the parties to the Contract. Its attempt at cancellation approximately two years after expiration of the contractual date, was, therefore, ineffective and

Buyer's refusal to perform constituted a breach. In addition, Buyer had no valid basis on which to cancel the Contract in light of its failure to establish Seller's inability to provide marketable or insurable title, or the existence of an incurable title defect. [2]

The Court also concludes that, in light of the applicable language in the Contract stating that Plaintiff did not rely on Seller's representations except to the extent set forth in the Contract, Plaintiff is unable to establish the elements of a fraudulent misrepresentation claim, which are 1) a misrepresentation or an omission of material fact which was false and known to be false by the defendant, 2) the misrepresentation was made for the purpose of inducing the plaintiff to rely upon it, 3) justifiable reliance of the plaintiff on the misrepresentation or material omission, and (4) injury. *Jablonski v Rapalje*, 14 A.D.3d 484, 487 (2d Dept. 2005).

Buyer's advance rejection of title and demand for return of its down payment on February 6, 2009 was an unjustified and anticipatory breach of the Contract. Accordingly, Plaintiff is not entitled to return of its down payment. The Court, therefore, denies Plaintiff's motion for summary judgment and dismisses the Complaint.

With respect to Seller's counterclaims, § 13.04 of the Contract provides as follows:

> If Purchaser shall default in the performance of its obligation under this contract to purchase the Premises, the sole remedy of Seller shall be to retain the Downpayment as liquidated damages for all loss, damage and expense suffered by Seller, including without limitation the loss of its bargain.

Thus, Seller's sole remedy is to retain the $750,000 down payment as liquidated damages and the Court hereby directs that Seller is entitled to retain that down payment. To the extent that Seller's counterclaims seek additional relief, they are hereby dismissed.

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[2] The Court notes that Section 10.10 of the Contract addresses Seller's obligation to deliver to the Buyer, at closing, "certificates, licenses, permits, authorizations and approvals issued for or with respect to the Premises by governmental and quasi-governmental authorities having jurisdiction." That section states, further, that "[t]his provision is not to be construed as a condition of closing but merely as an accommodation to the buyer." This is further support for the Court's conclusion that the disputed certificate of occupancy did not justify the Buyer's failure to close.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY
September 29, 2010

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

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