Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA Part 2
Justice

73-49, LLC, x

Plaintiff,

-against-

ELMINIC, LLC,

Defendant. x

Index Number 19839 2011

Motion Date September 28, 2011

Motion Cal. Number 39

Motion Seq. No. 1

The following papers numbered 1 to 14 read on this motion by plaintiff 73-49 LLC for an order granting a preliminary injunction enjoining defendant Elminic LLC from proceeding to closing under the time of the essence conditions of the contract of sale dated January 20, 2011, and staying defendant from releasing the sum of $325,000.00, and declaring plaintiff in default under said contract.

	Papers Numbered
Order to Show Cause-Emergency Affidavits -Exhibits(A-J).....	1-4
Supplemental Affidavits-Exhibits(A-B, 1-6)....	5-8
Opposing Affidavit-Exhibits(A-W).....	9-10
Opposing Affidavit-Exhibits(A-B).....	11-12
Reply Affidavit.....	13-14
Memorandum of Law.....	
Memorandum of Law.....	

Upon the foregoing papers it is ordered that plaintiff's motion for a preliminary injunction is determined as follows:

Initially, it is noted that the name of the LLC defendant is spelled differently on the summons and complaint from the way it is spelled in other documents contained in the motion papers. In addition, it is noted that the caption on the papers submitted by the defendant's attorney is not the caption of the instant case, but instead the caption from an action previously commenced and

subsequently discontinued with prejudice under index number 10131/2011. The parties are directed to take appropriate action to correct the name of the defendant in this action and to use the correct caption on their papers.

On January 20, 2011, 73-49 LLC, plaintiff herein, entered into a contract to purchase commercial real property located at 73-49 Grand Avenue, Maspeth, New York, from Elmnic LLC, defendant herein, sued herein as Elminic LCC. The contract's purchase price is $3,025,00.00, and the prospective purchaser(purchaser) delivered to the seller, an initial deposit, supplemental deposit and first extension deposit, totaling $325,000.00. At the time the contract was executed the property was leased to Blockbuster, Inc.

Section 6 of the contract sets forth the closing date and place, and provides that the closing is take place "on the first business day which is forty-five(45) days after expiration of the Inspection Period, (however, in no event shall the Closing be sooner than 90 days from the date of this Contract), **with time being of the essence.**" The contract permits the purchaser to extend the closing date up 30 days, three times, in which case the closing would occur 135 days after the date of the expiration of the Inspection Period, with time being of the essence. In order to obtain such an extension, the purchaser is required to deliver written notice to the escrow agent at least 10 days before the scheduled closing date, and pay the sum of $25,000.00, which would become part of the deposit. The contract also permits the seller to adjourn the closing up to an additional 14 days, and the closing date, as set forth in a notice by the seller, would be time of the essence.

Section 26 of the contract of sale, entitled "REMOVAL OF TANK" provides as follows:

> "Seller shall remove the underground tank at the Premises (to the extent that there is an underground tank at the Premises). Seller shall make commercially reasonable efforts to have the tank removed within thirty (30)days from the date of this Contract. Seller shall also obtain and submit to the applicable governmental agency having jurisdiction thereof (the "Agency") all necessary reports("Reports") as required by law in conjunction with the removal of the tank. The report shall be prepared by an engineer authorized by applicable law to prepare such Reports. Seller shall give Purchaser at least three (3) business days' notice of the date the tank will be removed so that Purchaser and or his representatives may be present to witness the removal of the

tank".

Section 27 of the contract, entitled "DUE DILIGENCE", provides, in pertinent part, as follows:

> "Notwithstanding anything to the contrary set forth in this Contract, Purchaser shall have a period to conduct its due diligence equal to the longer of (I) forty-five (45) days after the date this Contract and (ii) fifteen (15) days after Seller sends (by fax or email) a copy of the Reports submitted to the Agency, to Purchaser's attorney. The aforesaid period is referred herein as the "Inspection Period". All due diligence shall be conducted at Purchaser's sole cost and expense. If Purchaser elects to conduct a Phase I inspection or Phase II inspection, such inspections shall be performed by an environmental engineer licensed in the State of New York. Seller shall provide reasonable access to Purchaser, its agents, servants, licensees, and/or its independent contractors, to permit Purchaser to make its inspections and perform its environmental due diligence. Purchaser shall have the right to terminate this Contract within the Inspection Period for any reason or no reason, by delivering written notice to the Seller of such termination....In connection with Purchaser's right of inspection under this Article, Purchaser and its authorized representative shall have the right upon not less than 3 business days to enter upon the Premises for the purpose of conducting such studies...".

The seller engaged Soil Mechanics Environmental Services(Soil Mechanics), an environmental engineering firm, to determine if there was an underground gasoline storage tank (UST) on the premises. Following notice to the purchaser, Soil Mechanics performed a geophysical inspection conducted on February 15, 2011 and located an abandoned UST. The seller received Soil Mechanics' February 17, 2011 report of its findings and proposed tank closure proposal, and forwarded the same to the purchaser the following day. On February 23, 2011, Soil Mechanics notified the State Department of Environmental Conservation(DEC) of the presence of the UST, provided a petroleum bulk storage application and informed the agency that site assessment activities would take place on March 2, 2011. The purchaser was also advised that the tank closure was scheduled for March 2, 2011. The UST was removed on March 2, 2011. The purchaser's engineer was present at the site, and requested and was given permission to have five soil samples tested by Soil Mechanics at the purchaser's expense. The soil test results were e-mailed to the seller on March 15, 2011 and were forwarded to the purchaser

on the same day. Soil Mechanics forwarded the Closure Report to the DEC on March 15, 2011, and a copy was sent to the seller on March 17, 2011. The seller e-mailed a copy of the Closure Report to the purchaser's attorney on March 18, 2011.

It is undisputed that although the purchaser sought to conduct a Phase II investigation, the then tenant was in bankruptcy, and refused to permit access to the premises until the premises were vacated on April 21, 2011. The purchaser maintained that as the seller had not provided reasonable access to the premises, the Inspection Period had not ended. The seller's counsel, however, maintained that the Inspection Period had ended on April 3, 2011, and set a closing date of May 2, 2011, time being of the essence. The seller's counsel, in response to the purchaser's objections, offered to extend the Inspection Period to May 4, 2011 for the purpose of terminating the contract, and extend the closing date to May 18, 2011, time of the essence. The purchaser commenced an action on April 26, 2011, entitled *73-49 LLC v Elminic LLC, Gary A. Kreinik d/b/a Kreinik Associates, LLC, as Escrowee*, (Index No. 10131/11) in which it sought a preliminary injunction enjoining the defendants from proceeding to closing under the subject contract of sale, or from holding the purchaser in default, and staying the release of the deposit. The complaint alleged causes of action for declaratory judgment, specific performance, breach of contract, breach of the covenant of good faith and fair dealing, and for injunctive relief to preserve the status quo.

The purchaser and seller thereafter entered into a stipulation discontinuing the action commenced under Index No. 10131/2011, dated May 6, 2011. Said stipulation which was filed with the court on September 28, 2011, along with an affidavit and stipulation cancelling the notice of pendency, specifically referred to a first amendment to the contract of sale.

The first amendment to the contract of sale dated January 20, 2011, executed by the parties on May 3, 2011, provides, in pertinent part, as follows:

> "In the event of any conflict between the provisions of the printed form of Contract of Sale for the Premises, the terms and provisions of this First Amendment shall supercede, govern and control.
>
> 1) Modifying Section 27 of the Contract to provide the following:

The Purchaser's Inspection Period shall be extended until 5 P.M. June 18, 2011. In order for the Purchaser's Termination Notice to be effective it must be received by Seller (together with copies of all environmental and engineering reports, if any, obtained by Purchaser) by 5 P.M. on June 18, 2011, With Time Being of the Essence. If Purchaser properly terminates this Contract in a timely manner then the entire Deposit (of $325,000) will be refunded to Purchaser.

2) The parties acknowledge that Purchaser has now deposited a total of $325,000 in escrow and all references in the Contract to the "Deposit" shall now mean $325,000, which includes the Supplemental Deposit.

3) The parties agree that Purchaser tendered the first $25,000 Extension Deposit for one 30-day extension of the Closing Date and said amount is included as part of the $325,000 Deposit.

4) Except as set forth in this First Amendment, the terms of the Contract are unmodified and remain in full force and effect.

5) If Purchaser does not terminate the Contract prior to the expiration of the Inspection Period, the Purchaser will be deemed to have exercised its first thirty (30) day extension of the Closing Date. Seller acknowledges that Purchaser has made the first Extension Deposit of $25,000 so the Closing Date (as a result of Purchaser's exercise of its right to its first extension will be September 1, 2011, with Time Being of the Essence, subject to any rights to extend the Closing Date as set forth in the Contract....".

The purchaser's environmental engineer, Associated Environmental Services, Inc.(AES), gained access to the premises to conduct the Phase II investigation on May 12, 2011. On June 15, 2011 the purchaser informed the seller that its environmental consultant had discovered that the feeder and dispensing lines from the UST had been severed and that a gasoline leak had occurred along the path of the lines, and requested that the seller conduct a further investigation of the leak, remediate and file a proper closure report with the DEC.

On June 16, 2011 the prospective purchaser informed the seller in a letter that AES had found soil contamination "in close proximity" to the UST where the vent and dispensing piping path were believed to be located; claimed that the leak was

associated with the UST and was previously severed during prior construction on the site; asserted that the party who removed the UST did not conduct a proper investigation of the associated piping and fueling areas, and that the report filed with the DEC was inaccurate; asserted that the leak emanated from the UST as it was the only gasoline UST system that had ever been on the premises. The purchaser requested that the seller conduct a "further investigation of the leak and contamination, and remediate the same so that a proper closure report be filed." The purchaser further stated that "[p]ursuant to the terms of our Contract, our due diligence period will not expire until fifteen days after the filing of a proper closure report."

Similar letters were sent by the purchaser's counsel to the seller's counsel on June 17, 2011 and June 29, 2011. A copy of the AES Phase II Inspection Report was provided to the seller or its counsel on June 20, 2011. The seller's counsel, in a response dated August 17, 2011 rejected the purchaser's claim that the contract's Inspection Period had not yet expired, and rejected the claims that the removal of the UST was improperly performed and that the closure report was improperly prepared. Counsel stated that pursuant to the terms of the First Amendment to the contract, the Inspection Period ended at 5 P.M. June 18, 2011, with time being of the essence, and therefore as the purchaser had exercised its first extension of the closing, it now set the closing date for September 2, 2011, time of the essence. Counsel, however, stated that even though the purchaser had failed to timely elect to terminate the amended contract, the seller was willing to terminate the contract and return all deposits held in escrow. The termination period would be held open until 5 P.M. August 22, 2011, and if written notice was not received on or before that date and time, the closing would proceed on September 2, 2011, subject to any extension provided for in the amended contract.

Plaintiff purchaser commenced the within action on August 22, 2011, and has asserts claims for declaratory judgment, specific performance, breach of contract, breach of the covenant of good faith and fair dealing, and for injunctive relief. Plaintiff now seeks a preliminary injunction enjoining the defendant seller from proceeding to closing on September 1, 2011, January 20, 2011, and staying defendant from releasing the sum of $325,000.00, and staying the defendant from declaring the plaintiff in default under said contract. Plaintiff in essence seeks a status quo injunction, pending the determination of its claims.

A party moving for a preliminary injunction "must demonstrate by clear and convincing evidence (1) a likelihood of ultimate success on the merits, (2) irreparable injury absent the granting of the preliminary injunction, and (3) that a balancing of equities favors the movant's position'" (*EdCia Corp. v McCormack*, 44 AD3d 991, 993, [2007], *quoting Apa Sec., Inc. v Apa*, 37 AD3d 502, 503, [2007] *see W.T. Grant Co. v Srogi*, 52 NY2d 496, 517, [1981]). The movant must show that the irreparable harm is "imminent, not remote or speculative" (*Golden v Steam Heat*, 216 AD2d 440, 442, [1995]). Moreover, "[e]conomic loss, which is compensable by money damages, does not constitute irreparable harm" (*EdCia Corp. v McCormack*, 44 AD3d at 994; *see also Family-Friendly Media, Inc. v Recorder Tel. Network*, 74 AD3d 738, [2010]). The decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court (*see Glorious Temple Church of God in Christ v Dean Holding Corp.*, 35 AD3d 806, 807[2006]).

Here, with respect to the claim that the amended contract of sale's Inspection Period has not terminated, plaintiff has failed to establish that it is likely to succeed on the merits. The First Amendment to the January 20, 2011-contract of sale, specifically extended the purchaser's Inspection Period to 5 P.M. June 18, 2011. This modification superceded the contract's stated method of calculating the end of the Inspection Period and simply provided for a date and time certain. Furthermore, the extension of the Inspection Period to 5 P.M. June 18, 2011 was not made contingent upon the seller's investigation and remediation of the soil contamination, or upon its filing of a new or amended closure report with the DEC.

Plaintiff was aware of the soil contamination prior to 5 p.m. June 18, 2011, and chose not to terminate the contract and recover its down payment in full. Plaintiff was also given a further opportunity to terminate the contract and recover the down payment in full, on or before 5 p.m. August 22, 2011 and chose to commence this action on that date, rather than terminate the contract.

Prior to entering into the contract, the seller informed the purchaser that two earlier Phase I environmental reports on the property indicated the possible presence of the UST. Plaintiff was also aware of the fact that the premises had previously been occupied by an automobile repair shop. Plaintiff asserts that there was also a gasoline dispensing station on the site prior to the construction of the present building. Plaintiff's documentary evidence and the reports of the parties' engineers do not contain any evidence of a gas station on the site, although

the evidence presented indicates that gasoline had been stored in the underground tank for incidental use in connection with the repair shop.

Section 3 of the contract provides that "[a]ll's violations and Environmental Control Board judgments and Building Department judgments in excess of $15,000. Seller will be obligated to pay for the first $15,000 of violations....". The contract also provides the purchaser with the option to terminate the contract or proceed to closing, if the seller gives the purchaser's attorney written notice of the seller's refusal to pay any such amounts in excess of $15,000. This section is applicable to violations that exist at the time of the closing.

The parties' contract, however, does not allocate the parties' liabilities for environmental hazards on the property that may be discovered during the Phase I or Phase II inspection. Plaintiff, thus, has failed to establish that it is now entitled to delay the closing based upon its prospective liability for clean up costs and for any fines that may be imposed by the DEC, after it takes title to the property.

Accordingly, plaintiff's motion for a preliminary injunction, is denied.

Dated: October 17, 2011

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J.S.C.