Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: Honorable **JAMES J. GOLIA** IAS TERM, PART 33
Justice

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CHEN GIT CHENG AND LINGZHOU CHENG, Index No: 18652/12

Plaintiff(s), Motion Date: 1/11/13

-- against -- Cal. No: 24

117 GUY R. BREWER REALTY LLC and GINSBURG & MISK, Sequence No. 1

Defendant(s).
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The following papers numbered 1 to 44 were read on this motion by defendants for an order awarding summary judgment on their counterclaim and cross motion by plaintiffs for an order awarding summary judgment on the complaint.

	PAPERS NUMBERED
Notice of Motion, Affirmation, Affidavits and Exhibits.....	1 - 13
Cross Motion, Affirmation, Affidavits and Exhibits.....	14 - 36
Reply Affirmations, Affidavits and Exhibits.....	37 - 44

Upon the foregoing papers it is ordered that this motion is decided as follows:

This is a contract action in which plaintiffs seek the return of a $400,000 down payment made in connection with a contract of sale (the "Contract") for the premises known as 117/01/09/17 Guy R. Brewer Boulevard, Jamaica, New York (the "Premises"). Defendants counterclaim for breach of contract and seek to retain the down payment.

By this motion, defendants move for summary judgment on their counterclaim and plaintiffs cross move for summary judgment and an order disqualifying defendants attorney.

To grant summary judgment, it must clearly appear that there are no material issues of fact (*Sillman v. Twentieth Century-Fox)*

Film Corp., 3 N.Y.2d 395, 404, 165 N.Y.S.2d 498, 144 N.E.2d 387 [1957]). The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form to eliminate any material issues of fact from the case (Zuckerman v. City of New York, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718 [1980]; Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 404, 165 N.Y.S.2d 498, 144 N.E.2d 387 [1957]).

Once a prima facie showing of entitlement to judgment as a matter of law has been established with sufficient evidence to demonstrate the absence of any material issue of fact, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial of the action (Zuckerman v. City of New York, 49 N.Y.2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]).

Defendants argue that plaintiffs defaulted on the Contract by failing to obtain a mortgage commitment by the Commitment Date, failing to cancel the Contract pursuant to the terms of the Contract, failing to seek an extension of the closing date, and thereafter failing to appear for a "time of the essence" closing scheduled for March 29, 2012. Defendants contend that based on plaintiff's default they are entitled to retain the down payment.

Plaintiffs concede that they did not have a mortgage commitment by the Commitment Date but argue that upon their failure to satisfy this requirement, in accordance with the contingency clause, both purchaser and seller had a right to cancel the contract and neither party did so. Plaintiffs contend that their failure to cancel the contract within the seven business days required by the Contract did not operate as a waiver of their right to cancel the contract; that defendants' "time of the essence" letter was rejected as untimely and with insufficient notice; and that purchaser's letter of cancellation dated June 14, 2012 entitles them to a return of the down payment.

There is a fundamental concept that "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (Greenfield v Philles Records, 98 NY2d 562, 569, 780 NE2d 166, 750 NYS2d 565 [2002]). "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' " (id., quoting Breed v Insurance Co. of N. Am., 46 NY2d

351, 355, 385 NE2d 1280, 413 NYS2d 352 [1978]).

Here, the terms of Contract are clear and unambiguous. The Contract, which included a first rider, was executed in December 2011. The closing date was scheduled for 60 days from delivery of the executed contracts. The purchase price for the property was $4,000,000 and plaintiff was required to make a $400,000 down payment. Plaintiff agreed to purchase the premises "as is". The Second Rider to Contract of Sale includes the following contingency provision that reads, in part:

> 1. Contingencies Buyer makes this offer subject to the following contingencies. If any of these contingencies is not satisfied by the dates specified, then either Buyer or Seller may cancel this contract by written notice to the other
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> > a. Mortgage. This contract and purchaser's obligations hereunder are conditioned upon issuance on or before 45 days after receipt of the fully executed contract of sale by Purchaser's attorney ("the Commitment Date") of a written commitment from any Institutional Lender pursuant to which such institutional Lender agrees to make first mortgage loan to purchaser at purchaser's sole cost and expense of $2,400,000 or such less sum as purchaser shall be willing to accept, at the prevailing fixed rate. If such commitment is not issued on or before the Commitment Date, then, unless purchaser has accepted a commitment that does not comply with the requirements set forth above, purchaser may cancel this contract by giving Notice to Seller within 7 business days after the Commitment Date, in which case this contract shall be deemed cancelled and thereafter neither party shall have any further rights against, or obligations or liabilities to, the other by reason of the contract except that the Downpayment shall be promptly refunded to purchaser.

Plaintiffs acknowledge that the fully executed contracts were received on January 3, 2012. In viewing the facts in a light most favorable to plaintiffs, the court accepts January 3, 2013 as the date the executed contract was received and therefore, by the terms of the contract the closing was to occur on or about March 3, 2012 (the 60th day from receipt of the fully executed contract); the mortgage commitment was to be issued on

or before, February 17, 2012 (the "Commitment Date"); and plaintiffs cancellation of the Contract for failure to obtain a mortgage commitment, had to occur no later than February 28, 2012 (the "Cancellation").

Based upon the plain language of that mortgage contingency provision, if any contingencies were not satisfied by the dates specified, either party could cancel the Contract by written notice. The purchaser however, was required to cancel the Contract by giving notice to the seller within seven business days after the Commitment Date.

Plaintiffs concede that they did not have a mortgage commitment by the Commitment Date. In fact, plaintiffs never obtained a mortgage commitment. A conditional "subject to" mortgage such as the one offered in this matter is not a firm commitment and does not satisfy a mortgage contingency clause. Such a clause requires that a final approval or commitment be obtained. (See, Weaver v Hilzen, 147 AD2d 634; Grossman v Perlamn, 132 AD2d 522; Lieberman v Pettinato, 120 AD2d 646, Additionally, plaintiffs failed to cancel the Contract within seven business days of the Commitment Dated, February 17, 2012 and further failed to seek an extension of the closing date.

On March 5, 2012,(the first business day after the scheduled closing date which fell on a Saturday) defendants issued a time of the essence letter scheduling the closing for March 29, 2012. Plaintiff rejected the defendants' letter stating it was "untimely" and "with insufficient notice" however, on the record before the court plaintiff has not sufficiently raised any issues of fact or law to challenge the sufficiency of the letter.

Although the most effective way for a party to make time of the essence is to say so in the contract, it is well established that a seller may convert a non-time-of-the-essence contract into one making time of the essence by giving the buyer "clear, unequivocal notice" and a reasonable time to perform. (See, Levine v Sarbello, 67 NY2d 780, 492 NE2d 130, 501 NYS2d 22 [1986], affg 112 AD2d 197, 200, 491 NYS2d 419 [2d Dept 1985]), ADC Orange, Inc. v. Coyote Acres, Inc., 7 N.Y.3d 484, 490 (N.Y. 2006).

Defendants' March 5, 2012 letter was sufficiently clear and unequivocal to properly give the plaintiff notice that time was of the essence. What constitutes a reasonable time depends on the facts and circumstances of the particular case (Ballen v Potter, supra; Mazzaferro v Kings Park Butcher Shop, supra; 76 N. Assocs. v Theil Mgt. Corp., supra). Here, the plaintiff failed

to cancel the contract pursuant to the terms of the agreement and did not attempt to cancel the contract until June 14, 2012, approximately four months after the Commitment Date.

Although plaintiff continued to seek a mortgage commitment after the Commitment Date and obtained a conditional mortgage prior to the time of essence date, their continued efforts, and their requests of the defendants for assistance in resolving issues raised by the potential lender did not, without a writing, extend or change the terms of the Contract. Paragraph 23 of the Contract states that the contract may not be changed or cancelled except in writing and further states that the parties' attorneys are authorized to agree in writing to any changes in dates and time periods provided for in ths contract. Plaintiff has not submitted any evidence to establish that the Contract was changed or that pursuant to the contract defendants were obligated to assist in resolving conditions imposed by a potential lender.

The Court finds that the time of essence letter issued by the defendants is valid. Based on plaintiffs' failure to cancel the contract in accordance with the Contract and their failure to appear for the scheduled closing, plaintiffs have defaulted on the Contract. Pursuant to Paragraph 15, upon a default by the purchaser, purchaser shall forfeit to the Seller and the Seller shall be entitled to retain the amount of monies paid in advance or deposited as liquidated damages, as the exclusive remedy of the Seller.

Accordingly, defendant's motion for summary judgment is granted and defendant is awarded judgment in the amount of $400,000.00 representing the amount of the down payment made by purchasers. Plaintiff's cross motion is denied in its entirety.

This constitutes the Order of the Court.

Dated: March 15, 2013

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JAMES J. GOLIA, J.S.C.