

**Revital Realty Group, LLC v Ulano Corp.**

2013 NY Slip Op 32981(U)

April 17, 2013

Sup Ct, Kings County

Docket Number: 006702/2012

Judge: Carolyn E. Demarest

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part Comm-1 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 16<sup>th</sup> day of April, 2013.

PRESENT:

HON. CAROLYN E. DEMAREST,  
Justice.

-----X  
REVITAL REALTY GROUP, LLC,

Index No. 6702/12

Plaintiff,

**Decision and  
Order**

- against -

ULANO CORPORATION A/K/A  
ULANO CORP.,  
Defendant.  
-----X

<b>NYSCEF:</b>	<b>Document Number:</b>
Order to Show Cause	54
Hershkovich Affidavit / Exhibits	55-63
Castro Affirmation	65
Memorandum in Opposition to Proposed Intervenor	81
Knapp Affirmation	82
Trial Memorandum	85, 86

Following a framed-issue bench trial on whether plaintiff, Revital Realty Group LLC, as purchaser seeking specific performance of a real estate contract, was ready, willing, and able to close the real estate transaction with defendant, Ulano Corporation, on April 25, 2012, the Court makes the following findings of fact and reaches the following conclusions of law.

### Background

On November 30, 2011, plaintiff entered into a contract with defendant to purchase commercial real property located at 594 Dean Street, Brooklyn, N.Y. (the "Property") for \$4,550,000. Pursuant to the contract, plaintiff tendered two down payments for a combined deposit of \$200,000, which has been held in escrow pending full payment and closing of title. The contract states, at Section 3.01, that the closing shall take place on a specific date, defined at Schedule D as the "one hundred twentieth (120th) day following the date of this contract," which was March 29, 2012. In response to a letter dated March 13, 2012, from defendant's attorney seeking to confirm the March 29 closing date as "time of the essence to the Contract," by letter dated March 21, 2012 plaintiff's counsel requested an adjournment of the closing to April 25, 2012, warning that, should the adjournment not be granted by March 23, 2012, "we shall file a lis pendens in light of the anticipatory breach of contract and will seek specific performance of the contract." Defendant did not agree to such adjournment, and, on March 29, 2012, defendant held a closing before a notary public, at which plaintiff failed to appear and during which defendant tendered all the documents required to close title, declaring plaintiff to be in material breach of the contract.

On March 28, 2012, plaintiff initiated the instant action, seeking specific performance on the grounds of anticipatory breach of the contract, and filed a lis pendens against the Property. Plaintiff amended its complaint on April 25, 2012, adding a second cause of action for breach of contract and seeking the return of its deposit in the event that the Court does not grant specific performance. Plaintiff claims that defendant breached the contract by denying it access to the Property in violation of Section 9.06 of the contract, which provides that defendant must allow

plaintiff or plaintiff's representative, while accompanied by defendant's real estate broker, to access the Property "at reasonable times upon reasonable prior notice to [defendant] and its broker."

On May 9, 2012, defendant interposed an answer in which it asserted two counterclaims seeking damages, in the amount of its per diem costs, for inappropriate filing of a lis pendens and, in the amount of plaintiff's deposit, for breach of contract. Plaintiff interposed a reply, in which it denied defendant's allegations, on May 30, 2012.

On June 15, 2012, defendant filed a motion for summary judgment seeking dismissal of both of plaintiff's causes of action, awarding damages on its two counterclaims, and for cancellation of the lis pendens filed against the Property. Defendant further claimed that plaintiff is not entitled to specific performance because it was not ready, willing, and able to close title on the date specified in the contract. Moreover, defendant claimed that plaintiff's second cause of action lacked merit because the purported refusal to grant access to the Property occurred after plaintiff breached the contract, excusing any nonperformance.

On September 7, 2012, this Court denied the motion for summary judgment, dismissed defendant's counterclaims, and declined to cancel the lis pendens.<sup>1</sup> The Court found that the contractual closing date was not "of the essence" and defendant therefore anticipatorily breached the contract by refusing to grant a reasonable adjournment of the March 29, 2012 closing, and further breached the contract by failing to allow plaintiff's representatives access to the Property. As the defendant had anticipatorily breached the contract, plaintiff was absolved of its duty to

---

<sup>1</sup>See *Revital Realty Group v Ulano Corp.*, 36 Misc 3d 1240[A] [Sup Ct, Kings County 2012].

close upon the Property, and the counterclaim for breach of contract was dismissed. The Court also determined that plaintiff had filed the lis pendens in good faith in order to protect its interests in the property, dismissed defendant's counterclaim for improper filing of a lis pendens, and declined to cancel the lis pendens on the Property. The Court found that a question of fact remained as to whether plaintiff was able to tender full payment on the requested adjourned date of April 25, 2012, so as to establish plaintiff's entitlement to specific performance. On December 6, 2012 and March 18, 2013, a bench trial was conducted to make this determination.

#### Discussion

It is the law of this case that April 25, 2012 is the operative closing date to determine plaintiff's readiness and ability to close on the Property, yet plaintiff continues to dispute this Court's decision. Plaintiff contends that a reasonable time to prove financial ability should extend through the time of trial in order to take advantage of a contractual assignment plaintiff entered into with proposed intervenor Hershkovich on May 31, 2012. Proposed intervenor Hershkovich has submitted evidence of financial ability to complete the purchase since it received a purported assignment of plaintiff's contract to purchase the property on May 31, 2012. The purported assignment gives the proposed intervenor interest in the Property and the plaintiff a fee for securing the Property. The Court finds plaintiff's argument unavailing as the adjourned closing date was proposed by plaintiff and "afford[ed] . . . a reasonable time after the . . . closing date set forth in the contract within which to perform" (*Savitsky v Sukenik*, 240 AD2d 557, 558-59 [2d Dept 1997], citing *Zev v Merman*, 134 AD2d 555 [2d Dept 1987]). "What constitutes a reasonable time depends on the facts and circumstances of the particular case" (*Zev*, 134 AD2d at 558); as both parties had notice of the proposed date, with adequate time to prepare for closing,

the operative April 25, 2012 date is proper. Moreover, although, as noted in the Court's prior decision, defendant improperly preemptively sought to make the March 29 date "of the essence" by its letter of March 13, prior to the original closing date, the Court deems plaintiff's response in setting the date as April 25 to be binding upon it as a date "of the essence." In the circumstances, it would be inequitable to allow plaintiff time to secure financing through the close of trial, and beyond, in order to meet its burden to prove that plaintiff is able to close within a reasonable period following the original closing date.

"The elements of a cause of action for specific performance of a contract are that the plaintiff substantially performed its contractual obligations and was willing and able to perform its remaining obligations, that defendant was able to convey the property, and that there was no adequate remedy at law" (*EMF Gen. Contr. Corp. v Bisbee*, 6 AD3d 45, 51 [1st Dept 2004]).

Where the contract is for the sale of real property, the requirement that there be no adequate remedy at law is presumed, "on the premise that each parcel of real property is unique" (*id.* at 52; *see Lezell v Forde*, 26 Misc 3d 432, 442 [Sup Ct, Kings County 2009]). In the instant case, it is not disputed that defendant was, on March 29, 2012, and remains, able to convey the Property to plaintiff. However, defendant argues that plaintiff was not ready and able to perform its remaining obligations on the proposed adjourned closing date of April 25, 2012.

In order to prove a right to specific performance, a plaintiff is "obligated to prove at trial that it was ready, willing, and able to perform its obligations under the contract" (*L.I.C. Commercial Corp. v Zirinsky*, 142 AD2d 713, 715 [2d Dept 1988]; *see also Huntington Min. Holdings v Cottontail Plaza*, 60 NY2d 997 [1983]). Plaintiff must demonstrate it was in the possession of "requisite funds or financial commitments from others in order to meet [its] obligations under the contract" (*Jewell v Rowe*, 119 AD2d 634, 635 [2d Dept 1986]; *see also 3M Holding Corp. v Wagner*, 166 AD2d 580, 581 [2d Dept 1990]). In the case at bar, plaintiff did

not produce evidence that it possessed sufficient funds on April 25, 2012, the date of the proposed adjourned closing, or had secured the financing necessary to fulfill its contractual obligations.

The contract was for an all-cash transaction for \$4,550,000, without a contingency for securing financing. Plaintiff produced a proposed "Secured Promissory Note" for use in connection with a mortgage to be given at closing in the amount of \$3,300,000 to Hudson Capital Realty ("Hudson"). The unsigned Term Sheet proffered by Hudson, dated March 15, 2012, required, as a condition to closing on the mortgage, a demonstration that \$1,950,000 in "Sponsor Equity" had been invested in the Property by plaintiff prior to closing. Testimony at deposition of the Hudson loan officer was unequivocal that the unsigned Term Sheet, though executed by Calisto Bertin as a "partner" in plaintiff on March 15, 2012, was not a loan commitment binding upon the bank. Plaintiff submitted evidence in support of its contention that it had the requisite equity to obtain the Hudson loan, but argues that it was unable to consummate the loan due to defendant's frustration of the lender's due diligence by refusing plaintiff access to the Property. Defendant contends that the failure to provide access had no effect on closing the mortgage because plaintiff did not have the needed funds to invest in the Property as required by Hudson.

In support of plaintiff's contention that it had the funds necessary to secure the mortgage from Hudson, Calisto Bertin testified and submitted documentation to show available personal funds from refinancing on a corporate office, which funds were actually applied to the improvement of that property and which would, at most, have netted \$91,025 to Bertin as his 50% share; \$161,000 in proceeds from the sale of a gas station; a home equity line of credit with a balance owed in excess of \$240,000 and which had been "suspended" by Chase Bank, precluding further borrowing; business lines of credit available to three other LLCs owned by Bertin, totalling \$115,000; the bank accounts of those LLCs totalling \$300,733; and a 401(k)

account with a balance of \$534,887. The Court rejects plaintiff's contention that, notwithstanding that the equity credit line had "Available for use: \$0.00," after deduction of the \$240,182.42 balance, there remained equity in his home to be applied to the instant purchase. There is no evidence to support this speculation, as there was no competent indication of the value of the home or that a mortgage on Bertin's home had actually been applied for. Without the production of a mortgage application or commitment, such speculative evidence is insufficient to prove that plaintiff had available equity to access and apply to the instant project. Furthermore, while plaintiff's 401(k) statement shows funds within the account, it does not indicate the funds available after adjusting for the tax consequences or the substantial penalty for such premature withdrawal in light of the fact that Bertin was not yet 59 years of age. Thus, plaintiff fails to adduce proof of the actual and realistic assets available for investment in the Property and instead relies on unsubstantiated assertions of available equity, which are insufficient for this purpose (*see Aliperti v Laurel Links, Ltd.*, 27 AD3d 675, 676 [2d Dept 2006]).

It is undisputed that the \$200,000 deposit put down on the contract equally by Bertin and plaintiff's other member, Alex Zoldan, who testified that he did not intend to provide any additional funding on the project, would constitute a portion of the required Sponsor Equity. However, even if Bertin was willing to cash in his 401(k) account and divert all of the funds available to his other businesses, thus possibly rendering them insolvent, in order to fund the subject purchase, the total value of the assets available from Bertin, giving plaintiff full credit, except for the speculative home mortgage, equals approximately \$1,402,645, still short of the required \$1,950,000 investment.

Moreover, although this Court has found that defendant breached its contract with plaintiff in refusing plaintiff access to the Property, Paul Griffin of Hudson, who was responsible for processing plaintiff's mortgage application, testified that plaintiff had failed to comply with

other elements of the due diligence requirements for closing and that lack of access to the premises would not have precluded a closing on the mortgage. Specifically, a survey of the property was deemed essential, but was not provided, even though Bertin, through his own company, Bertin Engineering, was to do the survey. Bertin acknowledged, on cross examination, that he had never contacted defendant so as to gain access for the purpose of completing the survey.

Plaintiff's evidence falls short of demonstrating possession of, or access to, the \$1,950,000 in equity required by the lender to facilitate the \$3,300,000 in financing necessary to complete the \$4,550,000 purchase of the Property on April 25, 2012. In addition, plaintiff failed to provide to Hudson the survey, which Paul Griffin testified would be indispensable to Hudson's due diligence. Accordingly, plaintiff failed to meet its burden of proof that it was ready and able to close in order to obtain specific performance. Even if plaintiff had access to the \$1,950,000 required by Hudson, there is no evidence of a firm mortgage commitment for \$3,300,000, which remained contingent on further due diligence by Hudson. Thus, access to the mortgage funding required remained uncertain, and plaintiff has failed to demonstrate its ability to close on April 25, 2012 (*see 3M Holding Corp.*, 166 AD2d at 581; *LIC Commercial Corp.*, 142 AD2d at 716).

Although plaintiff failed to prove its right to specific performance, plaintiff is not left without remedy. Defendant's anticipatory repudiation of the contract, as previously decided in *Revital Realty Group v Ulano Corp.*, 36 Misc 3d 1240[A], absolved plaintiff from its contractual obligation to close (*see Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804, 806-07 [2d Dept 2011]). "Where the vendor breaches an executory contract for the sale of the land, the vendee, if not [itself] in default, may elect to rescind the contract and recover the amount [it] has paid on the purchase price" (*L.I.C. Commercial Corp.*, 142 AD2d at 716)(internal

citations omitted). As defendant anticipatorily breached the contract by refusing a reasonable adjournment of closing and by failing to permit access, plaintiff is entitled to restitution of its deposit. Plaintiff is therefore entitled to the return of the money held in escrow on account of the contract.

Insofar as third party intervenor Hershkovich's seeks leave to intervene in the instant action as an assignee of plaintiff's interests in the Property, such application is rendered moot by the decision herein. As plaintiff's claim for specific performance fails, plaintiff does not have an interest in the property to assign.

**Conclusion**

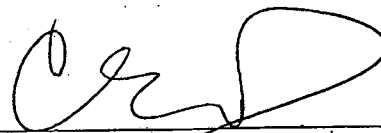
Because plaintiff did not establish readiness and ability to close on April 25, 2012, plaintiff's claim for specific performance is dismissed. Plaintiff's claim to recover the \$200,000 held in escrow is granted. The escrowee is directed to return the \$200,000 to plaintiff within ten days of service of this Order.

Proposed third-party intervenor Hershkovich's motion for leave to intervene is rendered moot, and thus denied.

The Kings County Clerk is directed the to vacate the notice of pendency affecting the real property known as 594 Dean Street, Brooklyn, NY, Block 1137, Lots 18, 19, 77, 81, and 82 on the tax map of the City of New York, Kings County.

The foregoing constitutes the decision and order of the Court.

ENTER:



HON. CAROLYN E. DEMAREST, J.S.C.