

**One PPW Residences, LLC v Copper 1 PPW, LLC**

2015 NY Slip Op 30535(U)

March 25, 2015

Supreme Court, Kings County

Docket Number: 507496/2014

Judge: Wayne P. Saitta

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Court of the state of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 25th day of March, 2015.

P R E S E N T:

Hon. Wayne P. Saitta, Justice.

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Index No.:507496 /2014

ONE PPW RESIDENCES, LLC,

DECISION and ORDER

Plaintiff,

-against-

COPPER 1 PPW, LLC, 1 PPW-IU LLC, GOLDMEDAL PPW LLC, ASNY REALTY LLC, CFNY REALTY LLC, and 1 PROSPECT PARK ALF, LLC,

Defendants.

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Defendants have moved for summary judgment dismissing the complaint and declaring the Plaintiff is in material default of a contract to sell the property located at 1 Prospect Park West, Brooklyn New York. The motion having come before the Court on November 12, 2014, and upon reading the Notice of Motion, dated September 2, 2014, and Affidavit in Support of Haysha Deitsch, sworn to September 2, 2014, and the exhibits attached thereto; the Memorandum of Law of Heller, Horowitz, & Feit, PC attorneys for Defendants, dated September 2, 2014; the Affirmation in Opposition of Joshua Siegel Esq., member of the firm of Kasowitz, Benson, Torres & Friedman LLP, attorneys for Plaintiff, dated September 30, 2014; the Affidavit in Opposition of David Schwartz and the exhibits annexed thereto; Plaintiff's Memorandum of Law in Opposition dated September 30, 2014, Defendants' Reply Memorandum of Law, dated October 13, 2014, and the exhibit annexed thereto; and the Assignment, Assumption

and Amendment to Lease, (which is exhibit K to the Agreement); and after argument of counsel and due deliberation thereon, Defendants' motion is denied for the reasons set forth below.

In this action Plaintiff seeks specific performance of a contract it entered into to buy the property located at 1 Prospect Park West, Brooklyn, New York from Defendants, or in the alternative, return of its downpayment of \$7,500,000.00.

Plaintiff claims that Defendants anticipatorily breached the contract by scheduling the closing before satisfying all conditions precedent in the Agreement. Defendants claim that they were ready, willing, and able to close, and that it was Plaintiff who breached the contract by failing to appear at the closing on August 1, 2014.

Plaintiff entered into an agreement, dated January 27, 2014, to purchase the property from Defendants for \$76,500,000.00 (the "Agreement"). The property is improved by a nine story building part of which is currently leased to 1 Prospect Park Residence LLC, (the "Operator"), who operates an assisted living facility at the site ("the Residence").

The Agreement provided that the closing would take place when two conditions were satisfied. The first condition was that the New York State Department of Health ("DOH"), approve the Operator's closing plan. The second condition was that the fourth floor of the building become vacant.

Section 2(a) of the Agreement provided for a downpayment of \$7,650,000.00, of which \$5,000,000.00 was paid upon execution of the agreement, and \$2,650,000.00 was to be paid within 3 days of confirmation that the fourth floor was vacant.

The Operator submitted its closure plan for DOH approval on September 27, 2013 and DOH notified the Operator by letter dated February 24, 2014 that DOH

approved implementation of its plan. The plan set April 30, 2014 as the closure date of the residence.

Section 8 of the Agreement provides that the Plaintiff could set the closing date of the property, provided it was within 30 days of DOH Closure Plan Approval and of confirmation that the fourth floor was vacant. Section 8 also provided that time would be of the essence as to an extended closing date.

Section 9(e) of the Agreement provides that at closing that the Plaintiff would enter into an amended lease with the Operator, to continue to operate the facility pursuant to the closure plan, until the facility was closed. The Agreement also provided monetary incentives to the Defendants to reach settlements with the residents who remained.

Section 17 of the Agreement provides that in the event of a default by Defendants, Plaintiff may either cancel the Agreement and have the downpayment returned, or sue Defendants for specific performance.

Section 20 of the Agreement provides that in the event of a default by the Plaintiff, Defendants shall be entitled to cancel the contract and retain the downpayment as liquidated damages. Section 20 also provides that the written Agreement represents the full agreement between the parties and that its terms may not be amended except in writing.

On June 5, 2014, Plaintiff confirmed that the fourth floor was vacant and tendered the \$2,650,000.00 balance of the downpayment.

On June 13, 2014, Joshua Marlow, an officer of Plaintiff, notified Harry Freifeld, Esq., Defendants' closing attorney, that pursuant to Section 8 of the Agreement, Plaintiff was extending the closing date until August 1, 2014.

On July 18, 2014, Plaintiff's attorney sent an e-mail to Freifeld stating that Plaintiff intended to close the week of July 28<sup>th</sup>, most probably on August 1<sup>st</sup>.

Plaintiff alleges that on July 24, 2014, it was informed by Defendants' landlord/tenant attorney that the Operator could not commence proceedings to remove the Residents because it had not surrendered its license, and that pursuant to the regulations, it could not surrender its license until all of the Residents vacated.

On July 28, 2014, Plaintiff received a title report which listed two proceedings commenced by Residents of the facility as title objections.

Freifeld sent Plaintiff's closing attorneys a letter dated July 30, 2014 stating that time was of the essence as to the August 1<sup>st</sup> closing date, and that if Plaintiff did not close on August 1<sup>st</sup>, the Defendants would consider Plaintiff in default of the Agreement and would retain the downpayment as liquidated damages.

On July 31, 2014, attorneys for Plaintiff sent Defendants' closing attorney a copy of a title report which listed as an exception, two law suits commenced by residents of the facility. The letter also gave Defendants notice that pursuant to Section 4 of the Agreement, the Plaintiff objected to this exception, and stated that the lawsuits were not a permitted exception under the Agreement. The title report indicates that this exception was listed on July 28, 2014.

Also, on July 31, 2014, another attorney for Plaintiff sent a letter to Freifeld, stating that the Plaintiff was ready, willing, and able to close, but that the closing could not be scheduled because of the Residents' lawsuits challenging the Operator's closure plan, and because the Operator could not commence special proceedings before surrendering its operating license.

In response, Freifeld sent Plaintiff's attorneys a letter also dated July 31, 2014, stating that Defendants did not consider the Residents' lawsuits a valid title objection and informing Plaintiff that seller would tender the deed at the closing scheduled for August 1, 2014, and would deem the Plaintiff in default if it did not close on that date.

Defendants appeared at the closing on August 1<sup>st</sup> and indicated that they were prepared to close. Plaintiff did not appear at the closing.

On August 4, 2014, Freifeld notified Plaintiff's attorneys by letter that the Defendants had demanded that Freifeld release to them the downpayment which he was holding in escrow.

On August 8, 2014, Plaintiff's attorney notified Freifeld that Plaintiff remained ready willing and able to close, and proposed three possible alternatives to closing under the terms of the contract.

Also on August 8, 2014, Mark Noordsy, an attorney with DOH, sent a letter to attorneys for the Operator stating that it was his opinion that surrender of its operating certificate was not a prerequisite to initiating special proceedings to remove the Residents.

On August 11, 2014, Defendants extended the time for Plaintiff to terminate the contract until August 15, 2014. The extension was given "without prejudice". The parties subsequently met but were unable to reach a resolution.

The Plaintiff did not terminate the Agreement on August 15, 2014, but instead commenced this action which seeks specific performance, or in the alternative, a declaration that Plaintiff is entitled to return of the deposit and other monetary damages.

Defendants moved for summary judgment dismissing the complaint and for a judgment declaring that Plaintiff is in material default under the terms of the Agreement, and that Defendants are entitled to keep the downpayment.

### **Defendants' arguments**

Defendants argue that there is no question that Plaintiff defaulted under the terms of the Agreement by failing to attend the August 1 closing, and that the terms of the Agreement between the parties were clear and unambiguous. They contend that the conditions precedent to closing were DOH approval of the Operator's closure plan, and vacatur of the fourth floor, both of which were satisfied. They argue that the Agreement did not condition the sale on resolution of any challenges to the closure plan, only upon DOH's approval of the plan. They also argue that the Agreement did not require that the building be delivered vacant, and specifically contemplated the Operator continuing to operate the facility after the closing pursuant to an amended lease.

Defendants further argue that the parties were sophisticated real estate investors represented by counsel, and that the Agreement should be enforced according to the plain meaning of its terms. Specifically, that the term "DOH Closure Plan Approval", means nothing more than when DOH approves the closure plan submitted by the Operator.

Defendants argue that nothing in the Agreement required that the closing plan be capable of being implemented. They further argue that the fact that the Residents challenged the plan does not mean it cannot be implemented, only that it might be more difficult, expensive and time consuming to evict all the Residents, which was a risk Plaintiff assumed under the agreement.

Defendants argue that had the parties intended to make the sale contingent on resolution of any legal challenges to the closure plan, they could have done so, but they did not.

Defendants further argue that Plaintiff's conduct demonstrates that the intent of the parties was that the Residents' lawsuit was not a bar to closing. Defendants point to Plaintiff's tender of the additional \$2,650,000.00 of the downpayment on June 5<sup>th</sup> 2014, despite Plaintiff's monitoring of the ongoing lawsuit. They also point to Plaintiff's June 13<sup>th</sup> notice to extend the closing date to August 1<sup>st</sup>, and the July 24<sup>th</sup> e-mail to Defendants' attorney stating that Plaintiff expected to close during the week of July 28<sup>th</sup>. Defendants argue that these acts evidence that the Agreement contemplated closing even though the Residents' lawsuit was not resolved.

Defendants argue that even though the Residents' lawsuits are listed as title exceptions in the title report procured by Plaintiff, several sections of the Agreement explicitly provide that the Plaintiff is purchasing subject to the existing residents' occupancy rights, and therefore the suits are not valid objections to title. Defendants also argue that Plaintiff did not raise the alleged title objections within the time provided by Section 4 of the Agreement.

Defendants contend that they are entitled not only to dismissal of the complaint, but also to a declaration that Plaintiff is in default of the Agreement, and that Defendants are entitled to keep the downpayment as liquidated damages pursuant to Section 20 of the Agreement.

### **Plaintiff's Arguments**

Plaintiff argues that it was not obligated to close on August 1<sup>st</sup> because Defendants had not satisfied the conditions precedent to the Agreement, as the closure

plan could not be implemented. Plaintiff alleges that Defendants notified it on July 24, 2014, shortly before the closing date, that the Operator could not implement the closure plan as of the closing date because of conflicting regulations. Specifically, the Operator could not commence proceedings to evict the remaining Residents until it surrendered its license, and it could not surrender its license until the remaining Residents left.

Plaintiff further argues that the term “DOH Closure Plan Approval” in the Agreement is ambiguous and open to two reasonable interpretations. Plaintiff argues that the intent of the requirement in the Agreement that Defendants obtain an approval of their closure plan as a precondition to closing on the property, was that Defendants would be able implement the approved plan.

Plaintiffs argue that in determining the meaning of the term DOH Closure Plan Approval one must consider what a reasonable person in the position of the promisee would understand the term to include.

Plaintiff further argues that the term is susceptible to two interpretations because the Agreement is silent as to what would be done if the plan could not be implemented, and that neither side considered the possibility that a closure plan approved by DOH could not be implemented.

Plaintiff argues that its conduct in paying the second portion of the downpayment and scheduling the closing for August 1<sup>st</sup>, while it was aware of the Residents’ lawsuits, is not inconsistent with its position in this action, because Plaintiff did not become aware that the closure plan could not be implemented until after those actions.

Plaintiff further argues that the Residents’ lawsuits were listed in its title report as exceptions, and since Defendants had not cured the exceptions, Defendants were not ready, willing, or able to convey clear and marketable title on August 1<sup>st</sup>.

Plaintiff also argues that Defendants failed to secure, pay for, and maintain the insurance policies required under the Amendment to the Operating Lease, which was a condition to closing under the Agreement.

Plaintiff argues that Defendants' conduct after August 1<sup>st</sup> evidenced an intent to continue to be bound the Agreement.

Lastly, Plaintiff argues that in the event that Plaintiff were denied specific performance, Defendants are not entitled to keep the downpayment because they breached the Agreement by failing to satisfy the conditions precedent to close on the property, and failed to secure the insurance required under the Amendment to the Operating Lease.

### **Discussion**

Summary judgment is a drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue of fact, or where such issue is even arguable. *Kolivas v Kirchoff*, 14 AD3d 493, 787 NYS2d 392, (2<sup>nd</sup> Dept 2005). On a motion for summary judgment, the evidence must be viewed in the light most favorable to the nonmoving party. *Marcum v Silva*, 117 AD3d 919, 985 NYS2d 900 (2<sup>nd</sup> Dept 2014); *Escobar v Velez*, 116 AD3d 735, 983 NYS2d 612 (2<sup>nd</sup> Dept 2014).

A party opposing summary judgment must make an evidentiary showing that there exists genuine triable issues of fact. *Sillman v Twentieth Century-Fox*, 3 NY2d 395, 165 NYS2d 498 (1957); *Weisman v Town of Brookhaven*, 197 AD2d 617, 602 NYS2d 697 (2<sup>nd</sup> Dept, 1993).

Summary judgment is inappropriate in real property disputes where there is a question of fact as to whether the conditions precedent of the contract of sale were satisfied. *Lazy S Group I v Gomez*, 60 AD3d 999, 876 NYS2d 473 (2<sup>nd</sup> Dept 2009).

Plaintiff argues there is a question of fact as to whether the intent of the parties in making the Agreement was that the closure plan be capable of being implemented. The Plaintiff's allegation that Defendants had not satisfied the condition precedent of the Agreement because the closure plan, by its terms, could not be implemented, is separate and distinct from the fact that the Residents filed a suit to challenge the plan.

The closure plan, which was approved on February 24th, called for the facility to close by April 30th. The closure plan, however, made no provision for what would occur if the Residents did not vacate within the short time period set forth in the plan.

Pursuant to Social Services Law Section 461-g (1) (e), an operator voluntarily closing its facility cannot terminate a residency agreement until it has "surrendered the operating certificate for the facility". Similarly, 18 NYCRR 487.5 (f) (14) (v) and 18 NYCRR 490.5 (f) (3) (v) provide that an operator may terminate an admission agreement when it "has voluntarily surrendered the operating certificate of the facility to the department".

Both the statute and regulation clearly provide for termination of residency agreements only after the operating certificate has been surrendered.

DOH attorney Mark Noordsy, sent a letter to Defendants dated August 8, 2014, one week after the closing date, stating that he believed that surrender of the operating license was not a prerequisite for commencing a special proceeding pursuant to Social Services Law Section 461-h. However, he cited no statutory authority for this opinion, which contradicts the clear language of both the statute and regulations.

The only authority cited in Noordsy's letter is a single Bronx Civil Court case from 1983, *Braker Memorial Home v White*, 121 Misc 2d 544, 468 NYS2d 430, (Civil Ct, Bx 1983). The Court in *Braker* held that statutory requirements that the operator surrender

their operating certificate before commencing a special proceeding “are apparently in conflict with Subdivision 1 of section 460-b, section 460-d (subd 9, par [a]) and section 460-f of the Social Services Law, which impose civil and criminal sanctions for surrendering the certificate while the facility remains in operation”. *id* at 546.

However, the statutory sections cited by the court in *Braker* do not, in fact, provide for any sanctions for surrendering the certificate while a facility remains in operation. Sections 460-b and 460-d (9) (a) prohibit an operator from operating a facility without a certificate, which is a different matter.

When the Operator sent notices to the Residents that it intended to commence special proceeding to evict them, this Court granted the Residents a preliminary injunction enjoining the Operator from commencing the proceedings, in part because the Operator had not surrendered its license.

The closure plan did not provide for a receiver or other licensed operator to take over the facility in the event the Operator chose to surrender its license commence special proceedings to evict the Residents. In the absence of such provision, the plan as approved by DOH, by its terms, could not be implemented.

While the Residents’ unwillingness to vacate date revealed the defect which was inherent in the closure plan, it was the failure of the plan to provide for a temporary administrator or receiver to operate the facility if the Operator chose to evict the Residents, rather than lawsuits themselves, which prevented implementation of the plan.

Plaintiff states that Defendants’ landlord/tenant attorney notified Plaintiff that the Operator could not commence special proceedings on July 24<sup>th</sup>, months before the Court issued an injunction against Defendants commencing special proceedings.

The fact that the closure plan as approved could not be implemented, is only relevant to the extent that the Agreement required that the closure plan be capable of being implemented. This in turn depends on what the parties to the Agreement meant by the term “DOH Closure Plan Approval”.

Where the terms of a contract are unambiguous, the Court must not ignore the plain meaning of its terms or rewrite the language of the contract. An ambiguity will be found only where reasonable minds could differ as to what was intended by the parties. *Computer Assoc. Intl., Inc. v U.S. Balloon Mfg. Inc.*, 10 A.D.3d 699, 782 N.Y.S.2d 117 (2<sup>nd</sup> Dept 2004); *Wiggins v Kopko*, 94 AD3d 1268, 942 NYS2d 666 (3d Dept 2012).

Whether or not a writing is ambiguous is a question of law to be resolved by the courts upon a reading of the document “as a whole to determine its purpose and intent”. *WWW Assoc. v Giancontieri*, 77 NY2d 157, 565 NYS2d 440 (1990); *Van Wagner Adv. Corp. v S & M Enters.*, 67 NY2d 186, 501 NYS2d 628 (1986).

A contract must be construed in a way that affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect. *Platek v Town of Hamburg*, 24 NY3d 688 (2015); *Consolidated Edison Co. of NY v Allstate Ins. Co.*, 98 NY2d 208, 746 NYS2d 622 (2002).

The court's role is limited to interpretation and enforcement of the terms agreed to by the parties, and the court may not rewrite the contract or impose additional terms which the parties failed to insert. *Maser Consulting PA v Viola Park Realty LLC*, 91 AD3d 836, 936 NYS2d 693 (2<sup>nd</sup> Dept 2012); *131 Heartland Blvd. Crop. v CJ Jon Corp.*, 82 AD3d 1188, 921 NYS2d 94 (2<sup>nd</sup> Dept 2011).

Courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing. *Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 775 NYS2d 765 (2004); *Reiss v Financial Performance Corp*, 97 NY2d 195, 738 NYS2d 658 (2001).

The Court will not imply a term where the circumstances surrounding the formation of the contract indicate that the parties, when the contract was made, must have foreseen the contingency at issue and the agreement can be enforced according to its terms. *Reiss v Financial Performance Corp*, 97 NY2d 195, 738 NYS2d 658 (2001).

A contract to purchase real estate is ambiguous where a term in the contract lends itself to two reasonable interpretations. *Farahzad v Monometrics Corp.*, 119 AD2d 721, 501 NYS2d 136 (2<sup>nd</sup> Dept 1986).

When a term or clause is ambiguous and the determination of the parties' intent depends upon the credibility of extrinsic evidence or a choice among inferences to be drawn from extrinsic evidence, then the issue is one of fact. *Amusement Business Underwriters v American International Group Inc.*, 66 N.Y.2d 878, 498 NYS2d 760 (1985); *Sutton v East River Sav Bank*, 55 NY2d 550 450 NYS2d 460 (1982).

It is uncontested that the Agreement envisioned the Plaintiff closing on the property even though there were residents still left in the facility, and made specific provisions for the Operator to continue to manage the facility while the closure plan was being implemented.

Section 9(e) of the Agreement provided for this contingency by assigning the lease between the Operator and the building owner, to the Plaintiffs, and amending its terms to provide that the Operator would continue to operate the facility and “diligently

and in good faith carry out the Closure Plan” (Section 10 (a)(ii) of the Amendment to the Operating Lease)

Section 9(e) of the Agreement made entering into the Amendment to the Operating lease a condition of the closing stating, “[F]or the avoidance of doubt, the Closing is contingent upon, and shall not be deemed to have occurred unless, Operator fully complies with its obligations under the Amendment to Lease on the Effective Date as defined herein”.

The Agreement provided that upon closing on the property, \$7,500,000.00 of the purchase price would be set aside in a tenant escrow fund as an incentive to relocate any remaining residents. The Amendment to the Operating lease provided for Plaintiff to potentially fund an additional “bonus amount” of \$7,500,000.00 to be used to induce any remaining residents to relocate within 16 months after the closing on the property.

While Plaintiff agreed to close on the property even with residents remaining and the facility still being open, the Agreement did not require the Plaintiff to assume responsibility either for closing the facility or for operating the facility until it was closed. The Agreement provided that the Operator would carry out the closure plan and wind down operations of the facility, pursuant to the closure plan.

There is a significant difference between purchasing a property with residents remaining while a closure plan, with a date for closing the facility, is in place, and purchasing a property with remaining residents, while there is no closure plan in place. The time, risks, and costs, of relocating the residents and closing the facility are significantly greater if there is no closure plan in place, than if there is one in place.

The fact that DOH approval of the closure plan was one of the two conditions precedent to closing, demonstrates that even though Plaintiff had committed to closing

on the building while the facility was still operating, the Agreement contemplated that the facility would be closed pursuant to the approved closure plan.

Implementation is an integral part of the closure plan. Without the ability to implement the plan, the plan itself is of little, if any, significance. Defendants' interpretation of the meaning of approval of the plan is controvertible when considered in the context of the whole Agreement. Indeed, there seems little reason to have made a \$76,500,000.00 sale of property contingent upon "DOH Closure Plan Approval", without the understanding or assumption that the plan could be implemented if it was approved by DOH.

Defendants' interpretation that implementability is not part of DOH Closure Plan Approval, is at odds with the fact that the February 24<sup>th</sup> letter from DOH states that the "Department approves the implementation of the closure plan . . ." Significantly, the DOH approval on which Defendants rely, approved implementation of the plan.

Both the Agreement and the Amendment to the Operating Lease are silent on what would occur if the closure plan could not be implemented. There is no indication in the Agreement as to which party would bear the risk and increased costs of the delay which would result in the event that the Operator was unable to implement the closure plan.

It is an open question whether this contingency was ever considered by the parties. No evidence has been submitted by either party that there was any discussion or agreement among the parties as to what would happen if the closure plan could not be implemented.

In determining whether there is ambiguity in the term "DOH Closure Plan Approval", the Court must consider the term in light of the entire Agreement, including

the Amendment to the Operating Lease, which was made a condition of the closing under the Agreement. The Amendment to the Operating Lease indicates that both sides intended that in the event there were residents remaining at the time of the closing, the Operator would continue to operate the facility and would close the facility pursuant to the terms of the closure plan.

Considering the text of the agreement alone, both Plaintiff's and Defendants' interpretations of the term "DOH Closure Plan Approval" are reasonable interpretations.

At a minimum, there is a question of fact as to whether the parties' intent was that "DOH Closure Plan Approval" meant approval of a plan that was capable of being implemented. It is necessary to look to evidence extrinsic to the Agreement to determine what the intent of the parties was.

Defendants' further argument that the Plaintiff's conduct, after becoming aware of the Residents' lawsuits demonstrated that the lawsuits were not an obstacle to closing, conflates the Residents' objections to the plan, with the fact that the plan could not be implemented. It was the inability to implement the closure plan, independent of the Residents lawsuits that was, by itself, an obstacle to closing.

On June 5<sup>th</sup>, the day that Plaintiff made the additional \$2,650,000.00 down payment, the parties were unaware that the closure plan could not be implemented. The stipulation entered into in the Residents' actions on June 18<sup>th</sup> provided that the stipulation would not affect the operator's ability to initiate special proceedings to evict the Residents. This indicates that as of that date, the parties were still unaware that the Operator could not commence special proceedings under the closure plan.

Plaintiff asserts that it did not learn that the plan could not be implemented, until its attorneys were informed of that fact by Defendants' attorneys on July 24<sup>th</sup>. Similarly it was not until July 28<sup>th</sup> that the title company included the Residents' lawsuits as title exceptions.

As the Plaintiff was unaware until one week before the scheduled August 1<sup>st</sup> closing that the plan could not be implemented, its prior actions in completing the down payment and setting the closing date, do not demonstrate that Plaintiff intended that DOH approval of a closure plan, that could not be implemented would satisfy the conditions precedent of the Agreement.

It is unclear from the record whether the continued negotiations between the parties after August 1<sup>st</sup>, including the agreement to extend Plaintiff's time to terminate the Agreement until August 15<sup>th</sup>, evidence an intent to continue to perform under the Agreement, or an attempt to negotiate a new terms.

Defendants have also moved for a declaration that Plaintiff is in material default of under the Agreement and that Defendants are entitled to keep the down payment as liquidated damages. As there is a triable issue of fact as to whether the approval of a closure plan that could not be implemented satisfied the conditions precedent of the Agreement, granting Defendants summary judgment declaring Plaintiff in default of the Agreement for failing to close on August 1<sup>st</sup>, is not warranted.

Further, there is an issue of fact whether Defendant satisfied the requirement that it secure, pay for, and maintain the insurance policies required under the Amendment to the Operating Lease. Assumption of the amended lease was a condition of the closing under the Agreement. Proof of insurance was not tendered at the attempted closing on August 1<sup>st</sup>, and the certificate of liability insurance submitted by

the Defendants with their moving papers does not establish that Defendants actually secured and paid for the required insurance as of August 1<sup>st</sup>. The certificate submitted is labeled "sample", and it does not include the name of the insurer, nor a policy number. Defendants have not established, at this point, that they met the insurance requirements, and on that additional basis, have not met their burden for summary judgment.

Wherefore, Defendants motion for summary judgment is denied. The parties are directed to appear in the intake part from a preliminary conference on April 13, 2015. This constitutes the decision and order of this Court.



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**HON. WAYNE P. SAITTA**  
J.S.C.

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