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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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In the Matter of the Application of

PATRICIA GERMAN, KRISTIAN GEVERT, TIM KAO, CHI-HUA CHUANG and MASOUD ARABIAN,

Plaintiffs,

Index No. 105539/11

-against-

DECISION/ORDER

S&P ASSOCIATES OF NEW YORK, LLC, PMF PROPERTIES LLC and STARR & ASSOCIATES as Escrow Agent,

Defendants,

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HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits.....	2
Replying Affidavits.....	3
Exhibits.....	4

This case involves a condominium conversion of a residential building located at 30 West 63rd Street, N.Y., N.Y., known as 30 Lincoln Plaza pursuant to an offering plan ("the Plan"), in which S&P Associates of New York, LLC ("S&P") was the sponsor. The plaintiffs Kristian Gevert, Tim Kao, Chi-Hua Chuang and Masoud Arabian (collectively referred to as "plaintiffs") are tenants in 30 Lincoln who signed purchase agreements to buy apartments from S&P in the conversion. Plaintiffs have brought the present motion for partial summary judgment on their first cause of action seeking specific performance by defendant of its alleged obligation to

renovate the apartments plaintiffs purchased and thereafter close title. As will be explained more fully below, the motion for summary judgment is denied.

The relevant facts are as follows. On or about September 21, 2007, S&P, as sponsor, submitted a condominium conversion plan to the Attorney General for approval pursuant to General Business Law ("GBL") § 352-eeee, which requires that offering plans be submitted to, and approved by, the Attorney General before buildings may shift from residential rental status to condominium or cooperative ownership status. All of the plaintiffs entered into purchase agreements to purchase apartments in the building in April and May 2008, soon before the financial crisis of 2008 which occurred in September 2008. The Plan was declared effective in December 2008 and the Attorney General approved the effective date of the Plan on August 24, 2009.

The plaintiffs in this action were part of the tenants committee that attempted to challenge the decision of the Attorney General to allow the Plan to become effective and that brought an Article 78 proceeding challenging the Attorney General's declaration of effectiveness and then unsuccessfully appealed to the Appellate Division.

On or about April 10, 2008, plaintiff Gevert, a resident of unit 20C, contracted to purchase unit 27PR in the building for $2,515,000.00 but has not yet closed on the unit allegedly due to, *inter alia*, defendants' failure to properly renovate the unit pursuant to their agreement. On August 6, 2010, S&P gave Gevert notice to close on September 16, 2010. Gevert refused to close on that date, saying the unit was not renovated and that Gevert's bank was not ready to close. On the eve of closing, Gevert's lawyer wrote to S&P: "I have been advised by David Snowdon-Jones that the Unit will not be ready before the end of the month. My client's bank

then has to go in and do their appraisal. After the appraisal the file moves to underwriting and that will take a certain period of time. I cannot see getting this closed before mid-October."

On October 11, 2010, S&P gave Gevert another notice of closing to be held November 11, 2010. Gevert again refused to close, saying that the renovation of the unit was not complete. Again on the eve of closing, Gevert's lawyer wrote to S&P: "The Unit is still incomplete and not in a condition to be closed upon. My client is working with the Sponsor to resolve some open issues. We hope these issues will be resolved shortly. If they are, construction will probably take from 4-6 weeks."

Gevert's lawyer wrote to S&P: "It is my opinion that my client does not have to pay for any of the work done in the Unit until the cost of such work exceeds the $350,000 construction allowance he is entitled to under the Second Amendment to the Plan. As I am sure you know, my client did not provide the Sponsor with authorization to proceed with a standard renovation. This project developed into a hybrid where we have the Sponsor wearing two hats; working on behalf of the Sponsor, while also following the custom design developed by my client's architect."

On or about April 10, 2008, plaintiffs Kao and Chuang (hereinafter referred to as "Kao"), residents of unit 17L, contracted to purchase unit 23PR in the building for $2,470,000.00 but have not yet closed on the unit allegedly due to, *inter alia*, defendants' failure to properly renovate the unit pursuant to their agreement. Two and a half years after signing the agreement, Kao wrote to his lawyer on Oct. 26, 2010:

> The apartment is completely gutted now. The purchase contract calls for the apartment to be renovated by two methods:
> 1) The sponsor provides the contractor and does the renovation according to our architectural floor plan but limit to certain types of finishes (flooring, bathroom fixture, kitchen appliances, kitchen countertop, etc.) as displayed in the building's model rooms/sales office

> 2) The buyer hires his own contractor and does the renovation and the seller deducts $350,000 (for PR line) from the purchase price at closing.
> My question is, is the closing under both methods after the renovation is completed and pass the inspection? In other words, if I decide to use method 2), i.e. hire my own contractor to do the renovation, am I forced to close before the renovation is completed?

S&P's attorney wrote to Kao's attorney on November 16, 2010, stating that Kao was in default and requesting that Kao cure the default and proceed with the transaction. Kao's attorney responded:

> Contrary to your assertion, Mr. Kao has been working with the building's management and his architect to finalize the plans, obtain the requisite sign-offs and submit to the NYC Department of Buildings ("DOB") for approval. To this end, Mr. David Snowdon-Jones, Mr. Kao's architect, worked with Alistair Lamb to obtain checks and to (sic) signatures required for his filing. All of the plans were then completed and sent to CODE LLC, the building's expeditor on November 2, 2010 for submission with DOB. At this point we are waiting for a response back from DOB. My client is working diligently to perform his obligations. Once the plans are approved and work permits issued, we will be able to fully engage with your client to communicate all of the information they so require.

On or about May 20, 2008, plaintiff Arabian, a resident of unit 8N, contracted to purchase his own unit for $1,965,000.00 but has not yet closed on the unit allegedly due to, *inter alia*, defendants' failure to properly renovate the unit pursuant to their agreement. Arabian's attorney wrote to the Attorney General on December 8, 2009 and argued that the current value of Arabian's apartment was significantly lower than the purchase price, that the defendant was in violation of the terms of the Plan, that the defendant made untrue statements of material facts with respect to the offering prices and that the tenants have been deceived because the Plan and the purchase agreement state that the tenant purchasers shall benefit from more favorable terms. The attorney concluded the letter by stating that the defendant has scheduled a closing for the day the letter was sent and that her client cannot close until the Attorney General makes a

determination as to the necessary reduction of the purchase price or directs the defendant to return Arabian's down payment.

The purchase agreements between the plaintiffs and defendant incorporate the terms of the offering Plan and any amendments. On April 11, 2008, S&P filed the Second Amendment to the Plan, which is incorporated into the purchase agreements. The Second Amendment allows the buyer of a vacant unit to elect to receive a standard renovation at S&P's expense or a credit at closing. The Second Amendment says that a tenant who purchases a unit other than the unit that the tenant occupied at the time of the Plan, would have the right to receive either (a) the standard renovation at S&P's expense, or (b) a credit at closing. If the purchaser elects the standard renovation the purchaser does not have to close until the renovation is substantially complete. However, if the purchaser elects the credit at closing, there is no right to delay closing. The Second Amendment says:

> A Bona Fide Tenant will not be required to close title to the Renovated Unit until such time as the renovations are substantially complete, as determined by Sponsor.
> ** *
> In the event a Bona Fide Tenant wishes to purchase a Vacant Unit without any of the foregoing renovations, the Bona Fide Tenant will receive a credit at Closing of $100,000 for a studio, $150,000 for a one bedroom and $200,000 for a two bedroom Residential Unit.

The plaintiffs argue that they are entitled to summary judgment on their claim for specific performance on the ground that each of them elected to have the defendant sponsor perform the standard renovations pursuant to the second amendment, that the sponsor never performed the standard renovations despite their request that the sponsor do so and that the sponsor remains obligated to renovate the apartments and to close on the apartments once the renovation is

completed. The sponsor makes a number of arguments as to why the plaintiffs are not entitled to summary judgment, including its argument that the plaintiffs Gevert and Kao did not select the standard renovation but instead sought a hybrid arrangement not authorized by the second amendment pursuant to which the sponsor would perform the renovations as specified by the tenant up to the amount of the closing credit. Notably, in the amended complaint, it is specifically alleged that both Gevert and Lao agreed to have the sponsor perform renovations on the property within the $350,000 renovation allowance, in lieu of receiving a $350,000 renovation credit.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

Initially, plaintiffs' motion for specific performance of the allegedly required renovations is barred by the prior decision of this court, dismissing plaintiffs' claim for specific performance of the renovations. In this court's prior decision dismissing many of plaintiffs' claims in this action, the court dismissed plaintiffs' claim for specific performance directing S&P to renovate the units plaintiffs agreed to purchase. The court held as follows:

> Here, the Amended Complaint's second cause of action seeking specific performance must be dismissed on the ground that plaintiffs Arabian, Gevert and Kao have an

> adequate remedy at law for money damages. The Amended Complaint's second cause of action seeks specific performance compelling S&P to perform renovations to the units that plaintiffs Arabian, Gevert and Kao agreed to buy. Specifically, the second cause of action alleges that there were agreements between S&P and Arabian, Gevert and Kao to perform renovations pursuant to certain architectural plans and specifications. However, the cost of renovating the apartments at issue in accordance with the architectural plans and specifications can be calculated to a significant degree of certainty based on the amount of labor and the materials used. Thus, as money damages would protect these plaintiffs' expectation interest, there is no basis for this court to compel specific performance with regard to the renovations of the specific units.

Based on this court's prior decision, which is law of the case, plaintiffs are barred from relitigating the issue of whether they are entitled to specific performance compelling the renovations and their motion for summary judgment on their claim for specific performance of the renovations is denied.

The court finds that plaintiffs' motion for summary judgment on their claims for specific performance of the agreements to convey the apartments must be denied as there are disputed issues of fact as to whether there was unreasonable prejudicial delay on the part of the plaintiffs which would preclude the remedy of specific performance. "Generally, the equitable remedy of specific performance is routinely awarded in contract actions involving real property, on the premise that each parcel of real property is unique (*see* 3 Dobbs, Remedies § 12.11 [3], at 299 [Practitioner's 2d ed]). The court has discretion to deny such relief "as equity and justice seem to demand in the light of the circumstances of each case" (91 NY Jur 2d, Real Property Sales and Exchanges § 204), and the available equitable defenses include serious unfairness, undue hardship, and laches, or unreasonable prejudicial delay (*see* 3 Dobbs, Remedies, *supra* at 302)." *EMF Gen Cont. Corp. v. Bisbee*, 6 A.D.3d 45 (1st Dept 2004). "[W]here it is established that the buyer has made excuses in order to delay closing on the contract, with an actual purpose of waiting to see whether to enforce the contract depending upon whether the market value of the

subject property increases or decreases, the courts will not grant specific performance." *Id.*

Under the unique factual circumstances of this case, which are discussed in the fact section of this decision and the court's prior decision in this matter, the court finds that it would be inappropriate to make a determination at this time as to whether or not there was unreasonable prejudicial delay on the part of plaintiffs in proceeding with the closing of these properties. This court cannot make a determination at this stage of the litigation on a summary judgment motion as to whether the delay by plaintiffs in scheduling a closing and in making the present motion for summary judgment was based on the plaintiffs' desire to wait and see what happened in the New York real estate market before moving forward on purchasing their apartments. The unique circumstances of this case which make a summary determination of the claim for specific performance inappropriate include the dramatic decrease in residential real estate values immediately after plaintiffs entered into their purchase agreements due to the 2008 economic collapse; the fact that the agreements were entered into in 2008 and it is now 2015; prior unsuccessful litigation by plaintiffs to attempt to lower the price of the apartments; Arabian's attempt to persuade the Attorney General to require defendant to either lower the price of the apartment or refund his down payment; the long delay between the commencement of this action in 2011 and the present motion by plaintiffs for summary judgment on their claim for specific performance; the fact that there have not yet been any depositions of plaintiffs; and the failure of both Kao and Gevert to ever make an election between the standard renovation and receiving a credit and to schedule a closing for their apartments. Although the plaintiffs argue that Gevert and Kao made an election to receive the standard renovation and therefore had no obligation to close until those standard renovations were performed, the court finds that there are disputed

issues of fact as to whether Gevert and Kao ever agreed to the standard renovation as opposed to their seeking a hybrid arrangement which would not have constituted either the standard renovations or receiving a credit.

Based on the foregoing, the court need not reach the other arguments raised by the parties. The motion by plaintiffs for summary judgment is denied in its entirety. This constitutes the decision and order of the court.

Dated: 8/21/15

Enter: _____
J.S.C.

CYNTHIA S. KERN
J.S.C.