Cameron Hill Constr., LLC v Syracuse Univ.
2016 NY Slip Op 32770(U)
December 22, 2016
Supreme Court, Onondaga County
Docket Number: 2014EF2722
Judge: Donald A. Greenwood
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At a Motion Term of the Supreme Court of the State of New York, held in and for the County of Onondaga on October 25, 2016.

PRESENT: HON. DONALD A. GREENWOOD
Supreme Court Justice

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

CAMERON HILL CONSTRUCTION, LLC,

Plaintiff,

v.

SYRACUSE UNIVERSITY, CITY OF SYRACUSE, INDUSTRIAL DEVELOPMENT AGENCY and CITY OF SYRACUSE,

Defendants.

DECISION ON MOTION

Index No.: 2014EF2722
RJI No.: 33-14-2702

APPEARANCES: JOHN CHERUNDOLO, ESQ., OF CHERUNDOLO LAW
For Plaintiff

MICHAEL J. BOWE, ESQ., OF KASOWITZ, BENSON, TORRES & FRIEDMAN, LLP
For Defendant Syracuse University

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For Defendant City of Syracuse

JON DEVENDORF, ESQ., OF HISCOCK & BARCLAY
For Defendant Syracuse Industrial Development Agency

I. Procedural History

This action was commenced on July 11, 2014 when Cameron Hill Construction, LLC (hereinafter Cameron Hill) filed its complaint against the defendants Syracuse University (hereinafter the University), Syracuse Development Agency (hereinafter SIDA) and the City of Syracuse (hereinafter the City). The complaint contains five causes of action, which allege, *inter*

alia, that the University wrongfully terminated the Amended and Restated Right of Reentry Agreement (the Amended Right of Entry Agreement) and Ground Lease executed between the parties, and that the termination was done without just cause, in bad faith and in violation of the covenant of fair dealing. Cameron Hill seeks to have the alleged termination declared null and void and to allow the parties to continue all actions under the agreements in good faith. In addition, Cameron Hill sought a preliminary injunction and a permanent injunction in its complaint, alleging it would suffer irreparable harm without the relief, as well as the loss of leasehold of the subject real property and monetary losses in excess of three million dollars, which would cause its financial ruin. Cameron Hill also alleges that a valid contract exists by virtue of the Ground Lease, and seeks specific performance and an order compelling the University to fully comply with and proceed with each of the provisions of the agreements between the parties. With respect to the remaining defendants, Cameron Hill alleges, *inter alia*, that as a result of the University's wrongful termination, the City improperly cancelled the Site Permit and Building Permit and that SIDA would likely cancel the agreement regarding payment in lieu of taxes (hereinafter the PILOT Agreement) and the various attendant leases.

Simultaneously with the filing of the complaint, plaintiff moved for a preliminary injunction by Order to Show Cause seeking a Temporary Restraining Order (hereinafter the TRO) in the interim. The Order to Show Cause was signed by Supreme Court (Hafner, J.) on July 11, 2014, and the temporary relief sought by Cameron Hill was granted. As a result, the University was enjoined from terminating the Ground Lease and related agreements, such as the Amended Right of Entry by which Cameron Hill was to develop a bookstore and related facilities. By Order dated August 19, 2014 this Court continued the TRO until August 29, 2014

and also ordered that Cameron Hill post an undertaking in the amount of $1,000,000 by no later than that date. The order further provided that if Cameron Hill failed to post the undertaking the order would not take effect and would be vacated. The parties subsequently engaged in substantial discovery, including document production and depositions of various witnesses. Settlement conferences were held with and without the court and a modified injunction was negotiated and agreed to by the parties which included restoring the building site and a waiver of the undertaking by the University. The University subsequently moved to vacate the preliminary injunction and later moved for summary judgment dismissal of the complaint in its entirety. Cameron Hill cross-moved for summary judgment on the second cause of action for specific performance, the third cause of action for breach of contract and monetary damages and the fourth cause of action for breach of the covenant of good faith and fair dealing. After numerous adjournments for various reasons such as further discovery, accommodating the schedules and personal issues of counsel, the various motions were orally argued before this Court on October 25, 2016.

II. Background of the Transaction at Issue

Commencing in the spring of 2007, Cameron Hill and the University undertook a multi-year vetting, negotiation, and design process (hereinafter the Process) for the purpose of agreeing upon the ultimate location and design of a mixed use building that would house retailers as well as educational space and the University's bookstore and fitness center. Dr. Louis G. Marcoccia, for the University, and Thomas Valenti, for Cameron Hill, were the primary points of contact for the negotiations and their respective building and design teams worked closely together throughout the Process. Throughout the early years of the Process, the size of the building

changed drastically. The University's initial design concept contemplated a building in excess of 250,000 square feet, yet when the University and Cameron Hill made their joint zoning and site plan application to the City of Syracuse, that plan contemplated an approximately 123,000 square foot building.

On June 3, 2008 Cameron Hill and the University signed a letter of intent whereby Cameron Hill agreed to ground lease certain property adjacent to the University Avenue garage from the University, build a building of approximately 116,000 square feet to house the University bookstore, fitness center and commercial retail. The rent for the bookstore and fitness center that was agreed to was $1,483,846 to be paid by the University annually to Cameron Hill. This letter of intent was the basis for the transaction between Cameron Hill and the University. Although scope of work between the parties, sizes of spaces, plans and other terms and conditions changed many times between 2008 and June of 2014, the basic deal never changed, namely that the Ground Lease and Space Lease (both as hereinafter defined) be coterminous for an initial term of thirty (30) years, that the University would not be responsible for the payment of real estate taxes on portions of the building it occupied for its exempt purposes and that the annual rent of $1,483,846 would not change.

In 2010, the University determined the size of the building to be designed, developed, and built should be further reduced to approximately 85,000 square feet. At that point, the agreed upon design concept of the building contemplated that one half of the first floor (approximately 7,300 square feet) would be commercial retail space that Cameron Hill would leased to third party retailers and the remaining half of the first floor and the other floors (approximately 77,700

square feet total) would be space that Cameron Hill leased to the University for use as the University's bookstore and fitness center (the Building).

The University and Cameron Hill agreed that Cameron Hill would construct the Building on property owned by the University and leased to Cameron Hill pursuant to a Ground Lease Agreement that would provide a thirty-year term commencing upon completion of the Building and during which term Cameron Hill would own the Building and pay an annual rent to the University of one dollar, plus such other carrying costs as might be expected under the circumstances for such a ground lease. In an effort to ensure the economic feasibility of Cameron Hill undertaking the construction of the Building and otherwise fulfilling its obligations to the University, which included the obligation that Cameron Hill ensure the University would have no responsibility for the payment of any real property taxes assessed against the Land or the Building, Cameron Hill sought and received certain financial assistance from SIDA, including a sales tax exemption, mortgage tax exemption and a payment in lieu of taxes agreement (hereinafter the Financial Assistance).

On February 21, 2013, Cameron Hill and the University entered into a Ground Lease Agreement (hereinafter the Ground Lease) pursuant to which the University leased land directly adjacent to a four-story parking garage located on University Avenue between East Adams Street and Harrison Street in Syracuse, New York (hereinafter the Land) to Cameron Hill for the purpose of Cameron Hill's development of the Land to include the Building (hereinafter the Project). In furtherance of its receipt of the Financial Assistance and upon execution and delivery of the Ground Lease, Cameron Hill, as landlord, and defendant SIDA, as tenant, entered into that lease agreement (hereinafter the Company Lease) pursuant to which Cameron Hill

leased its right, title and interest in the Land to SIDA. Immediately thereafter, SIDA, as landlord, and Cameron Hill, as tenant, entered into a lease agreement (hereinafter the Agency Lease) pursuant to which SIDA leased back to Cameron Hill the right, title and interest in the Land, and SIDA required that Cameron Hill commence construction of the Building within six months of the date of the Agency Lease and substantially complete such construction within eighteen months thereafter (the SIDA construction requirements).

During the period of 2010 through June of 2014, Cameron Hill agreed to many changes required the University relating to the terms of the deal and the modification of the Building plans and specifications. During the course of the year of 2013, Cameron Hill refined the construction drawings with the University's building and design group and all of the relevant architects, engineers and others involved in the Project retained by both the University and Cameron Hill. The University's design group drove the design process, and continually refined its desires and space utilization within the Building, which resulted in a large list of design drawing iterations that continued right up to and including the week of June 2, 2014.

Cameron Hill submitted its application for a site work, footing and foundation permit to the City of Syracuse in early August 2013. Cameron Hill, however, was not able to submit its application for the building permit at the same time because an application for a building permit in the City of Syracuse requires the submission of the plans and specifications for the building to be constructed. Cameron Hill claims that the University's design group's repeated requests for changes to the plans and specifications prevented Cameron Hill from submitting its application for a building permit until February 18, 2014. The University denies it was responsible for the delay.

By notice dated November 19, 2013, SIDA placed Cameron Hill in default for failure to commence construction of the Building within six months of the date of the Agency Lease . Cameron Hill claims that it attempted to cure the default, negotiating with the University to allow Cameron Hill access to the Land to commence site work in advance of its receipt of the building permit. On December 17, 2014, Murnane Building Contractors, Inc. (hereinafter Murnane) obtained a permit from the City of Syracuse to begin the site work and footing and foundation work upon the Land. In order to cure the default concerning SIDA, on December 18, 2013, the University and Cameron Hill entered into a Right of Entry Agreement that allowed Cameron Hill access to the Land for the purpose of commencing construction work in keeping with the site work permit. Upon execution and delivery of the Right of Entry Agreement, Cameron Hill commenced construction. Subsequently, Cameron Hill obtained insurance bonding as required by the Right of Entry Agreement.

Despite the commencement of construction, Cameron Hill claims that the University's design group continued to require new and further changes to the plans and specifications. Subsequently on December 23, 2013, to correct the legal description of the Land and to ratify and confirm the remainder of the terms contained therein, the University and Cameron Hill entered into a first amendment to the Ground Lease. Cameron Hill and SIDA amended and restated the Company Lease and the Agency Lease (respectively hereinafter the A&R Company Lease and the A&R Agency Lease). Also in December of 2013, Cameron Hill obtained the University's consent to the PILOT Agreement with SIDA and proceeded with the execution and delivery of the PILOT Agreement. Through the winter of 2013 to 2014, Cameron Hill continued to work with the University's design group and Marcoccia to finalize the construction plans, documents,

specifications and other issues necessary to submit the application for a building permit that would allow commencement of construction of the Building. This process included a multitude of design changes to the drawings and specifications that Cameron Hill claims were at the insistence of the University's design group. The University denies responsibility for any delays.

On February 18, 2014, Murnane applied for the building permit, which was issued on April 14, 2014 (hereinafter the Building Permit). Even after the Building Permit was issued, the University required additional plan changes.

Because plans were changing, Murnane advised Cameron Hill to delay final bidding on the Project until the plans were solidified. Consequently, Cameron Hill did not receive a Guaranteed Maximum Price Contract from Murnane until June 6, 2014, which Cameron Hill claims negatively impacted upon the ability to close the financing facility for the Project. Nonetheless, Cameron Hill continued construction of the Project during this period in reliance on the course of dealing that had been established with the University. The Project was moving forward, even though plans were not complete, even though Cameron Hill had not closed on its financing facility, and further Cameron Hill accelerated construction, at the request of the University.

On May 12, 2014, Cameron Hill entered into an Amended and Restated Right of Entry Agreement (hereinafter the A&R Right of Entry Agreement). Under the terms of that Agreement, the University and Cameron Hill went to the next step of the Project, and Cameron Hill, in the capacity as tenant under the Ground Lease, entered upon the Land to continue construction. Before agreeing to execute the A&R Right of Entry Agreement, the University required Cameron Hill to deliver (a) a description of a portion of the improvements that Cameron

Hill would be authorized to perform on the Land under the A&R Right of Entry Agreement (the project work) and the work of restoring the Land to its condition as it existed prior to December 18, 2013 (the restoration work) if the Project financing did not occur on or before June 13, 2014; (b) supply a schedule identifying the time period during which the project work would be performed (the work schedule); and (c) a letter of credit issued by KeyBank National Association (hereinafter KeyBank) to the University in the amount of $250,000.00, together with lien waivers for all project work performed through the date of closing of the Project's financing facility. Cameron Hill was also to acknowledge the environmental conditions of the Project in proper form and to supply a mechanic's lien waiver from Mumane and its other engineers and architects. All of these items were delivered by Cameron Hill and received by the University at or about the time of signing of the A&R Right of Entry Agreement.

The A&R Right of Entry Agreement contained six additional requirements to be fulfilled by Cameron Hill, five of which required completion on or before June 10, 2014 (hereinafter the A&R Right of Entry Agreement Deliverables), and the last of which, the closing of Project financing facility, required completion on or before June 13, 2014. Cameron Hill's failure to satisfy any of these six additional requirements would allow the University, upon notice to Cameron Hill, to terminate the Ground Lease, in which event (a) the Ground Lease would terminate on the date set forth in the University's notice of termination, (b) all recorded instruments relating to the Ground Lease, the Right of Entry Agreement and the A&R Right of Entry Agreement would be terminated of record, and (c) Cameron Hill, within five days after termination of the Ground Lease, would be obligated to begin restoration work. The A&R Right of Entry Agreement did not amend or modify the Ground Lease. On May 13, 2014, Cameron

Hill then worked to fully comply with the terms and conditions of the A&R Right of Entry Agreement, and went forward with the commencement of excavation of the Building pursuant to the Site Permit and Building Permit.

From May 12, 2014, through June 13, 2014, Cameron Hill and Murnane went about the process of moving forward with the construction. Significant progress was made, and by June 13, 2014, the Project was ahead of schedule. On May 21, 2014, Cameron Hill delivered to the University the construction schedule for the Building. On May 22, 2014, the University's design group acknowledged receipt of the construction schedule without any comment, concern or criticism. Cameron Hill and Murnane finalized the Guaranteed Maximum Price Contract on or about June 6, 2014. Accordingly, with Murnane's consent, on June 9, 2014, as required by the A&R Right of Entry Agreement, the bonding certificate was increased to $17,950,000.00 from the initial $55,411.50.

Shortly before May 12, 2014, the University's transaction counsel adopted a completion date of June 18, 2015, for the delivery of the Building, which they claimed was necessary because of the SIDA Construction Requirements. However, the University required, in the A&R Right of Entry Agreement, that Cameron Hill obtain from SIDA an estoppel agreement showing that under certain conditions SIDA would agree that the completion of construction could be extended another four months beyond June 18, 2015. As a result, Cameron Hill obtained that additional four months of construction time under the SIDA agreements.

As the week ending June 13, 2014 approached, the A&R Right of Entry Agreement Deliverables had been delivered to the University. Nowhere in any of the documents submitted to Cameron Hill was there any "time of the essence" requirement that would require the A&R

Right of Entry Agreement Deliverables and the closing of the Project's financing facility to be completed in a time of the essence fashion, nor did any University representative insist on such a requirement. Design changes were still being requested by the University through June 6, 2014. In addition, the University hired Cameron Hill's architects and structural, mechanical, electrical and plumbing engineers to complete interior fixture and finish plans for the University that may have effected and changed already approved plans. A design meeting among these professionals and the University's design group was scheduled by the University for June 24, 2014. That meeting never took place.

On or about June 8, 2014, Cameron Hill's transaction counsel received from the University's transaction counsel comments to the Ground Lessor Estoppel Agreement sought by lenders' counsel (hereinafter the Ground Lessor Estoppel) that changed the lender's rights to cure defaults under the Ground Lease. On June 10, 2014, Valenti was informed by one of the Project financing facility lenders, KeyBank, that it had terminated the employment of Stephanie Acheson, who had been the employee responsible for placing the permanent financing on the Project. The Project financing facility was based upon a credit tenant lease with backup letter of credit issued by KeyBank during the construction period. Cameron Hill received a term sheet from the permanent lender, a company known as PPM, which is a holding company for Jackson National Life Insurance Company, on June 11, 2014. Promptly following Valenti's June 10, 2014 telephone call with KeyBank regarding the termination of Ms. Acheson's employment, he informed the University, through an e-mail to Dr. Marcoccia, that because of Acheson's departure the actual closing of the Project financing facility might be delayed for as long as up to

two weeks, as requested by KeyBank. Valenti received no response from Marcoccia to his e-mail.

As June 13, 2014 approached, the University's transaction counsel made demands upon Cameron Hill. For example, on or about May 11, 2014, the University's counsel inserted a new default provision to the draft of the Amended and Restated Ground Lease (hereinafter the Draft Lease) that made a default under the PILOT Agreement a default under the Draft Lease and, further, demanded that the "force majeure" clause contained in paragraph 28 of the draft lease no longer apply to the time requirement for Cameron Hill's completion of construction of the Building. Additionally, on June 8, 2014, the University's transaction counsel demanded a reduction in the number of days within which Cameron Hill's lenders would have the right to cure a Cameron Hill default, and also demanded a shortened time frame within which the lenders would have to commence a foreclosure. Yet, notwithstanding this, Marcoccia told Cameron Hill to accelerate construction.

Additionally, as June 13, 2014 approached, there were numerous changes to the Draft Lease and the Space Lease generated by the University's transaction counsel. Cameron Hill's transaction counsel presented to the University's transaction counsel for execution the easements that had to be recorded before the filing of the condominium declaration and bylaws. The easements were to have been executed by Marcoccia on June 11, 2014, however they were not and Cameron Hill was informed that Marcoccia was not authorized by the Chancellor to execute the easements.

On or about June 5, 2014, while the University's transaction counsel was still making edits to the Space Lease, Cameron Hill's transaction counsel was informed by the University's

transaction counsel that the Space Lease would not be signed until the closing of the Project financing facility. During this period of time as well, ongoing changes of the plans were required by the University's design group. The design group added a requirement that a generator be attached to a University panel in the Building and to roof top HVAC units, and that Cameron Hill needed to retain a surveyor to plot out the easement route. All of the requirements requested by the University leading up to June 13, 2014 were met, despite the insertion for the first time by the University's transaction counsel on May 12, 2014 "June 17, 204" [sic] as the completion date for the Building in the Draft Lease. The only remaining issue was the closing of the Project financing facility, and that was also being prepared.

On June 13, 2014, Cameron Hill received from the permanent lender, PPM on behalf of Jackson National Life Insurance Company, a commitment to provide approximately $22,000,000.00 worth of lease-backed mortgage pass-through certificates at a rate of 4.2%. All of the provisions demanded by the University had been complied with leading up to June 13, 2014, with the exception of the provision for the closing of the Project financing facility. With regard to that, the rate was locked on June 13, 2014 at 4.2%, and it was confirmed that the $22,000,000.00 of lease-backed mortgage pass-through certificates had been approved.

After Valenti sent the e-mail to Marcoccia and the University's transaction counsel on June 10, 2014 informing them of the Acheson termination, the University's transaction counsel contacted Cameron Hill's transaction counsel requesting that Stephen P. Gross of KeyBank call Marcoccia to explain the situation. Gross did so on both June 11th and June 12th and did not receive a response. On June 18, 2014, Valenti received a letter from the University's counsel in this litigation advising Cameron Hill that, pursuant to the A&R Right of Entry Agreement, the

University was terminating the Ground Lease for Cameron Hill's failure to satisfy provisions of the A&R Right of Entry Agreement. The letter identifies two alleged breaches of the Ground Lease: the failure to close on secure construction financing by June 13, 2014 and the failure to provide a construction schedule that credibly demonstrated that construction can be completed by June 18, 2015.

III. The Motions Currently Before the Court

The University seeks summary judgment dismissal of the complaint on essentially two grounds, that Cameron Hill could not meet its obligations under the Ground Lease and that the University properly exercised its right to terminate the Ground Lease due to Cameron Hill's failure to meet its deadline to obtain financing. In opposing the University's motion and cross-moving for summary judgment on the complaint, Cameron Hill argues that it is entitled to an award of damages because the University breached the implied covenant of good faith and fair dealing by frustrating Cameron Hill's ability to close financing by June 13, 2014, that the University breached the Ground Lease by failing to provide it with 30 days to close financing after delivery of its notice of termination pursuant to the terms of the Ground Lease, and that the language utilized by the University in the Amended and Restated Right of Entry did not provide clear and unequivocal notice that the Ground Lease would be immediately terminated by the University if the closing did not occur on June 13, 2014. After reviewing the voluminous record in this matter and the countless submissions of the parties, this Court finds that neither party is entitled to summary judgment as a matter of law given the factual nature of the claims and the numerous questions of fact. For the reasons fully set forth below, both summary judgment motions are denied.

The University presents voluminous submissions in support of its version of the facts. The University continues to argue that the Amended Right of Entry is a time of the essence agreement, or if not, that the University notified Cameron Hill that time was of the essence. It contends that Cameron Hill was unable to finance the deal as it was written at that time. The University claims that the bottom line is straightforward and that Cameron Hill cannot produce evidence that he could have performed the contract upon which it is suing, arguing that the only evidence establishes that Cameron Hill could not perform under the contract, which Valenti testified was "commercially reasonable" and "generally was acceptable in the industry" because Cameron Hill could not convince his bank to finance it. The University further claims that what Cameron Hill needed was a new contract that the banks would accept and wanted the University to agree to it, yet it had no obligation to do so, especially a new contract exposed to the risks of an unknown builder and of losing SIDA tax benefits that Valenti testified were the "sine qua non" of the transactions. According to the University, Cameron Hill can only sue and only has sued on the contract that actually exists, which is not one that Cameron Hill could perform, and thus the claim fails and that Cameron Hill manufactured a materially false and misleading tale for the court to secure an injunction that it hoped to leverage into a new contract. The University extensively discusses the Ground Lease, the cure rights thereunder, that the Ground Lease, including the cure right afforded to the lease hold mortgagee, i.e. the lender were not "commercially unreasonable" according to Valenti (*Valenti EBT, p. 112; Statement of Uncontested Facts (SOF) para. 22).* Valenti also testified that a cure provision that provided a ground lessee 30 days to cure its default under the Ground Lease and provided a lender an additional 30 days to cure a lessee's default under the Ground Lease though with respect to the

lender's cure rights so long as such defaults could be cured by payment of money only and was provided for in the ground lease "is generally what is acceptable in the industry" (*Valenti EBT p. 129; SOF para 23*). The University highlights Valenti's admission that one of the University's "key requirements for this transaction was that Syracuse University not be responsible for any real estate taxes on this building or property" (*Valenti EBT pp. 9-10; SOF para. 33*). He also testified that he was "not sure" if the project would have been financially feasible if it had not obtained the tax relief provided by the City and SIDA through the agency lease and Pilot (*Valenti EBT p. 11; SOF para 34*). He further testified that the agency lease and PILOT benefitted both Cameron Hill and the University and constituted the "sine qua non for the University" of the transaction and was "very important to the University" (*Valenti EBT p. 12; SOF para. 35*). The University also discusses the Right of Entry Agreement as well as the Amended Right of Entry Agreement and argues that Cameron Hill could not obtain financing under the "commercially reasonable" and industry standard terms of the Ground Lease. Valenti repeatedly testified that the Ground Lease is commercially reasonable and contained lender cure rights that were generally what is acceptable in the industry (*Valenti EBT p. 112; SOF para. 70*). The University notes that Cameron Hill's potential lender, however, was not satisfied with the cure rights provided to it under the Ground Lease and through the June 6 Ground Lessor Estoppel demanded cure rights in excess of those provided in the Ground Lease (*SOF para. 71*). Thus, Cameron Hill was unable to obtain financing upon the terms of the deal made between the parties, and thus demanded that the University altered the terms of the parties' existing deal (*SOF para. 72*). It also notes that Cameron Hill's counsel testified that the lender cure rights provided in the executed Ground Lease though admitted by Valenti to be industry standard and reasonable were

"not...such that they were acceptable to the lenders..." (*Kevin McAuliffe EBT, p. 74; SOF para. 73*). In addition, it points to KeyBank's Steven Gross' testimony that [redacted]

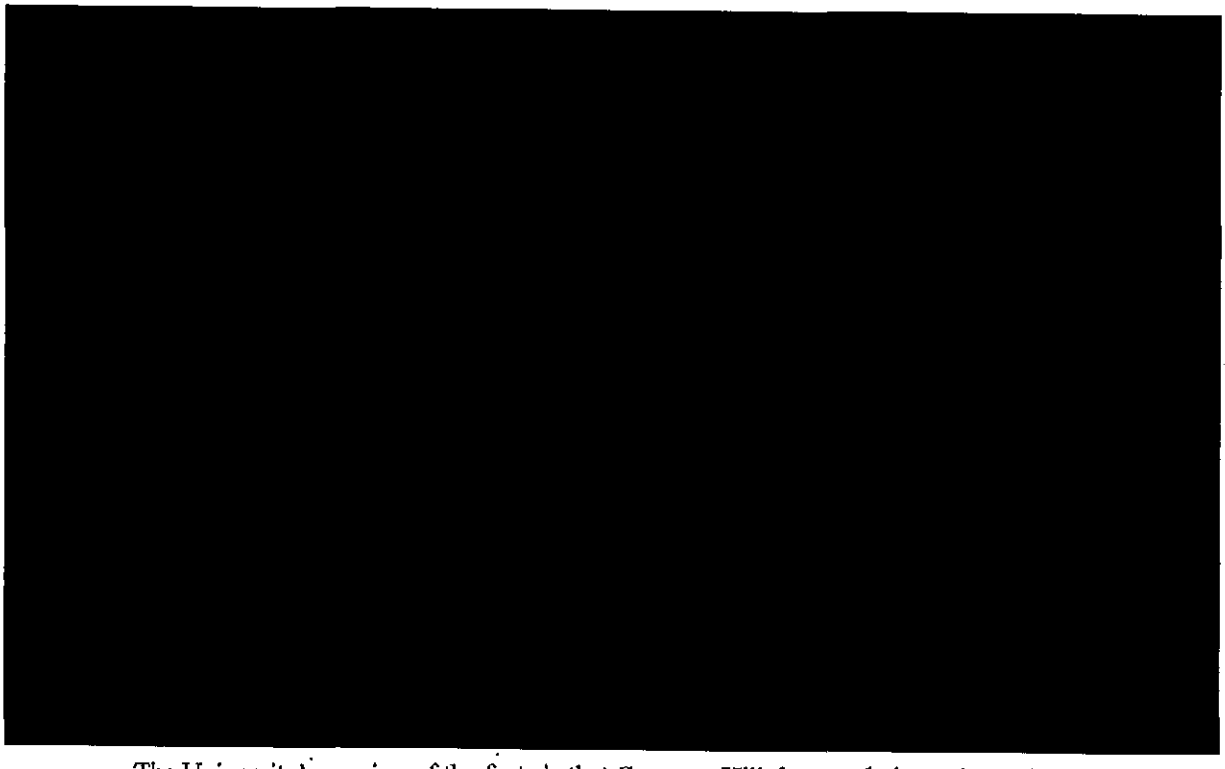
[redacted]

On June 20, 2014 Gross emailed Valenti indicating

[redacted]

The University also notes that in September of 2014 after filing this action Cameron Hill asked KeyBank directly whether it could "live with the terms that are set forth in the existing Ground Lease" (*Valenti EBT, p. 254; SOF para. 79*). [redacted]

[redacted]



The University's version of the facts is that Cameron Hill then made last minute demands that the University changed the commercially reasonable terms of the Ground Lease, noting that on June 6, 2014, one week prior to the June 13th deadline for Cameron Hill to close financing, Cameron Hill provided to the University for the first time a draft of an agreement called a "Ground Lessor Estoppel, Consent and Non-Disturbance Agreement" (*SOF para. 55*). With it Cameron Hill attempted to extract changes to the executed Ground Lease then in existence for 17 months from the University and demanded for the first time that new additional cure rights be provided to its lender under the Ground Lease (*SOF para. 57*). Cameron Hill demanded that the University agreed to increase the "grace period set" for lenders to cure any defaults thereunder by Cameron Hill "by an additional period of 90 days." (*SOF para. 57*). On June 8, 2014 the University's transaction circulated a counterproposal to the terms demanded in the June 6th draft,

countering with the proposal that the cure rights be extended by 15 days (*SOF, paras. 60-61*). The University notes that Cameron Hill's transaction counsel testified that he understood that the underlying causation of a counteroffer concerning cure rights and other proposed changes and stated that it "was to make sure that the Pilot remained in existence upon the completion of the building because the University did not want to pay taxes to the City" (*McAuliffe EBT, p. 111; SOF, para. 62*). He also testified if Cameron Hill defaulted under the Ground Lease an Agency Lease and PILOT were terminated the University could be subject to tax liability it desired to avoid (*EBT p. 111; SOF, para. 63*). However, in his reply affidavit submitted in support of Cameron Hill's original motion for a preliminary injunction, Valenti swore that "the clear proof on this record is that without commercially reasonable chances to cure a default of a borrower the bank (any bank) would not finance the loan.

The University thus claims that the facts demonstrate that Cameron Hill could not meet its obligations under the Ground Lease. The elements of breach of contract are formation of a contract between the parties, performance by the plaintiff, defendant's failure to perform and resulting damage. *See, Flomanbaum v. New York University*, 71 AD3d 80 (1st Dept. 2009). For Cameron Hill to recover either specific performance or damages it must demonstrate it was ready, willing and able to perform his obligations regardless of any purported breach by the defendant. *See, Bainbridge-Wyth partnership v. Niagara Falls Urban Renewal Agency*, 294 AD2d 806 (4th Dept. 2004). According to the University's argument, the documents and testimony from Cameron Hill's principals and attorneys demonstrate unequivocally that at no time could it have obtained financing under the terms of the Ground Lease. The parties' existing deal on the contract on the deal upon which it purports to sue. Instead the University claims that

the evidence is clear that Cameron Hill's potential lenders refused to lend under the terms of the Ground Lease and demanded that the University accede to terms other than those in the Ground Lease in order to close the financing. According to the University, the demands were made upon it despite the fact that Valenti testified the terms were commercially reasonable and the lender cure rights were generally acceptable in the industry. Steven Gross, of potential lender KeyBank, testified that [redacted]

The University relies upon a Fourth Department case which granted a defendant's motion for summary judgment on plaintiff's claim seeking specific performance of a real estate

transaction. *See, Scull v. Sicolt*, 247 AD2d 852 (4th Dept. 1998). The court held that regardless of whether the defendant anticipatorily breached the contract by terminating for failure to close by failing to declare "time of the essence" neither specific performance nor damages were available because plaintiffs fail to surmount its burden to establish that they were ready, willing and able to perform under the contract at some point prior to the commencement of the action. *See, id.* The court found that there is no proof that plaintiffs were financially able at any time to consummate the deal. *See, id.* The University contends that that is the case here since there is no evidence that Cameron Hill could have ever performed its obligation to obtain financing for the project under the terms of the Ground Lease and the evidence shows that Cameron Hill, like the plaintiff in *Skull*, was never financially able to consummate the deal.

The University likewise argues that it had no obligation to enter into a new contract. Cameron Hill suggested that Section 27.02 of the Ground Lease's provision that the University "reasonably cooperate" with Cameron Hill, required it to change the terms of the parties' existing deal; i.e. the Ground Lease and submit to its potential lender's demands for better terms than plaintiff had negotiated in the Ground Lease and its claim that the University breached the Ground Lease by not agreeing to Cameron Hill's last minute demands and changes is baseless inasmuch as the University's duty to reasonably cooperate with plaintiff's effort to obtain financing did not require to change the express terms of the Ground Lease to suit plaintiff and its potential lenders. A party's duty to reasonably cooperate with its contractual counterpart does not and cannot require it to change the terms of the original deal. Reasonable or good faith cooperation simply means "that neither party shall do anything with which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract". *See,*

Dalton v. Educational Testing Services, 87 NY2d 384 (1995). It does not oblige a party to "become an altruist toward the other party and relax the terms [of the parties existing agreement] if he gets in trouble in performing his side of the bargain". *Gaia House Mezz, LLC v. State Street Bank & Trust Co.*, 720 F3d 84 (2d Cir. 2013). Nor does the law require that a party acting any way inconsistent with the terms of the contractual relationship. *See, Murphy v. American Home Products Corp.*, 58 NY2d 293 (1983).

The University points to the documentation showing that PPM/Jackson National, the potential permanent lender would not lend on the terms of the Ground Lease and instead demanded changes as set forth in the June 6th Ground Lessor Estoppel and that Cameron Hill does not show otherwise. KeyBank was not the permanent lender on the deal, but acted only to arrange financing by marketing the potential loan to a permanent lender via a Credit Tenant Lease Financing Agreement (*Gross EBT, pp. 23-26, 29-30*). Thus, it contends that even if KeyBank was willing to close under the terms of the Ground Lease, Cameron Hill does not refute that the permanent lender, PPM/Jackson National, was not. Cameron Hill also claims that the Kaufman memo affirmatively states that KeyBank [redacted]

The University likewise denies Cameron Hill's argument that it frustrated Cameron Hill's ability to obtain financing and that Cameron Hill's claims that delays were caused during the

lifetime of the project in large part by the University's constant revisions of the plans, should be rejected and are false. The University points to the fact that Cameron Hill obtained a guarantied maximum price (GMP) from Murnane Builders on June 5, 2014 and provided it to KeyBank on June 6, 2014, well in advance of the 6/13 deadline. On May 22, 2014 prior to receiving final approval on the plans, Valenti assured the University that it could meet the June 13, 2014 deadline stating in an email that "according to the lender, we will have no trouble achieving the closing date of June 13" (reply affidavit, Ex. 3). In addition on June 10, 2014 Valenti informed the University that Cameron Hill would not be able to close on June 13, 2014 not because of the delay caused by the University but because a KeyBank employee had been fired. It further claims that the University did not frustrate Cameron Hill's ability to obtain financing by proposing amendments to the Ground Lease, as plaintiff claims. It argues that Cameron Hill cites no evidence that the University took the original Ground Lease off the table, demanded new terms that fundamentally changed the terms of the Ground Lease or asserted that is proposed amendments to the Ground Lease were non-negotiable. The University notes that the Draft Amended Ground Lease, which was never executed, had no legal effect on the parties' legal obligation to one another under the Ground Lease and Amended Right of Entry. Article 36 of the Ground Lease states that it "may not be changed or terminated orally or in any manner other than by a written agreement signed by the party against whom enforcement is sought..." In addition, Cameron Hill's characterization of the Draft Amended Ground Lease as being a demand is contradicted on the face of the document which states it is a draft and "for discussion purposes only". The University notes that like itself, Cameron Hill is a sophisticated entity represented by sophisticated transactional attorneys and cannot claim that the Ground Lease was or is no longer

in effect or off the table or that a new deal had arisen by reason of SU's proposed amendments to the Ground Lease.

It further claims that even if the Court accepts that the Draft Amended Ground Lease is relevant to the legal relations between the parties under the Ground Lease and Amended Right of Entry, the amendment to the force majeure clause proposed by the University was not made in bad faith. Cameron Hill now claims that that provision was an essential term of the Ground Lease, but it entered both the Agency Lease and PILOT despite the fact that neither agreement contained a force majeure provision. Despite that, the Agency Lease imposed a strict deadline for completing construction. According to the University, Cameron Hill's own conduct demonstrates that the University's request to remove the force majeure provision was not arbitrary or irrational and that in any event the University conveyed to Cameron Hill that its basis for the proposed amendment to the force majeure was to conform the Ground Lease with the terms of the Agency Lease and PILOT Agreement, neither of which contain that provision. Valenti also contemporaneously acknowledged he understood the basis for the University's request and stated he did not believe inclusion of an express force majeure clause was necessary for the document to apply. "BS&K has said that because there is not a force majeure provision in the [Agency] Lease, then they cannot allow one in the Ground Lease. As a general principle of contract law, force majeure is recognized as an acceptable and excusable reason for delay, whether or not a force majeure clause is included in the agreement. In addition, we will try to get a force majeure provision recognized in the SIDA estoppel." (Reply aff, Ex. 3; MML, p. 10). On March 23, 2014 Marcoccia responded to Valenti and reiterated SU's basis for its proposed modification to the force majeure stating "your proposal is not acceptable because if SU grants

force majeure and SIDA does not, there would be no way for SU to terminate the ground lease if Cameron Hill is late in completing." (MML, p. 10). After that email Valenti never again raised the concern over the proposed amendment to the force majeure clause or advised the University that it could not obtain financing by reason of that amendment.

Finally, the University further argues that it had no legal obligation to change the terms of the Ground Lease demanded in the Draft Ground Lessor Estoppel. Cameron Hill contends that the University frustrated its ability to perform by reason of its stance visa vie lender cure rights and negotiations over the proposed Ground Lessor Estoppel demanded by Cameron Hill and its lenders, but it defies logic and law for Cameron Hill to suggest that the University transgressed its duties under the Ground Lease by refusing to change the terms of that deal. Cameron Hill cites no law to support its erroneous proposition. Instead, the case law is clear that neither the implied covenant of good faith and fair dealing, nor the "reasonably cooperate" provision of the Ground Lease imposed on the University a duty to change the terms of the parties' executed agreements. *See, Bayerisch Landes Bank v. St. John St. LLC*, 102 AD3d 585 (1st Dept. 2013). Therefore, the University claims it did not frustrate Cameron Hill's ability to perform by acting squarely within the scope of its duties and because it has no legal duty or obligation to change the terms of the Ground Lease it could not as a matter of law frustrate Cameron Hill's ability to perform under the Ground Lease by not doing so.

Cameron Hill, however, relies on different and competing facts in its submissions. It notes that on May 10, 2014 an Amended and Restated Ground Lease was agreed to by the parties. On May 26, 2014 the University circulated a second draft of this with the same material changes included as its first. Marcoccia admitted that the University intended the Amended and

restated Ground Lease to be the operative Ground Lease for closing and further admitted that the University's elimination for force majeure was non-negotiable. *See, Marcoccia EBT, p. 84.* In addition, McAuliffe testified that the majority of the transactional documents, such as leases, loan instruments and security agreements almost always have a force majeure clause "especially if you live in a place like Syracuse, New York where we have snow storms that stop delivery of materials. You can have labor strikes, you can have lots of issues." (*McAuliffe EBT, pp. 30-31*). He also notes that force majeure can be read into an instrument, noting that SIDA instruments do not have it but that was a different relationship because an IDA is usually there to assist in the furtherance of development so one would not anticipate also because ordinarily an IDA does not have time of the essence, and thus there was not a force majeure clause. *See, id.* He further testified that "no although when you move to a lending side of a transaction, the lease side, force majeure is almost always included because it only addresses those circumstances outside the control of the two parties and force majeure pertains to the completion of obligations by both parties. It is not unilateral. It is bilateral or affects all parties if there are more than two". *See, id.* KeyBank's Gross also affirmatively testified that [redacted]

Cameron Hill argues thus it is disingenuous that the University moves for summary judgment dismissal and to vacate the injunction, without so much as mentioning that it prepared this Amended and Restated Ground Lease on May 10, 2014 and continued to proffer its new nonnegotiable terms through June of 2014, delaying the closing. It contends that the University

has shown bad faith by asking the Court to believe that Cameron Hill's lenders should have accepted this and proceed to close the $22 million by June 13, 2014.

Cameron Hill further argues that the University further frustrated its ability to close by demanding new and unreasonable changes to the lender's cure rights on June 8, 2014. In response to the University's May 11, 2014 new demands, counsel for permanent lender, PPM, prepared and circulated a Draft Ground Lessor Estoppel, Consent and Non-Disturbance Agreement on June 6, 2014. Section 25.03 of the original Ground Lease afforded the lender 30 days to step in and cure a default by Cameron Hill. The Ground Lessor Estoppel prepared by PPM's counsel contained *inter alia* a request that lenders be given 90 days to step up and cure a default by plaintiff (*Ex. 14 and 15*). On Sunday June 8, 2014, five days before the University imposed deadline for closing financing, the University circulated revisions to the Ground Lessor Estoppel in which the University not only rejected PPM's request for 90 days, but abandoned, *inter alia*, the lender's right to step in and cure a default be reduced from 30-15 days. Cameron Hill claims that it was therefore clear the University did not want the closing to occur by demanding this revision. McAuliffe testified as follows with regard to cutting the lender's time to cure from 30 days down to 15.

> I think the best way to describe that would be off the chart. I don't know how else to explain it. It was absurd...because no lender can react that fast and cure a default in 15 days. I think that's almost an impossibility. You're further talking about an institutional reaction to a problem that they may not even know of until a notice of default is delivered to them...and so now you're talking about the original 30 days in this case that the tenant had, plus 15. I don't think that was a commercially reasonable time period to demand under any circumstances. (*McAuliffe EBT, p. 31*).

Cameron Hill further points out that on June 8th the University made another demand. The lender would have no more than six months to complete a foreclosure action, which it claimed was commercially unreasonable by any measure. With regard to that demand, McAuliffe testified

> similarly the completion of a foreclosure in New York State within six months, I don't even know if that is statutorily possible with the requisite timer periods mandated by the RPAPL, notice provisions, everything else. Let's put it this way. If a single defendant, lets say a contractor, asserted an answer in a foreclosure saying that for some reason its mechanic's lien should trump the mortgage, the deliberation and resolution of that answer on a motion for summary judgment could take six to ten months. So to say that it can- the foreclosure had to be completed, properly sold, referee's deed transfer within six months, I think it was likewise impossible.
> (*McAuliffe EBT, p. 32*).

Cameron Hill contends that these commercially unreasonable changes to the lender's rights under the Ground Lease were demanded by the University on Sunday, June 8, 2014, approximately five days before it imposed the closing date of June 13, 2014 and it undoubtedly frustrated it's ability to close. *See, Cauff, Lipman & Co.*, 807 FSupp 122 (1992). It further claims that there is no logical explanation for why the University made these last minute demands, other than it simply did not want to proceed with the project and wanted to frustrate it's ability to close so it could terminate the deal.

In addition, Cameron Hill cites evidence in the record that the Chancellor did not want to move forward on the project. In January of 2014, Kent Syverud replaced Nancy Cantor as Chancellor. On May 25, 2014 Syverud called a meeting with Marcoccia, and others to review the "situation" with the bookstore project. "With the goal of understanding clearly where we currently stand on this project and...to discuss as a group what alternatives we have" (*see, Exhibit e-email*). Marcoccia testified that he did not recall this meeting (*Marcoccia EBT, p. 102*). On

Saturday, June 7, 2014 Syverud sent an email to Marcoccia, Cantor, Wits and others stating the following.

> As you will recall I asked each of you to take a hard look at the bookstore/fitness center plans so that we could make a decision at June 10th as to assuming the developer was not in compliance with requirements by that deadline we wish to go forward or not....but I remain adamant that (1) we must strictly apply the June 10 conditions and any variance no matter how minor must be treated as grounds for termination; and (2) we need to know before June 10th whether assuming there is such grounds each of you would want to terminate. I would like to hear from each of you on the latter question before we move any further forward on this project. In other words, if we do go forward I need us all to be on the same page and committed to making it work well. If you think the plans need modification in order to gain your committed support tell me that as well.

Cameron Hill contends that by June 10, 2014 the University refused to negotiate with it to close financing and instead unilaterally terminated the Ground Lease in bad faith on June 20, 2014. Section 27.02 of the original Ground Lease required SU to "reasonably cooperate with Plaintiff in its efforts to close its leasehold mortgage financing". This remained unchanged in the Amended and Restated Ground Lease. Even where additional terms remain to be agreed upon in a loan commitment and even though the deal could have fallen through due to a genuine disagreement over those terms, a party can not avoid its obligations under the contract when its refusal to participate in further negotiations prevents any possibility of finalizing the agreement. *See, Cauff, Lipman, supra*. Cameron Hill points to evidence that the University did not cooperate, which included refusing to participate in further negotiations: (1) it demanded fundamental changes to the default, cure and force majeure provisions of the Ground Lease on May 11, 2014, hours before Cameron Hill was to sign the Amended and Restated Right of Entry; (2) arbitrarily refused to work with Cameron Hill to provide its lender with acceptable cure rights through the Ground Lessor Estoppel on June 8, 2014 and even reduced and restricted rights already provided

for in the original Ground Lease; (3) ceased all communications on June 10, 2014 after Cameron Hill advised the University that KeyBank needed a few extra days to close and refused to communicate even after the University was furnished with the firm commitment letter from the lender for $20,966, 913 and refused to sign the prepared closing documents on June 11, 2014, all while still obstinately clinging to the June 13, 2014 closing date. Cameron Hill contends there is no reasonable explanation other than that the University acted in bad faith to kill the deal. *See, 6243 Jericho Realty Corp. v. Autozone, Inc.*, 71 AD3d 983 (2d Dept. 2010). Cameron Hill thus claims that the University's actions frustrated and/or prevented it from closing financing on June 13, 2014 and the law required the court to excuse the alleged failure to close by that date as the failure caused by the actions of the University and that since it had obtained a commitment for nearly $21 million for financing, but for the University's gamesmanship Cameron Hill and the lender were ready, willing and able to close.

Cameron Hill further claims that the University contorts the Gross testimony that [redacted] Despite pointing to this testimony, Gross specifically testified that [redacted] Gross also was asked over and over about the "operative documents from the bank's perspective in connection with financing. He testified [redacted]

[redacted]

With respect to Madeline Kaufman's memorandum of September 3, 2014, Cameron Hill notes tha[redacted]

[redacted]

[redacted]

She opined as follows with respect to § 25.03, that it

> addresses the rights of a lease hold mortgagee upon the failure of the tenant to comply with the terms of the Ground Lease given the above provision of §

[redacted]

Cameron Hill claims therefore that Kaufman concluded that [redacted]

[redacted]

IV. Discussion

A court may not rewrite terms of a contract that are clear and unambiguous. A court should not by construction add or excise terms or distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting their writing. *See, Reiss v. Financial Performance Corp.*, 97 NY2d 195 (2001). New York courts will enforce the express language of an agreement even where the results are contrary to the expectations of one of the parties and are extremely disadvantageous to that party while arguably resulting in a windfall to the other. *See, id.* Where there is a written agreement between the parties, an oral promise cannot be invoked to defeat the terms of the written agreement, nor is it the court's function to remake the parties' agreement; the court must enforce what the parties expressed in their agreement.

Specifically with respect to real estate contracts, it has been held that time is never of the essence...even if a closing date is stated, unless the contract specifically so provides, or if special circumstances surrounding its execution so require. *See, Whitney v. Perry*, 208 AD2d 1025 (3rd Dept. 1994). The University fails to identify any special circumstances where the June 13, 2014 closing date would qualify as a time of the essence date despite the absence of the words. *See, Andesco, Inc. v. Page*, 137 AD2d 355 (1st Dept. 1988). It is undisputed that the Amended Right of Entry contract does not contain the so-called magic words "time is of the essence". *Kutalek v. Stufer* (209 WL 5788644). It is well settled that the inclusion of a date by which a real estate contract should close does not in and of itself make that date the essence of the contract. *See, Ballen v. Potter*, 251 NY 224, 228-229 (1929).

The Court of Appeals has held that the most effective way to make a real estate contract time of the essence is to include those words in the contract. *ADC Orange, Inc., supra.* Even contractual language that requires a closing on a date "in no event later than" is insufficient to make time of the essence in connection with a closing date. There are circumstances in which a party 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." *See, Levine v. Sarbello*, 67 NY2d 780; *see also, Zev v. Merman*, 134 AD2d 555 (2d Dept. 1987) aff'd 73 NY2d 781 (1988).

Here the University's declaration of default was similarly ineffective. The contract did not contain a time of the essence provision. Nor did the University serve Cameron Hill with a clear, unequivocal proper notice in a timely manner that time was of the essence, and that failure to close on December 13, 2014 would amount to a default. This Court rejects the argument that the May 28, 2014 e-mail stating that "Syracuse University will not tolerate any delay beyond the

June 13, 2014 deadline" constitutes such notice. Accordingly, this Court concludes that the University is not entitled to summary judgment in this regard.

Based upon the record before the Court, Cameron Hill is not entitled to specific performance as a matter of law. To obtain specific performance, it was necessary for Cameron Hill to show that it was ready, willing and able to fulfill its contractual obligations. *See, Huntington M. Holdings v. Cottontail Plaza*, 60 NY2d 997 (1983). The University argues correctly that Cameron Hill did not meet its burden to show that it had the ability to close financing on the Ground Lease that was in effect as of June 13, 2014. Nor is the University entitled to a dismissal for specific performance or damages. It is a question of fact whether the University frustrated Cameron Hill's ability to close on its loan by requiring Cameron Hill's lenders to agree to commercially unreasonable terms. It is a question of fact whether the conditions set forth in the Ground Lessor Estoppel were material changes to the Ground Lease and therefore the University would not have been required to agree to them, or whether they were non-material changes and by not agreeing to the provisions of the Ground Lessor Estoppel (e.g. amended cure rights) violated Section 27.02 of the Ground Lease. While the University correctly argues that Cameron Hill must show that it was ready, willing and able to close on July 13, 2014 under the terms of the Ground Lease, the University was not entitled to require Cameron Hill to agree to a new Ground Lease removing Article 28 Force Majeure as a condition of closing. Because the force majeure clause excused nonperformance by Cameron Hill and the University for more than just acts of God, i.e. strikes, lockouts, labor trouble and impossibility of procuring materials, it was a material provision of the Ground Lease and Cameron Hill was entitled to the benefit of it. "A party to a contract cannot rely on the failure of another to perform a condition

precedent where he has frustrated or prevented the occurrence of the condition." *Kooleraire Service & Installation Corp., supra.* Whether the University frustrated Cameron Hill's ability to close on its financing is a question of fact.

The University also seeks to vacate its stipulation with Cameron Hill regarding its preliminary injunction which among other things vacated this Court's order which required Cameron Hill to post a bond and also permitted the University to enter into the construction site and restore it to its condition prior to the commencement of construction. There is no evidence in the record of any fraud, coercion or misrepresentation by Cameron Hill in securing its original injunction before Judge Hafner or this Court or just as importantly in its negotiation of its stipulation with the University. That agreement is between the parties and the Court will not disturb it pending the conclusion of this litigation on the issue of specific performance, unless there is a mutual application from the parties.

All other motions are denied. The parties are to submit a redacted decision in conformity with their confidentiality agreement no later than January 10, 2017. The parties are also to agree to a final scheduling order with a Note of Issue filing deadline no later than April 3, 2017.

The plaintiff is to prepare an order in accordance with this Decision.

ENTER

Dated: December 22, 2016
Syracuse, New York

DONALD A. GREENWOOD
Supreme Court Justice