At an IAS Term, Part 81 of the Supreme 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 20th day of September, 2018.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

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135 SOUTH 1LLC,

Plaintiff,

- against -

ALEJANDRO LOPEZ and MERY LOPEZ,

Defendants.

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Index No.: 515935/2017

DECISION AND ORDER

Motions Sequence #1

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

	Papers Numbered
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed.....	1/2,
Opposing Affidavits (Affirmations).....	3
Reply Affidavits (Affirmations).....	4

Upon the foregoing papers, and after oral argument, the Court finds as follows:

Plaintiff 135 South 1, LLC (hereinafter "the Plaintiff") has commenced this action for "specific performance of the Contract of sale dated on or about March 16, 2017 for the property known as and located at 135 South 1st Street, Brooklyn, NY (Block 2392 Lot37)." Defendants Alejandro Lopez and Mery Lopez (hereinafter "the Defendants") are the record owners of the property located at 135 South 1st Street, Brooklyn, NY (hereinafter "the Property"). On or about March 16, 2017, the Defendants entered into a contract to purchase the Property with the Plaintiff's purported predecessor in interest, non-party Ranco Capital, LLC (hereinafter "Ranco") (the "Contract"). The purchase price was $2,500,000.00 together with a down payment of $150,000.00. Plaintiff alleges that Ranco assigned its interest in the Contract to the Plaintiff, the Plaintiff has duly performed the conditions of the contract, and the Defendants refuse to perform their obligations under the contract.

The Defendants now move (motion sequence #1) for an order pursuant to CPLR §3212 granting summary judgment and dismissing the complaint. The Defendants also seek a judgment declaring that the Defendants are entitled to retain the downpayment of $150,000.00. The Defendants contend that it was Ranco who sought to initially adjourn a July 25, 2017 closing date with little notice and that Ranco failed to provide a new date for the closing of the subject transaction. The Defendants further contend that after Ranco adjourned the July 25, 2017 closing date, the Defendants sent a "time is of the essence" letter setting a law day for closing on August 2, 2017. The Defendants argue that this "time is of the essence" letter was appropriate and that neither Ranco nor the Plaintiff complied with its terms. As a result, the Defendants argue that this indicates that the Plaintiff is not ready, willing and able to consummate the transaction, and that summary judgment should be granted in favor of the Defendants.[1]

The Plaintiff opposes and argues that it should be denied. Specifically, the Plaintiff contends that the Defendants have not met their prima facie burden given that they have not shown how the Plaintiff was in breach of the agreement. What is more, the Plaintiff contends that the "time is of the essence" communication that provided that the closing date would be adjourned for nine days was not a reasonable amount of time to do so and as a result the Plaintiff's predecessor was not in breach of the Contract. Further, the Plaintiff contends that if Ranco was not in breach the Plaintiffs application for a declaratory judgment awarding them the downpayment of $150,000.00 should be denied.

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[1] Although not referenced in the Notice of Motion, the Plaintiffs also seek to have the Complaint dismissed because service was not completed within the time limit provided by CPLR 6512. Even assuming that the Defendants could seek to move for such relief without referring to it in the Notice of Motion, the Court finds that this application was untimely and is therefore denied. The Defendants served their answer on October 27, 2017 and arguably sought this relief on February 21, 2018, nearly four months after serving their Answer. A party or parties that fail to move to dismiss the complaint on this ground within 60 days after serving their answer waive that defense. *See Wells Fargo Bank, N.A. v. Cajas*, 159 A.D.3d 977, 73 N.Y.S.3d 223 [2nd Dept, 2018]; *Putnam Cty. Sav. Bank v. Mastrantone*, 111 A.D.3d 914, 975 N.Y.S.2d 684, 685 [2nd Dept, 2013].

It has long been established that "[s]ummary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact.'" *Kolivas v. Kirchoff,* 14 AD3d 493 [2nd Dept, 2005], *citing Andre v. Pomeroy,* 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2nd Dept, 2004], *citing Alvarez v. Prospect Hospital*, 68 N.Y.2d320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2nd Dept, 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 A.D.3d 518, 520, 824 N.Y.S.2d 166, 168 [2nd Dept, 2006]; *see Menzel v. Plotnick,* 202 A.D.2d 558, 558–559, 610 N.Y.S.2d 50 [2nd Dept, 1994].

"A party seeking specific performance of a contract for the sale of real property is required to establish not only that he or she was ready, willing, and able to close on the scheduled closing date, but also that the other party was in default." *Latora v. Ferreira*, 102 A.D.3d 838, 839, 958 N.Y.S.2d 727, 728 [2nd Dept, 2013]. "When a contract for the sale of real property does

not make time of the essence, the law permits a reasonable time in which to tender performance, regardless of whether the contract designates a specific date for performance." *Revital Realty Grp., LLC v. Ulano Corp.*, 112 A.D.3d 902, 904, 978 N.Y.S.2d 77, 79 [2nd Dept, 2013]. "The notice setting a new date for the closing must (1) give clear, distinct, and unequivocal notice that time is of the essence, (2) give the other party a reasonable time in which to act, and (3) inform the other party that if he does not perform by the designated date, he will be considered in default." *Nehmadi v. Davis*, 63 A.D.3d 1125, 1127, 882 N.Y.S.2d 250, 252 [2nd Dept, 2009]; *see also Point Holding, LLC v. Crittenden*, 119 A.D.3d 918, 919, 990 N.Y.S.2d 575, 577 [2nd Dept, 2014]. The notice must also contain language informing the defaulting party that they risk default by not appearing at the closing. *See Nehmadi v. Davis*, 63 A.D.3d 1125, 1127, 882 N.Y.S.2d 250, 252 [2nd Dept, 2009].

Turning to the merits of the instant motion made by the Defendants, the Court finds that the Defendants have failed to meet their *prima facie* burden. The Defendants, through counsel, mailed a "Time is of the Essence" letter to Ranco on July 24, 2017. That letter declared that the Defendants had set August 2, 2017 as the "Law Date" and set "the time and place for the closing described in the afore-mentioned Contract of Sale." The Defendants each stated in their affidavits that the "Time is of the Essence" letter was immediately sent on July 24, 2017 after an initial closing date of July 25, 2017 had been cancelled on July 24, 2017. However, on these facts, proclaiming "time of the essence" with respect to the closing date was premature and failed to afford the buyer a reasonable time after the July 25, 2017 to reschedule or perform. See *Revital Realty Grp., LLC v. Ulano Corp.*, 112 A.D.3d 902, 904, 978 N.Y.S.2d 77, 79 [2nd Dept, 2013]; *see Savitsky v. Sukenik*, 240 A.D.2d 557, 558, 659 N.Y.S.2d 48, 49 [2nd Dept, 1997]. Accordingly, the Defendants motion is denied.

Based on the foregoing, it is hereby ORDERED as follows:

The Defendant motion (Motion Sequence #1) is denied.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino
J.S.C.