

**Pastor v Degaetano**

2018 NY Slip Op 32531(U)

October 3, 2018

Supreme Court, New York County

Docket Number: 652396/2013

Judge: Andrea Masley

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: COMMERCIAL PART 48

-----X  
 CARLOS RODRIQUEZ PASTOR,

Plaintiff,

- v -

PETER DEGAETANO, individually, as escrow agent, and as  
 Executor of the Estate of Monique Uzielli, HUBERT LEVEN, as  
 Executor of the Estate of Monique Uzielli, and LAURENT  
 LANDAU, as Executor of the Estate of Monique Uzielli,  
 MAUREEN KLINSKY, CAROLE EISNER, LAUREN GORDON  
 MANDELBAUM, SUSAN DE ST. PHALLE, ROBERT SCHUMER,  
 and JOHN WERWAISS,

Defendants.

INDEX NO. 652396/2013

MOTION DATE 02/20/2018,  
02/20/2018

MOTION SEQ. NO. 005\_006

**DECISION AND ORDER**

-----X  
 The following e-filed documents, listed by NYSCEF document number (Motion 005) 261, 262, 263, 264,  
 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 365, 379, 380, 381, 382,  
 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396

were read on this motion to/for

SUMMARY JUDGMENT (AFTER JOINDER)

The following e-filed documents, listed by NYSCEF document number (Motion 006) 280, 281, 282, 283,  
 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303,  
 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323,  
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 406

were read on this motion to/for

SUMMARY JUDGMENT (AFTER JOINDER)

**MASLEY, J.:**

In motion sequence number 005, plaintiff Carlos Rodriguez Pastor (Buyer)  
 moves, pursuant to CPLR 3212, for summary judgment requesting an order "directing  
 entry of a judgment in favor of [Buyer] against" defendant Estate of Monique Uzielli  
 (Seller) in the amount of \$2.75 million, the amount of the deposit Buyer placed in  
 escrow in the underlying transaction, and payment of that sum plus interest to Buyer.

In motion sequence number 006, Seller moves, pursuant to CPLR 3212, for an  
 order: (1) summarily dismissing the remaining claims in Buyer's amended complaint

(the first, third, fifth, and sixth causes of action); and (2) awarding summary judgment in favor of Seller on its first counterclaim for breach of contract, and directing release from escrow of the \$2.75 million deposit to Seller.

### Background

This action arises from a contract of sale (Contract), executed by Buyer and Seller on March 21, 2012, for the purchase of a penthouse apartment (Penthouse) in a co-operative building (Co-op or Co-operative) in New York. Buyer agreed to pay \$27.5 million for the Penthouse and placed \$2.75 million in escrow as a deposit. The Contract did not have a set closing date.

Under the Co-op's proprietary lease, the terrace appurtenant to the Penthouse is for the "exclusive use" of the Penthouse owner. Shortly after the Contract was entered, in May 2012, the Co-op's board (Board) advised Buyer and Seller that the upper roof, "accessible by the stairs on the [Penthouse] terrace," "may be used by [all Co-op] shareholders at any time as a common area of the building," and that shareholder "[a]ccess to [the terrace] stairs is via the fire stairs, and a short path on the [Penthouse] terrace level." Next, in August 2012, the Board informed Buyer and Seller that the Board's consent to the sale was contingent on Buyer and Seller executing a conditional consent agreement (Conditional Agreement), which contained the following acknowledgements and waivers:

"the Co-operative and its shareholders have the right to use, maintain, reposition and replace the [terrace] Stairway . . . for the purpose of obtaining access to the [upper roof].

[Buyer] shall under no circumstances impede [Co-operative or shareholder] access to the Stairway[, and] . . . [a]ny violation of this provision shall constitute a default under the Lease; and

[Seller and Buyer] each release the Co-operative, its officers, directors, employees, agents and shareholders, from any and all claims, demands and causes of action, of any nature whatsoever, regarding any right to use in conjunction with the Penthouse any portion of the roofs of the Building except as specifically described herein as being included within the Plan of the Penthouse."

Buyer and Seller refused to sign the Conditional Agreement. Seller then commenced an action in this court, in September 2012, against the Co-op and the Board (Related Action)<sup>1</sup> seeking, among other things, a judgment declaring that the terrace is for the exclusive use and access of the Penthouse owner under the proprietary lease and enjoining the Co-op and Board from interfering with the Penthouse owner's rights.

In the Related Action, Seller also sought the plan for the Penthouse referred to in article 1, paragraph 8 of the proprietary lease (Proprietary Plan), which provides that the Penthouse owner "shall have and enjoy the exclusive use of the [terrace] as shown on the plan of the penthouse." That Proprietary Plan was not available when the Contract was executed; instead, annexed to the Contract was a floor plan of the penthouse and the terrace (Contract Plan). Paragraph 52 of the Contract's rider required: "Seller shall deliver to [Buyer] at or prior to Closing the 'plan of the penthouse' referred to in the Proprietary Lease . . . , from the [Co-op] or an agent thereof, addressed to the [Buyer] which [Proprietary] Plan shall be substantially similar to that of the floor plan annexed [to the Contract]."

Over the course of the Related Action, the Board withdrew its demand that Buyer and Seller execute the Conditional Agreement. Additionally, after entry of an interim

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<sup>1</sup> The Related Action, *Estate of Uzielli v 1107 Fifth Avenue Corp.*, Index No. 653392/2012, was commenced by Seller's filing of a summons and complaint on September 27, 2012.

order in the Related Action, dated May 23, 2013 (Oing, J.), the Co-op provided Seller with a floor plan for the penthouse and terrace (May Plan). By letter, dated May 28, 2013, from counsel for the Co-op and Board, Robert J. Pariser to Buyer's attorney, Buyer was informed that "the Board has waived the [C]onditional [Agreement]" requirement," and attached a copy of the May Plan.

The following day, May 29, 2013, Buyer's counsel notified Seller's counsel and the escrow agent, defendant Peter F. DeGaetano, by letter that Buyer elected to cancel the Contract, and requested the return of the \$2.75 million deposit, because the May Plan "is not substantially similar" to the Contract Plan. Buyer's counsel noted that the May Plan differed from the Contract Plan by including "a large stairway extending into the southeast terrace."

By letter, dated June 12, 2013, Seller's counsel rejected the cancellation, asserted that Seller had until the closing date to provide Buyer with the Proprietary Plan, and attached a new floor plan (June Plan), also obtained through the Related Action. Seller's counsel stated that the June Plan "has been adopted by the Board . . . and which is substantially similar to . . . the [Contract Plan]," satisfying Seller's obligation under paragraph 52 of the rider (NYSCEF Doc. No. 354 at 1). Seller's counsel further wrote that this court, on the record of the June 11, 2013 proceeding in the Related Action (Oing, J.), "decreed that [the June Plan] is substantially similar to [the Contract Plan]" (*id.* at 1-3).<sup>2</sup> In the letter, Seller's counsel scheduled a closing date of July 3, 2013, "time being of the essence" (*id.* at 1-2).

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<sup>2</sup> The letter enclosed the transcript of June 11, 2013 proceeding, so ordered by Justice Oing, and the June Plan, labeled "[Seller's] Floor Plan After Revision to 'Elevator Landing'" (NYSCEF Doc. No. 354).

Buyer did not appear on the closing date, the parties' disputed entitlement to the deposit, and this action was commenced by Buyer in July 2013.

Buyer filed an amended complaint on September 6, 2013, and Seller's answer to the amended complaint with counterclaims was filed on September 18, 2013. In November 2013, Seller filed a pre-discovery motion, pursuant to CPLR 3212, seeking an order awarding summary judgment in its favor on its first counterclaim (breach of the Contract in failing to close) and its second counterclaim (Buyer's liability to indemnify the escrow agent, DeGaetano). Seller also moved to summarily dismiss Buyer's amended complaint (see NYSCEF Doc. No. 28 et seq. [Mot. Seq. No. 002]).

By order, dated May 28, 2014, and on the record in the related oral argument, this court determined that Seller was ready, willing, and able to close at the time-of-the-essence closing, and Seller was entitled to retain the deposit due to Buyer's default (see NYSCEF Doc. Nos. 173 [5/28/14 order] [Oing, J.], 179 [tr of 5/28/14 proceeding] [Oing, J.]). The court further dismissed Buyer's claims for breach of contract and return of the deposit, rescission based on mutual mistake, and breach of the implied covenant of good faith and fair dealing (NYSCEF Doc. Nos. 173,179).

#### **Appeal of Motion Sequence Number 002**

Buyer appealed this court's May 28, 2013 decision and order, and the ruling was modified on appeal. The First Department found that "questions of fact remain[ed] as to whether the seller obtained unequivocal assurances that the coop's board of directors would not interfere with the buyer's right of exclusivity [to the terrace]"; thus, "the seller has not demonstrated that it was ready, willing, and able to close the sale" (*Pastor v DeGaetano*, 128 AD3d 218, 219-220 [1st Dept 2015]). The First Department further

found that "there [were] questions of fact as to whether the seller breached the implied covenant of good faith and fair dealing." (*id.*).

Specifically, the First Department, viewing the evidence in the light most favorable to Buyer, and based on the pre-discovery record with which it was provided, observed the following:

- The May Plan and the Co-op's statement that the Board "waived" the Conditional Agreement "did not resolve the exclusivity issue to [Buyer's] satisfaction";
- The May Plan included a terrace stairway, not identified in the Contract Plan, which was "the same maintenance stairway that the Board referenced in its May 2012 letter; and
- While the Co-op's attorney, Pariser, stated that the Board would "adopt" the June Plan disclosed to Seller in the Related Action, and the Board had "withdrawn its requirement that the parties sign the [Conditional Agreement]," "the Board did not withdraw its position as stated in the May 2012 letter, nor did it unequivocally and affirmatively acknowledge [Buyer's] right of exclusive use over the Terrace or state that the Board would refrain from taking future action to interfere with that right" (*id.* at 222-223).

The First Department modified this court's May 2014 order by denying summary judgment to Seller on its counterclaim for breach of contract. The First Department explained that Seller had not, on that record, carried its burden of demonstrating that it was "ready, willing, and able" to perform on the closing date because Seller had "not adduced evidence that the Coop unequivocally withdrew its position with respect to the penthouse owner's right of exclusivity granted in the proprietary lease"; specifically,

Seller had “not shown that the Board categorically recognized [Buyer’s] right to exclusively use the terrace or stated that it would not seek to abrogate that right in the future” (see *id.* at 222-225). Further issues of fact existed as to whether the any “of the plans provided by the Coop are the [Proprietary] Plan, because the Coop admitted that the original plan was lost and the [Seller] has not shown whether the Board formally adopted any of the new plans” (*id.* at 224-225).

The First Department noted that “the record [on appeal] suggests that [Seller] failed to achieve a sufficient resolution of the exclusivity issue” as it “abandoned” the Related Action without obtaining a decision on the merits—specifically, a declaratory judgment as to the Penthouse owner’s rights (*id.* at 225-226). Thus, the First Department found:

“In the context of the Board’s previous attempts to interfere with [Buyer’s] right of exclusivity, and contentious litigation between the [Seller] and the Coop—in which the Coop submitted the May Plan, which [Buyer] understood as representing the Coop’s unwavering intent to convert the rooftop into a common area accessible via the [terrace’s] maintenance stairs—anything short of an unequivocal assurance was inadequate. Even the subsequent June Plan, without more, would not suffice. Without the Board’s affirmative and unequivocal acknowledgment that the shareholders have no right to traverse the terrace, and that [the Board] would not take future action to revoke [Buyer’s] exclusive right to use that space, [Buyer] lacked adequate assurances that his right of exclusivity (and the market value of the apartment) would remain undisturbed if he consummated the sale” (*id.* at 226-227).

Inasmuch as Seller had not demonstrated that Buyer was given those assurances, Seller had “failed to demonstrate its ability to close,” and, “absent a showing that [Buyer] received unequivocal assurances that the Coop would not interfere with his right of exclusivity going forward, [Seller] cannot show that [Buyer] lacked a lawful excuse to abstain from attending the closing” (*id.* at 227). The First Department

noted, however, that discovery "may reveal that the [Buyer] was given the requisite assurances, and that at least one of the plans offered at the closing was 'substantially similar' to the Contract Plan" (*id.* at 227).

The First Department further found that questions of fact existed as to whether Seller breached the implied covenant of good faith and fair dealing "when it submitted the May Plan," which was "substantially dissimilar to the Contract Plan," and set a time-of-the-essence closing date; thus, Buyer had raised questions of fact as to whether Seller and the Co-op had colluded "in order to force the closing, irrespective of whether the Board intended to take future action to interfere with [Buyer's] right of exclusivity" (*id.* at 228-229).

The decision on appeal denied Seller's motion as to its first counterclaim, reinstated Buyer's first, third, fifth, and sixth causes of action, and affirmed dismissal of Buyer's fourth cause of action for rescission based on mutual mistake.

Discovery has now been completed, and the parties respectively move, pursuant to CPLR 3212, for summary judgment.

#### Discussion

Summary judgment is a drastic remedy that will be granted only where the movant demonstrates that no genuine triable issue of fact exists (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see generally* CPLR 3212). Initially, "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant has made such a showing, the burden shifts to the opposing

party to demonstrate, with admissible evidence, facts sufficient to require a trial (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

The court is required to examine the evidence in the light most favorable to the non-moving party (*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997]), and summary judgment "should not be granted where there is any doubt as to the existence of a triable issue" of fact (*American Home Assur. Co. v Amerford Intl. Corp.*, 200 AD2d 472, 473 [1st Dept 1994]).

1. Buyer's Motion for Summary Judgment (Motion Sequence Number 005)

Buyer moves, pursuant to CPLR 3212, for entry of a judgment against Seller in the amount of the deposit, \$2.75 million, plus interest. Buyer argues that the First Department "ruled that he was excused from closing on the purchase unless he received clear and unequivocal assurances that" "the Co-op recognized his right to exclusivity with respect to the Terrace" and that it "would not, in the future, attempt to interfere with that right" (Buyer's mem at 13 [NYSCEF Doc. No. 278]).

In support of this argument, Buyer submits excerpts of the deposition of Maureen Klinsky, President of the Co-op and a member of the Board, who testified, generally that: the Board's position during the Related Action was always that that the upper roof was common area for all shareholders, solely accessible at that time by the terrace stairway, and that the Board never retracted its statements in the May 2012 letter (see 1/10/17 Klinsky dep tr [NYSCEF Doc. No. 268]). Buyer also submits his own affidavit stating that he never received any assurances that the Co-op would not interfere with his right of exclusivity if the transaction closed (Buyer's 2/8/18 aff, ¶ 4 [NYSCEF Doc.

No. 263]). Buyer asserts that, absent the unequivocal assurances contemplated in the decision on appeal, Buyer had no obligation to close and did not breach the Contract.

Seller responds that Buyer has not met his burden as to any of the four causes of action in the amended complaint.

The court notes that Seller's counsel, in contravention of the Part 48 Practice Rules, submits an affirmation in opposition to Buyer's motion that is littered with legal arguments and appears to be an attempt to circumvent the Rules limiting the number of pages permitted in memoranda of law (*see generally* Tannenbaum 3/27/18 aff [NYSCEF Doc. No. 379]). The court does not consider any legal arguments in the attorney's affirmation, and counsel is cautioned to familiarize himself with, and to follow in the future, the Part 48 Practice Rules.

In his notice of motion or moving papers, Buyer does not identify the cause(s) of action upon which he contends he is entitled to summary judgment. Buyer's four claims in the amended complaint allege:

- (1) under the Contract, escrow agent DeGaetano was notified of Buyer's cancellation, did not receive timely notice of objection from Seller, and, therefore, Buyer is entitled to the deposit (first cause of action);
- (2) the May Plan presented to Buyer is not the Proprietary Plan—which neither Seller nor the Co-op “could locate” (amended complaint [compl.] ¶ 57); in any event, the May Plan was not substantially similar to the Contract Plan due to inclusion of the terrace stairway; thus, Buyer properly cancelled, and did not breach, the Contract (third cause of action);

(3) Buyer relied on the May Plan, changed his position and cancelled the Contract, then purchased a different, unrelated property that he "located as a back-up in case . . . the Penthouse fell through." Accordingly, Seller "is estopped from asserting that the [May Plan] is not the plan of penthouse approved by the Co-op," or that any later plan is the Proprietary Plan (fifth cause of action) (*id.* ¶¶ 90-92);

(4) Seller breached the implied covenant of good faith and fair dealing when it, in bad faith, set a time-of-the-essence closing date without obtaining a final judgment in the Related Action; thus, Seller is "estopped from claiming that it was ready, willing and able" to perform (sixth cause of action) (*id.* ¶¶ 93-102).

"Where a seller draws a prospective buyer into a transaction when it cannot possibly convey marketable title and then itself stymies the efforts of the buyer to remove the encumbrance, the seller may not rely on the language of the rider to keep the buyer's down payment"; additionally, where a seller is "in material breach of its contractual obligations to [the purchaser]," the purchaser may have "a lawful excuse for his failure to appear on the . . . closing date," precluding the seller from retaining the deposit under certain circumstances (*Cipriano v Glen Cove Lodge No. 1458*, 1 NY3d 53, 63 [2003]; *see also Donerail Corp. N.V. v 405 Park LLC*, 100 AD3d 131, 137-138, [1st Dept 2012] ["(A)bsent a breach on the part of the seller, a purchaser who defaults on a real estate contract without lawful excuse cannot recover its down payment."]).

Here, Buyer has not established prima facie entitlement to judgment as a matter of law on any of its four claims. First, Buyer has not demonstrated entitlement to

summary judgment as to its first cause of action, for breach of paragraph 27.1 of the Contract, which is dismissed for the reasons stated below in Part 2.

As for the third cause of action, even if Buyer had demonstrated that the May Plan was a Proprietary Plan under the Contract, or was a plan approved by the Board, summary judgment is precluded by issues of fact as to whether the later plans tendered satisfied paragraph 52 of the rider, which states that Seller had to present the Proprietary Plan "at or prior to Closing" (NYSCEF Doc. No. 271, rider ¶ 52). Issues of fact also exist as to whether Buyer had a lawful excuse to not appear at closing: his own statements that he received no assurances as to the exclusivity of the Penthouse owner's access to the terrace are insufficient to eliminate all triable issues of fact, and Klinsky's excerpted deposition testimony is equivocal.

Likewise, even if Buyer has met his burden of demonstrating prima facie entitlement for his fifth cause of action sounding in estoppel, Seller raises triable issues of fact as to whether Buyer's reliance in its evidence establishing that Buyer was involved with purchasing the unrelated property before the May Plan was tendered. Thus, there is an issue of fact as to whether the May Plan or the unrelated property transaction prompted Buyer to send the notice of cancellation (see NYSCEF Doc. Nos. 383, 385-387).

As to his sixth cause of action, Buyer has not eliminated triable issues of fact as to Seller's alleged breach of the implied covenant of good faith and fair dealing in setting the time-of-the-essence closing date. Specifically, whether Seller acted in good or bad faith exist in that Seller obtained the May and June Plans through its efforts in the Related Action, and the June Plan may have been sought to cure Buyer's objection to

the stairway in the May Plan. Apart from speculative and conclusory assertions, there is no evidence before the court establishing that Seller colluded with the Board, or sought to force the sale knowing that the Co-op or Board would not honor the Penthouse owner's rights regarding the terrace.

Finally, the court rejects Buyer's argument that it is entitled to the deposit because, absent unequivocal assurances to exclusivity from the Board, Seller could not force Buyer to close. On this motion, it is Buyer's burden to establish prima facie entitlement to judgment as a matter of law by eliminating triable issues of fact. Buyer has not demonstrated an absence of factual issues as to whether Seller was in material breach of its obligations between May 2013 or at closing in July 2013, there are issues of fact as to whether the May or June Plans were the Proprietary Plan or formally approved by the Board, and whether those Plans are substantially similar to the Contract Plan. Accordingly, there are issues of fact as to whether Buyer properly canceled the Contract or had a lawful excuse to not perform on the closing date.

2. Seller's Motion for Summary Judgment (Motion Sequence Number 006)

Seller first contends that Buyer's first cause of action should be dismissed on the basis that the escrow agent, DeGaetano, was contractually permitted to hold the deposit funds in escrow in good faith, despite any notice of cancellation or timely lack of objection, until the parties jointly direct release of those funds or a final order of a court of competent jurisdiction is issued. Buyer does not respond that DeGaetano did not act in good faith in holding the deposit; instead, Buyer argues only that the Contract commands DeGaetano to return the deposit if notice of objection is not timely received.

Paragraph 27.1 is unambiguous with respect to the rights and obligations of the escrow agent, and plainly authorizes, but does not require, the escrow agent to return the deposit if notice of objection to the cancellation is not received in ten business days. Paragraph 27.1 provides: if the closing “does not occur” and either party gives notice demanding payment of the deposit, and the escrow agent does not receive timely notice of objection from the other party, the escrow agent is “authorized and directed to make such payment to the demanding party”; however, the escrow agent “may continue to hold the Contract Deposit” if “for any reason [the escrow agent] in good faith elects not to make such payment” (see Contract, ¶ 27.1 [NYSCEF Doc. No. 271]). Buyer has failed to raise any triable issue of fact as to whether DeGaetano acted in bad faith; therefore, the first cause of action is dismissed.

Seller next contends that Buyer’s third cause of action must be dismissed because the Contract does not limit Seller to just one opportunity to provide a Proprietary Plan that is substantially similar to the Contract plan; rather, if there was a defect in the May Plan, Seller had the opportunity to, and did, cure that defect in tendering the subsequent June Plan.

Buyer responds that the inclusion of the staircase in the May Plan is not a “defect” which can be cured; it is “a factual position taken by [Seller] as to the scope of the ‘plan of the penthouse’ and it was relied on by [Buyer]” (Buyer’s mem opp at 18-19).

Paragraph 52 of the Contract’s rider does not limit Seller to one opportunity to providing Buyer with a Proprietary Plan substantially similar to the Contract Plan; Seller is plainly required to perform that obligation “at or prior to closing” (Contract, Rider ¶ 52

[NYSCEF Doc. No. 317]). Nevertheless, issues of fact preclude summary judgment in favor of Seller as to this claim.

As discussed above in Part 1, factual issues exist as to whether the May Plan, or the June Plan, were formally approved by the Board, and whether Buyer did, in fact, rely on the May Plan in issuing the notice of cancellation. Furthermore, the evidence submitted by Seller as to the Co-op's assurances regarding access to the terrace are equivocal, incomplete, and/or conclusory. While Buyer's assertion that he received no assurances does not, itself, raise a triable issue of fact sufficient to defeat a motion for summary judgment, Seller has not met its burden of demonstrating that Buyer was presented with assurances beyond the Board's withdrawal of its requirement that he sign the Conditional Agreement to obtain approval.

For instance, Pariser's affirmation in support of the Co-op and Board's motion to dismiss the Related Action states that "the Co-op Board has no current plans to develop the upper roof (which, by the way, is not part of any known floor plan of the Penthouse unit). [The Estate/Seller] will not grant a thoroughfare to the upper roof via the terrace and there are no plans to force the issue by trying to force [Seller to] grant a thoroughfare"; however, Pariser added that "[t]here can be no personal liability running to any board member for merely *thinking* of developing a wonderful public space or *thinking* if there is some other way of accessing it" (NYSCEF Doc. No. 290, ¶ 9 [emphasis in original]). Those statements are not sufficient to eliminate triable issues of fact and are contradicted by other evidence submitted in opposition to Seller's motion. Moreover, the evidence does not demonstrate that an unequivocal retraction of the Board's May 2012 position was communicated to Buyer.

For those same reasons, Seller has not demonstrated that there are no triable issues of fact as to whether Buyer had contractual right to cancel the transaction in May 2013. The Board's waiver of the Conditional Agreement requirement does not retract the Board's May 2012 statement, as noted on appeal by the First Department, and none of Seller's submissions demonstrate that any further assurances were communicated to Buyer. These factual issues go to whether Seller was ready, willing, and able to close, when Seller was capable of performing, and whether Buyer has a lawful excuse not to close on the transaction.

Seller has likewise failed to eliminate all triable issues of fact in connection with Buyer's fifth cause of action sounding in estoppel. Seller argues that Buyer cannot simply cancel the contract without granting Seller an opportunity to cure the claimed defect—the inclusion of the stairway in the May Plan—and, in fact, the objection to the May Plan was cured by the June Plan submitted to Buyer.

Buyer responds that he justifiably relied on Seller's delivery of the May Plan, changed his position, and opted to purchase the unrelated property. To the extent there are issues of fact pertaining to Buyer's reliance, and whether such reliance was justified in light of the circumstances surrounding the Board's interference, the ongoing Related Action, and the inclusion of the stairway in the May Plan that was central to the issue of the Related Action, this prong of Seller's motion must be denied. The parties' equivocal and contradictory statements and submissions do not warrant summary dismissal.

As discussed above in Part 1, issues of fact also preclude Seller's motion for summary judgment dismissing Buyer's sixth cause of action for breach of the implied covenant of good faith and fair dealing. Seller has not eliminated all triable issues of

fact as to whether it was ready, willing, and able to close, whether it was capable of performing its obligations when it set the closing date, or whether the closing date was set in bad faith. Issues of fact also exist as to whether any of the plans were the Proprietary Plan contemplated in the Contract and the proprietary lease, even as of the closing date. Seller's evidence that Buyer was engaged in the transaction to purchase the unrelated property before the May Plan was sent, and that Buyer ultimately did purchase the unrelated property, but not the Penthouse, does not eliminate all triable issues of fact.

Finally, Seller's motion is denied as to its first counterclaim. As discussed throughout, there are issues of fact as to whether Seller was ready, willing, and able to close, and whether Buyer has a lawful excuse for his failure to appear and perform at the time-of-the-essence closing. Seller's submissions in support of this counterclaim are insufficient to eliminate those and other triable issues of fact.

Accordingly, it is

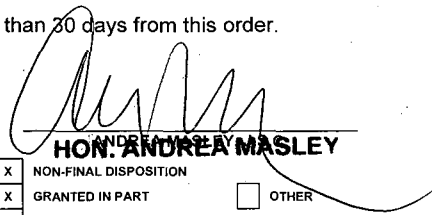
ORDERED that plaintiff Carlos Rodriquez Pastor's motion for summary judgment (motion sequence number 005) is denied; and it is further

ORDERED that the motion of defendants Peter DeGaetano, Hubert Leven, and Laurent Landau, as Executors of the Estate of Monique Uzielli, for summary judgment (motion sequence number 006) is granted in part, and the first cause of action in plaintiff's amended complaint is dismissed; and it is further

ORDERED that the parties shall appear for trial in Part 48, Room 242 at 60 Centre Street, on February 4<sup>th</sup> 2019; and it is further

ORDERED that any motions in limine must be served in compliance with the Part 48 Practice Rules and Part 48 Trial Rules no later than 30 days from this order.

10/3/2018  
DATE



HON. ANDREA MASLEY

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

SUBMIT ORDER

FIDUCIARY APPOINTMENT

REFERENCE