

**Secured Capital Partners, LLC v Wansdown Props.
Corp. N.V.**

2019 NY Slip Op 30844(U)

March 28, 2019

Supreme Court, New York County

Docket Number: 150780/2018

Judge: David Benjamin Cohen

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 58

-----X
SECURED CAPITAL PARTNERS, LLC,

DECISION AND ORDER

Plaintiff,

Index No. 150780/2018

- against -

WANSDOWN PROPERTIES CORPORATION N.V., REZA
GOLSORKHI, ROBERT ARMAO, and KAMRAN ABBAS
VAHID,

Defendants.
-----X

DAVID B. COHEN, J.:

This dispute arises out of the failed purchase of real property located at 29 Beekman Place, New York, New York (Block 1361, Lot 121) (the Premises). In motion sequence no. 001, defendants Wansdown Properties Corporation N.V. (Wansdown), Reza Golsorkhi (Golsorkhi) and Robert Armao (Armao) (together, individual defendants) (collectively, defendants) move by order to show cause under CPLR 6514 to cancel the notice of pendency filed January 24, 2018 with the New York County Clerk and for its costs and expenses in connection with the cancellation. In motion sequence no. 002, defendants move, pursuant to CPLR 3211 (a) (1) and (7), for an order dismissing the complaint, vacating the notice of pendency or any other encumbrance filed by plaintiff related to the subject Premises, declaring that Wansdown has not breached the contract of sale, and awarding defendants their reasonable attorneys' fees and costs.

Motion sequence nos. 001 and 002 are consolidated for disposition herein. For the reasons set forth below, defendants' motions are granted.

Factual and Procedural Background

Wansdown is the owner in fee of the subject Premises, a single-family townhouse in midtown Manhattan (NY St Cts Electronic Filing [NYSCEF] Doc No. 61, affirmation of Omar

Qudrat [Qudrat], exhibit 8 at 1). Golsorkhi and Armao are two of Wansdown's managing directors (NYSCEF Doc No. 42, Armao aff, ¶ 2; NYSCEF Doc No. 43, Golsorkhi aff, ¶ 2).

In a contract of sale dated December 18, 2017 (the Contract), plaintiff agreed to buy, and Wansdown agreed to sell, the subject Premises for \$17 million. The relevant provisions of the Contract state, in part:

"3. Purchase Price. The Purchase Price for the sale of the Premises is SEVENTEEN MILLION AND NO/100 DOLLARS (\$17,000,000), payable as follows:

(a) on the signing of this Contract, by bank wire to the client trust account of Escrowee (as herein defined), to be confirmed in writing by Purchaser's bank within two business days after execution hereof and which will be held in escrow pursuant to Paragraph 4 hereof (the '**Down Payment**'): ONE MILLION SEVEN HUNDRED THOUSAND AND NO/100 DOLLARS (\$1,700,000).

(b) on Closing (as herein defined), by bank wire to Escrowee's client trust account or Purchaser's good check payable to the Escrowee: FIFTEEN MILLION THREE HUNDRED THOUSAND AND NO/100 DOLLARS (\$15,300,000).

4. Down Payment in Escrow.

(a) Seller's attorney identified on the signature page hereto ('**Escrowee**') shall hold the Down Payment in escrow in a segregated interest bearing bank account at Citibank, N.A., 153 East 53rd Street, New York, NY 10043 until the Release Date (as herein defined). All interest shall be for the account of the Seller"

(NYSCEF Doc No. 2, complaint, exhibit 2 at 1-2). Paragraph 4(e) further reads, "[e]scrowee acknowledges receipt of the Down Payment by check subject to collection and Escrowee's agreement to the provisions of this paragraph by signing in the place indicated on the signature page of this Contract" (*id.*). The Contract designated Wansdown's attorney on the transaction, the law firm of Kelley, Drye & Warren LLP, as the escrowee (Escrowee), and Robert D. Bickford, Jr. (Bickford), a partner at the law firm, executed the Contract on behalf of the Escrowee (NYSCEF Doc no. 2 at 13). Paragraph 5(b) of the Contract defined the release date (Release Date) as January 8, 2018 (*id.* at 2).

Paragraph 5 also set forth additional conditions for closing as follows:

“(a) Closing shall occur as herein provided on a date designated by Purchaser by notice in writing to Seller but no later than (90) days after the date of this Contract (‘Outside Date’).

(b) Purchaser shall have the right and option, exercisable if at all prior to the expiration of such ninety (90) period, by notice in writing to Seller, to extend the date for Closing to a further date designated by Purchaser but no later than the date sixty (60) days after the Outside Date. If Purchaser so elects to extend the date of Closing, Purchaser shall pay to Escrowee the additional sum of ONE MILLION SEVEN HUNDRED THOUSAND AND NO/100 DOLLARS (\$1,700,000) (‘Extension Payment’) which shall be credited against the balance of the Purchase Price then remaining due.

(c) From and after the Release Date until the date of Closing or the Outside Date as extended (which is later), Purchaser shall pay the following costs associated with the Premises whether or not Closing shall occur: (i) Seller’s current monthly mortgage payments (\$TBC), (ii) monthly utility charges, (iii) any property taxes falling due in this period and (iv) existing structural damages to the Premises at a cost not to exceed ONE HUNDRED THOUSAND DOLLARS (\$100,000) (collectively ‘Pre-Closing Costs’)”

(NYSCEF Doc No. 2 at 3-4). A handwritten amendment to paragraph 5(c) raised the pre-closing costs (Pre-Closing Costs) to \$250,000 (*id.* at 4).

With regards to defaults, paragraph 22 reads in pertinent part:

“Defaults and Remedies . . . If Seller defaults hereunder Purchaser may elect either to (i) terminate this Contract and recover all Purchaser payments as provided in Paragraph 5 hereof or (ii) specifically enforce Seller’s obligations to convey the Premises in accordance with this Contract. Purchaser hereby expressly waives all other remedies available at law or at equity with regard to a Seller default”

(NYSCEF Doc No. 2 at 9).

Paragraph 26, entitled “Miscellaneous,” contains two clauses pertaining to changes and modifications to the Contract terms and reads:

“(a) All prior understandings, agreements, representations and warranties, oral or written, between Seller and Purchaser are merged in this Contract; it completely expresses their full agreement and has been entered into after full investigation, neither party relying upon any statement made by anyone else that is not set forth in this Contract.

(b) Neither this Contract nor any provision thereof may be waived, changed or cancelled except in writing. This Contract shall also apply to and bind the heirs, distributees [sic], legal representatives, successors and permitted assigns of the respective parties. The parties hereby authorize their respective attorneys to agree in writing to any changes in dates and time periods provided for in this Contract”

(NYSCEF Doc No. 2 at 10).

Although paragraph 3(a) states that the down payment (Down Payment) of \$1.7 million shall be made by wire transfer, paragraph 4(e) states that the Escrowee acknowledges receipt of the Down Payment by check by executing the signature page of the Contract. Despite these conflicting terms and Bickford’s signature on the Contract for the Escrowee, plaintiff never delivered the Down Payment to the Escrowee.

Because the Escrowee had not received the Down Payment, in an email dated January 5, 2018 (the January 5 email), Bickford informed Michael C. Barrows, Esq. (Barrows), the attorney representing plaintiff on the transaction (NYSCEF Doc No. 2 at 12-13), that Wansdown had elected to terminate the Contract (NYSCEF Doc No. 77, affirmation of Sevan Ogulluk (Ogulluk), exhibit 5 at 2). In an email response dated January 10, 2018, Barrows advised Bickford that plaintiff had sufficient proof of funds for the Down Payment. Importantly, Barrows further wrote:

“My client’s [sic] propose the following as and for an offer to purchase the property, subject to a fully executed contract:

Purchase Price: \$17 million

Contract Deposit: \$1.7 million. Paid immediately into your firm’s escrow account upon receipt of a fully executed contract. To be held in escrow until closing.

Terms: Same as prior contract. ‘As Is’ condition, etc.

Inspection: 10 working day inspection period to begin 10 days after contract is executed.

Closing: Within 90 days. Extendable for another 60 days at the cost of an additional \$1.7 million deposit.

If same is acceptable, I would work off of the contract that Ms. Jones provided to me. If your client’s [sic] wish to counter, we are certainly amendable to same.”

(NYSCEF Doc No. 77 at 2) (emphasis added).

Bickford responded by email dated January 15, 2018. He countered with additional terms for the proposed sale, including execution of a new “purchase and sale agreement that provides for a 10% deposit, payable on execution of the contract, and closing within 30 days at which the balance of the purchase price would be paid” (NYSCEF Doc No. 77 at 1). Bickford also advised Barrows that Wansdown reserved its right to entertain other offers for the Premises “unless and until a binding agreement with your client has been executed” (*id.*). It does not appear that plaintiff responded to Wansdown’s counter.

On January 24, 2018, plaintiff commenced this action for specific performance and a declaratory judgment. The complaint alleges that plaintiff fully performed its obligations under the Contract (NYSCEF Doc No. 1, complaint ¶ 7), and that Wansdown failed to furnish plaintiff with the requisite banking information to complete a wire transfer of the Down Payment (*id.*, ¶ 10). The complaint characterizes the latter action as a breach of the Contract. The complaint further alleges that plaintiff contacted defendant Kamran Abbas Vahid (Vahid), an “agent for the sellers,” to ascertain the correct bank information¹ (NYSCEF Doc No. 3, complaint, exhibit B, ¶ 11), and that Vahid directed plaintiff to transfer the Down Payment to Barrows (NYSCEF Doc No. 1, complaint ¶ 7). An email dated January 9, 2018 from Community Bank appears to confirm that a wire transfer of \$1,707,500 was made that same day from the account of 662 Ridgeway Escrow Inc. to the trust account for the Law Offices of Anthony A. Capetola² (NYSCEF Doc No. 4, complaint, exhibit C at 1). Barrows is affiliated with the latter law firm. Wansdown, though,

¹ Vahid has not answered or otherwise appeared in this action, and the court’s records, of which it takes judicial notice (*see Leary v Bendow*, 161 AD3d 420, 421 [1st Dept 2018]), do not reflect the filing of an affidavit of service of the summons and complaint upon him.

² Plaintiff does not explain its relationship with 662 Ridgeway Escrow Inc. or why it transferred \$7,500 in addition to the \$1.7 million Down Payment.

subsequently “changed the terms [of the Contract] in an email asking for the full \$17,000,000 in cash within 30 days” (NYSCEF Doc No. 1, complaint ¶ 9). The complaint alleges that these actions were undertaken by Wansdown’s agents to “unlawfully convert the down payment funds as an interest-generating enterprise in this potential down-payment-interest-generating fishing scheme” (*id.*).

After plaintiff initiated the action, the parties continued to negotiate the terms for a prospective sale. On February 15, 2018, plaintiff, acting through new counsel, Omar Qudrat (Qudrat), informed Wansdown’s transaction counsel, Bickford, that plaintiff could “wire the \$1.7 million now to the appropriate escrowee of your choosing” in connection with a new contract of sale (NYSCEF Doc No. 23, Ogulluk affirmation, exhibit 3 at 1).

In an email to Qudrat dated April 30, 2018, Bickford wrote that the new contract he had forwarded to plaintiff for execution had not been signed (NYSCEF Doc No. 16, affirmation of William J. Hine [Hine], exhibit 3 at 2). Annexed to the email was a letter (the April 30 Letter) in which Bickford wrote:

“Accordingly, in one last-ditch effort to try and complete this sale transaction and avoid litigation (reserving all of Wansdown’s rights in the Litigation and without prejudice to our position as to the validity of Wansdown’s earlier termination of the Contract), we write to inform you that Wansdown is ready, willing and able to complete the sale of the Premises to your client SCP under the terms of the Contract for which SCP has sued for specific performance”

(*id.* at 2). Given that plaintiff had alleged that it was “ready, willing and able to . . . perform” (NYSCEF Doc No. 1, complaint ¶ 11), Bickford set a deadline of “4:00 pm EDT on May 7, 2018 TIME IS OF THE ESSENCE as to that date and time” for the Down Payment to be delivered by wire transfer to his office’s account (NYSCEF Doc No. 16 at 3). The April 30 Letter set a new closing date of “August 7, 2018, the maximum 90-day ‘Outside Date’ allowed” under paragraph 5(a) of the original Contract (*id.*). Bickford informed Qudrat that an extension of the closing date

to a date no later than October 9, 2018 would require payment of an additional \$1.7 million upon notice, as required in paragraph 5(b) of the original Contract (*id.*). The letter further read, “BE FOREWARNED, IF YOUR CLIENT FAILS TO MAKE PAYMENT OR COMPLETELY TO PERFORM ANY OF ITS OBLIGATIONS UNDER THE CONTRACT BY THE ABOVE-SPECIFIED DATES, TIME BEING OF THE ESSENCE AS TO EACH OF THEM, YOUR CLIENT WILL BE IN DEFAULT AND THE CONTRACT WILL BE DEEMED TERMINATED” (*id.*) (emphasis in original).

Qudrat responded by email on May 7, 2018, writing that he had advised plaintiff “to wire the down payment to effect the original agreed upon contract” and requested that the parties “dispense of the self generated [sic] deadline [Bickford] provided” (NYSCEF Doc No. 58, Qudrat affirmation, exhibit 5 at 1). Bickford responded by letter on May 8, 2018, informing Qudrat that “SCP is in default under the Contract, and the Contract is now hereby terminated” (NYSCEF Doc No. 17, Hine affirmation, exhibit 4 at 3).

On May 16, 2018, defendants filed an order to show cause to cancel the notice of pendency and a separate motion to dismiss the complaint. Shortly thereafter, on May 29, 2018, Qudrat authorized a wire transfer of \$1.7 million from his IOLTA Trust account to the Escrowee’s IOLA account (NYSCEF Doc No. 60, Qudrat affirmation, exhibit 7 at 1). Qudrat advised Bickford the same date that the Down Payment had been transferred “for the purpose of completing the sale of 29 Beekman per the December 2017 contract” (NYSCEF Doc No. 62, Qudrat affirmation, exhibit 9 at 3). Bickford responded by email the next day, rejecting the late wire transfer and stating that the funds would be returned to Qudrat’s account (*id.* at 1).

The Parties’ Contentions

Defendants argue that the notice of pendency is without legal effect because plaintiff failed to serve the summons upon them within 30 days of its filing (*see* CPLR 6512 and 6514 [a]). In

addition, defendants submit that as of the date it filed the proposed order to show cause, plaintiff had not served any of them with the summons and complaint. Less than two weeks after defendants filed that application, plaintiff filed affidavits of service signed by Robert L. Lawson (Lawson) for service of the summons and complaint and notice of pendency on Wansdown, Armao and Golsorkhi.

Defendants now contest the veracity of the statements contained in Lawson's affidavits. With regards to Wansdown, they argue that service of process under CPLR 311 and Business Corporation Law § 306 was deficient. Business Corporation Law § 306 (b) (1) requires delivery of "duplicate copies of . . . process" upon the secretary of state. Lawson averred that he left only "a true copy" with the secretary of state on February 16, 2018³ (NYSCEF Doc No. 32, Ogulluk supplemental affirmation, exhibit 1 at 1). Next, the Service of Process Unit at the New York State Department of State (DOS), Division of Corporations, advised that it had no record of receipt of process for Wansdown in this action from February 16, 2018 to May 29, 2018 (NYSCEF Doc No. 40, Ogulluk supplemental affirmation, exhibit 9 at 2).

Lawson averred that he effected service of process upon Armao on February 7, 2018 at 239 East 17th Street, New York, New York, using the nail-and-mail method of service prescribed in CPLR 308 (4) and mailing the papers to Armao on February 12, 2018 (NYSCEF Doc No. 33, Ogulluk supplemental affirmation, exhibit 2 at 1). Armao, though, averred that he never saw any posting to the door of his single-family townhouse and that he never received any papers in the mail (NYSCEF Doc No. 42, Armao aff, ¶¶ 8-9). Additionally, he employed a full-time security

³ On February 15, 2018, Qudrat advised Bickford that "[w]e have effected service upon the New York Department of State. Thus, we no longer care to know who represents your client as service is legally effected under New York law and it's up to your client whether to consume the resources to engage us or not" (NYSCEF Doc No. 23 at 1). Lawson, though, did not attempt to serve Wansdown until the next day.

staff at his home, and none of his staff had knowledge of any attempts at service (*id.*, ¶ 9). The court notes that Lawson's affidavit does not bear the time when he effected nail-and-mail service.

Lawson stated that he served Golsorkhi via substituted service under CPLR 308 (2) by leaving the summons and complaint and notice of pendency with the building concierge at 333 East 57th Street, New York, New York, who had refused to call Golsorkhi (NYSCEF Doc No. 34, Ogulluk supplemental affirmation, exhibit 3 at 1). Golsorkhi averred that he never received process by any method, and that the doormen at his building were not aware of an incident as described in Lawson's affidavit.

Defendants also contend that plaintiff is not entitled to specific performance of the Contract on several grounds. First, plaintiff breached the Contract by failing to forward the Down Payment in the manner described in paragraph 4 when it elected to transfer the funds to its own attorney rather than to the designated Escrowee. Although plaintiff alleges that Vahid directed it to transfer the Down Payment to Barrows, defendants maintain that Vahid was never a consultant or agent for Wansdown. Second, plaintiff breached the Contract by failing to plead that it had paid the Pre-Closing Costs as required in paragraph 5 of the Contract. Third, Wansdown attempted to revive the original Contract after it had been terminated and after this action was commenced, albeit under revised terms, but plaintiff twice attempted to renegotiate the terms. Despite serving plaintiff with a time is of the essence letter, plaintiff failed to timely transfer the Down Payment.

As for the claims against Golsorkhi and Armao, they argue that they are not personally liable because they were not signatories to the Contract. In addition, the individual defendants submit that a corporate officer or director cannot be held liable for causing a corporation to breach a contract. The complaint has not alleged that the individual defendants were acting outside the scope of their duties, nor has the complaint detailed the specific malicious acts that induced

plaintiff to breach the Contract. The Contract also limited plaintiff’s remedies for a default to a return of the Down Payment or specific performance.

Plaintiff opposes dismissal on the ground that Wansdown failed to provide the bank wire information for the Down Payment. It was compelled to consult with Vahid, a “consultant and agent of the trustees” selling the Premises, who instructed them to wire the Down Payment to Barrows (NYSCEF Doc No. 3, ¶¶ 1 and 8). Defendants’ assertion that plaintiff breached the Contract by failing to pay the Pre-Closing Costs is without merit because Wansdown never advised plaintiff of that amount. Further, as the Contract did not contain a time is of the essence provision, plaintiff maintains that it was unreasonable for Wansdown to impose a strict deadline for performance and that the time within which plaintiff had to perform was unreasonable. Finally, plaintiff transferred the Down Payment to the Escrowee only 29 days after it received the April 30 Letter. As to the individual defendants, plaintiff submits that discovery is necessary to determine whether it can prevail on its cause of action for a declaratory judgment.

With regards to the notice of pendency, plaintiff argues that it properly served the summons upon defendants within 30 days of the filing of the notice. Plaintiff relies, in part, upon Lawson’s affidavit in which he averred that he followed DOS’ procedures for service, and that DOS withdrew \$40 as a processing fee from his account (NYSCEF Doc No. 72, Lawson aff, ¶¶ 3-4). Lawson did not address the statements in Golsorkhi’s or Armao’s affidavits.

Legal Standards

A. Cancellation of a Notice of Pendency

The relevant portion of CPLR 6512 reads that “[a] notice of pendency is effective only if, within thirty days after filing, a summons is served upon the defendant” Once a notice of pendency is filed, it is in effect for three years from the date of the filing (*see* CPLR 6513). CPLR 6514 sets forth the mechanisms for cancelling notice of pendency. Importantly, CPLR 6514 (a)

provides, in part, that “[t]he court, upon motion of any person aggrieved and upon such notice as it may require, shall direct any county clerk to cancel a notice of pendency, if service of a summons has not been completed within the time limited by section 6512.” Furthermore, “[i]f the procedures prescribed in article 65 have not been followed or if the action has not been commenced or prosecuted in good faith, the notice must be canceled in the first instance” (*5303 Realty Corp. v O & Y Equity Corp.*, 64 NY2d 313, 320 [1984]).

B. Dismissal under CPLR 3211

Dismissal under CPLR 3211 (a) (1) is warranted “only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). “To be considered ‘documentary’ under CPLR 3211 (a) (1), evidence must be unambiguous and of undisputed authenticity” (*Fontanetta v John Doe 1*, 73 AD3d 78, 86 [2d Dept 2010] [citation omitted]). Judicial records, mortgages, deeds and contracts, and correspondence, including emails, constitute documentary evidence (*id.* at 84; *Kolchins v Evolution Mkts. Inc.*, 128 AD3d 47, 58-59 [1st Dept 2015, *affd* 31 NY3d 100 [2018]]), but affidavits and deposition testimony are not considered documentary evidence (*see Lowenstern v Sherman Sq. Realty Corp.*, 143 AD3d 562, 562 [1st Dept 2016]; *Correa v Orient-Express Hotels, Inc.*, 84 AD3d 651, 651 [1st Dept 2011]). “[T]he paper’s content must be ‘essentially undeniable and . . . , assuming the verity of [the paper] and the validity of its execution, will itself support the ground on which the motion is based’” (*Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 432 [1st Dept 2014] [internal quotation marks and citation omitted]).

On a motion to dismiss brought under CPLR 3211 (a) (7), the court must “accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory

(*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [citations omitted]). Ambiguous allegations must be resolved in plaintiff's favor (see *JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015]). A motion to dismiss will be denied "if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). However, "the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts" (*Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003]). "When documentary evidence is submitted by a defendant 'the standard morphs from whether the plaintiff stated a cause of action to whether it has one'" (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 135 [1st Dept 2014] [internal citation omitted]).

Discussion

The court turns first to the motion to dismiss since dismissal of the complaint will result in the mandatory cancellation of the notice of pendency⁴ (see *Jericho Group Ltd. v Midtown Dev., L.P.*, 67 AD3d 431, 432 [1st Dept 2009], *lv denied* 14 NY3d 712 [2010] [citations omitted]).

A. The First Cause of Action for Specific Performance

The first cause of action seeks specific performance of the Contract. "[S]pecific performance is an equitable remedy" (*Nomura Home Equity Loan, Inc., Series 2006-FM2 v Nomura Credit & Capital, Inc.*, 133 AD3d 96, 106 [1st Dept 2015], *affd in part, mod in part*, 30 NY3d 572 [2017]), which is "intended to produce as nearly as is practicable the same effect that the performance due under a contract would have produced" (*Motor Veh. Mfrs. Assn. of U.S. v State of New York*, 75 NY2d 175, 181 [1990] [internal quotation marks and citation omitted]). To

⁴ The court observes that defendants have not moved for dismissal for lack of personal jurisdiction (see CPLR 3211 [a] [8]), despite the issues raised on their application seeking a mandatory cancellation of the notice pendency. Having charted their own course, the court will not address those issues at this time.

that end, “specific performance has been held to be a proper remedy in actions for breach of contract for the sale of real property” (*Cho v 401-403 57th St. Realty Corp.*, 300 AD2d 174, 175 [1st Dept 2002]). However, “the imposition of an equitable remedy must not itself work an inequity, and that specific performance should not be an undue hardship” (*Van Wagner Adv. Corp. v S & M Enters.*, 67 NY2d 186, 195 [1986]). It is within the court’s discretion to award specific performance (*see Cho*, 300 AD2d at 175).

“The elements of a cause of action for specific performance of a contract are that the plaintiff substantially performed its contractual obligations and was willing and able to perform its remaining obligations, that defendant was able to convey the property, and that there was no adequate remedy at law” (*EMF Gen. Contr. Corp. v Bisbee*, 6 AD3d 45, 51 [1st Dept 2004], *lv denied* 3 NY3d 607 [2004], *lv dismissed* 3 NY3d 656 [2004] [citation omitted]). However, “a party cannot seek specific performance of a cancelled real estate contract” (*Jericho Group, Ltd. v. Midtown Dev., L.P.*, 32 AD3d 294, 298 [1st Dept 2006] [collecting cases]).

Here, the documentary evidence establishes that at the time plaintiff commenced the action, there was no enforceable contract. Plaintiff pleads that “Wansdown has purported to terminate” the Contract (NYSCEF Doc No. 1, ¶ 6), and the documents show that Wansdown terminated the Contract in the January 5 email (NYSCEF Doc No. 77 at 2). Paragraph 23(c) of the Contract provides that a written notice may be sent by “electronic internet communication to the party’s attorney” (NYSCEF Doc No. 2 at 9), and the January 5 email complies with this requirement. Five days after receiving the January 5 email, plaintiff’s then-attorney, Barrows, implicitly acknowledged that the Contract had been terminated when he conveyed a new offer to purchase the Premises “subject to a fully executed contract” and invited Wansdown to counter (NYSCEF Doc No. 77 at 2). Wansdown, through Bickford, countered with different terms.

“It is a fundamental rule of contract law that an acceptance must comply with the terms of the offer” (*Gram v Mutual Life Ins. Co. of N.Y.*, 300 NY 375, 382 [1950] [citations omitted]). Further, an acceptance of an offer must be clear and unequivocal (*see Thor Props., LLC v Willspring Holdings LLC*, 118 AD3d 505, 508 [1st Dept 2014]). An acceptance conditioned upon new terms constitutes a rejection and a counteroffer (*id.*), and a “[r]ejection by counteroffer extinguishes the offer and renders any subsequent acceptance thereof inoperative” (*Jericho Group, Ltd.*, 32 AD3d at 299). As plaintiff did not unequivocally accept Wansdown’s counteroffer, the parties could not have created an enforceable agreement.

Moreover, the documentary evidence establishes that the parties contemplated reducing any new agreement to writing (*see Saul v Vidokle*, 151 AD3d 780, 781 [2d Dept 2017] [concluding that the parties’ emails showed they “expressly anticipated the execution of a formal contract”]; *Kowalchuk v Stroup*, 61 AD3d 118, 124 [1st Dept 2009] [finding that the parties did not intend to be bound until there was a fully-executed written agreement]), as evidenced in Qudrat’s February 15, 2018 email where he asked Bickford “to provide [his client with] a proposed contract” (NYSCEF Doc No. 23 at 2). Thus, specific performance is unavailable to plaintiff as a remedy in the absence of an enforceable contract.

Plaintiff’s objection to the court’s consideration of the January 5 email lacks merit. “The function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion” (*Dannasch v Bifulco*, 184 AD2d 415, 417 [1st Dept 1992]). Although defendants did not identify the termination date until their reply (NYSCEF Doc No. 64, defendants’ reply memorandum of law at 1-2; oral argument tr at 3), the court adjourned the two motions to allow the parties to address the issue (NYSCEF Doc Nos. 74-75). Hence, there is no prejudice or surprise to plaintiff (*see River View at Patchogue, LLC v Hudson Ins. Co.*, 122 AD3d 824, 825 [2d Dept

2014] [finding that the trial court's decision to adjourn a motion and allow the parties an opportunity to submit additional evidence and arguments obviated any claim of prejudice or surprise]), because plaintiff was already aware of the termination, as shown in the complaint (NYSCEF Doc No. 1, ¶ 6 ["Wansdown has purported to terminate the . . . Contract"]). Significantly, plaintiff did challenge the January 5 termination date in its supplemental papers or at oral argument (oral argument tr at 12-13).

Furthermore, the allegations in the complaint show that plaintiff did not comply with the Contract by delivering the Down Payment to the Escrowee. Plaintiff purports to rely upon a verbal directive from Vahid, but paragraph 26(b) of Contract dictates that its terms cannot be modified except in a writing (*see Global Events LLC v Manhattan Ctr. Studios, Inc.*, 123 AD3d 449, 449 [1st Dept 2014] [dismissing a breach of contract claim where the merger clause in the parties' agreement precluded modification of its terms in the absence of a signed writing by the parties]). To the extent that plaintiff relies upon Vahid's declaration, it does not comport with CPLR 2106 and is not notarized (*see CPLR 2106; Discovision Assoc. v Fuji Photo Film Co., Ltd.*, 71 AD3d 488, 489 [1st Dept 2010] [stating that the parties' submissions must comply with CPLR 2106 or else they must submit affidavits]; *Siagha v Salant-Jerome, Inc.*, 249 AD2d 11, 11 [1st Dept 1998], *lv dismissed* 92 NY2d 946 [1998] [declining to consider the defendant's claim, in part, because it was not notarized]). Additionally, paragraph 25 of the Contract identified nonparty Core Capital Holdings, LLC, not Vahid, as the sole consultant on the transaction (NYSCEF Doc No. 2 at 10).

Lastly, the complaint concerns events that preceded January 24, 2018, when plaintiff commenced the action, but the parties advanced arguments related to events that took place after that date. Although the Contract did not contain a provision that permitted its resurrection after cancellation (*see Milan Music, Inc. v Emmel Communications Booking, Inc.*, 37 AD3d 206, 206 [1st Dept 2007] ["Once an agreement has been rescinded, there can be no claims based on the

cancelled agreement unless the right to make such claims is expressly or impliedly reserved within the terms of the rescission”)), the parties, nevertheless, attempted to enforce the original Contract. Defendants have demonstrated that plaintiff did not comply with the time is of the essence notice in the April 30 Letter, and that they terminated the Contract a second time.

It is well settled that “[w]hen there is a declaration that time is of the essence . . . each party must tender performance on law day unless the time for performance is extended by mutual agreement” (*Grace v Nappa*, 46 NY2d 560, 565 [1979], *rearg denied* 47 NY2d 952 [1979]). Where a contract for the sale of real property does not specify that time is of the essence, a party may fix the day for performance so long as there is a “clear, distinct, and unequivocal notice to that effect giving the other party a reasonable time in which to act” (*Zev v Merman*, 134 AD2d 555, 557 [2d Dept 1987], *affd* 73 NY2d 781 [1988]). In order to determine what constitutes a reasonable time to perform, the court must consider “the nature and object of the contract, the previous conduct of the parties, the presence or absence of good faith, the experience of the parties and the possibility of prejudice or hardship to either one, as well as the specific number of days provided for performance” (*Ben Zev v Merman*, 73 NY2d 781, 783 [1988]). The notice also must clearly advise the other party that the failure to timely perform on the notice will result in a default (*see Charchan v Wilkins*, 231 AD2d 668, 669 [2d Dept 1996]).

Counter to plaintiff’s assertion, the April 30 Letter set forth reasonable time frames for it to perform. When Wansdown issued the letter, over four months had lapsed from the date of the original Contract, and the “Outside Date” for closing under paragraph 5(a) of that Contract had already passed. The April 30 Letter designated May 7, 2018 as the date by which the Escrowee must receive the Down Payment and August 7, 2018 as the new closing date. These new dates followed the timeframes described in the original Contract. The April 30 Letter also warned plaintiff of the consequences of a default. According to the complaint, plaintiff had transferred the

Down Payment to Barrows three months earlier and claimed that it was ready, willing and able to perform (NYSCEF Doc No. 1, complaint ¶¶ 7 and 11). Qudrat's February 15, 2018 email also indicated that plaintiff could wire the Down Payment "without delay" and that it could easily finance the balance of the purchase price (NYSCEF Doc No. 23 at 1). Despite these assurances, plaintiff inexplicably failed to tender the Down Payment to the Escrowee until May 29, 2018, 22 days late. Accordingly, defendants are entitled to dismissal of the first cause of action against them.

B. The Second Cause of Action for a Declaratory Judgment

The second cause of action seeks a judgment declaring that the individual defendants "unlawfully induced Wansdown to breach the Sale Contract, interfered with SCP's rights under the Sale Contract and interfered with SCP's reasonable economic expectancies from purchase and ownership of the Premises" (NYSCEF Doc No. 1, complaint ¶ 19).

CPLR 3001 provides, in part, that the "court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." A declaratory judgment action requires an actual controversy (*see Long Is. Light. Co. v Allianz Underwriters Ins. Co.*, 35 AD3d 253 [1st Dept 2006], *appeal dismissed* 9 NY3d 1003 [2007]). Relief is limited to a declaration of the parties' legal rights based on the facts presented (*see Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 100 [1st Dept 2009], *lv denied* 15 NY3d 703 [2010]).

Generally, an agent acting within the scope of its authority on the behalf of its principal is not liable for inducing the principal to breach a contract with a third party (*see Devash LLC v German Am. Capital Corp.*, 104 AD3d 71, 79 [1st Dept 2013], *lv denied* 21 NY3d 863 [2013], quoting *Nu-Life Constr. Corp. v Board of Educ. of City of N.Y.*, 204 AD2d 106, 107 [1st Dept 1994], *lv dismissed* 84 NY2d 850 [1994]). This principle applies equally to a corporate officer or

director acting in good faith (*see Murtha v Yonkers Child Care Assn.*, 45 NY2d 913, 915 [1978]). However, liability may be imposed upon a corporate officer or director for his or her own independent tortious conduct (*see Fletcher v Dakota, Inc.*, 99 AD3d 43, 56 [1st Dept 2012]).

Applying these precepts to the present action, the complaint is devoid of specific factual allegations showing that the individual defendants had acted outside the scope of their authority on the transaction (*see Wald v Graev*, 137 AD3d 573, 574 [1st Dept 2016] [finding that “[t]he complaint fails to set forth allegations sufficient to state a claim against the individual defendant”]). Nor are the allegations against them sufficient to support a claim for tortious interference with contract. The elements for such a claim are “(1) the existence of a contract, enforceable by the plaintiff, (2) the defendant’s knowledge of the existence of that contract, (3) the intentional procurement by the defendant of the breach of the contract, and (4) resultant damages to the plaintiff” (*Joan Hansen & Co. v Everlast World’s Boxing Headquarters Corp.*, 296 AD2d 103, 111 [1st Dept 2002], citing *Israel v Wood Dolson Co.*, 1 NY2d 116, 120 [1956]). A plaintiff seeking to hold an individual defendant liable must plead “either malice on the one hand, or fraudulent or illegal means on the other” (*Morgan v Worldwide Entertainment Holdings, Inc.*, 141 AD3d 461, 463 [1st Dept 2016], quoting *Foster v Churchill*, 87 NY2d 744, 750 [1996]; *see also Hoag v Chancellor*, 246 AD2d 224, 229-230 [1st Dept 1998] [stating that the corporate officer or director must have personally profited from the alleged breach]). Here, the complaint does not identify the illicit means by which the individual defendants allegedly induced the breach (*see Little Rest Twelve, Inc. v Zajic*, 137 AD3d 540, 541 [1st Dept 2016] [concluding that the third-party complaint fails to state a cause of action for tortious interference with contract against the third-party defendants as the plaintiff’s agents]; *Marks v Smith*, 65 AD3d 911, 916 [1st Dept 2009], *lv denied* 15 NY3d 704 [2010] [dismissing the plaintiff’s claim for tortious interference with contractual relations against the individual defendants as there was no evidence that they were

motivated by self-interest]). Plaintiff's reliance upon a real estate advertisement listing the Premises for sale at \$20 million (NYSCEF Doc No. 51, plaintiff's memorandum of law at 5; NYSCEF Doc No. 61 at 1) is misplaced. The listing was posted on May 30, 2018, after the original Contract had been terminated.

Finally, CPLR 3211 (d) permits the court to deny a dismissal motion where "facts essential to justify opposition may exist but cannot then be stated." Plaintiff, though, neither tendered an affidavit that satisfies CPLR 3211 (d) (*see Valyrakis v 346 W. 48th St. Hous. Dev. Fund Corp.*, 161 AD3d 404, 408 [1st Dept 2018]), nor any documentary evidence to support the inference that discovery would yield relevant information sufficient to defeat the motion. Consequently, the complaint is dismissed against the individual defendants.

C. The Notice of Pendency

In view of the foregoing, the notice of pendency must be cancelled as well (*see Jericho Group Ltd.*, 67 AD3d at 432). As such, the court need not address the arguments raised in support of motion sequence no. 001.

D. Costs and Expenses

CPLR 6514 (c) provides that "[t]he court, in an order cancelling a notice of pendency under this section, may direct the plaintiff to pay any costs and expenses occasioned by the filing and cancellation, in addition to any costs of the action." Such an award may include "counsel fees which flow from the wrongful filing and cancellation of such notice" (*No. 1 Funding Ctr., Inc. v H&G Operating Corp.*, 48 AD3d 908, 911 [3d Dept 2008] [stating that "[t]he purpose of CPLR 6514 (c) is to reimburse a party for costs and expenses incurred as a result of a wrongful filing of a notice of pendency"]). Thus, contrary to plaintiff's contention, Wansdown may recover its reasonable attorneys' fees (*id.*; *see also Josefsson v Keller*, 141 AD2d 700, 701 [2d Dept 1988] [cancelling a notice of pendency and awarding the defendant seller costs and expenses, including

attorneys' fees and disbursements]). The court need not condition an award upon a showing of bad faith (*see Knopf v Sanford*, 132 AD3d 416, 418 [1st Dept 2015]), which is a necessary element under CPLR 6514 (b) (*see 551 W. Chelsea Partners LLC v 556 Holding LLC*, 40 AD3d 546, 548 [1st Dept 2007]). Therefore, Wansdown is entitled to recover the costs associated with the cancellation of the notice of pendency in addition to its costs, including attorneys' fees and disbursements, incurred in defending the present action. Although Wansdown provided no proof of the costs incurred in defending the action (*see Saul*, 151 AD3d at 782 [denying the defendant costs in the absence of documentary proof to support an award]), this issue is set down for a hearing to determine the amount defendants may recover from plaintiff. And while defendants had also moved to recover their reasonable attorneys' fees under Rules of the Chief Administrator of the Courts (22 NYCRR) § 130-1.1, the court declines to impose a monetary sanction against plaintiff.

The court has considered the other arguments advanced by the parties and finds them unavailing.

Accordingly, it is

ORDERED that the motion of defendants Wansdown Properties Corporation N.V., Reza Golsorkhi and Robert Armao for an order cancelling the notice of pendency, filed in the office of the County Clerk of New York County on January 24, 2018 and affecting real property located at 29 Beekman Place, New York, New York (Block 1361, Lot 121) (motion sequence no. 001) is granted; and it is further

ORDERED that the County Clerk of New York County, upon service upon him of a copy of this order with notice of entry, shall cancel the aforesaid notice of pendency; and it is further

ORDERED that such service upon the County Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for*

Electronically Filed Cases (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that the amount of defendant Wansdown Properties Corporation N.V.’s costs and expenses occasioned by the filing and cancellation of the notice of pendency, in addition to its regular costs, including its attorneys’ fees and disbursements, incurred in defending this action, is referred to a Special Referee to hear and determine, in accordance with CPLR 4317 (b); and it is further

ORDERED that counsel for said defendants shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee’s Part for the earliest convenient date; and it is further

ORDERED that the motion of defendants Wansdown Properties Corporation N.V., Reza Golsorkhi and Robert Armao for dismissal of the complaint herein (motion sequence no. 002) is granted, and the complaint is dismissed in its entirety against them, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the action is severed and continued against the remaining defendant, Kamran Abbas Vahid; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

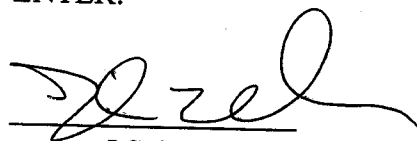
ORDERED that counsel for the moving parties shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General

Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

Dated: 3-28-2019

ENTER:



J.S.C.

HON. DAVID B. COHEN
J.S.C.