SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. GERALD LEBOVITS** **PART** **IAS MOTION 7EFM**

Justice

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SUNCORE GROUP SA, LLC

Plaintiff,

- v -

1660 1ST LLC,

Defendant.

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INDEX NO. 652992/2019

MOTION DATE 01/09/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43

were read on this motion to/for SUMMARY JUDGMENT.

Goldberg Weprin Finkel Goldstein, LLP, New York, NY (Kevin J. Nash of counsel), for plaintiff.
Wachtel Missry, LLP, New York, NY (Dani Schwartz of counsel), for defendant.

Gerald Lebovits, J.

Plaintiff, Suncore Group SA, LLC, sought to purchase certain real property from defendant, 1660 1st LLC. The purchase did not close on the date specified in the purchase agreement. 1660 1st took the position that the failure to close constituted a default by Suncore, thereby terminating the contract and entitling 1660 1st to retain Suncore's down payment.

Suncore brought this action, seeking a declaratory judgment that 1660 1st was estopped from immediately enforcing the default provision of the purchase agreement, and that Suncore was entitled to additional time in which to close on the purchase. 1660 1st counterclaimed, seeking a declaratory judgment that 1660 1st properly terminated the purchase agreement, and that it therefore is entitled to retain the downpayment (along with attorney fees and costs). 1660 1st now moves for summary judgment on its counterclaims.

BACKGROUND

1660 1st and Suncore entered into an agreement of purchase and sale dated February 8, 2019, for the purchase and sale of real property located at 1660 First Avenue in New York County, for $12,500,000. Suncore tendered a downpayment of $937,500 and agreed to pay the balance of the purchase price, $11,562,500, at the time of closing, set for May 6, 2019, no later than 6:00 p.m., with time being of the essence under section 4.1 of the agreement. (NYSCEF

Doc. No. 15, Motion 001 Exhibit B, at 9.[1]) The parties agreed, pursuant to section 10.1 of the agreement, that if Suncore defaulted, 1660 1st would be entitled to terminate the agreement and retain the downpayment as liquidated damages. (*Id*. at 21.) The parties further agreed, pursuant to section 17, that the agreement "may not be modified, changed, supplemented or terminated, nor may any obligations hereunder be waived, except by written instrument signed by the party to be charged or by its agent duly authorized in writing or as otherwise expressly permitted herein." (*Id.* at 26.)

By the end of day on May 6, 2019, 1660 1st was ready to close the sale but Suncore did not make the balance payment and requested instead an extension of the time-of-the-essence closing date. Suncore declared that it had prepared and was ready to file a Chapter 11 bankruptcy petition that would automatically extend the closing date by 60 days, regardless whether 1660 1st consented to the extension or received additional consideration for the postponement.

Suncore refrained, however, from filing the bankruptcy petition "because it believed that an extension would be obtained based on [1660 1st]'s commitment to negotiate the next day." (NYSCEF Doc. No. 32, Affidavit of Samvir Sidhu in Opposition to Motion for Summary Judgment on Counterclaims, at 6.) The parties met to discuss the possibility of an extension on May 7, 2019. But by the end of that day, 1660 1st filed a notice of default, asserting that Suncore had defaulted by failing to pay the balance of the property's purchase price on May 6, 2019.

As discussed above, Suncore then brought this action, in which the parties disputed whether 1660 1st was entitled to have declared Suncore in default under the purchase agreement (and thus whether 1660 1st was entitled to retain Suncore's down payment and collect attorney fees). 1660 1st now moves for summary judgment on its counterclaims under CPLR 3212.

DISCUSSION

A party moving for summary judgment "must make a prima face showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) Once this showing is made, "the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986].)

First Counterclaim

1660 1st argues that it should obtain summary judgment on its declaratory-judgment counterclaim because as a matter of law 1660 1st is not estopped from enforcing the contract's time-of-the-essence provision. This court agrees. The contract provides that the closing *must* occur on May 6. And it is undisputed that (a) 1660 was ready to close on May 6, and (b) the

[1] Citations to electronically filed documents refer to the document's page number as filed on NYSCEF, rather than the document's internal pagination.

reason no closing happened is that Suncore was not ready on May 6 to tender the balance of the purchase price.

Suncore argues that it reasonably relied on its belief that 1660 1st would agree to extend the time-of-the-essence closing date—supported by the fact that Suncore refrained from filing the Chapter 11 petition, which would immediately postpone the time of closing date—1660 1st was estopped from filing a notice of default pursuant to the time-of-the-essence provision. Suncore asserts that whether the parties agreed to negotiate an extension raises material issues of fact that must be decided at trial. But any modification of a time-of-the-essence provision of a contract must be made in accordance with the contract's terms. (*See Nemon Corp. v 45-51 Ave. B, LLC*, 102 AD3d 438, 439 [1st Dept 2013]; *accord No. 1 Funding Ctr., Inc. v. H & G Operating Corp*., 48 AD3d 908, 910 [3d Dept 2008].) Here, the contract expressly provides that the agreement could not be modified—or its obligations waived—except by a signed "written instrument." (NYSCEF No. 15 at 26.)

To be sure, the record suggests that 1660 1st may have indicated a potential willingness to extend the closing date—including by agreeing to meet the day after the closing date to discuss an extension. It is undisputed, however, that the parties never memorialized their willingness to extend the closing date in writing. Given the contract's clear language requiring contractual modifications to be both written and signed (*see id.*), as a matter of law Suncore could not have reasonably relied for estoppel purposes on 1660 1st's orally expressed willingness to discuss an extension. Thus, no factual dispute exists as to whether 1660 1st is equitably estopped from enforcing the time-of-the essence closing default at issue here.

Suncore argues that 1660 1st's motion for summary judgment is premature under CPLR 3212 (f) since no discovery has been exchanged yet. However, Suncore has not shown that further discovery would shed light on any material issues on 1660 1st's counterclaims.

This court therefore grants summary judgment declaring that 1660 1st properly terminated the purchase agreement according to its terms, because Suncore failed without lawful excuse to close on the date specified in the agreement. 16601 1st is, therefore, entitled to retain the down payment it received from Suncore per their contract.[2] (*See* NYSCEF No. 15 at 21.)

Second Counterclaim

"Under the general rule, attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule." (*Hooper Assoc. v AGS Computers*, 74 N.Y.2d 487, 491 [1989].) Here, the agreement provides under section 10.1 that "[i]f Seller properly terminates this Agreement pursuant to the immediately preceding grammatical paragraph of this section 10.1, and Purchaser or any Permitted Transferee takes any Action, the Purchaser and any Permitted

[2] Suncore alleges in its complaint as a third cause of action that in May, New York is under Eastern Daylight Time, not Standard Time, making the terms of the time-of-the-essence provision in section 4.1 of the parties' agreement imprecise. This is argument is irrelevant here: 1660 1st filed its default notice against Suncore one day after the time-of-the-essence closing date passed, not one hour after.

Transferee(s) shall be jointly and severally liable for all loss, cost, damage, liability or expense (including attorneys' fees, court costs and disbursements) incurred by Seller by reason of such Action." (NYSCEF No. 15 at 21.) In light of this court's conclusion (set forth above) that 1660 1st properly terminated the parties' purchase agreement, 1660 1st is entitled under section 10.1 to an award of reasonable attorney fees, costs, and expenses incurred in litigating this action.

Accordingly, it is

ORDERED that the branch of 1660 1st's motion seeking summary judgment under CPLR 3212 on its first counterclaim for a declaratory judgment is granted; and it is further

ORDERED that the branch of 1660 1st's motion seeking summary judgment under CPLR 3212 on its second counterclaim for a money judgment for attorney fees and other costs and expenses is granted, with the amount of the money judgment to be determined at the close of the case; and it is further

ORDERED that 1660 1st shall serve a copy of this order with notice of its entry on all parties.

HON. GERALD LEBOVITS
J.S.C.

03/23/20
DATE

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE