568 Empire LLC v Fisher
2020 NY Slip Op 31231(U)
May 4, 2020
Supreme Court, Kings County
Docket Number: 521180/2017
Judge: Debra Silber

At an IAS Part 9 of the Supreme Court of the State of New York, County of Kings, at the Courthouse, 360 Adams Street on the 4th day of May, 2020.

PRESENT:

HON. DEBRA SILBER, Justice

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568 EMPIRE LLC,

Plaintiff,

- against-

GLORIA FISHER,

Defendant.

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DECISION, ORDER and JUDGMENT

Index No. 521180/2017

Motion Seq. Nos. 3 and 4

The following e-filed papers read herein:	NYSCEF Doc. Nos.
Notice of Motion/Cross Motion, (Affidavits/ Affirmations) and Exhibits Annexed	71-86, 87-92, 94-127
Opposing Affidavit/Affirmations and Exhibits Annexed	88-92, 94-127, 128-141
Reply Affidavit/Affirmations and Exhibits Annexed	128-141, 142

Upon the foregoing papers, in this action for, inter alia, specific performance of a real estate contract, seller Gloria Fisher (defendant or Fisher) moves, in motion sequence (mot. seq.) number 3, for an order, striking the first through fifth affirmative defenses (all of them) of the plaintiff buyer, 586 Empire LLC (plaintiff or 586 Empire) in its reply to defendant's counterclaims, dated June 21, 2019, and for an order granting her, pursuant to CPLR 3212, summary judgment on her first counterclaim, which seeks a declaratory judgment that the

contract is null and void, and for an order granting her summary judgment dismissing the complaint and awarding her damages, including attorney's fees.

Plaintiff cross-moves, in mot. seq. number 4, for an order, pursuant to CPLR 3212, granting it summary judgment on its specific performance claim, denying defendant's summary judgment motion, both as to the branch which seeks to dismiss the complaint and the branch for summary judgment on her first counterclaim, and denying the branch of defendant's motion seeking to strike plaintiff's affirmative defenses to her counterclaims. For the reasons which follow, defendant's motion is denied, and plaintiff's cross motion is granted.

Background

On May 31, 2017, the parties executed a contract for plaintiff to purchase defendant seller's property at 586 Empire Boulevard (Property) in Brooklyn for $1,325,000.00 (Contract). The Property is a residential multiple dwelling. Plaintiff buyer, pursuant to the Contract, provided a $66,250.00 down payment, to be held in escrow by defendant's attorney who was handling the transaction, Glenroy M. George (transactional counsel) (*see* NYSCEF Doc. No. 95, exh B, schedule C and § 2.05, annexed to plaintiff's cross motion papers, NYSCEF Doc. Nos. 87-92 and 94-127). The Contract included a closing date of "on or about 90 days from receipt of fully signed contract" and did *not*, on its face, indicate that time was of the essence regarding either party's contractual obligations (*id.* at schedule D, ¶ 7).

586 Empire's counsel, after having provided a copy of the Property's title report to Attorney George (*see* NYSCEF Doc No. 96, annexed as exhibit C to plaintiff's cross-moving

papers) sent an October 23, 2017 letter to Attorney George (*see* NYSCEF Doc. No. 97, annexed as exhibit D to plaintiff's cross-moving papers) recounting that the 90-day period from the May 31, 2017 receipt of the fully signed contract had expired August 28, 2017. The letter further stated that 586 Empire "has been and remains ready, willing and able to close in accordance with the terms and conditions of the Contract"; that, considering that the "on or about date has passed," 586 Empire asserted a right to give notice that set a reasonable, unilateral time within which to close; and therefore scheduled "November 20, 2017 @ 10:00 a.m. as a closing date, TIME BEING OF THE ESSENCE as to the Seller . . ." The letter further warned that defendant Fisher's failure to then consummate the transaction would place her in default (*id.*).

Ms. Fisher neither rejected the letter from 568 Empire's counsel nor sent any notices attempting to schedule a closing on a different date. Instead, Attorney George sent an October 30, 2017 letter (*see* NYSCEF Doc. No. 98, annexed as exhibit E to plaintiff's cross-moving papers) which returned 586 Empire's $66,250 down payment with a check from Mr. George's escrow account. The letter stated that the Contract was deemed void and the transaction deemed cancelled. More specifically, the October 30, 2017 letter contended that "the purchaser has failed to close as agreed to in the contract dated 5/31/2017 that called for a closing date within 90 days of the contract date" (*id.*). This letter, though, made no reference to the portion of the aforementioned October 23, 2017 letter which had stated that 568 Empire "has been and remains ready, willing and able to close in accordance with the terms and conditions of the Contract," and advised the seller to attend the closing and issue a deed in

exchange for the balance of the purchase price on the designated closing date of November 20, 2017.

568 Empire's counsel responded to Attorney George's October 30, 2017 letter in a November 1, 2017 letter which rejected the Contract's "unilateral cancellation," characterized such act as violating Ms. Fisher's obligation to close, and states that the buyer considered "the Contract in full force and effect" (NYSCEF Doc. No. 99, exh. F, annexed to plaintiff's cross-moving papers). In addition, 568 Empire's counsel sent the $66,250 check back to Attorney George with its cancellation rejection letter (*id.*). Further, the November 1, 2017 letter advised Attorney George that the buyer, plaintiff, had commenced the instant action to compel Ms. Fisher's compliance with the Contract, and provided Mr. George with a copy of the pleadings and also informed him that a notice of pendency had been recorded against the Property.

Plaintiff in fact commenced this action on November 1, 2017 by filing a summons and complaint as well as a notice of pendency (*see* NYSCEF Doc No. 100, exh. G, annexed to plaintiff's cross-moving papers). Ms. Fisher then changed counsel, to her present counsel, Ms. Johnson, who notified plaintiff's counsel of such change and, according to 568 Empire's counsel, advised that her client now wanted to proceed to a closing, despite having attempted to cancel the Contract (*see* NYSCEF Doc. No. 89, October 29, 2019 affirmation of Anthony (Aaron) Goodman, Esq. [Goodman affirmation] at 3, ¶11, annexed to plaintiff's cross-moving papers).

On February 1, 2018, defendant answered the Complaint, with affirmative defenses but without counterclaims (*see* NYSCEF Doc. No. 8 and Doc. No. 73, annexed to defendant's motion papers). Her answer was subsequently amended to add the counterclaims (by court order following a motion to amend the answer). Communications provided between defendant's new counsel and plaintiff's counsel over the ensuing several weeks indicate that the defendant's new counsel was negotiating with defendant's lender to reduce the outstanding balance owed on the mortgage on the Property, and was waiting for an updated payoff letter (*see* NYSCEF Doc. Nos. 89 [Goodman affirmation at 3, ¶ 14). Defendant's new counsel further advised that she was helping Ms. Fisher find new housing so that she could deliver the Property vacant except for the two apartments which were occupied by tenants (*id.*). An August 13, 2018 email from the defendant's counsel states that her client, i.e., Ms. Fisher, "has a place to move to" and was "ready" to close (*see* NYSCEF Doc. No. 102, exh. I, annexed to plaintiff's cross-moving papers).

The Parties' Positions

Defendant, as previously mentioned, seeks an order striking plaintiff's first through fifth affirmative defenses of its reply to her counterclaims and awarding her summary judgment on her first counterclaim. The first counterclaim seeks a declaratory judgment that the contract is null and void, based upon a provision in the Rider to the Contract between the parties (*see* NYSCEF Doc. No. 81, defendant's amended answer with counterclaims, ¶ 20). Defendant argues that the provision in the Rider, "Government Violations and Orders," [1]

[1] The Contract identifies this provision as Section VIII, which defendant properly cites (*see* NYSCEF Doc. No. 72, at 7, ¶ 30) and also improperly cites (as Section VII, *id.* at 13, ¶ 61).

entitled her to cancel the contract, as the estimated cost of the violations exceeded the $5,000 threshold provided for therein, allowing cancellation.

However, plaintiff argues that the counterclaim should be considered a nullity as, procedurally, defendant failed to file the amended answer with counterclaims, as was required by the court's order dated June 13, 2019, and the time for such filing has expired (¶5 of Shternfeld aff.). Substantively, plaintiff asserts that defendant is not entitled to a declaratory judgment cancelling the Contract because the cited provision exists only for its benefit as the buyer. Mr. Goodman explains in his affirmation that the buyer had agreed to take title with only the contractual $5,000 credit toward the violations, although the violations that turned up would exceed that sum to cure. Plaintiff concurrently submits that it prima facie demonstrated entitlement to compel defendant's specific performance of the real estate Contract by showing it was ready, willing and able to tender the purchase price balance on the original closing date and when the instant motion and cross motion were filed; and that defendant anticipatorily breached the Contract by unilaterally cancelling it via the October 30, 2017 Letter before the closing day, i.e., before performance was due; and breached it again when she attempted to cancel it and have it declared void during pendency of this action.

Defendant replies that her amended answer (with counterclaims) was deemed served *and* filed pursuant to a stipulation between counsel and thus rejects plaintiff's argument about her counterclaim being a nullity. She also reiterates her construction of the pertinent Contract Rider section, and the Contract as well, as once she could not deliver good title free of violations for her out of pocket expenditure of $5,000 or less triggered her right to cancel the

Contract. Finally, she claims that plaintiff's summary judgment cross motion constitutes an impermissible, successive summary judgment cross motion.

Plaintiff states in its reply that defendant is in error in her interpretation of their stipulation, which was limited to deeming her amended answer served, not filed, and, in turn, contends that defendant has submitted an impermissible sur-reply. Plaintiff's counsel further notes that defendant does not dispute its financial ability to close on November 20, 2017, the original closing date, or when its cross motion was filed. Plaintiff asserts that defendant has failed to raise a triable factual issue with regard to plaintiff's claim that she has breached the contract, thereby entitling it to specific performance. Finally, counsel states that the rule against successive summary judgment motions is inapplicable, as the merits of its first motion remained undecided and the June 13, 2019 order herein denied the summary judgment motion and cross motion therein without prejudice to renew.

Discussion

Initially, addressing the procedural issues raised, the above-referenced June 13, 2019 order in fact specifically stated that the motion and cross motion were denied "without prejudice to renew (*see* NYSCEF Doc. No. 70, annexed as exh. CC to plaintiff's cross-moving papers. Hence, no prohibition against a successive a summary judgment motion or cross motion applies in this case.

Likewise, defendant's submission of a purportedly impermissible sur-reply presents no real issue, as the issues in the motion and cross motion are inextricably intertwined, and defendant was entitled to reply to her motion and to oppose plaintiff's cross motion, regardless

of what defendant's attorney called the document. Counsel's affirmations are virtually identical in any event. Thus, there is no need to separate the "reply" portion of defendant's opposition to the cross motion, or to classify it as impermissible or to disregard it.

Finally, the court must address the "controversy" over whether defendant's failing to file an amended answer bars the court from considering a motion for summary judgment on the first counterclaim in the amended answer. The court finds this issue need not be addressed, as the substantive legal discussion on plaintiff's motion for summary judgment for specific performance is an analysis of exactly the same issues. Indeed, this approach appears especially appropriate, considering that plaintiff served and filed its reply to the defendant's counterclaims and did not move to strike them.

Summary Judgment Standard

A party moving for summary judgment bears the burden of making a prima facie showing of entitlement to judgment as a matter of law and must tender sufficient evidence in admissible form to demonstrate the absence of any material factual issues (*see* CPLR 3212 [b]; *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Korn v Korn*, 135 AD3d 1023, 1024 [3d Dept 2016]). Failure to make this prima facie showing requires denial of the motion (*see Alvarez*, 68 NY2d at 324; *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidence in admissible form sufficient to establish an issue of material fact requiring a trial (*see* CPLR 3212; *Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562). "[A]verments merely stating conclusions, of fact or of law, are insufficient to defeat summary judgment"

(*Banco Popular North America v Victory Taxi Management, Inc.*, 1 NY3d 381, 383 [2004] [internal quotations omitted]). The court must view the totality of evidence presented in the light most favorable to the nonmoving party and accord that party the benefit of every favorable inference (*see Fortune v Raritan Building Services Corp.*, 175 AD3d 469, 470 [2d Dept 2019]; *Emigrant Bank v Drimmer*, 171 AD3d 1132, 1134 [2d Dept 2019]).

Summary judgment is a "drastic remedy" that "should not be granted where there is any doubt as to the existence of such issues or where the issue is 'arguable'; issue-finding, rather than issue-determination, is the key to the procedure" (*Sillman v Twentieth Century-Fox Film Corp*, 3 NY2d 395, 404, *rearg denied* 3 NY2d 941 [1957] [internal citations omitted]). "The court's function on a motion for summary judgment is 'to determine whether material factual issues exist, not resolve such issues'" (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010] quoting *Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]).

Turning to the matter at hand, a real estate contract, "[t]he 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." (*see EMF Gen. Contr. Corp. v Bisbee*, 6 AD3d 45, 51 [1st Dept 2004]).

Further, there is no issue that there was a valid, enforceable contract entered into. The issues before the court all arose after the contract was made. Some of the relevant principles of contract interpretation are discussed in *Sephardic Senior Citizens Lodge v Serure* (29 Misc

3d 1207[A], 2010 NY Slip Op. 51746[U],*5-*6), an opinion by (retired) Kings County Justice Carolyn E. Demarest:

> "It is well established that where there is a written contract, clear and explicit in its terms, and the intention of the parties may be gathered from the four corners of the instrument, the interpretation of the contract is a question of law for the court to decide (*see Chimart Assoc. v Paul*, 66 NY2d 570, 572 [1986]; *Abramo v HealthNow NY, Inc.*, 23 AD3d 986, 987 [2005]; *Sunrise Mall Assoc. v Import Alley of Sunrise Mall*, 211 AD2d 711, 711 [1995]; *Waring v Dynamics Corp. of Am.*, 101 AD2d 772, 773 [1984]). "In construing a contract, the document must be read as a whole to determine the parties' purpose and intent . . . giving a practical interpretation to the language employed so that the parties' reasonable expectations are realized" (*Sunrise Mall Assoc.*, 211 AD2d at 711; *see also Abramo*, 23 AD3d at 987; *Benderson v Wiper Check*, 266 AD2d 903, 904 [1999], *affd* 96 NY2d 855 [2001]). 'In cases of contract interpretation, it is well settled that "when parties set down their agreement in a clear, complete document, their writing should . . . be enforced according to its terms' (*South Rd. Assoc., LLC v International Bus. Machs. Corp.*, 4 NY3d 272, 277 [2005], quoting *Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004], quoting *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]).
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> "'A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms' (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). It is the court's duty to interpret a written contract as a matter of law where it is unambiguous and the intent of the parties is discernible from the four corners of the agreement (*see Matter of Wallace v 600 Partners Co.*, 86 NY2d 543, 548 [1995]; *R/S Assoc. v New York Job Dev. Auth.*, 98 NY2d 29, 32 [2002]). 'The fundamental, neutral precept of contract interpretation is that agreements are construed in accord

> with the parties' intent[, and that t]he "best evidence of what parties to a written agreement intend is what they say in their writing' (*Innophos, Inc. v Rhodia, S.A.*, 10 NY3d 25, 29 [2008], quoting *Greenfield*, 98 NY2d at 569; *see also Slamow v Del Col*, 79 NY2d 1016, 1018 [1992]).
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> "Furthermore, the court must 'construe the agreement[] so as to give full meaning and effect to the material provisions' (*Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007], quoting *Excess Ins. Co. Ltd. v Factory Mut. Ins. Co.*, 3 NY3d 577, 582 [2004]). '[A] contract should be read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose' (*Beal Sav. Bank*, 8 NY3d at 324-325 [internal quotation marks and citations *6 omitted]).
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> "Thus, 'single clauses cannot be construed by taking them out of their context and giving them an interpretation apart from the contract of which they are a part' (*Analisa Salon, Ltd. v Elide Props., LLC*, 30 AD3d 448, 448-449 [2006], quoting *Aimco Chelsea Land v Bassey*, 6 AD3d 367, 368 [2004], quoting *Matter of Friedman*, 64 AD2d 70, 81 [1978]; *see also American Express Bank v Uniroyal, Inc.*, 164 AD2d 275, 277 [1990]). Moreover, a 'reading of the contract should not render any portion meaningless' (*Beal*, 8 NY3d at 324; *see also Two Guys from Harrison-N.Y. v S.F.R. Realty Assoc.*, 63 NY2d 396, 403 [1984]; *Dental Health Assocs. v Zangeneh*, 34 AD3d 622, 624 [2006]; *Penguin 3rd Ave. Food Corp. v Brook-Rock Assoc.*, 174 AD2d 714, 716 [1991]). 'A contract should not be interpreted in such a way as would leave one of its provisions substantially without force or effect' (*Matter of John E. Andrus Mem. Home v DeBuono*, 260 AD2d 635, 636 [1999]; *see also Strong v Dubin*, 75 AD3d 66, 69 [2010])."

The Appellate Division Second Department held, in *Carpenter v Crespo* (166 AD3d 934, 936 [2d Dept 2018]) that:

> "'Before specific performance of a contract for the sale of real property may be awarded, a plaintiff must demonstrate that he or she was ready, willing, and able to perform on the original law day or, if time is not of the essence, on a subsequent date fixed by the parties or within a reasonable time thereafter' " (*Clarke v Bastien*, 128 AD3d 632, 633 [2015], quoting *Dairo v Rockaway Blvd. Props., LLC*, 44 AD3d 602, 602 [2007]; *see Chavez v Eli Homes, Inc.*, 7 AD3d 657, 659 [2004])."

A purchaser seeking specific performance must also demonstrate that the seller was in default (*see Latora v Ferreira*, 102 AD3d 838 [2d Dept 2013]; *Nehmadi v Davis*, 63 AD3d 1125, 1128 [2d Dept 2009].

Here, summary judgment to plaintiff is warranted. Plaintiff makes a prima facie case that it was ready, willing and able to conclude the transaction, and was willing to accept the property without the seller removing the violations, provided seller gave purchaser a credit at closing for $5,000.00. Defendant fails to overcome the motion and raise a triable factual issue. Defendant does not dispute plaintiff's financial ability to close on November 20, 2017, the scheduled "time of the essence" closing date, as well as when plaintiff filed its cross motion, on October 29, 2019, seeking specific performance.

The Contract here admittedly contained no Time of the Essence clause. In the absence of a contractual provision making time of the essence, one party may subsequently give notice to that effect (*see Stefanelli v Vitale*, 223 AD2d 361 [1st Dept 1996]). The notice must be clear, distinct and unequivocal and must fix a reasonable time within which to perform (id.). "[O]nce time is of the essence, it is of the essence for both parties" (Stefanelli, 223 AD2d at 362) and "each party must tender performance on the law day unless the time for performance is extended by mutual agreement" (Milad v Marcisak, 307 AD2d 281, 281-282, 762 N.Y.S.2d

282 [2d Dept 2003]). What constitutes a reasonable time for performance depends upon the facts and circumstances of the particular case (*see, Ballen v Potter*, 251 NY 224 [1929]; *Murray Co. v Lidgerwood Mfg. Co.*, 241 NY 455, 459 [1926]). Included within a court's determination of reasonableness are 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 (*see, Murray Co.*, *supra*, *Ballen, supra*; *Schoen v Grossman*, 33 Misc 2d 490, *affd* 17 AD2d 778; Pomeroy, Specific Performance of Contracts § 396 [3d ed]). The determination of reasonableness must, by its very nature occur on a case-by-case basis, and here the court finds that a reasonable time for performance was set by a properly noticed "time is of the essence" letter when the closing was not held within the time anticipated by the contract.

Defendant equally fails to raise a triable factual issue as to the plaintiff's claims of her anticipatory breach and subsequent breaches of her contractual obligations. First, she breached the Contract when she attempted to cancel it based upon plaintiff's alleged failure to close by the "on or before" date designated in the Contract. The "on or before" date designated in the Contract was decidedly not "time of the essence" (*see Tarlo v. Robinson*, 118 AD2d 561, 565 [2d Dept 1986] [Likewise, she breached the Contract by cancelling it during the pendency of this action even though plaintiff agreed to close title subject to the violations.])

Defendant's position that the violations section of the first Rider to the Contract, Section VIII, entitled her to cancel the contract, is unavailing. That section pertinently states that:

> "if the estimated cost to comply with any notes or notices of violations, under the terms of the contract or otherwise, is in excess of $5,000.00, then Seller shall have the right to cancel this contract *pursuant to the contract of sale*, and upon refund of the contract deposit to purchaser, neither party shall have any further rights against the other" (NYSCEF Doc. No. 95, annexed to plaintiff's cross motion papers) (emphasis added).

However, Contract of Sale paragraph 7.02 provides as follows:

> If the reasonably estimated aggregate cost to remove or comply with any violations or liens which Seller is required to remove or comply with pursuant to the provisions of §7.01 shall exceed the Maximum Amount specified in Schedule D (or if none is so specified, the Maximum Amount shall be one-half of one percent of the Purchase Price), Seller shall have the right to cancel this contract, in which event the sole liability of Seller shall be as set forth in §13.02, unless Purchaser elects to accept title to the Premises subject to all such violations or liens, in which event Purchaser shall be entitled to a credit of an amount equal to the Maximum Amount against the monies payable at the Closing.

In the Contract here, there was no sum provided in Schedule D, thus the Maximum Amount would have been one half of one percent of the sale price, or $6,625.00, had the Rider not specified that the applicable sum was $5,000.00. The Contract specifies that the seller has the right to cancel "*unless Purchaser elects to accept title to the Premises subject to all such violations or liens, in which event Purchaser shall be entitled to a credit of an amount equal to the Maximum Amount against the monies payable at closing* (emphasis added).

In addition, paragraph 10 of the Contract's Second Rider provides that "Except as amended by this Second Rider, the Contract shall remain unmodified and in full force and effect and is hereby ratified and confirmed in all respects."

Consequently, the proper interpretation of the Contract and its two Riders is that defendant's right to cancel the Contract was limited by plaintiff's right to elect to close and take title subject to the violations and to receive a credit for the $5,000.00 "Maximum Amount." Defendant could only have canceled the Contract if the cost to her to cure the violations exceeded $5,000 and plaintiff did not agree to close with a $5,000 credit and to assume responsibility for the violations.

Here, plaintiff repeatedly reiterated its willingness to close subject to the violations and to receive a credit of $5,000 at closing. Thus, defendant could not unilaterally cancel the Contract simply because the cost to cure the violations exceeded $5,000, as she would not have to pay the cost to cure them. Plaintiff's principal, Itzhak Ben Abou, says in his affidavit that he agreed to waive his right to receive a credit of $5,000 against the purchase price for the cost of curing the violations. He states (*see* (NYSCER Doc. No. 90, Ben Abou affidavit at 5, ¶ 18)

> "Plaintiff is prepared and hereby waives its rights under Paragraphs 7.01 and 7.02 of the Contract and Paragraph 10 of the Second Rider requiring that the Seller to deliver the Property "free and clear" of governmental notes or notices of violations of law or municipal ordinances, orders or requirements, subject to a cap of $ 5,000.00, or credit the Purchaser up to $5,000.00 at closing if Purchaser chooses to complete the transaction with the existent violations. Plaintiff is prepared to purchase the Property subject to the existing governmental violations of record as of the date of this motion and waives the right to receive any credit or setoffs against the balance of the purchase price."

The court has determined that the defendant breached the contract, and that plaintiff is entitled to specific performance. Accordingly, it is

ORDERED that plaintiff's cross motion, mot. seq. 4, for summary judgment on plaintiff's cause of action for a declaratory judgment that plaintiff is entitled to specific performance, is granted; and it is

ADJUDGED AND DECLARED that defendant breached the contract of sale between the parties, the contract of sale is in full force and effect, and defendant's unilateral attempt to cancel the contract is void, and of no force or effect; and it is further

ORDERED, ADJUDGED AND DECREED that plaintiff is entitled to specific performance, and defendant must sell the Property to plaintiff in accordance with the terms, conditions and provisions of the Contract of Sale, including the riders thereto, dated May 31, 2017; and it is further

ORDERED that defendant shall close and give a bargain and sale deed for the property to plaintiff and shall sign all other documents required for the valid transfer of title within sixty (60) days after service upon defendant's counsel of a copy of this order with notice of entry, unless the closing date is extended in writing by the parties' mutual agreement, and it is further

ORDERED that plaintiff's alternative cause of action, for damages for its loss of the "benefit of the bargain" is dismissed as moot, and it is further

ORDERED that defendant's counterclaims are dismissed, and it is further

ORDERED that plaintiff's motion, mot. seq. 3, which seeks an order striking plaintiff's first through fifth affirmative defenses to defendant's counterclaims, granting her summary judgment on her first counterclaim for declaratory judgment that the Contract herein was properly declared by her to be null and void, and awarding her damages, including attorney's fees, is denied in its entirety; and it is further

ORDERED that the County Clerk is directed to enter judgment accordingly, with costs and disbursements to plaintiff.

This constitutes the decision, order and judgment of the court.

E N T E R:

Debra Silber, J. S. C.

County Clerk