135 S. 1 LLC. v Lopez
2020 NY Slip Op 31756(U)
May 19, 2020
Supreme Court, Kings County
Docket Number: 515935/17
Judge: Carl J. Landicino
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At an IAS Term, Part 81, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 19th day of May, 2020.

PRESENT:

HON. CARL J. LANDICINO,

Justice.

---X

135 SOUTH 1 LLC.,

Plaintiff,

-against-

ALEJANDRO LOPEZ AND MERY LOPEZ,

Defendants.

---X

DECISION AND ORDER

Index No. 515935/17

Motion Seq. Nos. 2, 3 & 4

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

The following e-filed papers read herein:	NYSCEF Doc. Nos.[1]
Notice of Motion/Cross Motion, Affidavits (Affirmations) and Exhibits Annexed	41-58, 61-62, 64-74, 79-80
Opposing Affidavit/Affirmations)	62-74, 84
Reply Affirmations	82, 85

Upon the foregoing papers in this action for specific performance, Defendants, Alejandro Lopez and Mery Lopez (hereinafter the "Defendants" or "Sellers"), move (Motion Sequence # 2) for an order, pursuant to CPLR 3212, granting them summary judgment and dismissal of the complaint of Plaintiff, 135 South 1 LLC (hereinafter the

[1] New York State Courts Electronic Filing Document Numbers

"Plaintiff" or "Purchaser"), together with an award of the down payment on the subject contract. The Plaintiff opposes and cross-moves (Motion Sequence # 3) for an order, pursuant to CPLR 3025 (b), to file an amended complaint. Defendants oppose and cross-move (Motion Sequence # 4) for an order, pursuant to CPLR 6515, canceling the notice of pendency filed herein. Plaintiff opposes the cancellation.

Defendants purportedly own the property known as 135 South 1st Street, Brooklyn, New York (the "Property") and contracted to sell it to non-party Ranco Capital, LLC (hereinafter "Ranco"), as nominee for a new LLC to be formed upon closing of title. A two-million five-hundred thousand ($2,500,000.00) dollar purchase price was negotiated and Ranco deposited a one-hundred fifty-thousand ($150,000.00) dollar down payment in escrow pending the closing. The sale contract, dated March 17, 2017 (the "Contract"), specified that the closing would occur "on or about ninety (90) days from date of a fully signed contract of sale." The Contract did *not* make "time of the essence" regarding the closing date.

Ranco's purchase obligation, pursuant to the Contract, was subject to and conditioned upon Seller delivering the Property in broom clean condition, vacant and free of all leases or tenancies. The Sellers were required to provide Ranco access to the Premises in order to conduct inspections as it deemed appropriate, and the Sellers' sole specified remedy, upon Ranco's default, was retaining the down payment as liquidated damages. Ranco, on the other hand, was entitled to all remedies at law or in equity, including specific performance, upon the default of the Sellers.

Ranco assigned its contractual interest to Plaintiff, 135 South 1 LLC on or about July 12, 2017 (*see* NYSCEF Doc. Nos. 32 and 68), and the parties confirmed a mutually agreed July 25, 2017 closing date by a July 6, 2017 email (*see* NYSCEF Doc. No. 44, December 31, 2018 affirmation of Defendants' counsel at 3, ¶ 11, annexed to Defendants' Mot. Seq. # 2 papers). However, the Sellers' attorney received an email on July 24, 2017 from the Purchaser's attorney stating that: "It seems that our client is not ready to close tomorrow. We will have to adjourn. We apologize for any inconvenience and will be in touch with you as soon as possible to reschedule" (*see* NYSCEF Doc. No. 10, February 27, 2018 affirmation of Defendants' counsel 3, at ¶ 12 and NYSCEF Doc. No. 18, July 24, 2017 email @ 12:44 p.m., annexed as part of Exh H to Defendants' Mot. Seq. # 1 papers). That same day, July 24, 2017, the Sellers' attorney, by letter, set a law day[2] of August 2, 2017 at 2 p.m. and location for the transaction (his office) as the deadline and place for closing. The letter (NYCEF Doc. No. 19, annexed as Exh I to Defendants' Mot. Seq. #1 papers) stated:

> **Purchaser must be present at the above time and place and be prepared to tender all sums as set forth in the Contract of Sale.**
>
> **PLEASE TAKE FURTHER NOTICE that unless the purchasers close title on the LAW DATE, the seller shall tender the deed and related transfer documents on the LAW DATE and shall declare the purchaser in default. Upon which occurrence your client's contract deposit shall be forfeited and your clients shall be held liable for any and all damages sustained as a result of your client's breach of his contractual obligations.**

[2] A day fixed for closing (*see Willard v Mercer*, 58 HY2d 840, 841 [1983]; *Brickstone Group, Ltd. v Randall*, 172 AD3d 671, 672 [2d Dept 2019]).

Purchaser's attorney responded by a July 28, 2017 letter (NYSCEF Doc. No. 20, annexed as Exh J to Defendants' Mot. Seq. # 1 papers) stating: "We find your attempt to schedule a 'Time of the Essence' closing on nine (9) days' notice to be unreasonable, unfair and contrary to law and equity. Accordingly, we reject your notice." The Sellers appeared at their attorney's office on August 2, 2017 for the closing and signed the deed and related transfer documents necessary to tender the Property. The Purchaser did not appear and on August 16, 2017, filed the instant action for specific performance of the contract as well as a notice of pendency against the Property. Sellers, in turn, filed their verified answer with affirmative defenses and counterclaims on October 17, 2017.

Thereafter, Defendants filed their first motion, Mot. Seq. # 1, seeking an order, pursuant to CPLR 3212, granting them summary judgment dismissing the complaint and declaring their right to retain the down payment. They also sought, pursuant to CPLR 6514 (a) and (b), the cancellation of the notice of pendency. Plaintiff opposed that motion by claiming that Defendant failed to demonstrate a breach of contract. A September 20, 2018 decision and order by this court (*see* NYSCEF Doc. No. 40) denied that motion on the ground that sellers had acted prematurely in declaring "time of the essence" regarding the closing date and failed to afford purchaser a reasonable time to reschedule or perform.

The Sellers' attorney, by an October 5, 2018 letter (*see* NYSCEF Doc. No. 53, annexed as Exh. I to Defendants' Mot. Seq. # 2 papers) subsequently set a second law

date of November, 15, 2018 at 11 a.m. (and location, his office) as the deadline for closing the transaction. That letter stated:

> **Purchaser must be present at the above time and place and be prepared to tender all sums as set forth in the Contract of Sale.**
>
> **PLEASE TAKE FURTHER NOTICE that unless the purchasers close title on the LAW DATE, the seller shall tender the deed and related transfer documents on the LAW DATE and shall declare the purchaser in default. Upon which occurrence your client's contract deposit shall be forfeited and your clients shall be held liable for any and all damages sustained as a result of your client's breach of his contractual obligations.**

Plaintiff did not respond.

Defendants appeared at their attorney's office on November 15, 2018 for the closing and signed the deed and related transfer documents needed to tender the Property. Plaintiff did not appear, and its attorney, in a November 16, 2018 letter (*see* NYSCEF Doc. No. 55, annexed as Exh. K to Defendants' mot. seq. two papers), stated:

> **Please be advised the Property was occupied when inspected on the closing date in preparation for the closing on November 15, 2018. The Contract of Sale dated March 11, 2017 at paragraph 16(b), and in the Rider at paragraph 12 provide that the Property is to be delivered vacant at closing. As the Property was occupied at closing, the Sellers are in breach of the contract.**
>
> **Please be advise[d] that the Sellers are in breach of the Contract on the closing date they set as "Time of the Essence." Accordingly, Purchaser is electing the remedy of contract cancelation and return of the deposit of $150,000.00.**

Defendants' attorney responded, in a November 20, 2018 letter (*see* NYSCEF Doc. No. 56, annexed as Exh. L to Defendants' Mot. Seq. # 2 papers) as follows:

> **Due to your client's failure to appear on the law Date of November 15, 2018 the sellers tendered the deed and related transfer documents on November 15, 2018 and held your client in default of the terms and conditions of the contract of sale between the parties. Your office made no attempt to contact my office prior to the Law Date. Moreover, I telephone[d] your office on the Law Date and despite being told by your receptionist that you were in your office, you refused to speak to me. As you know there was no prior inspection of the Property in preparation for the closing on November 15, 2018 and your allegations are false and a ploy to recover your client's down payment, which pursuant to the terms and conditions of the contract of sale they have forfeited.**

The Purchaser's attorney responded by a November 21, 2018 letter (NYSCEF Doc. No. 57, annexed as Exh M to Defendants' Mot. Seq. # 2 papers) which stated:

> **Irrespective of your claim that your clients tendered a deed at your office, your clients are in default of the Contract of Sale dated March 11, 2017 ("the Contract"), because the Property was occupied when inspected on the closing date. Your self-serving claim that the Property was not inspected is factually false. The Property was inspected prior to closing and was found to be occupied.**
>
> **As you are well aware, the Contract provides at paragraph 16(b), and in the Rider at paragraph 12, that the Property is to be delivered vacant at closing. As the Property was occupied at closing, the Sellers are in breach of the Contract.**

> **As stated in my letter dated November 16, 2018, the Purchasers declared the Sellers to be in breach of the Contract, and the Purchaser elected the remedy of contract cancelation and requested the return of the deposit in the amount of $150,000.00.**

Defendants have made this second summary judgment motion, (Mot. Seq. # 2) seeking an order dismissing the complaint and awarding them the down payment. They have provided affidavits (NYSCEF Doc. Nos. 42 and 43) and their attorney has presented an affirmation (NYSCEF Doc. No. 44) supporting the motion which collectively purport that Defendants appeared at their attorney's office on the law date and tendered the Property; that copies of the signed and acknowledged bargain and sale deed with covenants against grantor's acts and related transfer documents dated November 15, 2018 were tendered; that the Purchaser never requested an inspection of the Property before the closing date; and that the Property had been unoccupied and that it was vacant and broom clean before the original closing date. Defendants also stated that a guard dog was on the Property for security purposes since the anticipated July 2017 closing, during which period it had been vacant and free of tenants.

Plaintiff opposes the motion and cross-moves to amend the complaint (Mot. Seq. # 3). The proposed complaint (NYSCEF Doc. No. 65) states only one cause of action, for breach of contract, and alleges that Plaintiff lost its mortgage commitment when Defendants refused to schedule another closing after the July 25, 2017 date. The proposed complaint also alleges that Defendants could not deliver the Property vacant, in accordance with the terms of the sale contract, on the November 15, 2018 closing date. Plaintiff also provides an affirmation from its purported principal member, Joseph Banda

(NYSCEF Doc. No. 62), who states that an investigator's report and affidavit demonstrate that the Property was occupied on November 15, 2018. Mr. Banda's affirmation does not detail any efforts made to reschedule the closing from August 2017 and does not demonstrate the Purchaser's financial ability to close the transaction on November 15, 2018.

Also included is the unsworn affidavit of the investigator, Angelo Mellilo (no license number provided) (NYSCEF Doc. No. 63), who claims to have visited the subject Property on November 14 and 15, 2018 and observed "Christmas Decorations adorned the Property as an occupied house would at that time of year" (*id.* at ¶ 21). Attached to the purported affidavit were copies of the investigator's report dated November 16, 2018 (NYSCEF Doc. No. 71) with poor-quality duplicates of photos he took of the front of the house (NYSCEF Doc. No. 72). The report states that the investigator visited the Property on three different occasions, and, each time, observed a light in the front room and a dog, who barked when he knocked on the door. The investigator did not observe anyone entering or exiting the Property during the times he was present. Plaintiff seeks return of the down payment funds, reimbursement for title, survey and inspections costs, and attorney's fees.

Defendants have also cross-moved for an order (Mot. Seq. # 4) pursuant to CPLR 6515, canceling the notice of pendency. They argue that, in seeking to amend the complaint to only assert a cause of action for breach of contract, Plaintiff has essentially abandoned its specific performance cause of action. Hence, the only remaining cause of

action, they observe, seeks monetary damages, secured by funds currently being held in escrow, and thus they request the notice of pendency's cancellation.

Discussion

An application for leave to amend a pleading under CPLR 3025 (b) "'should be freely granted unless the proposed amendment (1) would unfairly prejudice or surprise the opposing party, or (2) is palpably insufficient or patently devoid of merit'" (*Edwards v 1234 Pac. Mgt., LLC*, 139 AD3d 658, 659 [2d Dept 2016], quoting *Maldonado v Newport Gardens, Inc.*, 91 AD3d 731, 731-732 [2d Dept 2012]). "'[A] court shall not examine the legal sufficiency or merits of a pleading unless such insufficiency or lack of merit is clear and free from doubt'" (*Favia v Harley-Davidson Motor Co., Inc.*, 119 AD3d 836, 836 [2d Dept 2014], quoting *United Fairness, Inc. v Town of Woodbury*, 113 AD3d 754, 755 [2d Dept 2014]; *see also Lucido v Mancuso*, 49 AD3d 220, 229 [2d Dept 2014], *appeals withdrawn and discontinued* 12 NY3d 804, 813 [2009]). "Whether to grant such leave is within the motion court's discretion, the exercise of which will not be lightly disturbed" (*Hofstra Univ. v Nassau County, N.Y.*, 166 AD3d 861, 863 [2d Dept 2018] [quoting *APF Mgt. Co., LLC v Munn*, 151 AD3d 668, 670 [2d Dept 2017]; quoting *Pergament v Roach*, 41 AD3d 569, 572 [2d Dept 2007]; *see also Kimso Apts., LLC v Gandhi*, 24 NY3d 403, 411 [2014]).

Defendants do not raise any issues regarding unfair prejudice or surprise, but generally object to the two-year delay in Plaintiff's application to amend. However, Plaintiff's application is palpably insufficient in failing to adequately plead Sellers'

alleged breach. The elements of a cause of action to recover damages for breach of contract are the existence of a contract, the Plaintiff's performance under the contract, the Defendant's breach of the contract, and resulting damages (*Kausal v Educational Prods. Info. Exch. Inst.*, 105 AD3d 909, 910 [2d Dept 2013], citing *Elisa Dreier Reporting Corp. v Global NAPs Networks, Inc.*, 84 AD3d 122, 127 [2d Dept 2011]; *see also Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804, 806 [2d Dept 2011]; *JP Morgan Chase v J.H. Elec. of N.Y., Inc.*, 69 AD3d 802, 803 [2d Dept 2010]). Here, Plaintiff has failed to allege its performance under the contract by tendering the purchase price. Instead, the amended summons and complaint states that, due to Defendants' refusal to reschedule the July 25, 2017 closing, Plaintiff's lender could not continue to hold its mortgage commitment. Plaintiff fails to allege any instances where it attempted to reschedule the closing after August 2017 or advised Sellers that it would have difficulty extending its mortgage commitment. There are also no allegations of any attempts to acquire financing. Where the proposed amendment is palpably insufficient as a matter of law, leave to amend should be denied (*Morton v Brookhaven Mem. Hosp.*, 32 AD3d 381, 381 [2d Dept 2006] citing *Glassman v ProHealth Ambulatory Surgery Ctr.*, Inc., 23 AD3d 522, 523 [2d Dept 2005]; *Arnold v Siegel*, 296 AD2d 363, 364 [2d Dept 2002]; *Lee v Health Force,* 268 AD2d 564, 564-565 [2d Dept 2000]). Accordingly, Plaintiff's motion to amend the complaint is denied.

As to Defendants' request to grant them summary judgment dismissing the complaint, and awarding the Defendants the down payment in the sum of One Hundred Fifty Thousand ($150,000.00) Dollars, the movant must "make a *prima facie* showing of

entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact" (*Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft, LLP*, 26 NY3d 40, 49 [2015], *rearg denied* 27 NY3d 957 [2016], quoting *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]). A failure to make that showing requires a denial of the motion, regardless of the adequacy of the opposing papers (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]; *Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993]).

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 v City of New York,* 49 NY2d 557, 562 [1980]). "[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]).

The law is well settled that "[s]ummary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact'" (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005] citing *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). "[I]ssue-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]; *Vega*, 18 NY3d at 505; *Matter of Joseph Z. (Yola Z.)*, 173 AD3d1052, 1052 [2d Dept 2019]. "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]). Denial of the motion is necessary "where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Benetatos v Comerford*, 78 AD3d 750, 752 [2d Dept 2010] [internal quotation marks and citations omitted]; *see also Peerless Ins. Co. v Allied Bldg. Prods. Corp.*, 15 AD3d 373, 374 [2d Dept 2005] [denial of summary judgment required where "any doubt as to the existence of a triable issue, or where the material issue of fact is arguable"] [internal quotation marks and citations omitted]). Lastly, if there is no genuine issue of fact, a trial court should summarily decide the issues raised in a motion for summary judgment (*Andre*, 35 NY2d at 364).

A party seeking specific performance of a contract for the sale of real property is required to establish that he or she was ready, willing and able to close on the scheduled closing date. The Appellate Division Second Department, quoting its prior rulings, has reiterated, 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]).**

In addition, the party seeking specific performance must also show that "the other party was in default" (*Latora v Ferreira,* 102 AD3d 838, 839 [2d Dept 2013] citing *Nehmadi v Davis* 63 AD3d 1125 [2d Dept 2009]; *Elbayadi v Norton* 216 AD2d 936, 936, [4th Dept 1995]; *Exclusive Envelope Corp.v Tal-Spons Corp.,* 187 AD2d 556, 590 [2d Dept 1992]).

"When a contract for the sale of real Property does not make time of the essence, the law permits a reasonable time in which to tender performance, regardless of whether the contract designates a specific date for performance" (*Revital Realty Group, LLC v Ulano Corp.*, 112 AD3d 902 [2d Dept 2013] citing *Grace v Nappa*, 46 NY2d 560, 565 [1979]; *see also Cave v Kollar*, 296 AD2d 370, 371 [2d Dept 2002]; *Sohayegh v Oberlander*, 155 AD2d 436, 438 [2d Dept 1989]; *Zev v Merman*, 134 AD2d 555, 557 [2d Dept 1987] *affd* 73 NY2d 781 [1988]). Making time of the essence requires "'clear, distinct, and unequivocal notice to that effect giving the other party a reasonable time in which to act'" (*Cave*, 296 AD2d at 371, quoting *Savitsky v Sukenik* 240 AD2d 557, 558 [2d Dept 1997], quoting *Zev,* 134 AD2d at 557; *see also 3M Holding Corp. v Wagner*, 166 AD2d 580, 581 [2d Dept 1990] ["o]nce the closing date set forth in the contract ha[s] passed, either party [may make] time of the essence by giving, a clear, distinct and unequivocal notice along with a reasonable time for the other party to act" citing *Ballen v Potter* 251 NY 224 [1929]; *Sohayegh,* 155 AD2d 436, *Xhelili v Larstanna*, 150 AD2d 560 [2d Dept 1989]). Such notice must additionally inform the other party that if it does not perform by that date, it will be considered in default (*see Decatur (2004)Realty, LLC*

v. Cruz, 73 AD3d 970 (2d Dept. 2010). The reasonableness of the time set, as the earlier decision herein illustrates, depends upon the case's facts and circumstances (*Zev*, 134 AD2d at 783).

"When 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" (G*race*, 46 NY2d 560 at 566 citing *Rhodes v Astro-Pac., Inc.* 41 NY2d 919 [1977] *affg* 51 AD2d 656 [4th Dept 1976]; *Kotcher v Edelblute*, 250 NY 178, 184 [1928]; *see also Milad v Marcisak*, 307 AD2d 281, 281-282 [2d Dept 2003]); *Kaplan v Schneider*, 1 AD2d 329, 330 [1st Dept 1956]). A party seeking specific performance must demonstrate readiness and ability to perform their obligation under the contract (*see Huntington Min. Holdings v Cottontail Plaza,* 60 NY2d 702 [1983]), and a tender and demand are required to put the seller in default where his title could be cleared without difficulty in a reasonable time (*Cohen v Kranz*, 12 NY2d 242, 246 [1963], citing *Higgins* v *Eagleton*, 155 NY 466 [1898]; *Wija Bldg. Corp. v Kay-Wei Bldg. Corp*., 223 App Div 848, [2d Dept 1928] *affd* 249 NY 575 [1928]; *Amity Assoc. v Amity Farms Shopping Ctr.*, 11 AD2d 811 [2d Dept 1960], *lv denied* 11 AD2d1030 [2d Dept 1960], *lv denied* 9 NY2d 609 [1961]; *Amity Farms Shopping Ctr. v Morse*, 11 AD2d 812 [2d Dept 1960], *appeal dismissed* 10 NY2d 806 [1961] *affd* 11 NY2d 827 [1962]). The seller in such a case is entitled to a reasonable time beyond law day to clear title. (*Ballen,* 251 NY at 229).

Here, Defendants have met their *prima facie* burden. Their counsel mailed an October 5, 2018 "time of the essence" letter to purchaser's counsel that clearly and

distinctly set the new date, time and location for the closing and warned the purchaser that failing to perform by that date would result in declaring it in default. The purchaser did not object to the date, time or place as unreasonable or attempt to reschedule. Sellers appeared on the closing date and tendered the Property by signing the deed and related transfer documents. Therefore, the burden now shifts to Plaintiff to demonstrate that it was ready and able to perform its obligation under the contract on the closing date.

However, Plaintiff fails in this regard as it presents no proof that it tendered performance under the terms of the contract. More specifically, the record reflects that it neither appeared on the November 15, 2018 law date nor demonstrated its financial ability to close the transaction nor demanded cure of the alleged default. Also, it fails to produce admissible proof of Sellers' alleged breach or inability to deliver the Property vacant as the investigator's affidavit is unsworn. Even, assuming arguendo, the truth of the investigator's report, it fails to establish that the Property was occupied. The report in this regard alleges that the investigator did not observe anyone entering or exiting the Property at any of the times he was present. Furthermore, the claimed "defects," namely, the undisputed presence of a guard dog[3] or purported holiday decorations were curable in a reasonable amount of time. Hence, the Purchaser never placed the Sellers in default as it never tendered performance or advised the sellers of the defects on the law date, affording the Sellers a reasonable opportunity to cure. Consequently, Plaintiff is not entitled to specific performance in that it has breached the contract.

Each Defendant explained the guard dog's presence "for security purposes due to the fact that the Property has been free of tenants in anticipation of closing title to [the] Property" (NYSCEF Doc. No. 42, Alejandro Lopez's December 31, 2018 affidavit, ¶ 35 and NYSCEF Doc. No. 43, Mery Lopez's affidavit, ¶ 35, annexed to Defendant's mot. seq. two papers).

A review of Defendants' counterclaims reflects that there is no specifically stated cause of action for breach of contract, yet Defendants seek an award of the down payment amount on the Contract in the sum of One Hundred Fifty Thousand ($150,000.00) Dollars. Moreover, although they seek summary judgment dismissing the Complaint, the Defendants do not address any of the counter claims asserted in their answer. The Defendants have asserted six counterclaims; fraud, civil conspiracy to commit fraud, punitive damages, New York General Business Law ("deceptive practices act"), unconscionability and breach of good faith and fair dealing. Although the Contract at Paragraph 23 (a) may provide for liquidated damages as the sole and exclusive remedy of the sellers (Defendants) in the event of the default of the purchaser (Plaintiff), Defendants have 1) not sought to amend their answer to include a breach of contract claim and 2) have not claimed damages in relation to breach of contract in their answer. Although under certain limited circumstances the Court may, *sua sponte,* amend the pleadings to conform to the proof, the facts of this case do not warrant the exercise of such discretion (See *Cave v. Kollar,* 2 A.D.3d 386, 767 N.Y.S. 2d 856 (2nd Dept 2003), CPLR 3025(c) and also *Matter of Maag v. Lichtneger,* 141 A.D.3d 593, 37 N.Y.S. 2d 265 (2nd Dept 2016) and *Matter of Kennelly v. Mobius Realty Holdings LLC,* 33 A.D.3d 380, 822 N.Y.S.2d 264 (1st Dept 2006)). It is unclear whether the Defendants have sought to abandon their counterclaims and the related damages sought, and although the Plaintiff has not even addressed the propriety of Defendants' request for the downpayment, the Plaintiff has not been afforded an opportunity to address this conundrum and would be prejudiced if the court were to act without application on notice. Accordingly, the

Defendants' application for the award of the downpayment is denied and the Defendants' counterclaims shall continue. Notwithstanding this, the demise of Plaintiff's specific performance action does warrant granting Defendants' cross motion (Mot. Seq. # 4) which seeks to cancel the notice of pendency.

Accordingly, it is

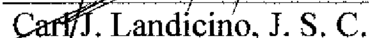
ORDERED that Defendants' motions (Motions Seq. # 2 & #4) are granted solely to the extent that the Defendants are awarded summary judgment in that the Plaintiff's complaint is dismissed and the notice of pendency shall be cancelled, and the remaining relief sought is denied; and it is further

ORDERED that Plaintiff's cross motion (Mot. Seq. # 3) to amend the complaint to allege breach of contract is denied; and it is further

ORDERED that Defendants shall settle an order on notice (including appropriate information for the purpose of cancelling the notice of pendency), together with a copy of this decision and order, with notice of entry, within 60 days of entry.

This constitutes the decision and order of the court.

ENTER,



Carl J. Landicino, J. S. C.