

<b>834 NY Group 18, LLC v Avila</b>
2020 NY Slip Op 33459(U)
October 13, 2020
Supreme Court, Kings County
Docket Number: 512214/2018
Judge: Peter P. Sweeney
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS, PART 73

Index No.: 512214/2018  
Motion Date: 8-17-20  
Mot. Seq. No.: 1

-----X  
834 NY GROUP 18, LLC,

Plaintiff,

-against-

**DECISION/ORDER**

THOMAS AVILA and MARGARITA RIVERA,

Defendants.  
-----X

The following papers numbered 1 to 3 were read on this motion:

<b>Papers:</b>	<b>Numbered:</b>
Notice of Motion/Order to Show Cause	
Affidavits/Affirmations/Exhibits/Memo of Law.....	1
Answering Affirmations/Affidavits/Exhibits/Memo of Law.....	2
Reply Affirmations/Affidavits/Exhibits/Memo of Law.....	3
Other.....	

Upon the foregoing papers, the motion is decided as follows:

In this action for specific performance, plaintiff, 834 NY GROUP 18, LLC, moves for an order pursuant to CPLR §3212(b) granting plaintiff 834 NY Group 18, LLC, summary judgment against defendants Thomas Avila and Margarita Rivera.

**Background:**

The plaintiff seeks a judgment compelling the defendants to sell to the plaintiff certain real property located at 834 New York Avenue, Brooklyn, New York pursuant to a Contract of Sale dated February 16, 2018 (Plaintiff's Exhibit "D"). In support of the motion, plaintiff submitted the affidavit of Joseph Cohen, the Managing Member of plaintiff 834 NY Group 18, LLC, who averred that on or about February 16, 2018, 834 NY Group 18, LLC entered into the contract with the defendants and that at all times relevant, plaintiff was ready, willing and able to

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complete the purchase of this property in accordance with the terms and conditions set forth in the contract. He averred that a closing had been previously scheduled (but did not state when), that the defendants refused to close at that time, and the defendants have failed and refused to close thereafter.

The contract of sale stated that the closing would take place on May 1, 2008 but time was not made of the essence. Plaintiff's moving papers are devoid of any admissible proof reflecting that after May 1, 2008, the plaintiff set a new date for closing and made time of the essence by giving clear, distinct, and unequivocal notice to that effect and giving the defendants a reasonable time in which to act.

**Discussion:**

A party seeking summary judgment must submit proof in evidentiary form sufficient to establish its prima facie entitlement to judgment as a matter of law (*see Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718). The moving party's failure to meet its burden requires denial of the motion "regardless of the sufficiency of the opposing papers" (*Smalls v. AJI Indus., Inc.*, 10 N.Y.3d 733, 735, 853 N.Y.S.2d 526, 883 N.E.2d 350; *see Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572; *Smith v. Tenshore Realty, Ltd.*, 31 A.D.3d 741, 742-743, 820 N.Y.S.2d 292).

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 (*see, Grace v. Nappa*, 46 N.Y.2d 560, 415 N.Y.S.2d 793, 389 N.E.2d 107; *Sohayegh v. Oberlander*, 155 A.D.2d 436, 547 N.Y.S.2d 98; *Zev v. Merman*, 134 A.D.2d 555, 521 N.Y.S.2d 455, *affd.* 73 N.Y.2d 781, 536 N.Y.S.2d 739, 533

N.E.2d 669). Time may be made of the essence by “clear, distinct and unequivocal notice to that effect giving the other party a reasonable time in which to act” (*Zev v. Merman, supra*, at 557, 521 N.Y.S.2d 455; *see also, 3M Holding Corp. v. Wagner*, 166 A.D.2d 580, 560 N.Y.S.2d 865; *Sohayegh v. Oberlander, supra*).

Here, while the contract of sale stated that the closing would take place on May 1, 2008, the contract did not make time of the essence (*see, Exclusive Envelope Corp. v. Tal-Spons Corp.*, 187 A.D.2d 556, 590 N.Y.S.2d 222; *O’Connell v. Clear Holding Co.*, 126 A.D.2d 530, 510 N.Y.S.2d 653; *Leading Bldg. Corp. v. Segrete*, 60 A.D.2d 907, 401 N.Y.S.2d 561). Accordingly, in order to hold the defendants in default, the plaintiff was required to set a new date for closing and make time of the essence by giving “clear, distinct, and unequivocal notice to that effect giving the other party a reasonable time in which to act” (*Savitsky v. Sukenik*, 240 A.D.2d 557, 558, 659 N.Y.S.2d 48; *see Mazzaferro v. Kings Park Butcher Shop*, 121 A.D.2d 434, 435–436, 503 N.Y.S.2d 134; *Levine v. Sarbello*, 112 A.D.2d 197, 200, 491 N.Y.S.2d 419, *affd.* 67 N.Y.2d 780, 501 N.Y.S.2d 22, 492 N.E.2d 130), and by informing the other party that if he or she does not perform by that date, he or she will be considered in default (*see Hamburger v. Rieselman*, 206 A.D.2d 822, 823, 615 N.Y.S.2d 143; *Charchan v. Wilkins*, 231 A.D.2d 668, 647 N.Y.S.2d 550). Since plaintiff’s moving papers are devoid of any admissible proof reflecting that plaintiff provided the defendants with such notice, plaintiff did not establish its prima facie entitlement to judgment as a matter of law and its motion must be denied regardless of the sufficiency of defendants’ opposing papers.

Accordingly, it is hereby

**ORDRED** that the motion is **DENIED**.

This constitutes the decision and order of the Court.

Dated: October 13, 2020

**PPS**

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**PETER P. SWEENEY, J.S.C.**

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020

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