SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ERIKA M. EDWARDS **PART 11**

Justice

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KIATON LLC,

Plaintiff,

- v -

CHARLENE H. CHAN, IAN J. MILLER and PAMELA G. WEST, ESQ., as Escrowee,

Defendants.

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INDEX NO. 656305/2017

MOTION DATE 03/17/2020, 06/16/2020

MOTION SEQ. NO. 002, 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 71, 73, 75, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 89

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 72, 75, 76, 77, 85, 86, 87, 90

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

This decision consolidates the motions filed under motion sequences 002 and 003. Upon the foregoing documents, the court denies both motions for summary judgment, without attorney's fees, costs or disbursements to any party.

Plaintiff Kiaton LLC ("Kiaton") brought this action for breach of contract for the purchase of a condominium unit owned by Defendants Charlene Chan ("Chan") and Ian Miller ("Miller") and their attorney, Defendant Pamela West, as Escrowee ("West") (collectively, "Defendants"). Kiaton seeks the return of its deposit in the amount of $99,900 and alleges that it exercised its right to cancel the contract of sale because the parties failed to close on the condominium unit by August 4, 2017.

Defendants Chan and Miller filed a separate action against Kiaton, under Index No. 158771/2017, seeking a declaration that Defendants Chan and Miller are entitled to retain the

deposit as liquidated damages for Kiaton's bad faith, default and breach of contract for refusing to close because Defendants Chan and Miller refused to sign an Identification of Acquired Property ("IAP") which was necessary to assist Kiaton in obtaining a tax deferred exchange pursuant to Internal Revenue Code ("IRC") § 1031. Defendants Chan and Miller refused to sign the document on the advice of Defendant West because the sellers do not normally have to sign the document, it was not necessary for Kiaton to take advantage of the exchange program, and it contained a misrepresentation that Kiaton identified the unit for purchase no later than March 15, 2017, which was subsequently amended to March 23, 2017, when the property was not listed for sale until April 18, 2017 and Kiaton did not view it until well after these dates.

The sales contract was dated July 20, 2017, but not delivered to Defendant West until August 1, 2017. The purchase price was $999,000 with an agreed upon deposit of $99,900, which was paid to Defendant West. The unit failed to close on August 4, 2017, Kiaton's counsel demanded the return of its deposit, but Defendant West refused to return the deposit.

Paragraph 3(a) of the Second Rider to the contract required Defendants Chan and Miller to warrant that there is "a valid and subsisting Certificate of Occupancy or other certificate of compliance, or evidence that none was required, covering the building(s) and all of the other improvements located on the property authorizing the use of the Unit as a residential Unit at the date of Closing."

Paragraph 9(a) of the Second Rider to the contract states in substance that Kiaton reserved its right to include the transaction as part of an IRC § 1031 tax deferred exchange for its benefit at no cost, expenses or liability to Defendants Chan and Miller. Additionally, Chan and Miller agreed to execute any and all documents, subject to the reasonable approval of their

attorney that are reasonably necessary in connection with the IRC Exchange and the transaction was not "contingent upon or subject to the completion of such exchange."

Paragraph 9(b) of the Second Rider to the contract indicated that since Kiaton was participating in the IRC Exchange, the closing had to take place on or before August 4, 2017, or Kiaton had the right to cancel the contract and Defendants Chan and Miller had to return the deposit within three business days.

Paragraph 10.1 of the contract indicates that if Kiaton defaults, than Defendants Chan's and Miller's "sole remedy shall be to retain the Contract Deposit as liquidated damages, it being agreed that Seller's damages in case of Purchaser's default might be impossible to ascertain and that the Contract Deposit constitutes a fair and reasonable amount of damages under the circumstances and is not a penalty."

Schedule A of the contract excludes "[l]iens, encumbrances and title conditions affecting the Common Elements which do not materially and adversely affect the right of the Unit owner to use and enjoy the Common Elements" and "notices of violations of law or governmental orders, ordinances or requirements . . . affecting only the Common Elements which were noted or issued prior to or on the date of this Contract or at any time thereafter."

The court previously denied Defendants' motion by order to show cause to cancel Kiaton's notice of pendency, but granted their motion in part by ordering both actions to be consolidated for discovery and trial. Kiaton now moves for summary judgment in its favor on its claims against Defendants and Defendants move for summary dismissal of Kiaton's complaint. The parties opposed each other's motions.

Kiaton moves for summary judgment in its favor, under motion sequence 002, on its First Cause of Action seeking a declaration that Kiaton has a valid and subsisting vendee's lien in the

amount of the deposit, plus reasonable expenses, and that it is entitled to enforcement of the vendee's lien; that the contract was canceled and terminated by Plaintiff no later than August 8, 2017; that Kiaton is entitled to the return of the deposit; and for an order directing Defendants to return the deposit. Kiaton also moves for summary judgment in its favor on its Second Cause of Action for a money judgment in the amount of $99,900, plus prejudgment interest from and after August 11, 2017, and awarding Kiaton reasonable attorney's fees as the prevailing party, plus costs and disbursements.

Kiaton argues in substance that it exercised its contractual right to terminate the contract because the property did not close by August 4, 2017 because Defendants Chan and Miller were not ready, willing and able to tender title and sell the condominium unit. Kiaton argues that Defendants Chan and Miller failed to comply with their obligation to warrant a valid and subsisting certificate of occupancy for the premises by the contractual deadline set for the closing. Additionally, Kiaton argues that it was reasonable for Kiaton not to close because as of the day of the closing the condominium's management could not confirm that it would have the necessary paperwork ready, the title report indicated that there was a question of whether there was a valid and subsisting certificate of occupancy for the unit and condominium because of an alteration affecting the certificate of occupancy that was not signed off, and there were fifteen (15) open housing violations affecting the condominium. Additionally, the management failed to respond to Kiaton's requests for indemnification related to the preexisting violations. Kiaton further argues that the closing was not a "time of the essence" closing, so Kiaton was not obligated to accept the unresolved issues and tender performance. Therefore, Kiaton argues that it did not default or breach any provisions of the contract and Defendants are not permitted to retain its deposit as liquidated damages.

Defendants move for summary dismissal of Kiaton's complaint, under motion sequence 003, plus attorney's fees and costs. Defendants argue in substance that they are entitled to retain the deposit as liquidated damages under the terms of the contract based on Kiaton's refusal to close because Defendants Chan and Miller, on the advice of Defendant West, refused to sign Kiaton's IAP because it contained a fraudulent misrepresentation as to the date that Kiaton identified the condominium unit. Kiaton would only be eligible for the IRC § 1031 tax deferred exchange program if the unit was identified within forty-five (45) days of the date Kiaton sold the property in which it sought to exchange. Defendants further argue that Kiaton's principle's daughter pressured Defendants Chan and Miller to sign the document, but they repeatedly refused to do so and Kiaton still entered into the contract for sale. Defendants further argue that counsel for Kiaton admitted that the document was not needed for Kiaton to qualify for the exchange program, but they wanted it in case the IRS audited Kiaton.

Defendants further argue in substance that Kiaton waived any potential issues with the title report because it failed to provide the title report and object to it in a timely manner pursuant to the deadlines set forth in the contract. Additionally, the alteration discussed in the title report involved plumbing fixtures and piping in the building's cellar and had no bearing on the certificate of occupancy for the condominium unit. Defendants also argue that the violations all involved areas of the building which did not affect the unit and the contract excluded violations that were not the responsibility of the condominium, so they could not be a valid basis for Kiaton's refusal to close. Finally, Defendants argue that "time of the essence" can be implied from the nature and circumstances of the contract.

To prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence

to demonstrate the absence of any material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824, 833 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The submission of evidentiary proof must be in admissible form (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067-68 [1979]). The movant's initial burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Jacobsen*, 22 NY3d at 833; *William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

If the moving party fails to make such prima facie showing, then the court is required to deny the motion, regardless of the sufficiency of the non-movant's papers (*Winegrad v New York Univ. Med. Center*, 4 NY2d 851, 853 [1985]). However, if the moving party meets its burden, then the burden shifts to the party opposing the motion to establish by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Construction Corp.*, 18 NY3d 499, 503 [2012]).

Summary judgment is "often termed a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue" (Siegel, NY Prac § 278 at 476 [5th ed 2011], citing *Moskowitz v Garlock*, 23 AD2d 943 [3d Dept 1965]).

The elements of breach of contract are (1) the existence of a valid contract, (2) plaintiff's performance of its obligations under the contract, (3) defendant's breach, and (4) resulting damages (*see Morris v 702 E. Fifth St. HDFC*, 46 AD3d 478, 479 [1st Dept 2007]; *Stonehill Capital Mgt., LLC v Bank of the West*, 28 NY3d 439, 448 [2016]). Additionally, all New York

contracts imply a covenant of good faith and fair dealing in the course of performance (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]).

Generally, parties to a sale of real estate contract, like parties to any agreement, are free to tailor their contract to meet their particular needs and to include or exclude provisions as they see fit (*Grace v Nappa*, 46 NY2d 560, 565 [1979]). Absent some indicia of fraud or other circumstances warranting equitable intervention, the court has a duty to enforce the terms of the agreement (*id.* [internal citations omitted]). When the relevant terms of an agreement are clear and unambiguous, the intentions of the parties are apparent and the court is prohibited from altering the terms of the contract (*see Osprey Partners, LLC v Bank of N.Y. Mellon Corp.*, 115 AD3d 561, 561-562 [1st Dept 2014]). However, when the meaning of a contract provision is reasonably susceptible to more than one interpretation, courts can look to the surrounding facts and circumstances extrinsic to the agreement to determine the intent of the parties (*67 Wall St. Co. v Franklin Natl. Bank*, 37 NY2d 245, 248 [1975]).

Here, the court denies both motions for summary judgment and determines that neither party is entitled to summary judgment relief as there are material issues of fact remaining, including, but not necessarily limited to, 1) whether Kiaton or Defendants Chan and Miller are entitled to Kiaton's $99,900 deposit pursuant to the terms of the contract; 2) whether Kiaton performed its obligations under the contract or whether it breached the terms of the contract and/or the implied covenant of good faith and fair dealing in refusing to close by August 4, 2017; 3) whether Kiaton's decision not to close was reasonable and made in good faith, or whether it was made in bad faith because of Defendants' refusal to sign its IAP with the alleged misrepresentation; and 4) whether Defendants Chan and Miller performed their obligations pursuant to the terms of the contract or whether they breached the terms of the contract by failing

to be ready, willing and able to close by August 4, 2017, and/or Defendant West failing to return the deposit within three business days of Kiaton's cancellation of the contract.

The court considered all additional arguments not expressly set forth herein and denies all relief not explicitly granted herein.

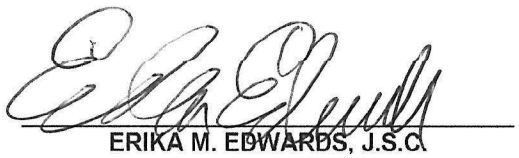
Therefore, both motions filed under motion sequences 002 and 003 are denied without attorney's fees or costs to any party.

As such, it is hereby

ORDERED that the court denies Plaintiff Kiaton LLC's motion for summary judgment on its First and Second Causes of Action, without attorney's fees or costs; filed under motion sequence 002, and it is further

ORDERED that the court denies Defendants Charlene H. Chan's, Ian J. Miller's and Pamela G. West, Esq., as Escrowees' motion for summary judgment and dismissal of Plaintiff Kiaton LLC's complaint, without attorney's fees or costs, filed under motion sequence 003.

This constitutes the decision and order of the court.



5/3/2021
DATE

ERIKA M. EDWARDS, J.S.C.

HON. ERIKA M. EDWARDS
J.S.C.

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