

Anolik v 66 Leo LLC
2021 NY Slip Op 32291(U)
October 29, 2021
Supreme Court, New York County
Docket Number: Index No. 652379/2020
Judge: Debra A. James
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

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ROBERT ANOLIK and LILI ANOLIK,
Plaintiffs,

INDEX NO. 652379/2020

MOTION DATE 11/30/2020

MOTION SEQ. NO. 001

- v -

66 LEO LLC,
Defendant.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63

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

ORDER

Upon the foregoing documents, it is

ORDERED that plaintiffs' motion for summary judgment is GRANTED as to the first cause of action for breach of contract; and it is further

ORDERED and ADJUDGED that within twenty (20) days of service of a copy of this order with notice of entry upon defendant by posting on NYSCEF, and by overnight courier upon non-party Theresa Racht, Esq., Theresa Racht, Esq., PLLC, (Escrow Agent) at her offices at 7 Penn Plaza, Suite 1602, New York, New York, the Escrow Agent is directed to release the Downpayment in the amount of \$ 350,000 held in the IOLA account of the Escrow Agent (_____

Bank Acct No. _____) pursuant to paragraph 16(a) of the Contract of Sale dated February 10, 2020 to plaintiffs; and it is further

ADJUDGED that upon release of such funds to plaintiffs, the Escrow Agent shall be discharged of all liability with respect to such funds to the extent of payment made as herein provided; and it is further

ORDERED that the motion of the plaintiffs' for summary judgment dismissing the counterclaim and affirmative defenses is hereby GRANTED, and the counterclaim and affirmative defenses are hereby dismissed; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiffs and against defendant for costs and disbursements, as taxed by the Clerk upon submission of an appropriate bill of costs.

DECISION

Plaintiffs move for summary judgment on their cause of action for breach of a contract to sell the subject premises to defendant under a real estate sales contract. As damages, plaintiffs seek to have the deposit currently held in escrow paid over to them as liquidated damages, as set forth in the contract on the grounds that they were ready, willing and able to close the transaction on the noticed date and the defendant failed to do so. Defendant opposes the motion on the grounds that the coronavirus pandemic emergency constituted a condition

under the contract which excused its performance at the time set forth by the plaintiffs.

"It is well-settled that absent a breach on the part of the seller, a purchaser who defaults on a real estate contract without lawful excuse cannot recover its down payment. Furthermore, when a party to a real estate contract declares time to be of the essence in setting a closing date, each party must tender performance on that date, and a failure to perform constitutes a default. Thus, where a seller seeks to hold a purchaser in breach of contract, the seller must establish that it was ready, willing, and able to perform on the time-of-the-essence closing date, and that the purchaser failed to demonstrate a lawful excuse for its failure to close."

Donerail Corp. N.V. v 405 Park LLC, 100 AD3d 131, 137-38 (1st Dept 2012) (citations omitted).

Plaintiffs, as sellers and defendant, as buyer, entered into a standard contract of sale for a condominium unit dated February 10, 2020. As relevant here, Paragraph 13(a) of the Contract provides:

"If Purchaser defaults hereunder, Seller's sole remedy shall be to retain the Downpayment as liquidated damages, it being agreed that Seller's damages in case of Purchaser's default might be impossible to ascertain and that the Downpayment constitutes a fair and reasonable amount of damages under the circumstances and is not a penalty."

Paragraph 20 (a) of the Contract provides:

"The risk of loss or damage to the Unit or the personal property included in this sale, by fire or other casualty, until the earlier of the Closing or possession of the Unit by the Purchaser, is assumed by Seller, but without any obligation of Seller to repair or replace any such loss or damage unless Seller elects to do so as hereinafter provided. Seller shall notify Purchaser of the occurrence of any such loss or damage to the Unit or the

personal property included in this sale within 10 days after such occurrence or by the date of Closing, whichever first occurs.”

As the proponents of the motion, plaintiffs-sellers here must establish that they were ready, willing, and able to perform and that a time of the essence closing date had been set. The affidavits and exhibits submitted in support of the motion establish that plaintiffs noticed a time of the essence closing date for June 1, 2020, and were prepared to close on that date. In opposition, defendant fails to adduce any evidence raising an issue of fact as to plaintiffs’ readiness to close, but challenges the plaintiffs’ reasonableness in setting a time of the essence closing date and asserts that the coronavirus public health emergency constitutes a “casualty” under the contract of sale which excuses defendants’ performance. This court disagrees with defendant that its opposition justifies denial of plaintiffs’ motion.

As stated by the Court,

“It is well established that for time to be made the essence of a contract of sale, where time was not made of the essence in the original contract itself, there must be a clear, distinct, and unequivocal notice to that effect giving the other party a reasonable time in which to act. Significantly, a party need not state specifically that time is of the essence, as long as the notice specifies a time on which to close and warns that failure to close on that date will result in default. Nor does it matter that the date is unilaterally set. Here, the [sellers] gave notice . . . of a specific date on which the closing would take place and warned that if the [buyer] failed to close

[it] would be in default. Accordingly, the letter . . . was sufficiently clear and unequivocal to properly give the plaintiff notice that time was of the essence. . . . What constitutes a reasonable time depends on the facts and circumstances of the particular case. Significantly, neither party's obligations under the contract of sale were contingent upon the [buyer]'s ability to obtain mortgage financing. Accordingly, regardless of whether or not the [buyer] obtained mortgage financing, the [seller] were entitled to require the [buyer] to perform on the law day, if they so chose. In this light, the [buyer] . . . should have timely sought an adjournment if [the] inability to obtain financing hampered [the] ability to perform. Notably, the plaintiff sought no adjournment until . . . after the originally scheduled closing date."

Zev v Merman, 134 AD2d 555, 557-558 (2d Dept 1987) (citations omitted), affd 73 NY2d 781 (1988).

Here, the defendant-purchaser assumed the risk of possibly not having sufficient funds to close the transaction due to economic dislocation but not including a financing contingency in the contract of sale. Nor is there any evidence that the defendant purchaser objected to the law date set by the plaintiffs in the time of the essence closing letter. The court further rejects defendant's argument that the pandemic constitutes a "casualty" under the contract of sale as the context in which the term is used evinces the parties' intent that it cover only physical damage and not economic dislocation. See A/R Retail LLC v Hugo Boss Retail, Inc., 2021 NY Slip Op 21139 (Sup Ct, NY County, Cohen, J., May 19, 2021) (the term

"casualty" denotes physical damage to the Premises as evidenced by surrounding provisions that refer to the repair and restoration needed to rectify such damage).

Therefore, as the plaintiffs have set forth a prima facie case that they were ready, willing and able to close on a reasonably noticed time of the essence closing date and as defendant has failed to raise any issue of fact as to plaintiffs' performance nor established why its performance should be excused under the terms of the contract of sale, the court shall grant plaintiffs' motion for summary judgment on its cause of action for breach of contract.

As Paragraph 13(a) of the Contract of Sale provides that the sole remedy of plaintiffs upon defendant's default is the retention of the downpayment, the court shall direct the escrow agent to release those funds to the plaintiffs. As the contract of sale sets forth the escrow as liquidated damages and the plaintiffs cite no attorney's fees clause in the contract, that is the extent of plaintiffs' recovery. See Sommer v Gen. Bronze Corp., 28 AD2d 981, 981 (1st Dept 1967) affd 21 NY2d 775 (1968) (contract of sale set forth that the amount of the down payment should represent the limit of the liability of the purchaser for damages for default in performance of the contract and seller is limited to such recovery and is not entitled in lieu thereof or in addition thereto to a recovery of money damages equivalent to

the amount of the down payment or to interest on the amount of the down payment as such). As the defendant has not opposed the dismissal of its counterclaims and affirmative defenses, the court shall also grant that relief.

Debra A. James
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<u>10/29/2021</u>			<u>DEBRA A. JAMES, J.S.C.</u>
DATE			
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED		<input type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/> GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE