313 Kingston LLC v Brown
2022 NY Slip Op 31322(U)
April 6, 2022
Supreme Court, Kings County
Docket Number: Index No. 523040/2018
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 6th day of April, 2022.

PRESENT:

HON. CARL J. LANDICINO,
Justice.

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313 KINGSTON LLC,

Plaintiff,

- against -

ZACHARIAH BROWN and BALISOK & KAUFMAN, PLLC,

Defendants.

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DECISION AND ORDER

Index No. 523040/2018

MOTION SEQUENCE #4

FILED
KINGS COUNTY CLERK
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The following e-filed papers read herein:	NYSCEF Doc Nos.
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations)	115-142
Opposing Affidavits (Affirmations)	147-154
Reply Affidavits (Affirmations)	156

Upon the foregoing papers in this action for specific performance of a July 24, 2017 contract (Sales Contract) for the sale of the residential real property at 507 Rutland Road in Brooklyn (Block 4803, Lot 60) (Property), plaintiff 313 Kingston LLC (Kingston) moves (motion sequence #4) for an order: (1) granting it a default judgment, pursuant to CPLR 3215, or, alternatively; (2) granting it summary judgment against defendants Zachariah Brown (Brown) and Balisok & Kaufman, PLLC (Balisok), pursuant to CPLR

3212 for specific performance of the Sales Contract by issuing an order: (a) setting a closing date for the Sales Contract during which Brown must attend and execute a deed and all supporting papers, Balisok must attend and apply the funds that it holds in escrow towards the purchase price of the Property and release them to Brown to consummate the transaction, and (b) setting the matter down for an inquest to calculate further damages against defendant Brown, including costs, disbursements and reasonable attorneys' fees.

Background

The Complaint for Specific Performance

On November 14, 2018, Kingston commenced this action by filing a summons, a verified complaint and a notice of pendency against the Property. The complaint alleges that defendant Brown resides at the Property and that defendant Balisok "is named a party herein for the sole reason that it holds the [Sales Contract] and is a stakeholder . . ." (complaint at ¶¶ 2-3). The complaint alleges that "[o]n or about July 24, 2017, the parties executed [the Sales Contract] wherein the Plaintiff agreed to purchase the Subject Premises from the Defendant a purchase price of $575,000.00" (*id.* at ¶ 6). The complaint alleges that "[p]ursuant to the terms of the contract for sale, and in addition to expending substantial efforts and sums on securing a title search and preparing for closing, Plaintiff rendered a down payment of $5,000.00 into an escrow account belonging to Balisok, who the [Sales Contract] recited as the Escrowee, on or about July 31, 2017" (*id.* at ¶ 7). The complaint further alleges that "[t]o date, Defendant has been uncooperative and unwilling to follow through with the contract for sale by closing on - and transferring - the Subject

Premises to Plaintiff" although a "law day closing was set for October 29, 2018[,]." The complaint also alleges that, Balisok allegedly "notified his client of the time-of-the-essence law-date closing by letter dated September 12, 2018, well over 30 days prior to the closing" yet Brown failed to appear (*id.* at ¶¶ 8 and 10-12). In addition, the complaint alleges that Kingston sent an October 30, 2018 default letter providing Brown with an opportunity to cure and that Brown refused to proceed with the closing (*id.* at ¶¶ 14 and 16). The complaint asserts a cause of action for breach of the Sales Contract and specific performance.

Brown's Appearance Default

According to Kingston's affidavits of service in the record: (1) Balisok was served with process on November 16, 2018, and (2) Brown was served with process on November 19, 2018, by nail and mail service. Said affidavits were electronically filed on November 23, 2018 (*see* NYSCEF Doc Nos. 4 and 5). Defendants failed to answer or otherwise respond to the complaint. Consequently, on January 4, 2019, Kingston moved for a default judgment against defendants.

On February 4, 2019, while Kingston's motion for a default judgment was pending, Brown filed a late answer to the complaint with a general denial and affirmative defenses, contending that: (1) Kingston breached the Sales Contract; (2) "[p]laintiff misrepresented the value of the property, which was used to fraudulently induce Defendant to sign the contract and therefore should be voided . . ."; (3) the granting of specific performance would be "unconscionable" under the circumstances; and (4) unclean hands (*see* NYSCEF

Doc No. 19). On February 4, 2019, Kingston filed a Notice of Rejection of Brown's late answer.

By a June 4, 2019 decision and order, the court (Montelione, J.) granted Kingston's motion for a default judgment and directed Kingston to settle an order on notice (*see* NYSCEF Doc No. 24). On July 19, 2019, Kingston submitted a proposed order to the court, which was rejected without prejudice (NYSCEF Doc No. 26). On July 19, 2018, Kingston filed a Notice of Settlement of Order (*see* NYSCEF Doc Nos. 28 and 29).

On July 24, 2019, defense counsel moved, by order to show cause, for an order relieving him as defense counsel to Brown with a temporary restraining order (TRO) staying the action. By an August 6, 2019, decision and order, the court (Montelione, J.) granted the motion and gave Brown 60 days within which to retain new counsel, during which time all proceedings were stayed (*see* NYSCEF Doc No. 43).

On November 14, 2019, the court issued a default judgment holding that: (1) Brown breached the Sales Contract; (2) Brown shall attend a closing on December 19, 2019, at which he shall execute a deed and all supporting papers pursuant to the Sales Contract; (3) Kingston must serve Brown with a notice of the closing within 10 days; (4) Balisok shall attend the closing, execute all appropriate papers and apply the escrow funds towards the purchase price of the Property and release it to Brown in furtherance of the transaction; and (5) the issues of costs, disbursements and reasonable attorneys' fees were referred to a special referee/JHO to hear and determine (*see* NYSCEF Doc No. 45). On November 15,

2019, the issues of costs, disbursements and reasonable attorneys' fees were referred to a special referee/JHO for a January 8, 2020 hearing (*see* NYSCEF Doc No. 50).

On December 5, 2019, Kingston filed an "Affirmation in Support of Amended Order" requesting that the court amend the November 14, 2019 order with "a new closing date that Your Honor deems reasonable notice to Defendant under the circumstances" (NYSCEF Doc No. 46). On December 10, 2019, the court issued an amended order rescheduling the closing for January 29, 2020 "at a location to be noticed by Plaintiff's counsel to Defendants within 10 days hereof . . ." (*see* NYSCEF Doc No. 51).

Vacatur of Brown's Appearance Default

On January 1, 2020, four weeks prior to the court-ordered closing, defendant Brown moved, by order to show cause, for an order: (1) vacating the June 4, 2019 default judgment; (2) voiding the Sales Contract based on duress, undue influence, conflict of interest and fraud in the inducement; (3) staying the December 10, 2019 amended order scheduling the closing for January 29, 2020; (4) staying the hearing regarding costs, disbursements and attorneys' fees; and (5) granting a preliminary injunction and TRO staying the sale of the Property. Brown claimed that he did not have actual notice of this action in time to defend it and blamed his former defense counsel.

On January 2, 2020, Kingston filed a notice of the January 29, 2020 sale (*see* NYSCEF Doc No. 61). On January 5, 2020, Kingston opposed Brown's motion to vacate the June 4, 2019 default judgment.

On January 6, 2020, the court (Baynes, J.) signed Brown's amended order to show cause, for an order, pursuant to CPLR 317, vacating and setting aside the June 4, 2019 default judgment, granting the same relief sought in Brown's January 1, 2020 order to show cause and staying the January 29, 2020 closing and the hearing regarding costs, disbursements and attorneys' fees (*see* NYSCEF Doc No. 93).

On January 8, 2020, Brown filed an answer to the complaint wherein he denied the material allegations therein and asserted affirmative defenses, including: (1) lack of personal jurisdiction; (2) he did not have independent legal representation; (3) "Plaintiff . . . committed fraud . . . in deliberately misrepresenting the value of Defendant Brown's real property in the [Sales Contract] and verbally upon which Defendant Brown relied to his detriment"; (4) fraudulent inducement; and (5) unclean hands (NYSCEF Doc No. 96). On January 9, 2020, Kingston filed a Notice of Rejection of Brown's January 8, 2020 answer (*see* NYSCEF Doc No. 99).

On January 20, 2020, the court (Montelione, J.) issued a decision and order granting Brown's motion to vacate the June 4, 2019 default judgment and holding that:

> [d]efendant adequately presented excusable default in light of the dispute as to whether defendant's former attorney represented him and given the circumstances surrounding the entry of the default judgment. Further, defendant demonstrated a potentially meritorious defense in that the [Sales Contract] was allegedly entered into where defendant relied upon a purportedly material misrepresentation that plaintiff made (*c.f. Concert Radio, Inc. v BAF Corp.*, 108 AD2d 273, 488 NYS2d 696 [1st Dept 1985], *aff'd,* 73 NY2d 766, 532 NE2d 1280 [1988]; *Hall v Hartford*, 50 Misc 133, 100 NYS 392 [Sup Ct 1906]). Moreover, the court notes that

> defendant's burden of showing a meritorious defense is not as great as the burden in opposing a motion for summary judgment as long as some potential meritorious defense is shown (*see Bilodeau-Redeye v Preferred Mut. Ins. Co.*, 38 Ad3d 1277 [4th Dept 2006]). Lastly, defendant's motion is timely in light of the fact that the instant motion was made within one year of the entry of the default judgment.
>
> Under the circumstances of this case, including the lack of willfulness or prejudice to the plaintiff, the strong public policy in deciding matters on their merits and in the interest of justice, defendant Zachariah Brown's motion to vacate the default judgment is granted (*see gen Damiano v Corhan*, 42 AD2d 699, 345 NYS2d 1022 [2d Dept 1973]).
>
> Defendant Zachariah Brown shall interpose an answer within 30 days hereof . . . (*see* NYSCEF Doc No. 100).

Thereafter, discovery ensued. On February 9, 2021, Kingston filed a note of issue and certificate of readiness advising that all discovery was completed (NYSCEF Doc No. 144).

Kingston's Instant Motion

In the interim, on January 27, 2021, Kingston moved for a default judgment or, alternatively, for summary judgment on its claim for specific performance of the Sales Contract. Kingston submits an attorney affirmation arguing that "[d]efendants have repeatedly defaulted in and prejudicially delayed this proceeding, and there is no material issue of fact." Counsel asserts that the default judgment should be reinstated and/or judgment should be granted, as a matter of law, because Brown's defense is based on an 8% price differential [in the sales price], which is not actionable, as a matter of law. Counsel notes that Brown failed to serve any discovery demands and failed "to produce any supporting evidence or witnesses as to any of his self-serving claims."

Counsel further argues that Brown is in default because he failed to interpose an answer within 30 days of the January 20, 2020 decision and order, as explicitly directed by the court. Counsel argues that "over eleven (11) months have passed since Defendant violated this Court's . . . Order in failing to interpose an answer within 30 days" and "[d]efendant neither moved to compel acceptance of the rejected [January 8, 2020] answer nor moved for leave to file a late answer."

Kingston's counsel contends that in the event Brown's January 8, 2020 answer is deemed interposed, it should nevertheless be stricken for "discovery violations," pursuant to CPLR 3126, despite the fact that Kingston's notice of motion does not seek such relief. Kingston's counsel asserts that Brown failed to serve any "evidence or witnesses of any sort . . ." to invalidate the Sales Contract, support any of his affirmative defenses or raise a question of triable fact to preclude summary judgment.

Kingston submits copies of the fully executed Sales Contract, the check and a time of the essence notice that it sent to Brown to demonstrate that it had performed under the Sales Contract by tendering a down payment and scheduling the closing. Kingston's counsel notes that "this Court has actually ruled twice that Defendant has breached the contract and Plaintiff is entitled to specific performance" and references the court's November 14, 2019 order granting Kingston a default judgment and the court's December 10, 2019 amended order (*see* NYSCEF Doc Nos. 130 and 133).

Defendants' Opposition

Defense counsel, in opposition, submits an attorney affirmation with a "Brief History of Facts" regarding Brown's personal background, Kingston's alleged misrepresentation regarding the value of the Property and the circumstances regarding Brown's execution of the Sales Contract (NYSCEF Doc No. 147). Defense counsel affirms, without any personal knowledge, that:

> Defendant Brown is an African American 71 year old man born and raised in Jamaica, W.I., who left school at the 6th grade to work in a clothing factory and then worked as a plumber for the Jamaican Government for six years. In 1984 he emigrated to the USA and worked in construction for 30 years for Local Union 79, until his retirement in 2012. Defendant Brown had little, if any, formal education, is blind in one eye, has very poor vision in need of very strong eyeglasses to see. In 1999 Defendant Brown purchased his first and only home at 507 Rutland Road, Brooklyn, New York, whereat he and his family have resided for the past 22 years.
>
> In July of 2017, while sweeping his sidewalk in front of his home, Defendant Brown was approached by two men who asked if he would like to sell his home. Defendant Brown told them he was not ready at that time. They exchanged information and said they would contact him in a couple of weeks.
>
> Two weeks later, on July 24, 2017, one of the two men named David [from a company known as 313 Kingston LLC (The 'Plaintiff' herein)], came back to Mr. Brown's home and drove him in his car to his lawyer's office at 251 Troy Avenue, Brooklyn, New York. The man named 'David' introduced Mr. Brown to a lawyer named Joseph Harrison who, to the surprise of Mr. Brown and without his knowledge or consent, had already prepared a Contract of Sale to sell his home at 507 Rutland Road, Brooklyn, New York to David of 313 Kingston LLC ('Plaintiff') for a purchase price of $575,000.

Defendant Brown was told by David that Joseph Harrison would be his attorney in the real estate transaction, and that the other lawyer at 251 Troy Avenue, Brooklyn, by the name of Joseph Balisok, would be David's lawyer as the 'buyer' [the attorneys shared the same office].

Defendant Brown had no experience in selling or buying houses (other than 22 years previously when he purchased his home) and he had little knowledge of real estate business or market.

Furthermore, Mr. Brown had forgotten his eye-glasses at home and could not read the alleged document [Contact of Sale] as he was blind in one eye. Neither David nor his alleged attorney, Joseph Harrison, made any effort to explain the terms and conditions of the Contract of Sale to Mr. Brown. In fact, Defendant Brown did not even know it was a Contract of Sale that was binding! The contract was not read by him due to his disability and it was not explained to him by his alleged attorney.

The two men told him his house was worth $600,000.00 but the contract price would be $575,000.00 since there was no broker. David told him that he would pay all 'transfer taxes' as well as pay for his attorney fees. Mr. Brown was unwittingly pressured to sign the document not realizing it was a 'binding contract,' as neither person explained the document to him.

Subsequently, Mr. Brown had discovered after the meeting that his home was valued at $710,000.00 in the 2017 real estate market, and not $575,000.00, and he realized that he was the victim of a scam as *this was a misrepresentation as to the true value of Mr. Brown's home and it was a material misrepresentation known to be false* by 'David' and his attorney at the time the false sales price was placed into the alleged Contract of Sale.

Furthermore, there was a serious conflict of interest as attorney Harrison shared the same office with David's lawyer, Joseph Balisok, at 251 Troy Avenue, Brooklyn, while Mr. Brown had

> never met or known his alleged lawyer, Joseph Harrison, previously, and in fact it was David who brought Mr. Brown to Mr. Harrison's law office and who had already prepared a Contract of Sale to sell Mr. Brown's home [unbeknownst to Defendant Brown] (emphasis added).

Defense counsel, who was retained by Brown in "late 20*19*[,]" also affirms that his client failed to timely answer the complaint on or before January 3, 2019, because "Mr. Brown was never personally served with a Summons and Complaint for Specific Performance, and his prior attorney, Joseph Harrison, never informed him of the lawsuit."

Defense counsel further affirms that on January 6, 2020, when he personally appeared before the late Justice Johnny Lee Baynes for oral argument on Brown's motion to vacate the November 2019 default judgment, the court granted Brown leave to file a late answer to the complaint *on the record*. Defense counsel annexes the official transcript of the January 6, 2020 oral argument, after which Justice Baynes stated that "I'm going to order counselor for the defendant that you serve an answer prior to - and thus will be on the record so you can order the record from the court reporter - prior to the 21st day of January" (*see* NYSCEF Doc No. 152, 6:13-21). Defense counsel explains that Brown promptly filed his answer to the complaint on January 8, 2020, in accordance with the court's directive at the January 6, 2020 hearing. When Justice Montelione subsequently granted Brown's motion to vacate the default judgment on January 20, 2020, and ordered Brown to answer within 30 days, defense counsel affirms that he served a duplicate of Brown's January 8, 2020 answer upon Kingston on February 23, 2020.

Brown submits a one-page opposing affidavit attesting that "I have read the entire Affirmation of my attorney . . . and I agree with it in its entirety as it reflects 100% per cent the true facts and circumstances of this pending lawsuit" (*see* NYSCEF Doc No. 148).

Notably, defense counsel's opposing affirmation specifically references a much more comprehensive fact affidavit from Brown that was previously submitted in support of Brown's January 2020 motion for an order vacating the June 4, 2019 default judgment, which recites the same factual assertions made by defense counsel in opposition to Kingston's summary judgment motion.[1] In that January 2020 affidavit, which will be considered by the court in opposition to Kingston's instant summary judgment motion,[2] Brown attests that the Sales Contract should not be enforced because Kingston's principal, David, misrepresented to him that the Property was worth $600,000.00 when the market value of his Property was actually $710,000.00 and that was a "material misrepresentation, fraudulent behavior and what I believe was outright 'cheating me out of the value of my home'" (*see* NYSCEF Doc No. 53, Brown January 1, 2020 Affidavit at ¶¶ 10 and 12).

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[1] Defense counsel's affirmation regarding Brown's execution of the Sales Contract and Kingston's principal's alleged misrepresentation regarding the value of the Property is inadmissible hearsay (*Zuckerman v City of New York*, 49 N.Y.2d 557, 560 [1980]).

[2] "In 2014, CPLR 2214 (c) was amended to provide: '[e]xcept when the rules of the court provide otherwise, in an e-filed action, a party that files papers in connection with a motion need not include copies of papers that were filed previously electronically with the court, but may make reference to them, giving the docket numbers on the e-filing system'" (*E. Funding LLC v San Jose 63 Corp.*, 172 AD3d 818, 819 [2019]).

Kingston's Reply

Kingston, in reply, submits an attorney affirmation arguing that Kingston made a *prima facie* showing of entitlement to summary judgment and that Brown, in opposition, failed to demonstrate any misrepresentation of material fact because "it is settled law that puffery or opinions of value may not form the basis of a fraud claim" and Brown failed to establish any of the elements of fraud.

Discussion

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should, thus, only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). "The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment, as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Manicone v City of New York*, 75 AD3d 535, 537 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also Zuckerman v City of New York*, 49 NY2d at 562; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If it is determined that the movant has made a *prima facie* showing of entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [1989]).

"To prevail on a cause of action for specific performance of a contract for the sale of real property, a plaintiff purchaser must establish that it substantially performed its contractual obligations and was ready, willing, and able to perform its remaining obligations, that the vendor was able to convey the property, and that there was no adequate remedy at law" (*Ashkenazi v Miller*, 190 AD3d 668, 670 [2021]; *Brickstone Grp., Ltd. v Randall*, 172 AD3d 671, 672 [2019]; *MB Shtetl 1 Corp. v Singh*, 166 AD3d 604, 605 [2018]; *1107 Putnam, LLC v Beulah Church of God in Christ Jesus of the Apostolic Faith, Inc.*, 152 AD3d 474, 475 [2017]). "In moving for summary judgment on a complaint seeking specific performance of a contract, a purchaser must submit evidence demonstrating financial ability to purchase the property in order to demonstrate that it was ready, willing, and able to purchase the property" *Finkelstein v. Lynda*, 166 A.D.3d 948, 949, 88 N.Y.S.3d 225, 227 [2d Dept. 2018]; *see also Grunbaum v. Nicole Brittany, Ltd.*, 153 AD3d 1384, 61 NYS3d 146 [2017]; *Kaygreen Realty Co., LLC v. IG Second Generation Partners, L.P.*, 78 AD3d 1010, 1015, 912 NYS2d 246 [2015]. Satisfaction of the requirement that there be no adequate remedy at law is presumed when real property is the subject of the contract (*Lezell v Forde*, 26 Misc 3d 435, 442 [Sup Ct Kings County 2009]). "Generally, the equitable remedy of specific performance is routinely awarded in contract actions involving real property, on the premise that each parcel of real property is unique" (*EMF Gen. Contracting Corp. v Bisbee*, 6 AD3d 45, 52 [2004]).

Here, Kingston has satisfied its *prima facie* burden of establishing a right to specific performance of the Sales Contract by producing the fully executed Sales Contract, evidence

that it substantially performed its obligations under the Sales Contract by making a payment towards the contract price and sending Brown a time of the essence letter scheduling the closing. Kingston demonstrated that Brown breached the Sales Contract by refusing to proceed with the time of the essence closing. In addition, paragraph 23 (b) of the Sales Contract specifically provides that "[i]f Seller defaults hereunder, Purchaser shall have such remedies as Purchaser shall be entitled to at law or in equity, including, but not limited to, specific performance" (*see* NYSCEF Doc No. 117). Thus, the burden shifted to Brown to raise a triable issue of material fact to preclude summary judgment.

Brown's fraud defense based on Kingston's principal's alleged misrepresentation that the Property's market value was $600,000.00 when it was actually worth $710,000.00 is rejected (*see First American Title Ins. Co. of NY v Ankari*, 19 Misc 3d 1141 (A) [Sup Ct, New York County 2008] [holding that a 10% price differential was not evidence of fraud]). Mere puffery or opinions of value do not constitute fraud (*see Sidamonidze v Kay*, 304 AD2d 415 [2003]). In his affidavit, at NYSCEF #53, Mr. Brown states that he was willing to accept $625,000 as a purchase price [less than a 10% price differential] (*see* paragraph 11; *see also Northern Group, Inc. v. Merrill Lynch*, 135 AD3d 414, 22 NYS3d 421 [1st Dept 2016] and *Kato v. Gerard*, 195 AD3d 516, 150 NYS3d 711 [1st Dept 2021]). In any event, Brown does not submit any evidence to establish the value of the Property when he executed the Sales Contract. Aside from asserting that Kingston engaged in fraudulent activity, claiming that he is an unsophisticated seller and expressing remorse regarding the

transfer price, Brown failed to establish that it would be inequitable to grant specific performance of the Sales Contract.

Additionally, there are specific inconsistencies with Brown's version as outlined herein: 1) he claims he was unaware it was a contract, 2) he signed the contract without reading it, 3) he was unaware the contract was binding, and 4) the lawyers who drafted the contract worked in the same office.

Accordingly, it is hereby

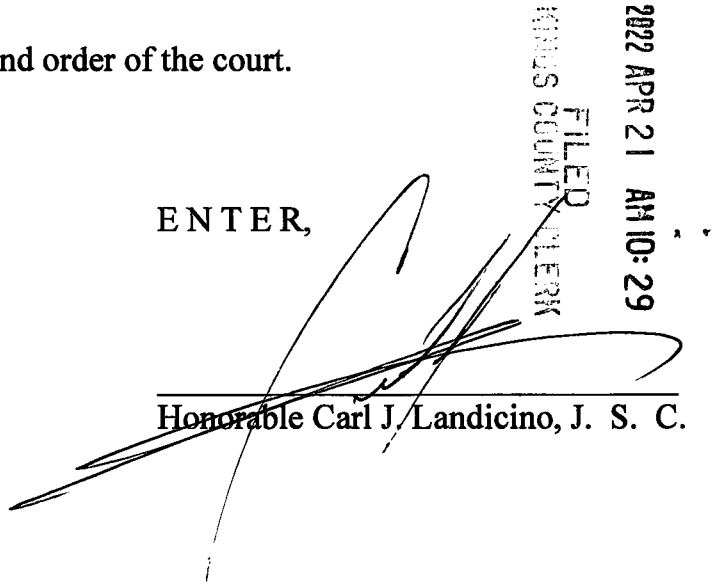
ORDERED that Kingston's summary judgment motion (mot. seq. four) is granted against defendants Brown and Balisok on its cause of action for specific performance of the Sales Contract; and it is further

ORDERED AND ADJUDGED that Plaintiff shall settle an order setting down a weekday date, time and place for closing and transfer of escrow funds, however, the closing date shall be no earlier than 45 days from the date of the entry of this decision and order, the time will be during regular business hours and the location will be in Kings County; and

ORDERED that the matter will be referred to a special referee/JHO for a hearing to calculate Kingston's reasonable attorneys' fees and costs, if any, in accordance with the

terms of the Sales Contract, Rider at ¶ 39[3] pursuant to separate order, which shall occur post closing.

This constitutes the decision and order of the court.



ENTER,

Honorable Carl J. Landicino, J. S. C.

[3] Paragraph 39 of the Rider to the Sales Contract states that "the prevailing party shall be entitled to recover its reasonable attorneys' fees and costs, whether incurred before suit, during suit, or at the appellate level" (*see* NYSCEF Doc No. 117, Rider at ¶ 39).