SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAVID B. COHEN** **PART 58**

Justice

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DANIEL POTTICK,

Plaintiff,

- v -

SHAWN WEIDMANN, MARIA WEIDMANN, and PALAZZO LAW, P.C.,

Defendants.

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INDEX NO. 155926/2020

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 27, 28, 29, 30-39, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79

were read on this motion to/for SUMMARY JUDGMENT.

This case arises from a residential real estate transaction in which the closing failed to take place due to Covid. Plaintiff Daniel Pottick and defendants Shawn Weidmann, Maria Weidmann, and Palazzo Law, P.C. all move for summary judgment seeking the customary 10% deposit. After consideration of the parties' contentions, as well as a review of the relevant statutes and case law, the motions are decided as follows.

A. Factual And Procedural Background

On January 10, 2020, plaintiff Daniel Pottick, as seller, and Shawn and Maria Weizmann, as buyers, entered into a contract for the Weidmanns to buy a condominium apartment located at 22 West 66th Street in Manhattan, near both Central Park and Lincoln Center. (Exhibit A, docket no. 49). The price was $3,250,000, and $325,000 was paid into escrow as a deposit. (*Id. See also* Shawn and Maria Weidmann Affs., docket nos. 44-45). Defendant Palazzo Law, P.C. was the escrowee. (Doc. 1 at ¶ 3). The Weidmanns received a mortgage loan commitment for $2,275,000 from Wells Fargo (Shawn Weidmann Aff., ¶¶14-15; Maria Weidmann Aff., ¶¶12-13, docket nos.

44-45), and intended to pay the $650,000 balance in cash. The Weidmanns, who resided in Carmel, California wished to have an apartment in New York to be closer to Mrs. Weidmann's parents due to their advancing age. The contract, which was executed electronically, provided for a closing on March 1, 2020. After receiving the mortgage commitment, Mrs. Weidmann came to New York in early March 2020 to close on the purchase. However, since Mr. Pottick was unable to close at that time because he was still awaiting approval by the condominium board, Mrs. Weidmann returned to California. (Shawn Weidmann Aff., ¶¶16-18; Maria Weidmann Aff., ¶¶14-16, docket nos. 44-45).

Soon after the Covid lockdown began on March 13, 2020, several unfortunate events befell the Weidmanns. On March 29, Mrs. Weidmann's father died from Covid. (Maria Weidmann Aff., ¶¶21-26, docket no. 45). At about the same time, Mr. Weidmann's company, Spring Education Group, had to shut down its business for a time due to the pandemic. (Shawn Weidmann Aff., ¶¶26-29, docket no. 44). Spring is a large, private-equity backed owner and operator of private schools in as many as 19 states. Mr. Weidmann received a letter from the company reducing his salary, but he also acknowledged that, as CEO of Spring, he felt an obligation to take a pay cut to show unity with the company's employees. As a result of Mr. Weidmann's reduction in salary, Wells Fargo also began to re-underwrite its loan commitment. (Shawn Weidmann Aff., ¶¶30-34, docket no. 44).

Although the contract of sale provided for an in-person closing, as was then customary, counsel for the seller, the buyers, and Wells Fargo discussed the possibility of conducting a remote closing, which was becoming more common as a result of various emergency orders issued by Governor Cuomo and others in his administration to allow economic activity to continue despite the lockdown. But, as counsel for the Weidmanns admits, "the Weidmanns 'decided to adjourn

the closing until there was clarity' on how a proper Closing could take place under the Contract." (Jonathan Cohen Aff., ¶32, docket no. 46). They did not suggest an alternate date or even a time frame within which a closing might occur. They also did not suggest any specific procedures they might entertain as to how to close remotely.

Whether or not the Weidmanns' conduct constituted a repudiation of the contract, at a minimum it raises questions as to the Weidmanns' ability and intention to perform at that time which entitled Pottick to ask for adequate assurances. However, Pottick did not seek such assurances. On April 10, 2020, Pottick's attorney unilaterally set April 21, 2020 as the closing date and stated that "time is of the essence". (Jonathan Cohen Aff., ¶¶41-47, and exhibit K, docket nos. 46, 59). As discussed below, the usual and customary rule in New York is that a party to a real estate contract must grant at least one closing extension before he or she can set a "time is of the essence" closing. Since there were two weekends between April 10 and April 21, 2020, the notice gave only seven business days' notice, in the early days of a pandemic, with exact closing instructions to follow ("in accordance with instructions to be sent to you 2 business days before Closing").

Although the Weidmanns maintained that Pottick's actions were unreasonable and that they were not given adequate notice under the circumstances (Jonathan Cohen Aff., ¶48, and exhibit L, docket nos. 46, 60), they did not propose a date by which they would be prepared to close. Similarly, Pottick did not propose any specific concrete procedures for having a remote closing other than the representation in his attorney's April 10 letter that any such procedures would be sent two days before the unilateral April 21 closing date.

Thereafter, nothing happened until July 7, 2020, when Pottick's attorney sent a letter terminating the contract and claiming the $325,000 deposit. (Jonathan Cohen Aff., ¶¶58-59, and

exhibit N, docket nos. 46, 62). In response, the Weidmanns' attorney asserted that the delay of almost three months between the selection of the closing date and the termination of the contract belied Pottick's claim that time really was of the essence as of April 21, 2020. However, the Weidmanns also took no steps during that period to try to close. All that they did prior to July 2020 was to send a response letter on April 15, 2020, disputing Pottick's demands, and demanding the return of the deposit to them.

The contract of sale, written on the City Bar's approved form for condominium sales, provides:

> "13. Defaults and Remedies: (a) If Purchaser defaults hereunder, Seller's sole remedy shall be to retain the Down payment as liquidated damages, it being agreed that Seller's damages in the case of Purchaser's default might be impossible to ascertain and that the Down payment constitutes a fair and reasonable amount of damages under the circumstances and is not a penalty."

Given the foregoing, the sole issue in this case is who should get the $325,000 deposit.[1] Pottick moves, pursuant to CPLR 3212 (mot. seq. 001), for summary judgment dismissing the Weidmanns' counterclaims and, upon the granting of the motion, for an order directing defendant Palazzo Law, P.C. to release the down payment to him. Docs. 27-28. The Weidmanns oppose the motion and move, inter alia, for summary judgment on their counterclaim against Pottick for anticipatory breach of contract and to have the money in escrow released to them. Docs. 43-45. Pottick opposes the Weidmanns' motion.

[1] The contract also provides, at paragraph 22, for a mortgage contingency in the amount of $2,275,000. That paragraph provides: "Once a Commitment is issued, Purchaser is bound under this Contract even if the lender fails or refuses to fund the loan for any reason." Although the Weidmanns' affidavits refer to Wells Fargo questioning them post-Covid about the wisdom of their pre-Covid commitment, it is clear that the Wells Fargo commitment made in February 2020 fulfills this mortgage contingency and, though the Weidmanns may refer to the Wells Fargo reaction post-Covid as an equitable factor in their arguments, they make no effort to argue that this is an excuse for their failure to close.

Having set forth the facts giving rise to this dispute and the relief sought, it is necessary for this Court to address the unusual procedural posture of this case. In motion sequence 001, the defendants moved, on November 8, 2021, to compel Pottick to respond to their discovery responses and, if he did not respond, to strike his complaint. Doc. 12. On December 1, 2021, Pottick opposed the motion and cross-moved under motion sequence 001 for a protective order against the defendants' demands, for the dismissal of the defendants' counterclaims and affirmative defenses, and, upon the granting of his motion, for an order directing defendant Palazzo Law, P.C. to release the down payment to him. Docs. 27-28. By order entered January 25, 2022, this Court resolved motion sequence 001 based on a notice filed by the Weidmanns the previous day withdrawing their motion to compel. Docs. 41-42. However, the January 25, 2022 order was silent regarding any disposition of Pottick's cross motion.

Also on January 25, 2022, the defendants moved under motion sequence 002 for the relief set forth above. Docs. 43-48. On February 11, 2022, Pottick submitted papers in opposition to the motion filed by defendants under motion sequence 002 and in further support of his cross motion under motion sequence 001, which motion sequence had been resolved by that date. Docs. 76, 78.

Although this procedural history is somewhat of an anomaly, this Court notes that the judicial system allows the parties a great deal of latitude in how they conduct litigation and they "may to a large extent chart their own procedural course through the courts" (*California Suites, Inc. v Russo Demolition Inc.*, 98 AD3d 144 [1st Dept 2012] [citations omitted]). Since the parties clearly intended to respond to each other's motions, despite the fact that they were filed under different sequence numbers, and since motion sequence 001 has been resolved, this Court will consider both motions under motion sequence 002.

B. Standard for Summary Judgment

In order to obtain summary judgment, a movant must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of material issues of fact (*See Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). If this *prima facie* showing is made, the burden shifts to the opposing party to adduce evidence in admissible form establishing that there is a triable issue of fact (*Id.*; *see also, Gammons v City of New York*, 24 NY3d 562 [2014]). Because summary judgment deprives a litigant of his day in court, "evidence should be analyzed in the light most favorable to the party opposing the motion." (*Martin v Briggs*, 235 AD2d 192 [1st Dep't 1997]). Bare or conclusory allegations or assertions are insufficient to create genuine issues of material fact sufficient to defeat a motion for summary judgment (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]; *See generally Taxi Medallion Loan Trust III v D&G Taxi Inc.*, 2020 NY Misc. LEXIS 508 [Sup Ct NY County 2020] and cases therein cited).

C. Legal Conclusions

Based upon these facts, the Court is compelled to deny both motions for summary judgment. In *Donerail Corp., N.V. v 405 Park LLC*, 100 AD2d 131, (1st Dep't 2012), the First Department recited the customary rule in New York that if a "time is of the essence" notice is clearly expressed in connection with a real estate contract, and set on reasonable notice, and the buyer cannot or does not close, the seller may take, and the buyer forfeits, the contract deposit. In *Miller v. Almquist*, 241 AD2d 181 (1st Dep't 1998), the First Department elaborated that unless the real estate contract itself clearly provides for a "time is of the essence" closing, ordinarily the parties get at least one adjournment that takes them beyond the contract date before a "time is of the essence" notice can be sent, and a notice of two weeks in that case was unreasonable, permitting

the prospective buyer to seek the return of his deposit. *See also Brum Realty Group, LLC v. Takeda*, 205 AD2d 365 (1st Dep't 1994); *Revival Realty Group, LLC v Ulano Corp.,* 112 AD3d 902 (2d Dep't 2013).

Based on the cases cited, the Weidmanns have a viable claim that the setting of a "time is of the essence" closing on seven business days' notice was unreasonable under the circumstances and they may therefore be entitled to a return of their deposit. The fact that New York was then in the early throes of the pandemic, as well as the early days of remote real estate closings, made acting reasonably and in good faith even more important. Pottick certainly had time to grant an adjournment between the date he chose to send his "time is of the essence" notice on April 10, 2020 and still send a "time is of the essence " notice thereafter before he sent his contract termination notice on July 7, 2020. Since reasonableness is an issue of fact here, it would be premature to grant the Weidmanns summary judgment before discovery is conducted (*see* CPLR 3212[f]).

In *Pesa v Yoma Development Group, Inc.*, 18 NY3d 527 (2012), the Court of Appeals ruled that, before a buyer can recover his deposit, he has to be prepared to demonstrate that he was ready, willing and able to perform at the appropriate time. That is questionable here given Mr. Weidmann's loss of income, the doubtful state of the Weidmanns' Wells Fargo mortgage approval and the death of Mrs. Weidmann's father, which eliminated one of their reasons for buying the apartment in the first place. That conclusion may be reinforced by the Weidmanns' apparent unwillingness, in response to Pottick's April 10, 2020 "time is of the essence" notice, to propose any time within which they were prepared to close.

Likewise, in *ADC Orange, Inc. v. Coyote Acres, Inc.,* 7 NY3d 484 (2006), the Court of Appeals ruled that, in a real estate contract, time is not of the essence unless the contract clearly

and expressly so states; and that without such a provision in the contract time can only be made of the essence after (1) a closing date has passed; (2) a clear "time is of the essence" notice has been sent; and (3) the other party is given a reasonable time to perform. Even in that event, the Court of Appeals held, the other party, whether buyer or seller, has to show he was ready, willing and able to perform. As such, there are issues of fact precluding summary judgment for any of the parties at this juncture. (*See also Princes Point LLC v. Muss Development L.L.C.,* 30 NY3d 127 [2017] [alleged anticipatory breach or repudiation of a real estate contract also raises issues of fact]).

Accordingly, both motions for summary judgment are denied.

Because these issues may be expensive to litigate through discovery, trial and appeal, in relation to the $325,000 amount in dispute, and because both sides have significant litigation risk, this Court believes mediation is appropriate here. Both sides are thus directed to contact Special Master Richard P. Swanson, who shall mediate the case pursuant to the Parts 146 .2(b) and 202.14 of the Rule of the Chief Administrator.

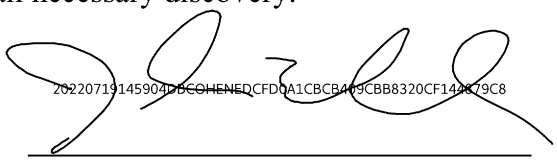
Accordingly, it is hereby:

ORDERED that the motion for summary judgment by plaintiff Daniel Pottick is denied with leave to renew at the completion of discovery; and it is further

ORDERED that the motion for summary judgment by defendants Shawn Weidmann, Maria Weidmann, and Palazzo Law, P.C. is denied with leave to renew at the completion of discovery; and it is further

ORDERED that plaintiff Daniel Pottick and defendants Shawn Weidmann, Maria Weidmann and Palazzo Law P.C. are directed to contact Special Master Richard P. Swanson, who shall mediate the case, at rpswanson432@gmail.com or at (201) 788-0783; and it is further

ORDERED that the parties shall appear for a compliance conference on December 6, 2022 at 2:30 p.m. to report on the status of the mediation and, if necessary at that time, to enter into a stipulation and/or order providing for the exchange of all necessary discovery.



7/19/2022
DATE

DAVID B. COHEN, J.S.C.

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