

**MP Indus. Venture LLC v Criterion Indus. Holdings
LLC**

2023 NY Slip Op 30693(U)

March 3, 2023

Supreme Court, New York County

Docket Number: Index No. 653506/2022

Judge: Margaret A. Chan

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

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 MP INDUSTRIAL VENTURE LLC,

Plaintiff,

- v -

CRITERION INDUSTRIAL HOLDINGS LLC, NATIONAL
 LAND TENURE COMPANY, LLC

Defendant.

INDEX NO. 653506/2022

MOTION DATE 12/01/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
 MOTION**

-----X
 HON. MARGARET CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31

were read on this motion to/for

DISMISS

Plaintiff MP Industrial Venture LLC (Meadow Partners) seeks a declaratory judgment against defendant Criterion Industrial Holdings LLC (Criterion) and nominal defendant National Land Tenure Company, LLC (Escrow Agent). Meadow Partners also seeks monetary damages against Criterion for alleged breach of contract. Criterion now moves under CPLR 3211 (a) (1) and (7) to dismiss the complaint (motion sequence (MS) 001). Meanwhile, Meadow Partners moves by order to show cause for certain equitable relief (MS 002). Meadow Partners and Criterion oppose the other's respective motions, which the court consolidates for disposition. Escrow Agent has not appeared.

Background

This action arises out of a membership interest purchase agreement between Criterion and Meadow Partners (NYSCEF # 6 – the MIPA). The MIPA contemplates Criterion's purchase from Meadow Partners of 95% of the membership interests of MP Criterion Industrial Venture LLC (the Target Company), which is the indirect holder of certain real property (*id.*, Recitals). The parties agreed to a purchase price of \$89,000,000, with Criterion to deposit with Escrow Agent \$2,500,000 (the Deposit; *id.*, § 2, 3). The MIPA provides that the closing of the transaction "shall occur no later than 5pm EST on August 1, 2022" (the Closing Date; *id.*, § 4). Notwithstanding that deadline, Criterion had the "one time right to extend the Closing Date to a date not later than August 30, 2022 (the 'Outside Closing Date'), by providing [Meadow Partners] with written notice establishing the extended Closing Date no less than five (5) days prior to the then scheduled Closing

Date” (*id.*). The MIPA included a “time is of the essence” clause for a closing on or before the Outside Closing Date (*id.*).

The closing did not occur. Meadow Partners blames Criterion for failing to transmit its requisite closing documents notwithstanding that Meadow Partners circulated drafts of its requisite closing documents (the Seller Closing Documents), which Criterion allegedly approved on August 9, and that Meadow Partners thereafter informed Criterion that it was ready, willing and able to close on the Outside Closing Date (NYSCEF # 1 – Complaint, ¶’s 5-6). Meadow Partners assert that its representative advised Criterion on August 29 that Meadow Partners was “not willing to waive our [time of the essence] closing tomorrow” and that Meadow Partners attempted to close on August 30 sharing final executed versions of its requisite closing documents (*id.*, ¶’s 30-31). Criterion allegedly failed to perform, however, such that on September 6 Meadow Partners sent a letter to Escrow Agent demanding the transfer of Criterion’s Deposit (*id.*, ¶ 35). On September 13, Criterion wrote Escrow Agent objecting to the Deposit transfer (*id.*, ¶ 36).

Criterion has a different explanation for why the Closing did not occur, which it asserts supports its objection to Meadow Partners’ receipt of the Deposit. Criterion claims that Meadow Partners was not ready to close on August 1, as demonstrated by the Complaint’s admission that Meadow Partners only shared drafts of closing deliverables on August 5, four days after the Closing Date (NYSCEF # 4 – MS 001 MOL at 1). Criterion notes that the parties engaged in continuous discussions regarding timing following August 5, but they never reached agreement as to a closing date nor did Criterion exercise its right to extend to the Outside Closing Date (*id.* at 1-2). Criterion’s principal, Shibber Khan, affirms that the parties “exchanged several communications negotiating a formal extension of the MIPA which would have included an agreed to Closing Date. At all times, the parties knew and understood that no Closing would be imminent, as the deal was still be fleshed out and finalized” (NYSCEF # 5 – Shibber Aff, ¶ 11).

Nonetheless, Criterion indicates that at 4:52 p.m. on the Outside Closing Date, Meadow Partners attempted unilaterally to force a closing by sending executed closing documents (NYSCEF # 4 at 2). Criterion states that this was problematic because Criterion had yet to agree on Meadow Partners’ proposed closing statement (being necessary to document the purchase price), which Meadow Partners had only shared in draft form thirty-two minutes prior to Meadow Partners unilaterally signing it (*id.* at 7). Criterion adds that it only received documentation supporting closing statement at 5:45 p.m. (*id.* at 17). Criterion indicates that it needed time to review the document because of a lack of clarity in the closing statement on the distributions related to one of the real estate properties (*id.* at 7-8). After the Outside Closing Date passed, Criterion underscores that on August 31, the parties continued to coordinate discussions regarding the draft closing statement “as though the transaction was still being finalized” (*id.* at 8). Criterion concludes that Meadow Partners “effectively waived the closing date and

any [time of the essence] clause” and “is not entitled terminate the MIPA nor to receive” the Deposit (*id.* at 3).

Discussion

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference,” and “determine only whether the facts as alleged fit into any cognizable legal theory” (*Siegmund Strauss, Inc. v E. 149th Realty Corp.*, 104 AD3d 401, 403 [1st Dept 2013]). Significantly, “whether a plaintiff . . . can ultimately establish its allegations is not taken into consideration in determining a motion to dismiss” (*Phillips S. Beach LLC v ZC Specialty Ins. Co.*, 55 AD3d 493, 497 [1st Dept 2008], *lv denied* 12 NY3d 713 [2009]).

At the same time, “[i]n those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence they are not presumed to be true or accorded every favorable inference” (*Morgenthau & Latham v Bank of New York Company, Inc.*, 305 AD2d 74, 78 [1st Dept 2003] [internal citation and quotation omitted]). However, dismissal based on documentary evidence under 3211 (a) (1) may result “only when it has been shown that a material fact as claimed by the pleader is not a fact at all and no significant dispute exists regarding it” (*Acquista v New York Life Ins. Co.*, 285 AD2d 73, 76 [1st Dept 2001]), quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). Moreover, “affidavits, which do no more than assert the inaccuracy of plaintiffs’ allegations, may not be considered, in the context of a motion to dismiss, for the purpose of determining whether there is evidentiary support for the complaint . . . and do not otherwise conclusively establish a defense to the asserted claims as a matter of law” (*Tsimerman v Janoff*, 40 AD3d 242, 242 [1st Dept 2007]).

Criterion’s motion to dismiss is denied. Meadow Partners pleads a prima facie breach of contract claim under Delaware law¹ in that (i) Criterion had obligations under the MIPA respecting the anticipated closing, (ii) Criterion failed to perform, and (iii) Meadow Partners was damaged as a result (Compl., ¶’s 15, 31-34, 40-47; *see Humanigen, Inc. v Savant Neglected Diseases, LLC*, 238 A3d 194, 202 [Del Super Ct, 2020]).

Criterion misstates the finding needed to sustain Meadow Partners’ claims under this motion to dismiss (NYSCEF # 4 at 17). The crux of this motion is not whether Meadow Partners is permitted under the MIPA to declare August 30 the Outside Closing Date without any notice; rather, it is sufficient that other evidence establish that Criterion was working toward a closing to take place before the August 30 Outside Closing Date (NYSCEF # 21 – July 15 Email; NYSCEF # 22 – July 29 Email).²

¹ Delaware law governs the transaction under Section 19 (k) of the MIPA.

² Criterion wrote on July 29 in response to Meadow Partners email of July 26 and follow-up of July 28 inquiring as to the anticipated closing date: “Sorry for the late response, still
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Criterion's argument that its extension was not delivered in conformance with the MIPA's notice provision is unavailing (NYSCEF # 30 at 4, n 5). Section 19 (f) of the MIPA allows notice to be done in writing and delivered by electronic mail. While any such notice "shall also be sent by first-class mail" under that provision, Criterion fails to show that strict compliance should be required. And its reliance on *PR Acquisitions, LLC v Midland Funding LLC* is unavailing, which, unlike here, notice was "never directly [given] in any form before the expiration date" (2018 WL 2041521 at *7 ([Del Ch 2018]).

Criterion faults Meadow Partners for not noticing an August 1 closing, but Criterion fails to indicate where the MIPA allegedly required Meadow Partners to notice a closing. Other than indicating that 5:00 p.m. on August 1 would be the deadline for the closing (unless extended to August 30), Section 4 of the MIPA covering the closing timing is silent as to noticing of the closing date. At any rate, Criterion does not dispute that on July 15 it had already emailed Meadow Partners to indicate its anticipated timing would extend beyond August 1.

Contrary to Criterion's position, to sustain the complaint at this juncture, this court need not find that Meadows Partners provided a reasonable time for Criterion to perform following Meadow Partners having sent "the closing statement, Seller Closing Documents, and all supporting documents" when it did (NYSCEF # 4 at 17). It is sufficient that Criterion has failed to contradict by documentary evidence supporting the complaint's allegations regarding the parties' respective actions to effect the closing. As to the Seller Closing Documents, Criterion does not contest Meadow Partners' assertion, supported by email correspondence, that Criterion's counsel approved the drafts on August 9 (NYSCEF # 1, ¶ 28; NYSCEF # 23 – August 5 Email of Meadow Partners counsel and August 9 response of Criterion's counsel).³ As to the closing statement and supporting backup for its calculations, even if Criterion only received them on August 30,⁴ Criterion has not met its burden of showing that no significant dispute exists regarding the timing the parties discussed and exchanged the closing statement draft.

As to Criterion's supposition that the court would need to find it had a reasonable time to "review the materials, resolve any issues thereto, execute the

waiting for some third parties to come in. That is likely to be the bottle neck. I'll give you a better idea early next week, but target is still by end of August with the goal of the week of the 15th (but again, subject to receiving third parties)."

³ The August 5 email suggests that drafts of documents respecting Assignment and Assumption of Membership Interest; FIRPTA; and Resignation were shared; Criterion's counsel replied on August 9: "These look fine."

⁴ Meadow Partners asserts that the draft closing statement was circulated and discussed among the parties at least one week before the closing date (NYSCEF # 29 at 18). In support thereof, it cites an August 30 email exchange between counsel in which Criterion's counsel's stated that the closing statement was received "for the first time minutes ago" and Meadow Partners counsel responded: "I understand our clients have been discussing and trading drafts since last week" (NYSCEF # 26 at 1).

documents” (NYSCEF # 4 at 17), again Criterion misses the mark. The court has no present opportunity to determine the nature of the issues allegedly outstanding with respect to the closing statement or the need for backup and the attendant time reasonably needed for concluding such matters; nor need the court make such determination at this juncture (*see Pivotal Payments Direct Corp. v Planet Payment, Inc.*, 2020 WL 7028597 at *8 [Del Super Ct 2020] [stating that parties have a ‘reasonable’ amount of time to perform the contract when the contract does not fix a time for its performance. A reasonable time for performance ‘is ordinarily a question of fact’ ”]).

And Criterion has failed to establish that Meadow Partner waived the MIPA provision that “[t]ime is of the essence with respect to [Criterion’s] obligation to effect the Closing” (NYSCEF # 6, § 4; *see Mergenthaler v Hollingsworth Oil Co. Inc.*, 1995 WL 108883 at *2 [Del Super Ct 1995] [noting that “Waiver is a voluntary and intentional relinquishment of a known right Waiver implies knowledge and an intent to waive, and the facts relied on to prove waiver must be unequivocal. . . . The question of waiver is normally a jury question, unless the facts are undisputed and give rise to only one reasonable inference”], *modified on reargument sub nom. Mergenthaler v M & K Bus Serv., Inc.*, 1995 WL 339037 [Del Super Ct 1995] [indicating that the court’s order, following reargument, does not affect “this Court’s decision that material factual issues exist with regard to whether Plaintiffs waived their claim”]).

The court need not reach the issue of whether Criterion demonstrated anticipatory repudiation of its obligations on August 23 (NYSCEF # 29 at 18 referring to #s 24, 30). It is sufficient to sustain the breach of contract claim at this early stage, with future discovery to answer issues that the present record may not conclusively reach.

Finally, Criterion is incorrect in asserting that “Meadow Partners has not pled or otherwise sufficiently stated facts to establish a ‘Purchaser Default’ under Section 13 of the MIPA” (NYSCEF # 30 at 11).⁵ The premise within this argument was rejected above (the timing of the closing, Meadow Partners’ provision of documents, and the waiver), Accordingly, this argument, too, fails.

Conclusion

In light of the foregoing, it is

ORDERED that motion sequence 001 of defendant Criterion Industrial Holdings LLC to dismiss the complaint of plaintiff MP Industrial Venture LLC is denied; and it is further

ORDERED that within 30 days of the e-filing of this order, defendant shall file an answer to the complaint; and it is further

⁵ Section 13 entitles Meadow Partners to retain the Deposit in the event Criterion “does not timely perform” its closing deliverables.

ORDERED that a preliminary conference shall be held via Microsoft Teams on April 12, 2023 at 11:30 a.m. or at such other time that the parties shall set with the court's law clerk.

03/03/2023
DATE


MARGARET CHAN, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED	GRANTED IN PART	<input type="checkbox"/>	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>	