SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **38M**

Justice

----------X

HOP HAT TRUST,

Plaintiff,

- v -

AVINA US 2 INC., MERCER HOLDINGS LLC, and JOHN DOES 1-10,

Defendants.

----------X

INDEX NO. 653102/2020

MOTION DATE 12/03/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 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, 32, 33, 34, 35, 36, 37, and 38 were read on this motion and cross-motion for SUMMARY JUDGMENT.

Plaintiff moves for summary judgment on its claim for return of its $300,000 downpayment on the sale of a $3,000,000 condominium unit which did not close by the contractual closing date of May 15, 2020. Defendants cross-move for summary judgment on their counterclaims seeking dismissal of the complaint and an order releasing the downpayment out of escrow to them.

The contract of sale (NYSCEF Doc. No. 2) conditioned the sale on a written waiver by the condominium board of its right of first refusal to acquire the unit (*id.*, § 5.1). The contract required plaintiff to submit an application to the condominium board preparatory to any such waiver (*id.*). Plaintiff posits, as a matter of logic, that the application form, being a document created and maintained by the condominium board, was the defendants' to procure and provide,

which did not occur until late in the pre-closing process (*see*, NYSCEF Doc. No. 13).[1] Plaintiff also points to Article VIII of the condominium's by-laws, which make plain that it is the "Unit Owner" who must take the initiative in informing the board of the circumstances of an anticipated sale (*see*, NYSCEF Doc. No. 16). Defendants, in contrast, point their fingers at plaintiff for, essentially, not taking its own initiative in seeking that form from the board prior to the scheduled closing date, and they accuse plaintiff of deliberate delay tactics so as to manufacture a situation where no closing would occur on or proximate to the contractually scheduled closing date. The record reveals that although the board ultimately issued its waiver a mere four days after the scheduled closing date, on May 19, 2020 (*see*, NYSCEF Doc. No. 25) – defendants did not inform plaintiff of that fact until July 14, 2020 (*see, id.*).

Essentially, each party asserts that the other materially breached its obligations under the contract of sale, either actually or anticipatorily (*see, e.g.*, NYSCEF Doc. Nos. 16, 17). Many of those assertions are fact-based (i.e., whether plaintiff deliberately delayed the board approval/waiver process so as to take the transaction beyond the scheduled closing date; whether defendants were capable of delivering violation-free title, or whether they accounted for any post-contractual loss or damage to the unit).

Summary judgment is appropriate where there are no disputed material facts (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The moving party must tender sufficient evidentiary proof to warrant judgment as a matter of law (*Zuckerman v City of N.Y.*, 49 NY2d 557, 562 [1980]). "Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once a movant has met this burden, "the burden shifts to the

[1] Letter from plaintiff's transactional counsel to defendants' transactional counsel, dated May 12, 2020, complaining of the lack of receipt of condominium board approval/waiver related documents.

opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial" (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013]). Therefore, if there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

This dispute is inappropriate for summary adjudication due to the many factual issues raised by the parties' motions. Thus, the motion and cross-motion for summary judgment are denied.

Insofar as defendants cast their cross-motion as one for a default judgment,[2] this court denies it given plaintiff's active participation in the action, especially in light of its motion for summary judgment and opposition to defendants' cross-motion (*see, Meyer v A&B America, Ltd.*, 160 AD2d 688, 689 [2d Dept 1990] [participation in the action is a factor toward vacatur of technical default]).

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that defendants' cross-motion for a default judgment and/or for summary judgment is denied; and it is further

ORDERED that plaintiff is granted leave to file a reply to counterclaims on or before May 3, 2023; and it is further

[2] Plaintiff neglected to serve a reply pleading in response to defendants' counterclaims, which are consistent with the matters raised in defendants' cross-motion for summary judgment, which was opposed by plaintiff.

ORDERED that a preliminary conference be held on May 17, 2023, at 10:00 a.m., at the Courthouse, 111 Centre Street, New York, New York.

Louis L. Nock

4/18/2023
DATE

LOUIS L. NOCK, 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	REFERENCE