

**Katzman 2008 GRAT 1 Portion II Trust UAD
8/29/2008 v Prasad**

2023 NY Slip Op 32103(U)

June 16, 2023

Supreme Court, New York County

Docket Number: Index No. 655124/2021

Judge: Alexander M. Tisch

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**SUPREME COURT OF THE STATE OF NEW YORK
 NEW YORK COUNTY**

PRESENT: HON. ALEXANDER M. TISCH PART 18

Justice

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KATZMAN 2008 GRAT 1 PORTION II TRUST UAD
 8/29/2008, BY CHRIS SERBAGI AND RICHARD
 KATZMAN, AS TRUSTEES,

INDEX NO. 655124/2021

MOTION DATE 12/17/2021

MOTION SEQ. NO. 002

Plaintiff,

- v -

VIKRAM PRASAD, POOJA GOYAL, AND KISHNER
 MILLER HIMES P.C. AS ESCROW AGENT,

**DECISION + ORDER ON
 MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 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, 80, 81, 82, 83, 84, 85, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199

were read on this motion for SUMMARY JUDGMENT.

In this action seeking specific performance of a contract of sale for the purchase of a condominium unit, plaintiff Katzman 2008 GRAT 1 Portion II Trust UAD 8/29/2008, by Chris Serbagi and Richard Katzman, as Trustees (hereinafter, plaintiff), moves, pursuant to CPLR 3212, for summary judgment on its claim for specific performance. In addition, plaintiff requests summary judgment dismissing defendants' first and second counterclaims. Plaintiff also requests attorney's fees and sanctions. For the reasons stated below, the motion is denied.

BACKGROUND

Richard Katzman (Katzman) alleges that he is the sole beneficial owner of plaintiff (NY St Cts Elec Filing [NYSCEF] Doc No. 58, Katzman aff, ¶ 1). On April 7, 2021, plaintiff and defendants Vikram Prasad and Pooja Goyal executed a contract of sale in which plaintiff agreed

to purchase Apartment No. 39AE in the condominium known as 56 Leonard Street Condominium (NYSCEF Doc No. 62 at 2). The contract provides that the purchase price was \$8,473,600, and that plaintiff was to pay a down payment of \$847,360 (id. at 3). Plaintiff sent the down payment in the amount of \$847,360 on April 6, 2021 (NYSCEF Doc No. 63 at 3).

The contract of sale did not include a financing contingency (NYSCEF Doc No. 62 at 21). The contract provides that the closing would take “on or about 60 DAYS FROM THE DELIVERY DATE” (id. at 3). The contract did not provide a time-of-the-essence clause for the closing date or for the application process (id.). Plaintiff asserts that the closing date was initially scheduled to be held “or or about” June 5, 2021 (NYSCEF Doc No. 49 at 2). The seller’s rider to the contract of sale provides the following provision:

“Purchaser recognizes and understands that this sale is subject to the issuance of what is commonly known as ‘the waiver of the right of first refusal’ of the Condominium Board of Managers and as otherwise provided in paragraph ‘8’ of this printed form of this Contract of Sale. In this regard, Purchaser shall in good faith submit to the Managing Agent, no later than 35 days after the Delivery Date (as such term is defined in paragraph ‘x’ of Sellers Rider) the condominium application and such data/information as the Condominium and/or managing agent requests and/or requires (‘Application’). Notwithstanding anything to the contrary, Purchaser agrees that prior to the submission of the Application to the Board or Managing Agent, Purchaser shall first submit same to Seller’s Broker i.e. Stephen Ferrara of Compass, for review and comment. Purchaser agrees to cooperate and act in good faith with Seller’s Broker relating to the Application and the potential need to modify and/or supplement the Application as may be reasonably requested by the Seller’s Broker. PURCHASER’S TIMELY SUBMISSION OF THE COMPLETED APPLICATION TO SELLER’S BROKER SHALL SATISFY PURCHASER’S TIMING OBLIGATION HEREUNDER”

(NYSCEF Doc No. 62 at 21). The contract further provides that “if Seller defaults hereunder, Purchaser shall have such remedies as Purchaser shall be entitled to at law or equity, including, but not limited to, specific performance” (id. at 7).

Plaintiff asserts that, after the initial May 12, 2021 deadline to submit the Board application passed, defendants repeatedly represented that they wanted to close “before fall” or

“around” August 2021 (NYSCEF Doc No. 49 at 4-6). For instance, in response to plaintiff’s broker’s inquiry, defendants’ broker stated in an email dated June 3, 2021 that “the sellers want to close before fall” (NYSCEF Doc No. 66 at 2). By email dated July 7, 2021, defendants’ attorney requested “the status of the Purchaser’s ability to schedule a definitive date for the closing of this transaction” (NYSCEF Doc No. 67 at 3). Plaintiff’s attorney responded that he would “check with [his] client and the lender” and asked when defendants were looking to close (id. at 2). Defendants’ attorney did not respond. However, defendants’ broker indicated in an email dated July 12, 2021 that defendants “are planning on closing around Aug. 15” (NYSCEF Doc No. 68 at 3). Plaintiff claims that its Board application was fully submitted by July 22, 2021 (NYSCEF Doc No. 49 at 6).

Nevertheless, by letters dated July 23, 2021 and July 28, 2021, defendants’ attorney notified plaintiff’s attorney that plaintiff was in default of the contract of sale and that the contract was deemed “cancelled” (NYSCEF Doc No. 71 at 5). Counsel stated that plaintiff: (1) failed to timely submit its application to the Board within 35 days of the Delivery Date, i.e., by May 12, 2021, (2) failed to submit a complete application to the Board, and (3) failed to submit its application to defendants’ broker prior to the submission of the application (id. at 4). Plaintiff’s attorney also notified defendants’ attorney of defendants’ demand for release of the down payment (id. at 5).

On August 5, 2021, the Board’s managing agent informed plaintiff that the Board had waived its right of first refusal and asked defendants for a confirmed closing date (NYSCEF Doc No. 74 at 2). Plaintiff asserts that defendants never contacted the Board about a closing date (NYSCEF Doc No. 49 at 7).

By letter dated August 13, 2021, plaintiff sent a time-of-the-essence letter, demanding a closing by September 13, 2021 (NYSCEF Doc No. 76 at 1-3).

In response, in a letter dated August 18, 2021, defendants refused to close and demanded rights to plaintiff's down payment (NYSCEF Doc No. 77 at 2-5).

Plaintiff commenced this action on August 23, 2021, asserting two causes of action for breach of contract seeking: (1) specific performance; and (2) return of the down payment (NYSCEF Doc No. 2, complaint ¶¶ 39-43, 44-47). Plaintiff requests costs, interest, attorney's fees, and punitive damages (*id.*, wherefore clause).

In their answer, defendants asserted counterclaims for breach of contract and for a declaratory judgment (NYSCEF Doc No. 5, answer ¶¶ 91-97, 98-103).

The Parties' Contentions

Plaintiff now moves for summary judgment on its specific performance claim. Plaintiff asserts that defendants anticipatorily breached the contract of sale by repudiating the contract without sending a time-of-the-essence letter. Plaintiff further contends that defendants breached the contract by failing to appear at the closing on September 13, 2021, in response to plaintiff's time-of-the-essence letter. According to plaintiff, defendants waived any breach by plaintiff by declining to set a firm closing date, by continuing to represent that that they were proceeding with the transaction, and that they were looking to close "around August 15." Plaintiff asserts that Katzman was always ready, willing, and able to perform his obligations (NYSCEF Doc No. 58, Katzman aff, ¶ 2). Alternatively, plaintiff requests an expedited trial pursuant to rule 9-A of the Rules of the Commercial Division of the Supreme Court. Plaintiff further requests his attorney's fees pursuant to the contract of sale, and seeks sanctions against defendants for filing frivolous counterclaims.

In opposition, defendants assert that plaintiff has failed to make a prima facie showing on its motion for summary judgment, as plaintiff acted in bad faith and breached the contract by failing to timely submit its application to the Board. According to defendants, when they cancelled the contract on July 23, 2021, they could not issue a time-of-the essence notice because plaintiff had acted in bad faith and materially breached the contract.

In addition, defendants assert that plaintiff has not demonstrated that it was ever ready, willing, and able to close and Katzman's financial ability to pay for the apartment is irrelevant. They argue that there is no evidence that plaintiff was funded at all. Defendants further point out that the trust instrument submitted to the Board does not match the name of the purchaser. Thus, according to defendants, there are questions of fact as to whether plaintiff was a valid trust at the time of entering into the contract. Defendants argue that there are issues of fact as to whether Katzman and Chris Serbagi had the authority to execute the contract on behalf of plaintiff as trustees. In any event, defendants contend that there is a triable issue of fact as to whether plaintiff acted in bad faith that precludes summary judgment. In the alternative, given that plaintiff has not responded to defendants' discovery demands, defendants request discovery as to: (1) all operative trust documentation; (2) communications with Wells Fargo or other lenders; (3) documentation demonstrating whether plaintiff was funded and able to purchase the apartment; and (4) plaintiff's communications with the Board. Defendants lastly note that plaintiff is not entitled to sanctions or attorney's fees.

In reply, plaintiff contends that, by continuing on the contract after May 12, 2021, defendants are precluded from later cancelling the contract based upon plaintiff's failure to submit its application to the Board by May 12, 2021. According to plaintiff, if defendants wished to assert a breach, they were required to give notice of the alleged default and an

opportunity to cure the breach. Additionally, plaintiff maintains that it did comply with the contract's requirement to provide the application documents to defendants' broker (NYSCEF Doc No. 145, Katzman reply aff, ¶¶ 43-45). Plaintiff also contends that Katzman had many times the necessary financial assets to complete the transaction, and Katzman did transfer the necessary funds to close into the trust account prior to the scheduled September 13, 2021 time-of-the-essence closing date (*id.*, ¶ 51). Thus, plaintiff argues that both plaintiff and Katzman had the funds necessary to close. Finally, plaintiff submits that defendants are estopped from attacking the trust documents.

DISCUSSION

A. Specific Performance

It is well settled that “the proponent of a summary judgment motion 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” (Matter of New York City Asbestos Litig., 33 NY3d 20, 25-26 [2019], quoting Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]). “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). “Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (Alvarez, 68 NY2d at 324). The court's function on a motion for summary judgment is “issue-finding, rather than issue- determination” (Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 [1957], rearg denied 3 NY2d 941 [1957] [internal quotation marks and citation omitted]).

“The elements of a cause of action for specific performance of a contract are that the plaintiff substantially performed its contractual obligations and was willing and able to perform its remaining obligations, that defendant was able to convey the property, and that there was no adequate remedy at law” (EMF Gen. Contr. Corp. v Bisbee, 6 AD3d 45, 51 [1st Dept 2004], lv dismissed 3 NY3d 656 [2004], lv denied 3 NY3d 607 [2004]). In addition, the purchaser must show that the vendor was in default (Rha v Blangiardo, 189 AD3d 1098, 1099 [2d Dept 2020]).

“The decision whether to grant or deny the remedy of specific performance lies within the discretion of the court and should not be granted ‘where it would cause unreasonable hardship or injustice’” (id., quoting McGinnis v Cowhey, 24 AD3d 629, 629 [2d Dept 2005]).

“[I]t is well established that, in order to be entitled to specific performance of a contract, a purchaser must demonstrate that it was ready, willing and able to perform its obligations regardless of the seller’s anticipatory breach . . .” (Sunrise Assoc. v Pilot Realty Co., 170 AD2d 214, 215 [1st Dept 1991]; accord 3801 Review Realty LLC v Review Realty Co. LLC, 111 AD3d 509, 509 [1st Dept 2013]).

When a purchaser submits “no documentation or other proof to substantiate that it had the funds necessary to purchase the property,’ it is not entitled to specific performance” (RBP Ventures, Ltd. v Concord Elecs., Inc., 69 AD3d 535, 536 [1st Dept 2010], lv denied 14 NY3d 709 [2010], quoting Fridman v Kucher, 34 AD3d 726, 728 [2d Dept 2006]; see also Gindi v Intertrade Internationale Ltd., 50 AD3d 575, 575 [1st Dept 2008] [purchaser “must show that he possessed the financial ability to complete the purchase”]; Del Pozo v Impressive Homes, Inc., 29 AD3d 620, 620 [2d Dept 2006] [“Even where a seller improperly cancels a contract for the sale of real property, the purchaser has the burden of demonstrating that he possessed the financial ability to complete the purchase in order to obtain the remedy of specific

performance”]; Madison Equities, LLC v MZ Mgt. Corp., 17 AD3d 639, 640 [2d Dept 2005], lv dismissed 5 NY3d 849 [2005] [same]).

Unsubstantiated assertions that a related person or entity would supply the necessary funds are insufficient to meet this burden (see Internet Homes, Inc. v Vitulli, 8 AD3d 438, 439 [2d Dept 2004] [“The plaintiff’s unsubstantiated assertions that a line of credit could be secured or that a closely-related corporation would supply the funds and the conclusory allegation that it was ready, willing and able to perform were insufficient to satisfy its burden”]; Lamanna v Wing Yuen Realty, 283 AD2d 165, 166 [1st Dept 2001], lv denied 96 NY2d 719 [2001] [“other than conclusory asserts concerning numerous benefactors, including a lotto winner, who were waiting to lend him money, plaintiff has failed to demonstrate that he possessed, at any time prior to the commencement of this action, the financial wherewithal to complete the purchase of the building in question”]).

Here, plaintiff has failed to make a prima facie showing that it was ready, willing, and able to close. Katzman avers that he “was able at the target closing in the Contract to pay cash for the premises, without a mortgage, and had made arrangements to do so” and “had access to \$30M in liquid securities” at an unspecified time (NYSCEF Doc No. 58, Katzman aff, ¶ 2). As support, plaintiff submits a letter dated May 17, 2021 from Alex Brown, a division of Raymond James, indicating that, “as of May 17, 2021,” Katzman “maintain[ed] brokerage account balances” with “liquid assets in excess of \$36 million dollars” (NYSCEF Doc No. 60 at 1). The letter indicates that “[t]hese balances are subject to market fluctuation” (id.). Katzman further states that “I obtained credit lines of over \$25M by June and July 2021” (NYSCEF Doc No. 58, Katzman aff, ¶ 2). Plaintiff relies on the following three financial statements: (1) a loan management account statement from Merrill addressed to “Katzman Family LLC” for the period

from May 29, 2021 through June 30, 2021, indicating available credit of \$16,455,628.97; (2) a securities-based line of credit statement from Raymond James addressed to Katzman individually for the period July 6, 2021 through July 30, 2021, indicating a line of credit of \$10,000,000; and (3) a securities-based line of credit statement from Raymond James addressed to “Katzman 2008 GRAT I – SUBTRUST U/A SECON” for the period from July 29, 2021 through July 30, 2021, showing a line of credit of \$1,763,798.18 (NYSCEF Doc No. 59 at 3-5). Katzman, Katzman Family LLC, and “Katzman 2008 GRAT I – SUBTRUST U/A SECON” were not identified as the purchaser in the contract of sale (NYSCEF Doc No. 62 at 2). That Katzman or these entities “may have had the ability to close did not establish that the plaintiff had such ability” (Main St. Xata, Ltd. v Valine Realty Corp., 47 AD3d 688, 688 [2d Dept 2008], *lv denied* 10 NY3d 708 [2008]). Moreover, plaintiff has not offered any evidence that it was ever funded in its moving papers. Plaintiff’s conclusory assertions to the contrary are insufficient. Thus, plaintiff’s moving papers do not adequately demonstrate that plaintiff had the financial ability to purchase the property in question (see Huntington Min. Holdings v Cottontail Plaza, 60 NY2d 997, 998 [1983]; Internet Homes, Inc., 8 AD3d at 439).

Plaintiff offers a reply affidavit from Katzman, in which he states that he “actually did provide the funds directly to the Trust’s account to close on September 13, 2021, for which Defendants did not appear,” and provides an account statement from Alex James for “Katzman 08 Grat I - Sub” for the period August 31, 2021 through September 30, 2021 indicating that that entity had a cash balance of \$2,732,176.91 (NYSCEF Doc No. 145, Katzman reply aff, ¶ 51; NYSCEF Doc No. 179 at 2). Plaintiff also submits a mortgage loan commitment letter dated August 26, 2021 to Katzman from Wells Fargo in the amount of \$5,507,840 (NYSCEF Doc No. 181 at 2). However, plaintiff may not use its reply papers “to remedy . . . basic deficiencies in

[its] prima facie showing” (Tribbs v 326-338 E 100th LLC, 215 AD3d 480, 481 [1st Dept 2023] [internal quotation marks and citation omitted]).

Even if the Court were to consider this evidence, it still fails to demonstrate that plaintiff was ready, willing, and able to close. For instance, the name of the trust on the account does not appear to match plaintiff’s name (NYSCEF Doc No. 179 at 2). Furthermore, the mortgage commitment letter states that it expired on August 31, 2021, and requested supporting documentation (NYSCEF Doc No. 181 at 2).¹ Katzman does not state that he provided these documents to Wells Fargo (NYSCEF Doc No. 145, Katzman reply aff, ¶ 52).

Even if defendants anticipatorily breached the contract, “this did not discharge plaintiff’s obligation to show that it was ready and able to perform its own contractual undertakings on the closing date, in order to secure specific performance” (Huntington Min. Holdings, 60 NY2d at 998).

Accordingly, plaintiff’s motion must be denied, regardless of the sufficiency of defendants’ opposition papers (see Winegrad, 64 NY2d at 853).

¹ The cases relied upon by plaintiff are not to the contrary. In Fridman v Kucher (8 Misc 3d 1017[A], 2005 NY Slip Op 51134[U], *2 [Sup Ct, Kings County 2005], revd 34 AD3d 726 [2d Dept 2006]), the seller scheduled a closing for December 17, 2004, and notified the purchaser that “time was of the essence.” After the seller notified the purchaser that he considered the contract cancelled, the purchaser scheduled a time-of-the-essence closing for February 1, 2005 (id.). The trial court held that the purchaser’s submission of affidavits and bank accounts from individuals who averred that they were prepared to provide funds to the purchase on February 1, 2005 established that the purchaser was ready, willing, and able to purchase the property on that date, and that that date was “within a reasonable time after the first time-of-the-essence closing on December 17, 2004” (Fridman, 8 Misc 3d 1017[A], 2005 NY Slip Op 51134[U], *3). The Second Department reversed, reasoning that the purchaser failed to demonstrate his entitlement to judgment as a matter of law, noting that “while the purchaser submitted evidence establishing that he was financially able to perform on a subsequent ‘time of the essence’ closing date set by his real estate attorney, he did not do so for the December 17, 2004, closing,” and that “when a purchaser submits no documentation or other proof to substantiate that it had the funds necessary to purchase the property, it cannot prove, as a matter of law, that it was ready, willing, and able to close” (Fridman, 34 AD3d at 728). In re FMTB BH LLC (620 BR 6, 8 [Bankr Ct, ED NY 2020], appeal dismissed 2020 WL 7186797, 2020 US Dist LEXIS 229389 [ED NY 2020]), also relied upon by plaintiff, was a decision after trial.

B. Dismissal of Counterclaims, Expedited Relief and/or Expedited Trial

While plaintiff requests dismissal of defendants' counterclaims in its notice of motion (NYSCEF Doc No. 48 at 1), it has not demonstrated the absence of material issues of fact as to the counterclaims (*see Alvarez*, 68 NY2d at 324). Plaintiff only argues that the counterclaims are "obviously frivolous and in bad faith" (NYSCEF Doc No. 50 at 28).

Plaintiff is not entitled to an expedited trial pursuant to rule 9-A of the Rules of the Commercial Division of the Supreme Court (*see* 22 NYCRR 202.70, rule 9-a). The Rules of the Commercial Division do not apply to this action. By administrative order dated September 30, 2021, then-Administrative Judge Deborah Kaplan denied plaintiff's request to transfer this case to the Commercial Division (NYSCEF Doc No. 136).

Plaintiff's request for "expedited relief" is similarly denied. Plaintiff has failed to demonstrate entitlement to such relief (NYSCEF Doc No. 58, Katzman aff, ¶ 4).

C. Attorney's Fees and Sanctions

Plaintiff requests attorney's fees pursuant to the contract of sale. Given that plaintiff has not prevailed on his claims,² plaintiff is not entitled to attorney's fees at this juncture.

Finally, plaintiff requests sanctions against defendants for filing frivolous counterclaims. However, sanctions are only appropriate when a party or an attorney has abused the judicial process, or wasted judicial resources by engaging in wholly frivolous litigation (Drummond v Drummond, 305 AD2d 450, 451 [2d Dept 2003], lv denied 1 NY3d 504 [2003]; Levy v Carol Mgt. Corp., 260 AD2d 27, 34 [1st Dept 1999]). The litigation for which sanctions are sought must "(1) [be] completely without merit in law and cannot be supported by a reasonable

² The contract of sale provides that "[t]he parties agree that in any action brought to enforce this Agreement, the prevailing party shall be entitled to reasonable attorney's fees and court costs actually incurred" (NYSCEF Doc No. 62 at 28).

argument for an extension, modification or reversal of existing law; (2) [be] undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) [] assert[] material factual statements that are false” (22 NYCRR 130-1.1 [c]). Here, plaintiff has failed to demonstrate that defendants’ counterclaims are completely without merit in law, are meant to harass or maliciously injure plaintiff, or assert material false statements of fact. Accordingly, the Court denies plaintiff’s request for sanctions.


CONCLUSION

Accordingly, it is

ORDERED that the motion (sequence number 002) of plaintiff Katzman 2008 GRAT 1 Portion II Trust UAD 8/29/2008, by Chris Serbagi and Richard Katzman as Trustees, for summary judgment on its first cause of action for specific performance is denied; and it is further

ORDERED that plaintiff’s requests for attorney’s fees, expedited relief and/or an expedited trial, and sanctions are denied.

This constitutes the decision and order of the Court.

6/16/2023			
DATE		ALEXANDER M. TISCH, J.S.C.	
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE