SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DEBRA A. JAMES** **PART 59**

Justice

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ANCHOR-BAY CORPORATION AND FOREST LEE BRANDT and JUSTIN ROGERS, AS CO-TRUSTEES OF THE DLC REVOCABLE TRUST,

Plaintiffs,

- v -

ANTHONY HACK and CHAUDHRY JAVID,

Defendants.

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INDEX NO. 654836/2018

MOTION DATE 08/03/2022

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 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, 171, 172, 173, 174, 175, 176, 177, 179

were read on this motion to/for JUDGMENT - SUMMARY.

ORDER

Upon the foregoing documents, it is

ORDERED that the motion of defendants Anthony Hack and Chaudhry Javid for summary judgment (motion sequence no. 004) is granted to the extent of granting a summary declaratory judgment on their first counterclaim; and it is further

ADJUDGED and DECLARED that defendants Anthony Hack and Chaudhry Javid are entitled to the return of the Down Payment paid to plaintiffs Forest Lee Brandt and Justin Rogers, as Co-Trustees of the DLC Revocable Trust, currently held in escrow, and all interest accrued thereon; and it is further

ADJUDGED and DECLARED that within thirty (30) days of service of a copy of this order with notice of entry by NYSCEF upon plaintiffs and by overnight mail or by overnight courier upon nonparty Rosenberg & Pittinsky, LLP (Escrowee), Attention Laurence D. Pittinsky, Esq., at 232 Madison Avenue, Suite 906, New York, New York 10016, Tel: (212) 286-6100, the Escrowee is directed to release and remit to defendants Anthony Hack and Chaudhry Javid the Down Payment in the amount of $450,000, together with all interest accrued thereon, held in the Escrowee's IOLA account maintained at Chase Bank, 220 East Park Avenue, Long Beach, New York 11561, as described in the Stipulation of Discontinuance against Lewis and Garbuz, P.C. and Substitution of Escrowee dated January 10, 2020 (NYSCEF Doc No. 116); and it is further

ORDERED that to the extent it seeks summary dismissal of the complaint, the motion of defendants Anthony Hack and Chaudhry Javid is granted, and the cross-motion of plaintiffs Anchor-Bay Corporation and Forest Lee Brandt and Justin Rogers, as Co-Trustees of the DLC Revocable Trust, for summary judgment on such complaint is denied; and it is further

ORDERED that the complaint against such defendants is dismissed; and it is further

ORDERED that the Clerk shall enter such judgment in favor of defendants and against plaintiffs, with costs and disbursements to

such defendants as taxed by the Clerk upon the submission of an appropriate bill of costs.

DECISION

This action stems from the alleged breach of a contract to purchase real property in Quogue, New York. Defendants Anthony Hack (Hack) and Chaudhry Javid (Javid)[1] (together, defendants) move, pursuant to 3212, for summary judgment and for a declaration that they are entitled to a return of the down payment, with interest from May 18, 2018. Plaintiffs Anchor-Bay Corporation (Anchor-Bay) and Forest Lee Brandt (Brandt) and Justin Rogers (Rogers), as Co-Trustees of the DLC Revocable Trust (Trust) (collectively, plaintiffs) oppose the motion and cross-move, pursuant to CPLR 3212, for summary judgment on the first, second and third causes of action pled in the complaint, and upon granting summary judgment, directing entry of judgment against defendants, jointly and severally, in the amount of $450,000, ordering the escrowee, nonparty Rosenberg & Pittinsky, LLP (R&P), to pay the down payment to plaintiffs, and declaring the parties relieved of their duties on the contract.

Background and Procedural History

[1] Javid's name also appears as "Javid Chaudhry" in defendants' moving papers.

Diana Lee Coles (Coles) and Lawrence I. Garbuz (Garbuz) served as co-trustees of the Trust until March 9, 2019, when Coles was appointed the sole trustee (NY St Cts Elec Filing [NYSCEF] Doc No. 149, Laurence D. Pittinsky [Pittinsky] affirmation, exhibit C, ¶¶ 1-3). Brandt and Rogers began serving as co-trustees upon Coles's death on April 27, 2019 (id., ¶ 5).

Pursuant to a residential contract of sale dated July 31, 2017 (the Contract), then-co-trustees Coles and Garbuz for the Trust as "Seller," agreed to sell, and defendants, together as "Purchaser," agreed to purchase, four parcels of real property known as 4 Fair Oaks Drive, Quogue, New York 11959; 23 Bay Road, Quogue, New York 11959; 25 Bay Road, Quogue, New York 11959; and 27 Bay Road, Quogue, New York 11959, designated on the tax map in Suffolk County as Section 006000, Lot 016003, 016004, 016005, 016006 and 016007, Block 0001 (collectively, the Premises) for a purchase price of $9 million (NYSCEF Doc No. 138, Garbuz aff, exhibit A, p 3). The amount of the down payment set forth in the Contract was later reduced from $900,000 to $450,000 (the Down Payment) (NYSCEF Doc No. 129, Javid 1/20/2021 aff, ¶ 5). Under paragraph 6 (a), the Seller's attorney agreed to hold the Down Payment in escrow and to release the Down Payment to the Seller at the closing (NYSCEF Doc No. 138, p 3). Paragraph 6 (a) also states:

> "If for any reason Closing does not occur and either party gives Notice (as defined in paragraph 25) to Escrowee demanding payment of the Downpayment, Escrowee shall give prompt Notice to the other party of such demand. If Escrowee does not receive Notice of objection from such other party to the proposed payment within 10 business days after the giving of such Notice, Escrowee is hereby authorized and directed to make such payment. If Escrowee does receive such Notice of objection within such 10 day period or if for any other reason Escrowee in good faith shall elect not to make such payment, Escrowee shall continue to hold such amount until otherwise directed by Notice from the parties to this contract or a final, nonappealable judgment, order or decree of a court"

(id.). Defendants deposited the Down Payment with the Seller's attorney, Lewis and Garbuz, P.C (L&G), as the designated escrowee (NYSCEF Doc No. 116). The parties agreed in Paragraph 23 (a) that "[i]f Purchaser defaults hereunder, Seller's sole remedy shall be to receive and retain the Downpayment as liquidated damages, it being agreed that Seller's damages in case of Purchaser's default might be impossible to ascertain and that the Downpayment constitutes a fair and reasonable amount of damages under the circumstances and is not a penalty" (NYSCEF Doc No. 138, p 7).

The Contract includes certain representations and warranties from the Seller. Paragraph 11 (a) (ii) states that "Seller represents and warrants to Purchaser that. . . Seller is the sole owner of the Premises and has the full right, power and authority to sell, convey and transfer the same in accordance with the terms

of this contract" (id., p 5). Paragraph 16 (a) states that "[t]his contract and Purchaser's obligation to purchase the Premises are also subject to and conditioned upon the fulfillment of the following conditions precedent . . . [t]he accuracy, as of the date of Closing, of the representations and warranties of Seller made in this contract" (id., p 5).

The Contract set August 7, 2017, as the closing date (id., p 5 [¶ 15]). It is not disputed that a closing did not take place on that date (NYSCEF Doc No. 129, ¶ 7).

By letter dated April 26, 2018, L&G informed defendants' attorney that a closing would be held on May 18, 2018, with "TIME BEING OF THE ESSENCE" (NYSCEF Doc No. 139, Garbuz aff, exhibit B) (emphasis in original). The letter stated that "[t]he Purchasers' failure to appear at the closing ready, willing and able to purchase the Premises on the Closing Date shall be deemed a breach of the Contract, and Sellers shall pursue all legal and equitable remedies available to them, including, but not limited to, the retention of the Downpayment" (id., p 3). Defendants did not appear at the May 18 closing (NYSCEF Doc No. 129, ¶ 10).

On June 15, 2018, L&G, on behalf of co-trustees Coles and Garbuz as the "Sellers," notified defendants and their attorney that defendants had defaulted on the Contract by failing to close on the Properties on May 18, demanded the escrowee release the Down Payment to the Sellers, and stated that "[a]ll rights,

remedies and claims of … Sellers are hereby reserved (NYSCEF Doc No. 140, Garbuz aff, exhibit C). Defendants' counsel responded on June 22 objecting to the release of the Down Payment (NYSCEF Doc No. 141, Garbuz aff, exhibit D).

By letter dated August 10, 2018, plaintiffs' counsel advised defendants and their attorneys that co-trustees Coles and Garbuz and Anchor-Bay "hereby make **TIME OF THE ESSENCE**" and fixed August 29 as the new closing date (NYSCEF Doc No. 142, Garbuz aff, exhibit E, p 3) (emphasis in original). The letter advised that defendants' failure to attend and close on the sale and purchase of the Properties would constitute a breach and a default on the Contract and would allow the Seller to retain the Down Payment as liquidated damages (id.). Defendants' counsel responded on August 14, and rejected the attempt to convert the Contract to a time-of-the-essence contract (NYSCEF Doc No. 143, Garbuz aff, exhibit F).

Plaintiffs appeared at the scheduled August 29 closing, but defendants did not (NYSCEF Doc No. 129, ¶ 20; NYSCEF Doc No. 137, Garbuz aff, ¶ 21).

On September 5, 2018, L&G and R&P, as attorneys for the Trust and Anchor-Bay, notified defendants and their counsel by letter that defendants had defaulted on the Contract by failing to close on the Properties on May 18 and August 29, and demanded the escrowee release the Down Payment to "Seller," defined as Coles,

as co-trustee (NYSCEF Doc No. 144, Garbuz aff, exhibit G). Defendants objected to the release of the Down Payment and claimed the Trust had breached the Contract (NYSCEF Doc No. 145, Garbuz aff, exhibit H).

Anchor-Bay and co-trustees Coles and Garbuz then commenced this action against defendants and L&G on October 1, 2018 (NYSCEF Doc No. 1). L&G has since resigned as the escrowee, and with defendants' consent, R&P was designated the successor escrowee (NYSCEF Doc No. 147, Pittinsky affirmation, exhibit A). The action has also been discontinued against L&G (id.). The complaint has been amended to substitute Brandt and Rogers for Coles and Garbuz (NYSCEF Doc No. 148, Pittinsky affirmation, exhibit B). The amended complaint pleads four causes of action: (1) breach of contract; (2) a judgment declaring that plaintiffs are entitled to retain the Down Payment based on defendants' breach of the Contract and that plaintiffs have no further obligations under the Contract; (3) an order directing the Escrowee to release the Down Payment to plaintiffs; and (4) recovery of plaintiffs' attorneys' fees and costs.

Defendants interposed an answer asserting three counterclaims for (1) breach of contract based on the Trust's attempt to sell property that it did not own; (2) breach of contract based on the June 15 letter claiming that defendants breached the Contract; and (3) a claim sounding in negligent misrepresentation. Defendants

seek a judgment declaring that they are entitled to a return of the Down Payment (NYSCEF Doc No. 150, Pittinsky affirmation, exhibit D). Plaintiffs have served a reply to the counterclaims (NYSCEF Doc No. 151, Pittinsky affirmation, exhibit E).

Defendants now move for summary judgment dismissing the complaint. Plaintiffs oppose the motion and cross-move for summary judgment in their favor.

The Parties' Contentions

Defendants contend that plaintiffs' false representation in paragraph 11 (a) (ii) of the Contract that the Trust was the sole owner of the Premises constitutes a breach and entitles them to a return of the Down Payment. Javid avers the transaction included the sale of five tax lots, but the Trust did not own title to tax lot 016.006 (the Anchor-Bay Property) when the Contract was executed in July 2017 or on May 18, 2018, the first law date fixed for closing on the Premises (NYSCEF Doc No. 129, ¶ 4). Javid avers to have understood that Coles and Garbuz terminated the contract on June 15, 2018, when L&G wrote that defendants had defaulted on the Contract and the co-trustees would retain the Down Payment (id., ¶ 12).

For their part, plaintiffs reject the contention that they had cancelled the Contract because none of their letters expressly state that the Contract was "cancelled." Plaintiffs also reject the argument that the Trust did not own the Anchor-Bay Property,

and claim it is immaterial that Anchor-Bay was not a party to the Contract since the Trust owns 100% of the shares in Anchor-Bay (NYSCEF Doc No. 137, ¶ 2). Plaintiffs maintain that they are entitled to summary judgment because defendants failed to appear on the two law dates for closing scheduled in the time-of-the-essence letters dated April 26 and August 10, 2018. Despite declaring defendants in breach of the Contract after they failed to appear at the May 18 law date, plaintiffs then scheduled a second law date. Plaintiffs prepared several documents in anticipation of the August 29 closing, including a corporate resolution under which Anchor-Bay expressly consented to the Contract (NYSCEF Doc No. 158, Pittinsky affirmation, exhibit L), a bargain and sale deed, an affidavit from Garbuz, and tax transfer documents, among others (NYSCEF Doc Nos. 155-162, Pittinsky affirmation, exhibits I-P). Plaintiffs also contend that defendants' title agency, Continental Abstract LLC (Continental), reviewed and approved the deed to be tendered at the closing (NYSCEF Doc No. 146, Pittinsky affirmation, ¶¶ 23-25; NYSCEF Doc No. 164, Pittinsky affirmation, exhibit R). Plaintiffs state they were ready, willing and able to close on August 29, but defendants failed to show.

Defendants, in reply, proffer affidavits from Javid and Hack, both of which largely repeat the averments made in Javid's first affidavit (NYSCEF Doc No. 171, Javid 7/14/2021 aff; NYSCEF Doc No.

172, Hack aff). Defendants also submit an affidavit from Joseph Greene, a manager for Clearance and Escrow at Continental, and an affirmation from Alan Greene, General Counsel at Continental. Both state that the co-trustees, Coles and Garbuz, could not have transferred title to tax lot 016.006 on May 18, 2018 because the Trust did not own the Anchor-Bay Property (NYSCEF Doc No. 173, Joseph Greene aff, ¶¶ 1, 4 and 7; NYSCEF Doc No. 174, Alan Greene affirmation, ¶¶ 1, 7 and 9).

Plaintiffs respond that the Trust was Anchor-Bay's sole owner on both law dates, and that Anchor Bay was ready, willing and able to close on August 29. In addition, plaintiffs contend that Continental approved the sale even though Anchor-Bay was not listed as a seller on the Contract.

Discussion

It is well settled that a party moving 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" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]). The "facts must be viewed in the light most favorable to the non-moving party" (Vega v Restani Constr. Corp., 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). Once the moving party has met this prima facie burden, the burden shifts to the non-moving party to furnish evidence in admissible form sufficient

to raise a material issue of fact (Alvarez, 68 NY2d at 324). The moving party's "[f]ailure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (id.).

A. Whether Anchor Bay is a Proper Party

Whether a party has standing to sue is a threshold issue (Saratoga County Chamber of Commerce. v Pataki, 100 NY2d 801, 812 [2003], cert denied 540 US 1017 [2003]) and requires the plaintiff to have an "injury in fact," which has been defined as "an actual legal stake in the matter being adjudicated" (Society of Plastics Indus. v County of Suffolk, 77 NY2d 761, 772 [1991]). As is relevant here, a cause of action for breach of contract requires the plaintiff to plead the existence of a valid contract, plaintiff's performance, the defendant's breach, and resulting damages (34-06 73, LLC v Seneca Ins. Co., 39 NY3d 44, 50 [2022]). "[I]t is a general principle that only the parties to a contract are bound by its terms" (Highland Crusader Offshore Partners, L.P. v Targeted Delivery Tech. Holdings, Ltd., 184 AD3d 116, 121 [1st Dept 2020]). It follows, then, that only parties to a contract have standing to enforce its terms (see Clavin v CAP Equip. Leasing Corp., 156 AD3d 404, 405 [1st Dept 2017]; see also Victory State Bank v EMBA Hylan, LLC, 169 AD3d 963, 965 [2d Dept 2019] ["[o]ne cannot be held liable under a contract to which he or she is not a party"]).

Here, defendants have demonstrated, and plaintiffs do not dispute, that Anchor-Bay was not a party to the Contract. The Contract expressly defines "Seller" as the Trust through co-trustees Coles and Garbuz. As Anchor-Bay is not in contractual privity with defendants, it cannot pursue a claim for breach of contract against them (see Clavin, 156 AD3d at 405; Leonard v Gateway II, LLC, 68 AD3d 408, 408-409 [1st Dept 2009]). Accordingly, defendants' motion insofar as it seeks summary judgment dismissing the complaint brought by Anchor-Bay must be granted.

B. The First Cause of Action and First Counterclaim for Breach of Contract

Although the Contract does not specify that time is of the essence, "it is possible for the seller to convert a non-time-of-the-essence contract into one making time of the essence by giving the buyer 'clear, unequivocal notice' and a reasonable time to perform" (ADC Orange, Inc. v Coyote Acres, Inc., 7 NY3d 484, 490 [2006]). The seller must also inform the buyer that a failure to close on the date chosen would be considered a default on the contract (see LG723, LLC v Royal Dev., Inc., 216 AD3d 931, 933 [2d Dept 2023]). The April 26 letter satisfies these requirements, and defendants concede that the April 26 letter converted the Contract to a time-of-the-essence contract (NYSCEF Doc No. 130,

Kenneth J. Glassman affirmation, ¶ 7). The April 26 letter selected May 18 as the law date for closing.

A seller who wishes to hold a buyer in breach of contract must demonstrate that it was ready, willing, and able to perform on the time-of-the-essence date and that the buyer failed to demonstrate a lawful excuse for failing to close on the closing date (see Donerail Corp. N.V. v 405 Park, LLC, 100 AD3d 131, 138 [1st Dept 2012]). As stated earlier, the Contract contains a provision that in the event of a default by defendants, the Sellers are entitled to retain the Down Payment as liquidated damages. Similar contractual provisions are routinely upheld (see Second Ave. Group LLC v Capdell LLC, 168 AD3d 415, 416 [1st Dept 2019]; Vista Devs. Corp. v Board of Mgrs. of the Diocesan Missionary & Church Extensions Socy. of the Prot. Episcopal Church in the Diocese of N.Y., 135 AD3d 559, 561 [1st Dept 2016], lv denied 27 NY3d 906 [2016]; Atlantic Dev. Group, LLC v 296 E. 149th St., LLC, 70 AD3d 528, 529 [1st Dept 2010]).

Here, plaintiffs cannot demonstrate they were ready, willing and able to perform on the May 18 law date because they failed to satisfy an express condition precedent, and defendants have demonstrated a lawful excuse for failing to close on that date. "A condition precedent is 'an act or event, other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the agreement arises'" (Related Cos.,

L.P v Tesla Wall Sys., LLC, 159 AD3d 588, 590 [1st Dept 2018] [citation omitted]). "[N]o action for breach of contract lies where the party seeking to enforce the contract has failed to perform a specified condition precedent" (Ampower-US, LLC v WEG Transformers USA, LLC, 214 AD3d 1129, 1131 [3d Dept 2023] [internal quotation marks and citation omitted]). In this instance, defendants' obligation to purchase the Premises and close on the transaction was subject to an express condition precedent, namely the accuracy as of the closing date of the Seller's representations and warranties (NYSCEF Doc No. 138 at 4). The Contract clearly and plainly states that "Seller represents and warrants … that … Seller is the sole owner of the Premises" (id.). However, at the time the Contract was executed and on the May 18 closing date, the Trust did not own the Anchor-Bay Property, as evidenced in the title report prepared for defendants, which states that title in the Anchor-Bay Property was vested solely in Anchor-Bay (NYSCEF Doc No. 163, Pittinsky affirmation, exhibit Q at 18). Anchor-Bay, the sole owner of the Anchor-Bay Property, was not a party to the Contract. Since plaintiffs failed to satisfy a condition precedent prior to the closing, plaintiffs cannot demonstrate that they were ready, willing and able to close on the law date (see Jobin Org., Inc. v Bemar Realty, LLC, 165 AD3d 904, 906 [2d Dept 2018]).

Plaintiffs' contentions that Anchor-Bay's omission as a party to the Contract as "de minimis" and that the omission "factually

made no difference" (NYSCEF Doc No. 167, plaintiffs' mem of law at 5) are unconvincing. Plaintiffs ignore the well-settled principle that a corporation has a separate and distinct existence from that of its shareholders (see Doe v Bloomberg, L.P., 36 NY3d 450, 461 [2021], quoting Billy v Consolidated Mach. Tool Corp., 51 NY2d 152, 163 [1980]). Thus, the mere fact that the Trust is Anchor-Bay's sole shareholder does not render the corporation's omission from the Contract unimportant. The Trust did not own title to the Anchor-Bay Property. Therefore, the Trust could not have contracted to sell the Anchor-Bay Property as the Trust did not own it in its own name.

In addition, plaintiffs fail to adequately address whether they were ready, willing and able to close on the May 18 law date they set in the April 26 time-of-the-essence letter. Instead, plaintiffs argue that they chose to offer defendants another opportunity to close by scheduling August 29 as a second law date for closing. The parties dispute whether plaintiffs cancelled the Contract on June 15 when they declared defendants in default, and whether it was permissible for plaintiffs to resurrect the Contract after it was cancelled.

Assuming, without deciding, that the Contract was not terminated on June 15, plaintiffs still have not demonstrated that they satisfied the express condition precedent that the representation and warranty in Paragraph 11 (a) (ii) of the

Contract was accurate as of the August 29 closing. Again, the Contract defined "Seller" as the Trust through Coles and Garbuz as co-trustees (NYSCEF Doc No. 138, p 2). Plaintiffs' belated attempt to effectuate a corporate resolution in which the Trust consented to a sale of the Anchor-Bay Property and approved the Contract at issue cannot cure this breach. The Contract required that all changes be made in writing (id., pp 7-8 [¶ 28 (b)]), and plaintiffs have not demonstrated that the Contract was ever modified in writing to include Anchor-Bay as a "Seller." Accordingly, defendants are entitled to summary judgment on their first counterclaim and to dismissal of the complaint. In light of the foregoing, plaintiffs' cross-motion for summary judgment on the first, second and third causes of action is denied.

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8/28/2023
DATE

DEBRA A. JAMES, J.S.C.

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