SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **14**

Justice

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HANSEN FAMILY INVESTMENTS, LLC,

Plaintiff,

- v -

IBRAHIM RABADI, SUHEIR RABADI, APRYL E. HAND

Defendant.

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INDEX NO. 654227/2022

MOTION DATE 07/31/2023

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 43, 44, 45, 46, 47, 48, 49

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

Plaintiff's motion for summary judgment and to dismiss defendants' counterclaims and affirmative defenses is granted.

Background

This action arises out of the failed sale of an apartment. Plaintiff (the buyer) and defendants Ibrahim Rabadi and Suheir Rabadi (the "Sellers") entered into a contract to sell a condominium unit in Manhattan. The parties entered into the contract on June 9, 2022 for $2.175 million (NYSCEF Doc. No. 37). In connection with this transaction, plaintiff made a down payment of $217,500, with the balance to be paid by certified check on the delivery of the deed. In the contract, the closing date was set for July 15, 2022 in the office of counsel for the Sellers, defendant Apryl Hand (*id.* ¶ 4). However, in the rider, which supersedes the pre-printed portion of the contract, the Sellers reserved the right to close "virtually," "electronically," or by delivering the documents to the title company without having to to appear in person at all (*id.*, ¶ 36).

Plaintiff emphasizes that the sales contract also required that the unit be delivered "broom-clean and free of tenancies or other rights of use or possession" (*id*. ¶ 11). Although not disclosed in the contract, there was tenant living in the unit whose lease did not end until December 2022. The sale fell through because the Sellers did not get the tenant out in time to plaintiff's satisfaction and could not deliver vacant possession.

After the parties entered into the contract on June 9, 2022, the next event in the record is a July 8, 2022 letter from the Sellers' attorney and escrow agent, defendant Hand (although the date on this letter [October 12, 2022] is apparently incorrect on the letter), in which Ms. Hand complains that plaintiff has been improperly communicating with the tenant (NYSCEF Doc. No. 25). Plaintiff's counsel responded by noting that there was a tenant still in the unit despite the fact that the contract required the unit to be delivered free of any tenants (NYSCEF Doc. No. 26). The parties did not close on July 15, 2022.

Having already received the Condo's right of first refusal, all that was left to do was pay the money, get the deed and deliver a vacant apartment. Accordingly, on July 18, 2022, plaintiff's counsel sent and letter which stated, in part, that:

> "[T]he Purchaser does hereby set August 18, 2022 as a closing date, TIME BEING OF THE ESSENCE, whereat the Purchaser shall accept delivery of the deed to the Unit and execute any and all other documentation necessary to transfer title to the Unit in accordance with the terms, provisions and conditions of the Contract, and will tender to the Sellers any and all payments due to the Sellers in accordance with said Contract. Failure on the part of Sellers close on this date will result in a default of contract and Purchaser shall avail itself of all remedies afforded to it under the law and Contract." (NYSCEF Doc. No. 27).

Plaintiff alleges that this closing date passed without any communication from the Sellers or Ms. Hand about the closing itself, such as a request for an adjournment. The Court observes that there were some email communications between the time of the essence letter and the closing, including one in which plaintiff offered to increase the sales price by $25,000 (to get the

tenant out of the apartment) if the closing happened by September 1, 2022 (NYSCEF Doc. No. 28). Plaintiff insists that this effort failed. However, defendants never sought to move the closing date (or object to it) and on August 19, 2022, plaintiff's counsel sent a letter declaring the Sellers in default for not closing and demanding the return of the down payment (NYSCEF Doc. No. 29).

After many subsequent communications between the parties over the ensuing weeks, defendants' counsel sent her own time of the essence later dated October 14, 2022 that set a closing date of November 3, 2022 (NYSCEF Doc. No. 35). Defendants insist that plaintiff refused to close on that date and cannot now complain about the Sellers' refusal to close in August. Apparently, the tenant vacated the unit sometime in October 2022 after finally receiving an acceptable buyout from the Sellers.

Plaintiff now moves for summary judgment and to dismiss defendants' counterclaims and affirmative defenses. It demands the down payment back and seeks damages under the terms of the contract relating to its efforts to seek the return of the down payment. Plaintiff contends that the Sellers breached the contract by failing to convey vacant possession to plaintiff. Accordingly, plaintiff argues that it is entitled to attorney fees, a return of the down payment, and a lien on the property under the provisions of the contract. Plaintiff claims defendants' affirmative defenses are invalid, and specifically notes that the eleventh affirmative defense alleging plaintiff is a foreign entity conducting business in New York is without merit as it has not continuously done business in the state.

In opposition, defendants contend that the original time of the essence letter did not comply with the minimum requirements, such as time or location of the closing. Moreover, defendants argue that plaintiff never took any steps to formally schedule the closing, such as

alerting a title company or securing closing documents from the condominium. Defendants further claim that the closing date did not provide a reasonable timeframe to deliver vacant possession of the unit as the tenant requested a "buyout" of their lease to vacate before the end of the year. Defendants assert the tenant required a buyout after speaking with plaintiff's agent, alleging that plaintiff purposely attempted to thwart the sale so it could purchase a larger unit in the building. Additionally, defendants argue that their counterclaims are adequately pled, and that their affirmative defenses should not be dismissed, although they only offer substantive arguments related to their eleventh affirmative defense that plaintiff is conducting business in New York without registering as a foreign entity.

In reply, plaintiff contends the notice was sufficiently clear and was sent at least thirty days in advance. Moreover, plaintiff argues that defendants did not object to the closing date prior to the deadline. Plaintiff also argues that it was not required to hold a formal closing because it would be a meaningless exercise – the tenant was still there. Plaintiff further claims that the fact it purchased another unit in the building after this one fell through is irrelevant to the instant dispute. Finally, plaintiff contends there is no precedent to support the conclusion that purchasing a residential apartment and contracting to purchase another unit constitutes doing business in the state of New York, such that it has to obtain authorization.

Discussion

To be entitled to the remedy of summary judgment, the moving party "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 from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers

(*id*.). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

"Where, as here, the original contract does not make the designated closing date 'time of the essence,' either party may set a reasonable closing date after the initially scheduled closing date has passed, and declare that the newly scheduled date is 'time of the essence,' and that failure to perform on such date will be considered a default" (*Madison Park Owner LLC v Schneiderman*, 93 AD3d 555, 556, 940 NYS2d 605 [1st Dept 2012]).

There is no question that the original contract did not designate the initial closing date as time of the essence (NYSCEF Doc. No. 37, ¶ 4) and so the issue in this motion is the effectiveness of the July 18, 2022 letter. The Court finds that this letter was a valid time of the essence letter that set a reasonable closing date of another 30 days (August 18, 2022). Moreover, the Sellers' "failure to object prior to the closing date rendered the time reasonable as a matter of law" (*Shimuro v Preston Taylor Products, LLC*, 146 AD3d 729, 730, 46 NYS3d 71 [1st Dept

2017]). Nothing in this record shows that defendants ever objected to the closing date prior to August 18, 2022. Defendants' assertion that this letter was premature or legally deficient is without merit. The parties entered into a contract in early June 2022 that set an initial closing date of July 15, 2022. When that closing did not take place, plaintiff sent a time of the essence letter that set a closing date of August 18, 2022. That is an inherently reasonable timeline.

Defendants' claim that plaintiff never actually held a formal closing is of no moment. Defendants do not deny that there was still a tenant in the unit at the time of the August 18, 2022 closing and so there is no way to conclude that the Sellers could have been ready, willing, and *able* to close on that date. The Court declines to find that plaintiff's failure perform a meaningless act precludes its recovery where, as here, there are no issues of fact about the Sellers' inability to close. Gathering a room full of people to pretend to be waiting for the Sellers to show up and for the plaintiff to arrange the various lawyers, banks, managing agents, title company and perhaps a court reporter would have been a huge waste of time and resources. Moreover, the Sellers, by their silence, showed no interest in showing up, rescheduling or contesting the timeline.

Defendants also focus on the fact that plaintiff purchased another apartment in the building. That issue is irrelevant—plaintiff was allowed to explore buying another apartment in a building it obviously liked, given the issues with this transaction.

Another issue defendants point to is that plaintiff knew that the unit was occupied by a tenant and that plaintiff may have directly communicated with this tenant. These assertions do not raise an issue of fact because the contract required the Sellers to give plaintiff the unit free of any tenancies (NYSCEF Doc. No. 37, ¶ 11). The sophisticated parties in this matter, with the assistance of their attorneys, were more than capable of including a provision (possibly in the

rider) that noted that there was a tenant and that the closing date might have to be adjusted to accommodate the vacatur of this tenant. It could also have prohibited communication directly with the tenant.

Instead, the contract does not even mention the tenant and the contract includes a merger clause stating that the terms constituted the entire agreement (*id*. ¶ 24). Defendants cannot insert additional provisions about communication with the tenant or efforts to get the tenant to move out into the parties' agreement after the fact. Understandably, plaintiff seems to have initially attempted to save the contract by offering to kick in $25,000 as part of a buyout. For whatever reason, the plaintiff's offer was never substantively addressed prior to the closing date despite the fact that it was made on August, 10, 2022 (more than a week before the closing date) (NYSCEF Doc. No. 28).

That this $25,000 offer also included a new potential closing date of September 1, 2022 is also of no moment because the Sellers never agreed to this proposal. And there is no question that the Sellers were not ready, willing, and able to close on that date either because the tenant was still in possession under his lease.

Affirmative Defenses/Counterclaims

The Court severs and dismisses the defendants' counterclaims and affirmative defenses as they fail to state a valid claim. As noted above, defendants only offered substantive arguments with respect to the eleventh affirmative defense. The record invalidates defendants' affirmative defenses of failure to state a claim (first), that defendants substantially performed (second), that defendants acted in good faith (third), that plaintiff breached the contract (fourth) and waiver/laches (fifth). The fact is that the Sellers were unable to close until about two months

after the closing date set forth in the plaintiff's time of the essence letter (and more than three months after the contract date). That is not plaintiff's doing.

The reference to defendants' attempt to schedule a time of the essence closing in November 2022 (the sixth affirmative defense and third counterclaim) is without merit as the Sellers were already in default at the time of this purported closing and had been for months.

The seventh affirmative defense contends that plaintiff failed to mitigate its damages, a curious assertion given that plaintiff offered $25,000 to help the tenant vacate the unit. Similarly, the affirmative defenses for unclean hands (eighth) and unjust enrichment (ninth) are without merit as plaintiff attempted to close. The closing was within a reasonable time which invalidates the tenth affirmative defense based on the alleged terms of the parties' contract.

The Court also dismisses the eleventh affirmative defense which asserts that plaintiff, a foreign corporation, lack standing to pursue this case. Limited Liability Company Law § 808 (a) provides that "A foreign limited liability company doing business in this state without having received a certificate of authority to do business in this state may not maintain any action, suit or special proceeding in any court of this state unless and until such limited liability company shall have received a certificate of authority in this state."

The party seeking to impose the limitation has the burden of showing the LLC's activities in New York are "systemic and regular" (*Access Point Medical, LLC v Mandell*, 2011 NY Slip Op 32107 [U], —— [Sup Ct, NY County 2011], *aff'd* 106 AD3d 40 [1st Dept 2013]). As plaintiff points out, buying two apartments in New York does not constitute doing business sufficient to require dismissal. Of course, even if this was required, the proper remedy is a brief stay to permit plaintiff to gain the proper authorization (*see Matter of Mobilevision Med.*

Imaging Services, LLC v Sinai Diagnostic & Interventional Radiology, P.C., 66 AD3d 685, 686, 885 NYS2d 631 [2d Dept 2009]).

Defendants did not timely move to dismiss for lack of proper service pursuant to CPLR 3211(e) (twelfth affirmative defense). As noted above plaintiff's alleged communications with the tenant does not constitute a sufficient affirmative defense (the thirteenth affirmative defense) given the merger clause in the parties' contract and the lack of any prohibition of communication in the contract. And there is no need for discovery (the fourteenth affirmative defense) as the record is quite clear that Sellers failed to close.

Finally, the first and second counterclaims relating to a reasonable closing date and plaintiff's closing are without merit. The letter noted that the closing would occur "in accordance with the terms, provisions and conditions of the Contract" (NYSCEF Doc. No. 27). The contract itself specifies a location and time for the closing (NYSCEF Doc. No. 37, ¶ 4) although on a different day. In any event, the Court finds that failing to put a precise time and location in this time of the essence letter is not a basis to deny the instant motion because the Sellers were not able to close and there is no evidence that defendants asked about the location of the closing. Even if they showed up, they couldn't close. This is not a situation where the defendants noted this omission prior to the closing, showed up at the Sellers' attorney's office on the day of the closing and plaintiff ignored their communications. Instead, defendants completely ignored this time of the essence letter.

Summary

The instant dispute arose because Sellers promised to deliver vacant possession of a condo in July even though they had a tenant who was entitled to stay, pursuant to a lease, until December.

The Sellers did not negotiate any wiggle room in the contract of sale. They did not provide for a reasonable adjournment to get the tenant out, or provide that if the tenant wanted more than a certain sum to vacate early, they were under no obligation to close. Maybe the Sellers thought that the tenant would be amenable to vacating the apartment earlier and that it would be easy to reach such an agreement. But that is not how it turned out. The Sellers' attempt to blame plaintiff for this issue does not compel the Court to deny plaintiff's motion as the evidence on this record shows that plaintiff even offered an extra $25,000 to help get the tenant out by September 1, 2022. That the Sellers apparently later paid over $50,000 to get the tenant out in October 2022 is not a reason to invalidate the time of the essence closing in August.

Here, Sellers should not have entered into a contract in which they agreed to provide a vacant unit without any wiggle room to address the existence of a valid lease. Plaintiff was certainly entitled to buy another apartment as the problems with the instant apartment dragged on. Therefore, plaintiff is entitled to a return of the down payment on or before September 20, 2022.

Moreover, the Court observes that a rider to the agreement provides that "In connection with any litigation arising out of this Contract, the prevailing party shall be entitled to recover all costs thereof, including, without limitation, reasonable attorneys' fees and disbursements for services rendered in connection with such litigation" (NYSCEF Doc. No. 37 at 14 [paragraph 11 to the rider]). Therefore, plaintiff shall make a separate motion for such fees on or before September 27, 2023.[1] Plaintiff is entitled to a lien upon the premises in an amount to be decided in connection with the aforementioned motion.

[1] The Court recognizes that many fee disputes, such as this one, are handled at a hearing. That may eventually be required here but the Court prefers that a motion be made so that the Court and the parties can evaluate whether a hearing (which involves the accrual of additional fees) is truly necessary.

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment and to dismiss defendants' affirmative defenses and counterclaims is granted as described above; and it is further

ORDERED that plaintiff is entitled to a return of the down payment on or before September 20, 2023; and it is further

ORDERED that defendant Apryl Hand, as escrowee, shall return the down payment in accordance with paragraph 16 of the contract by September 20, 2023; and it is

ORDERED that plaintiff shall make a separate motion for the fees it seeks in connection with this action on or before September 27, 2023.

9/8/2023
DATE

ARLENE P. BLUTH, J.S.C.

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