

**162 LSY, LLC v Allison**

2023 NY Slip Op 34874(U)

October 16, 2023

Supreme Court, Westchester County

Docket Number: Index No. 66493/2022

Judge: Paul I. Marx

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT : STATE OF NEW YORK  
 COUNTY OF WESTCHESTER  
 HON. PAUL I. MARX, J.S.C.

-----X  
 162 LSY, LLC,

Plaintiff,

-against-

OSHA NE ALLISON AS ADMINISTRATOR OF  
 ESTATE SHAWNIE ALLISON,

Defendant.  
 -----X

To commence the statutory  
 time period for appeals as of  
 right (CPLR 5513 [a]), you  
 are advised to serve a copy  
 of this order, with notice of  
 entry, upon all parties.

DECISION AND ORDER

Index No. 66493/2022

Motion Date: Aug. 23, 2023

Motion Sequence No. 1 & 2.

The papers filed electronically on NYSCEF numbered 7 to 69 were read on: (1) Defendant's motion to dismiss the complaint, vacate the lis pendens, and for other relief and (2) Plaintiff's motion for summary judgment and for dismissal of Defendant's counterclaim.

Upon reading the foregoing papers and upon the oral argument held on October 11, 2023, it is ORDERED that: (1) Defendant's motion is denied and (2) Plaintiff's motion is granted for the reasons which follow.

**BACKGROUND:**

On January 14, 2022, the parties entered into a Residential Contract of Sale, pursuant to which Defendant agreed to sell to Plaintiff the premises located at 162 Linden Street, Yonkers, New York (the "Premises") for the sum of \$400,000.00 in cash (the "Contract"). The Contract requires a down payment in the sum of \$20,000.00. The Contract provides that the closing shall take place "on or about February 15, 2022 or upon reasonable notice (by telephone or otherwise) by Purchaser" (Defendant's Exhibit C, par. 15).

On February 10, 2022, Plaintiff's counsel sent Defendant's counsel a copy of a title report and requested that the title be cleared before or at the closing. The report indicates, *inter alia*, that there are three judgments against the decedent Shawnie Allison and two mortgages: one given to MERS, as nominee for AEGIS Funding Corp. (the "AEGIS mortgage"), and one given to MERS, as nominee for BNC Mortgage, Inc.

On April 14, 2022, Defendant's counsel sent an email to Jennifer Amato ("Amato"), President of Coastal Land Services ("Coastal"), Plaintiff's title company, asserting that the three

judgments were not against Defendant and that there was only one open mortgage. Amato replied, stating that if the AEGIS mortgage has been satisfied, they will need a duplicate satisfaction, and that two of the judgments list the address of the Premises.

On July 14, 2022, Defendant's counsel sent a letter to Plaintiff's counsel, stating that Defendant "will no longer proceed with the contracts dated January 14, 2022, as too much time has passed and he is not prepared to give an extension." The letter deemed the Contract null and void. Defendant's counsel returned the down payment to Plaintiff's counsel.

On August 16, 2022, Plaintiff rejected Defendant's attempt to cancel the Contract.

On September 15, 2022, Plaintiff's counsel sent a letter to Defendant's counsel, scheduling a time of the essence closing date for October 19, 2022, and requesting that the closing be by mail.

On September 21, 2022, Defendant's counsel rejected the September 15, 2022, letter, stating that Plaintiff is in default of the Contract, that Defendant has not received any requests for an extension of the February 15, 2022, closing date, that Plaintiff applied for a mortgage in violation of the Contract, that Plaintiff delayed in ordering a title report, and that Plaintiff and its title company delayed the process of clearing the title.

On September 30, 2022, satisfaction of the AEGIS mortgage was recorded.

On October 7, 2022, Plaintiff commenced this action by filing a summons and complaint, and a notice of pendency. On October 20, 2022, Plaintiff filed an amended complaint, alleging a cause of action for specific performance.

On December 2, 2022, Defendant filed an answer, alleging a counterclaim for a money judgment in the amount of \$20,000.00 for Plaintiff's default on the Contract and a money judgment in the amount of \$650,000.00 for the value of the Premises.

## DISCUSSION:

### Defendant's Motion to Dismiss:

Defendant moves to dismiss the complaint, arguing that Plaintiff breached the Contract by failing to call a closing date by February 15, 2022, and by failing to request a written extension of that date pursuant to paragraph 28(b) of the Contract.<sup>1</sup> Defendant also argues that Plaintiff

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<sup>1</sup> Paragraph 28(b) of the Contract states: "Neither this contract nor any provision thereof may be waived, changed or cancelled except in writing. This contract shall also apply to and bind the heirs, distributees, legal representatives, successors and permitted assigns of the respective parties. The parties hereby authorize their respective attorneys to agree in writing to any changes in dates and time periods provided for in this contract."

breached the Contract by failing to timely order a title report.<sup>2</sup> Defendant further argues that Plaintiff has kept the down payment that his counsel returned.

Defendant asserts that he was ready, willing and able to close, because he had cleared the title, had no judgment liens or encumbrances against the Premises, had secured the payoff for the one open mortgage, and was willing to execute a title affidavit confirming it.

In opposition, Plaintiff argues that it did not default under the Contract by not closing on February 15, 2022, because it was not a time of the essence date. Plaintiff argues that Defendant never scheduled a time of the essence closing. Plaintiff also argues that it did not default under the Contract, because it was ready, willing and able to close, because it had sufficient funds to purchase the Premises on February 15, 2022, as well as on October 19, 2022. In support, Plaintiff submits two bank statements from a TD Bank account that Marat Leshchinsky, Plaintiff's sole member ("Leshchinsky"), shared with Noel Keyserman ("Keyserman"), his business associate and father-in-law. The first statement, which is for the period commencing on January 18, 2022, and ending on February 17, 2022, shows a balance of \$738,219.94 on February 15, 2022. The second statement, which is for the period commencing on October 18, 2022, and ending on November 17, 2022, shows a balance of \$885,087.69 on October 19, 2022. Plaintiff also submits an affidavit by Keyserman, who states that he and Leshchinsky maintained the joint checking account for their joint ventures and that he gave Leshchinsky permission to write any checks or make any wire transfers from the account necessary to purchase the Premises, irrespective of the date of the closing.

Plaintiff argues that it timely ordered a title report on January 18, 2022, from Coastal. Plaintiff argues that it received the report on February 10, 2022, and emailed a copy to Defendant's counsel that day.

Plaintiff argues that Defendant's return of the down payment, which Plaintiff never cashed, did not relinquish its rights under the Contract, because it merely represented a return of its own property after Defendant refused to perform.

Finally, Plaintiff argues that Defendant did not clear the title objections at any time prior

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<sup>2</sup> Paragraph 21(a) of the Contract states: "Purchaser shall order an examination of title in respect of the Premises from a title company licensed or authorized to issue title insurance by the New York State Insurance Department or any agent for such title company promptly after the execution of this contract or, if this contract is subject to the mortgage contingency set forth in paragraph 8, after a mortgage commitment has been accepted by Purchaser. Purchaser shall cause a copy of the title report and of any additions thereto to be delivered to the attorney(s) for Seller promptly after receipt thereof."

to July 14, 2022.

Generally, in contracts for the sale of land, time of performance is not of the essence unless the contract so states or one of the parties has unequivocally declared it upon proper notice (*ADC Orange, Inc. v Coyote Acres, Inc.*, 7 NY3d 484, 486 [2006]). When “a contract for the sale of real property does not make time of the essence, the law permits a reasonable time in which to tender performance, regardless of whether the contract designates a specific date for performance. What constitutes a reasonable time to perform turns on the circumstances of the case. Time may be made of the essence by clear, distinct and unequivocal notice to that effect giving the other party a reasonable time in which to act” (*Point Holding, LLC v Crittenden*, 119 AD3d 918, 919 [2<sup>nd</sup> Dept 2014]).

“When there is a declaration that time is of the essence, however, each party must tender performance on law day unless the time for performance is extended by mutual agreement.” (*Grace v Nappa*, 46 NY2d 560, 565 [1979]). A party is not required to consent to the adjournment of a time of the essence closing (*id.*; *533 Park Avenue Realty, LLC v Park Avenue Building & Roofing Supplies, LLC*, 156 AD3d 744, 747 [2<sup>nd</sup> Dept 2017]).

Here, Defendant has not established that Plaintiff defaulted or that it was not ready, willing and able to close. It is undisputed that the Contract did not make the February 15, 2022, closing date a time of the essence closing date. As such, either party was entitled to a reasonable adjournment of the closing date (*Baltic v Rossi*, 289 AD2d 430, 430 [2<sup>nd</sup> Dept 2001]; *Tarlo v Robinson*, 118 AD2d 561, 565 [2<sup>nd</sup> Dept 1986]). Despite arguing that Plaintiff delayed the closing and the process of clearing title, Defendant never scheduled a time of the essence closing date. As such, Plaintiff cannot be held in default (*Singh v Gopaul*, 43 AD3d 1145, 1146 [2<sup>nd</sup> Dept 2007] [“The seller failed to schedule a closing date with time of the essence. Therefore, the purchaser was never held in default”]; *Tarlo* at 566 [“when there is an indefinite adjournment, some affirmative act has to be taken by one party before he can claim the other party is in default; that is, one party has to fix a time by which the other must perform, and he must inform the other that if he does not perform by that date, he will be considered in default”]; *Levine v Sarbello*, 112 AD2d 197, 200 [2<sup>nd</sup> Dept 1985]).

Additionally, Defendant’s argument that Plaintiff defaulted by failing to timely order a title report is without merit. The Contract states only that Plaintiff shall order an examination of title “promptly after the execution of this contract” and that Plaintiff “shall cause a copy of the title report and of any additions thereto to be delivered to the attorney(s) for Seller promptly after

receipt thereof” (Defendant’s Exhibit C, par. 21[a]). It is undisputed that Plaintiff ordered a title report from Coastal on January 18, 2022, four days after execution of the Contract, and upon its receipt on February 10, 2022, emailed a copy to Defendant that day. There is no evidence that Plaintiff did not promptly order the title report or that it did not promptly deliver a copy to Defendant.

Furthermore, Defendant is not entitled to a dismissal of the complaint because of the fact that he returned the down payment, because it constituted nothing more than a return of Plaintiff’s own property (*Merill Lynch Realty/Carll Burr, Inc. v Skinner*, 63 NY2d 590, 596-597 [1984]; *Coneys v Game*, 141 AD2d 795, 795 [2<sup>nd</sup> Dept 1988]; *Paynter v Vishnia*, 114 AD2d 404, 405 [2<sup>nd</sup> Dept 1985] [“Nor was defendant entitled to a dismissal based upon an alleged accord and satisfaction in these circumstances (where the return of the buyer’s down payment was made by the check of the seller’s attorney which was deposited into the buyer’s attorney’s escrow account and was never personally received by the buyer) which constituted nothing more than the return of the buyer’s own property”]).

Accordingly, Defendant’s motion to dismiss the complaint, to vacate the *lis pendens*, and for other relief is denied.<sup>3</sup>

#### Plaintiff’s Cross-Motion for Summary Judgment:

Plaintiff cross-moves for summary judgment on its cause of action for specific performance. Plaintiff argues that it substantially performed under the Contract by paying the down payment, ordering a title report and requesting that Defendant clear the title. Plaintiff argues that its counsel’s letter dated September 15, 2022, scheduled a time of the essence closing date for October 19, 2022. Plaintiff argues that it was ready, willing and able to perform under the Contract on October 19, 2022, because it had sufficient funds.

Plaintiff argues that Defendant was able to convey the Premises, because Coastal was prepared to issue title insurance to Plaintiff for the Premises on October 19, 2022, since Coastal had caused a satisfaction of the AEGIS mortgage to be recorded in September 2022, the open

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<sup>3</sup> The Court notes that although Defendant’s counsel mentions in her September 21, 2022, letter that Plaintiff applied for a mortgage in violation of the Contract, paragraph 15 of the Rider to the Contract states that: “The Purchaser is permitted to apply for mortgage financing, however, the purchaser’s obligation under this contract is not contingent upon issuance of a loan. The Seller agrees to reasonable [sic] cooperate with the Purchaser’s lender” (Defendant’s Exhibit C, par. 15 of the Rider to the Contract). As such, even if Plaintiff had applied for a mortgage loan, Plaintiff would not have been in violation of the Contract.

mortgage could be paid off at closing, and Plaintiff agreed to waive the remaining title objections and close title subject to them.

Plaintiff argues that it has no adequate remedy at law, because the Premises are unique, and its loss cannot be compensated with money damages.

Plaintiff argues that Defendant defaulted on October 19, 2022, because Defendant did not deliver the original executed Deed and transfer documents.

Plaintiff also cross-moves for summary judgment dismissing Defendant's counterclaim. Plaintiff argues that it did not breach the Contract by not closing on February 15, 2022. Rather, Plaintiff argues that Defendant breached the Contract by purporting to terminate the Contract on July 14, 2022, and returning the down payment. Plaintiff argues that Defendant did not establish the validity of his cancellation pursuant to any particular contractual provision. Plaintiff also argues that Defendant breached the Contract by failing to deliver the original executed Deed and transfer documents on October 19, 2022.

In opposition and in reply, Defendant argues that Plaintiff's cross-motion should be denied, because Plaintiff did not meet its prima facie burden. Defendant argues that Plaintiff cannot provide proof of funds for a closing with the joint account with Keyserman. Defendant argues that Plaintiff must show a wire confirmation or certified checks made payable to Defendant or Defendant's counsel prior to the Deed transfer.

Defendant also argues that Plaintiff's cross-motion is premature, because there needs to be discovery of Plaintiff's bank account prior to January 2022, the parties need to be deposed, and the "title agents must present the documents they allegedly sent to 'MERS'" (Reply Affirmation of Valerie A. Gray, ¶ 37).

Defendant argues that he did not default, because he has the right to cancel the Contract pursuant to paragraph 9 of the Rider to the Contract<sup>4</sup> if he cannot render title marketable. Defendant also argues that Plaintiff and its title company delayed the process of clearing the title.

Defendant argues that the October 19, 2022, closing could not take place anyway, because the sales proceeds had to first be transferred to title in escrow or to his counsel's IOLA account

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<sup>4</sup> Paragraph 9 of the Rider to the Contract states: "The seller shall not be required to bring any action or proceeding or incur any expenses whatsoever to render title marketable. The purchaser may, however, accept such title as the seller is able to convey, but there shall be no reduction in the purchase price nor any credit or allowance with respect to the same nor there be any other liability on the part of the seller. Notwithstanding the above, the seller shall pay and satisfy all voluntary liens affecting the title to the Premises."

before his counsel could mail the executed Deed to Plaintiff, Plaintiff did not show proof of funds, Plaintiff's title company did not send a title bill or title affidavits to be executed by him, and because his counsel did not receive Plaintiff's corporation documents and tax identification number, which are necessary to prepare the transfer documents.

Defendant argues that paragraphs 11, 12, 15, 20, 21(a) and (b), and 28(b) of the Contract are relevant to this matter.<sup>5</sup>

"The elements of a cause of action for specific performance of a contract [for the sale of real property] are that the plaintiff substantially performed its contractual obligations and was [ready,] 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. A party seeking specific performance of a contract for the sale of real property is required to establish not only that he or she was ready, willing, and able to close on the scheduled closing date, but also that the other party was in default" (*Treasure Island of Asbury Park Self-Storage, LLC v MBAR Realty, LLC*, 216 AD3d 1200, 1203 [2<sup>nd</sup> Dept 2023] [internal quotation marks omitted]).

Here, Plaintiff established its prima facie burden for summary judgment by demonstrating that it substantially performed under the Contract, that it was ready, willing and able to perform on October 19, 2022, that Defendant was able to convey the Premises on October 19, 2022, and that there is no adequate remedy at law. Plaintiff also demonstrated that Defendant defaulted on the time of the essence closing date of October 19, 2022 (*Sweeney v Stark*, 216 AD3d 1193, 1197

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<sup>5</sup> The Court notes that in his reply memorandum of law, Defendant cites portions of what he asserts are paragraphs 11, 12 and 20 of the Contract. However, this does not match with what is in the Contract.

The Court also notes that Defendant does not explain how paragraph 21 is relevant to this action. Defendant's counsel did not cite this paragraph in her July 14, 2022, or September 21, 2022, letters. Moreover, Defendant does not argue that this is the basis for his cancellation of the Contract. In any case, paragraph 21(b) of the Contract is not a valid basis for cancellation of the Contract, because it is only applicable if Defendant is unable to transfer title to Plaintiff in accordance with the Contract or Plaintiff has other valid grounds for refusing to close. Defendant consistently argues that he was ready, willing and able to close and to give good title, and Plaintiff did not refuse to close on a time of the essence closing date.

Additionally, to the extent that only one open mortgage was at issue, paragraph 21(b) is not a valid basis for cancellation, because the paragraph expressly provides that it does not apply to encumbrances that Defendant has expressly agreed to remove, remedy or discharge. Defendant agreed to release, discharge or otherwise cure the existing mortgage prior to closing pursuant to paragraph 21(b)(iii) of the Contract (*Marsh v Christodoulou*, 288 AD2d 358, 259 [2<sup>nd</sup> Dept 2001]).

Finally, there is no indication that the clearing of title was "a situation beyond the parties' control" (*Karl v Kessler*, 47 AD3d 681, 682 [2<sup>nd</sup> Dept 2008]).

[2<sup>nd</sup> Dept 2023] [“[W]hen a party to a real estate contract declares time to be of the essence in setting a closing date, each party must tender performance on that date, and a failure to perform constitutes a default”).

In opposition, Defendant has not raised any issues of fact. Defendant’s argument that Plaintiff cannot demonstrate that it was ready, willing and able to perform by submitting bank statements from its sole member’s joint account with its business associate is without merit. Defendant does not cite any case law to the contrary.

Moreover, Plaintiff did not default and Defendant’s purported cancellation of the Contract by letter dated July 14, 2022, was not valid, because as explained above, the February 15, 2022, closing date was not a time of the essence closing date and Defendant never scheduled a time of the essence closing date. Although Defendant argues that he was permitted to cancel the Contract pursuant to paragraph 9 of the Rider to the Contract if he could not render title marketable, that paragraph does not provide for a means for Defendant to cancel the Contract. In any case, this argument is inconsistent with his argument that he was ready, willing and able to close and to give good title.

Although Defendant lists a host of reasons for which the October 19, 2022, closing could not take place, he does not contend that he ever sought that information from Plaintiff prior to the closing date or that he could not have obtained such information. In any case, the record demonstrates that Defendant did not reject the October 19, 2022, closing date for those reasons, but for reasons set forth in Defendant’s counsel’s letter dated September 21, 2022, which this Court has already determined to be without merit.

Finally, the discovery Defendant seeks will not change this outcome.

All other arguments not specifically addressed herein have been considered and found to be without merit.

Accordingly, Plaintiff’s cross-motion for summary judgment on its cause of action for specific performance and for dismissal of Defendant’s counterclaim is granted.

It is hereby

ORDERED that Defendant’s motion to dismiss, vacate the lis pendens, and for other relief is denied; and it is further

ORDERED that Plaintiff’s cross-motion for summary judgment on its cause of action for specific performance and for dismissal of Defendant’s counterclaim is granted; and it is further

ORDERED that the parties hold a closing in accordance with the Contract within thirty

(30) days of the date of this Decision and Order.

The foregoing constitutes the Decision and Order of the Court.

Dated: October 16, 2023  
White Plains, New York

ENTER.



HON. PAUL I. MARX, J.S.C.