

**3022 Ave. I Partners, LLC v Logan**

2024 NY Slip Op 32631(U)

July 18, 2024

Supreme Court, Kings County

Docket Number: Index No. 533611/2022

Judge: Richard J. Montelione

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At IAS Part 99 of the Supreme Court of the State of New York, Kings County, on the \_\_\_\_ day of \_\_\_\_\_ 2024

JUL 18 2024

PRESENT: HON. RICHARD J. MONTELIONE, J.S.C. SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF KINGS: PART 99

DECISION AND ORDER

-----X 3022 AVENUE I PARTNERS, LLC,

Plaintiff,

-against-

ANNETTE E. LOGAN,

Defendant.

-----X ANNETTE E. LOGAN,

Counterclaimant,

-against-

3022 AVENUE I PARTNERS, LLC, SOLOMON KOHAN, ALAN J. SASSON, ESQ.,

Counterclaim Defendants.

-----X

The following papers were read on this motion pursuant to CPLR 2219(a):

Papers	Numbered
Plaintiff's Notice of Motion for Summary Judgment for Breach of Contract and Specific Performance; Attorney Affirmation in Support of the Motion affirmed by Nissan Shapiro, Esq. on September 12, 2023, Exhibit 1-Contract of Sale; Exhibit 2-Affidavit of Soroosh Fajiram; Exhibit 3-Time of the Essence Notice; Exhibit 9-Wire Transfer Statement; Exhibit 10-Retainer Agreement.....	12-15, 21
Defendant's Notice of Cross-Motion for Leave to Serve an Amended Answer to Replead Affirmative Defenses; Attorney Affirmation in Opposition to Motion and in Support of Cross-Motion affirmed by Ishelli L. Oliver, Esq. on November 29, 2023, Affidavit of Annette E. Logan in Opposition to Motion and in Support of Cross-Motion, Exhibit A-Summons and Complaint; Exhibit B-Verified Answer with Counterclaims and Cross-claims & Summons on Cross-claims; Exhibit F-Proposed Amended Answer.....	24-28, 32
Plaintiff's Affirmation in Opposition to Cross-Motion and in Further Support of Motion affirmed by Nissan Shapiro, Esq. on March 6, 2024.....	33
Defendant's Affirmation in Reply affirmed by Ishelli L. Oliver, Esq. on March 10, 2024.....	34

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MONTELIONE, RICHARD J., J.

Plaintiff 3022 Avenue I Partners, LLC (“Plaintiff”) commenced this action by filing a summons and complaint on November 16, 2022. Issue was joined by defendant Annette E. Logan (“Defendant”) interposing an answer with counterclaims on February 18, 2023. Plaintiff now moves for summary judgment in its favor, pursuant to CPLR 3212, on all causes of action against defendant, and to strike defendant’s counterclaims and affirmative defenses, pursuant to CPLR 3211(b). Plaintiff further demands an order, pursuant to CPLR 5107, authorizing the Sheriff of Kings County to convey the subject premises to plaintiff in the event that Defendant fails to do so within fifteen (15) days of this Court’s order. (Motion Seq. #1). Defendant cross-moves for leave to amend her verified answer and replead affirmative defenses, pursuant to CPLR 3025(b). (Motion Seq. #2).

This is an action for breach of contract and specific performance of a contract of sale (“Contract of Sale” or “Contract”) for real property located at 3022 Avenue I, Brooklyn, New York 11210, Block: 7594 Lot: 49 (“Premises”). On or about May 13, 2022, plaintiff and defendant fully executed a written contract of sale for the sale of the premises. Both parties were represented by counsel at the time of signing the contract. Upon the execution of the contract on May 13, 2022, plaintiff tendered \$10,000.00 to defendant to be held in escrow. *See* NYSCEF #21. The remaining balance due at closing was \$520,000.00. The contract contemplated a closing date “on or before Thirty (30) days from when contract [plaintiff’s] Attorney receive[d] a fully executed contract.” NYSCEF #2, ¶15. Plaintiff alleges that after the execution of the contract, defendant breached her obligations under the contract by demonstrating an unwillingness to close within a reasonable time.

“A motion for summary judgment will be granted if, upon all papers and proof submitted, the cause of action or defense is established sufficiently to warrant directing judgment in favor of any party as a matter of law.” CPLR 3212 (b); *Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 967 (1988); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). On such a motion, the evidence will be construed in a light most favorable to the party against whom summary judgment is sought. *Spinelli v. Procassini*, 258 A.D.2d 577 (2d Dep’t 1999); *Tassone v. Johannemann*, 232 A.D.2d 627, 628 (2d Dep’t 1996); *Weiss v. Garfield*, 21 A.D.2d 156, 158 (3d Dep’t 1964). The movant must therefore offer sufficient evidence in admissible form to eliminate all material questions of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986); *Zuckerman v. City of New York*, *supra* at 562; *Friends of Animals, Inc v. Associated Fur Mfrs, Inc*, 46 N.Y.2d 1065 (1979).

“The essential elements of a breach of contract cause of action are the existence of a contract, the plaintiff’s performance pursuant to the contract, the defendant’s breach of his or her contractual obligations, and damages resulting from the breach.” *Morrow v. Vibration Mounting & Controls, Inc.*, 223 A.D.3d 736, 737 (2d Dep’t 2024) (quoting, *Reznick v. Bluegreen Resort Mgt., Inc.*, 154 A.D.3d 891, 893 (2d Dep’t 2017)). “In New York, the default accrual rule for breach of contract...is that the cause of action accrues when the contract is breached.” *Deutsche Bank Natl Tr. Co. Tr. for Harborview Mtge. Loan Tr. v. Flagstar Capital Markets Corp.*, 32 N.Y.3d 139, 145 (2018) [citations omitted]. “Specific performance is an appropriate remedy for a breach of contract concerning goods that “are unique in kind, quality or personal association” where suitable substitutes are unobtainable or unreasonably difficult or inconvenient to procure.” *Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 415 (2001). “A party seeking specific performance of a real estate contract must establish that it was ready, willing, and able to perform its obligations under the contract “on the original law day or, if time is not of the essence, on a subsequent date fixed by the parties or within a

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reasonable time thereafter”. *Zeitoune v. Cohen*, 66 A.D.3d 889, 891 (2d Dep’t 2009), (quoting *Ferrone v. Tupper*, 304 A.D.2d 524, 525 (2d Dep’t 2003)). “What constitutes a reasonable time to perform turns on the circumstances of the case.” *Point Holding, LLC v. Crittenden*, 119 A.D.3d 918, 919 (2d Dep’t 2014), (citing *Revital Realty Group, LLC v. Ulano Corp.*, 112 A.D.3d at 904 (2d Dep’t 2013)). “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.” *Id.* If plaintiff fails to establish that he was “ready, willing, and able to satisfy his obligations...” under the contract of sale, recovery is barred under theories of specific performance and breach of contract. *Stojowski v. D’sa*, 28 A.D.3d 645 (2d Dep’t 2006); *Novello v. 215 Rockaway, LLC* 70 A.D.3d 909 at 909-910, (2d Dep’t 2010).

In the case at bar, it is undisputed that a contract of sale was signed by the parties on May 13, 2022, which by the terms of the contract set a closing date on or about June 13, 2022. In accordance with its obligations under paragraph 3 of the contract, plaintiff wire transferred a downpayment of \$10,000.00 to be held in escrow by defendant’s attorney on May 13, 2022. NYSCEF #21. Thereafter, plaintiff alleges that defendant requested and was granted several adjournments of the closing date. Defendant allegedly requested an initial adjournment to evict her brother from the premises. NYSCEF Doc #33. Defendant then allegedly requested an additional adjournment to vacate judgments under index numbers 521533/2016 and 515220/2020 that were discovered by plaintiff after examination of the title. NYSCEF #12. The eviction of the defendant’s brother was allegedly completed at the end of August 2022. *Id.* Plaintiff then granted defendant more time to vacate the judgments. *Id.* On November 16, 2022, plaintiff became aware that defendant was not successful in vacating the judgments. *Id.* Thereafter on November 16, 2022, plaintiff sent to defendant and her attorney a letter advising that time was of the essence (“TOE letter”), and that closing would occur on December 23, 2022. NYSCEF #15. Notably, the plaintiff’s complaint fails to allege a date of breach and it is devoid of facts establishing defendant’s breach after time was made of the essence. In fact, defendant did not breach the contract because the date provided in the TOE letter by plaintiff had not yet passed. Plaintiff’s contention that the defendant was unable or unwilling to close because of the judgments and eviction proceedings is unavailing because neither occupancy of the premises nor open judgments constitute defects in title that prevent closing pursuant to the contract of sale. *See, Ex. 1, ¶ 20, 33-34. On November 16, 2022, the same day the TOE letter was sent scheduling the closing for December 23, 2022, plaintiff commenced this action.* This action is premature and will be dismissed because no cause of action for breach of contract existed on the date of commencement. *See Drucker v. N.Y. City Agency FISA*, 8 A.D.3d 666, 778 N.Y.S.2d 890 (AD 2<sup>nd</sup> Dept. 2004). (*Infinity Health Prods., Ltd. v. Eveready Ins. Co.*, 67 AD3d 862, 890 N.Y.S.2d 545 [AD 2d Dept 2009]); *Cf. Mount Sinai Hosp. v. Dust Tr., Inc.*, 117 AD3d 921, 986 N.Y.S.2d 506 [AD 2d Dept 2014]).

Moreover, the court declines to find that the defendant anticipatorily breached the contract. “An anticipatory breach of a contract...can be either a statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach or a voluntary affirmative act which renders the obligor unable or apparently unable to perform without such a breach.” *Costea v. Vemen Mgmt. Corp.*, 213 A.D.3d 634, 637 (2d Dep’t 2013) (citations omitted). “For an anticipatory repudiation to be deemed to have occurred, the expression of intent not to perform by the repudiator must be positive and unequivocal.” *Id.* Plaintiff neither shows that the defendant made any statements communicating her intention to breach, nor that her conduct evidenced a voluntarily and affirmative act to breach the contract.

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The court notes that absolutely no documentary proof was provided that the plaintiff actually had the funds to proceed to closing. *See Ashkenazi v Miller*, 190 AD3d 668, 671 [2d Dept 2021]:

‘In moving for summary judgment on a complaint seeking specific performance of a contract, the plaintiff purchaser must submit evidence demonstrating financial ability to purchase the property in order to demonstrate that it was ready, willing, and able to purchase such property’ (*Grunbaum v Nicole Brittany, Ltd.*, 153 AD3d 1384, 1385, 61 NYS3d 146 [2017]; *see Kaygreen Realty Co., LLC v IG Second Generation Partners, L.P.*, 78 AD3d 1010, 1015, 912 NYS2d 246 [2010]). ‘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 v Kucher*, 34 AD3d 726, 728, 826 NYS2d 104 [2006]; *see GLND 1945, LLC v Ballard*, 172 AD3d 1330, 1331, 102 NYS3d 78 [2019]).

Based on the foregoing, it is

**ORDERED** that 3022 Avenue I Partners, LLC’s motion for summary judgment for breach of contract and specific performance (Motion Seq. #1) is **DENIED** and the complaint is **DISMISSED**; and it is further

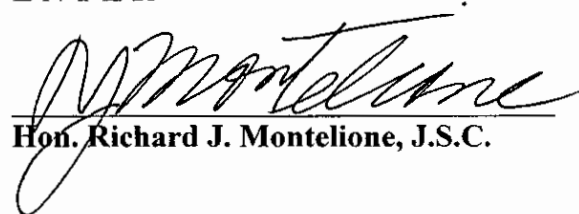
**ORDERED** that the branch of 3022 Avenue I Partners, LLC’s motion to strike defendant’s affirmative defenses is **DENIED** as academic and its motion to dismiss the first counterclaim of breach of contract, second counterclaim for declaratory judgment, deeming the contract of sale null and void, third counterclaim of lack of standing, and fourth counterclaim of undue influence are **DENIED** as there are issues of fact; and it is further

**ORDERED**, that defendant Annette E. Logan’s cross motion to amend her answer is **DENIED** as moot; and it is further

**ORDERED** that all other requests for relief are **DENIED**.

This constitutes the decision and order of the court.

**ENTER**

  
Hon. Richard J. Montelione, J.S.C.

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KINGS COUNTY CLERK  
FILED