| **One Harbor Point Sq. LLC v Birch Real Estate Servs. LLC** |
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| 2025 NY Slip Op 32037(U) |
| June 4, 2025 |
| Supreme Court, New York County |
| Docket Number: Index No. 651906/2023 |
| Judge: Melissa A. Crane |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 60M

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ONE HARBOR POINT SQUARE LLC and TWO HARBOR POINT SQUARE LLC,

Plaintiffs,

- against -

BIRCH REAL ESTATE SERVICES LLC,

Defendant.

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| **INDEX NO.** | 651906/2023 |
| **MOTION DATE** | 06/17/2024, 06/17/2024 |
| **MOTION SEQ. NO.** | 011 012 |

**DECISION + ORDER ON MOTIONS**

**HON. MELISSA A. CRANE, J.S.C.:**

The following e-filed documents, listed by NYSCEF document number (Motion 011) 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 339, 438, 439, 440, 441, 442, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 501

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

The following e-filed documents, listed by NYSCEF document number (Motion 012) 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 305, 306, 307, 308, 309, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 443, 444, 502, 503, 504

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

Upon the foregoing documents, plaintiffs' motion for summary judgment in motion sequence number 011 and defendant's motion for summary judgment in motion sequence number 012 are denied.

**Background**

This action involves a dispute over failed agreements for the purchase and sale of office buildings in Stamford, Connecticut. In sequence 011, plaintiff sellers move for summary judgment, declaring that defendant buyer defaulted in its duty to perform contractual obligations with reasonable diligence, and that sellers are therefore entitled to be awarded defendant's deposit as liquidated damages. Plaintiffs also seek to recover attorneys' fees. In sequence 012, buyer seeks summary judgment, declaring that sellers anticipatorily repudiated their agreements by falsely asserting that buyer had defaulted on its contractual obligations, and awarding buyer the return of its deposit, as the parties' agreements required.

Plaintiffs One Harbor Point Square LLC ("One Harbor") and Two Harbor Point Square LLC ("Two Harbor," together with One Harbor, "Harbor") are Delaware limited liability companies that share business offices in Stamford, Connecticut (amended complaint [complaint] ¶¶ 9, 11 [NYSCEF 184]). They are affiliates of Building & Land Technology Corporation, a property development firm, also based in Stamford (affirmation of Kamille Perry, Esq. [Perry affirmation], ¶ 6 [NYSCEF 183], ex 4 [deposition tr of Ted Ferrarone] at 11:22-12:8, 13:21-14:7, and 16:6-19 [NYSCEF 187]). One Harbor owns 2200 Atlantic Street and Two Harbor owns 100 Washington Boulevard (collectively, the Harbor Properties) (*id.* at 25:15-26:2, 26:8-25 and 28:2-25). Defendant Birch Real Estate Services LLC (Birch) is a New York limited liability corporation that maintains offices in Jersey City, New Jersey (complaint, ¶13).

Harbor alleges that, after a competitive bidding process, it agreed to sell the Harbor Properties to Birch pursuant to the terms of two purchase and sales agreements (PSAs) (*id.* ¶2),[1] that it contends "were not subject to any financing contingencies" (*id.* ¶3).

Harbor asserted seven causes of action against Birch: (i) One Harbor's breach of contract claim; (ii) One Harbor's declaratory judgment claim; (iii) One Harbor's claim for fraud; (iv) Two Harbor's breach of contract claim; (v) Two Harbor's declaratory judgment claim; (vi) Two Harbor's fraud claim; and (vii) Two Harbor's breach of contract claim relating to attorneys' fees. The Court previously dismissed Harbor's third and sixth causes of action for fraud in its decision and order entered September 14, 2023 (NYSCEF 67), and so only its first, second, fourth, fifth, and seventh causes of action remain.

In its verified answer, affirmative defenses, and counterclaims (answer [NYSCEF 185]), Birch generally denies Harbor's allegations in the complaint and asserts ten affirmative defenses: (i) anticipatory repudiation; (ii) laches/equitable estoppel; (iii) unclean hands or *in pari delicto*; (iv) contractual waiver clauses; (v) contractual merger clauses; (vi) absence of condition precedent to Defendant's performance; (vii) impracticability of performance/frustration of purpose; (viii) failure to mitigate damages; (ix) liquidated damages barred as unenforceable penalties; and (x) failure to name necessary parties (*id.* ¶¶ 164-73).[2]

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[1] In its moving papers in sequence 011, Harbor states that the PSAs are "nearly identical" in form and cites to provisions therein by the sections in that they appear in both "PSAs" (*see* memorandum of law in support at 2-3 [NYSCEF 234]). Birch adopts the same practice in referencing the PSAs in its opposition (*see* memorandum in opposition, at 5 (NYSCEF 442).

[2] In sequence number 007, Harbor moved to dismiss Birch's tenth affirmative defense and first counterclaim (*see* notice of motion, dated December 15, 2023 [NYSCEF 104]). The Court granted Harbor's motion in its decision and order dated April 16, 2024 (NYSCEF 140).

As its counterclaims, Birch assert causes of action for breach of contract and for declaratory relief against both Harbor entities (*id.* ¶¶ 174-226).

In its reply (NYSCEF 186), Harbor generally denies Birch's allegations in its counterclaims and affirmative defenses and asserts five affirmative defenses, contending that Birch's counterclaims are barred on the grounds of: (i) Birch's prior material breaches of the PSAs; (ii) equitable estoppel; (iii) waiver; (iv) unclean hands; and (v) laches.

In sequence 011, Harbor moves for summary judgment in its favor on its remaining causes of action, and against Birch on Birch's second counterclaim (*see* notice of motion [NYSCEF 182]).[3] In sequence 012, Birch moves for summary judgment "on all claims and counterclaims, in favor of" Birch and against Harbor (*see* notice of motion [NYSCEF 237]).

**The Transactions**

On October 10, 2022, Birch and Harbor entered "nearly identical" Purchase and Sale Agreements (PSAs) (annexed as exs 10 and 11 [NYSCEF 196 and 198] to the Perry affirmation [NYSCEF 183]) for the Harbor Properties at a total price of $205 million (complaint [NYSCEF 184] ¶¶ 16, 36).

On October 12, 2022, Birch escrowed its combined "Initial Deposit" of "$1 million in earnest money," $590,897.00 of that was apportioned to the One Harbor PSA and $409,103.00 to the Two Harbor PSA (*id.* ¶¶ 24, 44). "Additional Deposits" of $1,772,690.00 for One Harbor and

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[3] Birch's second counterclaim seeks a declaration that it was wrongful for Harbor to demand to be paid the Deposits that Birch had made, and that Birch is entitled to the return of its Deposits from escrow, with accrued interest (*see* answer ¶ 224 *et seq.* [NYSCEF 185]).

$1,227,310.00 for Two Harbor were made later (*see id.* ¶¶ 29, 49), bringing Birch's total deposit for the Harbor Properties to $4,000,000.00 (Deposit).[4]

The PSAs "required that Birch assume the existing loans" on the Harbor Properties, that included both senior loans and mezzanine financing. "Lender Consent" [5] was necessary for Birch to assume the existing loans. The PSAs "obligated Birch to make 'reasonable efforts' to secure Lender Consent" (complaint ¶¶ 18, 38).

The PSAs also provided for a "Feasibility Period," running from the October 10, 2022, their effective date, to October 31, 2022, that was intended to give Birch time to conduct due diligence on the Harbor Properties (PSAs [NYSCEF 196 and 198], Section 3 [a]). During the Feasibility Period, the Initial Deposits Birch made for the Harbor Properties were "fully refundable to Buyer [Birch], at its sole election, and without any objection or approval from Seller [Harbor], prior to the expiration of the Feasibility Period" (*id.* Section 4 [a] [1]). However, Birch waived the Feasibility Period pursuant to Section 3 (c) of the PSAs. This section provides that it "shall automatically terminate unless Buyer shall provide notice. . . to Seller at any time prior to the expiration of the Feasibility Period that Buyer has elected to proceed and waive the Feasibility Period, in that event the Agreements[s] shall continue on the terms set forth herein" (*id.*).

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[4] In Section 4 (a) of the PSAs, the "Deposit" is defined as the "Initial Deposit" and the "Additional Deposit," to be paid by Buyer, and "held, applied and released by the Escrow Agent in accordance with the Escrow Provisions" of the PSAs. Subsection 4 (a)(ii) thereto provides that "[t]he Deposit will be non-refundable to Buyer in all respects *except as expressly set forth in this Agreement*" (emphasis added).

[5] "Lender Consent" is defined in Section 16 (b) of the PSAs as "(x) Lender delivering its written consent to the transfer of the Premises to, and the assumption of the Existing Loan Documents, by Buyer, and (y) Lender releasing Seller and all of the existing guarantors and/or indemnitors under the Existing Loan. . .. Seller and Buyer acknowledge that Lender may grant or deny the Lender Consent with respect to the existing loan in its sole discretion."

Birch provided notice of that waiver. On October 31, 2022, Birch's counsel wrote letters to Ted Ferrarone of Harbor, transmitted by e-mail and Federal Express, giving notice that Birch had elected to waive the PSAs' Feasibility Periods for each of the Harbor Properties (*see* Perry affirmation, ex 12 [NYSCEF 200]). In a chain of e-mails, commencing with the e-mail that accompanied the waiver notices, Birch's counsel acknowledged Harbor's receipt of the notices and confirmed the delivery of the $4 million combined "Additional Deposits" from Birch under Section 4 (a) (ii) of the PSAs (*id.* ex 13 [NYSCEF 201]).

On November 2, 2022, Harbor sent letters by overnight courier, requesting loan assumption application packages from each of the lenders that had provided senior and mezzanine loans to the Harbor Properties (*see id.* ex 19 [NYSCEF 208]).

Harbor alleges that Birch was slow in following through on these loan assumption application packages. Harbor notes that, on November 3, the day after its request, its lender Wells Fargo (WF) e-mailed an assumption application request form to Harbor, for its use in providing to the bank information it needed about the proposed borrower, its authorized representative, and its legal counsel, that it forwarded on to Birch that same day (*id.* ex 20 [NYSCEF 209]). Harbor complains that Birch took until November 11, 2022, eight days later, to respond (*id.* ex 21 [NYSCEF 210]).

In opposition, Birch asserts that the period between its receipt and response was only four business days, as it included a weekend, Election Day, and Veterans' Day, when the office of Delaware's Secretary of State is closed. Birch's response time, however, was arguably only three

business days, because Birch received the assumption application request form from Harbor on a business day, but after normal office hours.[6]

LNR Partners, LLC (LNR), a special servicer Harbor's lenders appointed to underwrite Harbor's senior loan assumptions, sent pre-negotiation letter agreements to Two Harbor and Birch, dated November 8, 2022, and One Harbor and Birch, dated November 21, 2022, for their respective loans. LNR's agreements included extensive document requests, credit inquiry authorizations, and loan history certifications, that it needed to process Harbor's applications (*see id.* ex 16 and 28 [NYSCEF 204 and 217]).

LNR also required Harbor, as borrower, to prepay non-refundable processing fees and advances toward LNR's anticipated legal fees and expenses (*see* LNR November 15 and December 1, 2022 letters to Harbor (*id.* exs 22 and 23 [NYSCEF 211 and 212]). All told, the November 15 letter to Two Harbor and the December 1 letter to One Harbor sought prepayment of $120,000.00 (*id.* exs 22 and 23]). Harbor asserts that LNR directed its fee prepayment letters to "the parties." These letters, however, were only addressed to the Harbor Properties, with copies to LNR's attorneys and its loan servicing department (*see id.*).

Harbor notes that Section 16 (c) of the PSAs (*id.* exs 10 and 11) required Birch to pay LNR's processing and legal fees. Harbor alleges that, "without explanation," Birch delayed paying processing fees until December 8, 2022, and did not pay LNR's legal fees until December 16, 2022 (*citing id.* ex 24 at HP0001170–73). Harbor, however, did not state the dates that it

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[6] The e-mail thread in Perry affirmation ex 20 (*id.* at Bates Number HP 0000861), shows that Harbor did not forward the WF email to Birch, that annexed the Assumption Application Request Form, until after 7 pm on Thursday November 3.

forwarded LNR's letters to Birch, or the dates that it asked Birch to make payments of these fees and expenses to LNR on its behalf.

Between November 2022 and March 2023, LNR sought to complete the loan documentation. Harbor faults Birch for preventing LNR from doing so. For example, Harbor points to documentation that shows Birch's principal and proposed guarantor, Mark Meisner, satisfied the lender's net worth requirement but not the minimum liquidity requirement (*see id.* ex 17, excerpts of deposition transcript of Ann Hambly, at 317:23–11 [NYSCEF 205] and ex 18, excerpts of deposition of Ana Nunez, at 54:4-25; 79:4-25, and 89:11-21 [NYSCEF 207]).

Birch takes issue with these criticisms and asserts, among other things, that it complied with all of the lenders' outstanding document and information requests, and requests for legal fees, deposits, and processing fees. Birch also notes that Birch's principal had shown that he met the net worth requirement "and had the ability to meet the liquidity requirement" before Harbor prematurely repudiated the PSAs (Hambly expert report, 37 f and f [v] [NYSCEF 378]; *see also* affirmation of Mark Meisner, ¶38 [NYSCEF 238] [Birch's principal attests that his "net worth and liquidity were in excess of the [lenders'] minimum requirements," that lead Birch to designate him as its proposed guarantor on or about November 25, 2022).

On February 22, 2023, by e-mails and by Federal Express, Harbor gave Birch written notices under Section 15 (a) of the PSAs, asserting that Birch had "defaulted in the performance of its material obligations to be performed prior to the Closing Date" by failing to make diligent efforts to procure its Lenders' Consent to Birch's assignment and assumption of Harbor's existing debt and gave Birch 10 days from February 28, 2023 (*i.e.,* March 10) to cure its alleged

default (*see id.* ex 35 [NYSCEF 225]).[7] On March 16, 2023, again by e-mail and Federal Express, Harbor gave Birch written notice of termination of the PSAs (*see id.* ex 36 [NYSCEF 226]).

Birch contends that it was not remiss in providing information and documents to LNR on a timely basis, but notes that LNR continued to make requests for additional information and documents until February 14, 2023 (*see* affirmation of Drew Rosenberg, ¶ 43). Birch also asserts that it fulfilled LNR's last pending request for information and documents by March 14, 2023, two days before Harbor's written notice of termination (*id.* ¶¶ 50-51 [NYSCEF 244], citing ex 34 thereto [NYSCEF 278]).

**Discussion**

**Summary Judgment Standard**

"It is well established 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'" (*Stonehill Capital Mgt., LLC v Bank of the W.*, 28 NY3d 439, 448 [2016], *quoting Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Once the movant makes the proper showing, '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 that require a trial of the action'" (*id.*, *quoting Alvarez* 68 NY2d at 324).

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[7] The notice indicated that February 28, 2023 was the 120th day following the expiration of the Feasibility Period. This period was mentioned in Section 16 (e) of the PSAs, that governs "Existing Loan Agreements" but is not referenced at all in Section 15, that governs "Default and Termination."

"The facts must be viewed in the light most favorable to the non-moving party" (*id.* [internal quotation marks and citation omitted]). "However, bald, conclusory assertions or speculation and 'a shadowy semblance of an issue' are insufficient to defeat summary judgment" (*id.* [internal quotation marks and citation omitted]), "as are merely conclusory claims" (*id.* [citation omitted]).

**The Motions**

In sequence 011, Harbor asserts that it is entitled to summary judgment on: (i) its first claim for breach of contract; (ii) its second claim, for a declaratory judgment (iv) its fourth claim, for breach of contract; (v) its fifth claim, for a declaratory judgment; and (vi) its seventh claim to recover Two Harbor's attorneys' fees. Harbor also seeks summary judgment dismissing Birch's second counterclaim for a declaratory judgment that Birch is entitled to recover its Deposit, because Birch defaulted on its agreement under the PSAs (NYSCEF 196-199)[8] by failing to exercise "reasonable and diligent efforts" to secure consent of Harbor's lenders to the assignment and assumption of its loans by Birch within 120 days of the lapse of the "Feasibility Period."[9]

A. The 120-Day Deadline and Other Deadlines

Harbor asserts that Birch breached the PSAs by failing to make reasonable and diligent efforts to obtain Lender Consent within the 120-day window, especially considering the PSAs' time-is-of-the-essence provisions. This argument appears to be unfounded. First, neither the

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8 Exhibit 196 is the redacted version of the One Harbor PSA. Exhibit 197 is the One Harbor PSA filed under seal. Exhibit 198 is the redacted Two Harbor PSA. Exhibit 199 is the same filed under seal.

9 The "Feasibility Period" is defined in Section 3 (a) of the PSAs as the period between October 10, 2022, *i.e.*, the "Effective Date" of the Agreements (*see* initial paragraph of PSAs), and October 31, 2022, that was intended to allow Birch time to conduct due diligence of the Harbor Properties.

120-day period to which Harbor refers, nor the loan assumptions that Harbor's lenders were to have underwritten, are mentioned in Section 15 of the PSAs, that governs "Default and Termination."

Subsection 15 (a) provides that if Birch, as

> "(i) Buyer shall default in the Payment of the Purchase Price or in the performance of any of its other material obligations to be performed on the Closing Date, *or (ii) Buyer shall default in the performance of any of its material obligations to be performed prior to the Closing Date and, with respect to any default under this clause (ii)*, such default shall continue for ten (10) days after notice thereof from [Harbor as] Seller to Buyer, then Seller shall have the right, as its sole and exclusive remedy, to terminate this Agreement by notice to Buyer. . . and to receive the Deposit from Escrow Agent as liquidated damages for Buyer's default hereunder. . ."

(emphasis added).

Section 16 of the PSAs, titled "Existing Loan Agreement," governs the parties' rights and obligations with respect to the prospective assignment and assumption of Harbor's existing debt. From the language of the section, it appears that the parties anticipated delays, and the concomitant need for them to work together to obtain "Lender's Consent" to Birch's assignment and assumption of Harbor's "Existing Loan."[10]

Section 16 (c) of the PSAs provide that:

> "Buyer covenants and agrees, (x) to promptly provide Lender with all documentation reasonably required by Lender in order for Lender to issue such assumption application package, (y) within ten (10) business days following the date of receipt of such application package, to submit an initial application to the

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[10] Subsection (a) defines the "Existing Mortgage" as the mortgage and mezzanine financing encumbering the particular Harbor Property covered by each PSA. It defines the lender described in the Existing Mortgage, with its successors, assigns and servicers, as "the Lender," and these encumbrances, collectively, as the "Existing Loan, evidenced by the "Existing Loan Agreement." The "Existing Loan Documents" is defined as the Existing Loan, the Existing Loan Agreement, the Existing Mortgage, and all other loan documents evidencing the debt.

> Lender for the Lender Consent,[11] and (z) to designate and provide in favor of Lender the obligations of an entity meeting the net worth and liquidity tests set forth in the Existing Loan. *Buyer and Seller shall use reasonable efforts to obtain the Lender Consent. Each party shall keep the other party apprised of the status of its conversations, meetings and negotiations with Lender* (or any servicer or special servicer or similar party) *with respect to seeking the Lender Consent . . .*"

(emphasis added).

Section 16 (e) of the PSAs provides that, if the Lender rejects Birch's request for consent to its assumption of Harbor's Existing Loan, or if Lender fails "to either consent to or reject" assumption within the 120-day period following the lapse of the Feasibility Period, "despite Buyer's and Seller's diligent efforts to procure such . . . assumption" or Lender consents to such assumption but on terms that are not acceptable to Birch, then Birch, as "Buyer shall have the right to terminate this Agreement" and retrieve its deposit.

If Birch did not then terminate the PSAs, Harbor would have had the right to terminate the Agreement upon notice, but the Escrow would still "pay the Deposit to the Buyer [i.e., Birch]" (*id.*). Thus, the failure to obtain Lender consent within 120 days is not in and of itself an event of default.

Nor were the PSAs' "Time is of the Essence" clauses triggered automatically by the expiration of the Feasibility Period, as Harbor contends. Section 10 (a) provides that:

> "[t]he parties shall cause such deliveries, satisfaction and performance [of obligations required to be performed prior to or at the Closing] *to occur on the date that is the later of* (i) thirty (30) days following the expiration of the Feasibility Period, or (ii) the date that is fifteen (15) days following the receipt of Lender's approval of the assignment and assumption of the Existing Loan and authorization to close and all other terms and conditions set forth in Section 16, or

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[11] "Lender Consent" is defined in Section 16 (b) of the PSAs as "(x) Lender delivering its written consent to the transfer of the Premises to, and the assumption of the Existing Loan Documents, by Buyer, and (y) Lender releasing Seller and all of the existing guarantors and/or indemnitors under the Existing Loan. . .. Seller and Buyer acknowledge that Lender may grant or deny the Lender Consent with respect to the existing loan in its sole discretion."

> (iii) the date that is 15 days following the lender's approval of the assignment and assumption of a certain existing loan and authorization to close and all other related terms and conditions in that certain Purchase and Sale Agreement dated as of the Effective Date (the "Other Transaction Agreement")[12] by and between Two Harbor Point Square LLC, an affiliate of Seller, as seller, and Buyer or an affiliate of Buyer, as buyer (the "Other Transaction") (or, if such date is not a business day, then the immediately following business day) (as such date may be postponed pursuant to Section 10, Sections 6(f), and 6(h)[13] hereof, the "Scheduled Closing Date"), unless another date in writing shall be mutually agreed by the parties."

There is no formal date or time specified in the PSAs for Birch's performance. Section 10 (a) of the PSAs provides that the "Closing" of the purchase and sale of the Harbor Properties "shall occur on the Scheduled Closing Date through the Escrow Agent." Subsection (a) also provides that the latter of three conditions precedent could trigger the Scheduled Closing Date, or that the parties could merely agree to a certain Scheduled Closing Date in writing. Neither party claims that any of these events have occurred.

Although the PSAs provide that "TIME IS OF THE ESSENCE with respect to all of Buyer's and Seller's obligations under this Agreement,"[14] the PSAs did not set specific closing dates or deadlines for Birch's assumption-related performance to which these time-of-the-essence clauses would attach. The "proper meaning of the phrase [time is of the essence] is that

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[12] Section 10 (a) of the One Harbor PSA (NYSCEF 196), indicates that the Scheduled Closing Date for the One Harbor transaction could be triggered by receipt of its Lender's Consent to Birch's assignment and assumption of its Existing Loan, or by Two Harbor's receipt of its Lender's Consent to Birch's assignment and assumption of Two Harbor's Existing Loan. The same holds true for Section 10 (a) of the Two Harbor PSA (NYSCEF 198).

[13] Subsections (f) and (h) of Section 6 relate to "liens, encumbrances or other title exceptions that were not disclosed in the Title Documents," and extensions of time allotted to Harbor, to cure any such exceptions.

[14] "Time is of the Essence. *TIME IS OF THE ESSENCE* with respect to all of Buyer's and Seller's obligations under this Agreement" (Section 18 (q) of the PSAs [NYSCEF Doc Nos. 196 (One Harbor PSA) and 198 (two Harbor PSA)]).

the performance by one party at the time specified in the contract or within the period specified in the contract is essential in order to enable him to require performance from the other party" (*Blackwell v Mahmood*, 120 Conn App 690, 699 n4, 992 A2d 1219, 1227 n4 [Conn App Ct 2010] ["Its commonly understood meaning is that insofar as a time for performance is specified in the contract, failure to comply with the time requirement will be considered to be a material breach of the agreement."] [emphasis added]). As discussed above, the 120-day window was not the deadline for Birch's performance relating to lender consent/assumption, and the closing date was not formally designated or triggered (*see e.g. Demattia v Mauro*, 86 Conn App 1, 8, 860 A2d 262, 267 [Conn App Ct 2004] ["[e]ither party to a real estate contract may make formal demand that title be closed by a certain day when time is not already of the essence, but the date demanded for performance must be reasonable"], citing *Bethlehem Christian Fellowship, Inc. v Planning and Zoning Com'n of Town of Morris*, 58 Conn App 441, 446, 755 A2d 249, 253 [Conn App Ct 2000]).

Thus, the court cannot rule, as a matter of law, that Birch breached the PSAs by failing to reasonably and diligently pursue lender consent within the meaning of the contracts.

B. Reasonable Efforts

Harbor mistakenly argues that Birch's obligation to close on the transaction[s] was not contingent upon securing financing. To the contrary, Birch obtaining consent from the Lender was a material term of the transaction:

> "*[t]he obligations of Seller and Buyer to consummate the transactions contemplated by* [the PSAs] "*are expressly subject to and contingent upon (x) Lender delivering its written consent to the transfer of the Premises to, and the assumption of the Existing Loan Documents by, Buyer*, and (y) *Lender releasing Seller and all of the existing guarantors and/or indemnitors under the Existing Loan[s]*. . . from all obligations and liabilities under the Existing Loan Documents that accrue after the Closing. The items described in the foregoing clauses (x) and (y) with respect to the Existing Loan[s] are hereinafter collectively referred to as

> the 'Lender Consent.' *Seller and Buyer acknowledge that Lender may grant or deny the Lender Consent with respect to the Existing Loan[s] in its sole discretion*"

(PSAs, Section 16 (b) [emphasis added]).

Thus, if there was no Lender consent, there was no deal (*see Li v Yaggi*, 185 Conn App 691, 701, 198 A3d 123, 128 [Conn App Ct 2018]; *see also Luttinger v Rosen*, 164 Conn 45, 47, 316 A2d 757, 758 [1972] ["If the condition precedent is not fulfilled the contract is not enforceable."]). The financing contingency provision in the PSAs states that both Birch and Harbor were obligated to "use reasonable efforts to obtain Lender Consent" and "reasonably cooperate in connection with Buyer's efforts to obtain the Lender Consent" (PSAs, Section 16 [c]). Connecticut law also implies a similar covenant (*see Phillipe v Thomas*, 3 Conn App 471, 473, 489 A2d 1056, 1059 [Conn App Ct 1985]). Considering the foregoing, securing financing for the transactions was a condition precedent to Birch's obligation to purchase the Harbor Properties. However, whether Birch made reasonable efforts to secure financing cannot be answered at this juncture because questions of material fact remain, requiring trial.

"[W]hether there was a breach of contract is ordinarily a question of fact" (*McCoy v Brown*, 130 Conn App 702, 707, 24 A3d 597, 600 [Conn App Ct 2011]). "Reasonableness . . . is an objective standard, involving an analysis of what a person of ordinary prudence would do given the circumstances, without accounting for any particular knowledge or skill. . . . Whether the [buyers'] actions constituted reasonable efforts to satisfy the contractual condition is a factual determination for the trial court" (*id.* at 708 [internal quotation marks and citation omitted]).

Neither Harbor nor Birch are entitled to summary judgment. As trier of fact, the scope of the Court's inquiry here will be to determine whether, given the circumstances: (1) Birch's efforts to obtain Lender's Consent to its assignment and assumption of Harbor's Existing Debt

were reasonable; (2) whether Harbor's demand that Birch close title by March 10, 2023, on 10 days' notice, was reasonable; and (3) whether Harbor repudiated the Agreement.

C. Attorneys' Fees

Plaintiffs also argue that Two Harbor is entitled to summary judgment on its seventh cause of action for attorneys' fees, by virtue of Section 16 (d) of the Two Harbor PSA (NYSCEF 197), that states, in pertinent part, that "Buyer, at its sole cost and expense, shall be responsible for, whether or not Closing occurs, any and all fees, costs and expenses of Buyer and Lender pertaining to the seeking and/or obtaining of the Lender Consent and recording any assignment and/or assumption agreements . . . ."

In opposition, Birch argues that Harbor anticipatorily repudiated the PSAs by falsely declaring that Birch had defaulted in its performance under the PSAs and that this relieved Birch from any duty it had to Harbor, citing *McKenna v Woods* (21 Conn App 528, 534, 574 A2d 836, 839 [Conn App Ct 1990] ["It has also long been accepted that an anticipatory breach discharges any remaining duties of the nonbreaching party, and once there has been a repudiation that party is no longer required to hold himself ready, willing and able to perform."]). The determination of this issue must also await trial, as the winning party on these competing breach of contract claims remains to be seen.

D. Affirmative Defenses

Finally, Harbor argues that all nine of the remaining affirmative defenses[15] that Birch asserted in its answer (NYSCEF 185) fail. Birch's affirmative defenses largely mirror Birch's

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[15] In motion sequence number 007 herein, Harbor moved to dismiss Birch's tenth affirmative defense and first counterclaim (*see* notice of motion, dated December 15, 2023 [NYSCEF Doc No. 104]). This Court granted Harbor's motion in its decision and order dated April 16, 2024 (NYSCEF Doc No. 140).

counterclaims. As discussed above, there are triable fact issues, and it is premature to dismiss Birch's first through fourth and sixth through seventh affirmative defenses. However, the court dismisses Birch's fifth defense (merger clauses), eighth defense (failure to mitigate), and ninth defense (unenforceable penalty). There are no fact issues concerning these three defenses and Birch does not respond to Harbor's arguments relating to them.

E. Experts

Almost all of the material issues raised in sequence 012 were also raised in sequence 011, with the exception of Birch's question of whether Harbor needed, but failed, to present competent expert testimony to support its claim that Birch breached the PSAs. Expert testimony is not necessary. This dispute may be complicated, but is not beyond the ken of the trier of fact. "Although expert testimony may be helpful in many instances, it is required only when the question involved goes beyond the field of ordinary knowledge and experience of the trier of fact" (*State v Buhl*, 321 Conn 688, 700, 138 A3d 868, 878 [2016] [internal quotation marks omitted]; *see also ERA Cap. L.P. v Soleil Chartered Bank*, 216 AD3d 592, 593 [1st Dept 2023] ["No expert is necessary to explain the standard of care for imparting correct information to the judge at a bench trial."]). Therefore, the lack of an expert is not fatal to Harbor's claims.

**Conclusion**

The Court has considered the parties' remaining allegations and finds them unavailing.

Accordingly, it is

ORDERED that plaintiffs' motion for summary judgment in motion sequence number 011 is denied in all respects; and it is further

ORDERED that defendant Birch Real Estate Services LLC's motion for summary judgment in motion sequence number 012 is denied in all respects; and it is further

ORDERED that counsel shall appear for a Pre-Trial conference on June 12, 2025 at noon over VCAP/TEAMs.

6/4/2025
DATE

MELISSA A. CRANE, J.S.C.

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