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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER Justice

PART 15

Index Number : 114058/2011
NEMON CORP.
vs
45-51 AVENUE B, LLC
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to ____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1

Answering Affidavits — Exhibits _____ | No(s). 2, 3

Replying Affidavits _____ | No(s). 4, 5

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

FILED

JUN 12 2012

NEW YORK COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 6/4/12

_____, J.S.C.

HON. EILEEN A. RAKOWER

1. CHECK ONE: ..... [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: [ ] GRANTED [ ] DENIED [ ] GRANTED IN PART [ ] OTHER

3. CHECK IF APPROPRIATE: ..... [ ] SETTLE ORDER [ ] SUBMIT ORDER

[ ] DO NOT POST [ ] FIDUCIARY APPOINTMENT [ ] REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

----------X

NEMON CORP.,

Plaintiff,

- against -

45-51 AVENUE B, LLC,

Defendant.

----------X

Index No.
114058/11

**DECISION and ORDER**

Mot. Seq.,
001



HON. EILEEN A. RAKOWER

This action arises out of a contract of sale dated April 14, 2011 as supplemented by two riders (the "Contract") pursuant to which plaintiff Nemon Corp. ("plaintiff"), as buyer, agreed to purchase property located at 54-51 Avenue B, New York, New York(the "Property"),owned by defendant 45-51 Avenue B, LLC ("defendant") for the purchase price of $6,825,000. The Property was comprised of three commercial units and eight residential units. Plaintiff commenced this action on December 14, 2011 seeking, among other relief, specific performance of the Contract and the return of its $150,000 deposit.

Presently before the Court is defendant's motion for an Order (1) granting summary judgment to defendant pursuant to CPLR §3212; (2) dismissing the Complaint; (2) discharging and cancelling the Notice of Pendency; (3) awarding defendant judgment on its counterclaim; (4) directing payment of the $150,000 deposit held in escrow; (5) directing a hearing to determine the money damages allegedly suffered by defendant; (6) awarding defendant costs, disbursements and attorneys' fees; and (7) imposing sanctions against plaintiff and/or plaintiff's counsel. Defendant alternatively requests an Order directing plaintiff to post a reasonable bond. In support of its motion, defendant submits an affirmation and reply affirmation of its counsel, Eric M. Zim, Esq., and an affidavit of Sameh Jacob, member of the defendant. Annexed to Zim's affirmation, among other exhibits, is a copy of the pleadings, Notice of Pendency, Contract, October 11, 2011 letter from Zim to plaintiff's counsel

establishing Time of the Essence as to transaction closing on November 11, 2011, and plaintiff's October 26, 2011 response.

Plaintiff opposes and cross moves for an Order granting summary judgment in its favor. Plaintiff alternatively requests an Order disqualifying Zim, defendant/seller's counsel. In support of its cross motion, plaintiff submits an affirmation and reply affirmation of its counsel Steven R. Uffner, Esq., and an affidavit of Steven Cromoan, plaintiff's Vice President and principal.

Pursuant to Section 3 of the Contract, the date the transaction was scheduled to close was on or about August 31, 2011. Section 19, "Remedies," provides: "In the event Purchaser fails or refuses to close title, as required hereunder, Seller's sole remedy shall be retain the Deposit as liquidated damages, the parties hereby agreeing that Seller's actual damages shall be impossible to accurately calculate." Section 20, "Litigation," provides: "In the event any party commences litigation to enforce such party's rights hereunder, either party shall be responsible for their own costs and expenses, including all legal fees."

By letter dated October 11, 2011 to plaintiff's counsel, defendant's counsel notified plaintiff that the "Seller was presently willing and able to close title to the Premises" and "has complied with all of the other contractual commitments provided for in the Contract of Sale." The letter stated, "Pursuant to applicable caselaw this notice is intended to contain a 'clear distinct and unequivocal' establishment of Time Being of the Essence as to this matter closing on November 11, 2011 at 11:00 a.m. [at defendant's counsel's offices]." The letter also stated that "[n]o adjournment beyond this date will be granted" and that should plaintiff "fail to close this matter on November 11, 2011, they will be considered in willful default of the Contract of Sale." Plaintiff's counsel responded by letter dated October 26, 2011, which purported to reject defendant's letter on the basis that plaintiff had not complied with its contractual obligations. Plaintiff's letter did not specify any terms and/or conditions that the defendant had failed to comply with.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue

remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. *(Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-52 [1st Dept. 1989]).

"[W]hen parties set down their agreements in a clear, complete document, their writing should . . . be enforced according to its terms." *Vermont Teddy Bear, Inc. v. 538 Madison Realty Co.*, 1 N.Y. 3d 470, 475 (2004) (citations omitted). The Court of Appeals has "emphasized this rule's special import 'in the context of real property transactions, where commercial certainty is a paramount concern, and where . . . the instrument was negotiated between sophisticated, counseled business people negotiating at arm's length." *Id.*

When the seller is ready, willing and able to perform at the time of essence closing and the buyer defaults by failing to proceed to closing, the seller has establish a prima facie entitlement to summary judgment and may retain any funds deposited. *Diplomat Properties, L.P. v. Komar Five Associates, LLC*, 72 A.D. 3d 596, 600 (1st Dept 2010) ("As plaintiff established that it was ready, willing and able to close on the closing date, and defendant failed to demonstrate a lawful excuse for its failure to close, plaintiff was entitled to retain the contract deposit."); *Friedman v. O'Brien,* 287 A.D. 2d 311 *(1st Dept 2001); Capece v. Robbins,* 46 A.D.3d 589, 590 (2d Dept. 2007); *Zahl v. Greenfield*, 162 A.D. 2d 449, 450 (2d Dept. 1990), lv. denied 76 N.Y.2d 709 (1990)). The terms of the parties' contract govern their respective obligations at the time of closing. *Id.*

Here, the Contract did not contain a time of the essence clause. However, "It is well settled that a vendor of real property may convert an agreement in which time is not of the essence to one in which time is of the essence by giving clear and unequivocal notice to the vendee that a specified reasonable time to perform for the completion of his obligation will be deemed of the essence." *Levine v. Sarballo*, 112 A.D. 2d 197, *aff'd*, 67 N.Y. 2d 780. Defendant's October 11, 2011 letter to plaintiff was such a clear and unequivocal notification of defendant's intent to make time of the essence as to the November 11, 2011 closing date.

Plaintiff does not dispute that it did not appear at the closing but disputes that defendant was ready, willing and able to perform at the closing. Plaintiff alleges certain contractual obligations were unsatisfied. As noted earlier, none of these alleged contractual obligations were described or set forth in plaintiff's October 26, 2011 correspondence, which purported to reject defendant's Time of the Essence letter. Specifically, Plaintiff alleges that defendant did not provide or deliver certain documents including a deed, ACRIS transfer forms, tenant estoppel letter, a frontage reconciliation from DEP. Plaintiff also alleges that defendant did not use best efforts to arrange for an assignment of the existing mortgage, evidence satisfaction of an emergency repair lien, or remove any exceptions or objections to title or remedy title defects. Based on the Contract itself, affidavits, and other documentary evidence, defendant was prepared to either satisfy these requirements at the closing day or were not affirmatively obligated to do so based on the parties' agreement.

As for plaintiff's allegation that defendant failed to provide the deed and ACRIS transfer documents, section 10 of the Contract provided that defendant was to provide the same "at or prior to the Closing." Attached to Zim's reply affirmation are e-mail communications in September 2011 evidencing that defendant had forwarded Harry Erreich, a title officer at plaintiff's title company Royal Abstract NY LLC, a revised Correction Deed pursuant to Erreich's instructions which Errich approved. These emails also reflect that Zim's office notified Errich that defendant would execute all documents, including the ACRIS transfer documents at the closing, and that Zim's office completed the ACRIS Tax Preparation Form so that Royal Abstract could prepare the necessary ACRIS forms to accompany the correction deed.

As for plaintiff's allegation that defendant had not cleared title exceptions or remedy title defects, Zim states that the seller was prepared to clear the referenced exceptions to title. As stated in Marcus Jacob's affidavit, the defendant was prepared to have plaintiff's title company collect and/or escrow an appropriate amount to satisfy the emergency repair lien and to execute an affidavit indicating whether the City performed any work at the subject premises, or that the City made a demand for work that could result in charges.

Several of these "contractual obligations" were not affirmative contractual obligations of the defendant based on the terms of the Contract. For example, plaintiff contends that defendant failed to "use best efforts to arrange for an assignment of the existing mortgage." The relevant provision, Section 22.1.1 of the Contract, provides, "The parties acknowledge that this Contract and Purchaser's obligation to purchase

the Premises is not contingent upon the Purchaser obtaining any third-party financing. Seller shall, although no obligation to, use its best efforts to effectuate an assignment of its existing mortgages." Nevertheless, Zim's affirmation and the annexed exhibits set forth defendant's good faith efforts to arrange for the assignment of the existing mortgage to plaintiff's lenders and delay on plaintiff's lender's part to respond to those efforts.

As for plaintiff's allegation that defendant failed to procure and provide the appropriate Tenant Estoppel letters prior to closing, defendant was only obligated to provide Tenant Estoppel letters to "the extent [same] is available" pursuant to paragraph 9(e) of the Second Rider to the Contract. Nonetheless, Zim's affirmation demonstrates that defendant made efforts to procure and provide the appropriate Tenant Estoppel letters prior to the closing.

As for plaintiff's allegation that defendant did not provide a frontage reconciliation from the DEP and certain contract deliverables that were enumerated under paragraph 9 of the Second Rider to the Contract, as per the terms of the Contract, defendant was obligated only to produce the same at closing "to the extent [same were] available." See paragraphs 9(i) of the Second Rider and paragraph 9.

As for plaintiff's allegation with respect to defendant's failure to provide the final certificate of occupancy for Lot 5, defendant was not contractually obligated to provide the same to plaintiff. Pursuant to paragraph 5.1.1 of the Contract, plaintiff accepted the subject premises "AS IS."

As for plaintiff's allegation with respect to the contract deliverables that were enumerated in Section 10 of the Contract, the Contract provided that these documents were to be produced "at or prior to closing." Zim's reply affirmation states that defendant was prepared to produce them at the closing.

The Court finds that defendant met its prima facie burden to establish entitlement of summary judgment dismissing plaintiff's Complaint. Based on affidavits, the Contract, and other documentary evidence submitted in support of its motion, defendant has shown that it was ready, willing, and able to close on the Property and that plaintiff breached the Contract by failing to appear at the closing and consummate the transaction on November 11, 2011. In light of plaintiff's default, defendant is entitled to retain the deposit as liquidated damages in accordance with the

Contract paragraph 19. The Court finds that plaintiff fails to raise a triable issue of fact in opposition and that plaintiff's cross motion for summary judgment lacks merit.

Defendant asserts that the instant action was commenced by the plaintiff with malice, alleges that the commencement of this action and the filing of the notice of pendency has caused injury to the defendant, requests summary judgment on its malicious prosecution claim, and requests that the Court direct a hearing on this issue of damages. Defendant also seeks an Order directing plaintiff to pay costs, disbursements, and attorneys' fees, and imposing sanctions against plaintiff and/or plaintiff's counsel. Pursuant to the Contract, defendant's sole remedy is the retention of the deposit and the parties' are responsible for their respective legal fees. See paragraphs 3 and 20 of the Contract. *See Hooper Assoc. v. AGS Computers*, 74 N.Y. 2d 487, 491 (1989) ("[A]ttorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule"). As such, defendant's request for an Order directing a hearing to determine the money damages allegedly suffered by defendant, as well as its request for costs, disbursements, and attorneys' fees is denied.

Based on the above, it is hereby.

ORDERED that defendant's motion is granted to the extent that summary judgment dismissing plaintiff's Complaint herein is granted; and it is further

ORDERED that plaintiff's complaint shall be dismissed in its entirety; and it is further

ORDERED that the Notice of Pendency filed by plaintiff in this matter shall be discharged and cancelled; and it is further

ORDERED that defendant is entitled to retain the $150,000 deposit made by the Complaint under the parties' contract; and it is further

ORDERED that Horwitz & Zim Law Group, P.C., as Ecrowee, is directed to pay the $150,000 deposit held in escrow to defendant, and its if further

ORDERED that plaintiff's cross-motion is denied; and it is further

ORDERED that the Clerk enter judgment accordingly.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

**Dated:** 6/4/12

HON. EILEEN A. RAKOWER J.S.C.

**Check one:** X **FINAL DISPOSITION** **NON-FINAL DISPOSITION**

**Check if appropriate:** ☐ **DO NOT POST** ☐ **REFERENCE**