SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,
Justice

TRIAL/IAS, PART 19
NASSAU COUNTY

JULIAN SERER and CORINA SERER,

Plaintiffs,

-against-

GORBROOK ASSOCIATES INC. and JASPAN SCHLESINGER LLP,

Defendants.

Decision and Order

MOTION SUBMITTED:
July 12, 2011
MOTION SEQUENCE:01, 02
INDEX NO. 000571-11

The following papers and the attachments and exhibits thereto have been read on this motion:

Notice of Motion	1
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Affirmation	3
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The Plaintiffs, Julian Serer and Corina Serer ("Serers"), move for an order pursuant to CPLR 3212 granting them summary judgment for the relief sought in their complaint, to wit, the return of down payment and other monies tendered in connection with a contract of sale real

property entered into between them and Defendant Gorbrook Associates Inc. ("Gorbrook").[1] Gorbrook cross-moves for an order pursuant to CPLR 3212 granting summary judgment on it's counterclaims and directing that it be entitled to retain the down payment tendered by the Serers.

On August 4, 2009, Serers entered into a contract ("the Contract") with Gorbrook for the purchase of a new house ("the Property") that was being built by Gorbrook (Ex. "E" to Motion). Eric Silverstein ("Silverstein") signed the Contract on behalf of Gorbrook. At the time the Contract was executed, Serers gave a $96,000 down payment which was put into escrow with Defendant Jaspan Schlesinger LLP (Ex. "E" to Motion at ¶ 3; Ex. "Y" to Cross Motion). The closing was set to take place "on or about September 15, 2009, or on another date and time designated by Seller or Seller's attorney upon twenty (20) days written notice to Purchaser" (Ex. "E" to Motion at ¶ 5).

All notices required under the Contract were to be sent registered or certified mail, return receipt requested, "addressed to the party at the address hereinabove set forth with a copy of any such notice by regular mail to the attorney for such party" (Ex. "E" to Motion at ¶ 34). The Contract set forth that Chris Coschignano of Jaspan Schlesinger was the attorney for Gorbrook ("Gorbrook's attorney") and Janet Ganio of Forchelli, Curto, Deegan, Schwartz, Mineo, Cohn & Terrana, LLP was the attorney for Serers ("Serers' attorney") (Ex. "E" to Motion at ¶ 34).

The Contract further provided for an outside closing date four months from the September 15, 2009 closing date, after which Serers would be entitled to cancel the Contract. In this regard, the Contract specifically provided at paragraph 35:

> Delay in Completion of Dwelling. NOTWITHSTANDING ANYTHING IN THIS CONTRACT TO THE CONTRARY, the date of title closing shall not be adjourned by the Seller beyond four (4) months from the date of delivery of title set forth herein, without written consent of the parties hereto. The failure of the Seller to deliver title on or before the above final adjournment date shall entitle the Purchaser to cancel this Contract, and to the return of all sums paid hereunder, provided that the Purchaser shall give the Seller written notice of such intention to cancel by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, and must be received by the Seller at its above address no later than ten (10) days after the above final adjournment date. Upon the exercise of said option by the Purchaser as herein provided, the Seller will refund to the Purchaser the monies deposited hereunder (including extras) with all interest, if any, and, upon such refund, the Contract shall

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[1] In addition to seeking the return of their down payment, Serers also request a return of the payments they made for "extras", together with the net cost of the title examination (Ex. "A" to Motion).

> be deemed cancelled, null and void, without any further liability on the part of either of the parties as against the other. Failure to give such written notice within such period shall be deemed to be a waiver of the Purchaser's right to cancel under this paragraph of the Contract (Ex. "E" to Motion at ¶ 35).

The closing did not occur on September 15, 2009 or January 15, 2010, the outside closing date. By letter dated March 9, 2010, Serers' attorney wrote to Silverstein advising him that Serers, without waiving any rights set forth in the Contract, were willing to extend the adjourn date set forth in paragraph 35 of the Contract to April 15, 2010 (Ex. "F" to Motion).

In a letter dated April 5, 2010, Gorbrook's attorney acknowledged that construction had been delayed and that because of customizations to the Property, Gorbrook would like to "extend the closing date to 'on or about July 1, 2010'" (Ex. "G" to Motion).[2]

Serers rejected Gorbrook's request for an "on or about July 1, 2010" closing date on the ground that such a date "could extend the closing to approximately mid August" and that "with greater resources and manpower dedicated to this project, the job could be completed in a much shorter timeframe" (Ex. "H" to Motion) (emphasis in original). Accordingly, by letter dated April 8, 2010, Serers agreed to a June 15, 2010 closing date after which they could elect to "cancel the contract and receive back their downpayment without further notice or extensions to [Gorbrook] if the dwelling is not completed by that date in accordance with the terms of the contract . . . ." (Ex. "H" to Motion).

By letter dated May 27, 2010, Serers' attorney wrote to Silverstein setting forth a "TIME OF THE ESSENCE closing date of June 28, 2010" (Ex. "I" to Motion) (emphasis in original). Serers' attorney further indicated that in the event Gorbrook is "not ready willing and able to close on that date", Serers demand a "return of their down payment as well as the cost of all extras heretofore paid" (Ex. "I" to Motion).

In a letter dated June 24, 2010, Serers' attorney wrote to Gorbrook's attorney setting forth a final adjourn date of July 15, 2010, stating:

> Further to my letter of May 27, 2010, my clients can only agree to extend the Final Adjourn Date of this Agreement from June 28, 2010 to July 15, 2010. We can not agree to your request for an on or about July 15, 2010 date, as this will take us into

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[2] Coschignano also wrote that "it is important at this juncture for all parties to clarify their positions with regard to concluding this transaction. In the event your client does not wish to conclude the transaction, my client would most likely construct the residence in a different fashion than your client might otherwise desire" (Ex. "G" to Motion).

> August 2010 . . . . If your clients are unable to close by mid-July, my clients will have no choice but to seek another property (Ex. "J" to Motion).

By letter dated July 22, 2010 addressed to Silverstein and copied to Gorbrook's attorney, Serers' attorney indicated that his clients were canceling the Contract on the ground that each of the dates set for closing had passed and Gorbrook could not deliver possession of a completed dwelling. The letter requested a refund of the downpayment as well as all sums paid for customized extras (Ex. "K" to Motion). On the same date, Serers' attorney also e-mailed Gorbrook's attorney and Robert Tierman (a different Gorbrook attorney) notifying them of Serers' election to cancel the Contract (Ex. "L" to Motion; Ex. "U" to Cross Motion). Gorbrook's attorney replied to the cancellation as follows: "I understand completely. I will try to help facilitate things for you and your client. Thank you for your patience" (Ex. "M" to Motion).

Notwithstanding Serers' July 22, 2010 request for a return of their downpayment, on August 3, 2010, Serers' attorney wrote to Tierman and Michael Premisler[3] stating as follows:

> As you have advised me that there is a court date for tomorrow, we would be willing to hold off on insisting upon the immediate return of our downpayment, provided that some sort of stipulation is entered into in Court tomorrow confirming your and Bob Tierman's representations to me, and setting forth a short timeframe, such as August 16 or so, within which to complete the home and get the C/O inspection scheduled, with closing to occur upon issuance of the C/O. We also need a resolution of the Warranty issue, which we are entitled to by statute and by the terms of the Contract (Ex. "V" to Cross Motion).

On August 17, 2011, Gorbrook inquired as to whether Serers would be willing to proceed if Gorbrook hired a new general contractor to finish the job (Ex. "W" to Cross Motion). Serers rejected the request for a new contractor (Ex. "X" to Cross Motion).

On September 23, 2010, Serers purchased another house in Plainview (Ex. "D" to Motion) and thereafter commenced an action seeking, *inter alia*, the return of their down payment (Ex. "A" to Motion).

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[3] Michael Premisler is litigation counsel in a dissolution proceeding commenced by Allen Silverstein and Robin Silverstein seeking the dissolution of Gorbrook (Ex. "C" to Cross Motion). Allen Silverstein and Robin Silverstein are Eric Silverstein's father and sister, respectively (Tierman Affirmation to Cross Motion at ¶ 13).

Serers' Motion for Summary Judgment

In support of their motion for summary judgment, Serers argue that "because Gorbrook had been unable to deliver possession of a completed dwelling as required by the terms of the above contract, Serers elected to cancel the contract and demanded the return of their down payment, all accrued interest and all sums paid to Gorbrook for any and all extras ordered and/or installed at the above premises" (Affirmation in Support at ¶ 20). Accordingly, Serers seek an order directing Defendant Jaspan Schlesinger, the escrow agent, to deliver the downpayment to Serers and that Gorbrook be directed to repay Serers for any extras ordered as well as the cost of the title examination (Affirmation in Support at ¶ 27).[4] Serers' motion is premised on the July 22, 2010 letter canceling the contract, which was, according to Serers, sent within ten days of the final adjourn date of July 15, 2010.

In opposition, Gorbrook argues that it did not receive notice of cancellation of the Contract within ten days of January 15, 2010, which was the final adjourn date as established in paragraph 35 of the Contract. It is undisputed that Serers did not seek to cancel the Contract within ten days of January 15, 2010 nor did they, prior to that date, seek to adjourn the final closing date in accordance with the Contract. Significantly, the first correspondence after the January 15, 2010 final adjourn date did not occur until March 9, 2010 at which time Serers indicated a willingness to adjourn the closing date until April 15, 2010 (Coschignano Affirmation at ¶ 5; Ex. "F" to Motion).

In light of Serers' failure to comply with paragraph 35's terms regarding cancellation of the Contract, the court concludes that Serers waived their right to cancel thereunder. Accordingly, the Serers were relegated to common law contract principles, and, in particular, general time of the essence principles, with respect to canceling the Contract.

Either party may subsequently give notice making time of the essence provided that such notice is clear, distinct and unequivocal, and fixes a reasonable time for the other party to act (*Baltic v Rossi*, 289 AD2d 430 [2d Dept 2001]). Importantly, the party need not specifically state that time is of the essence as long as the notice specifies a time in which to close and notice that the failure to close on that date will result in a default (*Knight v McClean*, 171 AD2d 648 [2d Dept 1991]; *Ben Zev v Merman*, 134 AD2d 555 [2d Dept 1987]).

Serers' letter dated June 24, 2010 provided sufficiently clear and unequivocal notice that

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[4] Defendant Jaspan Schlesinger, which is holding the downpayment of $96,000 in escrow, has no interest in the escrow funds and will release the funds as directed by the court and, thus, takes no position with respect to the dispute between the parties or the parties respective motions.

July 15, 2010, set as the "final adjourn date", constituted a time of the essence closing date and advised Gorbrook that if it was "unable to close by mid-July" that the Serers would "have no choice but to seek another property" (Ex. "J" to Motion) (*Sohayegh v Oberlander*, 155 AD2d 436 [2d Dept 1989] [letter indicating a "final adjournment of closing" on certain date established a time of the essence closing date])."[5]

The question then arises as to whether Serers afforded Gorbrook a reasonable time to close. What constitutes a reasonable time to close depends on the particular facts and circumstances of each case. Among the factors to be considered are the nature and object of the contract, the previous conduct of the parties, the presence or absence of good faith, the experience of the parties and the possibility of hardship or prejudice to either one, as well as the specific number of days provided for the performance (*Knight v McClean*, 171 AD2d at 650, *supra*; *Ben Zev v Merman*, 134 AD2d at 783, *supra*; *Miller v Almquist*, 241 AD2d 181 [1st Dept 1998] [no bright-line criteria establishing the reasonableness of a particular time period given that the nuances of each case are different]).

Reasonableness in this case depends on many factors, including the conduct of the parties and whether the three weeks set forth in Serers' June 24, 2010 letter provided a reasonable time in which to close. The previous conduct of the parties as well as the time period for the adjournments involved do not reveal extensive delays or acts of bad faith on behalf of Gorbrook. However, in the absence of any admissible evidence as to the extent of construction needed to complete the house, coupled with Serers' knowledge that a certificate of occupancy would not issue prior to completion, Serers have failed to meet their burden of establishing, as a matter of law, that the June 24, 2010 letter constituted a valid time of the essence letter insofar as providing Gorbrook a reasonable time period in which to close (*see Klein v Opert*, 218 AD2d 784 [2d Dept 1995] [defendant's notice setting forth a time of the essence day, with knowledge that certain certificates or permits could not be obtained by that date, failed to provide plaintiff with reasonable time in which to close]). Accordingly, Serers' motion for summary judgment is

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[5] The Serers' letter dated May 27, 2010 letter set forth a time of the essence closing date of June 28, 2010 (Ex. "I" to Motion). However, on June 24, 2010, prior to the June 28 law date, Serers' attorney wrote Gorbrook setting forth a final adjourn date of July 15, 2010 (Ex. "J" to Motion). The June 28 time of the essence date, however, was waived by virtue of the letter dated June 24, 2010 letter.

denied.[6]

Gorbrook's Cross Motion

Gorbrook argues, in support of its cross motion for summary judgment, that Serers' cancellation of the Contract constituted an anticipatory repudiation entitling Gorbrook to retain Serers' down payment (Memorandum of Law in Support of Cross Motion at p 25).

Pursuant to the doctrine of anticipatory repudiation, a "wrongful repudiation of the contract by one party before the time for performance entitles the nonrepudiating party to immediately claim damages for a total breach. The nonrepudiating party need not, however, tender performance nor prove its ability to perform the contract in the future. Rather, the doctrine relieves the nonrepudiating party of its obligation for future performance and entitles that party to recover the present value of its damages from the repudiating party's breach of the total contract" (*American List Corp. v U.S. News & World Report*, 75 NY2d 38 [1989] [citations omitted]; *Smith v Tenshore Realty, Ltd.*, 31 AD3d 741 [2d Dept 2006] [plaintiff's notice of cancellation defective and, thus, defendant entitled to consider such notice as an anticipatory repudiation]; *Velazquez v Equity LLC*, 28 AD3d 473 [2d Dept 2006] [defendant entitled to consider plaintiff's defective notice of cancellation as an anticipatory repudiation of the contract]).

Here, Serers' July 22, 2010 letter indicating that they were canceling the Contract and seeking a refund of their downpayment was a positive and unequivocal indication of its intention to cancel the contract (*Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804, 807 [2d Dept 2011]). In this regard, Serers were aware that a house was being constructed to their specifications and customizations and that a certificate of occupancy was needed prior to closing. If it is determined that Serers' time of the essence date did not allow Gorbrook a reasonable time in which to comply with the Contract and close, then Serers' cancellation of the Contract was tantamount to an anticipatory breach of the contract (*Klein v Opert*, 218 AD2d at

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[6] The parties do not address the possible significance of the August 3, 2010 e-mail whereby Serers' attorney expressed a willingness to close after the July 15 "final adjourn date". In this regard, the court notes the following. In the event it is determined that the June 24, 2010 letter did not set forth a reasonable time in which to close and, thus, did not constitute a valid time of the essence letter, then the August 3, 2010 e-mail would arguably have no legal significance. On the other hand, if it is determined that the June 24 letter did set forth a valid time of the essence date, then the August 3, 2010 e-mail could arguably be viewed as waiver of the July 15, 2010 time of the essence date (*see Stefanelli v Vitale*, 223 AD2d 361 [1st Dept 1996] [a party's right to timely performance may be waived even after passage of the date which had previously been made of the essence]; *Levine v Sarbello*, 112 AD2d 197 [2d Dept 1985] [even if buyers were in default by failing to appear on closing date, sellers continued to deal with buyers as if their contract of sale remained in full force and effect]).

786, *supra*; *Oxford Funding Corp. James H. Northrup, Inc.*, 130 AD2d 722 [2d Dept 1987]). Under the circumstances, Gorbrook's cross motion for summary judgment is denied.

Serers' contention, raised in opposition to Gorbrook's cross motion, that the Contract was void because Silverstein lacked authority to execute it, is devoid of merit.

Serers' Request for the Withdrawal of Defendant's Attorney Tierman

Serers also seek an order directing the law firm of Litwin & Tierman to withdraw as Gorbrook's counsel on the ground that Tierman is not authorized to practice law in New York since he does not have a bona fide office in the State of New York, as required by Judiciary Law § 470. Contrary to Serers' contention, Tierman is authorized to practice in the State of New York insofar as his office in New Jersey has a reciprocal arrangement with the New York firm Salon, Marrow in which each firm uses the offices of the other to receive court papers, conduct depositions, closings, and meetings (Tierman Affirmation in Support of Cross Motion at ¶¶ 50-51) (*Keenan v Mitsubishi Estate, New York, Inc.*, 228 AD2d 330 [1st Dept 1996] [attorney with office in New Jersey complied with Judiciary Law § 470 insofar as attorney, who was a member of New York bar, had entered into a reciprocal satellite office sharing agreement with New York City firm]).[7]

Based on the foregoing, it is hereby ordered that the motion and cross motion are denied.

This constitutes the decision and order of the court.

Dated: December 1, 2011

Hon. Vito M. DeStefano, J.S.C.

[7] As co-counsel to the New Jersey firm Litwin & Tierman, P.A., New York firm Ackerman, Levine, Cullen, Brickman & Limmer LLP filed a Notice of Appearance on behalf of Gorbrook (Ex. "Q" to Motion).