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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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17 WEST 127th STREET PARTNERS LLC,

Plaintiff,

Index No. 158807/12

DECISION/ORDER

-against-

BARUCH REALTY, LLC, MOSHE NIR,
17 W 127TH STREET, LLC, ADAM DRESSLER, ESQ.,
DRESSLER LAW, LLP, DUSTIN BOWMAN, ESQ.,
A.M. TITLE INC. and SANDRA M. SALMON PINK,

Defendants.

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HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :

Papers	Numbered
Notice of Motion and Affidavits Annexed	1,2,3
Notice of Cross-Motion and Affidavits Annexed	4
Affidavits in Opposition	5,6,7
Affidavits in Reply	8,9,10
Exhibits	11

This action arises out of a contract for the sale of property entered into between defendant Baruch Realty, LLC ("Baruch") and plaintiff 17 West 127th Street Partners LLC. Plaintiff now moves for an Order pursuant to CPLR § 3212 granting it summary judgment on its first cause of action asserted in the Second Amended Complaint for breach of contract, awarding plaintiff specific performance of its contract to purchase the property located at 17 West 127th Street, New York, New York (the "subject property") from defendant Baruch and vacating the deed purporting to convey title to the subject property from Baruch to defendant 17 W 127th Street, LLC (hereinafter referred to as the "Second Purchaser"). Defendants Baruch and Moshe Nir ("Nir") (hereinafter collectively referred to as "Baruch") cross-move for an Order pursuant to CPLR § 3212 granting

them summary judgment dismissing plaintiff's first cause of action for breach of contract and specific performance. Defendant Second Purchaser separately moves for an Order granting it summary judgment dismissing plaintiff's first cause of action for breach of contract and specific performance and vacating the notice of pendency plaintiff filed against the subject property. Defendant Second Purchaser also separately moves for an Order granting it summary judgment on its cross-claims against Baruch and Nir and declaring that in the event plaintiff were to prevail against it on the first or sixth cause of action asserted in the Second Amended Complaint, then Baruch and Nir are liable to Second Purchaser for all damages sustained by it. The motions are consolidated for disposition and are resolved as set forth below.

The relevant facts are as follows. In or around August 2012, plaintiff entered into a written contract with defendant Baruch for the purchase of the subject property (the "Contract"). The Contract provides for a $842,500 purchase price which was to be paid as follows: (i) a down payment of $84,250; (ii) a $450,000 purchase money mortgage to be negotiated and issued by Baruch to plaintiff at the closing; and (iii) the balance of $308,250 to be paid with a certified check at the closing. Further, Paragraph 15 of the Contract provides that the closing will take place "on October 2, 2012" and a Rider to the Contract provides that "[i]t is understood and agreed that on or about as referred to in paragraph #15 of the printed form contract is to mean no more than 30 days past said contract date set for closing." Paragraph 15 of the Contract also provides that that the closing shall take place at Dressler Law LLP in New York County "or, upon reasonable notice by Purchaser, at the office of Purchaser's Attorney" in Queens. Paragraph 23 of the Rider to the Contract provides that "Purchaser agree[s] to close in New York County." Further, Paragraph 19 of the Rider to the Contract provides that the Rider controls "[i]n the event of a conflict with the provisions of the pre-printed portion of this contract."

Closing on the subject property did not occur on October 2, 2012. In an e-mail dated October 8, 2012, Adam Dressler, Esq., counsel for Baruch, notified Christopher O'Malley, Esq., counsel for plaintiff, that he was scheduling the closing for November 8, 2012 and that Baruch asked him to declare time of the essence. Specifically, the October 8, 2012 e-mail stated as follows:

> This is my third email to you in an attempt to schedule closing. I would appreciate a response. My client has asked me to deem time of the essence and schedule closing for 30 days from today.
>
> If I do not hear from you, a closing will be held on that day and your clients will be in default if they don't appear.
>
> I'd like to remind you that my client gave a 7500.00 price reduction over a month ago to facilitate a fast closing.
>
> Please advise your client's intentions.

Mr. O'Malley responded that same day and told Mr. Dressler that he would call him to schedule a firm date but that "[t]hirty days sounds about right." However, rather than sticking to the November 8, 2012 date allegedly declared the "essence date" by Baruch, by e-mail dated October 19, 2012, Mr. Dressler proposed that the parties close title to the subject property on November 15, 2012. Five days later, Mr. Dressler followed up by e-mail that he was "planning on moving forward with the closing for November 15, 2012. Please confirm, I am working on getting all the docs to the title company." On or about November 1, 2012, Mr. Dressler again postponed the closing date in an e-mail in which he advised Mr. O'Malley that Baruch had "planned to close on the 15th but it seems like [Superstorm Sandy] may have delayed us a few days. Let's make it firm for November 22. Please confirm." On November 13, 2012, Mr. O'Malley notified Mr. Dressler that November 22nd was Thanksgiving Day and proposed that the parties close on November 28, 2012. Mr. Dressler responded that he needed to speak to Baruch.

By letter dated November 28, 2012, the date Mr. O'Malley had proposed for the closing, Mr. Dressler sent plaintiff's counsel a letter notifying plaintiff that Baruch was cancelling the Contract and returned plaintiff's down payment along with a check in the amount of $1,500.00 representing fees paid in furtherance of the transaction. The letter specified that Baruch was canceling the Contract because "the contract called for an October 2, 2012 closing with the understanding that said date may not be extended beyond 30 days." On November 29, 2012, Mr. O'Malley wrote to Mr. Dressler rejecting Baruch's cancellation of the Contract, scheduling the closing for December 10, 2012 and declaring time of the essence. However, Baruch did not appear at the closing on December 10, 2012. Plaintiff later found out that on November 29, 2012, Baruch sold and transferred the subject property to defendant Second Purchaser for a higher price.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

As an initial matter, defendant Second Purchaser's assertion that plaintiff's motion for summary judgment must be denied on the ground that plaintiff failed to attach Second Purchaser's answer to its motion is without merit. Pursuant to CPLR § 3212(b), "[a] motion for summary judgment shall be supported by affidavit, *by a copy of the pleadings* and by other

available proof, such as depositions and written admissions" (emphasis added). However, "[a]lthough CPLR 3212(b) requires that a motion for summary judgment be supported by copies of the pleadings, the court has discretion to overlook the procedural defect of missing pleadings when the record is 'sufficiently complete.'" *Washington Realty Owners, LLC v. 260 Washington Street, LLC*, 105 A.D.3d 675 (1st Dept 2013). "The record is sufficiently complete when, although the movant has not attached all of the pleadings to the motion, a complete set of the papers is available from the materials submitted." *Id.* The pleadings will be considered available for the court's consideration if they are filed electronically, *see Studio A Showroom, LLC v. Yoon*, 99 A.D.3d 632 (1st Dept 2012), if they are attached to the reply papers, *see Pandian v. New York Health and Hospitals Corp.*, 54 A.D.3d 590 (1st Dept 2008) or if they are attached to a summary judgment motion made by one of the other parties, *see Welch v. Hauck*, 18 A.D.3d 1096 (3d Dept 2005). Here, the court finds that plaintiff's error in failing to attach Second Purchaser's answer to its motion for summary judgment may be overlooked as the record is sufficiently complete. Indeed, it is undisputed that Second Purchaser's answer was filed electronically, that it was attached to plaintiff's reply papers and that it was attached to the summary judgment motions made by both Second Purchaser and by Baruch and Nir and thus, it is available for the court's consideration.

Additionally, Baruch, Nir and Second Purchaser's assertion that plaintiff's motion for summary judgment should be denied on the ground that the Contract attached to plaintiff's motion papers is not legible is without merit. Although the copy of the Contract attached to plaintiff's motion papers and the copy of the Contract provided with plaintiff's sur-reply are not completely legible, the parties do not dispute that plaintiff and Baruch entered into said Contract nor do they dispute the Contract's authenticity or its material terms. Indeed, defendants freely

quote the Contract throughout their papers and have no trouble deciphering the terms of the Contract.

In the instant action, the court finds that plaintiff is entitled to summary judgment on its first cause of action for breach of the Contract as it has established that Baruch was not entitled to cancel the Contract based on the failure to close title to the subject property on October 2, 2012 or within thirty days thereafter because time was not of the essence with respect to that date and that Baruch breached the Contract by failing to close title to the subject property on December 10, 2012 because time was of the essence with respect to that date. As an initial matter, plaintiff has established that Baruch was not entitled to cancel the Contract based on the parties' failure to close on October 2, 2012, the date specified in the Contract, or within thirty days thereafter because time was not of the essence with respect to that date. "[I]n contracts [for the sale of land], time of performance is not normally 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 N.Y.3d 484, 486 (2006). *See also Whitney v. Perry*, 208 A.D.2d 1025, 1026 (3d Dept 1994)("time is never of the essence in real estate contracts, even if a closing date is stated, unless the contract specifically so provides, or if special circumstances surrounding its execution so require.") Even in situations where a contract states that performance must occur "in no event later than" a specific date, such "language alone does not make time of the essence. As we have long held, 'the mere designation of a particular date upon which a thing is to be done does not result in making that date the essence of the contract.'" *ADC Orange Inc.*, 7 N.Y.3d at 489, quoting *Ballen v. Potter*, 251 N.Y. 224, 228 (1929). *See also Whitney*, 208 A.D.2d 1025(holding that the phrase "in no event later than" is not sufficient to make time of the essence in connection with a closing date). *See also Lightle v. Becker*, 18 A.D.3d 449, 450 (2d Dept

2005)("[t]he contract for the sale of [the property] providing for a closing to take place on or about July 10, 2003, 'but not later than 8/10/03,' did not make time of the essence.")

Here, plaintiff has established that the failure of the parties to close title to the subject property on October 2, 2012, the date specified in the Contract as the closing date, or within thirty days thereafter, did not entitle Baruch to cancel the Contract because time was not of the essence with respect to that date. It is undisputed that the Contract did not contain a time-of-the-essence provision. To the contrary, Paragraph 15 of the Contract provided that the "Closing shall take place" "on October 2, 2012" and the Rider to the Contract further provided that "[i]t is understood and agreed that on or about as referred to in paragraph #15 of the printed form contract is to mean no more than 30 days past said contract date set for closing."

To the extent Baruch argues that even if it was not entitled to cancel the Contract for failing to close on October 2, 2012 or within thirty days thereafter, it was entitled to cancel the Contract for failing to close on November 8, 2015, the date which Baruch asserts was designated as the "essence" date in its October 8, 2012 e-mail, such argument is unavailing as plaintiff has established that time was not of the essence with respect to November 8, 2012. The Court of Appeals has held that it is possible for a party to a contract for the sale of land "to convert a non time-of-the-essence contract into one making time of the essence by giving the [other party] 'clear, unequivocal notice' and a reasonable time to perform." *ADC Orange, Inc.*, 7 N.Y.3d at 490, citing *Levine v. Sarbello*, 67 N.Y.2d 780 (1986). *See also Whitney*, 208 A.D.2d at 1026("where time is not stated to be of the essence in the agreement, a party may give notice making time of the essence provided the notice is clear, distinct and unequivocal, fixes a reasonable time within which to perform and 'inform(s) the other party that if he does not perform by that date, he will be considered in default.") "Such notice may be effected by a

letter from one of the party's attorneys." *Stefanelli v. Vitale*, 223 A.D.2d 361, 362 (1st Dept 1996).

Here, plaintiff has established that Baruch was not entitled to cancel the Contract for failing to close title to the subject property on November 8, 2012, the date specified in Mr. Dressler's October 8, 2012 e-mail, because Baruch never properly declared time of the essence with respect to November 8, 2012. The October 8, 2012 e-mail did not properly declare time of the essence with respect to November 8, 2012 as it did not constitute a "clear and unequivocal" notice to declare time of the essence because it failed to include a time or place for the closing. Further, the e-mail was not sent to plaintiff as required by the Contract, specifically, by overnight mail via Federal Express.

Moreover, even if Mr. Dressler's October 8, 2012 e-mail was sufficient to provide plaintiff with notice that Baruch was declaring time of the essence with respect to the November 8, 2012 closing date, Baruch waived any time of the essence declaration when Baruch postponed the November 8, 2012 closing date two separate times. It is well-settled that where time of the essence is found in an agreement or where a party declares time to be of the essence, "a mutual...agreement to extend the time may indicate a waiver of" such declaration. *Greto v. Barker 33 Associates*, 161 A.D.2d 109, 110 (1st Dept 1990). Indeed, "if the date so fixed [as time of the essence] is subsequently waived, the party causing the waiver cannot later claim a default on account of such delay...." *Brum Realty, Inc. v. Takeda*, 205 A.D.2d 365, 374 (1st Dept 1994). Here, plaintiff has established that Baruch's conduct after sending the October 8, 2012 e-mail waived any declaration that time was of the essence with respect to the November 8, 2012 closing date. In an e-mail sent on October 18, 2012, Mr. Dressler, counsel for Baruch, proposed a November 15, 2012 closing date, which was five days after the alleged "essence

date" of November 8, 2012, and plaintiff agreed to adjourn the closing to that date. Subsequently, in an e-mail sent on November 1, 2012, Mr. Dressler proposed yet another closing date of November 22, 2012, which happened to be Thanksgiving Day. Baruch's conduct demonstrates that it never intended time to be of the essence with respect to the November 8, 2012 closing date and thus, any time of the essence declaration with respect to that date was waived.

Further, plaintiff has established that Baruch materially breached the Contract by failing to close on December 10, 2012 because plaintiff properly declared time of the essence with respect to that date. Specifically, one day after Baruch notified plaintiff that it was canceling the Contract, Mr. O'Malley sent a letter to Mr. Dressler rejecting Baruch's cancellation of the Contract and stating as follows:

> **Please let this letter serve as further notice that we are hereby setting a "Time Of The Essence" closing date of Monday, December 10, 2012 at 10:00 AM at my office located at 105-20 Metropolitan Avenue, Forest Hills, New York, 11375, Tel: 718-268-8700. If your client fails or refuses to close in accordance with the terms of the contract of sale on said date and time, your client will be held in default of the contract of sale, and my client will seek all remedies and damages available to him, including but not limited to the option of specific performance of the contract of sale.**

The court finds that this letter properly declared time of the essence with respect to December 10, 2012 as it notified Baruch of the closing date, time and the address at which the closing would occur; it explicitly stated that time was of the essence; and it notified Baruch that its failure to appear at the closing would be considered a default under the Contract. Additionally, the notice was proper as it was sent to Baruch by overnight mail via Federal Express in satisfaction of the Contract's requirements.

To the extent Baruch argues that plaintiff failed to properly declare time of the essence with respect to the December 10, 2012 closing date because that date was unreasonable as it did not give Baruch enough time to perform, such assertion is without merit. This court finds that the December 10, 2012 closing date was reasonable as a matter of law based on the fact that Baruch did close title to the subject property with defendant Second Purchaser on November 29, 2012 so there can be no argument that Baruch would not have been ready to close on December 10, 2012.

To the extent Baruch asserts that plaintiff failed to properly declare time of the essence with respect to the December 10, 2012 closing date because Mr. O'Malley, plaintiff's counsel, designated the closing to occur in Queens County, in contravention of the Rider to the Contract, such assertion is without merit. Paragraph 15 of the Contract provides that the closing shall take place at Dressler Law LLP in New York County "or, upon reasonable notice by Purchaser, at the office of Purchaser's Attorney" in Queens County. Paragraph 23 of the Rider to the Contract provides that plaintiff "agree[d] to close in New York County." Reading both of these provisions together, the court finds that the Contract allows for the closing to occur in Queens County.

The argument by Baruch that Paragraph 23 of the Rider overrides Paragraph 15 of the Contract and only allows for the closing to take place in New York County based on Paragraph 19 of the Rider to the Contract which states that the Rider controls "[i]n the event of a conflict between the provisions of the pre-printed portion of this contract" is without basis as Paragraph 19 is inapplicable because there is no evidence that Paragraph 15 is a pre-printed contractual provision. However, even if Paragraph 19 is applicable, it was still proper for Mr. O'Malley to designate Queens County for the closing as Paragraph 15 and Paragraph 23 are not in conflict

with each other.

To the extent Baruch asserts that plaintiff's motion for summary judgment must be denied on the ground that there are issues of fact as to whether plaintiff's Principal, Jeffrey Berger, assigned the Contract to his business partner, James Parrella, in violation of the terms of the Contract, such assertion is without merit as there is no evidence that the Contract was ever assigned to Mr. Parrella or that Mr. Berger planned to assign the Contract to Mr. Parrella.

Further, this court finds that plaintiff has established its right to specific performance of the Contract as sought in its first cause of action. To obtain specific performance of a contract for the sale of land, the party seeking specific performance must establish that it "was ready, willing and able to perform pursuant to the contract, and that [it] had taken all the necessary steps to close, including retaining counsel, securing financing, and ordering title insurance." *Sanchez v. Hay*, 122 A.D.3d 533, 534 (1st Dept 2014).

Here, the court finds that plaintiff is entitled to specific performance of the Contract as it has established that it was ready, willing and able to perform pursuant to the Contract and that it had taken all the necessary steps to close by the closing date of December 10, 2012. It is undisputed that plaintiff retained Mr. O'Malley to represent it in connection with its purchase of the subject property and had ordered title insurance prior to the closing date. Additionally, plaintiff has affirmed that Mr. Berger and Mr. O'Malley attended the December 10, 2012 closing at Mr. O'Malley's office at 10:00 a.m. with all of the funds required to close. Indeed, it is undisputed that plaintiff paid the down payment in August 2012. Further, it is clear from the record that the parties had negotiated a $450,000 note and purchase money mortgage that Baruch was required to give plaintiff under the Contract and Mr. Berger has affirmed that he was prepared to execute said note and purchase money mortgage on behalf of plaintiff in said amount

at the closing. Additionally, Mr. Berger affirms that at the closing on December 10, 2012, he presented a certified check made payable to Baruch in the amount of $308,250, as required by the Contract. Mr. Berger has also affirmed that at the December 10, 2012 closing, he had in his possession checks for the remaining monies due and owing, including a check made payable to Landmark Land Services for the title bill and a check made payable to Baruch in the amount of $197.40 as payment of the balance of net adjustments due to the seller.

However, in order for plaintiff to be awarded specific performance of the Contract, this court must first determine whether it can vacate the deed transferring title to the subject property to defendant Second Purchaser. "The New York Recording Act (Real Property Law § 290 *et seq.*) protects a good faith purchaser for value from a prior unrecorded interest in real property provided, inter alia, that the subsequent purchaser's interest is the first to be duly recorded." *Transland Assets. Inc. v. Davis*, 29 A.D.3d 679 (2d Dept 2006). "The status of good faith purchaser for value cannot be maintained by a purchaser with either notice or knowledge of a prior interest or equity in the property, or one with knowledge of facts that would lead a reasonably prudent purchaser to make inquiries concerning such." *Yen-Ye Hsueh Chen v. Geranium Dev. Corp.*, 243 A.D.2d 708, 709 (2d Dept 1997). Specifically, in *Yen-Te Hsueh Chen*, the court found that the second purchasers of certain property were not bona fide purchasers for value based on the following:

> Here, the [second purchasers] do not dispute that they had actual knowledge of the prior contracts between [the seller] and the [first purchaser] for the sale of the subject parcels. Indeed, the [second purchasers'] contract of sale with [the seller] was expressly conditioned upon the cancellation of such contracts. However, despite this knowledge, the [second purchasers] merely accepted, without any proof or inquiry, independent or otherwise, a bare representation prior to their closing that the contracts had been cancelled. *Id.*

Here, the court finds that the deed transferring title to the subject property to defendant Second Purchaser must be vacated on the ground that Second Purchaser is not a bona fide purchaser for value of the subject property because as in *Yen-Te Hsueh Chen*, Second Purchaser knew about the Contract between plaintiff and Baruch and despite this knowledge, it failed to sufficiently inquire about whether the Contract had actually been cancelled but rather merely relied on the bare representation of Baruch that the Contract had been cancelled before purchasing the subject property. It is clear from the record before the court that Second Purchaser had knowledge of plaintiff's Contract to purchase the subject property. On or about November 8, 2012, Mr. Dressler sent an initial draft of their contract of sale to Dustin Bowman, Esq., counsel for Second Purchaser, which contained the following provision:

> It is further understood that, this contract and rider is a "reserve contract". The terms and validity of this contract are subject to the seller's ability to successfully cancel a prior/pending contract. Nothing herein shall require the seller to sale [sic] in the event that the previously existing contract is unable to be cancelled.

Additionally, Mr. Bowman has admitted that he received the draft contract and had knowledge of another purchaser, specifically testifying that he had "conversations with [counsel for Baruch] about there being some other potential purchaser" and that he "[knew] that there was some other prospective purchaser." Further, when Mr. Bowman asked Mr. Dressler why the initial draft contract did not provide for specific performance, Mr. Dressler responded that he "cannot allow that remedy with the other contract pending." Regarding any inquiry made by either Mr. Bowman or Second Purchaser, Mr. Bowman testified that it was not his "job" to inquire regarding the prior contract and that he "didn't do any diligence at all other than look at ACRIS" and search through the chain of title for the subject property. Instead of inquiring into the

prior/pending contract, Baruch and Second Purchaser entered into a side agreement which was designed to protect Baruch in the event plaintiff sued to enforce the Contract. Specifically, pursuant to the side agreement, the purchase price of the subject property was increased by $15,000.00, which Baruch would pay back to Second Purchaser "[i]n the event that no lawsuit/action is filed against Baruch Realty LLC." Through this side agreement and the $15,000 increase in the purchase price of the subject property, Second Purchaser was effectively providing partial indemnification to Baruch by providing litigation costs in anticipation of a claim brought by plaintiff. However, the court finds that the inquiry made by Mr. Bowman and Second Purchaser is insufficient under the circumstances. Mr. Bowman, and therefore Second Purchaser, had enough knowledge and awareness of facts that would lead a reasonably prudent purchaser to make inquiries about a prior pending contract to further inquire about its effect on the purchase of the subject property yet it merely accepted Baruch's bare representation that the Contract had been cancelled. Thus, based on the foregoing, Second Purchaser is not a bona fide purchaser for value of the subject property and the deed transferring title to the subject property to defendant Second Purchaser must be vacated.

Second Purchaser's reliance on *Berger v. Polizzotto*, 148 A.D.2d 651 (2d Dept 1989) for the proposition that it had no duty to make any further inquiry into whether the Contract had actually been cancelled is without merit as *Berger* is distinguishable. Second Purchaser points to the portion of *Berger* in which the court held that the second purchaser's "knowledge of a prior 'deal that broke up' was insufficient to impose upon him a duty to make a further inquiry." 148 A.D.2d at 652. However, the Second Department made such a finding because "no evidence was presented establishing that [the second purchaser] had notice of the plaintiffs' prior contract, or of their rights thereunder." *Id.* In the present case, there is ample evidence that

Second Purchaser had notice of the Contract and thus, *Berger* is inapplicable.

Second Purchaser's assertion that plaintiff is precluded from obtaining specific performance because it did not record the Contract as required by the New York Recording Act is also without merit. Real Property Law § 294(3) provides as follows:

> Every executory contract for the sale, purchase or exchange of real property not recorded as provided in this section shall be void as against any person who subsequently purchases or acquires...the same real property...in good faith and for valuable consideration, from the same vendor or assignor..., and whose conveyance, contract or assignment is first duly recorded....

Under the New York Recording Act, "an unrecorded contract of sale is deemed void as against a subsequent purchaser as long as the subsequent purchaser is a bona fide purchaser for value." *141 Sunnyside LLC v. Zoarez, Inc.*, 41 Misc.3d 1224 (Sup. Ct. Kings County 2013). However, the Recording Act does not apply here as the court has already determined that Second Purchaser was not a bona fide purchaser for value of the subject property. Thus, the fact that plaintiff did not record the Contract prior to Second Purchaser's purchase of the subject property is immaterial.

This court next turns to defendants Baruch, Nir and Second Purchaser's motions for summary judgment. As an initial matter, Second Purchaser's motion for summary judgment dismissing plaintiff's first cause of action and vacating the notice of pendency plaintiff filed against the subject property and Baruch and Nir's cross-motion for summary judgment dismissing plaintiff's first cause of action are denied based on this court's decision granting plaintiff summary judgment on its first cause of action alleging breach of contract and awarding plaintiff specific performance of the Contract.

The court will now address Second Purchaser's motion for summary judgment on its

cross-claims against Baruch and Nir and for an Order declaring that if plaintiff prevails against Second Purchaser on plaintiff's first or fifth causes of action, Baruch and Nir are liable to Second Purchaser for all damages it sustained. Initially, to the extent plaintiff asserts that such motion is untimely because it was not filed within sixty days of when plaintiff filed the Note of Issue, as required by the Preliminary Conference Order issued in this case, such assertion is without merit. It is undisputed that plaintiff filed the Note of Issue on December 18, 2015 and that Second Purchaser did not file the motion at issue until April 17, 2016, two months after its time to do so had already expired. However, such motion will be considered by the court on the ground that there was a motion to strike the Note of Issue pending from January 7, 2016, when the motion was filed, until March 15, 2016, when a decision was issued by this court noting that the motion had been withdrawn. Indeed, twenty days after the Note of Issue was filed, defendants Baruch and Nir moved to strike the Note of Issue on the ground that discovery was outstanding, which tolled the time to file for summary judgment and meant that the parties would have forty days after the motion was resolved to file their summary judgment motions. As the motion was resolved on March 15, 2016 and Second Purchaser filed the motion at issue thirty-three days later, the motion is timely.

In the instant action, the court finds that Second Purchaser has established its right to summary judgment on its cross-claims for indemnification asserted against Baruch and Nir. A claim for "indemnity involves an attempt to shift the entire loss from one who is compelled to pay for a loss, without regard to his own fault, to another party who should more properly bear responsibility for the loss because it was the actual wrongdoer." *Trustees of Columbia University v. Mitchell/Giurgola Associates*, 109 A.D.2d 449 (1st Dept 1985). The right to indemnification can be created by an express contract or may be implied by law. *Id.* "Implied

indemnity is a restitution concept which permits shifting the loss because to fail to do so would result in the unjust enrichment of one party at the expense of the other." *Mas v. Two Bridges Assoc.*, 75 N.Y.2d 680, 690 (1990). Indeed, the Court of Appeals has held as follows:

> The purpose of all contribution and indemnity rules is the equitable distribution of the loss occasioned by multiple defendants. In furtherance of that purpose the courts have granted relief in a variety of cases in favor of the party who, in fairness, ought not bear the loss, allowing it to recover from the party actually at fault. They have found indemnity appropriate because of a separate duty owed the indemnitee by the indemnitor (thus the indemnitee may recover for the wrong to it), [or] because there is "a great difference" in the gravity of the fault of the two tort-feasors....

Mas, 75 N.Y.2d at 690.

Here, Second Purchaser has established its right to summary judgment on its cross-claims for indemnification against Baruch and Nir as it has established that they should more properly bear responsibility for Second Purchaser's loss. Based on this court's finding that Second Purchaser was not a bona fide purchaser for value of the subject property, Second Purchaser's deed to the subject property has been vacated and Second Purchaser has thus been damaged in the amount it paid to Baruch to purchase the subject property. Further, as this court has granted plaintiff's request for specific performance of the Contract, Baruch will receive the purchase price of the subject property from plaintiff pursuant to the Contract. However, allowing Baruch to keep both the funds paid by plaintiff and the funds paid by Second Purchaser would give Baruch a windfall to which it is not entitled. Thus, this court finds that Second Purchaser is entitled to judgment against Baruch in the amount of the funds paid by Second Purchaser to purchase the subject property in addition to interest from November 29, 2012, the date the Second Purchaser purchased the subject property as that is what equity requires.

To the extent Second Purchaser moves for summary judgment on its cross-claims for

contribution against Baruch, such motion is denied as Second Purchaser has failed to provide any analysis as to its right to such relief.

Accordingly, plaintiff's motion for summary judgment on its first cause of action asserted in the Second Amended Complaint is granted; defendants Baruch and Nir's cross-motion for summary judgment is denied; defendant Second Purchaser's motion for summary judgment dismissing plaintiff's first cause of action and for an Order vacating the notice of pendency plaintiff filed against the subject property is denied; and defendant Second Purchaser's motion for summary judgment on its cross-claims against Baruch and Nir for and indemnification and for an Order declaring that if plaintiff prevails against it on plaintiff's first or fifth causes of action, Baruch and Nir are liable to Second Purchaser for all damages it sustained is granted. It is hereby

ORDERED that plaintiff is awarded specific performance of the Contract to purchase the subject property from defendant Baruch; and it is further

ORDERED that the deed conveying title to the subject property from Baruch to defendant Second Purchaser is vacated; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of Second Purchaser and against Baruch and Nir in the amount of $982,000 plus interest at the statutory rate from November 29, 2012. This constitutes the decision and order of the court.

Dated: 8/17/16

Enter: _____
J.S.C.
HON. CYNTHIA S. KERN
J.S.C.