At Part 84 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Brooklyn, New York on the 21st day of August 2018

PRESENT:
HON. CAROLYN E. WADE,
Justice

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S.C. BUYERS LLC,

Plaintiff,

Index No. 525040/2017

-against-

DECISION and ORDER

S & S UTICA AVENUE LLC.,

Defendant.

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Recitation, as required by CPLR § 2219(a), of the papers considered in the review of Defendant's Motion:

Papers	Numbered
Order to Show Cause/Notice of Motion and Affidavits/Affirmations Annexed.....	1
Cross-Motion and Affidavits/Affirmations.....	
Answering Affidavits/Affirmations.....	2
Reply Affidavits/Affirmations.....	3
Memorandum of Law.....	

FILED
KINGS COUNTY CLERK
2018 AUG 22 AM 8:03

Upon the foregoing cited papers and after oral argument, defendant S & S UTICA AVENUE LLC moves, pursuant to CPLR § 3211(a)(7), for an order dismissing the complaint in its entirety on the ground that plaintiff S.C. BUYERS LLC has failed to state a cause of action.

The underlying action was commenced by plaintiff-buyer S.C. BUYERS LLC ("Plaintiff") to recover damages from defendant-seller S & S UTICA AVENUE LLC , for allegedly breaching a Contract of Sale with respect to real property located at 2408 Dean Street, Brooklyn, New York 11233 ("Subject Premises"). Plaintiff seeks specific performance of the Contract of Sale ("Contract / Contract of Sale") or, in the alternative, damages for breach of contract in the sum of at least $500,000.

In support of the instant motion, Defendant notes that the Contract of Sale, dated October 27, 2017, provides that the closing was to take place within thirty (30) days, and that the property was to be delivered vacant at that time. However, Defendant notes that it adjourned the November 27, 2017 closing date pursuant to section 21(f) of the Contract, which in pertinent part, reads as follows:

> 21. Title Examination; Seller's Inability to Convey; Limitations of Liability.
>
> (b)(I) If at the date of closing, Seller is unable to transfer title to Purchaser in accordance with this contract, or Purchaser has other valid grounds for refusing to close, whether by reason of liens, encumbrances or other objections to title or otherwise (herein collectively called "Defects"), [...] Seller shall have the right at the Seller's sole election, either to take such action as Seller may deem advisable to remove,

remedy, discharge or comply with such Defects or to cancel this contract (ii) if Seller elects to take action to remove, remedy or comply with such Defects, Seller shall be entitled from time to time, upon Notice to Purchaser, **to adjourn the date for Closing hereunder for a period or periods not exceeding 60 days in the aggregate [...] and the date for Closing shall be adjourned to a date specified by Seller but not beyond such period. If for any reason whatsoever, Seller shall not have succeeded in removing, remedying or complying with such Defects at the expiration of such adjournment(s), and if Purchaser shall still be unwilling to waive the same and to close without abatement of the purchase price, the either party may cancel this contract by Notice to the other given within 10 days after such adjourned date [...]** [emphasis added]

(c) If this contract is cancelled pursuant to its terms, [...] this contract shall terminate and come to an end, and neither party shall have any further rights, obligations or liabilities against or to the other hereunder or otherwise, except that: **(i) Seller shall promptly refund or cause the Escrowee to refund the Downpayment to Purchaser [...] to reimburse Purchaser for the net cost of examination of title, including any appropriate additional charges related thereto, and the net cost, if actually paid or incurred by Purchaser for updating the existing survey of the Premises or of a new survey** [...] [emphasis added].

Sabrina Battles, Defendant's President, avers that shortly before the November 27, 2017 closing date, a tenant on the Subject Premises stated that it would not be able to vacate for three weeks. Plaintiff informed Defendant that it refused to close unless the property was delivered in vacant condition. Battles state that her attorney then informed her that the closing would be extended for up to 60 days to give tenants additional time to vacate. However, on December 18, 2017, Battles recalls that one of the tenants refused to vacate; thus, Defendant contemplated commencing a Housing Court holdover proceeding. Soon after, defense counsel sent a letter to Plaintiff's attorney, dated December 27, 2017, to advise that it was canceling the Contract of Sale, as it was unable to deliver a vacant premises in time for the closing. The correspondence was accompanied by a $30,0000 check made payable to Plaintiff, as reimbursement for its downpayment (Exhibit "B" of Defendant's motion). In response, Plaintiff rejected the notice of cancellation, and returned the check to Defendantl (Exhibit "B" of Defendant's motion).

Defendant asserts that it has not defaulted since it canceled the Contract of Sale pursuant to its terms. Thus, it argues that Plaintiff's specific performance and breach of the implied duty of good faith and fair dealing claims should be dismissed. Defendant further contends that the breach of contract action fails as a matter of law, as Plaintiff fails to present evidence that it suffered any damages as a result of the alleged breach.

In opposition, Plaintiff acknowledges that the contract states that if Defendant is unable to transfer title in accordance with its terms, its adversary could either attempt to cure the violation or cancel the contract. However, Plaintiff argues that Defendant did not take reasonable steps to comply with its obligations to deliver a vacant premises.

Plaintiff also contends that its claims were properly pled, and that a court deciding a CPLR § 3211(a)(7) motion, considers the adequacy of a pleading rather than the substantive merits of the claims. It further maintains that contrary to Defendant's contentions, it adequately alleges $500,000 in damages for lost profits, and notes that it expended money to secure financing, and run title searches.

Defendant, in rebuttal, maintains, *inter alia*, that it exercised an option in the Contract of Sale to cancel the transaction; thus, it is not in default.

On a CPLR § 3211(a)(7) motion to dismiss, "the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Breytman v Olinville Realty, LLC*, 54 AD3d 703, 703-704 [2nd Dept 2008]). The court does not determine the merits of the cause of action, instead it analyzes the "sufficiency" of the allegations in the pleading (*Canzona v Atanasio*, 118 AD3d 841, 842 [2nd Dept 2014]). The sole criterion is whether the pleading states a cause of action and "if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail." (*Kopelowitz & Co., Inc. v Mann*, 83 AD3d 793, 797 [2nd Dept 2011], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]).

In a breach of contract action, a plaintiff must allege: "(1) the existence of a contract, (2) performance pursuant to that contract, (3) defendant's breach of their contractual obligations, and (4) damages resulting from that breach" (*Canzona*, 118 AD3d at 842). The Second Department holds that "when interpreting a contract, the construction arrived at should give fair meaning to all of the language employed by the parties, to reach a practical interpretation of the

parties' expressions so that their reasonable expectations will be realized" (*Fernandez v Price*, 63 AD3d 672 [2009]). Courts must look to the "intent and purpose" of the contract (*Bibbo v 31-30, LLC*, 105 AD3d 791 [2nd Dept 2013]).

A purchaser of real property seeking specific performance must demonstrate that he or she was ready, willing, and able to perform the contract, regardless of any anticipatory breach by the seller (*see 533 Park Ave. Realty, LLC v Park Ave: Bldg. & Roofing Supplies, LLC*, 156 A.D.3d 744,747 [2017]). Notably, paragraph 23(b) of the subject Contract of Sale states, "**[i]f Seller defaults hereunder, Purchaser shall have such remedies as Purchaser shall be entitled to at law or in equity including but not limited to, specific performance** [emphasis added]."

In the instant case, this Court finds that Plaintiff has duly plead claims for specific performance, breach of contract / good faith and fair dealing. Defendant contends that it is not in default, as it canceled the Contract of Sale pursuant to its terms, and Plaintiff was refunded the $30,000 downpayment. On the other hand, Plaintiff alleges that it is entitled to extensive damages, including loss profits, and title search fees. Notably, paragraph 21 of the contract provides that if the seller cancels, the purchaser is entitled to recover the downpayment, the net cost of examination of title, related charges, and survey expenses. Given that Plaintiff has plead cognizable claims, Defendant has not established viable grounds for the dismissal of the Verified Complaint.

Accordingly, based upon the above, Defendant's Motion to Dismiss is **DENIED**.

This constitutes the Decision/Order of the court.

HON. CAROLYN E. WADE
ACTING SUPREME COURT JUSTICE

HON. CAROLYN E. WADE