SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 60

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OSCAR ENGELBERT

Plaintiff,

- v -

JIDE ZEITLIN,

Defendant.

INDEX NO. 653189/2016

MOTION DATE _____

MOTION SEQ. NO. 003

DECISION AND ORDER

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HON. MARCY S. FRIEDMAN:

The following e-filed documents, listed by NYSCEF document number (Motion Seq. No. 003) 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156
were read on this motion to/for SUMMARY JUDGMENT.

In this action, plaintiff Oscar Engelbert seeks the return from defendant Jide Zeitlin of his down payment of $825,000 toward the purchase from Zeitlin of a cooperative apartment. Engelbert moves, pursuant to CPLR 3212, for summary judgment. Zeitlin cross-moves, pursuant to CPLR 3212, for summary judgment "directing the Court, as escrow agent, to deliver to [Zeitlin] the contract deposit of $825,000 currently being held in escrow."

Background

The following facts are undisputed unless otherwise stated. Zeitlin is the owner of apartment units 6A and 6B (together, the Unit) in the "residential cooperative housing

cooperation [sic]" located at 121 Greene Street in Manhattan (the Co-op). (Joint Statement of Material Undisputed Facts [Jt. St.], ¶ 2.) Pursuant to a contract of sale made as of October 24, 2014 (the Contract), Engelbert agreed to purchase the Unit from Zeitlin for $8,250,000. (Id., ¶ 3; Contract, ¶¶ 1.1-1.1.2, 1.16 [Aff. of William McCracken (Pl.'s Atty.) In Supp., dated July 31, 2017 (McCracken Aff.), Ex. D].)[1] Upon signing the Contract, Engelbert made a 10% down payment of $825,000, which was delivered to and initially held by Zeitlin's attorney as escrow agent. (Jt. St., ¶¶ 4-5.)

Pursuant to the Contract, Zeitlin, as Seller, agreed (i) "to have removed as of record all Violations attributable to work done in the Unit or as a result of the condition of the Unit, including but not limited to, the Partial Stop Work Order presently pending, as well as all liens or judgments which might affect the Unit;" and (ii) "to cooperate with First American Title Insurance Company and satisfy all conditions required for them to issue an Eagle 9 policy." (Jt. St., ¶ 7; Contract Rider, ¶ 46.) "[I]t was a condition to closing for all Violations attributable to work done in the Unit to be removed, including the Partial Stop Work Order, and for First American Title Insurance Company to issue an Eagle 9 policy." (Jt. St., ¶ 8, citing Contract, ¶ 15.1, Contract Rider, ¶ 46.) "[T]he closing was also 'subject to the unconditional consent of the Corporation [i.e., the Co-op].'" (Jt. St., ¶ 9 [brackets in original], quoting Contract, ¶ 6.1.) The parties were required to "each cooperate with the other, the [Co-op] and title company, if any, and obtain, execute and deliver such documents as are reasonably necessary to consummate this sale." (Contract, ¶ 24.1; Jt. St., ¶ 10.)

[1] As the Contract refers to its provisions as paragraphs, rather than as sections, the court will also do so.

The Contract included a number of provisions relating to the parties' right to cancel. As relevant here, paragraph 6.3 provided:

> "If the [Co-op] has not made a decision on or before the Scheduled Closing Date, the Closing shall be adjourned for 30 business days for the purpose of obtaining such consent. If such consent is not given by such adjourned date, either Party may cancel this Contract by Notice, provided that the [Co-op's] consent is not issued before such Notice of cancellation is given. If such consent is refused at any time, either party may cancel this Contract by Notice. In the event of cancellation pursuant to this [sic] 16.3, the Escrowee shall refund the Contract Deposit to Purchaser"[2]

The Contract also included provisions related to Seller's inability to perform.

Paragraph 16.1 of the Contract provided:

> "If Seller shall be unable to transfer the items set forth in ¶2.1 [i.e. the Shares, Lease, Personality, and any Included Interests and all other items included in this sale] in accordance with this Contract for any reason other than Seller's failure to make a required payment or other willful act or omission, then Seller shall have the right to adjourn the Closing for periods not exceeding 60 calendar days in the aggregate."

Paragraph 40 of the Contract Rider modified Paragraph 16.1 to the extent that adjournments of the closing could "not exceed 30 calendar days in the aggregate, with such period commencing on the Scheduled Closing Date."

Paragraph 16.2 provided:

> "If Seller does not elect to adjourn the Closing or (if adjourned) on the adjourned date of Closing Seller is still unable to perform, then unless Purchaser elects to proceed with the Closing without abatement of the Purchase Price, either Party may cancel this Contract on Notice to the other Party given at any time thereafter."

[2] Paragraph 6.3 was modified by the Contract Rider to the extent that "30 business days" was changed to "30 days." (Contract Rider ¶ 34.)

Paragraph 16.3 provided:

> "In the event of such cancellation, the sole liability of Seller shall be to cause the Contract Deposit to be refunded to Purchaser and to reimburse Purchaser for the actual costs incurred for Purchase[r]'s lien and title search, if any."

The closing was scheduled for January 15, 2015. (Contract, ¶ 1.15.) On January 16, 2015, Zeitlin's counsel sent Engelbert's counsel an email, memorializing the parties "agree[ment] to adjourn [the January 15 closing] pending the Board's decision. . . ." (Email from Andrew Blumenthal (Def.'s Atty.) to Sandra Jacobus (Pl.'s Atty.), dated Jan. 16, 2015 [Aff. of Janice Mac Avoy (Def.'s Atty.), dated Aug. 28, 2017 (Mac Avoy Aff.), Ex. G].) The sale of the Unit did not close on the adjourned date, February 14, 2015. (See Jt. St., ¶ 11; Pl.'s Memo. In Supp., at 3; Def.'s Memo. In Opp., at 3, 9.)[3]

On February 26, 2015, the Co-op issued a letter to Zeitlin approving the proposed sale of the Unit to Engelbert, subject to certain conditions including, among others, that all open permits and violations be closed and cleared and that proof be provided that there were "no liens, encumbrances, or adverse interests" filed against the Co-op as a result of work performed in the Unit. (Jt. St., ¶¶ 12, 33; Letter from Daniel Dermer [Co-op Managing Agent] to Zeitlin, dated Feb. 26, 2015 [McCracken Aff., Ex. E].) The Co-op never gave unconditional approval to the proposed sale. (Jt. St., ¶ 13.)

From February 2015 until at least February 2016, the parties, through their respective attorneys and brokers, continued to communicate in an attempt to progress toward a closing.

[3] The memoranda of law filed on this motion are referred to as Pl.'s Memo. In Supp., Defs.' Memo. In Opp., Pl.'s Reply Memo., Def.'s Reply Memo., and Pl.'s Sur-Reply Memo.

(See e.g. Email from Blumenthal to Jacobus, dated June 11, 2015 [McCracken Aff., Ex. G] [providing an update on the status of the stop work order]; Email from Jacobus to Blumenthal, dated Feb. 12, 2016 [Mac Avoy Aff., Ex. J].)

Engelbert sought updates from Zeitlin on the status of the Partial Stop Work Order and the Eagle 9 policy and he and his attorney repeatedly expressed impatience with the delays. (See e.g. Email from Tom Doyle (Def.'s Broker) to Blumenthal & Zeitlin, dated June 8, 2015 [McCracken Aff., Ex. J] [copying an email sent from Engelbert to Doyle which expressed Engelbert's view that it was "getting ridiculous" that the "work stop order" was still in place]; Email from Jacobus to Blumenthal, dated June 3, 2015 [Mac Avoy Aff., Ex. C] ["As I mentioned yesterday, [the Partial Stop Work Order] is still on record, weeks after we were told everything was ok. [T]his is dragging on way too long"]; see also Email from Heyman (Def.'s Broker) to Zeitlin, Blumenthal, and Doyle, dated Mar. 6, 2015 [McCracken Aff., Ex. I] ["Oscar desperate for[] an answer today"].)

Zeitlin encountered "obstacles" in lifting the Partial Stop Work Order and satisfying the conditions to obtain the requisite Eagle 9 policy. (See Def.'s Memo. In Opp., at 4, 9; see e.g. Email from Blumenthal to Jacobus, dated Aug. 21, 2015 [explaining challenges Zeitlin's counsel encountered with certain UCC filings required by First American].) Zeitlin made periodic progress reports to Engelbert and offered projections of new closing dates. (See Def.'s Memo. In Opp., at 4; Engelbert Aff., ¶ 16; see e.g. Email from Blumenthal to Jacobus, dated Nov. 9, 2015 [McCracken Aff., Ex. H] [providing an update stating, among other things, that "Plan C" for resolving the issue with the Partial Stop Work Order had been "accomplished" and stating that

the parties could "start considering a closing date toward the end of November or early in December [2015]"].)

On January 25, 2016, Zeitlin's attorney sent an email to Engelbert's attorney acknowledging that the delays were Zeitlin's fault and seeking confirmation that Engelbert was "still interested in this sale." (Email from Blumenthal to Jacobus [McCracken Aff., Ex. M].) In a February 12, 2016 email, Engelbert's counsel confirmed that Engelbert was "still interested in proceeding," but would "need a few weeks from the time the stop work order has been lifted to closing" in order to "coordinate his funding." (Feb. 12, 2016 Email; see also Mar. 29, 2017 Engelbert Deposition Transcript, at 202-203 [Mac Avoy Aff., Ex. Z].)

By notice dated March 9, 2016 (Cancellation Notice), however, Engelbert's counsel advised Zeitlin and his counsel that Engelbert elected to cancel the Contract. The Notice stated in the pertinent part:

> "Pursuant to the terms of the Contract and the conditions of the consent of 121 Greene Street Owners Corp. ('Cooperative') to the purchase of Mr. Engelbert of the Apartments, the pending 'Partial Stop Work' order by the New York City Department of Buildings involving the Apartments had to be removed as of record before any closing would be permitted. As of this date, no closing has occurred and the Partial Stop Work Order has not been removed as of record.
>
> "Pursuant to the terms of Paragraph 16 of the Contract, Mr. Engelbert is electing to cancel the Contract. His contract deposit of $800,000, plus interest accrued should be immediately returned to him. Please forward the return of the deposit to my attention."

(Cancellation Notice [McCracken Aff., Ex. N]; see Jt. St., ¶¶ 23, 51.)

The Partial Stop Work Order was lifted by the Department of Buildings on or about March 15, 2016. (Jt. St., ¶ 67.) Notwithstanding the March 9, 2016 cancellation, Engelbert attempted to negotiate with Zeitlin about the sale of the Unit, offering to close if a concession were made in the purchase price and if the closing were adjourned approximately six months. (Email from Blumenthal to Jacobus, dated Mar. 21, 2016 [Mac Avoy Aff., Ex. O] [summarizing Engelbert's offer]; Email from Karen Heyman (Def.'s Broker) to Blumenthal, Zeitlin, & Doyle, dated Apr. 22, 2016, forwarding an email from Naim Mokadmini (Pl.'s Broker) of the same date [Mac Avoy Aff., Ex. S].) Zeitlin rejected these offers. (Mar. 21, 2016 Email; see Email from Blumenthal to Jacobus, dated Apr. 24, 2016 [Mac Avoy Aff., Ex. T].)

Zeitlin purported to serve a time of the essence notice, dated March 21, 2016, which stated: "All issues concerning title to the referenced premises have been resolved completely. . . . Therefore, please consider this letter a 'time of the essence' notice advising you that the closing will take place Monday, April 25, 2016. . . ." (Notice [Mac Avoy Aff., Ex. O].) By email dated April 21, 2016, Engelbert's counsel notified Zeitlin's counsel that Engelbert's position was that the Contract was cancelled, that he was entitled to the refund of the deposit, and that he would not appear at the closing. (Mac Avoy Aff., Ex. P.)

Neither Engelbert nor Zeitlin appeared at the April 25 closing. (Jt. St., ¶ 27.) The $825,000 deposit has not been returned to Engelbert or paid to Zeitlin and is being held by the Court in escrow pending the resolution of this litigation. (Id., ¶¶ 6, 24; Stipulation, so-ordered on Mar. 8, 2017 [NYSCEF Doc. No. 35].)

Discussion

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v. City of New York, 49 N.Y.2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party must show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd [b])." (Zuckerman, 49 N.Y.2d at 562.)

The complaint pleads a first cause of action for a declaration that Zeitlin breached the Contract (Compl., ¶¶ 42-46); a second for injunctive relief (id., ¶¶ 47-49); and a third for breach of the Contract (id., ¶¶ 50-55). The second amended answer pleads a first counterclaim for breach of contract (Second Am. Answer, ¶¶ 123-141); a second for breach of the implied covenant of good faith and fair dealing (id., ¶¶ 142-149); and a third for a declaration that Engelbert breached the Contract (id., ¶¶ 150-155).

The three causes of action pleaded in the complaint are all based on the allegation that Zeitlin breached the Contract by failing to remove all violations to work done in the unit prior to closing, failing to satisfy the conditions for issuance of a required insurance policy, and failing to close no later than February 14, 2015. (Compl., ¶¶ 43, 53.)

Engelbert's Motion

The court first addresses the parties' arguments concerning Engelbert's cancellation pursuant to Paragraph 16.2 of the Contract. The court holds that, upon the passage of the

adjourned closing date, the right to cancel the Contact immediately vested in each party. It is well settled that in a real estate sales agreement, "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 NY3d 484, 486 [2006]; see Grace v Nappa, 46 NY2d 560, 565 [1979], rearg denied 47 NY2d 952.) It is also well settled, however, that where the agreement expressly grants the purchaser and/or the seller the right to cancel after a specified date, such a provision will be enforced. (W.W.W. Assocs., Inc. v Giancontieri, 77 NY2d 157 [1990]; see Buxton v Streany, 68 AD3d 1036, 1037 [2d Dept 2009]; Ismael-Aguirre v Wharton, 2010 NY Slip Op 50894 [U], 2010 WL 2012060, * 3-4 [Sup Ct, NY County 2010]; Segundo v Killerlane III, 2009 NY Slip Op 31057 [U], 2009 WL 1401187, * 5 [Sup Ct, NY County 2009] [holding that, although time was not of the essence, buyer "was fully within her contractual rights to cancel the proposed purchase" when the board failed to give its unconditional approval].)

Here, paragraph 16.2 of the Contract provided that, in the event Zeitlin was unable to "perform" on the adjourned date, unless Engelbert elected "to proceed with the Closing without abatement of the Purchase Price," both parties had an unequivocal right to "cancel th[e] Contract on Notice to the other Party given at any time thereafter."[4] It is undisputed that Zeitlin was unable to perform under the terms of the Contract on that date. (See Def.'s Memo. In Opp., at 3-4; Jt. St., ¶ 11; Dec. 21, 2017 Oral Argument Tr., at 24-25.) The absence of a time of the essence clause therefore did not preclude Engelbert from canceling the Contract after the adjourned date.

[4] Notice is defined as follows: "Any notice or demand ('Notice') shall be in writing and delivered either by hand, overnight delivery or certified or registered mail, return receipt requested, to the Party and simultaneously, in like manner, to such Party's Attorney, if any, and to Escrowee at their respective addresses or such other address as shall hereafter be designated by notice given pursuant to this ¶17." (Contract, ¶ 17.1.)

The court rejects Zeitlin's argument that the cancellation clause is "ineffective" because "Engelbert 'elect[ed] to proceed' with the closing on the Contract after the original closing date passed." (Def.'s Memo. In Opp., at 12 [brackets in original]; see also id., at 2, 11, 13-14.) The court must "construe the [contract] so as to give full meaning and effect to the material provisions. A reading of the contract should not render any portion meaningless. Further, a contract should be read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose." (Beal Sav. Bank v Sommer, 8 NY3d 318, 324-25 [2007] [internal quotation marks and citations omitted]; W.W.W. Assocs., 77 NY2d at 162 [reading the contract "as a whole to determine its purpose and intent"].) Paragraph 16.2 must be read together with paragraph 16.1, as modified by paragraph 34 of the Contract Rider. These provisions afforded Zeitlin the "right to adjourn the Closing" only for a period not exceeding 30 days. Read in light of paragraph 16.1, paragraph 16.2 gave Engelbert the right to elect to proceed with the Closing on the adjourned date "without abatement of the Purchase Price" in the event that Zeitlin failed to comply with the terms of the Contract.[5] As Engelbert did not elect to close on that date, paragraph 16.2 gave either party the right to cancel at any time thereafter.

The court reaches a different result as to the issue of waiver and estoppel. It is well settled that "[c]ontractual rights may be waived if they are knowingly, voluntarily and intentionally abandoned. Such abandonment may be established by affirmative conduct or by failure to act so as to evince an intent not to claim a purported advantage." (Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P., 7 NY3d 96, 104 [2006] [internal

[5] To the extent that similar contract language was interpreted differently by a court on a motion for a preliminary injunction (Gath v Micali, 2012 NY Slip Op 32100 [U], 2012 WL 3449439 [Sup Ct, NY County 2012]), the court disagrees with that interpretation.

quotation marks and citations omitted].) Estoppel "is imposed by law in the interest of fairness to prevent the enforcement of rights which would work fraud or injustice upon the person against whom enforcement is sought and who, in justifiable reliance upon the opposing party's words or conduct, has been misled into acting upon the belief that such enforcement would not be sought." (Id., at 106.)

It is also well settled that "no oral modification" and "no-waiver" provisions may themselves be waived. (See generally Rose v Spa Realty Assocs., 42 NY2d 338, 343 [1977]; Schapfel v Taylor, 65 AD3d 620, 620 [2d Dept 2009].) Further, under the doctrine of equitable estoppel, "[o]nce a party to a written agreement has induced another's significant and substantial reliance upon an oral modification, the first party may be estopped from invoking the statute [of frauds] to bar proof of that oral modification." (Rose, 42 NY2d at 344.)

Engelbert relies on authority which holds that the right of a purchaser to a real estate contract to exercise its option to cancel is not waived or forfeited by the fact that the party "took certain steps towards closing on the contract" after the date by which the other party was required to perform. (See Bong Hyun Lieu v Goller Place Corp., 192 AD2d 634, 634 [2d Dept 1993] [holding that buyers were entitled to return of their down payment where buyers cancelled the contract after the date by which seller was required to perform]; accord BDG Oceanside, LLC v RAD Terminal Corp, 14 AD3d 472, 474 [2d Dept 2005], lv denied 5 NY3d 783 [same]; see generally Griswold Special Care of New York, Inc. v Executive Nurses Home Care, Inc., 66 AD3d 962, 963 [2d Dept 2009]; England v Nettesheim, 222 AD2d 825, 827 [3d Dept 1995].)

There is, however, also substantial authority that where a party discusses the possibility of new closing dates, grants an indeterminate extension of time to perform, engages in additional

performance, or otherwise leads the other party to believe he or she is willing to proceed in disregard of the original date, the party may waive its right to cancel the contract. (See Stefanelli v Vitale, 223 AD2d 361, 362 [1st Dept 1996] [holding, after trial, that a time of the essence provision "was waived by the statement of defendant[] [buyers'] attorney in response to plaintiffs' attorney's letter . . . that plaintiffs should '[c]lean up violations so that we can proceed to a closing—or give up—return monies in escrow'"]; Island Estates Mgt., Inc. v MBA-Manorhaven, LLC, 66 AD3d 839, 840 [2d Dept 2009] [holding that, although the contract afforded the seller the right to cancel in the event the buyer could not obtain a subdivision approval, issues of fact existed as to whether the seller had "waived performance within the time period originally fixed and essentially granted the plaintiff an indeterminate extension of time"]; Golfo v Kycia Assocs., Inc., 15 AD3d 540, 541 [2d Dept 2005] [holding that questions of fact existed as to whether the defendants waived their right to cancel where they asked plaintiffs to schedule a "mutually agreeable closing date" approximately three months after the original closing date and did not purport to cancel until seven months after the original closing]; see also El-Ad 250 W. LLC v 30 Hubert St. LLC, 67 AD3d 520, 521 [1st Dept 2009] ["We note also that by continuing to perform under the agreement without giving plaintiff [seller] notice of alleged defaults, defendant [buyer] could not thereafter elect to terminate the agreement for a default which apparently it chose to disregard as a ground for termination of the contract"] [internal quotation marks and citations omitted]; see generally Donald v Barbato, 27 AD3d 414, 414 [2d Dept 2006] [holding that, while the defendants made a prima facie showing of entitlement to judgment based on a cancellation provision in the contract of sale, the plaintiff raised triable issues of fact as to whether there was partial performance of an oral modification and therefore

whether the defendants waived or were estopped from exercising their right to cancel the contract].)

If such a waiver has occurred, a party who wishes to reinstate its right to cancel must "set a new date for closing and make time of the essence by giving clear, distinct, and unequivocal notice to that effect giving the other party a reasonable time in which to act. . . ." (Moray v DBAG, Inc., 305 AD2d 472, 472 [2d Dept 2003] [internal quotation marks and citations omitted]; see Cave v Kollar, 296 AD2d 370, 371 [2d Dept 2002].)

Triable issues of fact exist as to whether Engelbert, through his statements and conduct after the adjourned closing date, waived or is estopped from relying on his right to cancel under the Contract without first setting a deadline for Zeitlin to perform. In emails submitted in support of both Engelbert's motion and Zeitlin's cross-motion, the parties, through their counsel, repeatedly discussed rescheduling of a closing date after the Partial Stop Work Order was lifted. Although early on in the counsels' discussions, Engelbert's counsel stated that she would obtain "tentative dates" for a closing from Engelbert (Email from Jacobus to Blumenthal, dated May 12, 2015 [Mac Avoy Aff., Ex. H]), there is no evidence in the record that a subsequent date was ever set. In fact, in later months, Engelbert's counsel refused to discuss a closing date until the Partial Stop Work Order was lifted. (See e.g. Email from Jacobus to Blumenthal, dated Nov. 10, 2015 ["Once that issue [i.e., the Partial Stop Work Order] has been resolved we can discuss a closing date"] [Mac Avoy Aff., Ex. I]; Email from Jacobus to Blumenthal, dated Jan. 25, 2016 [McCracken Aff., Ex. M].) In emails to Zeitlin's brokers or counsel, Engelbert and his counsel also repeatedly expressed Engelbert's frustration over the delays in lifting the Partial Stop Work Order. (See Emails discussed supra at 5.) Zeitlin, however, submits evidence that as late as

February 12, 2016, Engelbert was "still interested in proceeding," and merely indicated that he "w[ould] need a few weeks from the time the stop work order has been lifted to closing." (Feb. 12, 2016 Email [Mac Avoy Aff., Ex. J].) Moreover, after sending the Cancellation Notice over a year after the adjourned closing date, Engelbert attempted to negotiate the price and closing date with Zeitlin. (Mar. 21, 2016 Email [Mac Avoy Aff., Ex. O]; Apr. 22, 2016 Email [Mac Avoy Aff., Ex. S].) While Engelbert argues that at no time did he "ever express or imply, either directly or indirectly, that he was waving any of his rights under the Contract" (Pl.'s Memo. In Supp., at 9), the communications between counsel raise an issue of fact as to waiver or estoppel which must be determined at trial.[6]

In holding that a triable issue of fact exists, the court rejects Engelbert's argument that his discussions with Zeitlin after sending the Cancellation Notice were not conducted in furtherance of the Contract and that "[a]ny agreement that Engelbert and Zeitlin may have made . . . would have constituted a new contract, not the Contract that Engelbert terminated on March 9, 2016." (See Pl.'s Reply Memo., at 22.) The evidence in the record of these motions does not support the claim that the parties were negotiating a new contract, as opposed to discussing belated performance of the existing Contract. (Compare Kistela v Ahlers, 22 AD3d 641, 643 [2d Dept 2005].)

[6] As discussed above (supra, at 8-10), the Contract permitted the seller to adjourn the closing date for 30 days after the original closing date (i.e., until February 14, 2015) if Zeitlin was unable to perform on the original closing date. (Contract, ¶ 16.1; Contract Rider, ¶ 40.) The Contract also provided that "[t]he Attorneys may extend in writing any of the time limitations stated in this Contract." (Contract, ¶ 14.2.) A January 16, 2015 email from Zeitlin's counsel to Engelbert's counsel refers to an agreement by the parties to adjourn the closing "pending the Board's decision." (Mac Avoy Aff., Ex. G.) The parties have not addressed the significance of this email and its impact on Engelbert's right to cancel the contract.

The court also rejects Engelbert's contention that, "[b]ecause Engelbert never signed any waiver of his right to cancel the Contract, any such purported waiver is unenforceable." (Pl.'s Reply Memo., at 17.) On the authority cited above (supra, at 11), this argument is without merit.

Engelbert also claims a separate right to cancel the Contract pursuant to paragraph 6.3.[7] Zeitlin argues that "paragraph 6.3 is inapplicable because the Corporation had, in fact, made a 'decision' on Engelbert's application[] on February 26, 2015, [when] the Corporation gave approval of the sale of the Unit to Engelbert, subject to resolving any liens or violations on the Unit and lifting the Stop Work Order." (Def.'s Reply Memo., at 7 [emphasis omitted].) The plain language of the Contract stated that "[t]his sale is subject to the unconditional consent of the Corporation." (Contract, ¶ 6.1.) Contrary to Zeitlin's contention, the board's conditional approval therefore does not render paragraph 6.3 of the Contract inapplicable. (See generally Lovelace v Krauss, 60 AD3d 579, 579-580 [1st Dept 2009], lv denied 12 NY3d 714.)

The court holds, however, that Engelbert is estopped from asserting its right to cancel pursuant to paragraph 6.3 of the Contract. The Cancellation Notice by its terms stated that Engelbert elected to cancel the Contract, pursuant to paragraph 16, based on Zeitlin's failure to remove the Partial Stop Work Order. There is persuasive authority that "where a party to a contract terminates the contract and presents a specific reason for the termination, that party is estopped from raising a different reason upon the commencement of an action." (See e.g. Leventhal v New York Valley Corp., 1992 WL 15989, * 5 [SD NY, No. 91 Civ 4238 (CSH), 1992] [holding, under New York law, that the defendant employer was estopped from arguing

[7] Paragraph 6.3 of the Contract is not raised in the complaint, which pleads that "Purchaser [Engelbert] issued a notice of termination pursuant to Paragraph 16.2 of the Contract." (Compl., ¶ 32.) In his Reply to the Counterclaims, Engelbert pleads fifth and sixth affirmative defenses that he had a right, among others, to cancel the Contract on Zeitlin's failure to secure the Co-op's unconditional assent to the sale. (Pl.'s Reply to Counterclaims, at 12-13.)

that a severance agreement was "void for lack of consideration or unconscionability" where "the only stated reason" for discontinuing severance payments under the agreement was the defendant's "severe financial problems"], citing Littlejohn v Shaw, 159 NY 188, 191 [1899] [holding that the defendant buyers could not raise a new reason for rejecting goods sold by the plaintiffs where the defendants' rejection letter stated two specific grounds, the court reasoning that "if a particular objection is taken to the performance and the party is silent as to all others, they are deemed to be waived"].) The appellate authority cited by Engelbert is not to the contrary, as it does not address whether a party may seek to justify a termination of a contract on a ground not stated in the termination or cancellation. (See e.g. Arbor Leasing, LLC v BTMU Capital Corp., 68 AD3d 580 [1st Dept 2009]; 3657 Realty Co., LLC v Jones, 52 AD3d 272, 272 [1st Dept 2008]; Baker v Norman, 226 AD2d 301, 304 [1996].)

In summary, the court holds that Engelbert has not demonstrated that he is entitled to judgment as a matter of law on his second cause of action for injunctive relief directing the release to him of his Contract Deposit. He has also not demonstrated that he is entitled to judgment as a matter of law on his third cause of action for breach of contract, alleging that Engelbert validly cancelled the Contract as a result of Zeitlin's breaches in failing to remove violations and to obtain a title insurance policy and, therefore, in failing to close by February 14, 2015. (Compl., ¶¶ 25, 53.) The first cause of action for declaratory relief should be dismissed as duplicative of the second and third causes of action.

Zeitlin's Cross-Motion

The factual issues outlined above also preclude summary judgment in favor of Zeitlin on his counterclaims. Further, a question exists as to whether Zeitlin was ready, willing, and able to

perform on his proposed closing date. Although Zeitlin's counsel, Andrew Blumenthal, testified that he believed that Zeitlin would have been able to close on April 25, 2016 (May 2, 2017 Deposition Tr., at 114-115 [Mac Avoy Aff., Ex. Y]), he also testified that he had not, among other things, advised the managing agent that there was a closing schedule (id., at 115), required that the managing agent issue a letter confirming that all payments in arrears had been paid (id., at 117), or requested that First American "send a closer prepared to write a title policy" (id., at 119-120). Contrary to Zeitlin's contention (Def.'s Memo. In Opp., at 24), Engelbert's alleged anticipatory repudiation of his obligations did not excuse Zeitlin from showing that he was ready, willing, and able to close. (See Pesa v Yoma Dev. Group, Inc., 18 NY3d 527, 530, 532 [2012] [holding that "in a case alleging that a seller has repudiated a contract to sell real property, the buyers must prove they were ready, willing and able to close the transaction"].)

Zeitlin has thus not demonstrated that he is entitled to judgment as a matter of law on his first counterclaim, alleging that Engelbert, not he, breached the Contract. The second counterclaim for breach of the implied covenant of good faith and fair dealing and the third counterclaim for a declaratory judgment will be dismissed as duplicative of the first counterclaim.

Attorney's Fees

Finally, the court holds that even if Engelbert ultimately prevails in this action, he will not be entitled to attorney's fees. Paragraph 13.2 of the Contract stated in the pertinent part: "Subject to the provisions of ¶ 4.3, each Party indemnifies and holds harmless the other against and from any claim, judgment, loss, liability, cost or expense resulting from the indemnitor's breach of any of its representations or covenants stated to survive Closing, cancellation or

termination of this Contract. . . . This ¶13.3 [sic] shall survive Closing, cancellation or termination of this Contract."

Engelbert points to no representation or covenant that could be a possible basis for indemnification under this provision. Engelbert claims that he is entitled to indemnification based on Zeitlin's failure to return the Contract Deposit to him, pursuant to paragraph 27 of the Contract. (Pl.'s Memo. In Supp., at 24-25; Pl.'s Reply Memo., at 23.) Paragraph 27 did not contain any representation or covenant regarding the Contract Deposit but, rather, set forth the obligations of the Escrowee with respect to the Contract Deposit and provided for indemnification of the Escrowee against claims in connection with the performance of the Escrowee's acts or omissions, other than those involving specified misconduct. Paragraph 4 of the Contract set forth representations that the shares shall be free and clear of liens and that "no violations shall be of record. . . ." (Contract, ¶¶ 4.1.9.2, 4.1.9.5.) Engelbert does not rely on these representations. But, in any event, paragraph 4.3 further provided that the representations and covenants in paragraph 4 "shall be true and complete at Closing. . . ." As no closing ever occurred, there is no claim for a breach of those representations and warranties.

It is accordingly hereby ORDERED that the motion of plaintiff Oscar Engelbert for summary judgment is denied, except to the extent of dismissing defendant Jide Zeitlin's second counterclaim for breach of the implied covenant of good faith and fair dealing and third counterclaim for a declaratory judgment; and it is further

ORDERED that the cross-motion of defendant Jide Zeitlin is denied, except to the extent of dismissing the first cause of action of the complaint for a declaratory judgment; and it is further

ORDERED that the second cause of action of the complaint for injunctive relief and the third cause of action for breach of contract are severed and shall continue; and it is further

ORDERED that the first counterclaim for breach of contract is severed and shall continue; and it is further

ORDERED that Engelbert's application for attorney's fees is denied; and it is further

ORDERED that the parties shall appear for a pre-trial conference on December 13, 2018 at 2:30 p.m.

This constitutes the decision and order of the court.

10/22/2018
DATE

MARCY S. FRIEDMAN, J.S.C.

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