At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 29th day of May, 2020.

P R E S E N T:
HON. RICHARD J. VELASQUEZ,
Justice.

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HM GREEN HOLDING, LLC ,

Plaintiff,

- against -

ISRAEL SILBERSTEIN and ABRAHAM HOSCHANDER, ESQ., as, ESCROW AGENT,

Defendants,

- and -

SAM SOUTH LLC,

Intervening Defendant.

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DECISION AND ORDER

Index No. 503878/2013

The following e-filed papers read herein:	NYSEF NOs.
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	382-383; 394-395; 278-279
Opposing Affidavits (Affirmations)	395; 401; 330-331
Reply Affidavits (Affirmations)	401; 408; 366

Upon the foregoing papers, Plaintiff HM Green Holding, LLC (HM Green) moves, in motion sequence (mot. seq.) 10, for an order vacating any and all stays and restoring the case to the trial calendar. Intervening defendant Sam South LLC (Sam South) cross-

moves, in mot. seq. 11, for leave to reargue this court's decision dated February 20, 2019 denying its prior motion for summary judgment in mot. seq. 9.

Background

In the underlying matter, HM Green seeks specific performance of an unsigned contract for the purchase of the premises known as 1015 Pacific Street, Brooklyn, New York (the premises) from Israel Silberstein (Silberstein). Abraham Hoschander (Hoschander) is alleged to be Silberstein's attorney for the transaction. Plaintiff claims, in its amended complaint dated September 30, 2013, that the contract dated May 31, 2011 became enforceable in June 2011 when it tendered its down payment check to Israel Silberstein.

On June 11, 2014, this court denied Silberstein and Hoschanders' motion (mot. seq. one) for summary judgment to dismiss the complaint and cancel the notice of pendency. The court found that there were issues of fact which precluded a summary determination to them.

By order dated January 13, 2016, Sam South was granted leave to intervene in this action (mot. seq. three) based on its allegations that it is the current deed owner of the premises and Silberstein did not have the right to sell the property to HM Green. Thereafter, depositions of the parties were held.

Sam South moved for summary judgment (mot. seq. nine), and in a decision dated February 20, 2019, this court found:

> "Intervening defendant, Sam South LLC's motion for summary judgment is denied, as the motion evidences that there are triable issues of fact. That this is the second motion for summary judgment, with the prior Short Form Order of June 11, 2014 which was not included in the intervening defendant's motion ruling that

there are issues of fact which preclude a summary judgment determination. That the Court adheres to its prior ruling and denies the intervening defendant's motion."

The Notice of Entry for this decision was served on plaintiff by first class mail on May 6, 2019.

Arguments

Plaintiff requests that this previously stayed action be restored to the trial calendar now that Sam South's motion for summary judgment has been denied. Sam South opposes plaintiff's motion and cross-moves for leave to reargue the court's decision to deny it summary judgment.

Sam South's main focus in reargument is that plaintiff was not a "ready, willing and able" buyer as required to prevail on its claim for specific performance. Sam South asserts that plaintiff's declaration, that this issue was previously decided in this court's 2014 order denying the other defendants' motion for summary judgment, was incorrect. Defendant proffers that, even if all of the other facts alleged by the plaintiff in its opposition to the Sam South's motion for summary judgment were true and the contract between the parties was enforceable, plaintiff did not sufficiently show that it had the funds to close in 2011.

Sam South submits that the court, in adhering to its prior determination, misapprehended that it had previously determined the issue of whether HM Green was ready, willing and able to close. Further, Sam South argues that, even if the court had previously decided this issue, that finding was not the law of the case as to Sam South because Sam South's motion to intervene was granted a year and a half after that motion

was decided. Sam South defends its original papers in support of its motion for summary judgment, and notes that the prior motion was made before most discovery was conducted in this case which has brought forth new information not considered in that prior motion. For example, Sam South claims the February 20, 2014 letter of funds written by plaintiff's escrow attorney, which plaintiff relies on in its opposition, was written three years after the presumptive closing date. As a result, the letter is insufficient and inadmissible. Further, the letter is negated by that same attorney's affidavit dated June 28, 2018 wherein he admits he did not have an escrow account in July 2011, that he was not even *admitted* in 2011, and that he did not have any documents showing that plaintiff had sufficient funds for the purchase. Sam South refutes plaintiff's witness' weak assertion at deposition, that he received verbal approval for a loan on the property from Bayport, by presenting an affidavit from Bayport dated January 15, 2018. In this affidavit, a member of Bayport avers that that plaintiff's first inquiry for a mortgage on the property occurred in 2017 and plaintiff never obtained a mortgage on that property. Sam South argues that plaintiff has shown, at best, that it had the funds to close the sale years after 2011.

In opposition to Sam South's motion, plaintiff argues that the application is untimely, given that it was filed 31 days after the notice of entry of the challenged decision was served. Plaintiff also claims the court did not overlook or misapprehend any law or fact in denying Sam South's prior motion. It argues that Sam South lacked standing to challenge the enforceability of the contract since it was not a party to the contract, was not a third-party beneficiary, and did not suffer any damages that were directly attributable to the contract. Alternatively, plaintiff claims that even if Sam South had standing to raise

the argument that plaintiff was not a ready, willing or able purchaser, plaintiff already established its status as such or at the very least raised a triable issue of fact through numerous affidavits. HM Green views this motion as merely another attempt for Sam South to present an argument for dismissal that has already been addressed, denied, and is the law of the case. HM Green claims that Sam South presents falsehoods, distortions and omits evidence to attempt to confuse the court. Plaintiff also alleges that Sam South's deed was a forgery, requiring a trial to show that Sam South is attempting to perpetrate a fraud.

In reply, Sam South claims that its motion was timely, given that the 30-day deadline to file was extended an additional five days when the notice of entry was sent by first class mail. Sam South further claims that it had standing to challenge the enforceability of the contract because it was granted permission to join the action as an intervening defendant and it is entitled to protect its right to the property. However, even if it did not have standing to make such a challenge, it could be permitted summary judgment given that this court may grant summary judgment to a non-moving party.

Sam South argues that the other defendants' motion for summary judgment was denied in 2014 because there was a triable issue of fact as to whether the contract was enforceable, but the issue of whether plaintiff was a ready, willing and able buyer was never addressed by the court. Therefore, this court's denial of its motion without fully addressing its argument in order to adhere to a prior decision was an oversight. Sam South claims it showed that the plaintiff did not have the funds to close in 2011 and the evidence presented by plaintiff to oppose that allegation is conclusory, illusory, and at best, only shows that plaintiff had the required funds years later. Any allegations by the

plaintiff that it does not own the property is merely a diversion from the fact that plaintiff cannot prove an essential element of its case.

Analysis

Sam South's Cross Motion for Reargument – Mot. Seq. 11

Leave to Reargue

"A motion for leave to reargue 'shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion'" (*Grimm v Bailey*, 105 AD3d 703, 704 [2d Dept 2013] citing CPLR 2221 [d] [2]; *see also Barnett v Smith*, 64 AD3d 669, 670-671 [2d Dept 2009]). Such a motion must be made "within thirty days after service of a copy of the order determining the prior motion and written notice of its entry" (CPLR 2221[d][3]) but five days are added to the allotted period where service is made by mail (CPLR 2103[b][2]).

As an initial matter, this court notes that Sam South's motion to reargue is timely even though it was filed 31 days after the order and notice of entry was served on Sam South, because the 30-day deadline was expanded when it was sent by mail.

"The doctrine of the law of the case seeks to prevent [re-litigation] of issues of law that have already been determined at an earlier stage of the proceeding" (*Brownrigg v New York City Hous. Auth.*, 29 AD3d 721, 722 [2d Dept 2006]; *see also Bellavia v Allied Elec. Motor Serv.*, 46 AD2d 807 [2d Dept 1974]). The doctrine applies only to legal determinations that were necessarily resolved on the merits in a prior decision (*see Gay v Farella*, 5 AD3d 540, 541 [2d Dept 2004]). "'Like claim preclusion and issue preclusion, preclusion under the law of the case contemplates that the parties had a full and fair

opportunity to litigate the initial determination'" (*PHH Mtge. Corp. v Burt*, 176 AD3d 1242 [2d Dept 2019] quoting *People v Evans*, 94 NY2d 499, 502 [2000]). However, denial of a prior motion for summary judgment is not necessarily the law of the case where the successive motion for summary judgment is based on information obtained or discovery produced after the denial of the motion (*see Wenger v Goodell*, 288 AD2d 815, 816 [2d Dept 2001]; *see also McIvor v Di Benedetto*, 121 AD 2d 519, 522 [2d Dept 1986]).

Here, Sam South was not a party to the action when Silberstein and Hoschander's motion was denied. Further, even if the issue of plaintiff's status as a ready, willing and able buyer was called into question in that prior motion, a successive motion arguing for dismissal on the same basis would be permitted given that significant discovery, including the depositions, transpired after the 2014 order. Therefore, to the extent that there was a mistaken obligation by this court to adhere to its prior denial of other parties' motion for summary judgment in denying Sam South's motion for summary judgment, Sam South's motion for leave to reargue is granted.

Reargument

Upon reargument, this court considers Sam South's contention that it is entitled to summary judgment and dismissal of plaintiff's claims because plaintiff did not have the requisite funds necessary to close the sale of the subject property and thus cannot be considered a ready, willing and able buyer entitled to specific performance, regardless of the seller's alleged breach.

A party seeking summary judgment has the burden of establishing his or her defense "sufficiently to warrant the court as a matter of law in directing judgment in his favor, and he must do so by tender of evidentiary proof in admissible form" (*Zuckerman*

v City of New York, 49 NY2d 557, 562 [1980] [internal quotation marks and citation omitted]; *see* CPLR 3212[b]). The moving party bears the burden of prima facie showing its entitlement to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of any material issue of fact (*see* CPLR 3212 [b]; *Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]). Failing to make that showing requires denial of the motion, regardless of the adequacy of the opposing papers (*see Point Holding, LLC v Crittenden*, 119 AD3d 918, 919 [2d Dept 2014]). Once movant has made its prima facie showing, the burden shifts to the non-moving party to show "facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]). Conflicting inferences and issues of credibility will preclude summary judgment to a party and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (*see Open Door Foods, LLC v Pasta Machs., Inc.,* 136 AD3d 1002, 1004-1005 [2d Dept 2016]; *see also Benetatos v Comerford*, 78 AD3d 750, 751-752 [2d Dept 2010]). However, conclusory allegations unsupported by competent evidence are insufficient to defeat a summary judgment motion (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 [1986]).

"Before specific performance of a contract for the sale of real property may be granted, a plaintiff must demonstrate that it substantially performed its contractual obligations and that it is ready, willing, and able to satisfy those obligations not yet performed, regardless of any alleged anticipatory breach by the defendant" (*Johnson v Phelan*, 281 AD2d 394, 395 [2d Dept 2001]; *see also Internet Homes Inc. v Vitulli,* 8 AD 3d 438, 439 [2d Dept 2004]). A subsequent deed holder or purchaser of real property can challenge the enforceability of a contract for the sale of the real property to another

prospective buyer by the seller who originally conveyed said property to it (*see Carpenter v Crespo*, 161 AD3d 934, 935 [2d Dept 2018]). One way that a bonafide purchaser may seek summary judgment dismissing the prospective buyer's action for specific performance is for it to show that the prospective buyer did not have sufficient funds to be ready, willing and able to perform on the contract at closing (*see id.* at 936). "The plaintiff's unsubstantiated assertions that a line of credit could be secured or that a closely-related corporation would supply the funds and the conclusory allegation that it was ready, willing, and able to perform were insufficient to satisfy its burden" (*Internet Homes Inc. v Vitulli,* 8AD3d 438, 439 [2d Dept 2004]; *see also GND 1945, LLC v Ballard*, 172 AD3d 1330 [2d Dept 2019]).

The purchaser must have been ready, willing, and able to close "on the original law day or, if time is not of the essence, on a subsequent date fixed by the parties or within a reasonable time thereafter" (*Ferrone v Tupper*, 304 AD2d 524, 525 [2d Dept 2003]). Where "a contract for the sale of real property does not make time of the essence, the law permits a reasonable time in which to tender performance, regardless of whether the contract designates a specific date for performance" (*Point Holding LLC v Crittenden*, 119 AD3d 918, 919 [2d Dept 2014]; *see also Simpson v 1147 Dean LLC*, 116 AD3d 835, 836 [2d Dept 2014]). "What constitutes a reasonable time to perform turns on the circumstances of the case" (*Point Holding LLC v Crittenden*, 119 AD3d 918, 919 [2d Dept 2014]). However, where there is an indefinite adjournment of the closing date, in order to claim the buyer is in default, there must have been an affirmative act by the seller to give the buyer reasonable time to perform, and the buyer must have been informed that

failure to so do would be considered default (*see Rodriguez NBA, LLC v Allied XV, LLC*, 164 AD3d 1188, 1189 [2d Dept 2018]).

To prevail on its motion, Sam South must have standing to challenge the contract. Plaintiff claims that Sam South cannot challenge the enforceability of the contract (based on it not being a ready, willing and able buyer) because Sam South was not a party to the contract at issue. Sam South alleges that Silberstein actually sold the property to it instead of plaintiff, and it was the actual owner of the deed at the time the alleged contract at issue was entered into. Sam South's allegations, if proven true, bar plaintiff from specific performance as an impossible remedy, as plaintiff would be unable to create a superior interest in the property (*see Carpenter*, 161 AD3d at 937; *see also 2386 Creston Ave. Realty, LLC v M-P-M Mgt. Corp*, 58 AD3d 158, 160 [1st Dept 2008]). Here, the court's finding that Sam South could intervene was a finding that it had a real and substantial interest in the outcome of the proceedings (*see American Home Mtge. Servicing, Inc. v Sharrocks*, 92 AD3d 620 [2d Dept 2012]). Based upon the foregoing, Sam South has standing to challenge plaintiff's entitlement to specific performance based on its argument that plaintiff was not ready, willing, and able to provide the required funds to close the sale.

Turning to Sam South's main argument for dismissal that plaintiff cannot be granted specific performance because it was not a ready, willing and able purchaser, the court notes that the June 30, 2011 closing date on the contract at issue was crossed out. Instead, the contract indicates that the closing date for the sale of the property to HM Green was to be "on or about 30 days from receipt of two fully executed contracts by purchaser's attorney."

Sam South's central argument revolves around their contradiction of the already unreliable and scant evidence that plaintiff would have been able to close within a reasonable time from June 2011 (when plaintiff attempted to pay its deposit). However, Sam South fails to show that the contract was ever fully executed, that two fully executed contracts were ever received by plaintiff's attorney, that another closing date was ever set by the parties, or that the seller ever provided plaintiff with notice that time was of the essence (*see Weiss v Feldbrand*, 50 AD3d 673, 674 [2d Dept 2008]). Therefore, Sam South failed to provide sufficient support for its allegation that plaintiff was in default and was not ready, willing, and able to close the transaction within a reasonable time after the contracted closing date (*see Revital Realty Group, LLC v Ulano Corp.*, 112 AD3d 902 [2d Dept 2013]). Given that Sam South failed to meet its initial burden of demonstrating its entitlement to judgment as a matter of law and dismissal of this action (*see Giuffrida*, 100 NY2d at 81; *Zuckerman*, 49 NY2d at 562), the burden never shifted to plaintiff to establish a material question of fact which would require a trial (*see* CPLR 3212[b]). Accordingly, Sam Smith's motion for summary judgment is denied without regard for the adequacy of the opposing papers (*see Point Holding, LLC*, 119 AD3d at 919).

Plaintiff's Motion to Vacate Stay and
Return Matter to the Trial Calendar - Mot. Seq. 10

Defendant, Sam South, opposes plaintiff's motion by arguing that obtaining summary judgment on its motion renders plaintiff's motion to vacate the stay (imposed by defendant's summary judgment motion) and return this case to the trial calendar moot. Therefore, as the court has denied defendant's request for summary judgment, plaintiff's

motion is granted to the extent that the stay for intervening defendant's summary judgment motion is lifted and this matter is returned to the trial calendar.

Accordingly, it is hereby **ORDERED** that, Sam South's motion for leave to reargue is granted, and it is further; **ORDERED** that, upon re-argument, Sam South's motion for summary judgment is denied; and it is further; **ORDERED** that, all stays in this matter are hereby vacated; and it is further; **ORDERED** that, this case is restored to the trial calendar, for the reasons stated above. The court, having considered the parties remaining contentions, finds them unavailing. All relief not expressly granted herein is denied. The foregoing constitutes the decision and order of the court.

Dated: Brooklyn, New York
May 29, 2020

HON. RICHARD VELASQUEZ

So Ordered
Hon. Richard Velasquez
MAY 29 2020