STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[FILED: August 28, 2019]

BRIAN SADLER, *Petitioner,*	:	
v.	:	**C.A. No. PC-2018-8928**
30 Route 6, LLC; and the property located at 30 Highland Avenue, East Providence, More Particularly identified on the City of East Providence Tax Assessor's Map as Map 607, Plat 20, Lot 1 an In-Rem Respondent, *Respondents.*	:	

AND

KSM REALTY, LLC; and STEVEN MEDEIROS, *Plaintiffs,*	:	
v.	:	**C.A. No. PM-2018-6994**
30 ROUTE 6, LLC; BRIAN SADLER, and *Defendants,*	:	
FRANCISCO CRUZ, *Intervenor/Defendant.*	:	

As Consolidated With

FRANCISCO CRUZ, *Plaintiff,*	:	
v.	:	**C.A. No. PC-2018-6384**
30 ROUTE 6, LLC, *Defendant.*	:	

DECISION

STERN, J. This matter comes before the Court for decision after a three-day bench trial based on the competing specific performance claims of Francisco Cruz (Mr. Cruz), one prospective buyer, and KSM Realty, LLC (KSM), the other prospective buyer, as against 30 Route 6, LLC (30R6) and Brian Sadler (Seller), sole member and manager of 30R6.[1] Both Mr. Cruz and KSM contend that they are entitled to real property located at 30 Highland Avenue in East Providence, Rhode Island (Property) based on separate purchase and sales agreements they had entered with Seller at different times. The parties have stipulated that if Mr. Cruz is not entitled to specific performance, an order should enter allowing KSM to purchase the Property.

I

Facts

This dispute arises out of Mr. Cruz's attempts to purchase and develop the Property into a "Tommy Car Wash."[2] Trial Tr. 181:21-25, 183:23-184:8, Apr. 24, 2019. On May 11, 2018, Mr. Cruz and his real estate broker, Jeffrey Mateus (Mr. Mateus) of Mateus Realty, executed and submitted a written offer to purchase the Property through Seller's real estate brokers, Michael Volpe (Mr. Volpe) and/or Michael Giuttari, of MG Commercial. Stipulated Statement of Material Facts (SOF) ¶ 12. On June 4, 2018, Mr. Cruz and Seller executed a purchase and sale agreement for the Property (P&S1) with a purchase price of $1,212,500. Ex. 2, §§ 1, 2.

[1] For purposes of trial pursuant to a stipulation and request by the parties, this Court entered a consent order consolidating the above-captioned matters with the instant case, which is a Receivership action filed by Mr. Sadler against 30R6 and the Property. SOF ¶ 7.

[2] Mr. Cruz described a "Tommy Car Wash" as the "Lamborghini of car washes" because the cars are guided through the system "on a belt" as opposed to a "metal rack." Trial Tr. 182:3-16, Apr. 24, 2019.

The P&S1 contained various terms and conditions relevant to the instant analysis. Specifically, the P&S1 provided a 60-day inspection period, commencing from the agreement's effective date, within which time Mr. Cruz could inspect and assess the Property (Due Diligence Period) and terminate the P&S1 for any reason. *Id.* § 12; SOF ¶ 15. The P&S1 contained a condition providing that Mr. Cruz would "use best efforts" during the Due Diligence Period "to obtain approval from the City of East Providence to open an automatic Tommy Carwash." Ex. 2, § 12(c). Nevertheless, the P&S1 was not expressly contingent on Mr. Cruz's obtaining any such permits or other Federal, State, and/or local regulatory approvals. SOF ¶ 21. The P&S1 contained another provision providing in substance that Mr. Cruz had the option to cancel the sale on or before August 1, 2018 in the event he could not obtain a financing commitment (Mortgage Contingency).[3] Ex. 2, § 13.

Assuming Mr. Cruz elected to proceed with the sale, with or without permits or financing, the P&S1 provided the following with respect to a closing: "[t]he Seller will deliver the said deed, duly executed and stamped . . . on August 20, 2018, at 10:00 unless otherwise mutually agreed upon by the parties" (Closing Date). Ex. 2, § 4. Complications arose. In mid-July—despite that the Property had previously been used as a car wash—representatives with the City of East Providence (City) began to suggest they might not approve a car wash on the Property until such time as a traffic study could be performed. Trial Tr. 42:19-23; 99:17-100:9, Apr. 23, 2019. Mr. Cruz was intending to finance the sale of the Property with a Small Business Administration (SBA) loan, which would have enabled him to simultaneously finance the purchase of the Property and equipment; however, these loans were contingent on the City's approvals. *Id.* at 98:14-99:16.

[3] It is undisputed that Mr. Cruz did not obtain a financing commitment from any lender as of the August 1, 2018 deadline. SOF ¶ 19. However, Mr. Cruz did not elect to terminate the P&S1 prior to the expiration of the Mortgage Contingency deadline. *Id.* § 20.

Recognizing the need for a traffic study might affect Mr. Cruz's ability to close with SBA financing by the Closing Date, Mr. Cruz, by and through Mr. Mateus, and his attorney, Todd McNamara (Attorney McNamara), began communicating with 30R6's representatives for several weeks concerning terms for a proposed extension of the Closing Date, Mortgage Contingency deadline, and Due Diligence Period. SOF ¶ 23. As of August 20, 2018, Mr. Cruz and Seller had not come to terms on an extension. *Id.* § 24. No closing occurred on the Closing Date. *Id.* § 25.

Just four days after the Closing Date, Seller decided he had waited long enough. On August 24, 2018, Seller's attorney, Matthew Slepkow (Attorney Slepkow), emailed Attorney McNamara informing him that Seller was terminating the P&S1 and retaining Mr. Cruz's $50,000 deposit. *Id.* § 26. On August 29, 2018, Seller and KSM (by and through Steven Medeiros) executed an agreement for the purchase and sale of the Property (P&S2). *Id.* §§ 28, 29. On September 14, 2018, despite having executed the P&S2, Seller agreed to extend the Closing Date (in the P&S1) to October 1, 2018 (Extension). Ex. 23. Seller admitted he only executed the Extension because he was afraid of losing the KSM deal due to Mr. Cruz's filing of a *lis pendens* action on September 5, 2018.[4] Trial Tr. 368:10-17, Apr. 25, 2019. Apparently, Seller was hoping Mr. Cruz would not be able to perform, at which time Seller would have petitioned the Court to remove the *lis pendens*.

Seller never told Mr. Cruz the purported Extension was a sham. After receiving the Extension, Mr. Cruz coordinated with Richard Storti (Mr. Storti), a "hard money" lender associated with Northeast Equity Partners, LLC, to procure a financial commitment. On September 28, 2018, Mr. Storti indicated he was ready to lend and had a commitment letter

[4] Because the Court is relying on Mr. Cruz's action after the Extension solely to determine whether Mr. Cruz would have been able to perform within a reasonable time, as will be explained *infra*, the Court declines Seller's invitation to assess the enforceability of the Extension itself, including Seller's argument that Mr. Cruz "fraudulently induced" Seller into execution.

prepared for Mr. Cruz. Ex. 24. However, before Mr. Cruz physically obtained the commitment letter from Mr. Storti, one of Seller's attorneys sent an email to Mr. Cruz explaining that the Extension was on hold because KSM had filed a lawsuit seeking, *inter alia*, an injunction preventing the sale of the Property. Ex. 97. This Court held a hearing on October 3, 2018, and subsequently entered an order restraining the Property's sale.

II

Standard of Review

The standard of review in a non-jury trial is governed by Superior Court Rules of Civil Procedure 52(a), which provides, "[i]n all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon . . . ." "The trial justice sits as a trier of fact as well as of law." *Hood v. Hawkins*, 478 A.2d 181, 184 (R.I. 1984). "[A] trial justice's analysis of the evidence and findings in the bench trial context need not be exhaustive." *McBurney v. Roszkowski*, 875 A.2d 428, 436 (R.I. 2005). "Even brief findings will suffice as long as they address and resolve the controlling factual and legal issues." *White v. LeClerc*, 468 A.2d 289, 290 (R.I. 1983).

III

Analysis

With respect to the matter tried before this Court, Mr. Cruz seeks the remedy of specific performance. "The grant of a request for specific performance is not a matter of right but rests within the sound discretion of the trial justice." *Eastern Motor Inns, Inc. v. Ricci*, 565 A.2d 1265, 1269 (R.I. 1989). Specific performance is particularly appropriate where, as here, the underlying transaction concerns the sale of land. *See, e.g., Griffin v. Zapata*, 570 A.2d 659, 661-62 (R.I. 1990); *Yates v. Hill*, 761 A.2d 677, 679 (R.I. 2000). "[W]hen a buyer has at all times been ready,

willing, and able to perform his or her part of an agreement to transfer real estate, the buyer is entitled to specific performance of that contract in the absence of a legitimate and articulable equitable defense." *Thompson v. McCann,* 762 A.2d 432, 436 (R.I. 2000); *Lajayi v. Fafiyebi,* 860 A.2d 680, 688 (R.I. 2004).

1

The Stipulated Closing Date

"'Ordinarily contract provisions relating to time do not by their mere presence in an agreement make time of the essence thereof so that a breach of the time element will excuse nonperformance.'" *Lajayi,* 860 A.2d at 688 (quoting *Jakober v. E. M. Loew's Capitol Theatre, Inc.,* 107 R.I. 104, 114, 265 A.2d 429, 435 (1970)). "That is, explicit time limits 'standing alone and without more do not indicate that the time[s] fixed for performance [are] intended by the parties to be a material or an essential part of their agreement.'" *1800 Smith Street Assocs., LP v. Gencarelli,* 888 A.2d 46, 52 (R.I. 2005) (quoting *Safeway Sys., Inc. v. Manuel Bros., Inc.,* 102 R.I. 136, 145-46, 228 A.2d 851, 856 (1967)). Our courts have recognized that delays in contracts for sale are not uncommon and it is accepted practice for people to overlook them—especially when "'the injury caused by delay is little or nothing.'" *Lajayi,* 860 A.2d at 688 (quoting *Thompson,* 762 A.2d at 438). "A specific date set for closing is usually treated more as a goal, and not as a deadline." 61 Am. Jur. *Proof of Facts* 3d 325, § 2. It is well established that, absent explicit contractual language to the contrary, "parties to a contract for the sale of property have a reasonable amount of time after the scheduled closing date within which to complete the closing." *Parker v. Byrne,* 996 A.2d 627, 633 (R.I. 2010). "What is a reasonable time depends upon the circumstances of each case." *Durepo v. May,* 73 R.I. 71, 75, 54 A.2d 15, 18 (1947).

It is undisputed that Mr. Cruz was not "ready, willing, and able" to close on the stipulated Closing Date. Trial Tr. 69:4-70:2, Apr. 23, 2019; 152:24-153:1, 296:18-20, Apr. 24, 2019. However, the P&S1 did not contain a "time is of the essence" clause. *See* Ex. 2. To the contrary, the P&S1 was expressly tolerant of time adjustments: "[t]he Seller will deliver the said deed, duly executed and stamped . . . on August 20, 2018, at 10:00 *unless otherwise mutually agreed upon by the parties*." *Id.* § 4 (emphasis added). Our Supreme Court has interpreted nearly identical language, holding time is not "of the essence" if the stipulated closing date contains a carve-out contemplating the potential for a mutually-agreeable modification of the date. *Empire Acquisition Group, LLC v. Atlantic Mortgage Co., Inc.*, 35 A.3d 878, 883 (R.I. 2012) ("Empire") (finding agreement stipulating for closing one hundred days from the agreement's execution or "at any such time . . . as may be agreed upon by the parties" did not constitute a "time is of the essence" clause). Although Seller testified that he made it very clear during contract negotiations that the Closing Date was a "hard and fast" one, the P&S1 simply did not provide the same. Ex. 2; Trial Tr. 344:8-11, Apr. 25, 2019. To the contrary, the P&S1 contained a "merger" clause: "this Agreement merges any and all understandings and agreements between [Mr. Cruz] and Seller . . . ." Ex. 2, § 16. Therefore, the Court affords no weight to these purported prior negotiations. *See Filippi v. Filippi*, 818 A.2d 608, 619 (R.I. 2003) (finding that where an agreement contained a merger clause, evidence of oral agreement offered to supplement or explain parties' agreement should be excluded). Based on the language contained in the P&S1 itself, the Court finds time did not constitute an essential element of the P&S1.[5] The parties were obliged to perform under the agreement only within a reasonable time of the Closing Date. *Gencarelli*, 888 A.2d at 52.

[5] The actual dealings, at least between realtors, indicated flexibility with respect to a closing date. On July 21, 2018, Mr. Cruz submitted an extension request to Mr. Volpe, proposing a modified October 31, 2018 closing date. Ex. 12. Mr. Volpe responded, indicating Seller would sign the

Seemingly acknowledging that time was not of the essence pursuant to the P&S1's plain language, Seller argues Mr. Cruz's conduct was unreasonable, so he cannot rely on the absence of a "time is of the essence" clause to excuse his nonperformance. Stated differently, Seller argues Mr. Cruz blatantly ignored the Closing Date and the lack of a "time is of the essence" clause should not absolve Mr. Cruz of attempting, in good faith, to adhere to the August 20, 2018 date. This argument finds some support in our jurisprudence: the absence of a "time is of the essence" clause does not "cloak a party with the unbridled discretion to be completely oblivious to a stipulation in a contract relating to time." *Empire,* 35 A.3d at 884 (citation, quotation marks omitted). "Rather, each party is bound to proceed reasonably and in good faith toward the completion of the contemplated performance." *Id.* Generally, the reasonableness of a party's conduct is "a question for a fact-finder to decide." *DeMarco v. Travelers Ins. Co.*, 26 A.3d 585, 614 (R.I. 2011).

Here, the Court finds Mr. Cruz did proceed in good faith toward a closing.[6] Mr. Cruz's realtor engaged in a stream of collaboration with Seller's realtor to prepare for closing and to stay on target. *See Empire*, 35 A.3d at 885 (finding plaintiff acted in bad faith where he failed to communicate with defendant or otherwise indicate the need for an extension). Mr. Mateus frequently texted with Mr. Volpe after the parties executed the P&S1, providing progress updates. Ex. 10. Moreover, Mr. Cruz researched the Property's suitability for a car wash before entering

extension subject to the deposit becoming non-refundable. Ex. 10, text on August 9, 2018 at 11:21 AM. Mr. Volpe and Mr. Mateus exchanged various proposals concerning an extension, negotiating terms including the deposit amount, whether the deposit would be refundable, as well as the length of the extension. *Id.* text on August 20, 2018 at 1:23 PM ("If you can get the extension down to 2-3 months then he would be more apt in signing the extension"). These negotiations continued even *after* the scheduled closing. For instance, one day after the scheduled closing, Mr. Volpe texted Mr. Mateus stating, "[w]e still haven't gotten an answer from him other than he is looking for the deposit to go hard and to increase it to $100k." *Id.* text on August 21, 2018 at 5:34 PM. Two days later, Mr. Volpe texted Mr. Mateus, indicating that he was hopeful to speak with Seller later that afternoon. *Id.* text on August 23, 2018 at 2:52 PM.

[6] Accordingly, Seller's argument that Mr. Cruz "abandoned" the P&S1 fails.

the P&S1; Mr. Mateus testified he met with a zoning official from the City, who indicated a car wash would comport with the applicable zoning classifications. Trial Tr. 22:4-11, Apr. 23, 2019. Accordingly, Mr. Cruz would have had no reason to anticipate approval and permitting complications, especially considering the instant transaction was Mr. Cruz's first time purchasing commercial property. Trial Tr. 272:19-25, Apr. 25, 2019; *Jakober*, 107 R.I. at 115, 265 A.2d at 435 (finding buyer abandoned sales contract in part because buyer had spent 20 years buying and selling *commercial* property).

When unexpected complications did arise, Mr. Cruz acted diligently and proactively by requesting an extension and agreeing—at the behest of Seller—to work with Bruce Cox, a land use attorney, to procure approvals from the City. Ex. 10, text on July 31, 2018 at 10:27 AM ("Jeff the seller is going to require the buyer hire Bruce Cox from Slepkow's Office to push this through the city."); Trial Tr. 149:8-9, Apr. 24, 2019. Finally, and most importantly, the P&S1 was not contingent on the City's approval; hence, Mr. Cruz's inability to obtain such approval within the P&S1's Due Diligence Period cannot logically support a finding that Mr. Cruz acted in bad faith. *See Jakober*, 107 R.I. at 113, 265 A.2d at 434 (holding in the context of a purchase and sales agreement containing a provision expressly conditioned on a zoning change, buyer acted in bad faith by submitting a new proposal once it became clear zoning would not be approved and otherwise waited for a two-month period for seller to capitulate to the terms of the proposal). Even without permit approvals, Seller could enforce the PS&1 with Mr. Cruz.

The Court is likewise unpersuaded by Seller's argument that Mr. Cruz's inability to qualify for commercial financing (within the Due Diligence Period) supports a finding Mr. Cruz acted in bad faith. While the P&S1 contained the Mortgage Contingency, it was in place entirely for Mr. Cruz's benefit; therefore, it was Mr. Cruz's contractual right to close without a prior financial

commitment and independently fund the purchase. *See* Ex. 2, § 13; *Thompson*, 762 A.2d at 436-37. Mr. Cruz's failure to obtain a commitment letter or satisfy the various conditions necessary to qualify for institutional financing cannot support a finding Mr. Cruz acted in bad faith or otherwise consciously ignored the Closing Date. *See Empire*, 35 A.3d at 884. Mr. Cruz was entitled to close on the transaction, with or without prior financial commitments.

2

Anticipatory Breach of the P&S1

Having established Mr. Cruz attempted in good faith to close by the Closing Date, Mr. Cruz was entitled to close within a reasonable time thereafter. *Parker,* 996 A.2d at 633. Moreover, to cut off a purchaser's rights under a real estate contract, most courts have held a seller must give notice to the purchaser of his intention. *See* 32 A.L.R.4th 8, § 2 (1984). "A party need not state specifically that time is of the essence, as long as the notice specifies a time on which to close and warns that failure to close on that date will result in default." *See Westreich v Bosler,* 965 N.Y.S.2d 467, 468 (N.Y. App. Div. 2013) (citation omitted). Our Supreme Court has implied the same:

> "Although [the contingency] lacked any requirement of notice, and appeared to indicate that the agreements terminated automatically if buyer had not provided a copy of the written mortgage commitment or denial or had not given written notice as specified in the agreements, such an interpretation is unwarranted. 'We think the only way the agreement can be interpreted as a rational instrument, satisfying the primary intent of the parties that the property be sold, as well as their subsidiary interests reflected in the mortgage contingency clause, is to recognize, even in the absence of a formal notice requirement, an implicit requirement that, to bring into play the "null and void" provision, one party communicate to the other some form of notice.'" *Lajayi*, 860 A.2d at 687 (quoting) *Tremouliaris v. Pina,* 505 N.E.2d 225, 227 (Mass. App. Ct. 1987)).

The Court emphasized that "[t]he duty of good faith and fair dealing, implied in every contract, would require some communication by seller if he chooses to call off the sales, since buyer may

be incurring expenses in anticipation of acquiring the properties." *Id*. In this case, the Court finds Seller never notified Mr. Cruz —from August 20 to August 24, 2018, the date Seller purportedly "terminated" the P&S1—that Mr. Cruz's failure to perform by a specific date would result in default. Of course, Seller could not, as a matter of law, hold Mr. Cruz in default for failure to perform on the Closing Date: to hold otherwise would be to convert the Closing Date into a "time is of the essence" clause. *See, e.g.*, *Limpus v. Armstrong*, 322 N.E.2d 187, 190 (Mass. App. Ct. 1975) ("Because the time specified for performance was not an essential condition, and neither party tendered performance on that day, neither was discharged, nor was either in breach or default."). Moreover, any purported notice given before the Closing Date would have been premature and ineffective. *See Highbridge Dev. BR, LLC v. Diamond Dev., LLC*, 888 N.Y.S.2d 654, 655 (N.Y. App. Div. 2009) (holding seller was not entitled to summary judgment based a letter which predated the contract's stipulated closing). Mr. Cruz first learned that Seller was attempting to hold him in default through an August 24, 2018 email sent by Attorney Slepkow, at Seller's instruction, stating,

> "Please accept this email as formal notice that my client considers the agreement with Francisco Cruz for the property located at 30 Highland Avenue, East Providence to be terminated due to buyer default. My client will be retaining the $50,000 deposit as damages. The buyer let the mortgage contingency clause expire without terminating the contract. The request for an extension is not sufficient to satisfy the buyer's obligations when no extension is granted. Now the closing date has passed without your client performing. Therefore, the agreement is hereby fully and formally terminated." Ex. 15; Trial Tr. 207:5-9, Apr. 24, 2019; 349:22-350:2, Apr. 25, 2019.

Mr. Cruz testified that he "was a little bit shocked" considering he was "still doing everything in [his] powers, doing [] due diligence, doing everything that [he] could possibly do to get this deal done." Trial Tr. 208:14-20, Apr. 24, 2019. The Court finds the above email did not effectively

terminate the P&S1 because the email was not preceded by a clear and unequivocal notice warning that failure to close on a certain date would result in default.[7] *See Eichengrun v. Matarazzo*, 25 N.Y.S.3d 431, 432 (N.Y. App. Div. 2016); *Bethlehem Christian Fellowship, Inc. v. Planning and Zoning Comm'n of Town of Morris*, 755 A.2d 249, 254 (Conn. App. Ct. 2000) ("[W]e conclude that the contract remained in effect. Time was not of the essence in the sales contract, and the seller did not formally demand that the plaintiff adhere to the closing date"). Accordingly, the Court finds Mr. Cruz's right to close on the P&S1 continued after the August 24, 2018 email. *See, e.g.*, *Bethlehem Christian Fellowship, Inc.*, 755 A.2d at 253.

Considering Seller was not entitled to terminate the P&S1 on August 24, 2018, the Court must consider how Attorney Slepkow's email impacted Mr. Cruz's performance obligations. The law governing anticipatory repudiation provides the appropriate framework. *See Management Capital, L.L.C. v. F.A.F., Inc.*, 209 A.3d 1162, 1175 (R.I. 2019). "Anticipatory repudiation 'occurs when the promisor unequivocally disavows any intention to perform when the time for performance comes.'" (citing Black's Law Dictionary 1496 (10th ed. 2014)). '"[I]n order to give rise to an anticipatory breach of contract, the defendant's refusal to perform must have been positive and unconditional."' *Thompson v. Thompson*, 495 A.2d 678, 682 (R.I. 1985) (quoting 11 Williston, *Contracts* § 1322 at 130 (3d ed. Jaeger 1968)). Our Supreme Court has explained that "a repudiation can be evidenced by either a statement to that effect or 'a voluntary affirmative act which renders the obligor unable or apparently unable to perform without [committing] such a breach.'" *Id.* at 682 (quoting Restatement (Second) of *Contracts* § 250(b) at 272 (1981)).

[7] Because time was not an essential element of the P&S1, the Court finds unpersuasive Seller's argument that Mr. Cruz is somehow at fault for not agreeing to pay an additional, nonrefundable deposit in exchange for a closing beyond August 20, 2018.

Based on the evidence presented at trial, the Court finds Seller's actions on or about the scheduled Closing Date amounted to an anticipatory breach of the P&S1. Specifically, Attorney Slepkow's email indicated positively and unconditionally that Seller would not be performing his end of the P&S1: "the agreement is hereby fully and formally terminated." Ex. 15. This email left no gray area in terms of whether Seller would be willing to close at another time. Moreover, if there was any doubt as to Seller's intention or willingness to perform, that doubt was put to rest by Seller's subsequent text to Mr. Cruz in which Seller stated, "unfortunately, as [I] said earlier today, [I] am not moving forward with any extension." Ex. 51, text on August 28, 2018. Thus, because Seller clearly and unequivocally stated he did not intend to perform—and the P&S1 had not lapsed—Seller's email constituted an anticipatory breach of the P&S1, excusing Mr. Cruz's performance obligations. *Thompson*, 495 A.2d at 682.[8]

3

Mr. Cruz's Entitlement to Specific Performance

Even though Seller wrongfully repudiated the P&S1, Mr. Cruz is not entitled to specific performance unless he can demonstrate that Seller's anticipatory repudiation caused harm. Of course, "[w]hen there has been a refusal in advance by one party to comply with the terms of the agreement, so that the other party knows the counter performance will not be forthcoming,

[8] The Court rejects Seller's argument that Mr. Cruz's subsequent text messages with Seller—"Brian got the email best of luck to you thank you"—amounted to a rescission. Ex. 15. The statement is ambiguous and must be read into the context of Mr. Cruz's previous text messages in which he indicated he had "been day in and day out . . . 90% to reaching the end" and "doing everything on [his] part." Ex. 51, text on August 27 and 28, 2018. Further, Seller even testified that in a phone conversation that took place *on the same day* as the above text, Mr. Cruz asked for an extension "four of five times" and "kept going around and around, asking for an extension." Trial Tr. 353:6-13, Apr. 25, 2019. Therefore, the Court finds disingenuous any suggestion that Seller could have interpreted the "good luck" text as an indication Mr. Cruz was not interested in moving forward with a closing.

requiring the second party to perform is . . . a futile act." 15 Williston, *Contracts*, § 43:17 (4th ed. Lord 2014). Thus, to establish the propriety of specific performance, the second party need only establish that he or she would have been ready, willing, and able to perform his or her respective contract obligations. *See Keystone Properties and Development, LLC v. Campo*, 989 A.2d 961, 962-63 (R.I. 2010); *Griffin*, 570 A.2d at 662. "[A]pplying the ready, willing, and able requirement . . . ensures that the non-breaching party actually suffered injury from the anticipatory repudiation, a primary justification for the requirement." *Thomas v. Montelucia Villas, LLC*, 302 P.3d 617, 621 (Ariz. 2013).

Because an anticipatory repudiation relieves the non-breaching party of its performance obligations, here, to justify specific performance, Mr. Cruz need only establish he would have been ready, willing, and able to perform within a reasonable time of the Closing Date but for the wrongful repudiation. *United California Bank v. Prudential Ins. Co. of America*, 681 P.2d 390, 440-41 (Ariz. Ct. App. 1983); *Stanwood v. Welch*, 922 F. Supp. 635, 642 (D.D.C. 1995) ("A party claiming anticipatory repudiation must show that but for the repudiation, he would have been ready, willing, and able to perform his obligations under the contract."); *Ross Bicycles v. Citibank, N.A.*, 613 N.Y.S.2d 538, 539 (N.Y. App. Div. 1994) ("to establish damages,[the business] must show that, but for [the bank's] wrongful repudiation, it would have been ready, willing and able to fulfill its obligations under contract.").[9]

[9] Seller would have this Court inquire into proof of whether Mr. Cruz in fact concluded his preparations for performance at the time when performance would have been due. Because of Seller's breach, Mr. Cruz had no obligation to go forward with the substantial expense of concluding preparations or tendering performance in the face of Seller's unequivocal repudiation.

The Court finds Mr. Cruz would have been ready and able to close within a reasonable time using private financing.[10] This ability is demonstrated by Mr. Cruz's actions in response to the Extension granted by Seller on September 14, 2018. Ex. 23. When Mr. Cruz received the Extension, he coordinated with Mr. Storti, the "hard money" lender, to procure a financial commitment. On September 28, 2018, just two weeks after Seller had granted the Extension, Mr. Storti indicated he was ready to lend and had a commitment letter prepared for Mr. Cruz. *See* Ex. 24 ("We have drafted the term sheet and commitment to fund letter—Frank will need to bring a Cashier's check for $10k written to Northeast Equity Partners in order to collect each of the items.").[11] Moreover, Attorney McNamara testified that he had performed closings with Mr. Storti in the past—approximately seven to ten times in previous transactions. Trial Tr. 113:17-23, Apr. 23, 2019. He opined based on his expertise and experience that Mr. Cruz could have closed with private financing less than a month after contacting Mr. Storti. *Id.* at 134:24-135-1 (opining that "assuming that on August 4th we went to the private lender, I think we'd be able to close by the end of August."). This timeline is consistent with one proposed by Mr. Storti himself. Ex. 86,

[10] Thus, the Court will not consider whether Mr. Cruz could have timely obtained commercial financing.

[11] As explained, Mr. Cruz was in the process of obtaining the commitment letter when Seller's attorney sent an email to Mr. Cruz's attorney indicating KSM had filed a lawsuit seeking an injunction preventing the sale of the Property. Ex. 97. Faced again with the prospect that Seller would not be able to deliver marketable title, the Court finds Mr. Cruz articulated a legitimate reason for not tendering the deposit necessary to secure the commitment letter. *See Parker*, 996 A.2d at 633 ("We are of the opinion that plaintiffs breached the agreements by failing to present two marketable titles to defendants within a reasonable time after the scheduled closing date, thereby excusing defendants from performance under the agreements."); 57 A.L.R. 1301(IV)(6)(3)(a) (1928) ("Doubtless all the cases referred to in this annotation might accurately be cited to the proposition that a title is not marketable if it is of such a character that there is a reasonable possibility that the holder will be involved in litigation to protect it, or will be required to resort to litigation to fully enjoy it."). Indeed, the P&S1 required Seller to deliver marketable title. Ex. 2, § 3 ("Seller agrees to convey to the Buyer . . . a good and clear record and marketable and insurable title to said real estate . . . .").

Richard Storti Deposition, 53:13-21, Apr. 12, 2019 (explaining that had Mr. Cruz approached him in late July or early August, he did not have any doubt that the deal could have been funded within 20 days or so, if not faster).

Moreover, unlike Mr. Cruz's contemplated institutional financing, which had been delayed by the City's permitting process, Mr. Storti—when asked at deposition whether he would have required zoning approval—stated, "[Mr. Cruz] would need to adhere to all of the standards of any town municipality prior to breaking the grounds . . . but, zoning certs, I'm going to think [Mr. Cruz] is smart enough to buy a property that's zoned properly for what he wants to use it for." Ex. *Id.* at 35:16-22. Asked about his level of comfort lending to Mr. Cruz, Mr. Storti explained, "I can tell you this, [Mr. Cruz] is going to get the money from me if he wants the money from me, because he's a known entity in the state . . . ." *Id.* at 56:5-8. The Court is persuaded, based on how quickly Mr. Storti was willing to offer a commitment letter for financing, coupled with Attorney McNamara's testimony, that Mr. Cruz would have been ready and able to close within a reasonable time of the Closing Date.

Moreover, the Court finds Mr. Cruz would have been willing to close using private financing. Mr. Cruz testified that he is in the business of buying and selling property and, when he is having trouble adhering to a firm closing date, he ordinarily uses hard money at the closing. Trial Tr. 216:10-12, Apr. 24, 2019 ("[i]f I can't target it with the bank, I'll get a hard money loan on it . . . ."). In fact, Mr. Cruz testified that he has used hard money anywhere from five to eight times a year for the past sixteen years in closing real estate transactions. *Id.* at 218:6-7. Mr. Cruz testified that he planned to use hard money to close the P&S1 and refinance the loan at a later date. *Id.* at 220:11-18. Had Seller provided Mr. Cruz with the legally-required notice to terminate the P&S1, the Court finds Mr. Cruz would have been willing to use private financing to close the

transaction. Accordingly, the Court finds Mr. Cruz would have been ready, willing, and able to perform under the P&S1 but for Seller's anticipatory repudiation.

IV

Conclusion

For the foregoing reasons, the Court grants Mr. Cruz's request for specific performance. Time was not an essential element of the P&S1. Moreover, Seller was not entitled to terminate the P&S1 when he did, particularly without giving notice, excusing Mr. Cruz's nonperformance. But for Seller's anticipatory repudiation, the Court finds Mr. Cruz would have been ready, willing, and able to perform. Accordingly, the Court grants Mr. Cruz's request for specific performance of the P&S1. Counsel for Mr. Cruz and the Receiver shall jointly prepare the appropriate order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Cover Sheet

TITLE OF CASE:	Brian Sadler v. 30 Route 6, LLC, et al.; KSM Realty, LLC and Steven Medeiros v. 30 Route 6, LLC, et al. As Consolidated with Francisco Cruz v. 30 Route 6, LLC (C.A. Nos. PC-2018-8928; PC-2018-6994; PC-2018-6384
CASE NO:	
COURT:	Providence County Superior Court
DATE DECISION FILED:	August 28, 2019
JUSTICE/MAGISTRATE:	Stern, J.
ATTORNEYS:	
For Plaintiff:	Eric S. Brainsky, Esq.; Michael L. Mineau, Esq.; Joseph R. Daigle, Esq.
For Defendant:	

Click here to enter text.

Click here to enter text.