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 360 Adams Street, Brooklyn, New York, on the 21th day of March, 2019.

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

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KEW GARDENS PROJECT, LLC.,

Plaintiff,

Index No.: 9252/2015

-against-

Decision and Order

BENJAMIN JONES and ODELL GILL JONES, and JOHN and/or JANE DOE #1-#5

Defendants.

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The following *papers* numbered 2 to 40 read on this motion:

Papers	Numbered
Notice of Motion/Order to Show Cause Affidavits (Affirmations) Annexed	2-18
Opposing Affidavits (Affirmations)	35-37
Reply Affidavits (Affirmations)	38-39
Memorandum of Law	19,34,40

After oral argument and a review of the submissions herein, the Court finds as follows:

Plaintiff, KEW GARDENS PROJECT, LLC., moved this court pursuant to CPLR 3212 for an order granting summary judgment on the plaintiff's cause of action for specific performance. Defendant opposes the same.

MS #3

BACKGROUND/FACTS

This action concerns real property in Kings County located at 240 Macon Street, Brooklyn New York (herein after "premises"). The plaintiff in this action has brought a cause of action for specific performance of the contract of sale for a unique parcel of residential property between the plaintiff and the defendant for the premises above.

The following facts are undisputed. There is a Contract of sale dated March 12, 2014. Defendant acknowledges and accepts terms of contract on March 20, 2014. There is a Memo of Contract dated April 8, 2014, no party objects. Then there is an amendment to contract dated September 30, 2014, no party objects. On November 13, 2014 Defendant sends letter to plaintiff attempting to terminate contract citing the following reasons; (1) seller is unable to turn over premises vacant, (2) seller is unable to obtain certificate of no harassment, (3) title report was not timely recorded. On November 18, 2014 Plaintiff sends letter to defendant rejecting defendants attempt to breach a valid contract. In said letter plaintiff states "we will commence legal motion for specific performance". Defendant then demanded an increase in the sale price, which plaintiff rejected. On June 3, 2015 defendant sent letter to plaintiff purporting to compel closing despite absence of Certificate of No Harassment, citing the premises was vacant. Plaintiff rejected demand via phone call by plaintiff attorney to defendant attorney reiterating closing is contingent upon defendants securing Certificate of No Harassment. On June 8, 2015 defendant files with HPD Application for Certificate of no Harassment. On June 24, 2015, defendants again attempt to unilaterally terminate the Contract by filing a Notice of Termination of Contract Memo dated April 14, 2014, which plaintiff again rejects.

ARGUMENTS

Plaintiff now moves for summary judgment on its cause of action for specific performance contending it was and is ready willing and able to purchase the property. Plaintiff argues that the defendant attempted to unilaterally terminate the contract and no provision in the contract permitted the same. Plaintiff contends the plain language of the contract only gave the plaintiff the ability to unilaterally terminate the contract of sale.

Defendant contends plaintiff's contention that supplemental rider overrides other contractual terms is devoid of merit. Defendants further contends they properly exercised their right to terminate the contract. Defendant also contends at a minimum there are issues of fact.

ANALYSIS

It is well established that a "moving party for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issue of fact" *Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 853 (1985). Once there is a prima facie showing, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form to establish material issues of fact, which require a trial of the action. *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980); *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986). However, where the moving party fails to make a prima facie showing, the motion must be denied regardless of the sufficiency of the opposing party's papers.

A motion for summary judgment will be granted "if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing the judgment in favor of any party". CPLR 3212 (b). The "motion shall be denied if any party shall show facts sufficient to require a trial of any

issue of fact." *Id.* The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. The moving party must tender sufficient evidence to show the absence of any material issue of fact and the right to judgment as a matter of law. (*Zuckerman v. City of New York,* 49 NY2nd 557 (2 Dept 1990). Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial (*Kosson v.Algaze,* 84 N.Y.2d 1019 (2 Dept 1995).

It is well established that when the terms of a contract are clear and unambiguous those terms shall be enforced. "When the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving practical interpretation to the language employed and the parties' reasonable expectations " (*Willsey v. Gjuraj*, 65 AD3d 1228, 1230, 885 NYS2d 528, *quoting Franklin Apt. Assoc., Inc. v. Westbrook Tenants Corp.*, 43 AD3d 860, 861, 841 NYS2d 673; *see Greenfield v. Philles Records*, 98 NY2d 562, 569, 750 NYS.2d 565, 780 NE2d 166; *Correnti v. Allstate Props., LLC*, 38 AD3d 588, 590, 832 NYS2d 594). "Thus, **a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms**" *see* (*Willsey v. Gjuraj,* 65 AD3d at 1230, 885 NYS2d 528, *quoting Greenfield v. Philles Records*, 98 NY2d at 569, 750 NYS2d 565, 780 NE2d 166; s*ee W.W.W. Assoc. v. Giancontieri*, 77 NY2d 157, 162, 565 NYS2d 440, 566 NE2d 639); *quoting Lobacz v. Lobacz*, 72 AD3d 653, 654, 897 NYS2d 516, 517–18 (2 Dept 2010). It is also well established, before specific performance of a contract for the sale of real property may be granted, a buyer must demonstrate that he or she was ready, willing, and able to perform on the original day, or, if time was not of the essence, on a subsequent date fixed by the parties or within a reasonable time

thereafter (*see Nuzzi Family Ltd. Liab. Co. v. Nature Conservancy*, 304 AD2d 631, 632, 758 NYS2d 364); (Dairo v. Rockaway Blvd. Props. LLC, 44 AD3d 602, 602, 843 NYS2d 642).

In the present case, contrary to defendant's contention, the plaintiff purchaser has demonstrated his prima facie entitlement to summary judgment by establishing that he was ready, willing, and able to perform his obligations under the subject contract. *Paglia v. Pisanello*, 15 AD3d 373, 789 NYS2d 715, 715 (2 Dept 2005). In the present case, the plaintiff annexes proof of his ability to pay by attaching the approval for the mortgage. In opposition, the defendant failed to present evidence sufficient to raise a triable issue of fact to successfully defeat the motion. *Clarke v. Bastien*, 128 AD3d 632, 633, 7 NYS3d 608, 609 (2 Dept 2015).

Moreover, all defendants' submissions establish they were not acting in good faith when they attempted to unilaterally cancel the contract for sale on numerous occasions. "A seller has not acted in good faith if he neglects or refuses to make "a reasonable ... effort to remedy defects in title, or if the title defect was "self-created" by the seller" (*see Naso v. Haque*, 289 AD2d 309, 310, 734 NYS2d 214); *quoting Karl v. Kessler*, 47 AD3d 681, 682, 850 NYS2d 164, 165 (2008). The record before the court establishes the defendant willfully and deliberately failed to obtain the Certification of No Harassment. Upon review of the plain terms of the contract and the rider the terms clearly indicate that it is the plaintiff not the defendant that retains the right to unilaterally cancel the contract in the event of the defendant's failure to comply with certain terms of the agreement. Specifically, defendant had the obligation to secure a Certificate of No Harassment from HPD prior to closing as a result of the premises being used as a SRO residence. Defendant's failure to obtain the Certificate of No Harassment vitiated specific provisions

of the contract, bestowing on the plaintiff the right to cancel or for plaintiff to exercise their absolute right to specific performance. Notably, plaintiff also assisted defendant in efforts to remove tenants as required in the contract and released additional escrow monies to aid is such efforts. At all times the plaintiff was ready willing and able to purchase the property. Any and all delays in closing on the property were a result of defendant's own actions. Any remaining contentions are without merit.

Accordingly, plaintiff's request for summary judgment directing specific performance of the contract of sale for the real property located at 240 Macon Street, Brooklyn New York, is hereby granted for the reasons stated above.

This constitutes the Decision/Order of the Court.

Date: March 21, 2019

RICHARD VELASQUEZ, J.S.C.

MAR 21 2019

So Ordered
Hon. Richard Velasquez

KINGS COUNTY CLERK
FILED
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