SHORT FORM ORDER

INDEX No. 13-9326

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 4/29/14 (#003)
MOTION DATE 5/20/14 (#004)
ADJ. DATE 6/10/14
Mot. Seq. # 003 - MG
004 - XMD

DAVID FRIEDMAN and CARLA SLOCUM FRIEDMAN,

Plaintiffs,

- against -

DAVID KRISS and AMY KRISS,

Defendants.

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the plaintiffs, dated April 9, 2014, and supporting papers (including Memorandum of Law dated April 9, 2014); (2) Notice of Cross Motion by the defendants, dated May 6, 2014, and supporting papers; (3) Affirmation in Opposition by the plaintiffs, dated May 22, 2014, and supporting papers; (4) Affidavit in Further Support by the defendants, dated June 6, 2014, and supporting papers; (5) Other ___ (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion by the plaintiffs for partial summary judgment and the cross motion by the defendants for summary judgment are determined as follows.

In December 2011, the plaintiffs entered into a contract to sell real property located at 22 Barn Lane in Bridgehampton to the defendants. The contract provided for a purchase price of $1,500,000 to be paid in installments with a closing date of November 1, 2013. Paragraph 50 of the agreement provided for an initial deposit of $50,000 upon the signing of the contract, an additional deposit of $100,000 on January 3, 2012 and a second additional deposit of $100,000 on November 1, 2012, with the balance due at closing. The contract specifically stated that the payment of the additional deposits "shall be deemed Time of Essence" and "subject to Sellers performing their obligations under this Agreement, said additional deposit shall be non-refundable and is not to be held in an attorney escrow account." Further, paragraph 50 provided that the defendants' failure to comply with these provisions would constitute a material default of the contract and the plaintiffs may declare the contract null and void. Paragraph 41 of the contract permitted the plaintiffs to retain the deposits

in the event of a default by the defendants. The contract also required the parties to execute a Memorandum of Contract which was held in escrow until either a default by the defendants in making a payment or the closing. In the event of a default, the escrow agent was to provide the defendants with notice stating that he would record a Release of Memorandum of Contract if the default was not cured within ten days. The parties also agreed that the defendants would lease the subject premises from the plaintiffs for the months of July 2012 and July 2013 pursuant to a separate lease agreement. The defendants had also leased the property from the plaintiffs prior to entering into the contract of sale.

The defendants paid the initial deposit upon signing the contract and the additional deposit that was due on January 3, 2012. On October 24, 2012, approximately one week before the second additional deposit was due, the defendants sent a letter to the plaintiffs alleging that no certificate of compliance was on file with the Town of Southampton for prior renovation work related to the enclosure of the front porch. The defendants indicated that they intended to renovate the premises and needed copies of the plans that should have been filed with the Town. The letter stated that the plaintiffs were in default under the contract for performing illegal renovations and failing to disclose such renovations prior to the contract. Before tendering the second additional deposit, the defendants demanded, among other things, that the plaintiffs retain a licensed architect to prepare plans reflecting the work and submit the plans to the defendants for review. In response, by letter dated October 28, 2012, the plaintiffs asserted that they had contacted their architect who had already commenced the process to obtain the necessary permits and certificates. The plaintiffs stated that they would have these issues corrected prior to the closing, they were not in default of the contract and the defendants were still required to make the second additional deposit on November 1, 2012. The defendants did not make the payment for the second additional deposit. On November 2, 2012, the escrow agent sent a notice of default to the defendants providing ten days to cure and stating that he would record the release if the default was not cured. The defendants did not make the payment and their attorney sent a letter claiming that the plaintiffs were in default for failing to disclose the illegal renovations and demanded that the escrow agent continue to hold the release in escrow. Thereafter, the defendants sent two letters again seeking architectural plans for the work but the plaintiffs did not respond.

In April 2013, the plaintiffs commenced this action seeking a judgment declaring that the defendants breached the contract and the plaintiffs are entitled to retain the initial deposit and additional deposit. The plaintiffs also seek damages for the defendants' refusal to allow the escrow agent to record the release and attorneys fees. The defendants asserted counterclaims for specific performance, breach of contract, lack of a rental permit by the plaintiffs and attorneys fees. The plaintiffs now move for summary judgment in their favor and the defendants cross-move for summary judgment.

When a contract states that time is of the essence, the parties are obligated to comply strictly with its terms (*see* ***Bank of America v Petit***, 89 AD3d 652 [2d Dept 2011]; ***New Colony Homes v Long Island Property Group***, 21 AD3d 1072 [2d Dept 2005]; ***Milad v Marcisak***, 307 AD2d 281 [2d Dept 2003]). Moreover, where time is of the essence, performance on the specified date is a material element of the contract and failure to perform on that date constitutes a material breach of the contract (*see* ***Bank of America v Petit***, *supra*; ***New Colony Homes v Long Island Property Group***, *supra*).

Here, the plaintiffs have made a prima facie showing of their entitlement to summary judgment by submitting evidence that the defendants failed to make the second additional deposit on the time of the essence date specified in the contract. The defendants contend that the plaintiffs failed to provide a certificate of

compliance for the property and that this was a condition precedent to their obligation to make the additional deposit. The defendants rely upon paragraph 16(b) of the contract which requires the plaintiffs to deliver a valid and subsisting certificate of occupancy or other required certificate of compliance. The plaintiffs contend that this provision only required them to provide such a certificate at the time of closing. The defendants allege that the phrase "at the date of closing" was deleted from this provision and therefore, the plaintiffs were required to have a valid certificate at all times during the pendency of the contract.

A contractual duty will not be construed as a condition precedent absent clear language showing that the parties intended to make it a condition (*see* ***Unigard Sec. Ins. Co v North River Ins. Co.***, 79 NY2d 576 [1992]; ***Ashkenazi v Kent South Assoc.***, 51 AD3d 611 [2d Dept 2008]). Here, a full reading of paragraph 16 demonstrates that all of the subdivisions are conditions precedent to the closing. The mere fact that the words "at the date of closing" may have been deleted from paragraph 16(b) did not demonstrate clear language showing that the parties also intended to make this a condition precedent to the installment payments. If the parties intended this result, they easily could have added such language to the contract. Paragraph 50 specifically makes the installment payments time of the essence and states that "subject to Sellers performing their obligations under this Agreement, said additional deposit shall be non-refundable." This language indicates that the defendants' remedy was to seek a refund of their deposits if the plaintiffs breached any provisions of the contract. Thus, the defendants have failed to demonstrate that a certificate of compliance was a condition precedent to the installment payments.

In addition, there was no deadline or time of the essence provision with respect to a certificate of compliance. Therefore, the plaintiffs were entitled to a reasonable time to obtain the certificate (*see* ***Martocci v Schneider***, 119 AD3d 746 [2d Dept 2014]; ***Vision Enterprises v 111 East Shore LLC***, 92 AD3d 868 [2d Dept 2012]; ***131 Heartland Blvd. Corp v CJ Jon Corp.***, 82 AD3d 1188 [2d Dept 2011]). The plaintiffs' letter of October 28, 2012 stated that they would take the necessary steps to obtain a certificate prior to the closing and the record indicates that the plaintiffs did ultimately obtain a certificate of compliance from the Town.

The defendants also contend that the plaintiffs violated paragraph 28(g) of the contract which provided that "each party shall, at any time and from time to time, execute, acknowledge, where appropriate, and deliver such further instruments and documents and take such other action as may be reasonably requested by the other in order to carry out the intent and purpose of this contract." The defendants assert that the plaintiffs refused to provide the architectural plans for the renovation work, which was necessary for their intended renovation of the property. However, there is no language demonstrating that this provision was intended as a condition precedent to the installment payments. In addition, the plaintiffs were entitled to a reasonable time to comply with the defendants' request. Instead, the defendants unilaterally withheld the time of the essence installment payment. Under these circumstances, the defendants breached the contract and the plaintiffs are entitled to retain the deposits (*see* ***New Colony Homes v Long Island Property Group***, *supra*).

Accordingly, the plaintiffs' motion for summary judgment is granted and the defendants' cross motion is denied.

Dated: September 4, 2014

Peter H. Mayer

PETER H. MAYER, J.S.C.