

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

**PUBLISH**

**PRESENT:**

**HON. PAUL J. BAISLEY, JR., J.S.C.**

-----X  
ALAN WUNDERLICH,

Plaintiff,

-against-

LIBERTY MEADOWS, LLC,

Defendant.  
-----X

INDEX NO.: 64450/14

MOTION DATE: 10/15/15

MOTION NO.: 005 MG; 006 MD;  
007 MD

**PLAINTIFF'S ATTORNEY:**

THE LAW OFFICES OF JAMES  
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**DEFENDANT'S ATTORNEY:**

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Upon the following papers numbered 1 to 158 read on this motion and cross-motion for summary judgment and motion to dismiss complaint; Notice of Motion/ Order to Show Cause and supporting papers 1-14; 103-119; Notice of Cross Motion and supporting papers 41-67; Answering Affidavits and supporting papers 15-40; 120-137; Replying Affidavits and supporting papers 68-89; 90-102; 138-158; Other     ; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that the motion (motion sequence no. 005) of defendant Liberty Meadows, LLC for an order granting defendant summary judgment dismissing plaintiff's complaint pursuant to CPLR R. 3212 and cancelling the notice of pendency filed against the property that is the subject of this action is granted; and it is further

**ORDERED** that the cross-motion (motion sequence no. 007) of plaintiff Alan Wunderlich for an order pursuant to CPLR R. 3212 for summary judgment granting plaintiff specific performance of a written contract for the purchase of a condominium unit between plaintiff and defendant Liberty Meadows, LLC, directing a hearing to determine the amount of money plaintiff owes defendant or defendant owes plaintiff in connection with the closing of title to the condominium unit, and to calculate plaintiff's damages resulting from defendant's breach of the contract, including plaintiff's reasonable attorney's fees, is denied; and it is further

**ORDERED** that the motion (motion sequence no. 006) of defendant Liberty Meadows, LLC for an order dismissing plaintiff's complaint pursuant to CPLR §3211(a)(1), (3), (7) and/or (10) based upon documentary evidence, lack of capacity to sue, failure to state a cause of action, and/or failure to join a necessary party; and cancelling the notice of pendency filed against the property that is the subject of this action, is denied.

The instant action arises out of a written contract dated April 2, 2010 for the purchase by plaintiff Alan Wunderlich of a condominium unit in a condominium development being constructed by defendant Liberty Meadows, LLC on property located in Port Jefferson, New York (the "Condo Contract"). The submissions reflect that the real property on which the development

is being constructed was purchased by defendant in 2007 from non-parties Howard O. Wunderlich Revocable Living Trust, Adeline E. Wunderlich Revocable Living Trust, and Adeline E. Wunderlich (collectively, the "Trust") subject to a \$6,000,000.00 mortgage and note and, *inter alia*, an agreement to convey a finished three-bedroom harbor-view condominium unit ("Unit 30"; the "Condo") to plaintiff Alan Wunderlich (the son of Howard O. Wunderlich and Adeline E. Wunderlich).

The Condo Contract incorporates by reference a certain written agreement dated April 2, 2010 between defendant and the Trust (the "2010 Agreement") that conditionally reduces the amount of the mortgage debt due from defendant to the Trust. Among other terms not relevant here, the 2010 Agreement requires defendant to deliver to plaintiff a fully executed contract to convey Unit 30 to plaintiff free and clear of all liens and encumbrances, and to execute and deliver to the Trust "or its heirs and assigns" a \$500,000.00 note as security for the conveyance, with the obligation to be personally guaranteed by and enforceable against defendant's members, Demetrius Tsunis and Enrico Scarda by the Trust or its heirs and assigns.<sup>1</sup> The 2010 Agreement further requires defendant to deliver Unit 30 to plaintiff with a certificate of occupancy no later than 24 months from the closing date (denoted therein as the "Conveyance Date"). The 2010 Agreement further provides that in the event Unit 30 is not conveyed to plaintiff on or before the Conveyance Date, defendant will give the Trust a credit of \$3,000.00 per month towards upgrades to the unit, commencing on the Conveyance Date and accruing through the date the unit is actually conveyed. In the event defendant fails to deliver Unit 30 to plaintiff by the Conveyance Date, the 2010 Agreement grants the Trust sole and absolute discretion to enforce the \$500,000.00 note, grant an extension of the Conveyance Date, institute an action for specific performance to compel delivery of the Condo, or pursue any other available legal or equitable remedies.

The Condo Contract entered into between defendant and Alan Wunderlich in accordance with and on the same date as the 2010 Agreement sets forth a purchase price of \$10.00, to be paid on closing of title, which was to take place "on or about April 12, 2012." A rider to the Condo Contract (the "Rider") provides that if the closing does not take place by the date set forth therein, plaintiff is entitled to a credit of \$3,000.00 a month against "extras" to be added to his condominium unit until defendant delivers the unit to plaintiff at closing. Pursuant to the Condo Contract, special orders for such "extras" must be in writing and paid for at the time of the order (§28).

In his complaint, verified and electronically filed on June 10, 2014, plaintiff alleges, *inter alia*, that he performed all of his obligations under the Condo Contract and that defendant breached both the 2010 Agreement and the Condo Contract by failing to complete the construction of Unit 30 and transfer title to plaintiff by the closing date. Plaintiff further alleges

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<sup>1</sup> Defendant's alleged breach of the 2010 Agreement is the subject of a separate federal lawsuit commenced by the Trust against defendant and its members which is currently pending in U.S. District Court for the Eastern District of New York. The plaintiffs therein make no claim with respect to plaintiff's Condo.

that defendant wrongfully delayed completion of Unit 30, despite plaintiff's repeated demands that defendant complete the condo and transfer title to plaintiff. Plaintiff further alleges that he incurred damages of approximately \$2,700.00 a month by being forced to rent a substitute residence since May 2012. Plaintiff seeks a judgment directing defendant to specifically perform the Condo Contract and to credit plaintiff in the amount of \$78,000.00 towards the actual cost of extras/upgrades to Unit 30 (first cause of action for breach of contract and specific performance) and awarding plaintiff consequential damages in the amount of at least \$75,000.00 (second cause of action for breach of contract).

After issue was joined, defendant moved for summary judgment dismissing plaintiff's complaint on the grounds that plaintiff cannot maintain a cause of action for specific performance because he never sought to close title by requesting in writing or otherwise that a time-of-the-essence closing be scheduled, and because plaintiff never tendered performance and demonstrated that he is ready and able to close title. Defendant further alleges that plaintiff cannot maintain a cause of action for breach of the Condo Contract because at the time he commenced the action plaintiff was himself in default by failing to pay defendant for the costs of the changes and upgrades that he requested and was obligated to pay for at the time of the order pursuant to the Condo Contract (§28).

Plaintiff submitted opposition to defendant's motion and also cross-moved for summary judgment predicated on the assertion that on the closing date and all times thereafter, plaintiff was ready, willing and able to close title to the Condo, and that defendant breached the Condo Contract by failing to complete construction of the Condo and convey title to plaintiff by the closing date. Plaintiff further alleges, for the first time, that defendant anticipatorily breached the Condo Contract by various actions in March through July 2014.

Defendant thereafter submitted opposition to plaintiff's cross-motion and moved separately to dismiss plaintiff's complaint pursuant to CPLR §3211(a) based on documentary evidence, lack of capacity to sue, failure to join a necessary party, and failure to state a cause of action. Defendant alleges in its motion to dismiss that plaintiff does not have standing to maintain an action for breach of the Condo Contract or the 2010 Agreement as the right of enforcement is exclusively reserved to the Trust by the 2010 Agreement; that the purported assignment of the \$500,000.00 note to plaintiff by the Trust is a nullity as defendant never executed such a note and thus the assignment does not give plaintiff standing to enforce the provisions of the 2010 Agreement; and the Howard O. Wunderlich Revocable Living Trust, Adeline E. Wunderlich Revocable Living Trust, and Adeline E. Wunderlich are necessary parties to this action and plaintiff cannot proceed without them.

Upon careful consideration of the parties' voluminous submissions, the Court makes the following findings and determination.

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, whether or not the contract designates a specific date for performance (*Point Holding, LLC v Crittenden*, 119 AD3d 918 [2d Dept 2014]; *Revital Realty Group, LLC v Ulano Corp.*, 112 AD3d 902 [2d Dept 2013]). A party seeking to make time of the essence of a contract must give clear, distinct and unequivocal notice to that effect, and provide the other party with a reasonable time in which to act (*id.*; *Zev v Merman*, 134

AD2d 555 [2d Dept 1987], *affd* 73 NY2d 781 [1988]). Moreover, the other party must be given explicit notice that if it does not perform by the designated date, it will be considered in default (*Decatur [2004] Realty, LLC v Cruz*, 73 AD3d 970 [2010]; *Nehmadi v Davis*, 63 AD3d at 1127). Typically, “a contract is not breached until the time set for performance has expired” (*Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804 [2d Dept 2011] quoting *Rachmani Corp. v 9 E. 96th St. Apt. Corp.*, 211 AD2d 262, 265 [1st Dept 1995]).

Where a plaintiff seeks specific performance of a contract for the sale of real property, he must establish that he was ready, willing and able to close on the scheduled closing date, and must also establish that the other party was in default (*Latora v Ferreira*, 102 AD3d 838 [2d Dept 2013]).

The submissions and the record reflect that although the Condo Contract set forth an “on or about” closing date of April 12, 2012, it did not contain a time-of-the-essence provision. The Rider to the Condo Contract expressly contemplated that Unit 30 would *not* be completed by the closing date, and provided a remedy to plaintiff for any delay in delivering title by granting him credits against the cost of extras added to the unit in the amount of \$3,000.00 a month from the scheduled closing date until the delivery of title. (Plaintiff could also cancel the contract after a specified period of time after the closing date [Condo Contract ¶27]). The submissions reflect that construction of plaintiff’s Condo did not even commence until June 2013, long after the projected contractual closing date, and that thereafter plaintiff executed numerous periodic written “change” orders as construction of his unit and others in the condominium development proceeded. The submissions thus reflect that both parties waived strict enforcement of the contract provisions (*Scull v Sicoli*, 247 AD2d 852 [4th Dept 1998]).

Although the verified complaint alleges that plaintiff made “repeated demands” that defendant complete construction and transfer title, plaintiff has proffered no evidence that any such demands – which do not appear to have been in writing – were sufficient to make time of the essence of the contract, and there is no evidence that any particular closing date was ever demanded or that plaintiff warned defendant that failure to close on that date would result in defendant’s being held in default.

Moreover, plaintiff’s verified complaint does not allege that he was ready, willing and able to close title on the contractual closing date, that defendant’s acts amounted to an anticipatory breach of the contract, or that he took any other steps in furtherance of a closing. Where “there was never a time of the essence closing, nor even a future scheduled closing date, it cannot be concluded that the [seller] willfully defaulted or was unable to tender his performance” (*Nehmadi v Davis*, 63 AD3d 1125, 1128 [2d Dept 2014]).

The submissions thus establish, *prima facie*, defendant’s entitlement to summary judgment dismissing plaintiff’s causes of action for breach of contract and for specific performance predicated on defendant’s failure to close title to Unit 30 on the closing date or at any time thereafter.

Plaintiff’s submissions in opposition, and in support of his cross-motion for summary judgment, fail to raise a material question of fact sufficient to defeat defendant’s motion for summary judgment. Plaintiff does not deny that he never sought to schedule a closing after the

date set forth in the Condo Contract. Rather, in his affidavit dated February 17, 2015, plaintiff alleges, for the first time, that defendant anticipatorily breached the Condo Contract: by failing to complete construction of the Condo more than two years after the contract closing date; by allegedly refusing, in March 2014, to complete construction of the Condo unless plaintiff procured a release from the Trust of a certain \$400,000.00 mortgage note provided for in the 2010 Agreement; by failing to close title to the Condo during the first week of June 2014 as allegedly promised by defendant's member Demetrius Tsunis on or about April 30, 2014; and by letting the work permit for Unit 30 expire on June 3, 2014. Plaintiff alleges that defendant's anticipatory breach of the Condo Contract excuses his tender of performance and entitles him to seek specific performance of the contract (*Children of America (Cortland Manor), LLC v Pike Plaza Assoc., LLC*, 113 AD3d 583 [2d Dept 2014]).

Under the doctrine of anticipatory breach, "a wrongful repudiation of the contract by one party before the time for performance entitles the nonrepudiating party to immediately claim damages for a total breach," and "relieves the nonrepudiating party of its obligation of future performance" (*American List Corp. v U.S. News and World Report*, 75 NY2d 38, 44 [1989]). Alternatively, the nonrepudiating party may elect to ignore the anticipatory breach and continue to perform the agreement and await defendant's future breach before bringing suit (*AG Properties of Kingston, LLC v Besicorp-Empire Development Company, LLC*, 14 AD3d 971 [3d Dept 2005]). Anticipatory breach requires a showing of "a clear and unequivocal intention by defendant not to perform or to abandon the contract" (*HRL Union Ave. Corp. v New York City Hous. Auth.*, 223 AD2d 486, 487 [1st Dept 1996]), *lv den* 88 NY2d 803 [1996]).

Plaintiff's anticipatory breach theory is not pleaded in the verified complaint. It is generally well established that "a party may not obtain summary judgment on an unpleaded cause of action" (*Weinstock v Handler*, 254 AD2d 165, 166 [1st Dept 1998], citing *Cohen v City Company of New York*, 283 NY 112 [1940]), although in some cases summary judgment "may be awarded on an unpleaded cause of action if the proof supports such cause and if the opposing party has not been misled to its prejudice" (*Weinstock v Handler, supra*, 252 AD2d at 166; *Deborah International Beauty, Ltd. v Quality King Distributors, Inc.*, 175 AD2d 791 [2d Dept 1991]).

Here, however, plaintiff's own submissions reflect that defendant never expressed a clear and unequivocal intent not to perform or to abandon the contract, and that plaintiff himself did not treat the contract as being no longer in effect. The several acts of defendant allegedly constituting an anticipatory breach took place at disparate times between March and July 2014. Notwithstanding the foregoing, the submissions reflect that plaintiff continued to execute work/change orders throughout 2014, up to and even after commencing the instant action in June 2014, with five separate change orders executed after March 2014 when defendant supposedly "unequivocally repudiated" the contract. The submissions thus reflect that plaintiff elected to ignore the alleged repudiation and to continue the contract.

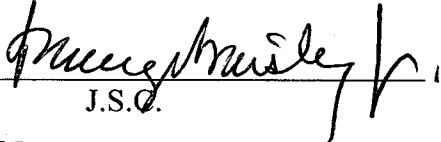
In light of the foregoing, plaintiff's submissions fail to establish his *prima facie* entitlement to summary judgment on the unpleaded theory of anticipatory breach. Accordingly, plaintiff's cross-motion is denied, and defendant's motion for summary judgment dismissing plaintiff's complaint and cancelling the notice of pendency is granted.

In light of the foregoing determination that plaintiff has not established that defendant is in breach of the Condo Contract or his entitlement to specific performance, the Court does not reach the issues raised in defendant's motion to dismiss the complaint pursuant to CPLR §3211(a) regarding, *inter alia*, plaintiff's standing, the validity of the purported assignment of the \$500,000.00 note, and whether Howard O. Wunderlich Revocable Living Trust, Adeline E. Wunderlich Revocable Living Trust, and Adeline E. Wunderlich are necessary parties, which motion is hereby denied as moot.

The foregoing constitutes the decision and order of the Court.

Submit judgment on notice.

Dated: March 28, 2016

  
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J.S.C.

**HON. PAUL J. BAISLEY JR.**

