

SUPREME COURT OF THE STATE OF NEW YORK
IAS/ TRIAL PART 34- SUFFOLK COUNTY

PRESENT:

HON. JOSEPH C. PASTORESSA

JUSTICE OF THE SUPREME COURT

Mot Seq: #001-MG; CASE DISP

FRONT & THIRD, LLC,

Plaintiff(s),

-against-

BLUE FLAG CAPITAL, LLC,

Defendant(s),
_____ X**ATTYS FOR PLAINTIFF(S):**ESSEKS HEFTER ANGEL DITALIA & PASCA
108 EAST MAIN STREET
RIVERHEAD, NY 11901**ATTYS FOR DEFENDANT(S):**KRIEGSMAN PC
279 MAIN STREET
SAG HARBOR, NY 11963**Pages Numbered**

Notice of Motion/Order to Show Cause/

Petition/Cross Motion and Affidavits (Affirmations) Annexed _____ 1 _____

Opposing Affidavits (Affirmations) _____ 2 _____

Reply Affidavits (Affirmations) _____ 3 _____

Affidavit (Affirmation) _____

Other Papers _____

Upon the foregoing papers, it is

ORDERED that the motion by the plaintiff for summary judgment in its favor is granted.

In February 2020, the plaintiff entered into a contract with the defendant to sell real property and certain business assets located in Greenport. The defendant paid a deposit of \$360,000.00 into escrow which was non-refundable unless the "Seller defaults under the terms of this Agreement." The contract provided for a closing date of on or prior to April 3, 2020. The plaintiff alleges that it was prepared to close on April 3 but the defendant attempted to renegotiate the price. By letter dated April 21, 2020, the plaintiff sent the defendant a letter setting a time of the essence closing date of May 27, 2020. The defendant's attorney rejected the letter and claimed the defendant was willing to schedule a closing at a time mutually agreeable to both parties but did not offer any alternative dates. The plaintiff's attorney responded that the plaintiff would consider an adjournment but if the defendant did not propose any alternate dates, the closing would proceed. The plaintiff went forward with the closing and the defendant failed to appear. The plaintiff then commenced this action for breach of contract and for a judgment declaring that it is entitled to receive and retain the deposit. The defendant asserted counterclaims for breach of the implied covenant of good faith and fair dealing and for tortious interference with business relations. The plaintiff now moves for summary judgment in its favor.

When 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 (*see Ashkenazi v Miller*, 190 AD3d 668; *Rodrigues NBA LLC v Allied XV LLC*, 164 AD3d 1388; *Point Holding v Crittenden*, 119 AD3d 918). One party may make time of the essence by giving proper notice to the other party (*see Sikorsky v City of Newburgh*, 188 AD3d 1112; *Decatur [2004] Realty v Cruz*, 73 AD3d 970). In order to make time of the essence, “there must be a clear, distinct, and unequivocal notice to that effect giving the other party a reasonable time in which to act” (*Ashkenazi v Miller*, *supra* at 671 quoting *Zev v Merman*, 134 AD2d 555, 557 *affd* 73 NY2d 781). “What constitutes a reasonable time [for performance] depends on the facts and circumstances of the particular case” (*Ashkenazi v Miller*, *supra* quoting *Zev v Merman*, *supra*).

Here, the plaintiff made a *prima facie* showing of its entitlement to summary judgment by submitting evidence that it sent a letter clearly setting forth that time was of the essence. In addition, the plaintiff demonstrated that it was ready willing and able to transfer title on the closing date and that the defendant had a reasonable time to close. In opposition, the defendant failed to submit any evidence in admissible form as it filed only a memorandum of law. Contrary to the defendant’s contention, it does not matter that the time of the essence date was unilaterally set (*see Mohen v Mooney*, 162 AD2d 664; *Zev v Merman*, *supra*). Although the defendant objected to the letter, no alternative dates for closing were suggested (*see Palmiotto v Mark*, 145 AD2d 549). The defendant failed to submit any evidence that the time for performance was unreasonable or that the plaintiff was in breach of the agreement. Thus, the defendant failed to demonstrate the existence of a triable issue of fact (*see Imperatore v 329 Menahan St LLC*, 130 AD3d 784; *Vision Enterprises LLC v 111 E. Shore LLC*, 92 AD3d 868; *Cento Properties Co v Rosenberg*, 72 AD3d 1002; *Hegner v Reed*, 2 AD3d 683).

A buyer who defaults on a real estate contract cannot recover the down payment at least where, as here, that down payment represents 10% or less of the contract price (*see Maxton Builders v Lo Galbo*, 68 NY2d 373; *Ashkenazi v Miller*, *supra*; *Pizzurro v Guarino*, 147 AD3d 879; *Willsey v Gjuraj*, 65 AD3d 1228).

Accordingly, the plaintiff’s motion for summary judgment is granted and it is declared that the plaintiff is entitled to receive and retain the down payment.

DATED: June 16, 2021


HON. JOSEPH C. PASTORESSA, J.S.C.