SHORT FORM ORDER

INDEX No. 611064/2020
CAL. No. 202300260CO

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

PRESENT:

Hon. FRANK A. TINARI
Justice of the Supreme Court

MOTION DATE 8/22/23 (004)
MOTION DATE 8/22/23 (005)
ADJ. DATE 9/19/23
Mot. Seq. # 004 MotD
Mot. Seq. # 005 MD

---X

ALTA REAL ESTATE HOLDINGS, LLC, f/k/a ALTA INVESTMENTS, LLC ,

Plaintiff,

- against -

OUR BUSINESS, LLC,

Defendant.

---X

ESSEKS, HEFTER, ANGEL, DI TALIA & PASCA LLP
Attorney for Plaintiff
108 East Main Street
Riverhead, New York 11901

TARTER KRINSKY & DROGIN LLP
Attorney for Defendant
1350 Broadway
New York, New York 10018

Upon the following papers read on these e-filed motions for summary judgment: Notice of Motion/Order to Show Cause and supporting papers by plaintiff, filed June 23, 2023; by defendant, filed June 23, 2023; Answering Affidavits and supporting papers by plaintiff, filed July 28, 2023; by defendant, filed July 28, 2023; Replying Affidavits and supporting papers by defendant, filed September 18, 2023; by plaintiff, filed September 18, 2023; it is

ORDERED that the renewed motion (004) by plaintiff Alta Real Estate Holdings, LLC and the motion (005) by defendant Our Business, LLC are consolidated for purposes of this determination; and it is

ORDERED that the renewed motion by plaintiff Alta Real Estate Holdings, LLC for, in part, summary judgment on its specific performance cause of action is granted in part and denied in part; and it is further

ORDERED that the motion by defendant Our Business, LLC for summary judgment dismissing the complaint is denied.

Plaintiff Alta Real Estate Holdings, LLC, f/k/a Alta Investments, LLC, brought this action seeking, in part, specific performance of a contract for the sale of real property. The real property,

located in Southold, New York, is owned by defendant Our Business, LLC. Plaintiff also seeks to recover delay damages and attorney's fees allegedly arising out of defendant's refusal to perform under the contract of sale. By its answer, defendant asserts 23 affirmative defenses, including, inter alia, estoppel, unclean hands, and laches. By order dated June 11, 2021, the court (Luft, J., retired) denied, without prejudice to renewal upon the completion of discovery, plaintiff's prior motion for, inter alia, an order for summary judgment in its favor on its specific performance cause of action.

Having been granted leave to renew upon the completion of discovery, plaintiff again moves, in part, for summary judgment in its favor on its specific performance cause of action and dismissal of defendant's affirmative defenses. Plaintiff contends, among other things, that it was ready, willing, and able to perform, and that defendant's affirmative defenses are without merit and were conclusory and contained no factual allegations. Plaintiff also moves for an order granting partial summary judgment in its favor as to delay damages, together with interest and attorney's fees and costs, and setting the matter down for a hearing on the issue of damages. In support of its motion, plaintiff submits, inter alia, the residential contract of sale dated December 13, 2019 (hereinafter, the December 13, 2019 contract), the affirmation and deposition transcript of Andrew Strong, Esq., a letter dated May 27, 2020, from Mr. Strong to defense counsel (hereinafter the May 27, 2020 letter), and various bank statements.

In addition, defendant moves, in part, for an order granting summary judgment dismissing the complaint and cancelling the notice of pendency. It further seeks an order directing plaintiff to pay costs and expenses associated with such cancellation. Defendant contends, among other things, that plaintiff's claims are barred by the express language of the parties' agreement. In support of its motion, defendant submits, in part, the letter dated March 5, 2020 from Mr. Strong to its counsel (hereinafter the March 5, 2020 letter) and the affidavit of Anatol Yusef.

Defendant failed to establish a prima facie case of entitlement to summary judgment in its favor (*see* ***Lundy Dev & Prop. Mgt., LLC v Cor Real Prop. Co., LLC***, 181 AD3d 1180, 118 NYS3d 478; ***Coizza v 164-50 Crossbay Realty Corp.***, 37 AD3d 640, 831 NYS2d 433 [2d Dept 2007]; *see generally* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). "A court should interpret a contract . . . in accordance with its plain and ordinary meaning, and should arrive at a construction that will give fair meaning to all of the language employed by the parties to reach a practical interpretation of the[ir] expressions . . . so that their reasonable expectations will be realized" (***249-251 Brighton Beach Ave., LLC v 249 Brighton Corp.***, 217 AD3d 809, 811, 192 NYS3d 133 [2d Dept 2023] [internal quotation marks omitted], quoting ***Kirk v Kirk***, 207 AD3d 708, 711, 174 NYS3d 381 [2d Dept 2022]; *see* ***Frantz v Marchbein***, 216 AD3d 746, 188 NYS3d 622 [2d Dept 2023]). "A limitation of remedies 'will not be implied and to be enforceable must be clearly, explicitly and unambiguously expressed in a contract'" (***Lundy Dev & Prop. Mgt., LLC v Cor Real Prop. Co., LLC***, 181 AD3d at 1181, 118 NYS3d 478, quoting ***Terminal Cent. v Henry Modell & Co.***, 212 AD2d 213, 218, 628 NYS2d 56 [1st Dept 1995]). "Indeed, '[s]uch clauses are . . . strictly construed against the party seeking to avoid liability[],[']' and 'a provision must be included in the agreement limiting a party's remedies to those specified in the contract in order for courts to find that th[o]se remedies are exclusive" (***Lundy Dev & Prop. Mgt., LLC v Cor Real Prop. Co., LLC***, 181 AD3d at 1181, 118 NYS3d 478 [internal quotation marks and citations omitted], first quoting ***Terminal Cent. v Henry Modell & Co.***, 212 AD2d at 219,

628 NYS2d 56; and then quoting ***HealthNow N.Y. v David Home Bldrs., Inc.***, 176 AD3d 1602, 1604, 112 NYS3d 360 [4th Dept 2019]).

Pursuant to the December 13, 2019 contract, "[i]f Seller defaults [thereunder], Purchaser shall have such remedies as Purchaser shall be entitled to at law or in equity, including, but not limited to, specific performance." Contrary to defendant's contention, nothing in the March 5, 2020 letter, which sets forth, in pertinent part, that "the entire down payment shall be returned to the Purchaser in the event of the Seller's default under the terms of the Contract of Sale [sic] 'Default,' for purposes hereof, shall mean ONLY that the Seller willfully or intentionally refused to close this matter as aforesaid," did not limit plaintiff's remedy for defendant's breach to return of the down payment (*see* ***Lundy Dev & Prop. Mgt., LLC v Cor Real Prop. Co., LLC***, 181 AD3d 1180, 118 NYS3d 478; ***Coizza v 164-50 Crossbay Realty Corp.***, 37 AD3d 640, 831 NYS2d 433; *cf.* 413 ***Throop, LLC v Triumph, the Church of the New Age***, 153 AD3d 1306, 61 NYS3d 307 [2d Dept 2017]; ***Arker Cos. v New York State Urban Dev Corp.***, 47 AD3d 739, 849 NYS2d 660 [2d Dept 2008]). Accordingly, the branch of defendant's motion for summary judgment dismissing the complaint is denied, as is the remainder of its motion.

Plaintiff established its prima facie entitlement to summary judgment in its favor on its cause of action for specific performance (*see* ***Herzog v Marine***, 170 A.D.3d 682, 96 NYS3d 69 [2d Dept 2019]; ***Clarke v Bastien***, 128 AD3d 632, 7 NYS3d 608 [2d Dept 2015]; ***Yitzhaki v Sztaberek***, 38 AD3d 535, 831 NYS2d 267 [2d Dept 2007]; ***Cheemanlall v Toolsee***, 17 AD3d 392, 792 NYS2d 360 [2d Dept 2005]). "To prevail on a cause of action for specific performance of a contract for the sale of real property, a plaintiff must establish that it substantially performed its contractual obligations and was ready, willing, and able to perform its remaining obligations, that the seller was able to convey the property, and that there was no adequate remedy at law" (***Herman v 818 Woodward, LLC***, 218 AD3d 756, 757, 195 NYS3d 10 [2d Dept 2023]; *see* ***Ashkenazi v Miller***, 190 AD3d 668, 138 NYS3d 185 [2d Dept 2021]). In moving for summary judgment in its favor on a complaint seeking specific performance of a contract for the sale of real property, "the plaintiff purchaser must submit evidence demonstrating financial ability to purchase the property in order to demonstrate that it was ready, willing, and able to purchase such property" (***Ashkenazi v Miller***, 190 AD3d at 670, 138 NYS3d 185 [internal quotation marks omitted], quoting ***Grunbaum v Nicole Brittany, Ltd.***, 153 AD3d 1384, 1385, 61 NYS3d 146 [2d Dept 2017]; *see* ***GLND 1945, LLC v Ballard***, 172 AD3d 1330, 102 NYS3d 78 [2d Dept 2019]).

Where, as here, time is not made of the essence in the original contract for the sale of real property, "one party may subsequently give notice to that effect, and avail [itself] of forfeiture on default" (***LG723, LLC v Royal Dev., Inc.***, 216 AD3d 931, 933, 189 NYS3d 625 [2d Dept 2023] [internal quotation marks omitted], quoting ***Mohen v Mooney***, 162 AD2d 664, 665, 557 NYS2d 108 [2d Dept 1990]; *see* ***Lashley v BDL Real Estate Dev. Corp.***, 212 AD3d 800, 182 NYS3d 196 [2d Dept 2023]). "The notice setting a new date for the closing must (1) give clear, distinct, and unequivocal notice that time is of the essence, (2) give the other party a reasonable time in which to act, and (3) inform the other party that if he [or she] does not perform by the designated date, he [or she] will be considered in default" (***Lashley v BDL Real Estate Dev. Corp.***, 212 AD3d at 801, 182 NYS3d 196 [internal quotation marks omitted], quoting ***Nehmadi v Davis***, 63 AD3d 1125, 1127, 882 NYS2d 250 [2d Dept 2009]; *see* ***Sikorsky v City of Newburgh***, 188 AD3d 1112, 136 NYS3d 362 [2d Dept 2020]).

"What constitutes a reasonable time for performance depends upon the facts and circumstances of the particular case" (***Zev v Merman***, 73 NY2d 781, 783, 536 NYS2d 739 [1988]; ***Herman v 818 Woodward, LLC***, 218 AD3d 756, 195 NYS3d 10). While the determination of reasonableness generally is a question of fact, it may determined as a question of law where there is no dispute as to the facts (*see* ***Herman v 818 Woodward, LLC***, 218 AD3d 756, 195 NYS3d 10; ***Please Me, LLC v State of New York***, 215 AD3d 1149, 187 NYS3d 415 [2d Dept 2023]).

Plaintiff established, prima facie, that it effectively made July 7, 2020, a time of the essence closing date (*see* ***LG723, LLC v Royal Dev., Inc.***, 216 AD3d 931, 189 NYS3d 625; ***Ashkenazi v Miller***, 190 AD3d 668, 138 NYS3d 185; ***Sikorsky v City of Newburgh***, 188 AD3d 1112, 136 NYS3d 362). The May 27, 2020 letter unequivocally set July 7, 2020, as the closing date, expressly stating that time was of the essence, and advising defendant that if it failed to perform on that date, it would be deemed in default of the December 13, 2019 contract and "[plaintiff] shall be entitled to pursue all available remedies including but not limited to specific performance and delay damages." Given, among other things, that defendant had roughly five months to close from the initial closing date set forth in the December 13, 2019, it had a reasonable amount time within which to close, (*see* ***Herman v 818 Woodward, LLC***, 218 AD3d 756, 195 NYS3d 10; ***2626 Broadway LLC v Broadway Metro Assoc., LP***, 85 AD3d 456, 925 NYS2d 437 [1st Dept 2011]; ***Chaves v Kornfeld***, 83 AD3d 522, 921 NYS2d 64 [1st Dept 2011]).

Through the submission of, inter alia, the deposition testimony and affidavit of Mr. Strong and bank statements, plaintiff further established, prima facie, that it was ready, willing, and able to perform on July 7, 2020 (*see* ***Clarke v Bastien***, 128 AD3d 632, 7 NYS3d 608; ***Sosa v Acevedo***, 40 AD3d 268, 834 NYS2d 189 [1st Dept 2007]; ***Paglia v Pisanello***, 15 AD3d 373, 789 NYS2d 715 [2d Dept 2005]; ***Ober v Bey***, 66 AD2d 441, 698 NYS2d 876 [2d Dept 2099]; *cf.* ***Dixon v Malouf***, 70 AD3d 763, 894 NYS2d 127 [2d Dept 2010]). As plaintiff contends, the bank statements submitted in support of its motion were self-authenticating documents (*see* ***Thomas v Rogers Auto Collision, Inc.***, 69 AD3d 608, 896 NYS2d 73 [2d Dept 2010]; ***Elkaim v Elkaim***, 176 AD2d 116, 574 NYS2d 2 [2d Dept 1991]). The evidence submitted by plaintiff indicated, among other things that, that prior to July 7, 2020, plaintiff transferred a down payment in the amount of $140,000 to defense counsel's escrow account, and that on July 7, 2020, plaintiff was willing and able to pay the purchase price balance, having transferred the necessary funds by wire transfer to the escrow account of its attorney in connection with the subject real estate transaction. Plaintiff was not required to demonstrate an actual tender of performance in light of defendant's refusal to close on July 7, 2020 (*see* ***Coizza v 164-50 Crossbay Realty Corp.***, 73 AD3d 678, 900 NYS2d 416 [2d Dept 2010]; ***Yitzhaki v Sztaberek***, 38 AD3d 535, 831 NYS2d 267). In opposition, defendant failed to raise a triable (*see* ***Breskin v Moronto***, 172 AD3d 1296, 102 NYS3d 88 [2d Dept 2019]; ***Clarke v Bastien***, 128 AD3d 632, 7 NYS3d 608; ***Lot 57 Acquisition Corp. v Yat Yar Equities Corp.***, 63 AD3d 1109, 882 NYS2d 454 [2d Dept 2009]; *see generally* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]).

Plaintiff also demonstrated its prima facie entitlement to partial summary judgment in its favor on the issue of attorney's fees and costs (*see* ***Loughlin v Meghji***, 186 AD3d 1633, 132 NYS3d 65 [2d Dept 2020]; ***Gianelli v RE/MAX of N.Y., Inc.***, 144 AD3d 861, 41 NYS3d 273 [2d Dept 2016]; ***LeVine v Catskill Regional Off-Track Betting Corp.***, 57 AD3d 624, 871 NYS2d 191 [2d Dept 2008]). "New

York follows the general rule that attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule" (***WFB Realty, LLC v R & W Brokerage, Inc.***, 219 AD3d 1469, 1469, 196 NYS3d 149 [2d Dept 2023] [internal quotation marks omitted], quoting ***Alpha/Omega Concrete Corp. v Ovation Risk Planners, Inc.***, 197 AD3d 1274, 1282, 154 NYS3d 113 [2d Dept 2021]; *see* ***Abraham v Torati***, 219 AD3d 1275, 197 NYS3d 235 [2d Dept 2023]). "To be considered a prevailing party, a party must be successful with respect to the central relief sought" (***Amato v Dayton Beach Park No. 1 Corp.***, 201 AD3d 684, 685, 161 NYS3d 288 [2d Dept 2022] [internal quotation marks omitted], quoting ***Fatsis v 360 Clinton Ave. Tenants Corp.***, 272 AD2d 571, 571, 709 NYS2d 421 [2d Dept 2000]; *see* ***Matter of Milton R.***, 197 AD3d 1174, 153 NYS3d 526 [2d Dept 2021]).

According to the December 13, 2019 contract, "[i]n the event of any litigation or dispute [thereunder], the prevailing party shall be entitled to recover from the other party its reasonable costs and fees actually incurred in connection therewith, including reasonable attorneys' and other professional fees." Based on the record, plaintiff demonstrated that it sufficiently prevailed in this litation (*see* ***Loughlin v Meghji***, 186 AD3d 1633, 132 NYS3d 65; ***LeVine v Catskill Regional Off-Track Betting Corp.***, 57 AD3d 624, 871 NYS2d 191). In opposition, defendant failed to raise a triable issue of fact (*see* ***Brooker Engineering***, 219 AD3d 1479, 196 NYS3d 512 [2d Dept 2023]; ***Lupo v Anna's Lullaby Café, LLC***, 189 AD3d 1205, 138 NYS3d 103 [2d Dept 2020]; ***Gianelli v RE/MAX of N.Y., Inc.***, 144 AD3d 861, 41 NYS3d 273).

The court now turns to the branch of plaintiff's motion for dismissal of defendant's affirmative defenses. When moving to dismiss an affirmative defense, the plaintiff bears the burden of demonstrating that the affirmative defense is without merit as a matter of law, because it either does not apply under the factual circumstances of the case or it fails to state a defense (*see* ***Lewis v US Bank N.A.***, 186 AD3d 694, 130 NYS3d 22 [2d Dept 2020]; ***Shah v Mitra***, 171 AD3d 971, 98 NYS3d 197 [2d Dept 2019]). In the context of a motion to dismiss an affirmative defense, "the court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference" (***LG Funding, LLC v United Senior Props. of Olathe, LLC***, 181 AD3d 664, 665, 122 NYS3d 309 [2d Dept 2020] [internal quotation marks omitted], quoting ***Bank of N.Y. v Penalver***, 125 AD3d 796, 797, 1 NYS3d 825, 826 [2d Dept 2015]; *see* ***Gonzalez v Wingate at Beacon***, 137 AD3d 747, 26 NYS3d 562 [2d Dept 2016]).

As to defendant's first affirmative defense, alleging that the complaint fails to state a cause of action, "[n]o motion by the plaintiff lies under CPLR 3211(b) to strike the defense [of failure to state a cause of action], as this amounts to an endeavor by the plaintiff to test the sufficiency of . . . [its] own claim" (***Ochoa v Townsend***, 209 AD3d 867, 868, 868177 NYS3d 81 [2d Dept 2022] [internal quotation marks omitted], quoting ***Butler v Catinella***, 58 AD3d 145, 150, 868 NYS2d 101 [2d Dept 2008]; *see* ***Lewis v US Bank N.A.***, 186 AD3d 694, 130 NYS3d 22; ***Mazzei v Kyriacou***, 98 AD3d 1088, 951 NYS2d 557 [2d Dept 2012]). However, plaintiff demonstrated, prima facie, that the other affirmative defenses were either without merit or were conclusory in nature and contained no factual allegations (*see* ***HSBC Bank USA, N.A. v Sene***, 219 AD3d 1499, 197 NYS3d 525 [2d Dept 2023]; ***US Bank N.A. v Okoye-Oyibo***, 13 AD3d 718, 183 NYS3d 485 [2d Dept 2023]; ***Countrywide Home Loans Servicing,***

L.P. v Vorobyov, 188 AD3d 803, 136 NYS3d 81 [2d Dept 2020]). In opposition, defendant failed to raise a triable issue of fact (*see* ***HSBC Bank USA, N.A. v Sene***, 219 AD3d 1499, 197 NYS3d 525; ***Bank N.A. v Okoye-Oyibo***, 13 AD3d 718, 183 NYS3d 485; ***Countrywide Home Loans Servicing, L.P. v Vorobyov***, 188 AD3d 803, 136 NYS3d 81). As such, plaintiff is entitled to dismissal of defendant's affirmative defenses except for the first affirmative defense.

Moreover, the remainder of plaintiff's motion is denied. Plaintiff failed to establish its prima facie entitlement to recover of delay damages. "It is well established that a purchaser of real property who is awarded specific performance, may also recover damages sustained by him or her as a result of the seller's unreasonable and unwarranted delay in conveying the property" (***Cobble Hill Nursing Home v Henry & Warren Corp.***, 196 AD2d 564, 567, 601 NYS2d 334 [2d Dept 1993]; *see* ***E.T. & B.R.L. of Cent. N.Y. v Tyll***, 185 AD2d 400, 586 NYS2d 30 [3d Dept 1992]). "When claims are made for damages for delay, plaintiff must show that defendant was responsible for the delay; that these delays caused delay in completion of the contract (eliminating overlapping or duplication of delays); that the plaintiff suffered damages as a result of these delays; and plaintiff must furnish some rational basis for the court to estimate those damages, although obviously a precise measure is neither possible nor required" (***Plato Gen. Constr. Corp./EMCO Tech Constr. Corp., JV, LLC v Dormitory Auth. of State of N.Y.***, 89 AD3d 819, 825, 932 NYS2d 504 [2d Dept 2011] [internal quotation marks omitted], quoting ***Manshul Constr. Corp. v Dormitory Auth. of State of N.Y.***, 79 AD2d 383, 387, 436 NYS2d 724 [1st Dept 1981]). Based on the record, at the very least, triable issues of fact exist as to whether defendant was the sole proximate cause of the delay (*see* ***Plato Gen. Constr. Corp./EMCO Tech Constr. Corp., JV, LLC v Dormitory Auth. of State of N.Y.***, 89 AD3d 819, 825, 932 NYS2d 504).

In light of the foregoing, the motion by plaintiff is granted in part and denied in part, and the motion by defendant is denied.

Dated: 12/11/23

Frank A. Tenaro
J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION