

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA Part 2
Justice

UNIQUE MARBLE & GRANITE ORG. CORP. <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- against -</p> HAMIL STRATTEN PROPERTIES, LLC, <p style="text-align: center;">Defendant.</p>	x x	Index Number <u>15185</u> 2005 Motion Date <u>September 19,</u> 2007 Motion Cal. Number <u>26</u> Motion Seq. No. <u>3</u>
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The following papers numbered 1 to 13 read on this motion by plaintiff for partial summary judgment pursuant to CPLR 3212 granting specific performance and directing defendant to perform its duties under the purchase agreement to bring about a closing, for leave to appoint a temporary receiver, referee, or other official with requisite authority, to execute all documents on defendant's behalf to bring about and effectuate the closing, and to extend the duration of the notice of pendency pursuant to CPLR 6513 for three years.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	1-5
Answering Affidavits - Exhibits.....	6-10
Reply Affidavits.....	11-13

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiff commenced this action for specific performance of a purchase option under lease agreement, or in the alternative,

an award of monetary damages for breach of the lease agreement and filed the notice of pendency against the property on July 11, 2005. Defendant served an answer admitting certain allegations, denying others, and asserting various affirmative defenses.

Plaintiff and defendant each previously moved for summary judgment. By order dated May 17, 2006, the court granted that branch of the motion of plaintiff seeking partial summary judgment on its claim for specific performance, and directed defendant to execute the purchase agreement. It denied that branch of plaintiff's motion seeking an inquest to ascertain the amount of damages to be awarded. The court determined that the parties had not completed discovery with respect to the issue of damages. It also denied the cross motion by defendant for summary judgment.

By order dated October 25, 2006, the court granted defendant leave to reargue the prior motion, but upon reargument, adhered to its previous determination. The court denied the branches of plaintiff's cross motion seeking to hold defendant in contempt of court, and leave to appoint a referee to execute the contract of sale as premature. The court also denied that branch of plaintiff's motion for a Yellowstone injunction (see First Natl. Stores v Yellowstone Shopping Ctr., 21 NY2d 630 [1968]). The court directed that defendant provide plaintiff with an itemized bill for all rent and additional rent due under the lease, and that plaintiff pay the back rent to defendant. The court also directed that in the event the parties were unable to agree on the amount of the back rent due, plaintiff was to continue to pay rent in the future as it became due and pay the disputed amounts to defendant's counsel to be held in escrow until the discrepancy is resolved at trial of plaintiff's claim for damages caused by defendant's breach of the option agreement.

Plaintiff remitted checks in amounts totaling \$203,540.98 to defendant as per the October 25, 2006 order. In mid-December 2006, defendant delivered a fully executed purchase agreement dated December 9, 2006 to plaintiff, in accordance with the purchase option under the lease agreement.

Plaintiff seeks partial summary judgment, asserting that it is ready, willing and able to perform its obligations under the purchase agreement, and that defendant is in breach of the purchase agreement for failing to perform, in a timely fashion, defendant's contractual obligations necessary to bring about a closing. In addition, plaintiff contends that defendant has violated the implied covenants of good faith and fair dealing by

wrongfully ignoring its repeated requests for information about efforts undertaken by defendant towards bringing about a closing. Plaintiff asserts that under the purchase agreement, defendant must obtain a certificate of occupancy and a separate tax lot designation for the portion of the building being sold.

Plaintiff further asserts that it served defendant with a letter dated June 6, 2007, declaring time to be of the essence with respect to defendant's performance of the pre-closing obligations and that "same must be completed within 30 days of today," and electing to invoke a 90-day extension period as provided for in paragraph 3.3 of the purchase agreement. Plaintiff contends that defendant has failed to respond to the letter, and refuses to undertake the acts necessary to obtain the certificate of occupancy and a separate tax lot designation for the subject property. Plaintiff also contends that defendant has unreasonably delayed in performing the contract, and that the notice of pendency shall expire on July 11, 2008. It seeks, as a matter of prudence, to extend the notice of pendency for three years to avoid its expiration while the matter remains unresolved.

Defendant opposes the motion asserting that it has taken, in good faith and at considerable expense, substantial steps towards closing and has kept plaintiff apprised of the progress. Defendant further asserts that the purchase agreement does not set a deadline for closing, but rather permits the parties to cancel it, if the subdivision process takes too long. Defendant argues that the June 6, 2007 letter is ineffective to fix a closing date because plaintiff never asserted therein that plaintiff was ready, willing and able to perform and would tender the balance of the purchase price on a date certain. In addition, defendant claims its ability to satisfy the essential conditions of the purchase agreement have been stymied by plaintiff's failure to file plans and obtain a work permit, prior to performing renovation work at the property.

The complaint herein does not include any cause of action for specific performance of the purchase agreement itself, and plaintiff has not moved for leave to amend the complaint to assert such a claim. Although 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 (see Deborah Intern. Beauty, Ltd. v Quality King Distributors, Inc., 175 AD2d 791 [1991]; Rubenstein v Rosenthal, 140 AD2d 156 [1988]), in this instance, plaintiff has failed to establish entitlement to summary judgment in its favor on such unpleaded claim as a matter of law (see Alvarez v Prospect Hosp., 68 NY2d 320,

324 [1986]; Zuckerman v City of New York, 49 NY2d 557 [1980]). That branch of the motion by plaintiff for partial summary judgment pursuant to CPLR 3212 granting specific performance is denied. Plaintiff, however, is granted leave to amend its complaint to assert a cause of action for specific performance of the purchase agreement and shall serve and file such amended complaint within 30 days after service of this order with notice of entry.

That branch of the motion by plaintiff seeking preliminary mandatory injunctive relief, directing defendant to perform various pre-closing acts, is denied. "The granting of a mandatory injunction is an extraordinary remedy and the court must weigh the conflicting considerations of benefit to the plaintiff and harm to the defendant which would follow the granting of such a drastic remedy" (Medvin v Grauer, 46 AD2d 912 [1974]; see Sunrise Plaza Assoc. v International Summit Equities Corp., 288 AD2d 300, 301 [2001]; see also Rosa Hair Stylists, Inc. v Jaber Food Corp., 218 AD2d 793 [1995]). Plaintiff has failed to demonstrate entitlement to such relief, and defendant has raised factual questions as to whether plaintiff's conduct has frustrated its efforts to fulfill the conditions necessary to close on the purchase agreement.

That branch of the motion for leave to appoint a referee or temporary receiver or other official with requisite authority to execute all documents on defendant's behalf to bring about and effectuate the closing is denied. The appointment of a receiver is a drastic and intrusive remedy and may only be invoked in cases where the moving party has made a clear evidentiary showing of the necessity of conserving the property and protecting the interests of that party (see Secured Capital Corp. of N.Y. v Dansker, 263 AD2d 503 [1999]; Modern Collection Assocs. v Capital Group, 140 AD2d 594 [1988]). Plaintiff has failed to make such showing. In addition, it has failed to demonstrate the statutory basis authorizing the appointment of a referee under these circumstances without the consent of both parties (CPLR 4317[b]), or the appointment of another official.

With respect to that branch of the motion to extend the duration of the notice of pendency pursuant to CPLR 6513 for three years, the complaint presently lacks any remaining viable cause of action which demands a judgment which would affect the title to, or the possession, use or enjoyment of real property (see CPLR 6501). Under CPLR 6513, a notice of pendency is valid for three years from the date of filing although it may be extended for an additional three-year period "for good cause shown" (see

CPLR 6513; RKO Properties, Ltd. v Boymelgreen, 31 AD3d 625 [2006]; EMC Mtg. Corp. v Stewart, 2 AD3d 772, 773 [2003]; Horowitz v Griggs, 2 AD3d 404, 405 [2003].) That branch of the motion to extend the duration of the notice of pendency pursuant to CPLR 6513 for three years is denied with leave to renew following the filing and service of the amended complaint.

Dated: Dec. 5, 2007

J.S.C.