SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX
----------X

ANDREW BULLARO,

Plaintiff(s),

- against -

LEDO, INC. AND THOMAS P. ANSELMO,

Defendant(s).
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DECISION AND ORDER

Index No. **35022/20E**

Hon. **FIDEL E. GOMEZ**
Justice

The following papers numbered 1 to 4, Read on this motion noticed on 11/6/23, and duly submitted as no. 3 on the Motion Calendar of 11/13/23.

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - *Ex Parte Application* - Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits	3	
Replying Affidavit and Exhibits	4	
Notice of Cross-Motion - Affidavits and Exhibits	2	
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers - Order Appointing Temporary Receiver in Mortgage Foreclosure Action		
Memorandum of Law		

Plaintiff's motion and defendants' cross-motion are decided in accordance with the Decision and Order annexed hereto.

Dated: 12/6/23

Hon. **FIDEL E. GOMEZ, JSC**

1.CHECK ONE ☐ CASE DISPOSED **X** NON-FINAL DISPOSITION

2. MOTION / CROSS-MOTION IS
X DENIED
X GRANTED
☐ OTHER

3. CHECK IF APPROPRIATE.
☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST
☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT
☐ NEXT APPEARANCE DATE

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In this action for, *inter alia*, breach of contract, plaintiff moves pursuant to CPLR § 6513 for an order extending the notice of pendency in this action. Plaintiff avers that an extension of the notice of pendency is warranted because the fifth cause of action in the complaint for foreclosure of a vendee's lien is an equitable action, which affects title to real property thereby warranting the extension sought. Defendants and third-party defendant oppose the instant motion, asserting that plaintiff fails to assert, let alone establish, the existence of good cause, which is required for the extension sought. Defendants and third-party defendant also cross-move pursuant to CPLR § 6515 seeking an order canceling the notice of pendency on grounds that upon an order of this Court, defendant THOMAS P. ANSELMO (Anselmo), the escrowee and against whom the amended complaint directs the fifth cause of action to foreclose a vendee's lien and the fourth cause of action for specific

performance, will deposit the funds in his possession, the object of this action, into court and such deposit is a sufficient undertaking which warrants cancellation of the notice of pendency. Defendants and third-party plaintiff also seek to, *inter alia*, dismiss the amended complaint against Anselmo pursuant to CPLR § 3211(a)(1)[1], averring, *inter alia*, that upon depositing the funds in his possession into court, the agreement between the parties relieves Anselmo of all liability. Plaintiff opposes the instant cross-motion, asserting, *inter alia*, that with respect to dismissal of the action against Anselmo, depositing the funds in his possession into court does not warrant dismissal because the damages sought against him exceed the sums in his possession as escrowee.

For the reasons that follow hereinafter, plaintiff's motion is denied and defendants and third-party plaintiff's cross-motion is granted.

The instant action is for, *inter alia*, breach of contract. The amended complaint, filed on May 9, 2020, alleges the following. On January 6, 2020, pursuant to a written agreement, plaintiff agreed to buy and defendant LEDO, INC. (Ledo) agreed to sell real property located at 340-346 Coster Avenue, Bronx NY, 10474 (340-

[1] While defendants and third-party plaintiff only cite to CPLR § 3211(a)(1) as the basis for dismissal of the action against Anselmo in their reply, their reliance on the agreement between the parties as the basis for such dismissal clearly implicates dismissal pursuant to CPLR § 3211(a)(1).

346). The purchase price was $3.4 million and, upon execution of the foregoing agreement, plaintiff tendered a down payment totaling $340,000 to Anselmo, Ledo's attorney and the escrowee. The agreement required an apportionment of water charges at closing and such apportionment would be based on a title meter reading. Per the agreement, the closing was to occur on February 27, 2020. On April 3, 2020, Anselmo emailed plaintiff and stated that Ledo was still in the process of obtaining a water meter reading and had no date when such reading would occur. As a result, on April 10, plaintiff elected to terminate the agreement and demanded a return of his down payment. On June 5, 2020, Anselmo sent plaintiff a letter attempting to resurrect the agreement by scheduling another closing, asserting that time was of the essence, and that such closing would occur on June 24, 2020. On June 12, 2020, plaintiff notified Ledo that the agreement had been terminated, prompting Ledo to cancel the June 24, 2020 closing. On August 6, 2020, Anselmo sent plaintiff another letter scheduling another closing on August 20, 2020. On August 19, 2020, plaintiff again notified Ledo that he had terminated the agreement and requested that Ledo return his down payment. On September 2, 2020, Ledo canceled the closing it previously scheduled for August 20, 2020 and scheduled another closing for September 17, 2020. On September 15, 2020, plaintiff again notified Ledo that he had terminated the agreement and requested that Ledo return his down payment.

Based on the foregoing, plaintiff interposes five causes of action. The first cause of action is for breach of contract, wherein it is alleged that Ledo breached the agreement between the parties when it failed to timely provide a water meter reading, precipitating plaintiff's cancellation of the agreement. Ledo further breached the agreement by failing to return the plaintiff's down payment. The second cause of action is for declaratory judgment wherein plaintiff seeks a judicial declaration that Ledo breached the agreement between the parties thereby warranting either the return of plaintiff's down payment or an order compelling Ledo to perform its obligations under the contract and sell 340-346 to plaintiff. The third cause of action is for specific performance against Ledo and mirrors the relief requested in the second cause of action. The fourth cause of action is for specific performance against Anselmo, wherein it is alleged that because Ledo breached the agreement, Anselmo, as escrowee in possession of plaintiff's down payment, should be directed to return the down payment to plaintiff. The fifth cause of action is for foreclosure of a vendee's lien, wherein it is alleged that with respect to plaintiff's down payment, the agreement between the parties authorizes the creation of a vendee's lien against 340-346 and seeks to foreclose the lien in order to satisfy plaintiff's down payment plus reasonable expenses associated with the examination of title, survey, and survey inspection charges.

On December 11, 2020, plaintiff filed a notice of pendency[2], indicating that this action affected title to 340-346.

On May 24, 2022, defendants and third-party plaintiff filed separate answers to the amended complaint, wherein they interposed six affirmative defenses. Their sixth affirmative defense states that defendants' "defenses are founded upon documentary evidence."

On June 16, 2022, the parties filed a so-ordered stipulation, which consolidated this action with an action titled *Ledo v Andrew Bullaro*, Index No. 721367/20 (Supreme Court, Queens County). In that action, Ledo sued the plaintiff in this action for breach of contract and sought to keep the down payment. The consolidation agreed upon by the parties converted the action venued in Queens County into the instant third-party action.

On November 3, 2022, this Court issued a Decision and Order granting defendants and third-party plaintiff's motion for partial summary judgment. Specifically, the Court dismissed the third cause of action in the amended complaint against Ledo, which sought specific performance.

On January 6, 2023, this Court issued a Preliminary Conference

[2] The notice of pendency was filed prior to the filing of plaintiff's complaint as authorized by CPLR § 6511(a). Thereafter the complaint was duly served within 30 days thereof (*id.* [If the notice of pendency is filed prior to the service of the summons, it is only effective if "within thirty days after filing, a summons is served upon the defendant or first publication of the summons against the defendant is made pursuant to an order and publication is subsequently completed."]).

Order, directing that the parties complete discovery pursuant to the schedule therein. Notably, the order required that the parties serve responses to discovery demands no later than March 3, 2023 and that depositions be conducted no later than May 31, 2023.

On July 7, 2023, this Court issued a Compliance Conference Order. The order evinces that plaintiff had yet to provide a response to defendants and third-party plaintiff's document demands and had yet to serve discovery demands on defendants and third-party plaintiff. This Court extended the discovery deadlines, requiring document discovery to be completed by August 2023 and depositions by November 1, 2023.

On September 28, 2023, the Appellate Division, First Department affirmed this Court's Decision and Order, which dismissed plaintiff's third cause of action for specific performance.

On October 14, 2023, plaintiff filed the instant motion. The Court heard oral argument on November 13, 2023. During oral argument, defendants and third-party defendants averred that plaintiff had not yet provided any document discovery and had not appeared for a deposition.

PLAINTIFF'S MOTION

Plaintiff's motion seeking an extension of the notice of pendency filed in this action is denied. Significantly, plaintiff fails to establish, as he must, that there exists good cause to

grant the extension sought.

Pursuant CPLR § 6501, in an action where a judgment "would affect the title to, or the possession, use or enjoyment of, real property", "[a] notice of pendency may be filed." The notice of pendency provides "constructive notice, from the time of filing of the notice only, to a purchaser from, or incumbrancer against, any defendant named in a notice of pendency (*id.*). The purpose of such notice is to ensure that the property - the object of the law suit - is not alienated by a defendant during the pendency of the action (*Israelson v Bradley*, 308 NY 511, 516 [1955] ["The purpose of the grant of the privilege (conferred by a notice of pendency) was to prevent the acquisition pendente lite of an interest in the subject-matter of the suit, to the prejudice of the plaintiff because otherwise there would be no end of any suit; the justice of the court would be evaded, and great hardship and inconvenience to the suitor would be necessarily introduced" (internal quotations omitted).]; *Hailey v Ano*, 136 NY 569, 576 [1893] ["(A notice of pendency) prevented the acquisition pendente lite of an interest in the subject-matter of the suit, to the prejudice of the plaintiff, because otherwise (in words already quoted) there would be no end of any suit; the justice of the court would be evaded, and great hardship and inconvenience to the suitor would be necessarily introduced." (Internal quotation marks omitted)]; *Mechanics Exch. Sav. Bank v Chesterfield*, 34 AD2d 111, 113 [3d Dept 1970] ["(A

notice of pendency's) function is to carry out the public policy that a plaintiff's action shall not be defeated by an alienation of the property during the course of the lawsuit; otherwise, there would be no end of any suit, the justice of the court would be evaded and great difficulty would confront a suitor."]).

Whether an action is one where the filing of a notice of pendency is appropriate is a determination made solely by the allegations in the complaint and as such, a court may not investigate beyond the face of the pleadings to determine if the merits of an action are sufficient to warrant a notice of pendency (*5303 Realty Corp. v O & Y Equity Corp.*, 64 NY2d 313, 321 [1984] ["The same considerations that require strict compliance with the procedural prerequisites also mandate a narrow interpretation in reviewing whether an action is one affecting the title to, or the possession, use or enjoyment of, real property. Thus, a court is not to investigate the underlying transaction in determining whether a complaint comes within the scope of CPLR 6501. Instead, in accordance with historical practice, the court's analysis is to be limited to the pleading's face (internal citations and quotation marks omitted).

An action where the plaintiff seeks to "foreclose a vendee's lien to recover a down payment made on a contract for the sale of real property" (*Wilson v Power House Dev. Corp.*, 12 AD3d 505, 505 [2d Dept 2004]), is, as a matter of law, one where the judgment

affects title to real property such that the filing of a notice of pendency is appropriate (*id.* at 505; *Tilden Dev. Corp. v Nicaj*, 49 AD3d 629, 631 [2d Dept 2008]; *Macho Assets, Inc. v Spring Corp.*, 128 AD2d 680, 682 [2d Dept 1987]).

A notice of pendency is effective for three years from the date it is filed and can be extended prior to its expiration upon good cause (CPLR § 6513 ["A notice of pendency shall be effective for a period of three years from the date of filing. Before expiration of a period or extended period, the court, upon motion of the plaintiff and upon such notice as it may require, for good cause shown, may grant an extension for a like additional period. An extension order shall be filed, recorded and indexed before expiration of the prior period."]). The failure to seek an extension of the notice of pendency prior to its expiration is fatal and precludes the extension of the notice (*In re Sakow*, 97 NY2d 436, 439 [2002] ["Does CPLR 6513 permit a plaintiff to file a notice of pendency after a previously filed notice of pendency concerning the same causes of action or claims has expired without timely renewal? The statutory language of CPLR article 65, its legislative history and underlying policies all clearly indicate that the answer is no."]; *Miller-Francis v Smith-Jackson*, 113 AD3d 28, 37 [1st Dept 2013]; *Ampul Elec., Inc. v Vil. of Port Chester*, 96 AD3d 790, 791 [2d Dept 2012]).

Good cause and a timely application are essential elements of

any application seeking to extend a notice of pendency (*Strong Is. Contr. Corp. v Padilla*, 218 AD3d 820, 820 [2d Dept 2023] ["Here, the plaintiff timely requested and established good cause for extending the notice of pendency by demonstrating that the trial for the instant foreclosure action was delayed by the motion of the defendant's counsel to be relieved and the court closures due to the COVID-19 pandemic."]; *SAI Contr. Corp. v 18 W. 16th St. Corp.*, 182 AD3d 438, 438 [1st Dept 2020] ["we find that good cause has been shown to extend the notice of pendency for an additional three years"]). Notably, good cause warranting an extension of the notice of pendency means a delay occasioned either by "circumstances outside the control of either party" (*SAI Contr. Corp.* at 438), or circumstances not attributable to the plaintiff (*L & L Painting Co., Inc. v Columbia Sussex Corp.*, 225 AD2d 670, 670-71 [2d Dept 1996] [Notice of pendency extended where "[t]here [was] no evidence in the record that the delay [in trying the action] was attributable to the appellant [the plaintiff]."]; *Tomei v Pizzitola*, 142 AD2d 809, 810 [3d Dept 1988] [" A review of the record reveals that, although an earlier filing of the note of issue by plaintiffs may very well have been possible, plaintiffs' actions do not necessarily imply a lack of good faith in the prosecution of the action. Additionally, there is evidence that some of the over-all delay in the progress of the litigation is attributable to defendants. While we are not holding that delays by

a plaintiff may not be considered by the court when determining whether good cause for an extension has been shown under CPLR 6513,we do find that under the circumstances of this case, particularly in light of the fact that the note of issue has been filed, Supreme Court did not abuse its discretion in finding good cause to grant the extension."]]).

However, when the delay precipitating an extension of the notice of pendency is occasioned by plaintiff's conduct, such as his/her failure to provide discovery, good cause is absent and an extension will be denied (*Petervary v Bubnis*, 30 AD3d 498, 499 [2d Dept 2006] ["The plaintiff's failure to submit records to the defendants in discovery in defiance of a court order was the cause of the delay that necessitated an extension of the notice of pendency."]; *Hall v Piazza*, 260 AD2d 350 [2d Dept 1999] ["The plaintiff's proof in support of his motion consisted of his bare assertion that there was a delay in conducting discovery occasioned by the need to bring in his malpractice insurance carrier to defend against the defendants' counterclaims. However, he failed to demonstrate why no discovery was attempted from December 1994, when he served his reply to the counterclaims, until August 27, 1997, when, it is alleged, his counsel served discovery demands. It should be noted that August 27, 1997, was the day after the order to show cause bringing on this motion was signed. The plaintiff has, therefore, failed to demonstrate 'good cause shown.'"]; *Pontas*

Renovation, Inc. v Kitano Arms Corp., 224 AD2d 349, 349-50 [1st Dept 1996] ["Plaintiff's corporate general ledger is relevant, and the order that plaintiff disclose it was a proper exercise of discretion. Plaintiff's counsel candidly stated that plaintiff was refusing to produce the ledger because it had unilaterally determined that it was immaterial. There was, therefore, willful non-compliance with a prior court order directing disclosure, justifying the sanction of dismissal. Given this background, there was no good cause shown to warrant extending plaintiff's notice of pendency (internal citations and quotation marks omitted)."]).

Here, in support of the instant motion, plaintiff avers that the notice of pendency should be extended because his fifth cause of action seeking to foreclose a vendee's lien is equitable and since the lien is against 340-346, it affects title to the forgoing property. The foregoing assertions, while mostly true, do not avail plaintiff.

It is true that an action where a plaintiff seeks to "foreclose a vendee's lien to recover a down payment made on a contract for the sale of real property" (*Wilson* at 505), is, as a matter of law, one where the judgment affects title to real property such that the filing of a notice of pendency is appropriate (*id.* at 505; *Tilden Dev. Corp.* at 631; *Macho Assets, Inc.* at 682). It is also true that a notice of pendency is effective for three years from the date it is filed (CPLR § 6513).

However, the extension is not automatic and the *sine qua non* of any application seeking to extend a notice of pendency is the existence of good cause warranting such extension (CPLR § 6513; *Strong Is. Contr. Corp.* at 820; *SAI Contr. Corp.* at 438). Here, to the extent that plaintiff filed his notice of pendency on December 11, 2020, it is to expire on December 11, 2023. Since the instant motion was made before the foregoing date, this application is timely. However, plaintiff's papers are utterly bereft of any assertion that good cause to extend the notice of pendency exists, let alone any evidence tantamount to good cause. Thus, the motion is denied for this reason alone.

Notwithstanding the foregoing, denial of the instant motion is also warranted since when the delay precipitating an extension of the notice of pendency is occasioned by plaintiff's conduct, such as his/her failure to provide discovery, good cause is absent and an extension will be denied (*Petervary* at 499; *Hall* at 350; *Pontas Renovation, Inc.* at 349-50). Here, as noted by defendants and third-party plaintiff, despite this Court's Preliminary Conference and Compliance Conference Orders, plaintiff has failed to provide any discovery in this action. Such failure has necessarily prevented the trial and disposition of this action, which necessarily is the impetus for the instant motion. Not only is this assertion within defendants and third-party plaintiff's papers, but it was asserted during the oral argument of this

motion. In response to the foregoing assertion, plaintiff asserts that

> any open discovery has not impacted progress in the case and the present scheduling order provides for a conference in January 2024 to assess the status of the litigation. There is no indication that discovery issues have played any role in delaying this litigation

(NY St Cts Elec Filing [NYSCEF] Doc No. 120 at 2-3). Plaintiff's assertion is nonsensical and fails to acknowledge that he bears the burden of prosecuting this action, filing the note of issue, and bringing this case to trial. Absent discovery, to state the obvious - this action cannot and will not be prosecuted and will, as it has done for almost three years simply linger. Accordingly, plaintiff's failure to provide discovery has delayed this action and has, indeed, prompted the instant motion to extend the notice of pendency. Accordingly, for this additional reason, the motion is denied.

DEFENDANTS AND THIRD-PARTY PLAINTIFFS' CROSS-MOTION

Defendants and third-party plaintiff's cross-motion seeking to cancel the notice of pendency is granted. Significantly, here, defendants and third-party plaintiff's willingness to deposit the down payment held by Anselmo into court is an undertaking that is sufficient to make plaintiff whole should he prevail in this action, which is no longer one for specific performance against Ledo. Defendants and third-party plaintiff's cross-motion seeking

to dismiss the fourth cause of action against Anselmo for specific performance (the only cause of action against him) and the fifth cause of action against Ledo for foreclosure of a vendee's lien is also granted. Significantly, per the agreement between the parties, once the down payment in Anselmo's possession is deposited into court, his liability and the action to foreclose the vendee's lien is no longer viable.

Canceling a Notice of Pendency

Pursuant to CPLR § 6514, a party may move for an order cancelling a notice of pendency. Generally, CPLR § 6514(a) mandates cancellation of a notice of pendency where the action has been resolved against plaintiff and plaintiff has no viable avenue to seek appellate review and/or stay enforcement of any judgment pending appeal (*id.* ["The court, upon motion of any person aggrieved and upon such notice as it may require, shall direct any county clerk to cancel a notice of pendency, if service of a summons has not been completed within the time limited by section 6512; or if the action has been settled, discontinued or abated; or if the time to appeal from a final judgment against the plaintiff has expired; or if enforcement of a final judgment against the plaintiff has not been stayed pursuant to section 5519."). By contrast, CPLR § 6514(b) promulgates circumstances where a court, in the exercise of its discretion, may cancel a notice of pendency, when subsequent to filing a notice of pendency, a plaintiff "has

not commenced or prosecuted the action in good faith" (*id.*). If appropriate, the court, upon granting an application to cancel a notice of pendency, can direct that a plaintiff pay costs and expenses incurred by a defendant in any action in which a notice of pendency was filed (CPLR § 6514[c] ["The court, in an order cancelling a notice of pendency under this section, may direct the plaintiff to pay any costs and expenses occasioned by the filing and cancellation, in addition to any costs of the action."]). Notably, the award of costs resulting from the cancellation of a notice of pendency is only available when cancellation is granted pursuant to CPLR § 6514 and not when cancellation is the result of the court's inherent power, such as when dismissal of an action requires, by operation of law, that such notice be cancelled (*Congel v Malfitano*, 61 AD3d 807, 809 [2d Dept 2009], *affd as mod*, 31 NY3d 272 [2018] ["However, the Supreme Court should not have awarded the plaintiffs costs and disbursements under CPLR 6514(c). CPLR 6514(c) authorizes an award of costs and disbursements if the cancellation of the notice of pendency is made pursuant to that section. Here, however, the Supreme Court invoked its 'inherent power,' and not CPLR 6514, to cancel the notice of pendency."]), or where such action did not fall within the ambit of CPLR § 6501, such that a notice of pendency was improper (*Nastasi v Nastasi*, 26 AD3d 32, 36 [2d Dept 2005]).

Lastly, pursuant to CPLR § 6515, except in any action to

foreclose a mortgage, a notice of pendency may be cancelled if a defendant posts an undertaking in an amount fixed by the court and which the court finds will provide adequate relief to the plaintiff in the relevant action (CPLR § 6515 [1] ["In any action other than a foreclosure action as defined in subdivision (b) of section 6516 of this article or for partition or dower, the court, upon motion of any person aggrieved and upon such notice as it may require, may direct any county clerk to cancel a notice of pendency, upon such terms as are just, whether or not the judgment demanded would affect specific real property, if the moving party shall give an undertaking in an amount to be fixed by the court, and if . . . the court finds that adequate relief can be secured to the plaintiff by the giving of such an undertaking."]). Under the foregoing circumstances, the amount of the undertaking should be sufficient to make the plaintiff whole should he/she prevail in the action (*Mitchell Field Realty Corp. v United Artists Communications, Inc.*, 188 AD2d 451, 451 [2d Dept 1992] ["Moreover, the Supreme Court's cancellation of the notice of pendency upon the posting of an undertaking in the amount of $300,000 upon its express finding 'that adequate relief can be secured to the plaintiff by the giving of such an undertaking' (CPLR 6515 [1]) did not constitute an improvident exercise of discretion."]; *John H. Dair Bldg. Const. Co. v Mayer*, 31 AD2d 835, 835 [2d Dept 1969] ["Under such circumstances, we are of the opinion that the maximum amount which

plaintiffs could recover by virtue of the Lis pendens, if successful in the action, would be the net proceeds realized upon a bona fide sale of the property. The undertaking under CPLR 6515 is a substitute for the property; and plaintiffs will be afforded adequate relief by an undertaking in the amount of such net proceeds" (internal citations omitted).]). Notably, in an action for specific performance, a valid notice of pendency should not be canceled merely because the defendant is willing to post an undertaking (*Andesco, Inc. v Page*, 137 AD2d 349, 357 [1st Dept 1988]). Instead, pursuant to CPLR § 6515(2), the cancellation is only appropriate if plaintiff gives an undertaking sufficient to "indemnify the moving party for the damages that he or she may incur if the notice is not cancelled" (*id.*; *Andesco, Inc.* at 357 ["Although the language of CPLR 6515 makes both subsections applicable to actions where 'the judgment demanded would affect specific real property' the preferred course in a claim for specific performance is the utilization of subdivision 2 by cancelling the notice of pendency upon an undertaking by the defendant seller unless plaintiff buyer posts an undertaking which will indemnify defendant. This 'double bonding' choice is preferable even when plaintiff's likelihood of success is doubtful" (internal citations omitted).]).

In reviewing an application seeking to cancel the notice of pendency on grounds that the action does not fall within the ambit

of CPLR § 6501 and thus, the notice of pendency is improper, the court's scope of review is circumscribed, limited to the face of pleadings, such that the court may not consider whether the action has merit (*id.* at 320 321 ["Critically, the statutory scheme permits a party to effectively retard the alienability of real property without any prior judicial review. To the extent that a motion to cancel the notice of pendency is available, the court's scope of review is circumscribed. One of the important factors in this regard is that the likelihood of success on the merits is irrelevant to determining the validity of the notice of pendency . . . Thus, a court is not to investigate the underlying transaction in determining whether a complaint comes within the scope of CPLR 6501. Instead, in accordance with historical practice, the court's analysis is to be limited to the pleading's face" (internal citations omitted).]).

In support of the their cross-motion, defendants and third-party plaintiff submit the agreement between the parties. The agreement is dated January 6, 2020 and is between plaintiff as purchaser and Ledo as seller. The agreement evinces that plaintiff agreed to purchase 340-346 from Ledo for $3.4 million. Section 2.06 defines the obligations of the escrowee, to whom the down payment "shall be paid by good check or checks drawn to the order of." Section 2.06(a), prescribes how the escrowee can be relieved of any obligations under the contract, including by depositing the

sums held by him into court. Specifically, per the foregoing section the

> Escrowee shall have the right at any time to deposit the escrowed proceeds and interest thereon, if any, with the clerk of the Supreme Court of the county in which the Premises is located, Escrowee shall give written notice of such deposit to Seller and Purchaser. Upon such deposit Escrowee shall be relieved and discharged of all further obligations and responsibilities hereunder. If the Downpayment is deposited in a money market account, dividends thereon shall be treated, for purposes of this Section, as interest.

Section 2.06(b), defines the extent of the escrowee's duties and states that

> [t]he parties acknowledge that Escrowee is acting solely as a stakeholder at their request and for their convenience, that the duties of Escrowee hereunder are purely ministerial in nature and shall be expressly limited to the safekeeping and disposition of the Downpayment in accordance with the provisions of this contract.

Section 13.06 of the agreement creates a vendee's lien against 340-346 equal to the down payment paid by plaintiff and states that the

> Purchaser shall have a vendee's lien against the Premises for the amount of the Downpayment, but such lien shall not continue after default by Purchaser beyond any notice and cure period under this contract or after deposit of the Downpayment in court by the Escrowee

Based on the foregoing, to the extent that the claim for specific performance seeking to have Ledo sell 340-346 to plaintiff

has been dismissed, the only object of this action is the down payment paid by plaintiff in the amount of $340,000. To that end, here, if defendants and third-party plaintiffs pay said sum into court, then should plaintiff prevail in this action, such undertaking is sufficient to make plaintiff whole

As noted above, pursuant to CPLR § 6515, except in any action to foreclose a mortgage, a notice of pendency may be cancelled if a defendant posts an undertaking in an amount fixed by the court and which the court finds will provide adequate relief to the plaintiff in the relevant action. Such undertaking should be for a sum sufficient to make the plaintiff whole should he/she prevail in the action (*Mitchell Field Realty Corp.* at 451; *John H. Dair Bldg. Const. Co.* at 835). Here, by depositing the down payment held by Anselmo into court, defendants and third-party plaintiffs will ensure that should plaintiff prevail in this action it will be paid the down payment and be made whole.

Contrary to plaintiff's assertion, should he prevail on this action, he is not entitled to recover anything beyond his down payment. To be sure, it is well settled that generally in the absence of an agreement, contract, or statute, a party involved in litigation is responsible for all legal fees and costs incurred in the defense or prosecution of the action and cannot recover the same from an opposing party (*Chapel v Mitchell*, 84 NY2d 345, 348 [1994]; *Hooper Associates, Ltd. v AGS Computers, Inc.*, 74 NY2d 487,

491 [1989]; *A.G. Ship Maintenance Corp. v Lezak*, 69 NY2d 1, 5 [1986]; *Mighty Midgets, Inc. v Centennial Ins. Co.*, 47 NY2d 12, 21–22 [1979]). Even when a contract entitles a party to legal fees, it is well settled, that such relief is only available to the prevailing party, who must also prevail on a central issue in the relevant action (*Nestor v McDowell*, 81 NY2d 410, 415-416 [1993]; *490 Owners Corp. v Israel*, 189 Misc 2d 34, 35 [App Term 2001]). Here, the agreement between the parties is bereft of any language which authorizes the recovery of any fees and/or costs. As such, the application to cancel the notice of pendency upon deposit of the down payment into court is granted.

Dismissal

Defendants and third-party plaintiff's application to dismiss the fourth cause of action against Anselmo for specific performance (the only cause of action against him) and the fifth cause of action against Ledo for foreclosure of a vendee's lien is granted.

On a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7), all allegations in the complaint are deemed to be true (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *Cron v Hargro Fabrics*, 91 NY2d 362, 366 [1998]). All reasonable inferences which can be drawn from the complaint and the allegations therein stated shall be resolved in favor of the plaintiff (*Cron* at 366). In opposition to such a motion a plaintiff may submit affidavits to remedy defects in the complaint

(*id.*). If an affidavit is submitted for that purpose, it shall be given its most favorable intendment (*id.*). The court's role when analyzing the complaint in the context of a motion to dismiss is to determine whether the facts as alleged fit within any cognizable legal theory (*Sokoloff* at 414). In fact, the law mandates that the court's inquiry be not limited solely to deciding whether plaintiff has pled the cause of action intended, but instead, the court must determine whether the plaintiff has pled any cognizable cause of action (*Leon v Martinez*, 84 NY2d 83, 88 [1994] ["(T)he criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one."]). However, "when evidentiary material [in support of dismissal] is considered the criterion is whether the proponent of the pleading has a cause of action not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

Significantly, documentary evidence means judicial records, judgments, orders, contracts, deeds, wills, mortgages and "a paper whose content is essentially undeniable and which, assuming the verity of its contents and the validity of its execution, will itself support the ground upon which the motion is based" (*Webster Estate of Webster v State of New York,* 2003 WL 728780, at *1 [Ct Cl Jan. 30, 2003]). Accordingly, much like on a motion seeking dismissal pursuant to CPLR § 3211(a)(1), where affidavits and deposition transcripts are not documentary evidence sufficient to establish a right to dismissal (*Fleming v Kamden Properties, LLC*,

41 AD3d 781, 781 [2d Dept 2007]; *Berger v Temple Beth-El of Great Neck*, 303 AD2d 346, 347 [2d Dept 2003]), "affidavits submitted by a defendant [in support of a motion pursuant to CPLR § 3211(a)(7)] will almost never warrant dismissal under CPLR 3211 unless they *establish conclusively that the plaintiff has no cause of action*" (*Sokol v Leader*, 74 AD3d 1180, 1182 [2d Dept 2010] [internal quotation marks omitted and emphasis added]; *see Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633, 636 [1976] ["affidavits submitted by the defendant will seldom if ever warrant the relief he seeks unless too the affidavits establish conclusively that plaintiff has no cause of action."]; *Matter of Lawrence v Miller*, 11 NY3d 588, 595 [2008]).

CPLR § 3013 states that

> [s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense.

As such, a complaint must contain facts essential to give notice of a claim or defense (*DiMauro v Metropolitan Suburban Bus Authority*, 105 AD2d 236, 239 [2d Dept 1984]). Vague and conclusory allegations will not suffice (*id.*); *Fowler v American Lawyer Media, Inc.*, 306 AD2d 113, 113 [1st Dept 2003]); *Shariff v Murray*, 33 AD3d 688, 690 [2d Dept 2006]; *Stoianoff v Gahona*, 248 AD2d 525, 526 [2d Dept 1998]). When the allegations in a complaint are vague or

conclusory, dismissal for failure to state a cause of action is warranted (*Schuckman Realty, Inc. v Marine Midland Bank, N.A.*, 244 AD2d 400, 401 [2d Dept 1997]; *O'Riordan v Suffolk Chapter, Local No. 852, Civil Service Employees Association, Inc.*, 95 AD2d 800, 800 [2d Dept 1983]). While generally, on a motion to dismiss the complaint for its failure to state a cause of action, the facts in the complaint are deemed true, "bare legal conclusions and factual claims which are flatly contradicted by the record are not presumed to be true" (*Parola, Gross & Marino, P.C. v Susskind*, 43 AD3d 1020, 1021-1022 [2d Dept 2007]; *Meyer v Guinta*, 262 AD2d 463, 464 [2d Dept 1999]).

Pursuant to CPLR § 3211(a)(1), a pre-answer motion for dismissal based upon documentary evidence should only be granted when "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Leon v Martinez*, 84 NY2d 83, 88 [1994]; *IMO Industries, Inc. v Anderson Kill & Olick, P.C.*, 267 AD2d 10, 10 [1st Dept 1999]). Much like on a motion pursuant to CPLR § 3211(a)(7), on a motion to dismiss pursuant to CPLR § 3211(a)(1), the allegations in plaintiff's complaint are accepted as true, constructed liberally and given every favorable inference (*Arnav Industries, Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P.*, 96 NY2d 300, 303 [2001], *overruled on other grounds by Oakes v Patel*,

20 NY3d 633 [2013]; *Hopkinson III v Redwing Construction Company*, 301 AD2d 837, 837-838 [3d Dept 2003]; *Fern v International Business Machines Corporation*, 204 AD2d 907, 908-909 [3d Dept 1994]).

CPLR § 3211 lists defenses, which if applicable, can be the basis of a motion to dismiss under the statute, or alternatively, can be raised as affirmative defenses in a responsive pleading. CPLR §3211(e) reads in pertinent part that

> [a]t any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a), and no more than one such motion shall be permitted. Any objection or defense based upon a ground set forth in paragraphs one, three, four, five and six of subdivision (a) is waived unless raised either by such motion or in the responsive pleading. A motion based upon a ground specified in paragraph two, seven or ten of subdivision (a) may be made at any subsequent time or in a later pleading, if one is permitted; an objection that the summons and complaint, summons with notice, or notice of petition and petition was not properly served is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading, unless the court extends the time upon the ground of undue hardship...An objection based upon a ground specified in paragraph eight or nine of subdivision (a) is waived if a party moves on any of the grounds set forth in subdivision (a) without raising such objection or if, having made no objection under subdivision (a), he or she does not raise such objection in the responsive pleading.

Hence, with regard to the defenses listed in CPLR §§ 3211(a)(1), (3), (4), (5), and (6), such as the statute of limitations defense, said defense is waived and a defendant is barred from rasing the same if he/she fails to raise the same in either a pre-answer motion to dismiss or within a responsive pleading (*Dougherty v City of Rye*, 63 NY2d 989, 991-992 [1984]; *Matter of Prudco Realty Corp. v Palermo*, 60 NY2d 656, 657 [1983]; *Fade v Pugliani/Fade*, 8 AD3d 612, 614 [2d Dept 2004]; *Hickey v Hutton*, 182 AD2d 801, 802 [2d Dept 1992]). Accordingly, the failure to raise such a defense in a pre-answer motion, nevertheless preserves the objection if the same is raised in a responsive pleading.

Preliminarily, this is the only motion to dismiss made by defendants and third-party plaintiff and its premised on dismissal pursuant to § 3211(a)(1) and (7). The Court will entertain this application since the motion to dismiss pursuant to CPLR § 3211(a)(1) is premised on the sixth affirmative defense within defendants and third-party plaintiff's answers to the amended complaint - that the documentary evidence warrants dismissal. Moreover, as will be discussed below, the fourth and fifth causes of action should be dismissed pursuant to CPLR § 3211(a)(7) because plaintiff no longer has a cause of action thereunder. The latter motion may be made at anytime and is never waived while the former, to the extent premised on an affirmative defense has not been waived.

Here, with respect to the fourth cause of action against Anselmo for specific performance, wherein plaintiff seeks to have him return the down payment, section 2.06(b) of the agreement between the parties defines Anselmo's duties as "purely ministerial in nature" and limits them "to the safekeeping and disposition of the Downpayment in accordance with the provisions of this contract." Thus, because the Court has authorized the payment of the down payment into court, the documentary evidence, namely the agreement, which premises Anselmo's liability on the possession of the down payment, establishes that once he no longer possesses the down payment, he bears absolutely no liability, let alone liability for specific performance. Thus, the fourth cause of action must be dismissed pursuant to CPLR § 3211(a)(7) since Anselmo cannot return money he no longer has and as such, the amended complaint fails to state a cause of action for specific performance. To be sure, "[t]he elements of a cause of action for specific performance of a contract are that the plaintiff substantially performed its contractual obligations and was willing and able to perform its remaining obligations, that defendant was able to convey the property, and that there was no adequate remedy at law" (*EMF Gen. Contr. Corp. v Bisbee*, 6 AD3d 45, 51 [1st Dept 2004]; *see Piga v Rubin*, 300 AD2d 68, 69 [1st Dept 2002]). Again, once Anselmo deposits the down payment into court, he cannot effectuate the return of the down payment, and therefore cannot perform.

The fifth cause of action must be dismissed pursuant to CPLR § 3211(a)(1), since the documentary evidence - the agreement between the parties - utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law (*Goshen* at 326; *Leon* at 88; *IMO Industries, Inc.* at 10). To be sure, section 13.06 of the agreement indicates that the lien cannot continue "after deposit of the Downpayment in court." Again , once Anselmo deposits the down payment into court, the agreement between the parties requires the extinguishment of the vendee's lien.

It has long been held that absent a violation of law or some transgression of public policy people are free to enter into contracts, making whatever agreement they wish no matter how unwise they may seem to others (*Rowe v Great Atlantic & Pacific Tea Company, Inc.*, 46 NY2d 62, 67-68 [1978]). Consequently, when a contract dispute arises, it is the court's role to enforce the agreement rather than reform it (*Grace v Nappa*, 46 NY2d 560, 565 [1979]). In order to enforce the agreement, the court must construe it in accordance with the intent of the parties, the best evidence of which is the very contract itself and the terms contained therein (*Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 [2002]). Thus,"when the parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms" (*Vermont Teddy Bear Co., Inc. v 583 Madison Realty Company*, 1 NY3d 470, 475 [2004] [internal quotation marks

omitted]). Moreover, "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield* at 569). Accordingly, courts should refrain from interpreting agreements in a manner which implies something not specifically included by the parties, and "courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing" (*Vermont Teddy Bear Co., Inc.* at 475). This approach, of course, serves to provide "stability to commercial transactions by safeguarding against fraudulent claims, perjury, death of witnesses [and] infirmity of memory" (*Wallace v 600 Partners Co.*, 86 NY2d 543, 548 [1995] [internal quotation marks omitted]).

Provided a writing is clear and complete, evidence outside its four corners "as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing" (*W.W.W. Assoc., Inc. v Giancontieri*, 77 NY2d 157, 162 [1990]; *see Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 [2002]; *Mercury Bay Boating Club Inc. v San Diego Yacht Club*, 76 NY2d 256, 269-270 [1990]; *Judnick Realty Corp. v 32 W. 32nd St. Corp.*, 61 NY2d 819, 822 [1984]). Whether a contract is ambiguous is a matter of law for the court to decide (*id.* at 162; *Greenfield* at 169; *Van Wagner Adv. Corp. v S & M Enterprises*, 67 NY2d 186, 191 [1986]). A contract is unambiguous if the language it uses has "definite and

precise meaning, unattended by danger of misconception in purport of the agreement itself, and concerning which there is no reasonable basis for a difference of opinion" (*Greenfield* at 569; *see Breed v Ins. Co. of N. Am.*, 46 NY2d 351, 355 [1978]). Hence, if the contract is not reasonably susceptible to multiple meanings, it is unambiguous and the court is not free to alter it, even if such alteration reflects personal notions of fairness and equity (*id.* at 569-570). Notably, it is well settled that silence, or the omission of terms within a contract are not tantamount to ambiguity (*id.* at 573; *Reiss v Financial Performance Corp.*, 97 NY2d 195, 199 [2001]). Instead, the question of whether an ambiguity exists must be determined from the face of an agreement without regard to extrinsic evidence (*id.* at 569-570), and an unambiguous contract or a provision contained therein should be given its plain and ordinary meaning (*Rosalie Estates, Inc. v RCO International, Inc.*, 227 AD2d 335, 336 [1st Dept 1996]).

Here, with respect to the cause of action to foreclose the vendee's lien, the clear and unambiguous language of the agreement terminates the lien upon the deposit of the down payment into court.

Contrary to plaintiff's assertion, the fact that, here, the parties have dueling claims for breach of the agreement between them does not, as a matter of law, preclude a court from enforcing the agreement according to its terms. Moreover, it is the

agreement which creates the very lien that undergirds the fifth cause of action, which allowed the filing of the notice of pendency sought to be extended. As such, plaintiff's attempt to use the agreement and the terms therein as both a sword and a shield is, of course absurd. In other words, a party cannot seek to enforce an agreement while concomitantly urging that the very same agreement is unenforceable.

It is well settled that a breach of contract by one party relieves the other from obligations under it and renders the contract unenforceable by the one who has breached it (*Grace* at 565-566 ["In the instant case, therefore, plaintiff was well within his rights when he refused to consent to an adjournment of the closing and instead insisted upon immediate performance of defendant's obligations. Once the closing was aborted, moreover, it was not necessary for plaintiff to entertain further proposals from defendant, for if defendant had failed to satisfy a material element of the contract, he was already in default."]; *Perlman v M. Israel & Sons Co.*, 306 NY 254, 257 [1954]; *Isse Realty Corp. v Trona Realty Corp.*, 17 NY2d 763 [1966]; *Unloading Corp. v State of N.Y.*, 132 AD2d 543, 543 [2d Dept 1987]; *Melodies, Inc. v Mirabile*, 7 AD2d 783, 783 [3d Dept 1958]; *Sherry v Fed. Terra Cotta Co.*, 172 AD 57, 61 [1st Dept 1916]; *Zadek v Olds, Wortman & King*, 166 AD 60, 63 [1st Dept 1915]; *Czerney v Haas*, 144 AD 430, 436 [1st Dept 1911]; *Hudson Riv. & W.C.M.R. Co. v Hanfield*, 36 AD 605, 610 [3d

Dept 1899]). Indeed, under the foregoing circumstances, the non-breaching party is discharged from performing any further obligations under the contract and can terminate the contract, sue for damages, or continue the contract (*Awards.com, LLC v Kinko's, Inc.*, 42 AD3d 178, 188 [1st Dept 2007]["When a party materially breaches a contract, the non-breaching party must choose between two remedies: it can elect to terminate the contract or continue it. If it chooses the latter course, it loses its right to terminate the contract because of the default."], *affd*, 14 NY3d 791 [2010]; *Albany Med. Coll. v Lobel*, 296 AD2d 701, 702 [3d Dept 2002]; *Capital Med. Sys. Inc. v Fuji Med. Sys., U.S.A. Inc.*, 239 AD2d 743, 746 [3d Dept 1997]; *Emigrant Indus. Sav. Bank v Willow Builders*, 290 NY 133, 144 [1943]). Stated differently, "[a] party may unilaterally terminate a contract where the other party has breached and the breach is material" (*Lanvin Inc. v Colonia, Inc.*, 739 F Supp 182, 195 [SDNY 1990]; *see Exportaciones Del Futuro Brands, S.A. De C.V. v Authentic Brands Group, LLC*, 156 NYS3d 857, 858 [1st Dept 2022] ["As a result, plaintiff's breaches of the agreement substantially defeated the parties' contractual objective and constituted material breaches, thus justifying defendants' termination of the contract" (internal quotation marks omitted).]; *Valenti v Going Grain, Inc.*, 159 AD3d 645, 646 [1st Dept 2018] ["However, [defendants'] failure to make monthly payments under the promissory note and to place $60,000 in escrow in anticipation of

the accounting constituted a material breach, justifying plaintiff's termination of the contract."]).

Here, on the remaining claim for breach of contract, there has been no determination of who, if anyone, breached the agreement. As such, the Court is not precluded from enforcing the relevant portion of the agreement pertinent to the instant motion. Moreover section 13.06 of the agreement is a remedy to which the parties agreed for the express purpose of, where as here, a party breached the agreement. Indeed, it is clear that this provision was included in the agreement to limit Ledo's liability by preventing an encumbrance on 340-346 in the event, as has occurred here, that the only claim warranting a notice of pendency was the one to foreclose a vendee's lien. Accordingly, in an action for breach of contract, [w]here parties contractually agree to a limitation on liability, that provision is enforceable, even against claims of a party's own ordinary negligence" (*Morgan Stanley Mortg. Loan Tr. 2006-13ARX v Morgan Stanley Mortg. Capital Holdings LLC*, 143 AD3d 1, 7-8 [1st Dept 2016]; *see Metro. Life Ins. Co. v Noble Lowndes Intern., Inc.*, 84 NY2d 430, 436 [1994]). When under the terms of an agreement, these remedies exist, a court should honor them (*Metro. Life Ins. Co.* at 436; *Morgan Stanley Mortg. Loan Tr. 2006-13ARX* at 8). It is hereby

ORDERED that Clerk of the Court cancel the notice of pendency in this action upon defendants and third-party plaintiff's deposit

of $340,000 into Court. It is further

ORDERED that upon the foregoing deposit, the fourth and fifth causes of action in th amended complaint be dismissed, with prejudice. It is further

ORDERED that defendants and third-party plaintiff serve a copy of this Decision and Order with Notice of Entry upon plaintiff within thirty (30) days hereof.

This constitutes this Court's decision and Order.

Dated :12/6/23

HON. FIDEL E. GOMEZ, JSC