

MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 19

UTRAH MANGAR,	X	INDEX NO. 9523/04
Plaintiff,		BY: SATTERFIELD, J.
- against -		DATED: June 2, 2008
VIJAY MEETOO and RUKIMINEE MEETOO,		
Defendants.		

X

Plaintiff Utrah Mangar ("plaintiff") commenced this action for specific performance of a contract to purchase real property known as 129-07 133rd Avenue, South Ozone Park, New York, or, in the alternative, to recover her down payment of \$20,000.00, and for damages, and to recover damages for expenses incurred in connection with the underlying transaction, in the sum of not less than \$5,000.00, together with interest.¹ Pursuant to the contract of sale, defendants were to construct a two-family dwelling on the premises. Plaintiff alleges that defendants did not perform the "rehabilitation" work prior to closing and that as of the closing date, said work was not completed by defendants; that defendants attempted to wrongfully cancel the contract on March 14, 2003; that plaintiff obtained a mortgage commitment, and was unable to close

¹A prior action for specific performance was commenced in April 2003, and was dismissed for lack of personal jurisdiction pursuant to an order dated April 14, 2004.

because defendants failed to comply with the terms of the contract.

Defendants Vijay Meetoo and Rukminee Meetoo ("defendants") counterclaimed to retain the down payment, alleging that plaintiff defaulted in her performance of the contract of sale, in that she failed to obtain a mortgage commitment pursuant to the terms of the contract, and failed to schedule a closing at her lender's office.

A non-jury trial was held on October 26, 2006 and March 27, 2007, at which time the parties stipulated that JHO Sidney Leviss would hear and determine the issues. At the conclusion of the trial, the parties were directed, and thereafter submitted proposed findings of fact and conclusions of law. As JHO Leviss died prior to rendering a decision, the matter was transferred to this part, and parties entered into a stipulation dated February 28, 2008, in which it was agreed that a decision would be rendered based upon the transcript and documents admitted at the trial.

FINDINGS OF FACT:

The Court makes the following findings of fact based upon the documentary evidence submitted at trial and the trial testimony of plaintiff, and non-party witnesses Udit Meetoo, the brother of defendant Vijay Meetoo and son of defendant Rukiminee Meetoo, who as a licensed real estate broker, handled the transaction defendants, and as general contractor, hired various contractors to perform the work; Chandar Persaud, a real estate broker, who acted as the broker for defendants; Jacob Azoulay, an attorney who

represented plaintiff for the real estate transaction; and N. Stephen Sukhdeo, Esq. ("Sukhdeo"), the attorney who represented defendants regarding the sale of the subject real property, and prepared the contract of sale:²

On October 17, 2002, the parties entered into a residential contract for the sale of real property located at 129-07 133rd Avenue, South Ozone Park, New York, at the purchase price of \$550,000.00, with plaintiff being required to give a down payment of \$20,000.00, to be held in escrow. It is undisputed that pursuant to said contract, defendants were required to construct a legal new detached frame two-family dwelling and one car garage on the property. Paragraph 3 of the rider to the contract of sale set forth defendants' obligation with respect to the new construction, providing that:

The Seller(s) represent and warrant that the building to be constructed will be a frame, detached, legal two family dwelling with a 1 car garage and will deliver a Certificate of Occupancy, or temporary Certificate of Occupancy on closing for the same.

Paragraph 5 of the rider of the contract set forth plaintiff's obligations with respect to financing, providing:

²Sukhdeo was suspended from the practice of law at the time of the trial and was disbarred on November 7, 2007 (Matter of N. Stephan Sukhdeo, 47 A.D.3d 6 [2nd Dept. 2007]).

This contract is conditioned upon the Purchaser(s) obtaining a conventional mortgage commitment in the sum of \$450,000.00 for a term of 25/30 years at the prevailing rate of interest at the time of closing, at no charge to the Seller(s).

The provision further provided:

The Purchaser(s) shall file an application within sixty (60) days of closing, or the time period which Seller(s) shall be entitle to extend, to advise the Seller's attorney if such mortgage commitment was obtained. In the event the Seller's attorneys are not notified that a commitment has been obtained then this Contract of Sale shall be deemed cancellable unless Seller(s) sole obligation shall extend the time to obtain the mortgage, Seller(s) shall be return the deposit paid hereunder whereupon both parties shall be released from any legal responsibility.

The closing date was set as "ON OR ABOUT DECEMBER 21, 2002."

On March 14, 2003, Sukhdeo sent a letter to plaintiff's attorney, stating: "the time for your client to obtain a mortgage approval has expired. My office did not receive a letter of commitment from your client. Upon receipt of the check the

Contract of Sale shall be deemed null and void with no further obligation by either party." Plaintiff's then attorney, Jacob Azoulay, in a letter dated March 20, 2003, rejected the cancellation of the contract and returned the escrow check, and the first action for specific performance was commenced. Based upon their willingness to comply with the contract, as reflected in a February 27, 2004 letter, plaintiff's attorney prepared a proposed Stipulation of discontinuing that action and reaffirming the provisions of the parties' Contract of Sale. The Stipulation was never executed.

It was plaintiff's understanding that she was not required to obtain a mortgage until 60 days before the closing, which could not occur until after defendants demolished the then-existing building and obtained a certificate of occupancy for the new building. The Certificate of Occupancy for the garage was issued on August 22, 2003, and the Certificate of Occupancy for the two family dwelling, was issued on August 29, 2003, following the August 28, 2003 issuance of the certificate of electrical inspection.

Prior to the issuance of the certificates of occupancy, plaintiff received a mortgage commitment on March 21, 2003 in the sum of \$300,000.00, which expired on May 20, 2003, which she had accepted this commitment notice and paid the lender a partial fee of \$500.00. On December 8, 2003, plaintiff received another mortgage commitment for \$300,000.00 from a different lender, which expired on February 28, 2004; and, on September 29, 2006, accepted

a third mortgage commitment from the original lender, in the sum of \$440,000.00, which expired on November 27, 2006. The premises, in which a Jacuzzi purchased by plaintiff in the amount of \$647.33 and installed in the residence, currently are occupied by defendants and their daughter, and defendants' daughter-in-law and three children; in the residence.

CONCLUSIONS OF LAW

The determination to grant specific performance lies within the discretion of the court. See Marinoff v Natty Realty Corp., 34 AD3d 765 (2nd Dept. 2006); McGinnis v Cowhey, 24 A.D.3d 629 (2nd Dept. 2005). Generally, purchasers who seek specific performance must demonstrate that they are ready, willing and able to perform prior to commencing the action. (Moray v DBAG, Inc., 305 A.D.2d 472, 473 (2nd Dept. 2003). However, a party seeking specific performance or damages for the nonperformance of a contract need not demonstrate that a tender of its own performance was made where the necessity for such a tender is excused by acts of the other party amounting to an anticipatory breach or an inability to perform under the contract. Madison Investments v Cohoes Assoc., 176 A.D.2d 1021, 1021-22 (2nd Dept. 1991), lv dismissed 79 N.Y.2d 1040 (1992). If a contract does not contain a time of the essence provision, in order for time to be made 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." Zev v Merman,

134 A.D.2d 555 (2nd Dept. 1987), affirmed 73 N.Y.2d 781 (1988); see Guippone v Gaias, 13 A.D.3d 339 (2nd Dept. 2004); Moray v DBAG, Inc., supra; Cave v Kollar, 296 A.D.2d 370 371-72 (2nd Dept. 2002); Savitsky v Sukenik, 240 A.D.2d 557 (2nd Dept. 1997). When the requisite notice that time is of the essence is not given by either party, the contract must be performed within a reasonable time. See Ramnarain v Ramnarain, 30 A.D.3d 394 (2nd Dept. 2006); Stansky v Mallon, 133 A.D.2d 392 (2nd Dept. 1987).

Here, the contract did not contain a time of the essence clause and neither defendants nor plaintiff made time of the essence. The contract of sale contains mutual preconditions to closing - defendants were required to obtain the certificates of occupancy, and plaintiff was required to obtain a mortgage commitment 60 days prior to the closing. Although the contract stated that the closing was to be on or about December 21, 2002, when that date passed neither defendants or plaintiff scheduled another closing date. Therefore, in the absence of a closing date, plaintiff's obligation to obtain a mortgage commitment within 60 days of the closing did not arise prior to March 14, 2003. The contract provides that defendants could retain the down payment as liquidated damages if plaintiff defaulted. Since defendants failed to schedule a closing date after the passage of the initial closing date, the court finds that plaintiff never defaulted (see Singh v Gopaul, 43 A.D.3d 1145 (2nd Dept. 2007)), and defendants' counterclaim to recover the \$20,000.00 down payment must be

dismissed.

Defendants' initial attempt to cancel the contract on March 14, 2003, constituted an anticipatory breach, as no closing date had been established, and defendants were unable to meet their own obligation of delivering the certificates of occupancy prior to August 2004. See generally, Fridman v Kucher, 34 A.D.3d 726 (2nd Dept. 2006). Despite the letter of March 14, 2003 and plaintiff's commencement of the prior action for specific performance, defendants' counsel, in his letter of February 27, 2004, reaffirmed their intent to convey the property to plaintiff.

A plaintiff who seeks specific performance of a contract for the sale of real property must demonstrate that he or she was ready, willing, and able to perform the contract, regardless of any anticipatory breach by a seller. See Madison Equities, LLC v ME Mgt. Corp., 17 A.D.3d 639, 640 (2nd Dept. 2005); Tsabari v Haye, 13 A.D.3d 360 (2nd Dept. 2004); Internet Homes v Vitulli, 8 A.D.3d 438 [2004]; Moutafis v Osborne, 7 A.D.3d 686 (2nd Dept. 2004); City Ownership v Giambrone, 5 A.D.3d 529 (2nd Dept. 2004); Ferrone v Tupper, 304 A.D.2d 524 (2nd Dept. 2003); Petrelli Assocs. v Germano, 268 A.D.2d 513 [2000]; 3M Holding Corp. v Wagner, 166 A.D.2d 580, 581-582 (2nd Dept. 1990); Cohn v Mezzacappa Bros., 155 A.D.2d 506 [(2nd Dept. 1989)]; Zev v Merman, supra; Huntington Min. Holdings v Cottontail Plaza, 96 A.D.2d 526 [1983], affirmed 60 N.Y.2d 997 (1983).

Here, the contract purchase price was \$550,000.00, and plaintiff paid a down payment of \$20,000.00. Plaintiff, pursuant to the terms of the contract, was required to obtain a mortgage commitment of \$450,000.00, and pay a balance of \$530,000.00 at the closing. Plaintiff obtained two mortgage commitments for \$300,000.00 and one was for \$440,000.00, which have all now expired. Plaintiff was clearly entitled to waive the mortgage contingency clause inserted solely for her benefit (W.W.W. Assoc. v Giancontieri, 77 NY2d 157, 162 [1990]; Xhelili v Larstanna, 150 A.D.2d 560 [1989]). However, although plaintiff claims to have the financial resources to cover the difference between the mortgage commitment and the purchase price, she failed to submit documentary proof such as bank or other financial records which indicates that she had such funds at any time when a closing could have been scheduled. Plaintiff therefore has not met her burden of proving that she is ready, willing and able to purchase the subject real property (Chernow v Chernow, 39 A.D.3d 684, 686 [2007]; Fridman v Kucher, 34 A.D.3d 726, 728 [2006]; Singh v Gopaul, 26 A.D.3d 370 [2006]; Haddad. v Portuesi, 18 Misc 3d 1126A [2008]; see also 28 Props. v Akleh Realty Corp., 309 A.D.2d 632 [2003]; Provost v Off Campus Apartments Co., II, 211 A.D.2d 850, 851 [1995]).

Accordingly, plaintiff is not entitled to judgment in her favor on the first cause of action for specific performance of the contract of sale, which hereby is dismissed. Plaintiff is entitled

to judgment in her favor on her second cause of action to recover the \$20,000.00 down payment, as defendants have not established that plaintiff defaulted under the terms of the contract.

Plaintiff also is entitled to judgment in her favor on the third cause of action to recover damages in the sum of \$937.44. Plaintiff established that she paid the sums of \$647.33 and \$290.11 for a Jacuzzi and faucets, which were installed in the newly built premises, and defendants have benefitted from their use. In view of the fact that plaintiff did not submit any documentary evidence as to the sums she incurred in obtaining the three mortgage commitments, she may not recover any sums for these expenditures.

Conclusion

Based upon the testimony of the parties and the witnesses, and the documentary evidence presented at trial, this Court finds that plaintiff has not established her claim for specific performance of the contract of sale, and therefore the first cause of action is dismissed. Plaintiff has established that she is entitled to recover the down payment of \$20,000.00 and the sum of \$937.44 for fixtures she purchased, and were installed in the subject premises. Plaintiff, therefore, is entitled to a judgment in her favor on the second and third causes of action, to the extent indicated herein.

The clerk of the court is directed to enter a verdict in favor of defendants dismissing plaintiff's first cause of action and canceling the notice of pendency, and is further directed to enter

a verdict in favor of plaintiff in the sum of \$20,937.11 together with interest, and statutory costs, and dismissing defendants' counterclaim in its entirety. This constitutes the decision and order of the court.

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J.S.C.