

SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS**

**PART 17
HON. ORIN R. KITZES**

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**DL ACQUISITION CORP.,
Plaintiff,**

-against-

**SONIA S. COHEN and DANIEL COHEN,
Defendants.**

**Index No. 25585/07
Motion Date: 1/2/08
Motion No. 10**

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The following papers numbered 1 to 20 read on this motion by Defendants for an order granting them summary judgment in their favor dismissing the complaint and awarding them specific performance of a contract of sale of real property, dated June 11, 2007 and ordering Plaintiff to purchase Defendant's real property, located at 37-60 Junction Boulevard, Corona, N.Y.; and cross-motion by Plaintiff for for an order pursuant to CPLR 3211 (a) (6) dismissing Defendants' counter-claim for specific performance and for an order granting Plaintiff summary judgment on its claim for breach of contract and ordering the return of Plaintiff's contract deposit, costs to examine title and attorney's fees and costs.

	PAPERS NUMBERED
Notice of Motion-Affirmation-Exhibits.....	1-4
Notice of Cross-Motion-Affirmation-Exhibits.....	5-8
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Plaintiff's Reply-Exhibit.....	12-14
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Upon the foregoing papers it is ordered that the motion by Defendants for an order granting them summary judgment in their favor dismissing the complaint and awarding them specific performance of a contract of sale of real property, dated June 11, 2007 and ordering Plaintiff to purchase Defendant's real property, located at 37-60 Junction Boulevard, Corona, N.Y.; and cross-motion by Plaintiff for for an order pursuant to CPLR 3211 (a) (6) dismissing Defendants' counter-claim for specific performance and for an order granting Plaintiff summary judgment on its claim for breach of contract and ordering the return of Plaintiff's contract deposit, costs to examine title and attorney's fees and costs are decided as follows:

Plaintiff commenced this action for breach of contract or alternatively, for specific performance, concerning a Contract of Sale, dated June 11, 2007, whereby Plaintiff, as buyer, agreed to purchase commercial property located at 37-60 Junction Boulevard, Corona, N.Y. from Defendants. The parties entered into the contract of sale, whereby Defendants agreed to sell the

property to Plaintiff for the purchase price of \$3,400,000 and Plaintiffs made a down payment of \$100,000. Paragraph 3 of the contract contains various representations and warranties made by Defendants' regarding the condition of the subject property including the following: that no structural alterations had occurred; seller had no knowledge of any incinerator, boiler or other burning equipment being operated by Seller in violation of any applicable law; to the best of Seller's knowledge, no asbestos-containing materials had been installed; and to the best of Seller's knowledge, the building was operated without being in violation of any applicable laws.

Defendants' claim that on September 17, 2007, Plaintiff served a "time of the essence" letter upon defendants indicating that unless certain violations were removed by October 10, 2007, it would consider the Contract as having been breached. According to defendants' these violations were recorded against the premises for a lack of a permit for an awning on the facade and a boiler violation. Defendants claim that, although these violations were not cured by October 10, defendants' presented assurances to plaintiff regarding their eventual curing, plaintiffs refused to close on the contract of sale. Rather, plaintiff's filed a lis pendens against the premises and commenced the instant action. Defendants claim the violation for the sign and awning was removed on or about November 1, 2007 and the boiler violation will be removed after a final inspection. (In its affirmation in reply to the cross-motion and in support of its motion for summary judgment, defendants have submitted evidence it alleges shows the boiler violation has been removed.) Furthermore, defendants' claim there are no other violations against the premises and there is no asbestos on the premises. Based on the above, Defendants' claim that Plaintiff's declaring a default was not justified and they seek an order granting them summary judgment on their counter claim of specific performance against plaintiff for plaintiff to complete the transaction.

Plaintiff opposes the motion seeking specific performance and has cross-moved for an order pursuant to CPLR 3211 (a) (6) dismissing Defendants' counterclaim for specific performance. Plaintiff claims that defendants' cause of action for specific performance is barred by the contract of sale and should be dismissed. Defendants' have not specifically responded to this branch of Plaintiff's cross-motion.

The provisions of the contract, when read as a whole, limit the defendants sellers' remedy for the purchaser's failure to perform the contract to liquidated damages. "When a contract for the sale of real property contains a clause specifically setting forth the remedies available to the buyer if the seller is unable to satisfy a stated condition, fundamental rules of contract construction and enforcement requires that this Court limit the

contracting parties to the remedies provided in the sale contract Mehlman v. 592-600 Union Ave. Corp., 2007 NY Slip Op (1st Dept 2007.) *See generally*, W.W.W. Assoc. v Giancontieri, 77 N.Y.2d 157, 162 (1990.) " The law is now well settled that a liquidated damages provision will not in and of itself be construed as barring the remedy of specific performance . . . For there to be a complete bar to equitable relief there must be something more, such as explicit language in the contract that the liquidated damages provision was to be the sole remedy" Rubinstein v Rubinstein, 23 N.Y.2d 293, 297-298 (1968) Coizza v. 164-50 Crossbay Realty Corp., 37 A.D.3d 640 (2d Dept 2007.), Paragraph 39 of the contract states that "Seller waives all rights to institute action for specific performance of the Contract and in the event of default by Purchase, the down payment shall constitute liquidated damages and Seller's sole remedy. Since the contract limit the defendants damages to liquidated damages, the defendants' counterclaim for specific performance is precluded. Mehlman v. 592-600 Union Ave. Corp., *supra*. 101123 LLC v Solis Realty LLC, 23 AD3d 107, 108, 801 N.Y.S.2d 31 (1st Dept 2005.) *Cf.* Coizza v. 164-50 Crossbay Realty Corp., *supra*. Consequently, Defendants' motion for an order granting them summary judgment on their counterclaim for specific performance is denied, and the branch of Plaintiff's cross-motion for an order pursuant to CPLR 3211 (a) (6) dismissing Defendants' counter-claim for specific performance is granted.

The branch of Plaintiff's cross-motion for an order granting summary judgment on its claim for breach of contract is denied. It is axiomatic that the Summary Judgment remedy is drastic and harsh and should be used sparingly. The motion is granted only when a party establishes, on papers alone, that there are no material issues and the facts presented require judgment in its favor. It must also be clear that the other side's papers do not suggest any issue exists. Moreover, on this motion, the court's duty is not to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist. *See*, Barr v County of Albany, 50 NY2d 247 (1980); Miceli v Purex, 84 AD2d 562 (2d Dept. 1981); Bronson v March, 127 AD2d 810 (2d Dept. 1987.) Finally, as stated by the court in Daliendo v Johnson, 147 AD2d 312,317 (2d Dept. 1989), "Where the court entertains any doubt as to whether a triable issue of fact exists, summary judgment should be denied."

Plaintiff claims that it is undisputed that Defendants breached their contractual obligations regarding the lack of boiler violations and the presence of asbestos on the premises. Defendants claim that to the extent violations existed they were not material and do not constitute a breach sufficient to constitute a breach. Moreover, Defendants point out these

violations were in the process of being cured and have been cured. Finally, Defendants deny the existence of asbestos on the premises. The Court finds that Defendants have submitted sufficient evidence to raise an issue of fact as to whether they breached the contract and were able to convey the property in the condition required by the contract. The Court notes that under Paragraph 5 of the contract, the parties contemplated the existence of violations after the closing date and provided that such “shall be the responsibility of Seller”. Additionally, the Court has considered all evidence submitted in the interest of justice in light of Plaintiff’s having an opportunity to respond to all submitted papers.

Finally, after reviewing the submitted papers, the Court finds it appropriate to order a conference for possible settlement of this matter or the ordering of discovery. All parties are to appear in this court, Part 17, Room 116 on January 25, 2008, at 10:00 a.m. A copy of this order is being sent to the parties, by means of facsimile transmission, on January 9, 2008.

DATED: January 9, 2008

ORIN R. KITZES, J.S.C.