NEW YORK APPELLATE DIGEST, LLC

Real Estate Transactions 2019

An Organized Compilation of the Summaries of New York State Appellate Decisions Addressing Real Estate Transactions Released in 2019 and Posted Weekly in 2019 on the New York Appellate Digest Website. The Table of Contents Allows a Quick Overview of the Issues. The Entries in the Table of Contents Link to the Summaries and the Summaries Link to the Decisions on the Official New York Courts Website. Click on "Table of Contents" in the Header on Each Page to Return There.

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ANTICIPATORY REPUDIATION, DEPOSITS.

THE DEMAND FOR THE RETURN OF THE DEPOSIT UNDER A REAL ESTATE PURCHASE CONTRACT WAS AN ANTICIPATORY BREACH OF THE CONTRACT AND PLAINTIFF WAS ENTITLED TO KEEP THE DEPOSIT AS LIQUIDATED DAMAGES (SECOND DEPT).

The Second Department determined defendant's demand for the return of its deposit in a real estate transaction was an anticipatory breach of the purchase agreement entitling plaintiff to retain the deposit as liquidated damages. Plaintiff, Lamarche Food, had represented that it was a New York corporation authorized to do business in New York. The corporation had been dissolved in 1992. For that reason defendant claimed plaintiff had breached the contract and demanded the return of the deposit. However, pursuant to Business Corporation Law 1006, a dissolved corporation may continue to function for the purpose of winding up affairs. Apparently defendant acknowledged the "winding up affairs" issue and argued only that its demand for a return of the deposit was not an anticipatory breach:

By letter dated June 23, 2017, a new attorney for the defendant informed the plaintiffs' attorney that Lamarche Food had defaulted on its obligations under the contract of sale inasmuch as it had represented therein that it was a New York corporation authorized to carry on its business in New York, with all the power and authority to enter into and perform the contract, and yet Lamarche Food was dissolved on June 24, 1992, and, therefore, was not a registered corporation in New York capable of engaging in new business. The defendant's attorney further stated that in light of the breach, the defendant demanded a refund of its deposit within 10 days. * * *

On appeal, the defendant does not dispute that Lamarche Food could continue to function for the purpose of selling the subject property as part of its winding up of the corporation's affairs. Rather, the defendant contends that its June 23, 2017, letter to the plaintiffs' attorney did not constitute an anticipatory breach of the contract of sale. "An anticipatory breach of contract by a promisor is a repudiation of [a] contractual duty before the time fixed in the contract for . . . performance has arrived" … . "For an anticipatory repudiation to be deemed to have occurred, the expression of intent not to perform by the repudiator must be positive and unequivocal'" … . We agree with the Supreme Court's determination that the June 23, 2017, letter reflected a positive and unequivocal repudiation of the contract by the defendant … , thereby, under the terms of the contract, entitling the plaintiffs to retain the deposit as liquidated damages for the defendant's anticipatory breach. Lamarche Food Prods. Corp. v 438 Union, LLC, 2019 NY Slip Op 08995, Second Dept 12-18-19

ANTICIPATORY REPUDICATION.

PLAINTIFFS BREACHED THE CONTRACT TO PURCHASE THE HOME BUILT BY DEFENDANTS BY CLEARLY INDICATING THEY COULD NOT GO THROUGH WITH THE PURCHASE (ANTICIPATORY REPUDIATION); HOWEVER, DEFENDANTS WERE NOT ENTITLED TO THE FULL AMOUNT PLAINTIFFS HAD ALREADY PAID DEFENDANTS, OVER $220,000, AS DAMAGES FOR THE BREACH, DAMAGES TRIAL ORDERED (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court, determined that plaintiffs breached the contract to purchase the home built by defendants by a clear expression that they did not intend to go through with the purchase (anticipatory repudiation). The plaintiffs had paid defendants about $220,000 toward the purchase price of about $322,000. After the plaintiffs repudiated the contract the builder sold the property to his daughter fore $269,000. Supreme Court allowed the defendants to keep the entire $220,000 paid by plaintiffs as damages. The Third Department determined the damages were excessive in ordered a trial to determine the appropriate amount of damages:

Having determined that plaintiffs breached the contract, the issue distills to whether Supreme Court correctly determined that, as a result thereof, they forfeited, as a matter of law, the $222,241 in payments made to defendants prior to their cancellation of the contract. Defendants argue that we must apply the well-settled rule set forth by the Court of Appeals over a century ago in Lawrence v Miller (86 NY 131 [1881]), which was later reaffirmed in Maxton Bldrs. v Lo Galbo (68 NY2d 373 [1986]), "that a vendee who defaults on a real estate contract without lawful excuse[ ] cannot recover his or her down payment" … . However, we find that forfeiture of the payments made by plaintiffs in this case, which constitute approximately 69% of the total contract amount, represents, on its face, a damages award disproportionally higher than the actual damages incurred by defendants … , such that defendants have failed to establish, as a matter of law, their entitlement to a damages award equivalent to all payments made by plaintiffs … . Accordingly, Supreme Court should have denied this portion of defendants' motion. As a result, a trial is required to determine the appropriate amount of defendants' damages. Burns v Reiser Bros., Inc., 2019 NY Slip Op 04522, Third Dept 6-6-19

ATTORNEY APPROVAL, SPECIFIC PERFORMANCE.

SELLER'S ACTION FOR SPECIFIC PERFORMANCE OF A REAL ESTATE PURCHASE AGREEMENT PROPERLY DISMISSED; THE CONTRACT WAS SUBJECT TO ATTORNEY APPROVAL BUT NO DEADLINE FOR ATTORNEY-APPROVAL WAS SET BY THE AGREEMENT; DEFENDANTS' COUNSEL INFORMED PLAINTIFF'S COUNSEL THAT DEFENDANTS DID NOT WISH TO GO FORWARD WITH THE PURCHASE EITHER SEVEN OR NINE DAYS AFTER THE CONTRACT WAS EXECUTED, WHICH WAS DEEMED A REASONABLE TIME (SECOND DEPT).

The Second Department determined defendant-purchasers' motion to dismiss the complaint seeking specific performance of a real estate purchase agreement was property granted. The agreement was subject to attorney approval and defendants' attorney disapproved the contract either seven or nine days after the agreement was executed. There was no time-limit for attorney approval in the agreement, and seven or nine days were deemed a reasonable time:

… [T]he defendants established their entitlement to dismissal of the complaint pursuant to CPLR 3211(a)(7). "On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" … . "Moreover, where evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), and the motion is not converted into one for summary judgment, the motion should not be granted unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it" … .

The evidentiary material submitted by the defendants in support of their motion demonstrated that the plaintiff had no cause of action against them. Contrary to the plaintiff's contention, the evidence conclusively established that the purchase agreement was unenforceable because it was subject to attorney approval, which was not given by the defendants' attorney. As the purchase agreement contained no time limit within which approval was required "a reasonable time for cancellation thereunder is implied" … . Whether, as acknowledged by the

defendants, it was seven days after the parties entered into the purchase agreement that the defendants' attorney disapproved it, or as alleged by the plaintiff, it was nine days after the parties entered into the purchase agreement that the defendants' attorney disapproved it, the time between the parties entering into the agreement and the disapproval was minimal, during which no prejudice would inure to the plaintiff, and was a reasonable time period as a matter of law. Makris v Boylan, 2019 NY Slip Op 06598, Second Dept 9-18-19

BONA FIDE PURCHASER.

ALTHOUGH THE EASEMENT WAS NOT RECORDED IN PLAINTIFF'S DIRECT CHAIN OF TITLE, IT WAS INDEXED UNDER A BLOCK AND LOT NUMBER SYSTEM, THEREFORE PLAINTIFF HAD CONSTRUCTIVE NOTICE OF THE EASEMENT AND WAS NOT A BONA FIDE PURCHASER (FIRST DEPT).

The First Department, in a detailed opinion by Justice Friedman, determined a reasonable title search would have turned up an easement on the subject property. Therefore, plaintiff was not a bona fide purchaser of the empty lot (57 Crosby). The interesting opinion is too detailed to fairly summarize here. The following excerpt provides the flavor of the reasoning:

The question presented … is whether plaintiff, when it purchased 57 Crosby in 2011, had constructive notice of the 1981 easement, notwithstanding that the indexing of the easement had not been changed by the City Register when 57 Crosby was subdivided from Lot 30 in 1984 and reassigned its previous designation of Lot 9.

… [T]he answer to the foregoing question does not turn on whether the 1981 easement would have been found in a search in 2011 of the direct chain of title to 57 Crosby. Almost 40 years ago, the Court of Appeals held that "the rule limiting constructive notice to recorded conveyances that are within the purchaser's direct chain of title" does not apply "to instances in which the purchaser had access to a block and lot' or tract indexing system," such as the one in use in New York City … . … "[I]n counties using a block and lot' indexing system, a purchaser is charged with record notice of all matters indexed under the block and lot numbers corresponding to the purchaser's property, regardless of whether such information also appears in his or her direct chain of title" … . Thus, although … the 1981 easement was not recorded within plaintiff's direct chain of title, that circumstance has no bearing on the outcome of this appeal … . Akasa Holdings, LLC v 214 Lafayette House, LLC, 2019 NY Slip Op 06447, First Dept 9-3-19

BROKERS.

COMPLAINT STATED CAUSES OF ACTION FOR BREACH OF REAL ESTATE BROKERAGE CONTRACT, QUANTUM MERUIT, UNJUST ENRICHMENT AND PROMISSORY ESTOPPEL, STATUTE OF FRAUDS DID NOT APPLY, COMPLAINT SHOULD NOT HAVE BEEN DISMISSED (FIRST DEPT).

The First Department, reversing Supreme Court, determined that plaintiffs' complaint stated causes of action for breach of contract, quantum meruit, unjust enrichment and promissory estoppel. The contract between plaintiff, a real estate broker, and defendant, a real estate developer, gave plaintiff the exclusive right to broker sales of luxury apartments in return for a reduced commission rate. The complaint alleged defendant accepted plaintiff's services for two years but refused to pay after defendant received the benefits of the bargain:

Plaintiffs' failure to identify in the complaint the specific national real estate sales and marketing agency with which plaintiffs were going to partner, along with the terms of such partnership, is not fatal to plaintiffs' breach of contract claim. The alleged contract would imply a covenant of good faith and fair dealing pursuant to which plaintiffs would propose reasonable entities and defendants would reasonably accept or reject those proposals … . … As to the start and end date of the agreement, it can be inferred from the allegations in the complaint … . With regard to the identity of the promisor, the complaint indicates that all negotiations and interactions were with defendant Kuzinez. …

The complaint should not have been dismissed pursuant to the statute of frauds. As an initial matter, defendants did not move to dismiss based on the statute of frauds and plaintiffs were not afforded the opportunity to address the issue … . Moreover, the statute of frauds is inapplicable here as General Obligations Law § 5-701(a)(10) specifically exempts contracts to pay compensation to licensed real estate brokers, which is the type of contract alleged by plaintiffs.

The declaratory judgment cause of action, which seeks a declaration that plaintiffs have the right to serve as exclusive broker for all residential sales for the subject development, should be reinstated based on our finding that the complaint sufficiently alleges a claim for breach of contract.

Additionally, the quantum meruit, unjust enrichment, and promissory estoppel claims state causes of action. As to quantum meruit, the complaint alleges that plaintiffs provided services to defendants at a reduced cost or no cost, based on the promiseof the oral agreement …. As to promissory estoppel, the complaint alleges that

defendants promised plaintiffs that they would serve as exclusive broker and that, in reasonable reliance on that promise, plaintiffs agreed, among other things, to substantially reduced commissions … . Elhanani v Kuzinez, 2019 NY Slip Op 04042, First Dept 5-23-19

BROKERS, FIDUCIARY DUTY.

PLAINTIFF ENTITLED TO SUMMARY JUDGMENT ON THE FRAUD AND BREACH OF FIDUCIARY DUTY CAUSES OF ACTION, DEFENDANT PURCHASED THE PROPERTY FOR HERSELF WHILE ACTING AS PLAINTIFF'S REAL ESTATE BROKER (SECOND DEPT).

The Second Department determined plaintiff was entitled to summary judgment on the fraud and breach of fiduciary duty causes of action against defendant (Maureen), a real estate broker. The complaint alleged that Maureen purchased the property herself while acting as plaintiff's broker:

"[A] real estate broker is a fiduciary with a duty of loyalty and an obligation to act in the best interests of the principal"… . "[I]n dealing with the principal, a real estate broker must act honestly and candidly, and the broker must disclose all material information that it may possess or obtain concerning the transactions involved"… . Moreover, "[w]here a broker's interests or loyalties are divided due to a personal stake in the transaction or representation of multiple parties, the broker must disclose to the principal the nature and extent of the broker's interest in the transaction or the material facts illuminating the broker's divided loyalties" … . "A breach of this duty of loyalty by a real estate broker may constitute a fraud for which the broker is answerable in damages" … . Edwards v Walsh, 2019 NY Slip Op 01197, Second Dept 2-20-19

CAVEAT EMPTOR, MOLD.

DEFENDANT-SELLERS NOT LIABLE FOR MOLD AND MICE IN HOUSE SOLD TO PLAINTIFFS, UNDER THE MERGER DOCTRINE NO PROVISION OF THE CONTRACT SURVIVED THE DELIVERY OF THE DEED, THE DOCTRINE OF CAVEAT EMPTOR APPLIED, NO DUTY OF CARE OWED TO THE PLAINTIFFS OVER AND ABOVE THE CONTRACT PROVISIONS, THE PRIVITY ELEMENT OF NEGLIGENT MISREPRESENTATION WAS ABSENT (SECOND DEPT).

The Second Department determined the defendant-sellers were not liable under breach of contract or negligence theories for the presence of mold and mice in a house sold to plaintiffs:

The contract of sale contained language providing that, unless expressly stated, no covenant, warranty, or representation in the contract survived closing. A rider to the contract stated that the defendants were not aware of any mold or vermin infestation in the house. Prior to the closing, the plaintiffs conducted a home inspection which revealed, among other things, the presence of water staining and evidence of water infiltration on the interior of the house. The home inspection report stated that a mold evaluation was beyond the scope of the inspection and recommended that if the plaintiffs were concerned about potential mold issues, they should call a professional mold abatement company to perform an inspection. The report also stated that the need for some periodic general pest control should be anticipated. The plaintiffs did not undertake a mold inspection. * * *

… [O]nce title to the property closed and the deed was delivered, "any claims the plaintiff[s] might have had arising from the contract of sale were extinguished by the doctrine of merger" since there was no "clear intent evidenced by the parties that [the relevant] provision of the contract of sale [would] survive the delivery of the deed". … Furthermore, "New York adheres to the doctrine of caveat emptor and imposes no duty on the seller or the seller's agent to disclose any information concerning the premises when the parties deal at arm's length, unless there is some conduct on the part of the seller or the seller's agent which constitutes active concealment" … . …

A simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated … . …

"A claim for negligent misrepresentation requires the plaintiff[s] to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant[s] to impart correct information to the plaintiff[s]; (2) that the information was incorrect; and (3) reasonable reliance on the information" … . Here, the defendants demonstrated that there was no special or privity-like relationship between themselves and the plaintiffs in this arm's length transaction … . Rosner v Bankers Std. Ins. Co., 2019 NY Slip Op 04015, Second Dept 5-22-19

CONSTRUCTION CONTRACTS, GENERAL BUSINESS LAW 771, QUANTUM MERUIT.

THE HOME-BUILDER'S CONTRACT WAS INVALID BECAUSE IT DID NOT COMPLY WITH THE GENERAL BUSINESS LAW, THE HOMEOWNERS' BREACH OF CONTRACT COUNTERCLAIM SHOULD NOT HAVE BEEN DISMISSED ON THAT GROUND HOWEVER; CONTRACTOR ENTITLED TO RECOVER IN QUANTUM MERUIT IF, UPON REMITTAL, IT IS DETERMINED THE CONTRACTOR'S BREACH, IF ANY, WAS NOT SUBSTANTIAL (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court, determined the plaintiff contractor's breach of contract cause of action against defendants-homeowners was properly dismissed because the contract to build the home did not comply with General Business Law 771. The defendants-homeowners refused to make the final payment of approximate $39,000 upon completion of the home, alleging the home was not complete and was not up to code. The homeowners' counterclaim for breach of contract should not have been dismissed because General Business Law 771 applies only to contractors. The contractor's quantum meruit cause of action was not precluded by the contractor's failure to comply with the General Business Law. The agreed price of the work in the "contract" was evidence of the value of the work done by the contractor, even though the contract itself was invalid. The matter was sent back for determination of the homeowners' breach of contract cause of action, and a determination of whether the contractor committed a substantial breach of the contract, which would preclude the quantum meruit cause of action:

"The elements of a cause of action sounding in quantum meruit are (1) performance of services in good faith, (2) acceptance of services by the person to whom they are rendered, (3) expectation of compensation therefor, and (4) reasonable value of the services rendered" … . Defendants' argument centers around plaintiff's failure to establish the fourth element. In its decision, the court stated that, "[a]lthough there was no direct evidence presented regarding the reasonable value of the work performed, the parties' agreement can furnish evidence of

such value." We discern no error in the court so holding, as "an unenforceable writing may provide evidence of the value of services rendered in quantum meruit" … . …

… [O]on remittal, should the court find that plaintiff breached the contract, it must then also decide if the breach was substantial, and, if so, plaintiff is precluded from recovering in quantum meruit … . Conversely, if the court finds that plaintiff's breach of contract was not substantial, plaintiff is not precluded from quantum meruit recovery, and the damages due to defendants for plaintiff's breach of the contract must be offset by plaintiff's award … . Grey's Woodworks, Inc. v Witte, 2019 NY Slip Op 04525, Third Dept 6-6-19

CONTAMINATION.

FOUR CLASSES PROPERLY CERTIFIED TO BRING CLASS ACTION SUITS BASED UPON THE CONTAMINATION OF AIR, WATER, REAL PROPERTY AND PEOPLE WITH TOXIC CHEMICALS (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Lynch, determined that Supreme Court properly certified four classes bring class action suits against a manufacturer alleging the contamination of water, air, real property and people with toxic chemicals, PFOA and PFOS:

Plaintiffs, residents of the Town, commenced this action as a proposed class action, alleging that defendant's use and improper disposal of PFOA and PFOS caused personal injury and property damage. In their complaint, plaintiffs proposed four classes: (1) a public water property damage class; (2) a private well water property damage class; (3) a private well nuisance class; and (4) a PFOA invasion injury class. Generally, the putative class members were individuals who owned or leased property in the Town or who ingested contaminated municipal or well water or inhaled PFOA or PFOS particulates in the Town and had demonstrable evidence of elevated levels of the chemical in their blood system. * * *

We agree with Supreme Court's determination that, in addition to those questions common to the property classes, the answers to certain additional common questions will be applicable to all members of the invasion injury class, for example: (1) whether medical monitoring is an available remedy; (2) the extent of the health hazard presented by exposure to PFOA; and (3) whether the members of the class are at significant increased risk for disease based on the excess accumulation of PFOA in their bodies. Although defendant contends that there are myriad factual questions that are not common to the class, we do not agree that those predominate. Importantly, this is not a case where there is an issue of fact regarding exposure — rather, each class member

must establish exposure and accumulation through blood work … . Burdick v Tonoga, Inc., 2019 NY Slip Op 08461, Third Dept 11-21-19

DISCLAIMERS, MOLD.

DISCLAIMER IN THE REAL ESTATE PURCHASE AND SALE CONTRACT PRECLUDED ACTIONS BASED IN FRAUD ALLEGING THE CONCEALMENT OF A RECURRING MOLD-CAUSING CONDITION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the causes of action alleging fraud in the concealment of a recurring mold-causing condition should have been dismissed. The real estate contract included a disclaimer which stated that plaintiffs relied upon their own inspection of the property and not any representations made by others:

"In an action to recover damages for fraud, the plaintiff must prove a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" … . In the context of real estate transactions, "New York adheres to the doctrine of caveat emptor and imposes no duty on the seller or the seller's agent to disclose any information concerning the premises when the parties deal at arm's length, unless there is some conduct on the part of the seller or the seller's agent which constitutes active concealment" … . "If however, some conduct (i.e., more than mere silence) on the part of the seller rises to the level of active concealment, a seller may have a duty to disclose information concerning the property" … . "To maintain a cause of action to recover damages for active concealment, the plaintiff must show, in effect, that the seller or the seller's agents thwarted the plaintiff's efforts to fulfill his [or her] responsibilities fixed by the doctrine of caveat emptor" … .

The presence of disclaimers in a written agreement may preclude a claim of common-law fraud by rendering any resulting reliance unjustified … . Moreover, a specific disclaimer of reliance on representations as to the condition of real property will generally bar related fraud-based claims … . Here, the contract of sale for the subject premises set forth, a… lia, that the plaintiffs were "fully aware of the physical condition and state of repair of the Premises . . . based on [their] own inspection and investigation thereof," and that they were "entering into this contract based solely upon such inspection and investigation and not upon any information . . . or representations . . . given or made by Seller or its representatives." Comora v Franklin, 2019 NY Slip Op 02671, Second Dept 4-10-19

ECONOMIC DISTRESS, DOCTRINE OF.

DEFENDANTS DID NOT DEMONSTRATE THAT THE DOCTRINE OF ECONOMIC DISTRESS VOIDED THE PURCHASE AGREEMENT; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS BREACH OF CONTRACT ACTION SHOULD NOT HAVE BEEN GRANTED (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court, determined that the criteria for the doctrine of economic duress to void a contract were not met by the defendants. The defendants had entered an agreement to purchase four McDonald's restaurants from plaintiffs. The defendants alleged they agreed to an amendment of the contract because of the actions of the plaintiffs which amounted to economic distress:

A party seeking to void a contract on the basis of economic duress must show that he or she was compelled to agree to it because of a wrongful threat precluding the exercise of his or her free will … . "The existence of economic duress is demonstrated by proof that one party to a contract has threatened to breach the agreement by withholding performance unless the other party agrees to some further demand" … . A mere threat to breach a contract, however, does not amount to economic duress if the party who has been threatened can obtain performance of the contract from another source and pursue normal legal remedies for a breach of contract … . …

As the parties relying on economic duress, defendants bore the burden of proving that the agreement could not have been performed by another party. Defendants, however, failed to tender any proof in this regard. …

The record also fails to establish that other legal remedies were not available to defendants. Indeed, [one defendant] testified that, before agreeing to the amendment, [defendants] weighed whether to take possession of the restaurants and then sue to have the original agreement enforced or not to take possession and then sue plaintiffs for specific performance. The fact that neither of those options was ultimately desirable does not mean that defendants did not have available legal remedies. Because defendants could resort to legal recourse, they cannot claim economic duress … . CRG at Arnot Mall, Inc. v Feehan, 2019 NY Slip Op 08467, Third Dept 11-21-19

INJUNCTIONS, LACHES.

PLAINTIFFS' ACTION SEEKING TO ENJOIN THE CONSTRUCTION OF A HOME PLAINTIFFS CONTENDED WAS IN VIOLATION OF THE TOWN CODE SHOULD HAVE BEEN DISMISSED PURSUANT TO THE DOCTRINE OF LACHES (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the doctrine of laches applied to plaintiffs' action seeking to enjoin defendant's construction of a house. Plaintiffs alleged the construction violated the Town Code:

" To establish laches, a party must show: (1) conduct by an offending party giving rise to the situation complained of, (2) delay by the complainant in asserting his or her claim for relief despite the opportunity to do so, (3) lack of knowledge or notice on the part of the offending party that the complainant would assert his or her claim for relief, and (4) injury or prejudice to the offending party in the event that relief is accorded the complainant'" … . " The mere lapse of time without a showing of prejudice will not sustain a defense of laches. In addition, there must be a change in circumstances making it inequitable to grant the relief sought'" … . "Moreover, as the effect of delay may be critical to an adverse party, delays of even less than one year have been sufficient to warrant the application of the defense" … . …

The plaintiffs commenced this action nearly three years after the building permit was first issued in May 2012 and after [plaintiff] Kverel withdrew his administrative appeal, two years after the parties entered into the stipulation, and more than six months after construction purportedly commenced in August 2014. Although the building permit was amended several times thereafter and as late as February 2015, the record demonstrates that the plaintiffs were aware as early as July 2012, when the subject property remained undeveloped and before the defendant purchased the subject property, of their claim that the defendant's construction was in violation of the Town Code. Although the record unequivocally demonstrates that the plaintiffs were opposed to the defendant's construction on the subject property, the plaintiffs did not seek administrative review by the ZBA or injunctive relief until they commenced this action. Kverel v Silverman, 2019 NY Slip Op 04152, Second Dept 5-29-19

PREINCORPORATION INDIVIDUAL LIABILITY, CONTAMINATION.

THE TERMS OF THE PURCHASE CONTRACT INDICATED BUYER, WHO PURCHASED THE PROPERTY KNOWING IT WAS CONTAMINATED BY OIL, WOULD INDEMNIFY SELLER FOR COSTS RELATED TO THE ENVIRONMENTAL CONDITIONS, QUESTION OF FACT WHETHER BUYER, WHO SIGNED THE CONTRACT 'ON BEHALF OF AN ENTITY TO BE FORMED,' WAS INDIVIDUALLY LIABLE (FOURTH DEPT).

The Fourth Department determined that the terms of the purchase contract for property contaminated by oil indicated the buyer would indemnify the seller for costs associated with the condition of the property. The Fourth Department further held there was a question of fact whether the buyer signed the contract in his individual capacity in that he signed "on behalf of an entity to be formed:"

The purchase contract provided that a "Phase One Environmental report" had been completed on the property and that Marks, the "Buyer" of the property, was in receipt of the environmental report and "approve[d] of same." The contract further provided that Atkin was the "Seller," the property "was not in compliance with federal, state and/or local laws/ordinances," the Buyer agreed to purchase the property "as is," the "Buyer accept[ed] the property as is, with no representations or warranties as to environmental conditions" of the property, and the Buyer "release[d] and indemnifie[d] Seller with respect to any claims as to environmental conditions on or related to the property." Thus, the terms of the contract establish that, prior to entering into the contract, both Atkin and Marks were generally aware of the property's historical environmental contamination by the Exxon defendants and their predecessor, and the language in the indemnification provision, considered in light of the contract as a whole and the circumstances of the sale of the property, clearly and unambiguously expresses the intent of the parties that the Buyer would indemnify the Seller with respect to any claims regarding environmental conditions related to the property … . …

Although it is well settled that "[a]n individual who acts on behalf of a nonexistent corporation can be held personally liable" … , the determination "[w]hether a person is personally obligated on a preincorporation transaction depends on the intention of the parties" … . One Flint St., LLC v Exxon Mobil Corp., 2019 NY Slip Op 00752, Fourth Dept 2-1-19

SPECIFIC PERFORMANCE.

PLAINTIFF DID NOT SUBMIT PROOF IT HAD THE FINANCIAL ABILITY TO CLOSE ON THE PURCHASE OF REAL PROPERTY, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON ITS ACTION FOR SPECIFIC PERFORMANCE OF THE REAL ESTATE PURCHASE AGREEMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's motion for summary judgment in this action for specific performance of a real estate purchase agreement should not have been granted. Plaintiff did not submit proof it had the financial ability to close:

"A plaintiff seeking specific performance of a contract for the sale of real property bears the burden of demonstrating that he or she was ready, willing, and able to perform his or her obligations under the contract" … . "[C]onclusory assertions that the plaintiff was ready, willing, and able to perform, are insufficient to satisfy this burden" … .

"When a purchaser submits no documentation or other proof to substantiate that it had the funds necessary to purchase the property, it cannot prove, as a matter of law, that it was ready, willing, and able to close" … . Thus, in moving for summary judgment on a complaint seeking specific performance of a contract for the sale of real property, a plaintiff purchaser must submit evidence demonstrating its financial ability to purchase the property, and in the absence of such evidence, the motion must be denied … .

Here, the plaintiff failed to establish, prima facie, that it was ready, willing, and able to purchase the subject property. More specifically, the conclusory assertions of Gavriel Yakubov, the alleged sole member of the plaintiff, that he had always been, and remained, ready, willing, and able to close, absent any evidence demonstrating the plaintiff's financial ability to close, were insufficient to establish, prima facie, that the plaintiff was ready, willing, and able to purchase the subject property … . GLND 1945, LLC v Ballard, 2019 NY Slip Op 04143, Second Dept 5-29-19

STATUTE OF FRAUDS, SPECIFIC PERFORMANCE.

DOCUMENT PURPORTING TO CONSTITUTE A CONTRACT FOR THE SALE OF TWO PROPERTIES DID NOT SATISFY THE STATUTE OF FRAUDS, PLAINTIFF'S ACTION FOR SPECIFIC PERFORMANCE PROPERLY DISMISSED (SECOND DEPT).

The Second Department determined the one page document purporting to be a contract to sell two properties to defendant did not satisfy the statute of frauds. Therefore plaintiff's action for specific performance was properly dismissed:

In a real estate transaction, the essential terms of a contract typically include the purchase price, the time and terms of payment, the required financing, the closing date, the quality of title to be conveyed, the risk of loss during the sale period, and adjustments for taxes and utilities … . "[W]here a contract's material terms are not reasonably definite, the contract is unenforceable" … .

Here, the defendant demonstrated her prima facie entitlement to judgment as a matter of law dismissing the complaint on the basis that the agreement did not satisfy the statute of frauds. The agreement did not state all of the essential terms, including allocation of the price between the two properties, whether one property could be sold without the other, the terms of payment, and the risk of loss during the sale period, and did not mention the adjustments for taxes and utilities which would customarily be included in a transaction of this nature … . In addition, the agreement did not include the necessary parties because not all of the owners of the properties executed the agreement … . 443 Jefferson Holdings, LLC v Sosa, 2019 NY Slip Op 05376, Second Dept 7-3-19

TERMINATION OF CONTRACT, DEPOSITS.

PURCHASE AGREEMENT DID NOT ALLOW BUYERS TO TERMINATE THE CONTRACT DURING THE CONTINGENCY PERIOD, BUYERS' ACTION TO RECOVER THE DOWN PAYMENT PROPERLY DISMISSED (SECOND DEPT).

The Second Department determined the seller's motion for summary judgment in this action by the buyers for return of the deposit was properly granted. The buyers purported to cancel the real estate purchase contract when

the bank denied the mortgage application. But the purchase agreement did not allow the buyers to terminate the contract at that point:

Section 5.8 of the rider clearly and unambiguously provided that if the buyers were unable to obtain a mortgage commitment within 45 days of executing the contract, the seller had the unilateral right to either cancel the contract or extend the mortgage contingency period for an additional 30 days. The buyers were only entitled to cancel the contract upon the expiration of that 30-day period. Neither the rider nor the contract contained any provision permitting the buyers to cancel the contract during the mortgage contingency period upon receiving notice that their application had been denied … .

In opposition, the buyers failed to raise a triable issue of fact. The record does not support the buyers' contention that their mortgage application was denied on the ground that the subject property constituted "unacceptable collateral," and that, therefore, their performance under the contract was rendered impossible. Under these circumstances, the buyers willfully defaulted and anticipatorily breached the contract by purporting to cancel the contract during the mortgage contingency period. Federico v Dolitsky, 2019 NY Slip Op 07383, Second Dept 10-16-19

TIME OF THE ESSENCE, DEPOSITS.

THERE EXISTS A QUESTION OF FACT WHETHER DEFENDANT'S FAILURE TO APPEAR AT THE LAW DAY CLOSING WAS WILLFUL WITHIN THE MEANING OF THE REAL ESTATE CONTRACT, PLAINTIFFS' MOTION SEEKING SUMMARY JUDGMENT ON THE ACTION TO RETAIN THE DOWN PAYMENT PROPERLY DENIED, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SEEKING THE RETURN OF THE DOWN PAYMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, modifying Supreme Court, determined that defendant's motion for summary judgment in plaintiffs' action to retain the defendant's down payment because defendant did not appear at the real estate closing should not have been granted. Although plaintiffs demonstrated they were ready and willing close on the time-of–the-essence closing date, defendant raised a question of fact whether the failure to appear was "willful" within the meaning of the real estate contract. Defendant submitted evidence his application for credit in connection with a mortgage on the property had been declined. Plaintiff's motion for summary judgment was

properly denied. But defendant's motion for summary judgment seeking return of his down payment should not have been granted:

"The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent" … . The best evidence of the parties' intent is their own writing… . A written agreement that is complete, clear, and unambiguous on its face is to be enforced according to the plain meaning of its terms … . Here, the contract provided that a party would be considered in breach if a default was willful, and that the plaintiffs could retain the down payment as liquidated damages only if the defendant "willfully" defaulted under the contract. The defendant submitted a copy of a "Statement of Credit Denial" from his lender which indicated that his application for an extension or renewal of credit with respect to a mortgage on the property had been declined. Consequently, a triable issue of fact existed as to whether the defendant had a lawful excuse for defaulting given the denial of his application to extend or renew his mortgage commitment, or whether he willfully defaulted.

Accordingly, we agree with the Supreme Court's determination denying the plaintiffs' motion for summary judgment on the complaint.

However, the Supreme Court should not have, upon searching the record, awarded summary judgment to the defendant dismissing the complaint and directing the return of the down payment to the defendant. A buyer who defaults on a real estate contract without " lawful excuse'" cannot recover the down payment amount, "at least where . . . that down payment represents 10% or less of the contract price" … . Since a triable issue of fact existed as to whether the defendant's failure to close was willful, the Supreme Court should not have determined, at this juncture, that he was entitled to the return of his down payment. Goetz v Trinidad, 2019 NY Slip Op 00099, Second Dept 1-9-19

TIME OF THE ESSENCE, FORECLOSURE SALE.

PLAINTIFF LOAN SERVICING COMPANY WAIVED THE TIME OF THE ESSENCE PROVISION BY ITS RELENTLESS EFFORTS TO PREVENT THE FORECLOSURE SALE TO THE HIGHEST BIDDER (TO EXACT A HIGHER PRICE); THE SANCTIONS IMPOSED ON PLAINTIFF WERE NOT SUPPORTED BY A WRITTEN DECISION AS REQUIRED BY THE CONTROLLING REGULATION; SANCTIONS ASPECT REMITTED (FOURTH DEPT).

The Fourth Department determined plaintiff loan company waived the time of the essence provision in this foreclosure sale to the highest bidder, Fox, by its relentless attempts to prevent the sale from going forward (to exact a higher purchase price). The Fourth Department noted that the sanctions imposed upon plaintiff were not supported by a written decision as required by 22 NYCRR 130-1.1 and remanded for compliance with the regulation:

We reject plaintiff's contention that the court erred in determining that Fox did not breach the time is of the essence clause. It is well settled that "[a] party may waive timely performance even where the parties have agreed that time is of the essence" … , and that such a waiver may be accomplished by the conduct of a party … . Here, we agree with the court that plaintiff's relentless attempts to prevent the sale from going forward constituted a waiver of the time is of the essence clause.

We also reject plaintiff's further contention that the court erred in determining that plaintiff engaged in frivolous conduct and in imposing sanctions for such conduct. We conclude that plaintiff's conduct was "completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law[, and was] undertaken primarily to delay or prolong the resolution of the litigation" (22 NYCRR 130-1.1 [c] [1], [2] …). Nevertheless, we conclude that the court erred in failing to comply with 22 NYCRR 130-1.2 because "it failed to set forth in a written decision the conduct on which . . . the imposition [of sanctions] is based, the reasons why the court found the conduct to be frivolous, and the reasons why the court found the amount . . . imposed to be appropriate' " … . We therefore modify the order by vacating the fourth ordering paragraph and we remit the matter to Supreme Court for compliance with 22 NYCRR 130-1.2 … . Bayview Loan Servicing, LLC v Strauss, 2019 NY Slip Op 05866, Fourth Dept 7-31-1

TITLE INSURANCE.

INSURANCE LAW STATUTE AND RELATED REGULATIONS WHICH PROHIBIT REAL PROPERTY TITLE INSURANCE COMPANIES FROM PROVIDING SPORTS TICKETS, MEALS AND OTHER ENTERTAINMENT TO SOLICIT BUSINESS FROM THOSE WHO USE THEIR SERVICES ARE VALID AND ENFORCEABLE (FIRST DEPT).

The First Department, reversing Supreme Court, in a full-fledged opinion by Justice Singh, determined that Insurance Law 6409 (d) was not ambiguous and the related regulations promulgated by the Department of Financial Services (DFS), with two exceptions, were valid. The statute and regulations deal with real property title insurance companies and prohibit the companies from soliciting business by providing sports tickets, meals and other entertainment to those who can use their services, including attorneys:

Following the investigation, DFS determined that some practices that resulted in higher premiums and closing costs for consumers, violate Insurance Law § 6409(d). DFS found that "insurers reported meal and entertainment expenses in the following categories: advertising, marketing and promotion, and travel, and other'" (Statement of Maria T. Vullo, Superintendent New York State DFS, Prepared for Delivery at Public Hearing: An Examination of Recent Title Insurance Regulation in New York, January 12, 2018) and expenses reported in the "other" category were "replete with excessive entertainment," often including "wining and dining . . . of real estate professionals" (id.). For example, one insurer spent approximately $2.5 million to $5.4 million a year, amounting to about 5% to 14% of its charged premiums, on tickets to basketball, baseball, and tennis events for attorneys and other clients in a position to refer business to the insurer (id.). Some insurers paid for their clients to go to bars, strip clubs, and Hooters restaurants (id.). Insurers paid for "expensive designer goods" and "gift cards" for referral sources (id.). One insurer spent about 15% to 30% of premiums on entertainment and gifts for referral sources. Another insurer spent about 50% of its revenue on meals for referral sources. Insurers would report these expenses in the information submitted to DFS to support the premiums they charged (id.).

As a result of its investigation, DFS estimated that, on average, 5.3% of premiums charged statewide violated Insurance Law § 6409(d) from 2008 to 2012. To prevent such practices and to protect consumers from exorbitant costs, DFS promulgated Insurance Regulation 208. Matter of New York State Land Tit. Assn., Inc. v New York State Dept. of Fin. Servs.. 2019 NY Slip Op 00245, First Dept 1-15-19

TITLE INSURANCE.

INSURANCE REGULATION WHICH PROHIBITS TITLE INSURERS FROM PROVIDING VALUABLE INDUCEMENTS TO ATTRACT TITLE INSURANCE BUSINESS IS NOT UNCONSTITUTIONALLY VAGUE, SUPREME COURT REVERSED (FIRST DEPT).

The First Department, reversing Supreme Court, determined Insurance Regulation 208 (11 NYCRR part 228), which prohibits title insurers from providing valuable inducements to attract title insurance business, is not unconstitutionally vague:

Petitioners contend that section 228.2(c) is unconstitutionally vague in setting forth a non-exhaustive list of activities that are "permissible, provided[,]" among other things, that they are "reasonable and customary, and not lavish or excessive" … . The court should have rejected this vagueness challenge, since section 228.2(c) "is sufficiently definite to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden," and "the enactment provides officials with clear standards for enforcement so as to avoid resolution on an ad hoc and subjective basis" … . … [T}he words "lavish" and "excessive," standing in clear contrast with the word "reasonable," provide adequate notice of the type of behavior that is proscribed. The word "customary" also sets forth a standard that can be understood by an ordinary person … . …

The provisions of section 228.2(c) generally permitting advertising, charitable contributions, and political contributions are consistent with the right to free speech under the First Amendment to the United States Constitution and article I, § 8 of the New York Constitution. … The content-neutral provisions at issue in this case are narrowly tailored to the substantial government interest of clarifying a statute intended to "prevent consumers from being required to subsidize unscrupulous exchanges of valuable things for real estate professionals" … , and that interest is "unrelated to the suppression of free expression" … . Matter of New York State Land Tit. Assn., Inc. v New York State Dept. of Fin. Servs., 2019 NY Slip Op 09366, First Dept 12-26-19