Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES IA Part 17
Justice

VERNON REALTY HOLDING, LLC. x

Index Number 20084 2006

- against -

Motion Date May 27, 2009

BARUCH SINGER, et al.

Motion Cal. Number 56

x

Motion Seq. No. 4

The following papers numbered 1 to 23 read on this motion by plaintiff for summary judgment against defendants declaring that the contract of sale, including all amendments, for the real property known as 44-02 Vernon Boulevard, Long Island City, New York is terminated by reason of the default of defendants, plaintiff is entitled to retain the monies paid by defendants under the contract as liquidated damages, plaintiff is entitled to the incidents of ownership, without obligation to or interference by defendants, dismissing the counterclaims with prejudice, and awarding it reasonable attorneys's fees and disbursements incurred by it in connection with the action; and this cross motion by defendants for summary judgment against plaintiff declaring that the contract of sale, including all amendments thereto, was improperly terminated by plaintiff and that defendants are entitled to the return of the sum of $64,000,000.00 paid to plaintiff.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	1-6
Notice of Cross Motion - Affidavits - Exhibits.....	7-15
Answering Affidavits - Exhibits.....	16-23

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

Plaintiff and defendant Baruch Singer executed a contract of sale, originally dated October 17, 2005, pursuant to which plaintiff (the Seller) agreed to sell certain real property, adjacent to the East River and a bulkhead, with a street address of 44-02 Vernon Boulevard, Long Island City, New York to defendant Singer or an entity controlled by him (the Purchaser), for a purchase price of $193 million. At the time of the execution of the contract, the property was under development as a residential complex, with environmental remediation taking place there pursuant to a stipulation dated August 15, 2005, entered into by the Seller with the New York State Department of Environmental Conservation (DEC) (the DEC stipulation). The premises had become contaminated by leakage of oil through its use by a prior owner as a fuel storage terminal, with numerous above-ground and below- ground oil storage tanks, and gas station. Under the DEC stipulation, the Seller agreed to cleanup and remove the discharge of petroleum at the site, in accordance with a "Corrective Action Plan" (CAP), which was annexed to the stipulation.

Under the contract of sale, the Seller agreed to continue to pursue the development of the premises, at the sole cost and expense of the Purchaser, but the Seller also agreed to be responsible for the cost of the remaining environmental cleanup. Upon execution of the contract, the Purchaser paid a down payment of $9.65 million, and funded a construction escrow account with an additional $12.5 million. The contract provided for an original closing date of "on or before ninety (90) days after the Contract is fully executed" and also provided that in the event the closing did not take place by that date, the closing would automatically be scheduled to take place 30 days thereafter, time being of the essence. The contract further provided for $30 million of the purchase price to be held in an "Environmental Escrow" account pending the Seller's delivery of a "No Further Action Letter" issued by the DEC (*see* paragraph 29).

Over a period of several months in 2006, the parties entered into a series of four amendments to the contract of sale, pursuant to which each amendment extended the closing date and the Purchaser assumed responsibility for the costs of the environmental cleanup, which the Seller continued to perform. The amendments also served to, among other things, reduce the purchase price to $185 million, while increasing the monies the Purchaser was required to pay to the Seller in anticipation of the closing date. When the Purchaser failed to deliver an additional down payment as required in the "Fourth Amendment" to the contract, by a June 13, 2006 deadline, the Seller's attorneys notified counsel for the Purchaser by letter dated June 13, 2006, that the contract was terminated by reason of the Purchaser's default and the Seller would be retaining all funds previously released to it.

The parties entered into a "Fifth Amendment," dated July 18, 2006, reinstating the contract, amending the purchase price to $189 million, obligating the Purchaser to immediately pay the Seller the sum of $15 million and three weeks later to pay another $5 million, and extending the closing date to August 30, 2006, time being of the essence as against the Purchaser.

The Seller's counsel, by letter dated August 23, 2006, reminded the Purchaser that the closing of title was scheduled for August 30, 2006, time being of essence as against the Purchaser. The counsel noted that he had yet to receive any indication from the Purchaser, or the Purchaser's title company, whether the Purchaser would be attending the closing.

The Purchaser failed to appear for the closing on August 30, 2006. As a result, the Seller notified the Purchaser, by letter dated August 31, 2006, that the Purchaser was in default under the contract. The Seller advised the Purchaser that it deemed the contract to be terminated and of no further force or effect, and would retain, as liquidated damages, all sums previously released to it.

The Seller subsequently commenced this action seeking a judgment against the Purchaser declaring that the contract of sale is terminated by reason of the Purchaser's failure and refusal to close on August 30, 2006, the Seller is entitled to retain, as liquidated damages, all moneys paid by the Purchaser under the contract, and the Seller is entitled to the incidents of ownership in relation to the property without obligation to, or interference by, the Purchaser.

The Purchaser served an answer denying the material allegations of the complaint, and asserting various affirmative defenses, including that the Seller is in breach under the contract (as amended), and that the Seller cannot recover liquidated damages since the Seller was not ready, willing and able to close the transaction pursuant to the terms of the contract of sale on the closing date. The Purchaser also interposes counterclaims based upon breach of contract and fraud, and seeks damages, rescission, recovery of the down payment and other expenses incurred by it in connection with the contract of sale, and injunctive relief. The Purchaser alleges that the Seller prevented it from completing "additional activities" pursuant to the contract of sale, by barring the its consultants access to the premises to conduct environmental testing and remediation work. The Purchaser also alleges that the Seller committed fraud, by failing to disclose to it, and actively concealing, the existence of hazardous substances located on the premises. The Seller served a reply asserting affirmative defenses to the counterclaims.

The Seller moves for summary judgment in its favor and dismissing the counterclaims. It argues that the contract of sale, as amended, made time of the essence with respect to the

closing date of August 30, 2006, and that the Purchaser's failure to comply with such provision is a material breach and constitutes a default by the Purchaser. The Seller also argues that under the contract, it is permitted to retain the down payments pursuant to the liquidated damages provision. The Seller asserts that the counterclaims are without merit. In support of its motion, the Seller offers, among other things, a copy of the pleadings, the letters dated August 23, 2006 and August 31, 2006, and the affirmations its counsel and of Marshall Weisman, its managing member.

The Purchaser opposes the motion and cross-moves for summary judgment declaring that the Seller improperly terminated the contract of sale and the Purchaser is entitled to the return of the moneys paid to the Seller. The Purchaser argues the documentary evidence demonstrates that as of the August 30, 2006, the Seller was unable to deliver title to the premises in accordance with the contract, and therefore, the Seller could not declare the Purchaser in default and terminate the contract on August 31, 2006, notwithstanding the Purchaser's failure to attend the closing. In opposition to the motion, and in support of its cross motion, the Purchaser offers, among other things, a copy of excerpts from the transcript of the deposition testimony of Marshall Weisman, and Andre Obligado, a geologist with DEC and nonparty witness, the DEC stipulation, the contract of sale and amendments, the Declaration of Easements and Offers of Dedication to the City of New York made by R.A.K. Tennis Corp. (R.A.K.) dated July 29, 1991 and recorded on September 13, 1991 in reel 3203, page 110 (the 1991 Declaration), the First Modification of Declaration of Easement dated January 26, 2006 and recorded on February 15, 2006 (2006 Modified Declaration), the Maintenance and Operation Agreement made between R.A.K. and the City of New York dated July 29, 1991 and recorded in reel 3203, page 183 (1991 Maintenance and Operation Agreement), the Declaration of Maintenance dated as of January 19, 2006 and recorded on January 20, 2006 (the 2006 Maintenance Declaration), certain correspondence, a title report of the subject premises made effective as of September 25, 2008, and an affidavit of defendant Singer, the sole member of defendant River East City, LLC.

It is well established that the proponent of a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact," (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of its position (*see Zuckerman v City of New York*, 49 NY2d 557, *supra*). However, where the proponent fails to make a prima facie showing, the motion must be denied regardless of the sufficiency of the opposing party's papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985], *supra*).

The Seller has established a prima facie case for summary judgment dismissing the counterclaims. The counterclaims for breach of contract are based upon the Seller's alleged interference with the Purchaser's ability to perform "certain activities, including environmental inspection and remediation" at the premises (Purchaser's Answer, Counterclaims, ¶ 3). The contract of sale, however, did not provide for the Purchaser to perform any "activities" on the property, whether related to environmental conditions or otherwise, and defendant Singer admitted during his examination before trial, that he never asked to perform any tests at the property and never retained any experts to do so. The Purchaser, moreover, acknowledged in each of the five contract amendments that the Seller had not breached any of the Seller's obligations under the contract.

With respect to the counterclaims based upon fraud, the Seller has established that the Purchaser was aware at the time of the execution of the contract of sale of the existence of hazardous substances at the premises, and action was necessary to remediate the contamination. In addition, pursuant to paragraph 13 of the original contract, the Purchaser agreed to buy the property "'as is, where is, with all faults,' except as provided herein," and unequivocally disclaimed any reliance on any statements or representations not specifically contained in the contract:

> "13. Acknowledgments of Purchaser and Seller's Representations. (A) Except as otherwise provided in this Agreement, it is understood and agreed that Seller is not making and has not at any time made any warranties or representations of any kind or character, express or implied, with respect to the Premises, including, but not limited to, any warranties or representations as to habitability, merchantability, fitness for a particular purpose, ... latent or physical patent physical conditions, ..., the compliance of the Premises with governmental laws, Certificates of Occupancy [.] ... Purchaser has not relied and will not rely on, and Seller is not liable for or bound by, any express or implied warranties, guaranties, statements, representations or information pertaining to the Premises or relating thereto made or furnished by Seller, ... to whomever made or given, directly or indirectly, orally or in writing, unless specifically set forth in this Agreement."

A specific disclaimer defeats any claim that the contract was executed in reliance upon contrary oral representations (*see Danann Realty Corp. v Harris*, 5 NY2d 317-320, 321 [1951]; *Masters v Visual Bldg. Inspections*, 227 AD2d 572 [1996]; *Weiss v Shaplosky*, 161 AD2d 707 [1990]). The disclaimer in paragraph 13 is sufficient to bar any claim by the

Purchaser that it was fraudulently induced into entering the contract based upon oral or written representations made outside of the contract.

To the extent the Purchaser claims that it was defrauded by the Seller's failure to disclose information, "New York adheres to the doctrine of caveat emptor and imposes no liability on a seller for failing to disclose information regarding the premises when the parties deal at arm's length, unless there is some conduct on the part of the seller which constitutes active concealment" (*Simone v Homecheck Real Estate Servs., Inc.*, 42 AD3d 518, 520 [2007]). Here, the Purchaser has failed to allege that there was a confidential relationship or fiduciary duty between it and the Seller (*see Levine v Yokell*, 258 AD2d 296 [1999]; *Mobil Oil Corp. v Joshi*, 202 AD2d 318 [1994]), and thus, the transaction between the Purchaser and the Seller must be viewed as one made at arms-length between an experienced real estate investor and developer.

Although the Purchaser alleges in its answer that the Seller concealed the existence of hazardous substances located on the premises, the contract of sale addressed the need for environmental remediation and issuance of a "No Further Action Letter" by the DEC, and cited a cost estimate, which had been generated by J.D. Posillico, a consulting firm, on behalf of the Seller. The Posillico cost estimate contained numerous references to contaminated soil. Mr. Weisman states that on October 6, 2005, he provided the attorney for the Purchaser, by facsimile transmission, with a copy of the Posillico cost estimate. The Purchaser has offered nothing to rebut such showing. The Seller is entitled to summary judgment dismissing the counterclaims.

With respect to cross motion by the Purchaser for summary judgment awarding it declaratory relief, the Purchaser interposed no counterclaim for such relief.

With respect to that branch of the motion by the Seller for summary judgment in relation to the complaint, Mr. Weisman states in his affirmation that the Seller did not consent to any further extension of the closing date beyond August 30, 2006, and the Seller was ready, willing and able to close on that date, but the Purchaser failed to appear and close. The Seller asserts that upon the Purchaser's failure to appear at the closing and tender the balance of the purchase price, it properly declared the Purchaser in default and the contract terminated, and indicated that all sums previously released to it would be retained as liquidated damages.

The Purchaser asserts that as of August 30, 2006, the premises remained subject to the DEC stipulation, two notices of violations and the 2006 Modified Declaration and 2006 Maintenance Declaration with the City of New York encumbering the property. According to the Purchaser, it was not required under the contract to take title subject to the DEC

stipulation, notices of violations and those declarations, and the Seller cannot show it cured these title defects by the closing date. The Purchaser offers proof by virtue of the title report that the premises still remained subjected to them as of September 25, 2008. Defendant Singer, in his affidavit, states, among other things, that he never agreed to take title to the premises subject to the 2006 Modified Declaration and the 2006 Maintenance Declaration, and that prior to August 30, 2006, he was unaware of such declarations.

The contract, at paragraph 7, provides that the "Seller shall deliver an executed and acknowledged bargain and sale deed with covenant against grantor's acts for the Premises in statutory form for recording, sufficient to convey the fee simple title to the Premises free and clear of all encumbrances except as provided in this Agreement."

The contract, at paragraph 3, in relevant part, obligates the Seller to give and the Purchaser to accept:

> "such title as any reputable title insurance company doing business in the State of New York [would] approve and insure without additional premium, subject only to the following exceptions to which Purchaser has herein agreed to take subject to:
>
> (A) Any state of facts an accurate survey of the Premises would show provided same does not render title unmarketable;
>
> (H) Those matters set forth on Schedule 'B' annexed hereto and made a part hereof (collectively, the 'Permitted Encumbrances')."

The "Permitted Encumbrances" includes, among other things, the 1991 Declaration (Schedule B, paragraph 8), the "terms, conditions and obligations imposed upon the fee owner pursuant to [the 1991 Maintenance Agreement]" (Schedule B, paragraph 7) and the "[r]ight of the United States Government, the state of New York, the City of New York or any of their departments or agencies to regulate and control the use of the piers, bulkhead, land under water and land adjacent thereto" (Schedule B, paragraph 4).

In addition to the provision regarding insurable title, the contract, at paragraph 6(a), in relevant part, provides that the Seller:

> "shall comply with all notes or notices of violations of law or municipal ordinances, orders or requirements noted or issued as

> of the date hereof by any governmental department having authority as to, including without limitation, the following: lands, housing, buildings, fire, health, environmental and labor conditions affecting the Premises. The Premises shall be conveyed free of them at Closing ...."

Furthermore, the contract, at paragraph 29, obligated the Seller to use its "best efforts to obtain the No Further Action Letter" and provides:

> "However, notwithstanding anything to the contrary contained herein, if a No Further Action Letter is not issued within 12 months after the Closing, Environmental Escrowee shall, upon the first day of the thirteenth month following the closing, (if the No Further Action Letter has still not been received), release to the Purchaser [$5,000,000.00] from the funds being held in the Environmental Escrow. Thereafter Environmental Escrowee shall deliver to Purchaser's attorney the sum of $5,000,000.00 from the Environmental Escrow every thirty (30) days continuing until the earlier of (1) the No Further Action Letter is issued and (2) the funds from the Environmental Escrow have been fully disbursed in accordance with this paragraph ..."

Paragraph 11 of the original contract, in substance, required the Purchaser, within five days of the contract's execution to order title insurance and within five days of receipt of the report of title, to cause a copy of it to be delivered to the Seller. Such paragraph granted the Seller the option to (1) adjourn the closing to remove objections to title within a specified time, (2) bond liens or encumbrances, (3) deliver instruments to satisfy liens or encumbrances of record or, (4) if arranged with the title insurer in advance of closing, deposit funds with the title insurer sufficient to obtain and record satisfactions. Paragraph 11 also granted the Purchaser the option to accept title subject to the title defect without abatement in the purchase price or cancel the contract if at the closing there were any liens or encumbrances subject to which the purchaser was not required to take title and receive the down payment and construction escrow with interest thereon.

The contract, at paragraph 15, provides:

> "Purchaser's or Seller's Default. (A) In the event of a default by Purchaser hereunder, Seller's sole remedy shall be to retain the Down Payment, together with any interest thereon, as liquidated

> damages and not as a penalty, in which event this Agreement shall terminate and neither party shall have any further rights or obligations hereunder ...."

The contract, at paragraph 11 (c), also provides:

> "If at the Closing there are any liens or encumbrances to which Purchaser is not required to take title subject to pursuant to the terms of this Agreement, ... Purchaser may ... cancel this Agreement and receive the return of its Down Payment and Construction Escrow with interest thereon and without reduction."

The Seller argues that the Purchaser has failed to show the Purchaser was unable to obtain title insurance which complied with paragraph 3 of the contract.

Where, as here, "'the contract requires such title as a title company will insure and also requires conveyance of a fee simple free of all encumbrances save those specified in the contract, the buyer is entitled to insist on both insurable title and title which is free of all encumbrances save those specified in the contract' (*Hudson-Port Ewen Assoc. v Chien Kuo*, 165 AD2d 301, 304-305 [1991], *affd* 78 NY2d 944 [1991]; *cf. Creative Living v Steinhauser*, 78 Misc 2d 29, 31 [1974], *affd* 47 AD2d 598 [1975], *lv denied*, 36 NY2d 643 [1975])]" (*Patten of New York Corp. v Geoffrion*, 193 AD2d 1007, 1008 [1993]). Hence, under the terms of the contract, the Seller would have had to tender both marketable and insurable title at the closing (*see Patten of New York Corp. v Geoffrion*, 193 AD2d 1007 [1993], *supra*). Marketable title has been defined as "'a good title, one that is free and clear of encumbrances or material defects, on reasonable certain not to be called into question' (91 NY Jur 2d, Real Property Sales and Exchanges, § 71, at 164); in short, a title that is free from reasonable doubt and is readily subject to resale (*see Laba v Carey*, 29 NY2d 302, 311 [1971])" (*see Patten of New York Corp. v Geoffrion*, 193 AD2d at 1009). Thus, the failure by the Purchaser to show it was unable to obtain title insurance in compliance with paragraph 3, does not resolve the matter of whether the Seller was able to deliver title which was free of those encumbrances not specified in the contract on August 30, 2006.

The Purchaser argues that the DEC stipulation is an "order" as provided for in paragraph 6(a), and therefore needed to be removed by the Seller from the premises prior to closing. The DEC stipulation, however, is not denominated as an order, and does not notice any violation of law. Rather, it is a voluntary agreement between DEC and the Seller to provide for the environmental remediation of the property leading to DEC's issuance of a "no further action" letter. Even accepting the Purchaser's argument that the DEC stipulation is

in the "nature" of an order, because it states that it is "equivalent" to an order and "is enforceable as such," such equivalency would have been for purposes unrelated to the contract of sale and this action. The contract of sale reflects that the parties knew environmental remediation was ongoing at the time of its execution, and no deadline for completion of the remediation was specified in the stipulation, the CAP or the contract of sale.

The Purchaser claims the Seller's contractual duty to obtain a "no further action" letter was independent from the Seller's duty to convey the premises "free" of governmental orders. The Purchaser, however, has failed to explain the manner in which the premises could have been conveyed "free" of the DEC stipulation. The CAP annexed to the DEC stipulation required certain steps to be taken by the Seller, culminating in the issuance of a no "further action letter," and inactivation of the spill case. Andre Obligado testified that the DEC issues a "no further action letter" to indicate that a spill has been remediated. The terms of the DEC stipulation themselves make clear it would remain in effect even after completion of the remediation and the issuance of the no further action letter, and the CAP explicitly permits reactivation of the remediation under various circumstances.

Paragraph 4.e of the "First Amendment" to the contract, moreover, belies the Purchaser's argument that remediation was required to be completed before the closing. That paragraph, in relevant part, provides:

> "4.e Purchaser represents that upon the closing of title to the Premises, Seller its agents, employees contractors, and or workers of any sort shall be entitled to full access to the Premises. Purchaser shall in no way hinder, delay or in any way prevent the Seller's efforts towards completion of the work as cited in the Weeks Marine Inc. contract, the Posillico Quote and any and all work required towards the attainment of the No Further Action Letter ...."

The Purchaser's interpretation of the word "order" in paragraph 6(a) vis-a-vis the DEC stipulation would render meaningless the grant of access included in paragraph 4.e in connection with the completion of the work cited in the Posillico cost estimate. " 'Where possible, a contract should be interpreted to avoid inconsistencies and to give meaning to all of its provisions, giving a practical and reasonable interpretation to the language employed and the parties' reasonable expectations with respect thereto' (*Malleolo v Malleolo*, 287 AD2d 603, 603-604 [2001]; *see W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). Therefore, 'a court should not adopt an interpretation which would leave any

provision without force and effect' (*Gonzalez v Norrito*, 256 AD2d 440, 440 [1998])" (*Zullo v Varley*, 57 AD3d 536 [2008]).

The argument by the Purchaser that the Seller would have been obligated pursuant to paragraph 6(a) to convey the property free of the DEC stipulation is without merit.

To the extent the Purchaser asserts there were "two other violations" encumbering the property as of the closing date, the 2008 title report makes reference to a fine levied by the New York City Environmental Control Board (ECB) on August 10, 2006 in the amount of $85.00, and a violation issued by the New York City Fire Department (Fire Department) on July 7, 2004 related to a "SEAL TANK." With respect to the ECB fine, paragraph 6(b) of the contract of sale provided, in relevant part, that "all obligations affecting the Premises pursuant to the Administrative Code of the City of New York incurred prior to Closing and payable in money shall be paid by Seller and discharged by Seller at or prior to Closing." The Seller consequently had the right to pay the ECB fine at the closing. Because the Fifth Amendment to contract of sale designated time to be of the essence as against the Purchaser only, the Purchaser remained obligated to tender performance and give the Seller a reasonable opportunity to cure title defects (*see Ilemar v Corp. v Krochmal*, 44 NY2d 702, 703-704 [1978], *supra*; *Klaiber, LLC v Coon*, 48 AD3d 856, 857 [2008]; *Anderson v Meador*, 56 AD3d 1030 [2008]; *see also Cohen v Kranz*, 12 NY2d 242 [1963], *supra*). The Purchaser has failed to demonstrate the title defect created by the ECB fine would not have been readily curable either on August 30, 2006 or within a reasonable time period thereafter.

With respect to the Fire Department violation, the Seller offers evidence by means of an affidavit of Arnold Fleming, a professional engineer licensed in the State of New York, who states he oversaw the remediation process and was physically present at the property on many occasions. Mr. Fleming also states that he is personally familiar with the Seal Tank notice, which directed that an empty petroleum storage tank which was located on the property, be filled or sealed. He further states that the Seller complied with the directive by cleaning and removing the tank and related piping from the property on February 24, 2005. The Purchaser has failed to submit any evidence which raises a triable issue of fact as to whether the Seller would have been unable to obtain evidence of compliance or discharge of the Fire Department violation if afforded a reasonable adjournment.

As for the two declarations, the Seller entered into them following the execution of the contract and beyond the due diligence period set forth in paragraph 11 for the Purchaser's ordering of title insurance.

The Seller argues that these declarations are merely modifications of the pre-existing declarations which were permitted encumbrances. The Seller also argues that even assuming

the 2006 Modified Declaration and the 2006 Maintenance Declaration are different from the pre-existing declarations, the Purchaser still must accept title with them in place. The Seller asserts these declarations resulted from the City's right to regulate the property's waterfront, which constituted another permitted exception. The Seller also asserts the 2006 Modified Declaration qualified as a title coverage exception under the contract provision which required the Purchaser accept title exceptions for "[a]ny state of facts an accurate survey of the Premises would show provided same does not render title unmarketable" (paragraph 3[A]).

The Seller asserts that R.A.K., the former owner of the property, sought to obtain zoning changes necessary to develop the property as a residential and commercial project. The City Planning Commission allegedly required, as a condition for approval of the rezoning of the property, that R.A.K. construct a public pedestrian access easement and maintain it. R.A.K. entered into the 1991 Declaration, which set forth a public access easement, and the 1991 Maintenance and Operation Agreement, which provided for the maintenance and operation of the mandated easement. Besides the rezoning, changes to the City map were made to establish 44th Street between Vernon Boulevard and the East River, and delineate the easement. The Seller asserts that the 1991 Declaration required that the waterfront promenade portion of the easement be constructed in substantial conformity of with a specified landscape plan depicted on a drawing annexed to the 1991 Declaration. The 1991 Declaration stated that the easement "may be modified from the Landscape Plan only upon the approval of the Commissioner of the New York City Department of Parks and Recreation" (1991 Declaration, paragraph 1[b]).

The Seller asserts that at the time it entered into the original contract with the Purchaser, it was developing the property in the same manner contemplated by the R.A.K. rezoning and mapping application, which became the basis of the 1991 Declaration. The Seller claims that erosion due to the forces of the East River destroyed part of the bulkhead adjacent to the property, altered the shoreline and allowed the river to encroach on part of the property's waterfront, and that as a result, the easement could not be constructed as required pursuant to the 1991 Declaration. The Seller asserts that since it was obligated to continue development of the property under paragraph 27 of the original contract, it sought the modification of the 1991 Declaration and the landscape plan. The Seller also asserts that the Planning Commission and the Parks Department approved such modifications upon condition that the Seller enter into the 2006 Modified Declaration and the 2006 Maintenance Declaration.

The 1991 Declaration and 1991 Maintenance and Operation Agreement are "Permitted Encumbrances" under Schedule D, Schedule B (7) and (8), respectively. The 1991 Declaration provided for a 37,360 square foot, public pedestrian access easement. The

2006 Modified Declaration, however, materially changed the size of such easement to 49,370 square feet, representing an additional 12,010 square feet, or a 32% increase, and substituted a new landscape plan for the previous one. Furthermore, the 2006 Modified Declaration created a new pedestrian access easement encroaching upon 155 square feet of formerly private property. Although the 2006 Maintenance Declaration contained some more favorable terms regarding insurance and indemnification than the 1991 Maintenance and Operation Agreement, it also imposed new, more burdensome obligations on the premises owner, i.e. to (1) complete development of the promenade within four years of the date of such agreement, (2) comply with a Parks Inspection Program Manual when performing ordinary maintenance and repair of the public access areas, (3) construct new or improved marine structures, (4) maintain the marine structures in good condition by engaging a marine engineer for routine inspections, including inspection of the underwater portions, and (5) be solely responsible for the cost of all utilities required for the operation of the public access areas. Consequently, the 2006 Modified Declaration and the 2006 Maintenance Declaration were not materially the "same" as the originally excepted 1991 Declaration and 1991 Maintenance and Operation Agreement. Nor can it be said that any de minimus rule permitting such differences applies (*see generally Wates v Crandall*, 144 NYS2d 211 [1955], *affd* 2 AD2d 715 [1956]; *see also Rosenberg v Centre Davis Corp.*, 209 NYS2d 19, *affd* 15 AD2d 506 [1961]).

Contrary to the Seller's other argument, the 2006 Modified Declaration and the 2006 Maintenance Declaration were not the product of the government's right to "regulate and control," and thus excepted encumbrances under the contract pursuant to Schedule D, paragraph 4. Rather, the 2006 Modified Declaration and the 2006 Maintenance Declaration are consensual agreements entered into between the City of New York and the Seller to modify the prior easement, cancel and replace the maintenance and operation agreement, and make a separate grant of any entirely new private easement.[1] That the contract of sale obligated the Seller to continue developing the property, did not entitle the Seller to increase the burden on the premises with the 2006 Modified Declaration and the 2006 Maintenance Declaration without the knowledge and consent of the Purchaser. The contract explicitly states that "[t]he parties agree that the Seller shall continue to develop the Premises in the same manner which it had been prior to the date hereof ...."

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[1] Presumably, if the City had attempted to impose an easement or increase its size or scope, without the Seller's consent, it would have constituted a taking, and accordingly an exercise of the power of eminent domain, for which the contract granted the Purchaser the right to cancel.

An easement is an encumbrance rendering title unmarketable (*see Rhodes v Astro-Pac, Inc.*, 41 NY2d 919, 920 [1977]; *see also Laba v Carey*, 29 NY2d 302 [1971], *supra*). The 2006 Modified Declaration and the 2006 Maintenance Declaration were intended to run with the land, and would inhibit the use of the land by premises owners (*see Patten of New York Corp. v Geoffrion*, 193 AD2d 1007 [1993], *supra*; *Schermerhorn, LLC v Nevins Realty Corp.*, 23 Misc 3d 1109[A] [2009]). Thus, any depiction of the expanded portion of the original easement and the new private easement on a survey made based upon an inspection on August 30, 2006, would not have constituted an title exception under paragraph 3(A) because the easements rendered the property unmarketable (*see Brockton Assoc. v Weinbaum*, 23 Misc 2d 109 [1960]; *see also Litt v City of New York*, 37 Misc 2d 406, 407 [1962]). Insofar as the 2006 Modified Declaration and the 2006 Maintenance Declaration were substantially different from those to which the sale was made subject, the Seller could not have tendered marketable title on August 30, 2006. For that matter, even if the Purchaser had attended the closing, the Purchaser could not have been compelled to accept title subject to those encumbrances (*see Anderson v Meador,* 56 AD3d 1030 [2008], *supra*).

A purchaser's requirement to tender performance can be excused if the title defect is not curable for in such a case the tendering of performance would be an idle and useless ceremony (*see Ilemar v Corp. v Krochmal*, 44 NY2d 702, 703-704 [1978], *supra*; *Anderson v Meador*, 56 AD3d 1030 [2008], *supra*; *R.C.P.S. Assoc. v Karam Devs.*, 258 AD2d 510, 511 [1999]). Here, the title defects created by 2006 Modified Declaration and the 2006 Maintenance Declaration were the result of very recent negotiations by the Seller with the City as a condition for permitting development to go forward. It would have been extremely difficult, or nay impossible, for the Seller to have been able to cure these defects within a reasonable time period after August 30, 2006 (*cf. Anderson v Meador*, 56 AD3d 1030 [2008], *supra*; *Gentile v Sang Y. Kim*, 101 AD2d 939, 940 [1984]). More importantly, the Seller, rather than seek an adjournment of the closing to work towards that end, terminated the contract, thereby clearly denoting its abandonment of the contract. By doing so unilaterally, the Seller relieved the Purchaser from any duty to terminate the contract and the termination of the agreement had the opposite of its intended effect, i.e. vesting the right to the deposit in the Purchaser.

However, the Purchaser agreed to limit any monetary claim to "no greater than all amounts then paid to the Seller **in respect of the Purchase Price** and shall not seek any other or additional damages or any interest of any kind" (emphasis added) (paragraph 5[c] of the Fifth Amendment). The Purchaser contends that it made a total payment of $64 million to the Seller, by means of the original down payment, additional deposits and the release of escrowed funds.

To the degree the payment included construction escrow funds, it is undisputed that such funds were released to the Seller to pay for the development work. The phrase "Purchase Price" is defined under the original contract at paragraph 4, and is unquestionably not the same as the Construction Payment at paragraph 27 (*see also* paragraph 6 of the First Amendment). Under such circumstances, the Purchaser is not entitled to the return of the $9,350,000, representing the funds it paid into the Construction Escrow.

As for the Seller's argument that a further limitation to the Purchaser's right to monetary relief may be found in the Second Amendment, the court rejects it.

The Second Amendment provides that:

> "All portions of the Additional Down Payment shall be immediately released to Seller and shall be deemed earned by the Seller and shall be non refundable to the Purchaser."

Although the Seller argues that the nonrefundability of this particular down payment is unqualified--i.e. not subject to any exception in the event the Seller was found to be in default--the Fifth Amendment provides that it would "control in the event there is any contrary or inconsistent language," in the prior versions of the contract, and as a consequence, such provision modifies the Second Amendment and governs the issue of the maximum amount of damages recoverable by the Purchaser.

The total amount paid by the Seller in respect of the purchase price is $54,650,000, which is recoverable by the Purchaser.

The motion by the Seller is granted only to the extent of granting summary judgment dismissing the counterclaims and declaring that (1) the contract of sale is terminated by the Seller by virtue of the abandonment of it by the Seller, and is of no further force and effect, (2) the Seller is entitled to retain the sum of $9,350,000, representing the moneys paid by the Purchaser with respect to the Construction Escrow, (3) the Seller is not entitled to retain the sum of $54,650,000, representing the moneys paid by the Purchaser in respect of the Purchase Price, as liquidated damages, (4) the Purchaser is entitled to the return of sum of $54,650,000, representing the moneys paid by the Purchaser in respect of the Purchase Price. The cross motion for summary judgment for declaratory relief by the Purchaser is denied as moot.

Dated: November 19, 2009

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J.S.C.