STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT

LHNY HOLDINGS, LLC,
Plaintiff,

v. **Case No. 19-174005-CB**
Hon. James M. Alexander

MHT PROPERTIES XVIII, INC.,
ET AL,
Defendants.
_____/

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendants' motion for summary disposition.

In their Complaint, Plaintiffs allege that the parties entered into a purchase agreement on February 6, 2019, whereby Plaintiff was to purchase, and Defendant was to sell, a low-income housing tax credit project known as Royal Oak Tower. Despite proceeding to the due diligence phase of the contract, there were delays in completing various contingencies attributed to Defendants.

The purchase agreement listed a closing date of March 31, 2019. The parties did not close on March 31, 2019, as provided in the purchase agreement. Plaintiff contends, however, that the closing was adjourned by agreement of the parties to May 22, 2019. Despite the adjournment, Defendants have refused to proceed with the sale, and have relisted the property.

Plaintiff allege that the parties, during a phone conversation, agreed to revise the original purchase agreement. Plaintiff sent a revised purchase agreement to Defendants, but Defendants refused to sign the same. Plaintiff contends that it took all necessary steps under the agreement

to close on the property, but Defendant breached the same, which prevented the parties from successfully closing on the property.

On these general allegations, Plaintiff filed a Complaint on claims titled (Count I) breach of contract/specific performance; and (Count II) injunctive relief.

Defendants now move for summary disposition of Plaintiffs' claims – arguing that the same fail because there is no genuine issue of material fact that the closing was to occur on or before March 31, 2019, and any alleged extension of the closing date was not in writing, and therefore, barred by the statute of frauds.

And Defendants do so under MCR 2.116(C)(7) and (C)(10). A (C)(7) motion determines whether a claim is barred, among other grounds, by the statute of frauds."[1] And a (C)(10) motion tests the factual support for a plaintiff's claims. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).[2]

Plaintiff argues that the parties never intended to have the March 31, 2019 closing date be the true closing date under the original purchase agreement. Plaintiff argues that it was understood between the parties that the closing date would need to be extended. The first agreement, however, contained an integration clause that provided that:

> This Contract represents the entire agreement between the parties relating to the subject matter herein and this Contract supersedes all other prior written or oral agreements between the parties with respect to the subject matter hereof. (Defendants' Exhibit B at §26(b).

[1] When analyzing a (C)(7) motion, the Court accepts the plaintiff's well-pleaded allegations as true and construes them in the plaintiff's favor unless the allegations are contradicted by documentary evidence. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999); *Huron Tool & Eng'g Co v Precision Consulting Services, Inc*, 209 Mich App 365, 376-77; 532 NW2d 541 (1995).

[2] In such a motion, the moving party must specifically identify the issues that he believes present no genuine issue of material fact. *Maiden, 461 Mich* at 120. The opposing party may not rest on mere allegations or denials in his pleadings, but must, by affidavits or as otherwise provided in the rule, set forth specific facts showing a genuine issue for trial. *Id.* at 120-121. Where the evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* at 120.

It is well established that "[w]hen the parties choose to include an integration clause, they clearly indicate that the written agreement is integrated," and "the general contract principles of honoring parties' agreements as expressed in their written contracts" should be enforced. *UAW-GM Human Resources Center v KSL Recreation Corp*, 228 Mich App 486, 495; 579 NW2d 411 (1998). "Thus, where the terms of a contract are unambiguous, their construction is for the court to determine as a matter of law, and the plain meaning of the terms may not be impeached with extrinsic evidence." *Zurich Ins Co v CCR and Co*, 226 Mich App 599, 604; 576 NW2d 392 (1997).

Further, "the law presumes that the parties understand the import of a written contract and had the intention manifested by its terms. Accordingly, a written contract is construed according to the intentions therein expressed, when those intentions are clear from the face of the instrument." *Id.*

Here, it is undisputed that the original purchase agreement provided that closing was to occur by March 31, 2019. It is also undisputed that closing did not and has not occurred. And further, it is undisputed that the original purchase agreement contained an integration clause. Based on the same, the law presumes that the parties intended to be bound by the terms contained in the contract. Additionally, parole evidence cannot be used to refute the plain meaning of the contract, including the closing date.

The parties included that closing was to occur by March 31, 2019. The Court, in upholding general contract principles, presumes the parties understood the importance of the written contract and the closing date contained therein. Further, since those intentions are clear from the face of the contract, the Court cannot consider parole evidence as it related to any oral agreement to extend the closing date.

Based on the same, the Court finds, as a matter of law, that (1) the original Purchase Agreement contained a closing date of March 31, 2019; (2) the closing date was an essential term of the contract; and (3) the Purchase Agreement expired by its terms.

As it related to any modification of the closing date or Purchase agreement, any such modification must be in writing pursuant to the statute of frauds." (Complaint, at ¶26). Based on the same, Plaintiff seeks specific performance of the Purchase Agreement.

Michigan law is clear and provides:

> No estate or interest in lands, other than leases for a term not exceeding 1 year, nor any trust or power over or concerning lands, or in any matter relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by some person thereunto by him lawfully authorized by writing. MCL 566.106.

Further,

> Every contract for the leasing for a longer period than 1 year, or for the sale of any lands, or any interest in lands, shall be void, unless the contract, or some note or memorandum thereof be in writing, and signed by the party by whom the lease or sale is to be made, or by some person thereunto by him lawfully authorized in writing. . . . MCL 566.108.

As it relates to the statute of frauds, Defendants argue that any alleged extension of the purchase agreement was not in writing, and therefore, unenforceable. Further, Defendants argue, if the Court were to find that the extension to May 22, 2019 did not violate the statute of frauds, Plaintiff was not prepared to close May 24, 2019, two days after the alleged extension expired.

Additionally, Defendants argue that Plaintiff's claims are barred because the parties did not sign the Amended and Restated Contract. After Defendants informed Plaintiff that it did not intend to sign the Amended and Restated Contract, Plaintiff sent a letter to Defendants stating that Plaintiff was intending to close on the original Purchase Agreement. (Defendants' Exhibit I). Since the statute of frauds requires that the contract for the conveyance of land be in writing

and signed by the party granting the same, Defendants argue that the alleged extension and Amended and Restated Contract do not comply and are not enforceable.

In response, Plaintiff argues that while trying to enforce the Purchase Agreement's closing date, Defendants ignore section 16(a) of the Purchase Agreement that provides in the event of a default, the seller is to provide written notice and ten days for the buyer to cure. Plaintiff argues that since Defendants never informed it of a default under the terms of the Purchase Agreement, Defendants are in default as they have relisted the property without providing Plaintiff an opportunity to cure.

But, as Defendants argue, they did not have to terminate the Purchase Agreement. The Purchase Agreement expired by its own terms on March 31, 2019. Interestingly, the Purchase Agreement allowed Plaintiff to "adjourn the closing from time to time by notice to Seller by no such adjournment shall extend the closing date to a date later than 30 days from the date first set for closing." (Defendants' Exhibit B, at §15(a)). Plaintiff did not take advantage of the extension by providing notice to Defendants. Rather, Plaintiff "operated under the assumption" that the closing date would be modified. (Plaintiff's Response, at 2).

Plaintiff argues that on April 5, 2019, the parties orally agreed to "re-date" the Purchase Agreement. Plaintiff, however, provides no evidence that an oral agreement was reached to re-date the agreement. Instead, Plaintiff includes an affidavit of Ari Kosterlitz. (Plaintiff's Exhibit 1). Aside from the other deficiencies in his affidavit, Kosterlitz, notably, does not state that he was involved with and present on the call when the alleged agreement was reached. Since he was not on the call, Kosterlitz affidavit is inadmissible hearsay, and the Court cannot consider the same.

Further, based on Plaintiff's representations, the intended goal of the Amended and Restated Contract was to "re-start the transaction," not merely re-date the Purchase Agreement (Defendants' Exhibit H). Additionally, Plaintiff states that it will "do [its] best to get information moving at a faster pace with this second iteration so that we can get this one closed." *Id.* It is evident from Plaintiff's own admissions that the original Purchase Agreement was no longer valid, and that the transaction needed to be "restarted."

As further proof that The Amended and Restated Contract was to be the controlling document, it provided that "[t]his contract amends and restates in its entirety that certain Contract for sale and Purchase of Partnership Interest of Royal Oak Tower . . . dated as of February 6, 2019 by and between the Parties." (Plaintiff's Exhibit 7). Further, [t]he parties with to amend and restate the Original Contract as set forth below." *Id.*

Additionally. the Amended and Restated Contract includes and integration clause that provides:

> This Contract represents the entire agreement between the parties relating to the subject matter herein and this Contract supersedes all other prior written or oral agreements between the parties with respect to the subject matter hereof. *Id.*, at §26(b).

Based on the foregoing, the Court finds that the Amended and Restated Contract was not merely an extension of the closing date pursuant to the original Purchase Agreement, as the original Purchase Agreement had already expired. Rather it was a new, offer that Defendants had the right to accept or reject.

Assuming arguendo the Court found that a valid contract existed between the parties, the Court would still find that Plaintiff was the first breaching party, and therefore, not entitled to maintain an action against Defendants.

Plaintiff argues that Defendants' breached the Purchase Agreement by "failing to proceed in good faith and with due diligence to complete the transaction. As such, Plaintiff argues that tit is entitled to specific performance.

The Purchase Agreement provided that Defendants deliver due diligence material to Plaintiff and facilitate approval of the transfer of ownership and Management by Michigan State Housing Development Authority (MSHDA). (Defendants' Exhibit B, at §4(a)(i)). Plaintiff acknowledged receipt of "all due diligence material" in an email dated March 7, 2019. (Defendants' Exhibit C). Further, on February 21, 2019, Defendants initiated an email with MSHDA. (Defendants' Exhibit D). Plaintiff was included on the email and introduced as the individual who would "be coordinating any and all MSHDA forms on behalf of Buyer." *Id.*

Based on the foregoing, the Court finds that there is no question of fact that Defendants complied with their requirements under the purchase agreement. As such, Defendants did not breach the Purchase Agreement.

It is undisputed, however, that Plaintiff was not able to close on March 31, 2019, May 10, 2019, or May 24, 2019. (*See* Plaintiff's Exhibits 8 and 12). Since Plaintiff was not able to close, it breached the Purchase Agreement. As the breaching party, Plaintiff cannot maintain an action against Defendants for the same.

For the foregoing reasons and viewing all evidence in the light most favorable to Plaintiff, the Court concludes that (1) the Purchase Agreement expired by its own terms, (2) the statute of frauds bars Plaintiff's claims, and (3) there are no material questions of fact in dispute,

so Defendants are entitled to judgment matter of law. As such, Defendants' motion for summary disposition is GRANTED and Plaintiff's Complaint is DISMISSED.[3]

In its response, Plaintiff seeks leave to amend its Complaint. Based on the Court's ruling that Plaintiff was the first breaching party, the Court finds that any amendment would be futile. And Plaintiff's request to amend is DENIED.

This is a final order that resolves the last pending claim and closes the case.

IT IS SO ORDERED.

September 4, 2019
Date

/s/ James M. Alexander
Hon. James M. Alexander, Circuit Court Judge

[3] The Court ruled on Plaintiff's injunctive relief on May 24, 2019. At said hearing, the Court vacated the temporary retraining order issued on May 20, 2019. Based on the Court's May 24, 2019 ruling, Plaintiff's claim for injunctive relief is moot.