Sutphin Management Corp. v. Rep 755 Real Estate LLC, 774/08
Decided: August 15, 2008

Justice Leonard B. Austin

NASSAU COUNTY
Supreme Court

Counsel For Plaintiff & Additional Counterclaim Defendants

Castro & Karten LLP

Counsel for Defendants

Rosenberg Calica & Birney LLP

Counsel for Additional Parties

Mintz Levin Cohn Ferris

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Justice Austin
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Defendants, REP 755 REAL ESTATE, LLC, REP 755 HOLDINGS, LLC, REP 777 REAL ESTATE, LLC, REP 777 HOLDINGS, LLC, REP 1211 REAL ESTATE, LLC, REP 1211 HOLDINGS, LLC and REP REALTY, LLC (hereinafter collectively referred to as "REP"), move for an Order seeking partial summary judgment pursuant to CPLR 3212(e) on their third counterclaim; dismissal of Plaintiff's complaint and cancellation of Plaintiff's notice of pendency filed against 755 and 777 South Oyster Bay Road, Bethpage, New York ("REP Parcel") pursuant to CPLR 6514; or, in the alternative, should summary judgment not be granted in REP's favor, cancellation of the notice of pendency pursuant to CPLR 6515 upon the filing of an undertaking.

Plaintiff, Sutphin Management Corp. ("Sutphin"), and additional Counterclaim Defendants, 777 Realty, LLC ("Triple 7") and Robin Eshaghpour ("Eshaghpour"), cross-move seeking dismissal of REP's first counterclaim against Sutphin and Triple 7 and, dismissal of REP's second counterclaim

against Eshaghpour.

REP also moves, via a second Order to Show Cause, for an Order pursuant to CPLR 6515 directing the cancellation of the notice of pendency; relief which was sought in the first application.

BACKGROUND

Sutphin is in the business of locating real estate sites for development by or on behalf of major retail tenants, such as Additional Parties, CVS Albany LLC and CVS Corp. (hereinafter collectively referred to as "CVS"), and banking institutions in the metropolitan area. Triple 7 is an affiliate of Sutphin. Eshaghpour is principal of both Sutphin and Triple 7.

REP is the owner of the REP Parcel, a commercial property. Currently, the REP Parcel is occupied by an automobile repair facility and an office tenant.

Sale and Purchase Contract

Sutphin, as Purchaser, through its president, Eshaghpour, and REP, as Seller, through its manager, Ron Pecunies ("Pecunies"), entered into a Sale and Purchase Contract ("Contract"), dated December 21, 2005, with respect to the REP Parcel. The purchase price was set at $7.2 million. Sutphin paid a contract down payment of $250,000. In accordance with Rider _ 14, "in the event of any default by the Purchaser in the terms of this contract, then the damages due to the Seller, by reason of said default, shall be deemed liquidated in the sum of money deposited upon the signing of this contract . . . as Seller's sole remedy."

Pursuant to Â§17 of the Contract, Sutphin was afforded a 60 day due diligence period during which Sutphin had the right to inspect the premises. During that period, REP would make available all of the books, files and records relating to the REP Parcel. If, at the end of the due diligence period, Sutphin was satisfied with its inspection, it would purchase the REP Parcel for the agreed upon purchase price.

Prior to closing, REP was to bear the cost of subdividing Lot 82 included in the REP Parcel (Â§1.01). As part of the subdivision, REP was to obtain a new tax lot number for the subdivided portion.

The Contract established the parties' closing obligations at Â§Â§10 and 11. At the closing, REP was to deliver to Sutphin, among other documents, a bargain and sale deed with covenants (Â§10.01) and Sutphin was to deliver the balance of the purchase price as adjusted for apportionments (Â§11.01).

Schedule D set the closing to occur within 90 days following completion of the due diligence period or sooner, as mutually agreed upon by the parties, unless REP elected to effectuate an IRS Code Â§1031 or 1031/721 Exchange which would afford REP the right to postpone the closing for up to six months solely at its option. As for the location of the closing, it was left to be determined.

Although no actual closing date was set in the Contract, REP maintains that the closing was anticipated to occur sometime during May of 2006. No closing occurred in May 2006.

First Letter Agreement

In August 2006, the parties entered into a Letter Agreement, dated August 24, 2006 ("First Letter Agreement"), adjusting the contract terms. The First Letter Agreement fixed the closing date as January 31, 2007, making time of the essence. Further, it stated that "failure to close by (January 31, 2007) shall be a material breach of the Contract". In order to obtain this adjournment, Sutphin paid REP a "bonus payment" of $50,000 and reimbursed the carrying charges and the legal fees incurred by REP.

The First Letter Agreement allowed for an extension of the closing date to no later than February 28, 2007 if Sutphin paid a premium of $50,000. This option had to be exercised by January 15, 2007, by written notice, simultaneous with payment of the non-refundable premium. The February 28th date would also be "of the essence".

In the event that Sutphin, through no fault of REP, failed to close on or before January 31, 2007 or February 28, 2007, if Sutphin exercised that option, the parties agreed that the following would occur: (1) the Contract conclusively would be deemed materially breached by Sutphin and REP would have no further obligations to Sutphin; (2) REP would be entitled to retain the down payment; (3) Sutphin would assign its rights in any agreement and/or lease entered into with CVS for the REP Parcel to REP and all of Sutphin's rights contained in that agreement and/or lease would

automatically and indefeasibly vest in REP; and (4) Sutphin would immediately return and relinquish all items of due diligence and project planning associated with the REP Parcel to REP at no cost to REP. Moreover, no notice of breach would be required.

CVS Lease

Subsequent to the First Letter Agreement, Triple 7, as Landlord, and CVS, as tenant, entered into a lease ("CVS Lease") for the REP Parcel. Pursuant to the CVS Lease, dated December 21, 2006, CVS was to construct and operate a pharmacy on the REP Parcel.

The CVS Lease acknowledged that Triple 7 did not have fee title to the REP Parcel but was in contract to purchase the parcel from REP.

Subdivision of Lot 82

With respect to the subdivision of Lot 82, REP hired William A. DiConza, Esq. ("DiConza") to file the necessary paperwork with the appropriate municipal entities. To comply with Town of Oyster Bay zoning regulations requiring minimum one acre lots, the western portion of Lot 82 had to be merged with Lot 40 creating Lot 96 and the remaining eastern portion was combined with Lot 41. The subdivision of Lot 82 was approved by the Town of Oyster Bay Department of Planning and Development and the Nassau County Planning Commission ("NCPC") in September of 2006. A deed for Lot 96 was recorded on January 26, 2007.

By letter, dated January 31, 2007, John DelPonte, Esq. ("DelPonte"), of All Island Abstract Ltd., wrote to Eshaghpour concerning the subdivision. DelPonte's letter reiterates that the subdivision of Lot 82 was approved by resolution of the NCPC on September 21, 2006. Further, DelPonte explained that certain filing requirements and subdivision regulations were waived provided that within six months of the NCPC resolution a separate deed for the new lot be recorded with the Nassau County Clerk's Office. In DelPonte's opinion, failure to comply with this provision would have automatically voided the approval of the NCPC resolution. Furthermore, he opined that lot 96 did not exist until the recording of the deed on January 26, 2007 and, therefore, could not be sold or insured until that date.

Second Letter Agreement

On January 31, 2007, no closing occurred. Sutphin did not exercise the option to extend the closing date to February 28, 2007.

In spite of the failure to close in accordance with the terms set forth in the First Letter Agreement, a Second Letter Agreement, dated March 13, 2007, reinstating the Contract and amending its terms was entered into between Sutphin and REP. Sutphin and REP agreed that they would proceed with the Contract as modified by the Second Letter Agreement and release the other party of any prior cause of action, suit or controversy it may have had against the other.

The Second Letter Agreement fixed a new closing date of June 30, 2007. As before, this agreement indicated that time was of the essence and that failure to close by the closing date would be considered a material breach. The Second Letter Agreement stated that "no notice of breach or tender of deeds or other documents by the Seller shall be required."

The Second Letter Agreement provided Sutphin one option to extend the "time of the essence" closing date from June 30, 2007 to July 31, 2007 upon payment of a premium with notice by June 15, 2007 that Sutphin intended to exercise this option. The Second Letter Agreement reiterated the consequences set forth in the First Letter Agreement, which would occur if Sutphin failed to close by the stated closing date provided that REP fulfilled all of its material obligations under the Contract and was ready, willing and able to transfer marketable and insurable title. Those consequences included, inter alia, Sutphin's unconditional assignment of its interest in the CVS Lease to REP.

On March 19, 2007, REP, Sutphin and Triple 7 executed an Assignment of the CVS Lease. Pursuant to the Assignment:

Upon any material default of Sutphin under the terms and conditions of the Contract, Sutphin and Triple 7 shall be conclusively deemed to have assigned to REP all of the rights of Sutphin and Triple 7 in and to the CVS lease concerning the lease of all or a certain portion of the Properties to CVS, and all of the rights of Triple 7 contained in the CVS Lease shall automatically and indefeasibly vest in REP, at no cost or expense to REP, and neither Triple 7 nor Sutphin shall have no further rights in or to the CVS Lease.

June 30, 2007 Closing

On June 30, 2007, REP, through its real estate counsel and attorney-in-fact, Stephen G. Phillips, Esq. ("Phillips"), appeared at the offices of Intracoastal Abstract, REP's title company, located in Floral Park, New York, to transfer title of the REP Parcel. As evidence of REP's appearance at the closing, REP annexed a copy of a Certification for ALTA Owner's Policy - Title Number 552-812N, with an effective date of December 22, 2006, re-certified as of June 30, 2007, relating to the REP Parcel. According to the Certification, Intracoastal Abstract certified that good and marketable title to the REP Parcel could be conveyed by REP. In handwriting at the bottom of the Certification appears, "I was present at Intracoastal Abstract on 6/30/07 where grantors' counsel and attorney in fact was present and ready, willing and able to tender deeds for parcels known as "1", "2" and "3"[1]." Underneath this statement is the signature of a Susan Banks.

Neither Sutphin nor its counsel was present at the closing. Sutphin did not exercise the option to extend the closing date to July 31, 2007.

By letter, dated September 5, 2007, sent certified mail to Sutphin and Eshaghpour, Pecunies, on behalf of REP, informed Sutphin and Eshaghpour that REP had attended a closing pursuant to the Second Letter Agreement and tendered deeds and other closing instruments. Pecunies wrote that given Sutphin's failure to attend, Sutphin was in default of the Contract. Consequently, REP sought return of the due diligence materials it had provided to Sutphin.

A response letter, dated September 18, 2007, was sent via certified mail from Sutphin's attorney, Jennifer Padnick, Esq., to Pecunies and Phillips indicating that Sutphin rejected REP's request for return of the due diligence and closing items and deemed the Contract to be in full force and effect.

September 18, 2007 Meeting

On the same date as Sutphin's response letter, Sutphin and REP met, along with CVS, in an attempt to resolve this matter. A memorandum ("September 18th Memo") was prepared during the meeting. The September 18th Memo states, "This memo is a synopsis of the terms agreed to between the Seller and Purchaser of (the REP Parcel), and CVS Corporation. The parties meet (sic) on 9/18/07 and agreed to the following terms." The terms concerned

the sales price, the exclusion of Lot 82 from the purchase resulting in a reduction in the purchase price, a November 15, 2007 closing date and an agreement by CVS to increase the rent. This memorandum was signed by Pecunies, principal of REP, next to the number 1 on a line under which his name is handwritten with no reference to his title. Eshaghpour signed the memo underneath Pecunies next to the number 2. There is a third line next to number 3 which is blank. On the opposite side of the page, on a line next to the word "Witness" there is a signature which purports to be that of a Charles J. Rotella ("Rotella") based upon the printed name as it appears under the signature. There is no indication in the September 18th Memo as to Rotella's affiliation with the REP parcel.

According to an affidavit submitted by Rotella, he is Regional Director of Real Estate for CVS Realty Co. Rotella attended the September 18th meeting along with Pecunies, Eshaghpour, Peter Pecoraio ("Pecoraio"), Vice President of CVS Albany LLC, and Roger Delisle, of Island Associates. Rotella asserts that he is not an officer of either CVS Albany LLC or CVS Corporation and, therefore, did not have the authority to bind either entity during the September 18th meeting. For this reason, he signed the document as a witness.

Following the September 18th meeting, an email, dated September 24, 2007, was sent to Eric Grayson and jpadnickcpllplaw.com[2] from Stephen E. Friedberg, Esq. ("Friedberg"), CVS's counsel, attaching for review drafts of new amendments to the Contract and the CVS Lease, in addition to an indemnity agreement, in accordance with discussions held on September 18th. As per Friedberg, he "tried to draft the documents in the spirit of the agreement of the seller and purchaser to settle their disputes . . . ". Attached to this email was a proposed six page Third Letter Agreement relating to the Contract. In addition to incorporating the terms included in the September 18th Memo, the Third Letter Agreement included a provision that the Assignment of the CVS Lease would continue to be held in escrow by All Island Abstract, Ltd. and that the Assignment would become effective on and released to REP if Sutphin failed to close for any reason other than a material default of REP on or before November 15, 2007. Despite REP signing the agreement, the Third Letter Agreement was never executed by Sutphin or CVS.

No closing occurred on November 15, 2007.

This Action

On January 9, 2008, Sutphin commenced this action alleging the following causes of action: (1) specific performance of the Contract; (2) detrimental reliance on REP's false representations with respect to the subdivision of the REP Parcel[3]; (3) damages in the form of expenses incurred by Sutphin in connection with this transaction; and (4) money damages in the event that REP is not able to specifically perform pursuant to the Contract. In conjunction with the complaint, Sutphin filed a notice of pendency against the REP Parcel, situated at Section 46, Block G, Lots 96,39, 40 and part of Lot 82.

Issue was joined on or about February 8, 2008 with the service of REP's answer, which included three counterclaims. REP's counterclaims are as follows: (1) that Sutphin and Triple 7 filed the complaint without legal cause or justification and have wrongfully repudiated the assignment of the CVS Lease to REP rendering CVS unable or unwilling to proceed with the CVS Lease; (2) that Eshaghpour tortiously interfered with the assignment of the CVS Lease, with REP's rights as successor landlord under the CVS Lease, and by wrongfully causing a lien to be placed upon the REP Parcel; and (3) for a declaration stating the following: (a) that Sutphin's rights as Purchaser under the Contract have been terminated; (b) that Sutphin has no further interest in or claim under the Contract or interest in the REP Parcel or CVS Lease; (c) that Triple 7 assigned all of its rights under the CVS Lease to "Plaintiffs"; (d) that "Plaintiffs" are the successor landlord under the CVS lease and (e) for any other declaration necessary to define the rights of the parties vis-a-vis the Contract and CVS Lease.

REP now moves for partial summary judgment on its third counterclaim and for dismissal of the complaint based upon Sutphin's default of its contractual obligations on numerous occasions. REP also seeks cancellation of the notice of pendency.

Sutphin opposes REP's motion on the grounds that: (1) REP's motion is premature as no discovery has been exchanged, (2) REP was not able to convey title in May 2006, the original contract closing date, due to the pending subdivision of Lot 82; (3) the September 18th Memo set the closing for a date on which Sutphin was ready, willing and able to close; (4) REP committed an anticipatory breach of the contract obviating the requirement that Sutphin establish that it was ready, willing and able to close; (5) REP

has failed to submit any documentation to establish that REP was ready, willing and able to tender title on June 30, 2007 in accordance with the terms of the Contract; and (6) there was no agreement as to place and time of the closing since Schedule D of the Contract indicated that this information was "TBD". Due to foregoing, Sutphin asserts that it did not default on its contractual obligations; and, consequently, there has been no assignment of the CVS lease to REP.

Sutphin responded to the counterclaims with its pre-answer cross-motion seeking dismissal of the first and second counterclaims pursuant to CPLR 3211(a)(7). Sutphin seeks dismissal of the first counterclaim because: (1) REP seeks unspecified damages in the amount of $10,000,000; (2) Sutphin has a viable cause of action for specific performance; (3) REP's claim for "wrongful" service of process is premature at this point; and (4) there are no damages arising out of the "mere filing of a Notice of Pendency" and the filing was appropriate because Sutphin seeks specific performance. As to the second counterclaim, Sutphin seeks dismissal because Eshaghpour is not personally liable for actions he performed on behalf of Sutphin, a corporation, or Triple 7, an LLC and there can be no contractual tortious interference between CVS and REP as no contract exists between the two as the Assignment never became effective.

DISCUSSION

A. REP's Motion for Summary Judgment

1. Standard of Review - Summary Judgment

Summary judgment is a drastic remedy which will be granted only when the movant established that there are no triable issues of fact. Andre v. Pomeroy, 35 N.Y.2d 361 (1974).

Once the movant has established a prima facie entitlement to judgment as a matter of law, the party opposing the motion must come forward with proof in evidentiary form establishing the existence of triable issues of fact or must demonstrate an acceptable excuse for its failure to do so. Zuckerman v. City of New York, 49 N.Y.2d 557 (1980); Davenport v. County of Nassau, 279 A.D.2d 497 (2nd Dept. 2001); and Bras v. Atlas Construction Corp., 166 A.D.2d 401 (2nd Dept. 1991).

The function of the court in deciding a motion for summary judgment is to determine if triable issues of fact exist. Matter of Suffolk County Dept. of Social Services v. James M., 83 N.Y.2d 178 (1994); and Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 (1957). A motion for summary judgment should be denied if the court has any doubt as to the existence of a triable issue of fact. Freese v. Schwartz, 203 A.D.2d 513 (2nd Dept. 1994); and Miceli v. Purex Corp., 84 A.D.2d 562 (2nd Dept. 1984).

When deciding a motion for summary judgment, the court must view the evidence in a light most favorable to the non-moving party and must give the non-moving party the benefit of all reasonable inferences which can be drawn from the evidence. Negri v. Stop & Shop, Inc., 65 N.Y.2d 625 (1985); and Louniakov v. M.R.O.D. Realty Corp., 282 A.D.2d 657 (2nd Dept. 2001). However, mere conclusions of law or fact are insufficient to defeat a motion for summary judgment. Banco Popular North America v. Victory Tax Mgt., Inc., 1 N.Y.3d 381 (2004).

2. Timing of the Motion

A motion for summary judgment may be made any time after issue has been joined. CPLR 3212(a). Furthermore, CPLR 3212(f) specifies that, "should it appear from affidavits submitted in opposition . . . that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had . . . ".

REP's motion is timely as issue has been joined. Given that REP seeks to dismiss Plaintiff's specific performance cause of action and for a declaration as to the rights of the parties vis-a-vis the Contract and the Assignment of the CVS Lease, and upon review of the record before the Court, it appears that discovery would not be required for Sutphin to obtain information about essential facts necessary to oppose REP's motion. Information concerning Sutphin's ability to perform under the Contract necessary to defeat REP's motion would be in the possession of Sutphin and not the other parties. Consequently, REP's motion is not premature and should not be denied on that basis.

3. Specific Performance

For a purchaser to be entitled as a matter of law to specific performance of a

sales contract, the purchaser must have been ready, willing and able to close on the law date. Kabro PM, LLC v. WGB Main Street, LLC, 52 A.D.3d 659 (2nd Dept. 2008); and Chernow v. Chernow, 39 A.D.3d 684 (2nd Dept. 2007). Without sufficient evidence demonstrative of the purchaser being ready, willing and able to perform, causes of action for specific performance must be dismissed as a matter of law. Id. See also, International Baptist Church v. Fortini, 20 A.D.3d 507 (2nd Dept. 2005); and Weiss v. Feldbrand, 50 A.D.3d 673 (2nd Dept 2008). When a party seeks summary judgment dismissal of a specific performance cause of action, the movant bears the burden of establishing the absence of a triable issue of fact as to whether or not plaintiff-purchaser was ready, willing and able to close in accordance with the contract terms. Knopff v. Johnson, 29 A.D.3d 741 (2nd Dept. 2006); and Iannucci v. 70 Washington Partners, LLC, 51 A.D.3d 869 (2nd Dept. 2008).

In the Second Letter Agreement, the parties agreed that time would be of the essence and that the closing would occur on or before June 30, 2007. In addition to Pecunies's affidavit in support of the motion, REP annexed to the motion papers a certification regarding title to the REP Parcel with Susan Banks's handwritten statement indicating that REP was ready, willing and able to transfer title of the REP Parcel to Sutphin on June 30, 2007. REP also submitted evidence to establish that it had completed the subdivision of Lot 82 by January 26, 2007, as required under the original Contract terms[4]. Sutphin challenges REP's ability to transfer title given the list of REP's closing obligations outlined in Â§10 of the Contract and the Rider. These obligations concern documents which were to be provided at the closing such as, inter alia, the original leases for the tenants and assignments of same, insurance policies, and checks payable to the appropriate taxing authorities and corresponding tax returns. Failure to annex these documents to REP's motion papers does not raise a material, triable question of fact as to whether REP was ready, willing and able to transfer title to Sutphin. In addition, REP's mortgage of $300,000 from North Fork Bank and the corresponding UCC-1 financing statements filed with the Nassau County Clerk, which were identified in the title report obtained by Sutphin[5], also do not raise triable issues of material fact with respect to REP's ability to convey the premises in light of the fact that the proceeds from the sale would have sufficiently paid off REP's $300,000 mortgage on the property.

Since REP submitted proof that it was ready to close by the law date and Sutphin was unwilling or unable to close in accordance with the contract terms, REP has demonstrated prima facie entitlement to judgment as a

matter of law[6]. Moutafis v. Osborne, 7 A.D.3d 686 (2nd Dept. 2004).

The burden now shifts to Sutphin to establish that it was ready, willing and able to perform its contractual obligations. In response to REP's motion, Sutphin argues, inter alia, that the September 18th Memo, which included an extension of the closing date until November 15, 2007, was a binding agreement between the parties regardless of REP's assertion that the September 18th Memo was not fully executed and, therefore, Sutphin's failure to close by June 30, 2007 is not a proper ground for summary judgment. Sutphin further asserts that REP failed to submit an affidavit from a person with knowledge regarding the fact that CVS's representative signed the September 18th Memo as a witness and not as a signatory of the agreement.

The Rotella Affidavit establishes that Rotella signed solely as a witness and did not intend to bind CVS or have the authority to do so. Furthermore, in attendance at the September 18th meeting was Pecoraio, Vice President of CVS Albany LLC, the tenant under the CVS Lease, who seemingly would have had authority to bind CVS to the terms of the September 18th Memo. Rotella's inability to bind CVS to the terms of the September 18th Memo contradicts the theories asserted by Sutphin in its Memorandum of Law that the September 18th Memo is valid and enforceable as it was a "full manifestation of mutual assent and a complete meeting of the minds has been reached". Plaintiff Memo of Law, p. 5. Thus, Sutphin's citations to Sanders v. Pottlizer Bros. Fruit Co., 144 N.Y.209 (1894); Sherry v. Proal, 131 A.D.774 (1st Dept. 1909) and No. 2 and 4 Roman Ave., Inc. v. Goddard, 220 A.D. 138 (2nd Dept. 1927) are inapplicable to the case at bar as the court in those cases found that where it clearly appears that every material term of a contract was in fact agreed to and that nothing remained for future negotiations and agreement, the lack of a formal writing would not bar recovery on a breach of contract cause of action. The existence of the Third Letter Agreement, which was circulated among the parties for execution and is much more comprehensive than the September 18th Memo, clearly indicates that the parties did not agree on every material term and that future negotiations were necessary.

Sutphin also argues that it could not have been in breach of the Second Letter Agreement requirement that the closing occur on or before June 30, 2007, a Saturday, since the Contract indicated that the time and place of the closing was "to be determined" and Sutphin did not receive notice of the

designated time and place from REP. REP's real estate counsel, Phillips stated in an affidavit that his co-counsel, Eric Grayson, Esq., and he were in direct communication on numerous occasions with Jeffrey A. Chester, Esq. ("Chester"), Sutphin's real estate counsel, before and during the June 30, 2007 closing and provided information as to where the closing was to occur. In the days before the June 30th closing, a proposed "Third Letter Agreement" was exchanged between counsel in an attempt to adjourn the June 30th closing date; however, the parties could not reach agreement.

In a reply affidavit, Chester asserts that no closing was scheduled for June 30th, despite of the terms of the Second Letter Agreement, and that he was never advised of the place for the closing. However, an email from Chester to Grayson, dated June 28, 2007 at 3:18 p.m., acknowledges Chester's understanding that any third letter agreement would have to be worked out by tomorrow afternoon, June 29th, the day before the closing was to occur, when he wrote "we have to get this (third letter agreement) done by tomorrow afternoon . . . .".

Phillips emailed Chester at 3:50 p.m. on June 30th indicating REP's willingness to tender deeds up until midnight upon receipt of the balance of the purchase price. No response was ever received from Chester as out with his family on the East End of Long Island on that date; and not in his office.

Sutphin's assertions about the lack of communication regarding the time and place of the closing still does not address Sutphin's inability to tender the balance of the purchase price in accordance with the terms of the Contract. Accordingly, Sutphin has failed to raise a material issue of fact to be tried with respect to its ability to maintain a cause of action for specific performance. Kabro PM, LLC v. WGB Main Street, LLC, supra.

Similarly, Sutphin's argument that REP anticipatorily breached the September 18th Memo obviating Sutphin's burden of establishing that it was ready, willing and able to close in order to maintain its cause of action for specific performance is also unpersuasive. Sutphin bases this argument upon Madison Investors v. Cohoes Assocs., 176 A.D.2d 1021 (3rd Dept. 1991); and Ehrenpreis v. Klein, 260 A.D.2d 532 (2nd Dept. 1999). These cases are unpersuasive as the Second Department has subsequently held that proof of being ready, willing and able is necessary in actions seeking specific performance is required, regardless of any alleged anticipatory breach by the other party to the contract. Madison Equities, LLC v. MZ Mgt. Corp., 17

A.D.3d 639 (2nd Dept. 2005); Johnson v. Phelan, 281 A.D.2d 394 (2nd Dept. 2001); and Petrelli Assocs. v. Germano, 268 A.D.2d 513 (2nd Dept. 2000).

Finally, Sutphin maintains that it was ready, willing and able to close by August 2007. Such claim is belied by the fact that no evidence has been produced by Sutphin establishing that it was, in fact, able to close. In opposition to REP's motion, Sutphin annexed a letter from 40/86 Mortgage Capital Inc ("40/86"). Sutphin characterizes this document as a commitment letter. The document, however, is actually a loan application to 40/86 Mortgage Capital Inc. to issue a commitment to fund a mortgage loan. This letter is undated and unsigned.

The application letter sets forth numerous conditions which Sutphin had to meet before a commitment could be issued by 40/86. Paragraph 20 of the 40/86 application indicates that the loan application and the initial deposit/application fee had to be received on or before August 17, 2007 or the application would be deemed null and void. No additional documentation was provided to the Court to establish that the application was ever finalized, that Sutphin paid the initial deposit/application fee or that 40/86 issued a commitment for a mortgage to Sutphin. Thus, there is no evidence submitted to establish that Sutphin had secured financing to pay for the balance of the purchase price by the closing date. Failure to provide such evidence warrants dismissal of Sutphin's cause of action seeking specific performance. See, O'Connell v. Soszynski, 46 A.D.3d 644 (2nd Dept. 2007).

Sutphin also indicates through the affidavit of Eshaghpour that it had sufficient funds to close. No documentary evidence was submitted to support this allegation. Bare unsupported conclusory assertions of Sutphin having sufficient funds to close in Eshaghpour's affidavit are insufficient to establish Sutphin's ability to close. Madison Equities, LLC v. MZ Mgt. Corp., supra.; and 3M Holding Corp. v. Wagner, 166 A.D.2d 580 (2nd Dept. 1990).

Except for the unsigned and undated mortgage application letter from 40/86 Mortgage Capital, Inc., the record is devoid of any evidence that Sutphin acquired financing or had sufficient funds to purchase the property. Even assuming that the closing was to occur on or before November 15, 2007, the date noted in the September 18th Memo and the date Sutphin asserts is the closing date, Sutphin has produced no evidence to establish that it was ready, willing and able to close by that November date. In light of Sutphin's failure to submit documentary evidence to establish that it was ready, willing and

able to close on the REP Parcel, its cause of action for specific performance must be dismissed.

In light of the foregoing, Sutphin has breached its obligations under the Contract by failing to be ready, willing and able to tender funds to REP to purchase the REP Parcel. Consequently, as a matter of law, Sutphin is not entitled to specific performance and Sutphin's first cause of action must be dismissed.

The remaining two causes of action in the complaint pertain to damages only. As these "causes of action" do not contain a legal basis upon which relief is sought, the two remaining causes of action must be dismissed as well.

4. Declaratory Judgment

REP's third counterclaim seeks a declaratory judgment. A declaratory judgment requires a "justiciable" controversy and may not be used to obtain an advisory opinion. CPLR 3001; and Watson v. Aetna Cas. & Sur. Co., 246 A.D.2d 57 (2nd Dept. 1998). As it has been determined that Sutphin breached its contractual obligations, a justiciable controversy exists. It is thus appropriate to render a declaratory judgment concerning the parties' positions with respect to the Contract and the CVS Lease.

Pursuant to the Second Letter Agreement, the parties agreed that, if REP was able to render marketable and insurable title to Sutphin by June 30, 2007 and Sutphin failed to close, then the Contract would be deemed to have been breached by Sutphin and REP would have no further obligations to Sutphin. Furthermore, the CVS Lease would be assigned to REP.

Therefore, REP is entitled to the following declaration sought in its third counterclaim: (1) that all right, title and interest of Sutphin as Purchaser under the Contract has been duly terminated; (2) that Sutphin has no further interest in, or claim under the Contract, to any interest in the REP Parcel or the CVS Lease; (3) that all interest of Triple 7 under the CVS Lease has been duly and unconditionally assigned to REP[7]; and (4) that REP is the successor Landlord under the CVS lease.

B. REP's Motion to Vacate the Notice of Pendency

CPLR 6514 provides for both a mandatory and a discretionary cancellation of

a notice of pendency. A mandatory cancellation is required, inter alia, if an action has been settled, discontinued or abated. CPLR 6514 (a).

CPLR 6515 provides:

The court, upon motion of any person aggrieved and upon such notice as it may require, may direct any county clerk to cancel a notice of pendency, upon such terms as are just, whether or not the judgment demanded would affect specific real property, if the moving party shall give an undertaking in an amount to be fixed by the court, and if (1) (t)he court finds adequate relief can be secured to the plaintiff by the giving of such undertaking.

In light of the dismissal of the complaint and the declaration concerning the Contract, the notice of pendency must be vacated pursuant to CPLR 6514. Consequently, it is not necessary to vacate the notice of pendency pursuant to CPLR 6515 and no undertaking is required.

C. Sutphin's Cross-Motion to Dismiss REP's First and Second Counterclaims

1. Standard of Review - Motion to Dismiss

When deciding a motion to dismiss made pursuant to CPLR 3211(a)(7), the court must determine whether the pleader has a cognizable cause of action, not whether it has been properly plead. Guggenheimer v. Ginzburg, 43 N.Y.2d 268 (1977); and Rovello v. Orofino Realty Co., 40 N.Y.2d 633 (1976).

In making such a determination, the court must accept as true all the facts alleged in the complaint and any factual submissions made in opposition to the motion to dismiss. 511 West 232rd Street Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144 (2002); Sokoloff v. Harriman Estates Dev. Corp., 96 N.Y.2d 409 (2001); Smith v. Meridian Techs, Inc., 52 A.D.3d 685 (2nd Dept. 2008); and Danna v. Malco Realty, Inc., 51 A.D.3d 621 (2nd Dept. 2008).

The complaint must be liberally construed and the pleader must be given every favorable inference that can be drawn. Leon v. Martinez, 84 N.Y.2d 83 (1994); and Aberbach v. Biomedical Tissue Servs, Ltd., 48 A.D.3d 716 (2nd Dept. 2008).

"If we determine that plaintiffs are entitled to relief on any reasonable view

of the facts stated, our inquiry is complete and we must declare the complaint legally sufficient." Campaign for Fiscal Equity, Inc. v. State of New York, 86 N.Y.2d 307, 318 (1995).

2. First Counterclaim

REP interposed its first counterclaim against Sutphin and Triple 7, seeking $10 million in damages, for the following:

Despite the due termination of the Contract and the due assignment of the CVS Lease to REP, Sutphin has filed the within action wrongfully, unlawfully, and without any legal cause or justification, claiming that the Contract remains effective and that Sutphin is entitled to specific performance and damages thereunder, and has filed a Notice of Pendency constituting a lien on the REP Parcel.

The filing of the action and the notice of pendency further constitutes a wrongful repudiation by Sutphin and Triple 7 of their assignment of the CVS Lease to REP which has rendered CVS unable or unwilling to proceed with the CVS Lease.

REP's answer with counterclaims, __ 27-28.

Given the language of the counterclaim, Sutphin opines that REP's first counterclaim sounds in one of three causes of action - prima facie tort, slander of title or malicious prosecution - all of which, Sutphin maintains, are not adequately pled by REP. In response, REP concedes that its first counterclaim does not state a claim for any of the aforementioned causes of action and is rather a cause of action for statutory damages pursuant to CPLR 6514 (c) for the wrongful filing of the notice of pendency.

CPLR 6514 (c) allows the court to order a plaintiff to pay any costs and expenses incurred due to the filing and cancellation of a notice of pendency. Therefore, it is in the court's discretion to award costs and expenses when it determines that a party filed a notice of pendency in bad faith. Joseffson v. Keller, 141 A.D.2d 700 (2nd Dept. 1988).

In support of its contention that an action for damages exists where a party wrongfully files a notice of pendency pursuant to CPLR 6514(c), REP cites to Joseffson v. Keller, supra; #1 Funding Center, Inc. v. H&G Operating Corp.,

(3rd Dept. 2008); and Neiderfer v. Hampton Design and Construction Group, Inc., 6 Misc.3d 1009 (A) (Sup. Ct. Nassau Co. 2005). All three cases involve the court making a determination to award costs pursuant to CPLR 6514(c) upon granting a motion to cancel a notice of pendency rather than establishing CPLR 6514(c) as a basis for a cause of action. Thus, it appears that this is an element of damages and not a separate cause of action. Id.

Furthermore, in support of its second Order to Show Cause, REP submitted a supplemental affirmation to which was annexed a fully executed copy of a document entitled "First Amendment To and Reinstatement of Lease" entered into between REP and CVS. This document is dated April 19, 2008. Consequently, this document, submitted by REP concerning the motions, contradicts REP's allegations that Sutphin's suit and notice of pendency has rendered CVS unable or unwilling to proceed with the CVS Lease.

Consequently, REP's first counterclaim must be dismissed.

3. Second Counterclaim

REP alleges in its second counterclaim that Eshaghpour tortiously interfered with the assignment of the CVS Lease and wrongfully caused a lien to be placed upon the REP Parcel interfering with REP's implementation of the CVS Lease by causing CVS to be unable or unwilling to proceed with the CVS Lease.

A claim of tortious interference requires proof of (1) the existence of a valid contract between plaintiff and a third party; (2) defendant's knowledge of that contract; (3) defendant's intentional procuring of the breach of that contract; and (4) damages. Foster v. Churchill, 87 N.Y.2d 744 (1995). An essential element is the malicious procurement of the breach of a valid contract. Estate of Roth v. Erhal Holding Corp., 141 A.D.2d 693 (2nd Dept. 1988).

"A corporate officer who is charged with inducing the breach of a contract between the corporation and a third party is immune from liability if it appears that he is acting in good faith as an officer . . . (and did not commit) independent or predatory acts directed at another." Murtha v. Yonkers Child Care Ass'n, Inc., 45 N.Y.2d 913 (1978), citing Buckley v. 112 Central Park South, 285 A.D. 331 (1st Dept. 1954). To successfully plead a claim of tortious interference by a principal of a corporation, it is necessary to plead

that the purported tortious conduct of the principal was undertaken outside of the scope of his or her authority as principal of the corporation. Weinstein v. Hotel Acquisitions Corp., 43 A.D.3d 917 (2nd Dept. 2007).

REP fails to allege that Eshaghpour was acting outside of the scope of his authority as principal of Sutphin or Triple 7 or that he intentionally or maliciously procured a breach of the CVS Lease.

Moreover, the documentary evidence, submitted by REP in connection with the motions, established that no breach of the CVS Lease has occurred since REP and CVS entered into an agreement reinstating and amending the lease.

Consequently, Sutphin's cross-motion to dismiss REP's second counterclaim must be granted.

Accordingly, it is

ORDERED, that Defendant REP's motion for summary judgment dismissing the complaint is granted; and it is further

ORDERED that Defendant REP's motion for partial summary judgment on its third counterclaim is granted and declaring (1) that all right, title and interest of Sutphin Management Corp., as Purchaser under the Contract, has been duly terminated; (2) that Sutphin Management Corp. has no further interest in, or claim under the Contract, to any interest in the REP Parcel or the CVS Lease; (3) that all interest of Triple 7 under the CVS Lease has been duly and unconditionally assigned to REP; and (4) that REP is the successor Landlord under the CVS lease; and it is further

ORDERED that Defendant REP's motion to cancel the notice of pendency, dated January 9, 2008, affecting the REP Parcel, situated at Section 46, Block G, Lots 96, 39, 40 and part of Lot 82 is granted; and it is further

ORDERED, that the County Clerk of Nassau County is hereby directed, upon service of a copy of this order, to vacate and discharge of record, the notice of pendency dated January 9, 2008, affecting property known as 755 and 777 South Oyster Bay Road, Bethpage, New York, and situated at Section 46, Block G, Lots 96, 39, 40 and part of Lot 82; and it is further

ORDERED that Sutphin's cross-motion to dismiss the first and second

counterclaims of REP is granted.

This constitutes the decision and Order of this Court.

1. The REP Parcel is comprised of the properties referred to as Parcels "1", "2" and "3" in the Intracoastal Abstract Certification.

2. This email address appears to belong to Jennifer Padnick, counsel for Sutphin, who sent the September 18, 2007 correspondence to Pecunies.

3. By letter, dated June 12, 2008, Sutphin's counsel informed the Court that it was withdrawing its second cause of action.

4. Any inability by REP to close prior to January 26, 2007, the filing date of the deed for the subdivided lot, is irrelevant as the filing of the deed satisfied the requirements of the NCPC resolution and the parties entered into the Second Letter Agreement after the deed was filed fixing the law date as June 30, 2007. According to the Second Letter Agreement, the parties agreed to release the other from any cause of action which it might have had up through March 14, 2007, the execution date of the Second Letter Agreement.

5. Sutphin's title report has an effective date of August 27, 2007, which is post June 30th closing date. Consequently, this title report had not been provided to REP prior to the June 30th closing.

6. In accordance with the terms of the Second Letter Agreement, it would not be necessary for REP to tender deeds or other documents or to give notice of the breach to Sutphin before it was determined that a material breach occurred.

7. With respect to provisions (3) and (4), in REP's initial motion and third counterclaim, REP requests a declaration that the interest of Triple 7 be assigned to "plaintiffs" and that "plaintiffs" are the successor Landlord under the CVS Lease. As plaintiff is Sutphin, it is clear that REP is requesting that the interest be assigned to REP or Defendant. In its papers, REP also requests a declaration from the Court concerning "such other matters and rights and relations among the parties with reference to the REP Parcel, the Contract, and the CVS Lease as may be necessary and appropriate . . . " Def. answer with counterclaims, pp. 8, 9. Therefore, in light of REP's request for a declaration concerning such other matters and rights and relations respecting

this Contract and Assignment of the CVS Lease, the Court has substituted "plaintiffs" for "REP". Moreover, in a declaratory action, the Court "has the fullest liberty in molding its decree to the necessities of the occasion." First Nat. Stores v. Yellowstone Shopping Ctr., 21 N.Y.2d 630, 637 (1968).