SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION

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RAPSON INVESTMENTS LLC,ACTON PROPERTIES LLC,NORTHPOINT PROPERTIES LLC

Plaintiff,

- v -

45 EAST 22ND STREET PROPERTY LLC,

Defendant.

INDEX NO. 158967/2017

MOTION DATE 03/07/2019

MOTION SEQ. NO. 003

DECISION AND ORDER

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HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 83, 84, 85, 86, 87, 88, 89, 90, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130

were read on this motion to/for JUDGMENT - SUMMARY.

Borrok, J.S.C.:

The critical issue in this case is whether a purchaser, in default of a purchase agreement who waives all of its right, title, and interest in the down payment and consents to the release of such deposit from escrow and then defaults in its new obligations under an extension agreement giving them another opportunity to close during the extension of time by paying the carrying costs of the property, may nonetheless still recover its down payment where the Sponsor sent out a termination notice a few days early but subsequently sent a timely termination notice. Based upon the foregoing documents, and following oral argument (A. Armstrong, Ct. Rep., January 13, 2019), for the reasons set forth below, because the Court answers this question in the negative, the defendant's motion for summary judgment is granted, this case is dismissed, and the plaintiffs' cross motion is denied as moot.

This declaratory judgment action arises out of defendant 45 East 22nd Street Property LLC's (the **Sponsor**) allegedly improper termination of purchase agreements for the sale of five condominium units of the 45 East 22nd Street Condominium (the **Condominium**), located at 45 East 22nd Street, New York, New York (the **Property**). The Sponsor is the owner of the Property and the developer of the Condominium. Plaintiffs Rapson Investments LLC (**Rapson**), Acton Properties LLC (**Acton**), and Northpoint Properties LLC (**Northpoint**; Northpoint, together with Rapson and Acton, collectively, the **Purchasers**), seek to recover $5,874,500 in contract deposits.

The Facts Relevant to the Instant Motion

Reference is made to (i) an Agreement (the **24B Original Purchase Agreement**), dated June 24, 2015, by and between the Sponsor and Rapson, for the purchase of Unit 24B in the Condominium for $3,200,000, as such 24B Original Purchase Agreement was amended by a certain First Amendment to Agreement (the **24B First Amendment**; the 24B Original Purchase Agreement together with the 24B First Amendment, hereinafter, collectively, the **24B Agreement**), dated August 28, 2018, by and between the Sponsor and Rapson Investment LLC (**Rapson**), (ii) an Agreement (the **29A Original Purchase Agreement**), dated June 8, 2015, by and between the Sponsor and Acton Properties LLC (**Acton**), for the purchase of Unit 29A in the Condominium for $5,935,000, as such 29A Original Purchase Agreement was amended by a certain First Amendment to Agreement (the **29A First Amendment**), dated June 8, 2015, between the Sponsor and Acton, and as further amended by a certain Second Amendment to

Agreement (the **29A Second Amendment;** the 29A Original Purchase Agreement, together with the 29A First Amendment and the 29A Second Amendment, hereinafter, collectively, the **29A Agreement**), dated August 28, 2017, between the Sponsor and Acton, (iii) an Agreement (the **29B Original Purchase Agreement**), dated June 8, 2015, by and between the Sponsor and Acton Properties LLC, for the purchase of Unit 29B in the Condominium for $4,550,000, as such 29B Original Purchase Agreement was amended by a certain First Amendment to Agreement, dated June 8, 2015 (the **29B First Amendment**), between the Sponsor and Acton and as further amended by a certain Second Amendment to Agreement, dated August 28, 2017 (the **29B Second Amendment;** the 29B Original Agreement, together with the 29B First Amendment and the 29B Second Amendment, hereinafter, collectively, the **29B Agreement**), between the Sponsor and Acton, (iv) an Agreement (the **52A Original Purchase Agreement**), dated June 24, 2015, by and between the Sponsor and Northpoint Properties LLC (**Northpoint**), for the purchase of Unit 52A in the Condominium for $10,025,000, as such 52A Original Purchase Agreement was amended by a certain First Amendment to Agreement (the **52A&B First Amendment;** the 52A Original Agreement, together with the 52A&B First Amendment, hereinafter, collectively, the **52A Agreement**), dated August 28, 2017, between Sponsor and Northpoint, and (v) an Agreement (the **52B Original Purchase Agreement**), dated June 24, 2015, by and between the Sponsor and Northpoint Properties LLC, for the purchase of Unit 52B in the Condominium for $8,125,000 (the **52B Original Purchase Agreement**), as such 52B Original Purchase Agreement was amended by the 52A&B Amendment (the 52B Original Purchase Agreement, together with the 52A&B Amendment, hereinafter, collectively, the **52B Agreement**). The 24B Agreement, the 29A Agreement, the 29B Agreement, the 52A Agreement, and the 52B Agreement, collectively, hereinafter the **Purchase Agreements**. Terms

used but not otherwise defined shall have the meaning ascribed thereto in the Purchase Agreements.

Pursuant to §§ 4.1 (a) and (b) of (i) the 24B Agreement, Rapson was required to deposit, with a designated Escrow Agent, $640,000, payable in two installments of $320,000 , as a down payment, (ii) the 29A Agreement, Acton was required to deposit, with a designated Escrow Agent, $1,187,000, payable in two installments of $593,500, as a down payment, (iii) the 29B Agreement, Acton was required to deposit, with a designated Escrow Agent, $910,000, payable in two installments of $455,000, as a down payment, (iv) the 52A Agreement, Northpoint was required to deposit, with a designated Escrow Agent, $2,0005,000, payable in two installments of $1,002,500, as a down payment, and (v) the 52B Agreement, Northpoint was required to deposit, with a designated Escrow Agent, $1,625,000, payable in two installments of $812,500, as a down payment.

Rapson however only provided $319,500 of the $320,000 second deposit required under the 24B Original Agreement (Eichner Aff., Ex. B, § 4.1[b]) and Northpoint only provided $320,000 of the $812,500 second deposit required under the 52B Original Agreement (Eichner Aff., Ex. F). The failure to make the additional payments to complete the second deposits was a material default under the Original Purchase Agreements, which was never rectified by Purchaser (*id.*, Ex. B, § 15.1 [a]; Ex. F, §15.1 [a]).

Nevertheless (and without obligation as it related to Units 24B and 52B), the Sponsor issued Notices of Closing (i) dated May 31, 2017, scheduling the closing for Unit 24B for July 6, 2017

(which date was adjourned until July 24, 2017), (ii) dated May 31, 2017, scheduling the closing for Unit 29A for July 7, 2017 (which date was adjourned until July 24, 2017), (iii) dated June 16, 2017, scheduling the closing for Unit 29B for July 17, 2017 (which date was adjourned until July 24, 2017), (iv) July 6, 2017, scheduling the closing for Unit 52A for August 7, 2017, and (v) July 6, 2017, scheduling the closing for Unit 52B for August 7, 2017.

In response, (i) with respect to Unit 24B, Rapson exercised its 20-day adjournment right and adjourned the closing to August 14, 2017, (ii) with respect to Unit 29A, Acton exercised its 20-day adjournment right and adjourned the closing to August 14, 2017, (iii) with respect to Unit 29B, Acton exercised its 20-day adjournment right and adjourned the closing to August 14, 2017, (iv) with respect to Unit 52A, Northpoint exercised its 20-day adjournment right and adjourned the closing to August 28, 2017 and, finally, (v) with respect to Unit 52B, Northpoint exercised its 20-day adjournment right and adjourned the closing to August 28, 2017. The Purchasers failed to close on the designated adjourned closing dates (Eichner Aff., Exs. B-F, §§ 6.1, 15.2). In fact, by email, dated July 25, 2017 (the **July 25th Email**), the Purchasers advised that they were not prepared to pay the full purchase price for the units and would not have adequate funds to complete the transactions until the first quarter of 2018 (Eichner Aff., Ex. G). Following some unsuccessful attempts to agree to new dates for closing and to amend the original purchase agreements, the Sponsor issued Notices of Default, dated August 25, 2017 for Units 24B, 29A, and 29B, by which the Purchasers were given 30 days to cure their default and to close title to the units (Eichner Aff., Ex. H).

Section 15.2 of the Purchase Agreements provides in relevant part that:

> TIME IS OF THE ESSENCE with regard to Purchaser's obligation to pay the balance of the Purchase Price and to perform Purchaser's other obligations under this Agreement. If Purchaser fails to make such payment when required as herein provided . . . Sponsor shall give written notice to Purchaser of such default. If such default shall not be cured within thirty (30) days thereafter Sponsor may, at its option, cancel this Agreement by notice of cancellation to Purchaser. If Sponsor elects to cancel this Agreement (A) Sponsor may retain all sums deposited by Purchaser hereunder . . . together with interest earned thereon as liquidated damages.

In other words, inasmuch as the Purchasers had indicated that they could not close within the 30 day cure period, the Sponsor would have been entitled to cancel the original purchase agreements and keep the down payments as liquidated damages.[1]

Nevertheless, on or about August 28, 2017, without any obligation to do so, the Sponsor agreed that it would give the Purchasers additional time beyond the 30 day cure period to close if the Purchasers would release all claims to the down payments and escrow the Property's carrying charges until an agreed upon further adjourned closing date. Accordingly, the Sponsor and the Purchasers entered into the amendments and the Sponsor rescinded the August 25, 2017 Notices of Default (Eichner Aff., Exs. B-F; Ex. I).

The deal codified in the amendments was essentially that the Sponsor would permit the Purchasers to close if the Purchasers immediately and unconditionally released all right, title, and interest it had to and in the down payments and otherwise agreed to escrow the carrying charges for the apartment until the newly extended closing date. In respect of Unit 24B, Rapson agreed pursuant to (x) Section 2 of the 24B First Amendment:

[1] To wit, such July 25th Email constituted an anticipatory breach of the contract. Inasmuch as the Purchasers indicated they could not timely close with the exercise of their rights of extension, the Purchasers were in default.

> [a]s of the date of this First Amendment, Purchaser hereby ***releases to Sponsor the Down Payment and waives any and all claims Purchaser may have to such Down Payment*** (emphasis added). Escrow Agent is hereby authorized to release the Down Payment to Sponsor or such party as Sponsor designates to receive the Down Payment in Sponsor's sole discretion.

and (y) Section 3 of the 24B First Amendment (the **24B Carry Fee Escrow**):

> No later than August 31,2017, Purchaser shall deposit $122,123.02 (the "Carrying Fee") to be held in escrow by. Escrow Agent pursuant to the Agreement, as hereinafter modified. Immediately upon delivery of the Carrying Fee to Escrow Agent, $10,775.56 or the Carrying Fee shall be released to Sponsor or such party as Sponsor designates; to receive the Down Payment in Sponsor's sole discretion. Escrow Agent shall automatically on the first of every month beginning on September i, 2017 through and including February 1, 2017 release the amount of $18,557.91 to Sponsor or such party as Sponsor designates to receive the Down Payment in Sponsors sole discretion without the need for approval from Purchaser….

and (z) Section 4 of the 24B First Amendment:

> Purchaser waives any and all claims Purchaser may have to any portion or the Carrying Fee that is released to Sponsor in accordance with the foregoing. Escrow Agent is hereby authorized to automatically release the Carrying Fee in accordance with the foregoing timeline to Sponsor or such party as Sponsor designates to receive the Doren Payment in Sponsor's sole discretion without approval from Purchaser.

Section 5 of the 24B First Amendment makes clear that in the event that the Purchaser closes title to the unit, any remaining Carrying Fee (as such term is defined in the 24B First Amendment) not otherwise released shall be applied by the Sponsor to the balance of the Purchase Price at closing. In addition, pursuant to Sections 7, 8 and 9 of the 24B First Amendment, the parties agreed to extend the closing date until February 28, 2019, and that there would be no further adjustment for real estate taxes or common charges and that if the Sponsor pays for additional months of real estate taxes, then the Purchaser would have to reimburse the Sponsor at closing for such additional payments. In other words, following execution of the 24B First Amendment, the Purchaser (i) had no further rights to the down payment, (ii) agreed to the

immediate release of the same from escrow to the Sponsor, and (iii) solely retained the right to close provided that it carried the unit by escrowing the carrying charges and agreed to their automatic release without further approval.

The 29A Second Amendment, the 29B Second Amendment and the 52A&B First Amendment contain identical waivers of rights and releases to (x) the down payments (each such waiver and release, a **Down Payment Release**) and (y) the carrying charges under those agreements (each such waiver and release, a **Carrying Fees Release**) except that the carrying charges (Section 3) to be escrowed are $225,549.24 in respect of unit 29A, $159,869.73 in respect of unit 24B, and $635,405.60 in respect of units 52A & B.

On August 31, 2017 (three days after the execution of the above referenced amendments), the Purchasers failed to escrow the carrying charges to which they had agreed[2] (Eichner Aff., Ex. J). As a result, the Sponsor provided each Purchaser with a Notice of Default (the **Notice of Default**), dated September 7, 2017, for failure to escrow the carrying fees (Eichner Aff., Ex. K).

The Purchase Agreements, by specifically incorporating the Offering Plan therein, provided for a 30 day cure period in the event of default after a notice of the default was issued (Offering Plan, p. 74, p. 67, p. xxii, and p. vi). However, before that 30 day period had run, the Sponsor sent the Purchasers a "Notice of Termination" by letter, dated September 25, 2017, advising that the "Sponsor has elected to terminate the [purchase] Agreement" (the **First Termination Notice**) (*id.*, Ex. 9, NYSCEF Doc. 105). In response, the Purchasers sent the Sponsor a letter, dated

[2] This constituted the second default under the Purchase Agreements.

September 26, 2017, advising the Sponsor that its termination notice was "fatally defective" as the Purchase Agreements granted the Purchasers 30 days to cure their default after a notice of default, and the time to cure, running from the September 7, 2017 Notice of Default, had not yet expired (*id.*, Ex. 10, NYSCEF Doc. No. 110). The letter concluded with a demand to "rescind [the] Notice immediately" (*id.*). The Sponsor did not rescind its termination notice. On October 9, 2017, the Sponsor then issued a second Notice of Termination (the **Second Termination Notice**) to the Purchasers.[3]

> Notwithstanding § 48 of the Purchase Agreements, pursuant to which "Purchaser[s] waive[d] any right to place a *Lis Pendens* against the Unit or the Building," the Purchasers filed Notices of Pendency (Eichner Aff., Exs. B-F). Previously, on motion seq. no. 001, this Court (Ramos, J.) granted the Sponsor's motion to cancel the notices of pendency that were filed by the Purchasers (NYSCEF Doc. 44). In rendering his decision, Justice Ramos determined that even if the Sponsor's First Termination Notice was premature and the Purchasers were correct that they still had a few more days to cure, the First Termination Notice was a legal nullity as all the Sponsor needed to do was send a timely notice which he determined that they did: Mr. Dougherty: Sure, your Honor. Bad faith is on their side. There is no question about it. I know you haven't had an opportunity to see our opposition. They issued an early termination notice of September 25th.
>
> The Court: **Consider that to be a nullity** (emphasis added).
>
> Mr. Dougherty: Your Honor, the next day we sent by hand a written demand to rescind those wrongful termination notices.
> We didn't hear from them. They didn't pick up the phone. They didn't write to us.
>
> The Court: Did they serve a subsequent termination notice?
>
> Mr. Dougherty: They did.
>
> The Court: Was it served on time?

[3] To be clear, the Sponsor is not relying on the First Termination Notice in any respect, only on the Second Termination Notice that was served the after the 30 day cure period expired on October 7, 2017. To date, the Purchasers have not paid any portion of the carrying charges that were due on August 31, 2017 or have otherwise indicated that they are ready, willing and able to close. Instead, on October 6, 2017, the Purchasers commenced the instant action (Eichner Aff., Ex. A).

> Mr. Dougherty: I need to add the following, your Honor. They did not recognize our letter to them that said your method is wrong. What they did –
>
> The Court: **They have no obligation to. The only obligation they have to do is send you a notice, and they are relying on the second notice, which they say was timely. Apparently, it was** (emphasis added).[4]

Following cancelation of the Notices of Pendency, the Purchasers filed an Amended Complaint advancing in sum and substance essentially the same theory. To wit, the Purchasers allege that (1) the Sponsor anticipatorily breached the Purchase Agreements by sending out the First Termination Notice prior to the expiration of the 30 day cure period and that there was an obligation to rescind the First Termination Notice, and that (2) by failing to rescind the First Termination Notice as the Purchasers requested notwithstanding (i) their express waiver of their rights to the down payments and consents to release of such down payments set forth in the Down Payment Release, (ii) that Justice Ramos previously ruled that the First Notice of Termination was a legal nullity and that the Second Termination notice was timely, and (iii) that the Purchasers never stood ready, willing and able to close the transactions, that their rights to the down payments were revived as the Purchasers were relieved of all of their obligations under the Purchase Agreements and they are now entitled to a return of the down payments which down payments they had previously released pursuant to the Down Payment Release when they agreed to escrow the Carrying Fees and to the Carrying Fees Release.

The Sponsor now moves for summary judgment pursuant to CPLR 3212 to dismiss the Amended Complaint and the Purchasers cross-move for summary judgment.

[4] *November 15, 2017 Tr.*, pp. 3-4 (NYSCEF Doc. No. 44).

The Amended Complaint alleges the following four causes of action: (1) for a declaratory judgment that Sponsor's issuance of the First Termination Notice prior to the expiration of a 30 day cure period constituted anticipatory breach; (2) for breach of contract by anticipatory repudiation; (3) for breach of the implied covenant of good faith and fair dealing; and (4) for unjust enrichment.

D I S C U S S I O N

I. Declaratory Judgment and Anticipatory Repudiation (First and Second Cause of Action)

The relevant facts in this matter are not in dispute. The Purchasers do not dispute that they were not ready to close at the closing dates set forth in the Purchase Agreements and that they could not close within the 30 day cure period. At that time, the Sponsor had the right to terminate the Purchase Agreements and retain the down payments as liquidated damages at the expiration of the 30 day cure period subject to release from escrow, as set forth in the Purchase Agreements (Eichner Aff., Exs. B-F, §§ 15.2-15.5). Nevertheless, and as described above, without any obligation to do so, the Sponsor elected to give the Purchasers additional time to close if the Purchasers agreed to waive any rights to the escrowed down payments and to pay the carrying charges of the units until closing as described above.

The Purchasers concede that they failed to pay any carrying charges on August 31, 2017, that a Notice of Default was properly served on September 7, 2017, and that two Termination Notices were issued – the first on September 25, 2017 and the second on October 7, 2017. However, the Purchasers maintain that they are relieved of their contractual obligations and entitled to a return

of their down payments because when the Sponsor issued the First Termination Notice -- before the time to cure had run -- it wrongfully repudiated the contract.

As indicated above, this Court (Ramos, J.) already rejected this argument when it determined that the First Termination Notice was "a nullity" and that the Sponsor had no obligation to rescind its First Termination Notice (*November 15, 2017 Tr*., NYSCEF Doc. No. 44).

Notwithstanding this Court's prior ruling, the Purchasers argue, relying on, *inter alia, Peters v Peters* (118 AD3d 593, 594 [1st Dept 2014), that the determination is not binding because "the original complaint was superseded by the amended complaint." The Purchasers' argument is, however, without merit. The fundamental problem is that the facts of this case do not support return of the down payment. Rights to the down payment were expressly waived by the Purchasers pursuant to the Down Payment Release. And, the issue raised before the Court on November 15, 2018 was whether the Sponsor had an obligation to rescind its First Termination Notice. Although this was raised in the context of whether to lift the *lis pendens* and in respect of the original complaint, the couching of the same argument in a different cause of action – *i.e.*, anticipatory breach -- does not change the analysis. Either the First Termination Notice was a nullity or it was not. New York State Supreme Court Justice Charles Ramos already determined that it was and that is the law of this case. Putting Justice Ramos' earlier determination aside, the argument that the First Termination Notice was an anticipatory repudiation of the Purchase Agreement (when the Purchasers were already in default) and therefore revived rights to the down payments which had already been waived and released from escrow pursuant to the Down

Payment Release – rather than merely releasing the Purchasers from the obligation to close -- still fails.

Under the doctrine of anticipatory repudiation, when a party "repudiates contractual duties prior to the time of performance and before all the consideration has been fulfilled, the repudiation entitles the non-repudiating party to claim damages for total breach" (*Norcon Power Partners, L.P. v Niagara Mohawk Power Corp.*, 92 NY2d 458, 462-63 [1998] [internal quotation and citation omitted]). The "repudiation can be either 'a statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach' or 'a voluntary affirmative act which renders the obligor unable or apparently unable to perform without such a breach'" (*id.* at 463, citing *Restatement [Second] of Contracts* § 250). The rationale underlying the doctrine is that it gives the non-repudiating party an opportunity to treat a repudiation as an anticipatory breach without having to futilely tender performance or wait for the other party's time for performance to arrive (*Kaplan v Madison Park Group Owners*, LLC, 94 AD3d 616, 619 [1st Dept 2012]; *Cooper v Bosse*, 85 AD2d 616, 618 [2d Dept 1981]). However, by definition, an anticipatory breach is one that occurs *before* the time for performance is due (*see Kaplan*, 94 AD3d at 618). In this case, the Purchasers were in default of the Purchase Agreements in that they could not timely close even by exercising all of their adjournment rights pursuant to the July 25th Email.[5] Without having any obligation to do so, the Sponsor nonetheless permitted the Purchasers to close provided they escrowed the carrying charges and waived their rights to the down payments which they agreed to but did not

[5] Indeed, if anything was an anticipatory breach of the Purchase Agreements, it was the July 25th Email where the Purchasers indicated that they would not be able to close even if they exhausted all of their adjournment rights and within the 30 day cure periods. This arguably (under the rationale behind the doctrine of anticipatory repudiation) relieved the Sponsor of all its obligations under the Purchase Agreements.

do. Now, the Purchasers instead argue that sending out the First Termination Notice a few days early constituted an anticipatory repudiation of the Purchase Agreement not only relieving them of their obligations under the Purchase Agreement but also reinstating their rights to the down payments which rights they otherwise waived pursuant to the Down Payment Release.

In support of their theory, the Purchasers primarily rely on *Beinstein v Navani* (131 AD3d 401 [1st Dept 2015]), *Dembeck v Hassler* (248 AD2d 148 [1st Dept 1998]), and *Princes Point LLC v Muss Dev. L.L.C.* (30 NY3d 127 [2017]). Their reliance, however, is misplaced.

In *Beinstein v Navani*, the plaintiffs-sellers and the defendants-purchasers entered into a purchase agreement relating to a condominium apartment (131 AD3d 401). The sellers claimed that the purchasers breached the purchase agreement by failing to close. The purchasers claimed that their refusal to close was justified by the sellers' failure to satisfy a condition precedent to closing having to do with the completion of a firestopping project in the building. Specifically, the purchasers claimed that after execution of the purchase agreement, they learned that the building's board of managers had determined that firestopping throughout the building, including in all of the individual apartments, was inadequate. When the purchasers became aware of this issue, their attorney sent the sellers a letter stating that based on the "life-safety issues" surrounding the property, the purchasers would not proceed with the purchase and demanded return of the down payment. However, over the next two months, the parties engaged in negotiations to resolve the dispute while the escrow agent continued to hold the deposit. At some point, the sellers demanded assurances that the purchasers were ready to close and the purchasers indicated that they were but only provided that certain conditions were met. The

sellers' counsel responded by stating, "I do not know under what agreement you are prepared to close, as your clients breached the Contract of Sale … While our clients are amendable to negotiate a new Contract of Sale for the premises, at the present time no agreement has been reached…." (*id.*). The sellers' counsel concluded by reiterating his clients' willingness to close and offering to negotiate a new agreement (*id.*). The purchasers' counsel responded by insisting that it was the sellers who breached the contract by failing to ensure that the unit was adequately protected from fire but indicated that since the firestopping project had been completed, the purchasers would be willing to close upon receipt of certain proof/documentation of same. The idea being that the sellers were required to comply with the bylaws which required, *inter alia*, that all building regulations be observed and that a 1968 Building Code which required the unit to be firestopped was a condition to closing that did not expressly appear in the contract but which nonetheless had not been satisfied. The sellers rejected the notion that completion of the firestopping project was a condition precedent to performance and formally demanded that the escrow agent release the contract deposit to them. The purchasers made a counter-demand that the agent continue to hold the escrow, filed a *lis pendens*, and brought a claim for breach of contract and specific performance. The trial court granted the sellers' motion for summary judgment and declared that they were entitled to the contract deposit, holding that the purchasers repudiated the contract when they informed the sellers that they did not intend to perform (*i.e.*, like the Purchasers here in the July 25th Email) and because the purchasers offered no evidence that the unit was in violation of the building code, and that, in any event, the purchasers agreed to accept the unit as is. On appeal by the purchasers, the sellers, among other things, argued that the purchasers repudiated the contract by conditioning the closing upon the receipt of information to which they were not entitled (*i.e.*, concerning fireproofing). The purchasers

argued that they had retracted their repudiation when they indicated that they would close on new terms (*i.e.*, among other things receipt that the firestopping work was complete). The First Department affirmed the trial court decision, concluding that because there was no provision in the parties' agreement requiring the firestopping work to be completed as a condition precedent to closing, the purchasers' "retraction" of the purported repudiation was ineffective. Clearly, *Beinstein* does not support the position taken by the Purchasers in the case before the Court. As an initial matter, the First Department held that, under the circumstances of that case, the seller was entitled to keep the purchasers' down payment. Here, the facts are even more compelling: the parties entered into an amendment to the Purchase Agreement pursuant to which the Purchasers voluntarily agreed to release all of their rights in and to the down payments pursuant to the Down Payment Release contained in each Purchase Agreement. Equally importantly, when the Purchasers sent their July 25th Email, they, not the Sponsor, anticipatorily repudiated the Purchase Agreements. Most importantly, the Purchasers never escrowed the Carrying Fees as they were required to do, and to date, the Purchasers have never indicated that they were ready, willing, and able to close.

Next, the Purchasers cite *Dembeck v Hassler*, an action by a plaintiff-buyer against a defendant-seller to recover damages for breach of contract to sell a cooperative apartment (248 AD2d 148). In *Dembeck*, the First Department held that the trial court correctly held that the seller, once advised that the buyer had obtained a mortgage commitment, effectively retracted her wrongful repudiation of the contract that had been based on the buyer's failure to obtain such a commitment. The Court explained:

> The effect of the seller's wrongful repudiation was an anticipatory breach that did not put the contract out of existence but merely relieved the buyer of her future obligation to perform and entitled her to a remedy if her position materially changed before the retraction had issued. There is no issue of fact as to whether the buyer's position had changed (*id.*).

In other words, putting aside that the down payments were released to the Sponsor pursuant to the Down Payment Releases and that Justice Ramos already determined that the First Termination Notice was a nullity, but instead assuming that the First Termination Notice constituted a wrongful repudiation, the Purchaser did not materially change its position before the Second Termination Notice was issued other than by failing to fund the Carrying Fees it was otherwise obligated to do (and for which the First Termination Notice and Second Termination Notice were sent out). Moreover, and significantly, the Purchasers do not claim that they had either the means or the intention to do so during the 30 day cure period. In any event, the down payments were already released to the Sponsor and the Purchasers' rights to such down payments were waived pursuant to the clear terms of the Purchase Agreements, Justice Ramos already ruled that the First Termination Notice was a nullity (*i.e.*, not a wrongful repudiation) and there was no material change in position. Accordingly, reliance on *Dembeck* is likewise misplaced.

Finally, the Purchasers cite *Princes Point LLC v Muss Development LLC* (30 NY3d 127). In that case, the purchaser entered into an agreement with the sellers to purchase a certain property on an "as is" basis, with the plaintiff having an unlimited right to conduct whatever testing or investigation of the property it wanted. One of the conditions precedent to closing was that the sellers would obtain various government development approvals. The parties' contract provided for an "outside closing date," defined as eighteen months from the execution date of the contract.

In the event the sellers could not obtain the necessary approvals prior to the closing date, either party could terminate the contract and the purchaser would receive a return of its deposit. Alternatively, the purchaser could waive the government approvals and close on the sale without an abatement in the purchase price. At some point during this period, a problem with the site was discovered that would require additional cost and time to address, and the sellers notified the purchaser that they would exercise their right to terminate the contract and return the deposit unless the purchaser agreed to amend the contract. The parties then amended the contract to extend the outside closing date, increase the purchase price and down payment, and require the purchaser to reimburse the sellers for half the costs related to completing the additional work and obtaining the related approvals, as well as to require the purchaser to forbear from commencing any legal proceeding against the sellers in the event that the approvals were not issued or the work was not completed by the new outside closing date. The amendment incorporated all the remaining unchanged terms of the original purchase agreement. The down payment money remained in escrow and was not released. New problems with the work arose and the parties extended the outside date on a month-to-month basis. The final date to which the outside closing date was extended was July 22, 2008. About a month prior to the revised closing date, the purchaser commenced an action in New York Supreme Court alleging that it was defrauded into entering the amendment by the sellers' alleged misrepresentation about the additional work that needed to be completed. The purchaser sought rescission of its agreement to invalidate the amendment only, and the sellers alleged counterclaims for, among other things, breach of contract and anticipatory repudiation. The Supreme Court (Ramos J.) granted summary judgment for the sellers on both counterclaims, determining that the purchaser anticipatorily breached the contract by commencing its rescission action. The First Department affirmed,

explaining that, "[a]n anticipatory breach, or repudiation, occurs when a party to a contract unequivocally communicates to its counterpart before performance is due, a statement or voluntary affirmative act, that it will avoid performance of its contractual duties" (138 AD3d 112, 116 [1st Dept 2016]). The First Department acknowledged that an action seeking a declaratory judgment does not constitute an anticipatory breach but distinguished the case before it because an action for rescission is "markedly different" from an action for a declaratory judgment (*id.* at 117). The Court of Appeals reversed, holding that, in this context, the action for rescission was not markedly different from a declaratory judgment action, as "[a]t bottom, both actions seek a judicial determination as to the terms of the contract, and the mere act of asking for judicial approval to avoid a performance obligation is not the same as establishing that one will not perform the obligation absent such approval" (30 NY3d at 134). Although *Princes Point* is certainly instructive as to the doctrine of anticipatory repudiation, it does not support the Purchasers' position. Here, the down payment was already released to the Sponsor, and the Purchasers waived all claims to such down payments that may have otherwise existed at the time of closing pursuant to the Down Payment Release set forth in the Purchase Agreements. This is wholly different from the cases cited by the Purchasers. Having agreed to the release of the down payment from escrow and waiving all rights to the down payment, the Purchasers cannot now ask the Court to rewrite their Purchase Agreements and ignore the express language and plain meaning contained therein. For the avoidance of doubt, to the extent that the Purchasers claim that such a literal reading of their Purchase Agreements would deprive them of any recourse in the event of the Sponsor's nonperformance, this argument is disingenuous. Notwithstanding the release of the down payment, the Purchasers clearly maintained the right to sue for specific performance and/or for breach of contract in the event of the Sponsor's failure to

abide by the terms of the Purchase Agreements. Notably, the Purchasers' letter rejecting the First Termination Notice neither demanded assurances of performance nor indicated that the Purchasers were ready, willing, and able to close before the 30 day cure period expired. The doctrine of anticipatory repudiation is intended to be a shield, not a sword. The Purchasers cannot take advantage of this equitable doctrine to escape the fact that they were not ready to close on any of the five units once the 30 day cure period had run. Accordingly, the First and Second causes of action are dismissed.

II. Breach of the Implied Covenant of Good Faith and Fair Dealing (3rd Cause of Action)

A cause of action for breach of the implied covenant of good faith and fair dealing cannot be maintained where the alleged breach is "intrinsically tied to the damages allegedly resulting from the breach of the contract" (*Canstar v Jones Constr. Co.,* 212 AD2d 452,453 [1st Dept 1995]). Here, all the alleged damages arise out same facts as the breach of contract cause of action and are, therefore, duplicative of that claim. In any event, "the covenant of good faith and fair dealing … cannot be construed so broadly as effectively to nullify other express terms of a contract, or to create independent contractual rights" (*Fesseha v TD Waterhouse Inv. Servs.,* 305 AD2d 268, 268 [1st Dept 2003]). Nor have the Purchasers established that the Sponsor acted "in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement" (*Jaffe v Paramount Communications,* 222 AD2d 17, 22-23 [1st Dept 1996]). Simply put, the Purchasers could have funded the Carrying Fee escrow and closed but chose not to do so, or they could have demanded adequate assurances by giving some indication when the First Termination Notice was rejected

that they were prepared to fund the Carrying Fee Escrow and/or close in accordance with the Purchase Agreements if the Sponsor would honor the Purchase Agreements. Rather, the Purchasers who were in default merely demanded that the First Termination Notices which were sent a few days early be rescinded, which First Termination Notices Justice Ramos determined were a legal nullity. Accordingly, the third cause of action is dismissed.

III. Unjust Enrichment (4th Cause of Action)

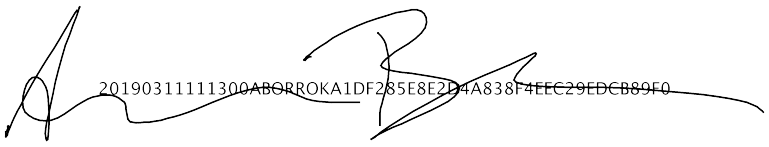
An unjust enrichment claim is a quasi-contractual theory of recovery and cannot stand where, as here, there are written contracts between the parties (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]). In addition, to recover under this "obligation imposed by equity to prevent injustice," the Purchasers would need to show that the Sponsor was: (1) enriched at (2) the Purchasers' expense, and that (3) it is against equity and good conscience to permit the Sponsor to retain what is sought to be recovered (*id.*; *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 183 [2011]). The well settled rule in New York is, however, that "a vendee who defaults on a real estate contract without a lawful excuse cannot recover his or her down payment" (*Uzan v 845 U.N. Ltd. Partnership*, 10 AD3d 230, 236 [1st Dept 2004] [citing *Lawrence v Miller*, 86 NY 131 [1881]; *Maxton Bldrs. v Lo Galbo*, 68 NY2d 373 [1986]). The Purchasers have no "lawful excuse" here.

Accordingly, it is

ORDERED that 45 East 22nd Street Property LLC's motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to 45 East 22nd Street Property LLC as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that Rapson Investment LLC, Acton Properties LLC, and Northpoint Properties LLC's cross motion for summary judgment is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly, with costs and disbursements to 45 East 22nd Street Property LLC.



3/11/2019
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:	[X]	**CASE DISPOSED**		[ ]	**NON-FINAL DISPOSITION**			
	[X]	**GRANTED**	[ ] **DENIED**	[ ]	**GRANTED IN PART**	[ ]	**OTHER**	
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**			
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**	