To be Argued by:
LISA SOLOMON
(Time Requested: 15 Minutes)

New York Supreme Court
Appellate Division—Second Department

JOSEPH N. MORAY,

Plaintiff-Respondent,

– against –

DBAG, INC.,

Defendant-Appellant.

Docket Nos.:
2002-09159
2003-00175

BRIEF FOR PLAINTIFF-RESPONDENT

LUBELL & KOVEN
350 Fifth Avenue, Suite 7610
New York, New York 10118
(212) 736-7432

Attorneys for Plaintiff-Respondent

Of Counsel
Lisa Solomon, Esq.

Westchester County Clerk's Index No. 8539/02

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the principle that, where a contract does not make time of the essence, the parties are entitled to a reasonable time in which to tender performance, is applicable to a contract term requiring a party to obtain a zoning variance by a particular date?

   Plaintiff-Respondent respectfully submits that the answer is yes.

2. Whether Plaintiff-Respondent is entitled to an order declaring that Defendant-Appellant's purported cancellation of the contract at issue in this case, based on Plaintiff-Respondent's failure to obtain a zoning variance by the date specified in the contract, constitutes an anticipatory breach of that contract, entitling Plaintiff-Respondent to maintain an action for specific performance or, in the alternative, money damages?

   Plaintiff-Respondent respectfully submits that the answer is yes.

3. Whether the court below properly denied Defendant-Appellant's motion to renew, based on Defendant-Appellant's failure to offer any new or additional evidence justifying renewal?

   Plaintiff-Respondent respectfully submits that the answer is yes.

4. Whether the appeal of that portion of the December 10, 2002 Order of the court below denying reargument should be dismissed because the denial of a motion to reargue is not appealable?

   Plaintiff-Respondent respectfully submits that the answer is yes.

COUNTERSTATEMENT OF FACTS

On October 2, 2001, Plaintiff-Respondent Joseph N. Moray ("Moray") as buyer, and Defendant-Appellant DBAG, Inc. ("DBAG") as seller, entered into a contract (the "Contract") for the sale of certain real property located at 161 Saw Mill River Road in Yonkers, New York (the "Property"). (R. 29-38). The Contract contains a rider providing, in paragraph 21, that Plaintiff-Respondent's obligations were

> subject to the issuance on or before December 31, 2001 of an area variance from the City of Yonkers Zoning Board of Appeals under which the authority to convey the Premises to Purchaser is authorized by the governing municipal authority. Purchaser shall make prompt application to the City of Yonkers Building Department to obtain an objection letter and promptly thereafter file an application for an area variance to the Zoning Board of Appeals. Purchaser shall:
>
> a) furnish accurate and complete information as may be required.
> b) pay all fees and costs required in connection with such application.
> c) pursue such application with diligence, and
> d) cooperate in good faith with the governing authorities to which purchaser has made such application.
>
> Purchaser shall comply with all requirements of the Yonkers Zoning Board and shall furnish Seller with a copy of Purchaser's application and all notices received by Purchaser in connection with the said application. If Purchaser fails to receive the area variance on or prior to December 31, 2001, Seller may cancel this Contract by giving notice to Purchaser in which case this Contract shall be deemed cancelled and thereafter neither party shall have any further rights against, or obligations or liabilities to, the other by reason of this Contract, except that the down payment shall promptly be refunded to Purchaser.

(R. 36a-37). The contract did not make time of the essence. (R. 29-38).

The Yonkers Zoning Board of Appeals did not issue an area variance before December 31, 2001. Accordingly, on February 14, 2002, Moray's attorney requested an extension of time to obtain

the necessary variance until March 31, 2002. (R. 39). On March 13, 2002, DBAG, through counsel, purported to cancel the Contract based on Moray's failure to obtain the necessary approvals by December 31, 2001, as set forth in paragraph 21 of the Contract. (R. 41). DBAG also returned Moray's down payment at that time.

Meanwhile, on March 12, 2001, the Yonkers Department of Housing & Buildings conditionally denied Moray's application for a variance. (R. 40). However, the denial letter provided that Moray could cure the defects in the original application. (R. 40). Moray did not subsequently request that DBAG's principals sign an additional application for a variance, as DBAG had already returned Moray's down payment and purported to cancel the contract. (R. 65). By letter, dated March 18, 2002 Moray's counsel rejected DBAG's tender of the down payment funds, and requested that DBAG's counsel contact him to schedule the closing. (R. 42).

Moray commenced this action on or about May 10, 2002 by filing a Summons and Verified Complaint. (R. 22-27). Moray also filed a Notice of Pendency with respect to the Property at that time. (R. 44-46). The Verified Complaint explicitly alleged that Moray was "at all times hereinafter mentioned . . . ready, willing and able to continue with the terms of the Contract, and . . . still is ready to duly perform all of the conditions of such Contract on his part to be performed . . . ." (R. 25). Moray sought specific performance of the Contract or, in the alternative, damages in the amount of $136,000. (R. 26).

By notice of motion, dated June 13, 2002, DBAG purportedly moved to dismiss this action, pursuant to CPLR 3211, asserting that Moray's Verified Complaint failed to state a claim upon which relief could be granted. (R. 18). However, DBAG did not argue that Moray failed to plead any elements of its breach of contract and specific performance claims. (R. 19-21). Rather, DBAG

argued that "it is clear that the Contract became terminable as a result of plaintiff's failure to obtain the area variance on or before December 31, 2001. The plaintiff's attorneys unsuccessfully requested an extension in Contract time for obtaining the area variance, and the Contract was thereafter terminated in strict accordance with its terms." (R. 21).

By Order, dated September 9, 2002 and entered September 10, 2002, the court below (Nastasi, J.) denied DBAG's motion to dismiss and directed Moray to serve an amended complaint within thirty (30) days after the date of entry of its order. (R. 6-10). Inexplicably, despite the fact that the Verified Complaint specifically alleged that Moray was "at all times hereinafter mentioned . . . ready, willing and able to continue with the terms of the Contract, and . . . still is ready to duly perform all of the conditions of such Contract on his part to be performed . . ." (R. 25), the court held that Moray "fails to allege that he was ready, willing and able to perform the parties' contract." (R. 7).

The court further held that, aside from Moray's supposed failure to allege that he was ready, willing and able to perform its obligations under the Contract, the Verified Complaint stated a valid claim. (R. 10). The court explained that, since the Contract did not contain a provision making time of the essence, and since DBAG did not give sufficiently specific notice that time was of the essence, Moray was afforded a reasonable time in which to tender his performance. (R. 9-10). Accordingly, the Court concluded that DBAG's declaration of Moray's default was not dispositive and, "indeed, was simply improper." (R. 10).

By notice of motion, dated October 23, 2002, DBAG moved for "renewal/reargument" of its previous motion. (R. 11). By Order, dated and entered December 10, 2002, the court below (Nastasi, J.) denied DBAG's motion to renew and reargue on the grounds that the motion was

untimely (CPLR 2221(d)(3)) and failed to comply with the requirements set forth in CPLR 2221(f); DBAG failed to establish that the court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law; and there were no new or additional facts which, although in existence at the time of the original motion, were not known to DBAG. (R. 3-4).

ARGUMENT

I. THIS COURT IS EMPOWERED TO SEARCH THE RECORD AND GRANT PARTIAL SUMMARY JUDGMENT IN FAVOR OF MORAY DECLARING DBAG TO BE IN BREACH OF CONTRACT

As the court below correctly stated, the test on a motion to dismiss for failure to state a cause of action is "whether the pleading gives notice of the transactions relied upon by the plaintiff and whether sufficient material elements of the cause of action have been asserted." (R. 6); see also, e.g., Bayside Controls, Inc. v. Telyas, 295 A.D.2d 343, 743 N.Y.S.2d 153 (2d Dep't 2002); Fireman's Fund Ins. Co. v. Farrell, 289 A.D.2d 286, 734 N.Y.S.2d 217 (2d Dep't 2001); Chaudhry v. Abadir, 261 A.D.2d 499, 692 N.Y.S.2d 399 (2d Dep't 1999). However, DBAG simply did not argue in its June 13, 2002 motion, which purported to seek dismissal pursuant to CPLR 3211, that the complaint failed to plead all of the material elements of a cause of action for breach of contract and specific performance. (R. 18-21). Instead, DBAG argued that it properly terminated the contract — in other words, that it was not in breach of contract, as alleged in the complaint. (R. 21). Thus, DBAG's motion was improperly denominated as one to dismiss under CPLR 3211, when it was, in actuality, a motion for summary judgment pursuant to CPLR 3212.

Although the court below did not explicitly state in its September 10, 2002 Order that it was treating DBAG's motion as the summary judgment motion that it was, it addressed the merits of

DBAG's argument that it did not breach the Contract.[1] The court properly analyzed this issue, focusing on Moray's right to a reasonable time in which to tender its performance and concluding that DBAG, rather than Moray, had breached the Contract.[2] Thus, although Moray did not move for summary judgment in the court below, this Court is empowered to search the record and grant partial summary judgment in favor of Moray declaring DBAG to be in breach of contract. See, e.g., Merrit Hill Vineyards, Inc. v. Windy Heights Vineyard, Inc., 61 N.Y.2d 106, 472 N.Y.S.2d 592, 460 N.E.2d 1077 (1984) (Appellate Division may search record and grant summary judgment to nonmoving party even where nonmovant did not appeal); Selter v. MCM Distributors, Inc., ___ A.D.2d ___, 749 N.Y.S.2d 94 (2d Dep't 2002) (CPLR 3212(b) authorizes Appellate Division to search record and grant summary judgment to nonmoving party with respect to issue that was the subject of motion before Special Term); Zinker v. Makler, 298 A.D.2d 516, 748 N.Y.S.2d 780 (2d Dep't 2002) (same); Image Clothing, Inc. v. State Nat. Ins. Co., 291 A.D.2d 377, 736 N.Y.S.2d 885 (2d Dep't 2002) (same).[3]

---

[1]Although, pursuant to CPLR 3211(c), the court below should arguably have given notice to the parties that it was treating DBAG's motion as one for summary judgment, DBAG cannot now complain of the court's failure to do so, since DBAG — which argued the merits of the action in the first place — was not prejudiced by the conversion. Moray did not, and does not, object to the conversion. Furthermore, by seeking summary judgment pursuant to CPLR 3212 in its renewal/reargument motion (R. 11), DBAG implicitly recognized that its initial motion was really one for summary judgment pursuant to CPLR 3212, rather than dismissal pursuant to CPLR 3211(a)(7).

[2]The merits of the court's decision on this issue are discussed *infra*, at Point II.

[3]The court below clearly erred in finding that Moray did not allege that he was ready, willing and able to perform the contract, since he explicitly asserted in paragraph 15 of the Verified Complaint that "at all times hereinafter mentioned . . . [he was] ready, willing and able to continue with the terms of the Contract, and . . . still is ready to duly perform all of the conditions of such Contract on his part to be performed . . ." (R. 25). Although Moray did not appeal from that portion of the September 10, 2002 Order directing him to replead, the doctrine of law of the

II. SINCE TIME WAS NOT OF THE ESSENCE, MORAY'S INABILITY TO OBTAIN A VARIANCE BY DECEMBER 31, 2001 DOES NOT CONSTITUTE A MATERIAL BREACH OF CONTRACT, AND DBAG'S CANCELLATION OF THE CONTRACT BASED ON THE FAILURE TO OBTAIN A VARIANCE BY DECEMBER 31, 2001 CONSTITUTES AN ANTICIPATORY BREACH OF THE CONTRACT

As the court below correctly held, when a contract for the sale of real property does not make time of the essence, the parties are entitled to a reasonable time in which to tender performance,

---

case does not preclude this Court from examining the validity of that order, and modifying it to the extent that it calls for dismissal of the complaint if Moray did not serve an amended complaint within 30 days. See, e.g., Klein v. Smigel, 44 A.D.2d 248, 250, 354 N.Y.S.2d 117, 117 (1st Dep't 1974), aff'd, 36 N.Y.2d 809, 370 N.Y.S.2d 897, 331 N.E.2d 679 (1975) (prior order determining motion to dismiss, not appealed, "constitutes no impediment to an appellate court in the proper and just disposition of the motion on its merits, freed from any procedural stumbling block."); Atlantic Mut. Ins. Co. v. Lauria, 291 A.D.2d 492, 739 N.Y.S.2d 394 (2d Dep't 2002) (doctrine of law of the case does not apply in an appellate court when prior order was made by a court of subordinate jurisdiction and no appeal was taken); Gargiulo v. Oppenheim, 95 A.D.2d 484, 467 N.Y.S.2d 276 (2d Dep't 1983), aff'd, 63 N.Y.2d 843, 482 N.Y.S.2d 256, 472 N.E.2d 32 (1984) (same).

In this regard, this Court's decision in Bellavia v. Allied Electric Motor Service, 46 A.D.2d 807, 361 N.Y.S.2d 193 (2d Dep't 1974) is on all fours with this case. In Bellavia, the defendant moved for an order of conditional preclusion following the receipt of a bill of particulars that it deemed insufficient. Id., 361 N.Y.S.2d at 195. The court granted the motion and directed plaintiffs to serve a supplemental bill of particulars. Id. The defendant deemed the supplemental bill of particulars to also be deficient, and it made another motion for a conditional order of preclusion, which was granted on default. Id. Special Term held that, while the supplemental bill of particulars might have been sufficient, the plaintiffs' default on the second motion established, as law of the case, the defendant's right to the additional particulars sought. Id. This Court, on the plaintiffs' appeal from the second order, reversed, holding that it is "not bound by the doctrine of law of the case and, hence, is not constrained by the prior default conditional order of preclusion." Id. The Court further noted that, before the second order was granted, the supplemental bill of particulars was amended by stipulation, thus making it sufficient. Id. at 808, 361 N.Y.S.2d at 195. The Court thus concluded that, "[i]n the interests of judicial economy and substantial justice," the plaintiff was not required to serve a further bill of particulars. Id. Similarly, here, this Court is not bound by the September 10, 2002 conditional preclusion order. Furthermore, since the Verified Complaint has at all times sufficiently alleged that Moray is ready, willing and able to perform his obligations under the Contract, this Court, in the interests of judicial economy and substantial justice, should modify the September 10, 2002 Order by striking that portion directing Moray to serve an amended complaint.

regardless of whether the contract designates a date for performance. E.g., Big Apple Meat Market, Inc. v. Frankel, 276 A.D.2d 657, 714 N.Y.S.2d 333 (2d Dep't 2000); Dowling v. Pierre Gohill America Corp., 209 A.D.2d 774, 617 N.Y.S.2d 992 (3d Dep't 1994); Petrizzo v. Pinks, 154 A.D.2d 521, 546 N.Y.S.2d 142 (2d Dep't 1989), appeal denied, 76 N.Y.2d 702, 559 N.Y.S.2d 239, 558 N.E.2d 41 (1990). It is undisputed that the Contract at issue here did not make time of the essence, and DBAG never gave Moray notice that it was making time of the essence. Therefore, DBAG's purported cancellation of the Contract was not only, as the court below found, "improper" (R. 10), it constitutes an anticipatory breach of the Contract. See, e.g., Klein v. Opert, 218 A.D.2d 784, 631 N.Y.S.2d 70 (2d Dep't 1995) (defendant seller's failure to give plaintiff buyer a reasonable time to obtain certificates and permits called for in contract was tantamount to an anticipatory breach); Whitney v. Perry, 208 A.D.2d 1025, 617 N.Y.S.2d 395 (3d Dep't 1994) (where time was not made of the essence in contract or at a later time, seller was not entitled to unilaterally cancel agreement because closing did not occur within time specified in contract).

DBAG says that its "[r]esearch does not reveal a single authority holding that the 'time of the essence' principles apply to conditional termination clauses" (Appellant's Brief, at p. 9); this is quite curious, since Moray's research reveals many such authorities, including one of the cases cited in DBAG's own brief in this Court (albeit in support of a different point). For example, the contract in Lo Biondo v. D'Auria, 45 A.D.2d 735, 736, 356 N.Y.S.2d 679, 681 (2d Dep't 1974), was conditioned on the buyer's obtaining a zoning change by September 1, 1971, and also on the buyer's obtaining financing within 60 days from the final zoning approval; pursuant to the buyer's October 27, 1971 request, the zoning clause was later extended to December 31, 1971. The town granted a zoning change on December 21, 1971, conditioned on, among other things, the transfer of a portion

of the property to the town. Id. On February 23, 1972, the seller advised the buyer's attorney that, since the town had "granted approval" of the zoning change on December 21, 1971, and the buyer had not advised the seller that he had obtained a mortgage commitment within 60 days of the zoning approval, the contract was null and void. Id., 356 N.Y.S.2d at 682. On March 16, 1972, the buyer's attorney mailed a proposed deed to the parcel sought by the town to the seller for execution. Id. The seller's attorney did not return the executed deed, but responded that the contract had been cancelled. On these facts, this Court held that

> the vendee did comply within the extended time limit provided by the zoning clause (December 31, 1971) by obtaining conditional 'approval' of the zone change on December 21, 1971. He acted in good faith in pursuing the zoning application resulting in obtaining the approval of the zone change. The conditions imposed by the Town Board, which deferred final zoning approval, were not within the vendee's control. Under these circumstances, when the vendor attempted to cancel the contract by letter of February 23, 1972, the vendee's rights under the contract were still viable and could not be terminated.

Id. at 683.

Similarly, the contract of sale at issue in Tucek v. Hoffman, 161 A.D.2d 588, 589, 555 N.Y.S.2d 167, 168 (2d Dep't 1990), required the purchaser to obtain certain necessary building and zoning permits, including zone changes (if required) by October 31, 1982. Although the purchaser was unable to obtain the requisite approvals by October 31, 1982, the seller did not demand that the parties proceed to closing or indicate that time was of the essence. Id. In December 1985, the sellers notified the purchaser that they were cancelling the contract and returning the down payment. Id. This court concluded that the evidence supported the conclusion that the seller wrongfully attempted to rescind the contract, without first notifying the purchaser that time was of the essence. Id. at 590, 555 N.Y.S.2d at 169; see also Big Apple Meat Market, Inc. v. Frankel, 276 A.D.2d at 657, 714

N.Y.S.2d at 333 (applying "time of the essence" principles to buyer's alleged failure to provide notice under mortgage contingency clause); Palmiotto v. Mark, 145 A.D.2d 549, 536 N.Y.S.2d 101 (2d Dep't 1988), appeal denied, 74 N.Y.2d 608, 545 N.Y.S.2d 104, 543 N.E.2d 747 (1989) (applying "time of the essence" principles to mortgage contingency clause); Dowling v. Pierre Gohill America Corp., 209 A.D.2d at 774, 617 N.Y.S.2d at 992 (since time was not of the essence, buyer's delay in giving notice under mortgage contingency clause did not result in forfeiture of its termination privilege); Xhelili v. Larstanna, 150 A.D.2d 560, 541 N.Y.S.2d 132 (2d Dep't 1989) (in *dicta*, stating that, under mortgage contingency clause, buyers were entitled to reasonable adjournment of closing to secure mortgage; however, after four adjournments, seller made time of the essence, putting buyer in breach when he failed to close on law day specified in letter granting last adjournment); Conley v. Sorrentino, 134 A.D.2d 695, 521 N.Y.S.2d 347 (3d Dep't 1987) (since seller did not give buyer clear, distinct and unequivocal notice providing reasonable time in which to tender performance under mortgage contingency clause, seller's attempted cancellation was ineffective and buyer was entitled to specific performance); Friend v. McGarry, 141 Misc.2d 479, 533 N.Y.S.2d 357 (Sup. Ct. N.Y. County 1988) (since time was not of the essence, adjournment of closing date to afford purchaser additional time to secure financing in compliance with loan contingency clause did not extinguish buyer's right to terminate under that clause). In light of these cases, DBAG's contention that the date set in a conditional termination clause for the satisfaction of a contingency is not subject to "time of the essence" principles is simply wrong.[4]

---

[4]The cases DBAG cites in support of its argument on this point hold that the conditional termination clauses in those cases were properly invoked; however, those cases do not even mention the "time of the essence" doctrine, much less hold that the doctrine is inapplicable to conditional termination clauses. See W.W.W. Assocs., Inc. v. Giancontieri, 77 N.Y.2d 157, 565 N.Y.S.2d 440, 566 N.E.2d 639 (1990); Cortesi v. R&D Constr. Corp., 73 N.Y.2d 836, 537

III. THE COURT BELOW PROPERLY DENIED DBAG'S MOTION TO RENEW BECAUSE DBAG DID NOT PRESENT ANY NEW OR ADDITIONAL FACTS JUSTIFYING RENEWAL

A motion for leave to renew must be based either on (1) new or additional facts which, although in existence at the time of the original motion, were not known to the party seeking renewal and, therefore, were not made known to the court, or (2) facts which were known at the time of the original motion, but were not then presented to the court, provided that the movant offers a reasonable explanation for the failure to submit such facts on the original application. E.g., Granato v. Waldbaum's, Inc., 289 A.D.2d 289, 734 N.Y.S.2d 498 (2d Dep't 2001); Oremland v. Miller Minutemen Constr. Corp., 133 A.D.2d 816, 520 N.Y.S.2d 397 (2d Dep't 1987). The only "new" matter that DBAG presented in its motion to renew/reargue was (1) Moray's failure to take any action to obtain the zoning variance between March 2002 and October 2002 and (2) Moray's failure to serve an amended complaint. (R. 15-16). However, as DBAG conceded that it learned of Moray's inaction with respect to the variance on October 26, 2002 (R. 15), this was clearly not

---

N.Y.S.2d 475, 534 N.E.2d 313 (1988); Lamont v. Story Book Homes, 288 A.D.2d 351, 734 N.Y.S.2d 94 (2d Dep't 2001); Koo v. Gross, 133 A.D.2d 613, 519 N.Y.S.2d 720 (2d Dep't 1987); Waskewich v. Redding, 97 A.D.2d 758, 468 N.Y.S.2d 178 (2d Dep't 1983); Zigman v. McMackin, 6 A.D.2d 907, 177 N.Y.S.2d 723 (2d Dep't 1958). Delta Properties, Inc. v. Fobare Enterprises, Inc., 251 A.D.2d 960, 960, 674 N.Y.S.2d 817, 818 (3d Dep't 1998), cited by DBAG in support of the proposition that "a party seeking specific performance must act diligently and in good faith under the subject contract" (Appellant's Brief, at p. 7) is inapposite because, in that case, the contingency clause was for the benefit of both parties and provided for automatic cancellation of the contract upon failure of the contingency, whereas in this case the contingency clause does not provide for automatic cancellation.

Furthermore, DBAG's attempt to distinguish the cases cited in Justice Nastasi's September 10, 2002 Order on the ground that those cases generally involved claims by buyers for the return of contract deposits, rather than claims for specific performance (Appellant's Brief, at p. 9), is misguided: the identity of the party seeking relief, and the type of relief sought, are irrelevant to the issue of the existence of a breach *vel non*.

information that was in existence but not known to DBAG when the original motion was made on June 13, 2002 (indeed, it was impossible for the fact of Moray's inaction from June 13, 2002 through October 26, 2002 to have been in existence at that time). The fact of Moray's failure to serve an amended complaint also was not in existence when the original motion was made on June 13, 2002. Therefore, the court below properly denied DBAG's motion to renew.

To the extent that this Court addresses the merits of DBAG's argument that Moray's failure to take any action between March 2002 and October 2002 to obtain the variance precludes it from obtaining specific performance (an issue raised only on the motion to renew/reargue), such an argument is meritless. Moray's right to judicial relief to enforce his rights under the Contract accrued when DBAG anticipatorily breached the Contract on March 13, 2002. See S.E.S. Importers, Inc. v. Pappalardo, 53 N.Y.2d 455, 463, 442 N.Y.S.2d 453, 457, 425 N.E.2d 841, 845 (1981). Once a contract has been breached, the non-breaching party is not required to tender its performance in order to be entitled to relief, since the law does not require futile acts. E.g., Lo Biondo v. D'Auria, 45 A.D.2d at 737, 256 N.Y.S.2d at 679 (since vendor had cancelled contract, there was no necessity for buyer to tender performance of zoning clause); Petrizzo v. Pinks, 154 A.D.2d at 521, 546 N.Y.S.2d at 142 (seller's unjustified cancellation of contract relieved buyer from tendering performance). Thus, since DBAG anticipatorily breached the contract by wrongfully declaring it cancelled, Moray was not obligated to perform the futile act of continuing to seek the variance called for in the contract before commencing this action for, *inter alia*, specific performance. See, e.g., Bauman v. Pinckney, 118 N.Y. 604, 23 N.E. 916 (1890); Spence v. Curry, 126 A.D.2d 632, 633, 511 N.Y.S.2d 69, 70 (2d Dep't 1987).

Moreover, as asserted in both the Verified Complaint and Moray's affidavit in opposition to

the June 13, 2002 motion, Moray remains ready, willing and able to obtain the variance. (R. 25, 65). Moray will be entitled to specific performance if he obtains the variance by the time of trial in this action. See, e.g., Judnick Realty Corp. v. 32 West 32nd St. Corp., 61 N.Y.2d 819, 473 N.Y.S.2d 954, 462 N.E.2d 131 (1984) (mem.) (purchaser entitled to specific performance where, after action was initiated and before summary judgment motion was made, tenant vacated premises, thus allowing seller to convey premises free of tenancies or occupancy, as called for in contract); S.E.S. Importers v. Pappalardo, 53 N.Y.2d at 465, 442 N.Y.S.2d at 459, 425 N.E.2d at 846 (trial judge properly ordered specific performance where seller obtained surrender of lease after action for specific performance was commenced, but before trial, and was therefore able to convey property without encumbrances, as called for in contract of sale); Downe v. Treadwell, 173 A.D.2d 673, 570 N.Y.S.2d 589 (2d Dep't 1991) (summary judgment granting specific performance proper where objections to title were removed before motion); Cohn v. Mezzacappa Bros., Inc., 155 A.D.2d 506, 547 N.Y.S.2d 367 (2d Dep't 1989) (specific performance should have been granted where objections to title were removed before summary judgment motion); Glauber v. P.S.F.B. Assocs., 89 A.D.2d 576, 452 N.Y.S.2d 234 (2d Dep't 1982) (where seller unilaterally cancelled contract, trial court properly awarded buyer specific performance because title defect was cured before trial). In this regard, we note that DBAG cannot frustrate Moray's entitlement to specific performance (by, for example, refusing to sign an amended application for a variance), but must cooperate with Moray's efforts to obtain the variance. See Wells v. Meader, 192 A.D.2d 827, 828-29, 596 N.Y.S.2d 506, 507-08 (3d Dep't 1993) (requiring defendant seller to facilitate buyer's obtaining a mortgage, and thus his satisfaction of contract's mortgage contingency clause, by allowing access to property for inspection and appraisal, and explaining that "[n]ot only does this result prevent opponents from frustrating a

proponent's specific performance rights by unilateral action, but it puts the parties back on equal footing."); Barnett v. Star Mech. Corp., 171 A.D.2d 142, 146, 574 N.Y.S.2d 844, 846-47 (3d Dep't 1991) (where seller breached contract, court directed seller to obtain marketable title with "due diligence" by obtaining discharge of mortgage, and thereafter convey property to buyer, who was entitled to specific performance).[5]

IV. THE APPEAL OF THAT PORTION OF THE DECEMBER 10, 2002 ORDER DENYING REARGUMENT SHOULD BE DISMISSED BECAUSE THE DENIAL OF A MOTION FOR REARGUMENT IS NOT APPEALABLE

Insofar as the December 10, 2002 Order denied that part of DBAG's October 23, 2002 motion seeking reargument, it is not appealable. N.Y. Civ. Prac. L. & R. §5701(a)(2)(viii); see also, e.g., Lopez v. Lincoln Appliances, Bedding & Furniture, ___ A.D.2d ___, 751 N.Y.S.2d 556 (2d Dep't 2002) (dismissing appeal because, *inter alia*, denial of motion to reargue is not appealable). Therefore, that portion of the Appeal which seeks reversal of that portion of the December 10, 2002

---

[5]Because DBAG still holds title to the Property and can convey it to Moray, there is no basis for its argument that specific performance is unavailable because it is legally impossible (compare Appellant's Brief, at p.8).

Furthermore, although specific performance of a contract may not be granted where a non-party's consent is necessary to fulfill a contingency in the contract, and the non-party has refused to give such consent (thus making performance impossible), Nalitt v. City of New York, 163 A.D.2d 373, 557 N.Y.S.2d 934 (2d Dep't 1990), does not mandate dismissal of Moray's specific performance claim. In Nalitt, the contract of sale provided, as a condition precedent to closing, that the Inspector General of the City of New York "'shall have raised no objections in connection with the transfer of the Property to the Purchaser.'" Id. at 374, 557 N.Y.S.2d 935. The court held that the City properly terminated the contract because the Inspector General had objected to the sale, based on findings by the Department of Investigation that the sale violated five conflict of interest provisions of the New York City Charter and by the New York City Board of Ethics that the borough president had improperly used his influence in the City's land disposition process. Id. at 374-75, 557 N.Y.S.2d at 935-36. Here, by contrast, it is still possible for Moray to cure the defects identified in the Yonkers Department of Housing & Building's denial letter, and thus obtain the variance called for in the Contract (*i.e.*, the third party's consent) (see R. 40, 65).

Order denying Defendant-Respondent's motion to reargue should be dismissed.[6]

CONCLUSION

For all the foregoing reasons,

(1) the September 10, 2002 Order of the Court below should be modified by striking that portion directing Plaintiff-Respondent to serve an amended complaint and, as so modified, affirmed; and

(2) the December 10, 2002 Order of the Court below should be affirmed; and

(3) this Court should enter an order granting partial summary judgment to Plaintiff-Respondent declaring that Defendant-Appellant breached the Contract, and remitting the matter to the court below for a determination of Plaintiff-Respondent's entitlement to specific performance or, in the alternative, money damages; and

---

[6]To the extent that the court's holding that DBAG failed to establish that the court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law can be construed to indicate that the court below granted DBAG's motion for leave to reargue and, upon reargument, adhered to its prior determination, that determination is correct for the reasons set forth in Points II and III, *supra*.

(4) this Court should assess costs on this appeal against Defendant-Appellant and in favor of Plaintiff-Respondent.

Dated: New York, New York
March 11, 2003

LUBELL & KOVEN

By:_____
Arthur Lubell

Attorneys for Plaintiff-Respondent
350 Fifth Avenue, Suite 7610
New York, New York 10118
(212) 736-7432

Of Counsel
Lisa Solomon, Esq.