SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
--X
MFP 933 Broadway LP,

Plaintiff,

-against-

933 Broadway, LLC and Old Republic National Title Insurance Company, in its capacity as escrow agent,

Defendants.
--X

Index No. 651879/2020

NOTICE OF ENTRY

Motion Sequence Numbers 004

PLEASE TAKE NOTICE that the within is a true copy of a Decision & Order entered in the office of the clerk of the within named Court, at the courthouse thereof, located at 60 Centre Street, New York, New York on September 1, 2021.

Dated: Whitestone, New York
September 9, 2021

Borchert & LaSpina, P.C.

By: */s/ Robert W. Frommer*
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **IAS MOTION 38EFM**

Justice

---X

MFP 933 BROADWAY LP, Plaintiff,	**INDEX NO.**	651879/2020
- v -	**MOTION DATE**	N/A, N/A
933 BROADWAY, LLC, and OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY, in its capacity as escrow agent, Defendants.	**MOTION SEQ. NO.**	002, 004

---X

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers (Motion 002) 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 72, 73, 74, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 115, and 131

were read on this motion for SUMMARY JUDGMENT .

The following e-filed documents, listed by NYSCEF document numbers (Motion 004) 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, and 130

were read on this motion for SUMMARY JUDGMENT .

LOUIS L. NOCK, J.

Motion sequence nos. 002 and 004 are consolidated for disposition. In motion sequence no. 002, defendant 933 Broadway, LLC ("933") moves, pursuant to CPLR 3212, for summary judgment on its counterclaims against plaintiff MFP 933 Broadway LP ("MFP"), dismissal of the complaint with prejudice, a declaration that 933 is entitled to receive funds held in escrow, and for an order severing its third counterclaim for attorneys' fees. MFP cross-moves, pursuant to CPLR 3212, for summary judgment on the complaint against 933, dismissal of the counterclaims, an order directing a return of its deposit, and an award of its attorneys' fees, costs and disbursements. In motion sequence no. 004, defendant Old Republic National Title

Insurance Company ("Old Republic") moves, pursuant to CPLR 3212, for summary judgment on its cross claim against 933.

BACKGROUND

Defendant 933 owns a commercial building located at 929-933 Broadway, New York, New York (the "Building") (NYSCEF Doc No. 41, Jordan Mautner [Mautner] affirmation, exhibit A at 5). On March 11, 2020, 933, as "Seller," and MFP, as "Purchaser," entered into a Real Estate Purchase and Sale Agreement (the "PSA") whereby 933 agreed to sell and MFP agreed to purchase the Building for a purchase price of $23.75 million (*id.* at 2). The PSA designated Old Republic as the escrow agent (*id.* at 3). On March 12, 2020, MFP wired a deposit of $1,187,500 (the "Deposit") to Old Republic (NYSCEF Doc No. 58, Joseph Lee Matalon [Matalon] affirmation, exhibit A, ¶ 12; NYSCEF Doc No. 79, Ivaylo V. Ninov [Ninov] aff. ¶ 2).

The PSA set the closing date (the "Closing Date") at "Sixty (60) days after the Effective Date, subject to Purchaser's rights to adjourn the Closing Date one or more times in accordance with Section 3(b) of the Agreement and any other express adjournment rights set forth in the Agreement, with TIME BEING OF THE ESSENCE as against Purchaser" (NYSCEF Doc No. 41 at 2). The "Effective Date" is the date the PSA was made and entered – March 11, 2020 (*id.* at 5) – thereby making May 10, 2020, the Closing Date. Because May 10, 2020, fell on a Sunday, the Closing Date was extended to the next business day, or May 11, 2020 (*id.* at 36 [Section 21(i)]). Section 3(b) grants MFP the right to adjourn the closing for two 30-day periods, provided it furnishes 933 with written notice and pays an additional deposit for each adjournment (*id.* at 7-8).

When the parties executed the PSA, four tenants occupied the Building under separate leases with 933: Flatiron Wines, Inc. ("Flatiron"); PQ 933 Broadway, Inc. d/b/a Le Pain Quotidien ("LPQ"); Godiva Chocolatier Inc. ("Godiva"); and Peter Manning LLC ("PML") (*id.* at 44). Section 6(a) of the PSA sets forth 933's representations and warranties "as of the date hereof," which include certain representations about the four tenancies, and states, in relevant part:

> "**(ix)** Seller has not given any written notice to any Tenant under any Lease of a default which remains uncured, nor is there, to Seller's Knowledge, any fact or circumstance which, with or without notice or the passage of time, or both would constitute a default of any Tenant under its Lease"

(*Id.* at 14.) Section 6 (c) further provides:

> "**(c)** The representations and warranties of Seller contained in this **Section 6** shall be deemed modified and amended to correspond to (i) the information in any reports or other materials provided to Purchaser by or on behalf of Seller prior to the Effective Date … and (ii) any other information known to or learned by Purchaser in connection with its due diligence investigation of the Property or otherwise, or (iii) any changed facts or circumstances not within Seller's reasonable control, but subject to the other provisions of this Agreement . . . The provisions of this Section 6(c) shall survive the Closing.
>
> . . .
>
> **(e)** The representations and warranties of Seller contained in this Agreement, as updated at Closing in Seller's Representations Update, shall survive the Closing for one hundred twenty (120) days following the Closing Date (the 'Limitation Period')"

(*Id.* at 18.)

Section 7 details 933's covenants from the Effective Date to the Closing Date. Relevant herein is Section 7 (a)(xiv), which discusses tenant estoppel certificates (the "Tenant Estoppels") and requires 933 to:

> "**(xiv)** request from each Tenant under each of the Leases, and use commercially reasonable efforts to obtain and deliver to Purchaser,

> an estoppel certificate in the form attached hereto as **Exhibit L** or in another form that is either set forth in the applicable Lease, or which contains the minimum information required to be provided by the Tenant . . . which (i) contains information which is consistent with the subject Lease, (ii) does not disclose any fact which contradicts representations and warranties made by Seller herein, (iii) is addressed to Purchaser and Purchaser's lender, (iv) does not disclose any default by Seller under the subject Lease (except with respect to a Seller default that can be cured by the payment of money and Seller agrees in writing to pay such amount or credit such amount to Purchaser at Closing), (v) indicates that the subject Lease is in full force and effect, and (vi) is addressed to Purchaser and provides that it may be relied upon by Purchaser and any entity providing financing to Purchaser (each, a '**Tenant Estoppel'**). Seller shall promptly, and in any event within five (5) business days after receipt thereof, deliver to Purchaser a true, correct and complete copy of any Tenant Estoppel received . . . "

(*Id.* at 21.) Section 7(a)(xv) also provides that the Tenant Estoppels shall be deemed acceptable even if the tenants modify language on the certificates (*id.* at 21). The subsection partially reads:

> "In the event Seller is unable to obtain the Tenant Estoppels and Purchaser does not waive the requirement of receiving such Tenant Estoppels as a condition of Closing, Seller may, by written notice to Purchaser, elect to extend the Closing Date for a period not to exceed sixty (60) days, during which time Seller shall continue to use commercially reasonable efforts to obtain the Tenant Estoppels. Purchaser acknowledges and agrees that if, any Tenant fails to deliver a Tenant Estoppel, the same shall constitute a failure of a condition to Purchaser's obligation to close in accordance with this Agreement and Purchaser shall not have any remedies against Seller except that Purchaser shall have the right to terminate this Agreement and receive the return of the Deposit"

(*Id.* at 21-22.) Section 7 also sets forth MFP's closing obligations, and states, in part:

> "**(c)** The obligation of Purchaser to consummate the transaction which is the subject of this Agreement is and will be subject to the fulfillment on or before the Closing Date of all of the following conditions, any or all of which may be waived by Purchaser in its sole discretion:
>
> > **(i)** Seller shall have delivered to Purchaser, at least two (2) business days prior to the Closing Date, a Tenant Estoppel from each Tenant under each of the Leases listed on Schedule 1(c);

. . .

> **(iv)** Seller's Representations Update shall not contain any information: (x) which indicates that any of Seller's representations and warranties set forth in this Agreement were not true and correct in all material respects as of the Effective Date, (y) which indicates a breach of any of Seller's covenants or obligations contained in this Agreement, or (z) which was not disclosed to Purchaser prior to the Effective Date and indicates that any of Seller's representations and warranties set forth in this Agreement are not true and correct in all material respects (i) as of the Effective Date; and (ii) as to the representations set forth in the following subsections of Section 6(a) of this Agreement, as of the Closing Date: (i), (ii), (iii), (iv), (v), (vi), (vii), (ix) (subject to any applicable updates), (x) (subject to any reduction as permitted by the applicable Lease between the Effective Date and Closing), (xi) (subject to any applicable updates), (xiii), (xiv), (xv) (subject to any applicable updates), (xvii) (subject to any applicable updates), (xviii) (subject to any applicable updates), (xix), (xx), (xxi), (xxii) and (xxv)"

(*Id.* at 22-23.) 933 also agreed to furnish a certificate on the Closing Date stating that its representations and warranties "were true and correct in all material respects as of the Effective Date, and, only with respect to the subsections of **Section 6(a)** hereof described in **Section 7(c)(iv)** above, as of the Closing Date, except as otherwise set forth with reasonable specificity in such certificate (**'Seller's Representations Update'**)" (*id.* at 24 [Section 8(a)(v)]).

If 933 defaults on its obligation to convey title at the closing in the condition required under the PSA, then MFP may seek specific performance or receive a return of the Deposit (*id.* at 31 [Section 14(a)]). If MFP defaults on paying the purchase price or on its contractual obligations, 933's "sole remedy . . . shall be to terminate this Agreement, and upon such termination, Seller shall be entitled to retain the Deposit as liquidated damages" (*id.* [Section 14(b)]). The successful party in any litigation brought by MFP or 933 on the PSA may recover its expenses, including attorneys' fees, costs and disbursements (*id.* at 35 [Section 21(f)]). In addition, in the event of a dispute between MFP and 933, Old Republic may "take such

reasonable affirmative steps as it may, at its option, elect in order to terminate its duties as Escrow Agent, including, without limitation, the depositing of the Deposit with a court of competent jurisdiction and the commencement of an action for interpleader, the costs thereof to be borne by whichever of Seller or Purchaser is the losing party" (NYSCEF Doc No. 41 at 42-43 [Section 23(c)]).

On May 5, 2020, 933's counsel delivered Flatiron's Tenant Estoppel to MFP (NYSCEF Doc No. 40, Mautner affirmation, ¶¶ 1, 20; NYSCEF Doc No. 47, Mautner affirmation, exhibit G at 1). No other certificates were exchanged. That same day, MFP's counsel wrote to 933's counsel expressing his concern that 933 would be unable to meet its contractual obligation to make truthful representations and warranties as of the Closing Date (NYSCEF Doc No. 48, Mautner affirmation, exhibit H at 1). MFP's counsel wrote that "Section 6(a)(ix) … states that 'nor is there, to Seller's knowledge, any fact or circumstance which, with or without notice or the passage of time, or both would constitute a default of any Tenant under its Lease'" (*id.*). MFP had learned that LPQ intended to file for bankruptcy and that LPQ had "a specific intent to reject this particular lease"[1] (*id.* at 1-2). Additionally, Godiva had informed 933 on April 8, 2020, that it would cease paying rent (NYSCEF Doc No. 48 at 2; NYSCEF Doc No. 82, Ninov aff, exhibit C at 5). Counsel requested a written explanation as to why 933 did not agree with MFP's assessment and explained that it was not repudiating the PSA as its concerns were limited to 933's potential inability to close (NYSCEF Doc No. 48 at 2).

Mautner, 933's transaction counsel, affirms that in a May 5, 2020, telephone conversation, MFP's counsel indicated that MFP did not wish to close and sought a return of its Deposit (NYSCEF Doc No. 40, ¶¶ 1 and 21). Ninov, Chief Financial Officer and a Director of

[1] MFP supplied a link to an online New York Post article detailing LPW's plans.

MFP's general partner, Mactaggart Family & Partners Ltd., avers that the call took place on May 6, 2020, and that a verbal request was made of 933 to explain in writing whether it could close (NYSCEF Doc No. 79, ¶ 9). 933 did not furnish MFP with a written explanation (*id.*).

By letter dated May 7, 2020, and emailed at 1:56 p.m., MFP's counsel informed 933's counsel that the 9 a.m. deadline for delivering the Tenant Estoppels two business days before the Closing Date had passed that morning, and that MFP had not waived this requirement (NYSCEF Doc No. 50, Mautner affirmation, exhibit J [the "May 7 Letter"] at 1-2). Counsel further indicated that 933's failure to deliver the certificates constituted a failure of a condition to MFP's obligation to close (*id.*). Since 933 failed to serve MFP with a written notice extending the Closing Date under Section 7(a)(xv), MFP elected to exercise its right to terminate the PSA (*id.*).

933's counsel responded to MFP's "anticipatory repudiation" by letter on May 8, 2020 (NYSCEF Doc No. 52, Mautner affirmation, exhibit L at 1). Counsel rejected the contention that the Tenant Estoppels had to have been delivered by 9 a.m. on May 7, 2020, and, citing General Construction Law § 19, claimed that 933 had until midnight on May 7 to perform (*id.*). Counsel also indicated that MFP's premature termination precluded 933 from exercising its right to extend the Closing Date (*id.* at 2). In addition, the PSA did not condition MFP's obligation to close upon a re-certification that no Building tenant was not in default at the time of the closing because that representation was subject to applicable updates under Section 7(c)(iv) (*id.*).

In a reply letter dated May 15, 2020, MFP's counsel denied repudiating the PSA and claimed that 933 had repudiated the contract based on its failure to produce the Tenant Estoppels timely (NYSCEF Doc No. 53, Mautner affirmation, exhibit M at 2). Counsel also rejected the contention that a business day began at midnight (*id.* at 2), and stated that, under 933's view, 933 should have exchanged the certificates by midnight the night before May 7, 2020 (*id.* at 3).

Both MFP and 933 have sought a release of the Deposit from Old Republic (NYSCEF Doc No. 87, affirmation, exhibit at 1; NYSCEF Doc No. 51, Mautner affirmation, exhibit at 3; NYSCEF Doc No. 89, Ninov aff, exhibit at 1).

PROCEDURAL HISTORY

MFP commenced this action against 933 and Old Republic by filing a summons and complaint asserting three causes of action for judgments declaring that: (1) the PSA was terminated under Section 7(a)(xv); (2) the PSA was terminated under Section 14 (a); and (3) MFP is entitled to recover its attorneys' fees, costs and disbursements from 933. I n its answer, 933 interposed three counterclaims for: (1) breach of contract; (2) a judgment declaring that 933 is entitled to recover the Deposit; and (3) for its attorneys' fees, costs and disbursements from MFP. Old Republic interposed an interpleader counterclaim and cross claim and seeks to recover its attorneys' fees, costs and disbursements. This court has granted Old Republic summary judgment on its counterclaim against MFP (NYSCEF Doc No. 132). 933 now moves and MFP cross-moves for summary judgment on the complaint and counterclaims. Old Republic moves for summary judgment on its cross claim against 933.

DISCUSSION

A party moving for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant fails to meet its prima facie burden, the motion must be denied without regard to the sufficiency of the opposing papers (*see Pullman v Silverman*, 28 NY3d 1060, 1063 [2016]).

CPLR 3001 provides, in part, that the "court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." A declaratory judgment action requires an actual controversy (*see Long Is. Light. Co. v Allianz Underwriters Ins. Co.*, 35 AD3d 253, 253 [1st Dept 2006], *appeal dismissed* 9 NY3d 1003 [2007]). Relief is limited to a declaration of the parties' legal rights based on the facts presented (*see Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 100 [1st Dept 2009], *lv denied* 15 NY3d 703 [2010]).

A. MFP's First Cause of Action

The first cause of action seeks a declaration that MFP properly terminated the PSA under Section 7(a)(xv) based on 933's failure to deliver timely Tenant Estoppels or deliver notice of its election to extend the Closing Date. At issue is construction of the phrase "at least two (2) business days prior to the Closing Date" in Section 7(c)(i). MFP argues that two business days before the May 11, 2020, Closing Date fell on May 6, 2020. Because 933 failed to furnish the Tenant Estoppels by midnight on May 6, MFP maintains that it was entitled to terminate the PSA. 933 argues that, pursuant to General Construction Law §§ 19 and 20, the second business day before the Closing Date was May 7, 2020, and that it had until midnight on May 7 to exchange the certificates or seek an extension of the Closing Date. MFP and 933 also dispute whether the Tenant Estoppels had to disclose that a tenant was in default on its respective lease.

It is well established that "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). An agreement is unambiguous "if the language it uses has 'a definite and precise meaning, unattended by danger of misconception in the purport of the

[agreement] itself, and concerning which there is no reasonable basis for a difference of opinion'" (*id.* [internal citation omitted]). An agreement is ambiguous if "specific language is 'susceptible of two reasonable interpretations'" (*Georgia Malone & Co., Inc. v E&M Assoc.*, 163 AD3d 176, 185 [1st Dept 2018] [internal citation omitted). That said, "a contract is not rendered ambiguous just because one of the parties attaches a different, subjective meaning to one of its terms" (*Moore v Kopel*, 237 AD2d 124, 125 [1st Dept 1997]).

Pursuant to General Construction Law § 19, "[a] calendar day includes the time from midnight to midnight." General Construction Law § 20 also provides, in relevant part:

> "A number of days specified as a period from a certain day within which or after or before which an act is authorized or required to be done means such number of calendar days exclusive of the calendar day from which the reckoning is made. If such period is a period of two days, Saturday, Sunday or a public holiday must be excluded from the reckoning if it is an intervening day between the day from which the reckoning is made and the last day of the period."

If the last day for performance falls on a weekend or public holiday, the statute extends the day for performance to the next business day (*see Matter of City of Albany v Newman*, 181 AD2d 953, 955 [3d Dept 1992]). General Construction Law § 20 applies to statutes and contracts (*see Messina v Lufthansa German Airlines*, 47 NY2d 111, 115 [1979], *rearg denied* 47 NY2d 1012 [1979], *mot to amend remittitur denied* 48 NY2d 976 [1979]).

Applying these precepts, 933 has demonstrated that May 7, 2020, was the last business day on which it could timely deliver the Tenant Estoppels. First, the phrase "at least two (2) business days prior to the Closing Date" in Section 7(c)(i) is clear and unambiguous. Working backwards from the Closing Date, which is excluded (*see* General Construction Law § 20), two calendar days from May 11, 2020 is May 9, a Saturday. However, "the law has recognized the difference between a calendar day and business day" (*Jesa Med. Supply, Inc. v American Tr. Ins.*

Co., 28 Misc 3d 827, 828 [Civ Ct, Kings County 2010], *citing Miuccio v Puppy City, Inc.*, 22 Misc 3d 1132[A] [Civ Ct, Richmond County 2009]). A business day is "any calendar day excluding Saturday, Sunday and legal holidays" (*Jesa Med. Supply, Inc.*, 28 Misc 3d at 829 [discussing business days in an action seeking first-party no-fault benefits]; *see also* Black's Law Dictionary [11th ed 2019], day [Note: online version] [defining "business day" as "[a] day that most institutions are open for business, usu. a day on which banks and major stock exchanges are open, excluding Saturdays, Sundays, and certain major holidays"]). This makes Friday, May 8, the first business day before the Closing Date. Thus, the second business day before the Closing Date was Thursday, May 7, not Wednesday, May 6.

MFP fails to raise a triable issue of fact in opposition. Construing the phrase "(2) business days prior to the Closing Date" to mean two full 24-hour periods preceding midnight on May 8, 2020, as MFP contends, would render Section 7(c)(i) meaningless, which is impermissible (*see 150 Broadway N.Y. Assocs., L.P. v Bodner*, 14 AD3d 1, 6 [1st Dept 2004]). Moreover, *Messina v Lufthansa German Airlines* (47 NY2d 111 [1979]) is distinguishable, as that case dealt with calendar days, not business days. In any event, the *Messina* Court's method for calculating whether a written notice was timely does not support MFP's position that the Tenant Estoppels were due by May 6. In *Messina*, the plaintiff's 60-day probationary employment period ran from September 22 to November 20, 1975 (*id.* at 114). The defendant employer could extend this period if it furnished the plaintiff with written notice "ten (10) days before the expiration of the first sixty (60) days of employment" (*id.*). The Court reasoned that the first 60 days of employment expired at midnight on November 20, 1975, and excluded it from its calculation (*id.* at 116). Since November 19 was the first day before November 20, then November 10 was the tenth day before the November 20 expiration (*id.*). The Court concluded

that the defendant's written notice on November 11, 1975, was untimely (*id.*). Applying the reasoning in *Messina* and General Construction Law § 20 here, two business days prior to the May 11 Closing Date means May 7, 2020.

Furthermore, the court "'may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing'" (*Vermont Teddy Bear Co. v 538 Madison Realty Co*., 1 NY3d 470, 475 [2004] [internal citation omitted]). Had the parties elected to require delivery of the Tenant Estoppels more than two business before the Closing Date, they could have expressed that intention, but they did not. Otherwise, nothing in the phrase "at least (2) business days prior to the Closing Date" supports such an interpretation.

In its May 7 Letter, MFP also claimed that 933 would have been unable to obtain Tenant Estoppels from Godiva and LPQ in conformity with Section 7(a)(xiv) because that subsection required the tenant to certify that it is not in default of its lease. Because Godiva and LPQ were or would have been in default of their respective leases on the Closing Date, MFP maintains that it would have been impossible for 933 to deliver proper Tenant Estoppels. 933 counters that the Tenant Estoppels must disclose whether 933, not the tenant, was in default, and that nothing in any of the leases required the tenants to certify whether they were in default.

Here, MFP has failed to demonstrate that each tenant was obligated to certify whether it was in default in an estoppel certificate. As stated above, Section 7(a)(xiv) specifies that a Tenant Estoppel shall "not disclose any default by Seller under the subject Lease (except with respect to a Seller default that can be cured by the payment of money and Seller agrees in writing to pay such amount or credit such amount to Purchaser at Closing)" (NYSCEF Doc No. 41 at 21). Critically, this provision does not expressly require a tenant to certify its own default.

Section 7(a)(xiv), though, also states that an estoppel certificate may take the form of Exhibit L attached to the PSA (*id.*), and Paragraph 3 of the "Form of Tenant Estoppel" provides that "[n]o default exists under the Lease on the part of the Tenant" (*id.* at 79). Notwithstanding the language in Exhibit L, 933 was not obligated to furnish a Tenant Estoppel in that form. Section 7(a)(xv) explains that a tenant may furnish less information in a Tenant Estoppel if its lease so states, provided that the certificate contains the minimum information described in Section 7(a)(xiv). The relevant portion of Section 7(a)(xv) reads:

> "A Tenant Estoppel shall be deemed to be acceptable to Purchaser and satisfy the required form of Tenant Estoppel notwithstanding the fact that the Tenant modifies the form of certificate delivered to the Tenant to . . . (B) make note of items which constitute Permitted Exceptions or defaults of Seller (notwithstanding subsection (iii) above that Seller otherwise agrees to cure and so cures prior to Closing, (C) conform the same to the applicable Lease or other information delivered to Purchaser prior to the Effective Date . . . and/or (E) limit to 'Tenant's knowledge' (or words of similar import) the Tenant's statements as to (1) defaults on the part of Seller or such Tenant . . . For avoidance of doubt, if a Tenant is required or permitted under the terms of its Lease to provide less information or to otherwise make different statements in a certification of such nature than are set forth in this Section 7(a)(xiv) or on the form described in Exhibit L, then Purchaser shall accept any modifications made to such form of estoppel certificate to the extent that such modifications to the form are consistent with the minimum requirements set forth in the applicable Lease, it being understood by Purchaser that a Tenant shall not be required to make any certifications not specifically enumerated in the applicable Lease estoppel requirements even if the applicable Lease requires the Tenant to certify to any additional items 'reasonably requested'."

(NYSCEF Doc No. 41 at 21.) An examination of 933's leases with Flatiron, LPQ, Godiva and PML reveals that none of the leases required the tenant to certify whether it was in default. Section 17.1 in the leases for Flatiron and LPQ reads as follows:

> "Tenant shall, upon not less than ten (10) days' prior notice, execute, acknowledge and deliver to Landlord a statement (a) certifying that this Lease is unmodified and in full force and effect (or if there have

> been modifications, that the same is in full force and effect as modified and stating the modifications), (b) certifying the dates to which the Rent has been paid in advance, (c) stating whether or not to the best knowledge of Tenant, Landlord is in default under this Lease, and if so, specifying such default and/or (d) certifying to such other matters with respect to this Lease as may be reasonably requested"

(NYSCEF Doc No. 42, Mautner affirmation, exhibit B at 41; NYSCEF Doc No. 44, Mautner affirmation, exhibit D at 49.) The same clause appears in Godiva's lease, except the clause also states that "[a]ny such certificate may be relied upon by any third party, prospective purchaser or mortgagee of the Premises or any part thereof" (NYSCEF Doc No. 43, Mautner affirmation, exhibit C at 39). PML's lease contains a similar clause in Section 13(D), which reads, in part:

> "From time to time, Tenant, on ten (10) days' prior written request by Landlord, will deliver to Landlord and the holder of any Superior Interest a statement in writing certifying that this Lease is unmodified and is in full force and effect (or if there have been modifications, that the same is in full force and effect as modified and stating the modifications) and the dates to which the rent and other charges have been paid, stating the date of expiration of the term hereof and whether any renewal options exists (and if so, the terms thereof), stating whether any defense or counterclaim to the payment of any rent exists, whether any allowance or work is due to Tenant from Landlord, stating whether or not the Landlord is in default in performance of any covenant, agreement or condition contained in this Lease and, if so, specifying each such default of which Tenant may have knowledge and containing such other information as the holder of any Superior Interest may request"

(NYSCEF Doc No. 45, Mautner affirmation, exhibit C at 30-31.) Hence, MFP's position that each tenant was required to certify that it was not in default on an estoppel certificate is not supported.

Last, MFP contends that the motion should be held in abeyance under CPLR 3212(f). A party seeking relief under CPLR 3212(f) "'must demonstrate that the needed proof is within the exclusive knowledge of the moving party, that the claims in opposition are supported by

something other than mere hope or conjecture, and that the party has made at least some attempt to discover facts at variance with the moving party's proof'" (*River Park Assoc. (1972) L.P. v Richman Plaza Garage Corp.*, 178 AD3d 422, 423 [1st Dept 2019], quoting *Voluto Ventures, LLC v Jenkins & Gilchrist Parker Chapin LLP*, 44 AD3d 557, 557 [1st Dept 2007]). "The 'mere hope that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient' to deny such a motion" (*Tavarez v Castillo Herrasme*, 140 AD3d 453, 454 [1st Dept 2016] [internal citation omitted]).

MFP submits that additional discovery may yield additional defenses that could preclude summary judgment. It asserts that 933's document exchanges are deficient, particularly with respect to its correspondence with its tenants on the Tenant Estoppels. MFP's allegation that discovery may be needed, though, is not sufficiently specific especially where, as here, none of 933's tenants were obligated to certify their defaults on a Tenant Estoppel. And while MFP submits that each lease contains an "open-ended requirement to 'certify[ ] to such other matters with respect to this Lease as may be reasonably requested'" (NYSCEF Doc No. 78, MFP mem of law at 18), Section 7(a)(xv) of the PSA plainly states that MFP understands that "a Tenant shall not be required to make any certifications not specifically enumerated in the applicable Lease estoppel requirements even if the applicable Lease requires the Tenant to certify to any additional items 'reasonably requested'" (NYSCEF Doc No. 41 at 21). As such, MFP has failed to demonstrate that the motion should be denied or held in abeyance under CPLR 3212(f) (*see Chern v Leclerc*, 191 AD3d 591, 591 [1st Dept 2021]). Since MFP has failed to establish that its termination of the PSA under Section 7(a)(xv) was permissible, 933's motion for summary judgment dismissing the first cause of action is granted, and MFP's cross motion on this cause of action is denied.

B. MFP's Second Cause of Action

The second cause of action seeks a judgment declaring that MFP properly terminated the PSA under Section 14(a). The complaint alleges that 933's knowledge of Godiva's ongoing default and LPQ's bankruptcy rendered 933 "incapable of making truthful representations and warranties on the Closing Date that Seller was not aware of any fact or circumstance which, with or without notice or the passage of time, or both would constitute a default of any Tenant under its lease with Seller" (NYSCEF Doc No. 58, ¶ 78). MFP submits that 933 was obligated to certify at the closing that no tenant was in default. 933 counters that its representation regarding tenant defaults was subject to an update.

Sections 6(a)(ix), 6(c), 7(c)(iv) and 8(a)(v) are all interrelated as they discuss 933's warranties and representations. Pursuant to Section 6(a)(ix), 933 represents that as of the Effective Date, "Seller has not given any written notice to any Tenant under any Lease of a default which remains uncured, nor is there, to Seller's Knowledge, any fact or circumstance which, with or without notice or the passage of time, or both would constitute a default of any Tenant under its Lease" (NYSCEF Doc No. 41 at 14). Section 6(c) provides that 933's representations "shall be deemed modified and amended to correspond to . . . (iii) any changed facts or circumstances not within Seller's reasonable control" (*id.* at 18). Under Sections 7(c)(iv) and 8(a)(v), only certain representations made by 933 must be true and accurate as of the Closing Date, with the representation in Section 6(a)(ix) subject to any applicable updates. The form template for the Seller's Representations Update found in Exhibit H to the PSA repeats that the representation in Section 6(a)(ix) is subject to any applicable updates (*id.* at 73).

Here, 933 has demonstrated that it was not obligated to certify that no tenant was in default as of the Closing Date. Sections 6(a)(ix), 6(c), 7(c)(iv) and 8(a)(v), when read together,

plainly allow 933 to update that representation as of the Closing Date. MFP fails to raise a triable issue of fact regarding this issue. First, MFP does not challenge 933's representation that neither Godiva nor LPQ were in default of their respective leases as of the Effective Date. Similarly, MFP does not contest that Godiva's and LPQ's defaults arose after the Effective Date, as evidenced by MFP's own proof. Godiva's April 8, 2020 letter stated that "the extraordinary events of the COVID-19 pandemic have greatly impacted GODIVA financially and forced our company to provisionally stop the payment of rent, storage, CAM, taxes and additional charges under all lease agreements" (NYSCEF Doc No. 82 at 5). A New York Post article dated April 14, 2020, reported that LPQ had closed all of its locations due to the coronavirus pandemic, that LPQ intended to file bankruptcy and that LPQ had identified five of its Manhattan locations that would close (NYSCEF Doc No. 83, Ninov aff, exhibit D at 1). The article, though, did not report that LPQ's location at the Building was slated for permanent closure (NYSCEF Doc No. 83, Ninov aff, exhibit D at 1). LPQ subsequently filed for Chapter 11 Bankruptcy on May 27, 2020 (NYSCEF Doc No. 92, Ninov aff, exhibit M), more than two weeks after the Closing Date, and an interim order dated May 28, 2020, granted LPQ's motion to "reject[ ], on an interim basis, effective *nunc pro tunc* to the Petition Date[,]" LPQ's lease with 933 (NYSCEF Doc No. 93, Ninov aff, exhibit N at 2 and 9). Likewise, MFP does not contest that Godiva's and LPQ's defaults are events outside of 933's reasonable control. As such, MFP has failed to demonstrate a default on the part of 933 that would have entitled it to terminate the PSA under Section 14(a). 933's motion for summary judgment dismissing the second cause of action is granted, and MFP's cross motion on this same cause of action is denied.

C. 933's First Counterclaim

As a first counterclaim, 933 alleges a cause of action for breach of contract predicated upon MFP's repudiation of the PSA. On this motion, 933 argues that MFP's premature termination of the PSA constitutes an anticipatory repudiation of the parties' contract. MFP contends that it did not repudiate the PSA because it invoked its right to terminate it.

A cause of action for breach of contract requires the existence of a contract, the plaintiff's performance, a defendant's breach, and damages (*see Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). "'An anticipatory breach of contract by a promisor is a repudiation of [a] contractual duty before the time fixed in the contract for . . . performance has arrived'" (*Princes Point LLC v Muss Dev. L.L.C.*, 30 NY3d 127, 133 [2017] [internal citation omitted]). "An anticipatory breach of a contract – also known as an anticipatory repudiation – 'can be . . . a voluntary affirmative act which renders the obligor unable or apparently unable to perform without such a breach'" (*id.* [internal citation omitted]). The repudiator's "expression of intent not to perform . . . must be 'positive and unequivocal'" (*id.* [internal citation omitted]). An anticipatory repudiation relieves the nonrepudiating party of having to tender its performance or show its ability to perform in the future (*see American List Corp. v U.S. News & World Report*, 75 NY2d 38, 44 [1989]; *Computer Possibilities Unlimited v Mobil Oil Corp.*, 301 AD2d 70, 77 [1st Dept 2002], *lv denied* 100 NY2d 504 [2003] [collecting cases]). The nonrepudiating party may pursue damages for breach of contract or proceed with the contract as if it was valid (*see Princes Point LLC*, 30 NY3d at 133).

Applying these precepts, 933 has established that MFP unilaterally breached the PSA by terminating it without affording 933 an opportunity to seek an extension of the Closing Date, as was permissible under Section 7(a)(xv) (*see Tesmer Bldrs. v Cimato*, 217 AD2d 953, 954 [4th

Dept 1995], *lv denied* 87 NY2d 810 [1996] [finding that the purchaser's unilateral rescission of the contract constituted an anticipatory breach]; *MK W. St. Co. v Meridien Hotels*, 184 AD2d 312, 313 [1st Dept 1992] [concluding that the defendant's unconditional letter of termination, which did not afford the plaintiff an opportunity to cure, constituted a repudiation]). In the May 7 Letter, MFP's counsel wrote that "our client hereby exercises its 'right to terminate [the PSA] and receive the return of the Deposit'" (NYSCEF Doc No. 50 at 3). This statement clearly and unequivocally expresses MFP's intent not to perform (*see Jacobs Private Equity, LLC v 450 Park, LLC*, 22 AD3d 347, 347 [1st Dept 2005], *lv denied* 6 NY3d 703 [2006] [dismissing a cause of action for repudiation where the complaint failed to allege "a definite and final communication by defendant . . . of its intention to forgo its obligations under the [contract]"]). Crucially, MFP was not in breach of the PSA when it sent the May 7 Letter (*see Kaplan v Madison Park Group Owners, LLC*, 94 AD3d 616, 618 [1st Dept 2012], *lv dismissed* 19 NY3d 1012 [2012], *lv denied* 20 NY3d 858 [2013] [stating that "[b]y definition an anticipatory breach cannot be committed by a party already in material breach of an executory contract"]).

MFP fails to raise a triable issue of fact in opposition. It cites *Lopresti v Merson* (2001 WL 1132051 [SD NY, Sept. 21, 2001, No. 00 Civ. 4255 (JGK)]) for the proposition that "[r]epudiation is the unilateral termination of a contract and breaches a contract if the contract does not provide the right to terminate a contract unilaterally." MFP submits that its termination of the PSA under Section 7(a)(xv) does not constitute a repudiation or an anticipatory breach. However, "[a] party cannot prevent the fulfillment of a contractual condition and then argue failure of that condition as a defense to a claim that it breached the contract" (*RSB Bedford Assoc., LLC v Ricky's Williamsburg, Inc.*, 91 AD3d 16, 23 [1st Dept 2011]). MFP's termination of the PSA before 933 could deliver the Tenant Estoppels was improper because, as determined

earlier, May 7, 2020 was the second business day prior to the Closing Date (*see IBM Credit Fin. Corp. v Mazda Motor Mfg. (USA) Corp.*, 92 NY2d 989, 993 [1998] [adopting "an untenable interpretation of a key contractual provision, and refusal to perform otherwise, constituted an anticipatory breach of the contract"]).

MFP also contends that 933 could have extended the Closing Date by delivering a written notice to MFP and maintains that 933 repudiated the PSA by refusing to tender its performance. These arguments are unpersuasive since MFP's repudiation of the PSA discharged 933 from its contractual obligation to perform (*see Federico v Dolitsky*, 176 AD3d 916, 919 [2d Dept 2019] [concluding that the buyers "anticipatorily breached the contract by purporting to cancel [it]"]; *Bucciero v Jian Sheng Li*, 191 AD2d 887, 889 [3d Dept 1993] [stating that "[w]here . . . a party commits an anticipatory breach of a real property sale contract by totally repudiating that party's obligation to purchase, the selling party is relieved of any duty to tender performance"]). Consequently, 933's motion for summary judgment on the first counterclaim is granted, and MFP's cross motion for summary judgment dismissing this cause of action is denied.

D. 933's Second Counterclaim

As a second counterclaim, 933 seeks a judgment declaring that it is entitled to recover the funds held in escrow and directing Old Republic to release the funds to it. 933 has demonstrated the existence of a justiciable controversy and shown its entitlement to a judgment declaring that it is entitled to the Deposit as its liquidated damages under Section 14(b). 933, though, is not entitled to an order directing Old Republic to release the funds, as the court has previously directed that Old Republic may pay the funds into the court. At this juncture, it is unclear whether Old Republic has retained the funds or whether those funds have already been deposited into the court.

E. MFP's Third Cause of Action and 933's Third Counterclaim

MFP and 933 both seek an award of their attorneys' fees. Generally, "attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule" (*Hooper Assoc., Ltd. v AGS Computers*, 74 NY2d 487, 491 [1989]). 933 has demonstrated that, as the prevailing party, it is entitled to its attorneys' fees, costs and disbursements under Section 21(f) of the PSA. The issue of 933's reasonable attorneys' fees incurred in this action is referred to a Referee to hear and determine.

F. Old Republic's Motion for Summary Judgment

Old Republic moves for summary judgment on its cross claim against 933, arguing that, as a stakeholder, it bears no liability to 933, and seeks leave to pay the $1,187,500 Deposit into the court. Old Republic also seeks to recover its reasonable attorneys' fees under Section 23(d) of the PSA (NYSCEF Doc No. 41 at 42). 933 partially opposes the application to the extent that a determination on legal fees must await a resolution of the dispute between MFP and 933, and that Old Republic has not furnished the court with the information needed for determining a fee award.

In view of this court's prior decision and order dated April 14, 2021 (NYSCEF Doc No. 132), which resolved Old Republic's counterclaim against MFP, Old Republic's motion is granted to the extent that Old Republic may deposit the $1,187,500 deposit into the court if it has not already done so pursuant to the prior order. Old Republic is also entitled to recover its reasonable attorneys' fees from MFP under Section 23(c) of the PSA. The issue of Old Republic's reasonable attorneys' fees incurred in this action is referred to a Referee to hear and determine.

Accordingly, it is

ORDERED that the branch of the motion of defendant 933 Broadway, LLC, for summary judgment dismissing the complaint (motion sequence no. 002) is granted, and the complaint is dismissed against said defendant with costs and disbursements to said defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the branch of the motion of defendant 933 Broadway, LLC, for summary judgment on its counterclaims against plaintiff MFP 933 Broadway LP (motion sequence no. 002) is granted as to liability; and it is further

ADJUDGED and DECLARED that the Real Estate Purchase and Sale Agreement dated March 11, 2020, between plaintiff MFP 933 Broadway LP and defendant 933 Broadway, LLC, is hereby terminated; and it is further

ADJUDGED and DECLARED that defendant 933 Broadway, LLC, is entitled to recover the deposit of $1,187,500, together with any interest that has accrued thereon, that had been held in escrow as liquidated damages; and it is further

ORDERED that the issue of the amount of defendant 933 Broadway, LLC's reasonable attorneys' fees incurred in this action that it may recover from plaintiff MFP 933 Broadway LP is severed and referred to a Referee to hear and determine, as set forth herein; and it is further

ORDERED that the cross motion of plaintiff MFP 933 Broadway LP for summary judgment (motion sequence no. 002) is denied; and it is further

ORDERED that the motion of defendant Old Republic National Title Insurance Company for summary judgment (motion sequence no. 004) is granted to the extent set forth herein; and it is further

ORDERED that, to the extent not already completed, defendant Old Republic National Title Insurance Company shall deposit into this court, pursuant to the protocols set forth by CPLR 2601, the $1,187,500.00 that are the subject of its motion, which it is currently holding in escrow, together with any interest accrued thereon, in full satisfaction of Old Republic's duties as escrow agent under the contract that is the subject of this action, and that Old Republic, upon such deposit, shall be discharged from all liability under said contract; and it is further

ORDERED that counsel for defendant Old Republic National Title Insurance Company shall consult, and cooperate with, the Office of the Commissioner of Finance of the City of New York, consistent with CPLR 2601, in effectuating the aforesaid deposit, and said counsel shall serve a copy of this order on said office; and it is further

ORDERED that the deposit authorized herein, once effected, shall continue until further order of this court, and no part of same shall be disbursed until further order of this court; and it is further

ORDERED that, upon the presentment of proof that the funds that had been held in escrow by defendant Old Republic National Title Insurance Company have been deposited into this court, defendant 933 Broadway, LLC, may apply for their release, if it be so advised; and it is further

ORDERED that the issue of the amount of reasonable attorneys' fees defendant Old Republic National Title Insurance Company has incurred in this action that it may recover from plaintiff MFP 933 Broadway LP is severed and referred to a Referee to hear and determine, as set forth herein; and it is further

ORDERED that entry of judgment in favor of defendant Old Republic National Title Insurance Company for the foregoing is held in abeyance pending an assessment of its reasonable attorneys' fees; and it is further

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to hear and determine the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose:

(1) the issue of defendant 933 Broadway, LLC's reasonable attorneys' fees incurred in this action; and

(2) the issue of defendant Old Republic National Title Insurance Company's reasonable attorneys' fees incurred in this action; and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees' Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the "References" link), shall assign this matter at the initial appearance to an available JHO/Special Referee to hear and determine as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiff shall, within 15 days from the filing of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that defendants 933 Broadway, LLC, and Old Republic National Title Insurance Company shall each serve a proposed accounting of the costs and attorneys' fees they have incurred within 24 days from the filing of this order and the plaintiff shall serve objections to the proposed accounting within 20 days from service of defendants' papers and the foregoing papers shall be filed with the Special Referee Clerk prior to the original appearance date in Part SRP fixed by the Clerk as set forth above; and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed with the hearing, on the date fixed by the Special Referee Clerk for the initial appearance in the Special Referees' Part, subject only to any adjournment that may be authorized by the Special Referees' Part in accordance with the Rules of that Part; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue(s) specified above shall proceed from day to day until completion and counsel must arrange their schedules and those of their witnesses accordingly; and it is further

ORDERED that counsel shall file memoranda or other documents directed to the assigned JHO/Special Referee in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the "References" link on the court's website) by filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules).

This shall constitute the decision and order of the court.

ENTER:

8/31/2021
DATE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

---x

MFP 933 Broadway LP,

Plaintiff,

-against-

933 Broadway, LLC and Old Republic National Title Insurance Company, in its capacity as escrow agent,

Defendants.

---x

Index No. 651879/2020

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) ss.:
COUNTY OF QUEENS)

Amanda Snyder, being duly sworn, deposes and says:

That deponent is not a party to the action, is over 18 years of age and resides at Nassau, New York.

That on the 9th day of September 2021, deponent served the within Notice of Entry upon:

Office of the Commissioner of Finance of the City of New York
NYC Department of Finance
Correspondence Unit
One Centre Street, 22nd Floor
New York, NY 10007

the addresses designated for that purpose by depositing true copies of same enclosed in a postpaid properly addressed wrapper, by Regular

Mail, in an official depository under the exclusive care and custody of the United States Postal Service within New York State.

/s/ Amanda Snyder
Amanda Snyder

Sworn to before me this
9th day of September 2021

/s/ Robert W. Frommer
Notary Public

Robert W. Frommer
Notary Public, State Of New York
NO. 02FR5044430
Qualified in Westchester, County
Commission Expires May 30, 2023