SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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DAVID LIPMAN,

Plaintiff,

-against-

IRA SHAPIRO,

Defendant.

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DECISION AND ORDER

Index No.: 600222/2010
Mot. Seq. Nos.: 007-008

In motion sequence 007, plaintiff David Lipman moves for summary judgment pursuant to CPLR 3212 on his fraud (First Cause of Action) and tortious interference with contract (Second Cause of Action) claims against defendant Ira Shapiro. In motion sequence 008, defendant Shapiro moves for summary judgment pursuant to CPLR 3211(a)(7), 3212, and 3016(b) dismissing plaintiff's complaint as against him in its entirety. For the reasons discussed below, plaintiff's motion is denied and defendant's motion is granted.

BACKGROUND[1]

A. Lipman's Agreements Pertaining to Two Condominium Units

On October 25, 2007, plaintiff and Slazer Enterprises Owner LLC ("Slazer") entered into an agreement whereby plaintiff was entitled to condominium units 15A and 15B ("Units") of a property being developed by Slazer at 20-22 East 22nd Street ("the Property") in exchange for plaintiff's marketing services (*see* Pl. SOF [Motion 007], NYSCEF Doc. No. 230, ¶ 1; Lipman Aff., Ex. 2 [Agreement] at p. 2, ¶ 3). Slazer agreed to convey the Units "free and unencumbered from the lien of any underlying mortgage and/or other type of financing that may encumber the Unit" (Pl. SOF ¶ 4b). Defendant Shapiro signed the Agreement on behalf of Slazer, which was the managing member of four limited liability companies (Shapiro was a member to each of these companies) that owned the Property as tenants-in-common[2] (the "Tenants in Common") (*see* Pl. SOF ¶ 2; Def. SOF [Motion 008], NYSCEF Doc. No. 244, ¶¶ 1-3). It is undisputed that

[1] Unless otherwise noted, the facts as discussed herein are drawn from the parties' respective Rule 19-a statements and counter-statements of material fact (cited herein as "Pl. SOF/CSOF" and "Def. SOF/CSOF").

[2] The Tenants in Common include Madison Park Group Owner LLC (12%), Slazer Enterprises Owner LLC (78%), JMS 23rd Street Realty Owner LLC (4%), and FKF Madison Group Owner LLC (6%).

plaintiff performed his end of the contract (*see* Def. SOF ¶ 5). Under Section 4 of the Agreement, "[s]hould Slazer fail or be unable to convey title . . . for any reason," Lipman could terminate the Agreement and be paid $4,700,000 in lieu of receiving the Units (*see* Pl. SOF ¶ 4c).

The Agreement provided for transfer of the Units to plaintiff through two Purchase Agreements, one for each Unit (the "Purchase Agreements") (Pl. SOF ¶ 4d; Lipman Aff., Exs. 3 and 4). The Purchase Agreements were each signed by defendant Shapiro as President of the Madison Park Group Owner LLC (Pl. SOF ¶ 5). Each Purchase Agreement explained that it was between the "Sponsor" or "Seller" and the Purchaser, and each Sponsor or Seller consists of the Tenants in Common (*see* Pl. SOF ¶ 7.) Plaintiff never entered into a contract with Shapiro individually (Def. SOF ¶ 6).

B. Assignment of Units to the Kaplans

Pursuant to an assignment agreement dated October 30, 2008 (the "Assignment"), Lipman assigned his right to the Units to David and Marcia Kaplan (the "Kaplans") (Pl. SOF ¶ 14; Lipman Aff., Ex. 5 [Assignment Agreement]). Under the terms of the Assignment Agreement, the entire purchase price of $6,225,000 was payable solely to Lipman (Pl. SOF ¶ 14). The Kaplans deposited $622,500 into escrow as a down payment (*see id.*). Shapiro signed the Assignment Agreement on behalf of Madison Park Owner Group LLC, as the "Seller," and consented to the terms of the assignment (*see id.*). On June 19, 2009, Shapiro sent a letter to the Kaplans setting July 27, 2009 as the closing date (*see* Pl. SOF ¶ 15).

C. The Aborted Closing

The Kaplans did not appear at the scheduled closing (Pl. SOF ¶ 17). Instead, in July 2009 the Kaplans notified Madison Park Group Owner, LLC by letter (as well as a second letter in August) that they "have determined to terminate the applicable agreements and request an immediate return of the Contract Deposits, together with interest thereon" (*see* Pl. SOF ¶ 14; Lipman Aff., Ex. 8 [July 29, 2009 letter]).

Lipman alleges that after he learned of the Kaplan's refusal to close, he discussed the matter with Shapiro (*see* Pl. SOF ¶ 19). Shapiro allegedly told Lipman to "do nothing" and that he would "fix things" with the Kaplans (*see id.*). These alleged statements however are not supported by any documentary evidence. In November 2009, Shapiro arranged a tour of the

property for the Kaplans (*see* Pl. SOF ¶ 19). Plaintiff alleges that Shapiro prevented the Tenants in Common from providing the Kaplans with notice of their breach (*see* Pl. SOF ¶ 22).

D. The Kaplan Action and First Department Decision

On February 24, 2010, the Kaplans sued Lipman and the Tenants in Common seeking return of their $622,500 deposit (Pl. SOF ¶ 23; *Kaplan et al. v Madison Park Group Owners LLC, et al.*, Index No, 650136/2010 [the "Kaplan Action"]). On appeal, the First Department, held that "there was no lawful excuse or legitimate basis for plaintiffs' failure to attend the July 27, 2009 closing. Plaintiffs therefore defaulted under the purchase agreements and the assignment agreement" (Schalk Aff., Ex. E; *Kaplan v Madison Park Group Owners, LLC*, 94 AD3d 616, 618 [1st Dept 2012]). However, the First Department also held that ***"Lipman's contractual right to retain the deposit was never triggered because neither Lipman nor the sponsor sent plaintiffs the default notices required by paragraph 13 of each purchase agreement"*** (*see id.* [emphasis added]).

Accordingly, Lipman contends that if a default notice was served, the Kaplans either would have closed to avoid forfeiting the deposit, or Lipman would have been entitled to the deposit if they still refused to close given the First Department's findings (*see* Pl. SOF ¶ 26). He further alleges that under Section 13 of the Purchase Agreements, the "Sponsor" had the responsibility to serve the default notice (Pl. CSOF [Motion 008], NYSCEF Doc. No. 268, at ¶ 19, *citing* Lipman Aff., Exs. 3 and 4, at p. 9, Section 13 ["Sponsor shall notify Purchaser in writing of such default and advise Purchaser that he has thirty (30) days after Sponsor gives written notice to the Purchaser to cure such default"]). Notably, the "Sponsor" under the Purchase Agreements was not Shapiro individually.

E. Allegations That Shapiro Prevented Service Of The Default Notice

Lipman alleges that he made numerous oral demands upon Shapiro to serve a default notice on the Kaplans (*see* Pl. CSOF at ¶¶ 20-21). The only evidence Lipman provides is his own testimony referencing the Complaint and his affidavits. Other evidence, however, suggests that rather than pursue a default, Lipman continued to seek to bring the Kaplans back to the table for a new closing. In an attachment to an email dated November 23, 2009, Lipman's counsel sent the Tenants in Common a draft letter addressed to the Kaplans (*see* Sugrue Aff., Ex. G, NYSCEF Doc. No. 277). Plaintiff proffers this letter as evidence that he asked Shapiro to send a

default notice (*see* Pl. Reply at 5-6). Shapiro argues that the letter actually showed that plaintiff believed Kaplans would eventually close on the Units (*see* Def. SOF ¶¶ 27-28; Sugrue Aff., Ex. I [NYSCEF Doc. No. 242]). The Court will address this contention below. As further evidence, Shapiro cites an email chain dated September 30, 2009, where plaintiff requested the defendant's assistance in providing Mr. Kaplan with a tour of the premises in which, plaintiff communicated his level of confidence as "fingers crossed" that the tour would lead to a closing (*see* Def SOF ¶ 26; Opp. at 12; Sugrue Opp. Aff., Ex H; NYSCEF Doc. Nos. 244, 278, 242). Plaintiff admits he engaged in good faith negotiations intended to convince the Kaplans to close (*see* Pl. CSOF ¶ 261 NYSCEF Doc. No. 268).

F. Shapiro's Alleged Financial Motive

Plaintiff contends, but defendant disputes, that Shapiro prevented the Tenants in Common from placing the Kaplans in default because Shapiro's companies were facing financial difficulty and Shapiro also personally guaranteed other debts in connection with the property (*see* Def. CSOF, NYSCEF Doc. No. 269, ¶ 26). Plaintiff argues that because the debt owed to him had not been guaranteed by Shapiro, Shapiro had a financial motive to defraud him and tortuously interfere with his contractual rights (*see* Pl. CSOF ¶ 6).

Defendant does not deny that at this time the Tenants in Common were in bankruptcy and were experiencing financial difficulty (*see* Def. CSOF ¶ 27; NYSCEF Doc. No. 269). In 2010, the lender/mortgagee, iStar, commenced a foreclosure proceeding against Lipman and the Tenants in Common. There is no dispute that in excess of $30 million in judgments were entered against Shapiro in relation to personal guarantees he signed in connection with the Property (*see* Pl. SOF ¶ 28; NYSCEF Doc. No. 230).

G. Lipman's Alleges that Shapiro Tried to Sell the Units Under Him

Plaintiff alleges that after the Kaplans refused to close, plaintiff Shapiro and others told Lipman that the finances of the Tenants in Common would not allow them to honor their obligation to provide the Units to Lipman free and clear of any liens (*see* Pl. SOF ¶ 31). Lipman alleges he entered into what he thought were good faith negotiations with the Tenants in Common, where he would pay some money for the Units that would enable them to satisfy the lender's release price on the Units but that these negotiations were a "sham" because Shapiro was actively negotiating with a third party, nonparty Gary Barancik, to sell the Units (*see id.*). In

December 2009, Shapiro circulated a draft contract providing for Barancik to buy the Units for $5,360,500 (Pl. SOF ¶ 33; Lipman Aff., Ex. 9). Slazer's other managing member, Marc Jacobs, asserts in an affidavit that Shapiro never advised him that he was negotiating to sell the Units to a third-party such as Barancik without Lipman's knowledge or consent (Schalk Opp. Aff., Ex. 7 [Jacobs Aff.] at ¶¶ 18-19 [Motion 008]).

H. Shapiro Pled his "Fifth Amendment" Rights at Deposition and Discovery Issues

At his deposition on June 19, 2015, Shapiro refused to answer any questions by pleading his Fifth Amendment right against self-incrimination (*see* Pl. SOF ¶ 34). The purported basis for Shapiro's refusal to answer questions was that his attorney received a call from the United States Attorney's Office inquiring about the Property (*see* Pl. SOF ¶ 35).

Lipman also asserts that Shapiro was uncooperative concerning document discovery, alleging that Shapiro essentially gave him no new information, other than a list of $30 million in judgments entered against him based upon personal guarantees (*see* Pl. SOF ¶¶ 33-34). Specifically, Shapiro did not produce documents related to One Madison Park or any of the other Tenants in Common (*see* Pl. SOF ¶ 30). Defendant responds that these documents were given to a receiver and a trustee in bankruptcy (*see* Def. CSOF ¶ 30).

DISCUSSION

A. Legal Standard

The standards for summary judgment are well-settled. Summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*see* CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 329 [1986]; *Sillman v Twentieth Century-Fox Film Corporation,* 3 NY2d 395 [1957]). To prevail, the party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law tendering evidentiary proof in admissible form, which may include deposition transcripts and other proof annexed to an attorney's affirmation (*see Alvarez,* 68 NY2d 329; *Olan v Farrell Lines,* 64 NY2d 1092 [1985]; *Zuckerman v City of New York,* 49 NY2d 557 [1980]). Absent a sufficient showing, the court should deny the motion without regard to the strength of the opposing papers (*see Winegrad v New York Univ Med. Ctr.*, 64 NY2d 851 [1985]).

Once the initial showing has been made, the burden shifts to the party opposing the motion for summary judgment to rebut the prima facie showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*see Kaufman v Silver,* 90 NY2d 204, 208 [1997]). Although the court must carefully scrutinize the motion papers in a light most favorable to the party opposing the motion and must give that party the benefit of every favorable inference (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625 [1985]) and summary judgment should be denied where there is any doubt as to the existence of a triable issue of fact (*see Rotuba Extruders, Inc. v Ceppos,* 46 NY2d 223, 231 [1978]), bald, conclusory assertions or speculation and "a shadowy semblance of an issue" are insufficient to defeat a summary judgment motion (*S.J. Capalin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338 [1974]; *see Zuckerman,* 49 NY2d 557; *Ehrlich v American Moninga Greenhouse Manufacturing Corp.*, 26 NY2d 255, 259 [1970]).

B. Fifth Amendment Adverse Interest

Shapiro was asked at his deposition to read each paragraph of the Complaint and state whether each allegations was true. He instead pled his Fifth Amendment right as to each allegation. Therefore, Lipman argues that he should be entitled to an adverse inference with respect to each allegation in the Complaint (*see* Pl. Memo., NYSCEF Doc. No. 231, at 9-10). Notably, plaintiff's motion relies heavily on allegations in the Complaint, which are by in large not supported by any documentary evidence.

It is well-established that a party's invocation of the Fifth Amendment in a civil or administrative proceeding may form the basis of an adverse factual inference (*DeBonis v Corbisiero*, 155 AD2d 299 [1st Dept 1989], *citing Baxter v. Palmigiano,* 425 US 308, 316-17 [1976]); *see also Access Capital, Inc. v DeCicco*, 302 AD2d 48, 55 [1st Dept 2002] [the law is clear that adverse inferences *may* be drawn against a defendant who invokes the privilege in a civil case]). However, a party's invocation of its Fifth Amendment rights cannot be the deciding factor of a case (*DeBonis v Corbisiero*, 155 AD2d 299, 301 [1st Dept 1989] [silence may only be one of a number of factors which the finder of fact considers in making its determination]; *see also Steinbrecher v Wapnick*, 24 NY2d 354, 365 [1969] ["that a defendant in a civil suit assumes a substantial risk when he chooses to assert his privilege does not, however, mean that the plaintiff is relieved of his obligation to prove a case before he becomes entitled to a judgment"]).

Accordingly, while the Court may draw inferences against defendant, the Court may not use defendant's silence as the deciding factor and may not simply deem true all of the allegations in the Complaint.

C. First Cause of Action for Fraud

Plaintiff alleges that there were two separate instances of fraud committed by Shapiro: (1) Shapiro made fraudulent statements when he told Lipman that they would attempt to reach an agreement with him whereby Lipman could retain his rights to the Units while at the same time Shapiro was actively engaged in an attempt to sell the Units to Barancik; and (2) Shapiro assured Lipman that he would "fix things" to ensure that the Kaplans ultimately would close and failed to serve the Kaplans with a default notice (or Notice to Cure). (*see* Pl. Memo., NYSCEF Doc. No. 231, at 11-13). These arguments lack factual support and do not make out a claim for fraud.

To properly state a claim for fraud, plaintiff must allege that the defendant made a false representation of fact, the defendant had knowledge of its falsity, the misrepresentation was made in order to induce the plaintiff's reliance, there was justifiable reliance on the part of plaintiff, and the plaintiff was injured as a result (*see Eurycleia Partners, LP v Seward & Kissel, LLP,* 12 NY3d 553, 559 [2009]). An intent to commit fraud is to be divined from the surrounding circumstances (*see id.* at 559). Further, "[w]here a cause of action or defense is based upon misrepresentation, fraud . . . , the circumstances constituting the wrong shall be stated in detail" (CPLR 3016[b]; *J.A.O. Acquisition Corp. v Stavitsky*, 18 AD3d 389, 391 [1st Dept 2005]).

As to the allegations that Shapiro made fraudulent statements by telling Lipman that they would attempt to reach an agreement with him whereby Lipman could retain his rights to the Units while Shapiro was actively engaged in an attempt to sell the Units to Barancik, it is undisputed that in December 2009, Shapiro circulated a draft contract for Barancik to buy the Units (Pl. SOF ¶ 33; Lipman Aff., Ex. 9). However, assuming that Shapiro hid the existence of these negotiations from plaintiff, plaintiff has not shown how Shapiro's statements induced detrimental reliance by Lipman who was represented by counsel and was capable of protecting his legal rights against the Kaplans. Further reliance on Shapiro's statements did not damage plaintiff. Plaintiff does not allege that Barancik closed on the Units and then Shapiro failed to repay him out of the proceeds. Plaintiff argues instead that he would have taken alternative

means to ensure that his right to the Units was honored (*see* Pl. Reply [Motion 007], NYSCEF Doc. No. 285, at 10). However, plaintiff does not explain what these alternative means were or how Shapiro's statements prevented him from acting to employ such means. In any event, if plaintiff is asserting that his rights to the Units were violated, this claim should be stated as a breach of contract claim, not fraud (*see Krantz v Chateau Stores of Can. Ltd.*, 256 AD2d 186, 187 [1st Dept 1998] [cause of action for fraud does not arise when the only fraud charged relates to a breach of contract]). Accordingly, plaintiff cannot base his fraud claim on these allegations.

Regarding the allegations that Shapiro assured Lipman that he would "fix things" to ensure that the Kaplans ultimately would close and failed to serve the Kaplans with a default notice, plaintiff provides no specificity as to when Lipman assured defendant that he would "fix things" or when Lipman allegedly made verbal demands on Shapiro to serve the demand notice. Accordingly, CPLR 3016(b) is not satisfied because the fraud claims are not pled with requisite specificity. Moreover, these allegations are not supported by any documentary evidence.

Arguably, the Court could provide leniency to plaintiff with respect to evidentiary issues given the adverse inference. Even so, plaintiff's claim fails. Plaintiff does not show that he reasonably relied to his detriment on Shapiro's statement that he would "fix things" with the Kaplans. "Reliance . . . connotes something more than simply a bare hope or anticipation" (*Home Mut. Ins. Co. v Broadway Bank and Trust Co.*, 53 NY2d 568, 578 [1981]). Lipman who was well counseled throughout, was or should have been aware that Shapiro did not control the behavior of the Kaplans. Further, when plaintiff requested defendant's assistance in providing Mr. Kaplan with a tour of the premises in September 2009, months after the scheduled closing, plaintiff also communicated his level of confidence of bringing them back to the table as "fingers crossed" (*see* Opp. at 12; Sugrue Opp. Aff. Ex. F). In other words, plaintiff was aware (or should have been) that Shapiro could not guarantee that the Kaplans would close. Accordingly, even if Shapiro made assurances to plaintiff, plaintiff could not reasonably have relied on them.

Plaintiff's claim also fails because a future event, such as the promise to "fix things", is not an existing "fact" and cannot support a claim of fraud or misrepresentation (*see* Def. Opp. at 10 [Motion 007], *citing Giblin v Murphy*, 97 AD2d 668, 670 [3d Dept 1983] [promissory statements are not actionable as fraud unless plaintiff can show that defendants, at the time they were made, had no intention of carrying them out]). The First Department has held similarly (*see*

Bd. of Managers of 147 Waverly Place Condominium v KMG Waverly, LLC, 129 AD3d 549, 550 [1st Dept 2015] [statements in the description were predictions of future events and, therefore, cannot sustain an action for fraud]; *Dragon Inv. Co. II LLC v Shanahan*, 49 AD3d 403, 403 [1st Dept 2008] [a prediction of something which is ... expected to occur in the future will not sustain an action for fraud]; *Albert Apt. Corp. v Corbo Co.*, 182 AD2d 500, 501 [1st Dept 1992] [a party does not make an actionable representation of fact when predicting a future event with no knowledge of whether or not the event may occur]). While plaintiff argues that Shapiro had a financial incentive to commit fraud, plaintiff offers no evidence showing that Shapiro had no intention of carrying out his alleged promises.

The submitted evidence suggests that plaintiff did not expect that Shapiro would send out a default notice because Lipman was still insisting on arranging a new closing date. While very little documentary evidence exists in this case, the parties dispute the meaning behind a draft letter addressed to the Kaplans which plaintiff's attorney emailed to the attorney for the Tenants in Common in November 2009 (*see* Sugrue Opp. Aff. Ex. G [Motion 007] NYSCEF Doc. No. 277). The draft letter was a response to an untimely termination letter sent by an attorney for the Kaplans. It states, in relevant part:

> **PLEASE TAKE NOTICE**, that Seller rejects the allegations set forth in Purchaser's Notice. Thus, the Purchase Agreements remain in full force and effect in accordance with their terms. **PLEASE TAKE FURTHER NOTICE** that Seller hereby establishes the time and place for the closing of the sale of the Units as 10:00 a.m. On _____, _____ at the offices of _____ in New York, New York. **TIME SHALL BE OF THE ESSENCE** with respect to your obligation to close title. Should you default in respect of your obligation, Seller reserves all of its rights and remedies, at law or in equity, in such regard, including, without limitation, the right to terminate the Purchase Agreements and retain all deposit monies paid by Purchasers pursuant to the Assignment Agreement.

Plaintiff characterizes the draft letter as being a Notice to Cure and asserts that its existence supports his contention that he repeatedly asked Shapiro to serve a default notice on the Kaplans. Defendant responds that the draft provided the Kaplans with a new, unspecified closing date and stated that *in the event they did not appear at the new closing* they would then be in default. Plaintiff replies that the draft used the same procedures set forth in the Purchase Agreements under Section 13 to place a buyer in default. Although Section 13 and the draft letter

both reference a "Time is of the Essence or "TOE" clause (*see* Pl. Reply 5-6), plaintiff's contention is simply incorrect. Section 13 of the Purchase Agreements provides:

> Sponsor shall notify Purchase in writing of such default and advise Purchaser that he has thirty (30) days after Sponsor gives notice to the Purchaser to cure such default. **TIME IS OF THE ESSENCE FOR PURCHASER TO CURE ANY DEFAULT UNDER THE AGREEMENT ON OR BEFORE THE 30TH DAY OF SUCH 30-DAY PERIOD.**

The language set forth in the draft letter does not mirror the procedure provided for in Section 13. The language used in the draft letter is neither a notice of default, nor a notice to cure. Instead the draft states that the "Purchase Agreements remain in full force and effect" and gives notice of a new, unspecified closing date and includes a TOE provision. It does not give the Kaplans notice of default or of their obligation to cure their default by closing within 30 days. It does not even specify when the Kaplans must close. If a final version of this letter had been drafted, it could have provided for a closing date much further out, or even much sooner, than 30 days. Indeed, the only commonality between Section 13 and the draft letter is the inclusion of a TOE clause. Accordingly, the draft cannot be viewed as a default notice. The draft is not evidence that might corroborate a claim that Lipman was making repeated verbal demands for the Tenants in Common to serve a default notice on the Kaplans. It shows only that Lipman sought a new closing date. The limited record evidence does not support the claim that Lipman "reasonably relied" on Shapiro's purported oral assurances. To the contrary, the action of Lipman's attorney seeking to arrange a new closing shows otherwise.[3]

Accordingly, plaintiff's fraud claims fail.

D. Second Cause of Action for Tortious Interference with Contract

Plaintiff argues that defendant tortuously interfered with the Assignment Agreement (*see* Pl. Memo., 13-15). The elements of a tortious interference with contract cause of action are (1) the existence of a valid contract, (2) defendant's knowledge of same, (3) defendant's intentional procurement of the third-party's breach without justification, (4) actual breach of the contract,

[3] Defendant raises several other arguments worth noting. In the Kaplan Action, wherein plaintiff sought to keep the Kaplan's deposit, plaintiff argued that it was not necessary to send a default notice for him to keep the deposit. As discussed above, the First Department concluded otherwise. Defendant also argues that even if he were truly asked by plaintiff to send a default notice, and he failed to do so, this would give rise to a breach of contract claim *against the Sponsor*, the party with the alleged responsibility (*see Krantz*, 256 AD2d at 187). The Court need not address these arguments as there are other ground that require dismissal of the complaint.

and (5) damages caused by the breach (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]); *Kronos, Inc. v AVX Corp.*, 81 NY2d 90 [1993]).

Here, there is no dispute that elements one (existence), two (Shapiro's knowledge) and four (breach) are satisfied. However, the third (procurement of the breach) and fifth (damages caused by the procurement) are absent.

Plaintiff has not shown that Shapiro intentionally procured the Kaplans' breach of the Assignment Agreement without justification. Plaintiff asserts that Shapiro's failure to serve a default notice on the Kaplans tortuously interfered with the contract (*see* Pl. Memo., NYSCEF Doc. No. 231, at 14-16). This claim lacks merit. According to plaintiff, Shapiro procured the breach by failing to send the Kaplans a notice of default (Pl. Memo, NYSCEF Doc. No. 231, at 14-15). It follows that, as of the time Shapiro would have procured the breach of the Assignment Agreement, the Kaplans were already in breach of it.[4] The Appellate Division First Department has already held that "there was no lawful excuse or legitimate basis for plaintiffs' [the Kaplans'] failure to attend the July 27, 2009 closing. Plaintiffs therefore defaulted under the purchase agreements and the assignment agreement" (*Kaplan*, 94 AD3d at 618). Accordingly, Shapiro could not have procured the breach of the Assignment Agreement because the Kaplans were in breach long before the "procurement" occurred.

As to the third element, a defendant is liable for tortious interference only if the breach would not have occurred but for defendant's conduct (*see Sun Gold, Corp. v Stillman*, 95 AD3d 668, 669 [1st Dept 2012] [tortious interference with contract was not viable because plaintiff cannot show that "but for" the defendant's conduct, the lease would not have been breached], citing *Lana & Samer v. Goldfine*, 7 A.D.3d 300, 776 N.Y.S.2d 66 [2004]; *Cantor Fitzgerald Assoc., L.P. v Tradition N. Am., Inc.*, 299 AD2d 204 [1st Dept 2002] [an essential element of such a claim is that the breach of contract would not have occurred but for the activities of the defendant]). Plaintiff contends that if Shapiro had served the default notice, the Kaplans would have closed in order to avoid forfeiting the deposit or Lipman would have been entitled to the deposit given the First Department's findings (*see* Pl. Memo., NYSCEF Doc. No. 231, at 16). However, in plaintiff's hypothetical scenario where Shapiro served the default notice and the Kaplans still did not close, Lipman admits to the possibility of the Kaplans not closing after

[4] Under Section 2 of the Assignment, the Kaplans agreed to timely perform the duties under the Purchase Agreements (*see* Lipman Aff., Ex. 2 [agreement]).

being served with a default notice. Accordingly, plaintiff's claim fails because he cannot show that "but for" the Shapiro's alleged conduct (failure to give a notice of default), the Assignment Agreement would not have been breached (*see Sun Gold, Corp.*, 95 AD3d at 669).

CONCLUSION

Plaintiff has put forth little or no evidence supporting his claims outside of his own testimony. Even if the Court were to afford plaintiff an adverse inference, his claims still fail for the reasons stated above. Moreover, and as discussed above, invocation of Fifth Amendment rights cannot be the deciding factor to a case. The Court has considered plaintiff's remaining arguments, and finds them to be unavailing. Accordingly, it is hereby

ORDERED that the motion for summary judgment (motion sequence number 008) of plaintiff David Lipman against defendant Ira Shapiro as to the First Cause of Action (fraud) and Second Cause of Action (tortious interference with contract) is DENIED; and it is further

ORDERED that the motion of defendant Ira Shapiro for summary judgment (motion sequence number 007) dismissing the complaint as against him in its entirety is GRANTED and the Clerk of the Court is directed to enter judgment accordingly, dismissing the complaint together with costs upon presentation of a proper bill of costs..

This constitutes the decision and order of the court.

DATED: March 1, 2016

E N T E R,

O. PETER SHERWOOD

J.S.C.