

**Spalding Home Corp. v Hayes**

2007 NY Slip Op 34553(U)

December 28, 2007

Supreme Court, New York County

Docket Number: 110965/2005

Judge: Karla Moskowitz

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: LAS PART 3

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Spalding Home Corp.,

Plaintiff,

Index No. 110965/2005  
Trial Cal. No. 2007L/00878

- against -

**DECISION AFTER TRIAL**

Gwendolyn Hayes a/k/a Rebecca Louise Hayes,  
Veronica Grant and Harlem MMG Inc.,

Defendants.

**FILED**

JAN - 4 2008

-----X  
**KARLA MOSKOWITZ, J.:**

COUNTY CLERK'S OFFICE  
NEW YORK

In this action tried before me, plaintiff Spalding Home Corp. ("Spalding") claimed that defendant Gwendolyn Hayes, a/k/a Rebecca Louise Hayes ("Miss Hayes") signed a contract on January 10, 2005 to sell her interest in 130 West 127<sup>th</sup> Street, New York, New York ("the property") to Spalding and, thereafter, signed a deed but repudiated it and that defendants Veronica Grant ("Miss Grant") Harlem MMG, Inc ("Harlem MMG") had intentionally interfered with that contract by executing a deed with Miss Hayes on May 25, 2005. Plaintiff sought specific performance, compensatory and punitive damages.

Defendants denied these allegations and counter claimed inter alia for fraud in obtaining Miss Hayes consent and signatures, to vacate the Notice of Pendency and attorneys fees.

**Findings of Fact**

1. Defendant Gwendolyn Hayes testified in the narrative, at times somewhat confused. It appeared to the court that she did not always understand or hear the court proceedings. But it is not disputed that she had helped care for a women named Pearl Robinson who put her in her will and died in December 1998, leaving Miss Hayes the property. Miss Hayes transferred 50% of building to Garland Williams ("Williams") on March 15, 2000

thinking he would help her with building repairs and non rent paying tenants. There were no tax liens on the property, but it was in trouble with taxes. So, at some point she wanted to sell her interest in the property.

2. Clifford Konah ("Konah") is a licensed real estate broker who represents others and "flips" property, that is, he buys and immediately sells property using the name of plaintiff Spalding Home Corp.

3. In June or July 2004, he contacted Garland Williams and then called Miss Hayes who was not living at the property. By late July, in a phone call, Miss Hayes told him he would have to meet with her friend, Richard McFaddin, Sr. ("McFaddin"). At a meeting at Sylvia's with McFaddin and Miss Hayes, McFaddin said her attorney was Daphne McKenzie ("Miss MacKenzie") and that Garland Williams owned half. Miss Hayes wanted \$400,000 but, in August, over the telephone, said she was flexible and then said she would accept \$200,000. Konah spoke with Miss MacKenzie and then met with Miss Hayes about taxes on the property. She said that would be his problem. Miss Hayes also told him, in response to his raising a problem with the probate of the estate, that that would be his problem. He told Miss MacKenzie to draft a contract and send it to his lawyer, James Reiser, Esq. ("Reiser"). Miss MacKenzie sent a proposed contract with a \$200,000 sales price on October 11, 2004 to Reiser but never heard from Konah or Reiser again. (Ex. 17).

4. After that, Konah apparently negotiated directly with Miss Hayes. He said he explained the tax and probate problems and that title was not clear. He proposed that Miss Hayes would get \$115,000, not \$200,000, and he would pay for probate and the taxes. Konah and McFaddin testified Miss Hayes did not want to use Miss MacKenzie. This was in a meeting in

Miss Hayes' house in late December 2004. Konah had a business card of Maygen Moore, Esq. and testified that he gave it to Miss Hayes. He promised her she would get all her money once the probate issue was cleared.

5. Either before or after January 10, 2005, Miss Hayes received a letter that New York City would take property. Konah told her she would lose the building if she did not sell to him.

6. Maygen Moore, Esq. testified that she worked as an associate at a Brooklyn real estate law firm from September 2004 to April 2005 that had represented a seller in a Konah transaction. Konah had mentioned Miss Hayes as a client with a medical condition. Miss Hayes called her and asked her to represent her in the sale and Ms. Moore suggested she would go to her apartment instead of Miss Hayes going to Brooklyn. Thereafter, Miss Moore prepared the contract of sale (Ex. I) based solely on information from Konah and came with it and Konah to the January 10, 2005 meeting at Ms Hayes apartment. Mr. McFaddin observed Miss Moore came with Konah to the meeting. It was Miss Moore's impression that Miss Hayes appeared alert and talked in a friendly way. Although Miss Moore testified that she explained the probate issue, the contract and asked whether Miss Hayes was comfortable with the purchase price, Mr. McFaddin credibly contradicted Moore's testimony about the extent of the advice she gave to Miss Hayes. Miss Moore wrote a note to the file allegedly reflecting the conversation, that Miss Hayes and Mr. Konah signed. (Ex. 19).

The note stated:

**“ON JANUARY 10, 2005, MS. GWENDOLYN HAYES  
ATTESTS TO THE FACT THAT SHE INDEPENDENTLY  
NEGOTIATED THE PURCHASE PRICE WITH SPALDING  
HOME CORP. FOR THE PREMISES LOCATED AT 130**

WEST 127<sup>TH</sup> STREET, NEW YORK, NEW YORK. MS.  
HAYES FURTHER AGREES AND REPRESENTS THAT  
THE PURCHASE PRICE OF \$115,000 DOES NOT  
INCLUDE ANY AND ALL LEINS [sic] AND ADJUSTMENTS  
THAT SPALDING HOME CORP. HAS AGREED TO PAY.”

(Exhibit 19)

Miss Moore never took any money from Mr. Konah or from Spalding, had no written retainer and expected to be paid at the closing but never was. She did not note the probate issue in the contract because, based on her conversation with James Reiser, Spalding's attorney, she believed that 40 days was more than sufficient time to close. Although she called Reiser and Miss Hayes at least two times, the closing date was never extended in writing or set before she left the firm. Thus, although not paid, she considered herself Miss Hayes' attorney for the transaction.

7. Konah and Miss Hayes signed the contract (Plaintiff Ex. 1) on January 10, 2005 at her apartment. Konah, Miss Hayes, Magen Moore, Esq. and McFaddin were present. Although Miss Hayes admitted that it was her signature on the January 10, 2005 contract, she testified she never spoke to Miss Moore before and did not talk to her alone. Miss Hayes does not know why the downpayment amount was crossed out. Miss Hayes also admitted that she read part of the contract before she signed it and that Miss Moore explained some of it to her. Even though she testified at trial that she did not understand that probate first had to be done, at her deposition Miss Hayes testified she did realize that. (EBT July 26, 2006, P. 144).

8. Konah testified that the \$100 deposit was crossed out in the contract because he agreed he would do the probate and all the liens and whatever the costs would be, they were subtracted, even though they were not mentioned in the contract.

9. Konah testified that he agreed to give Miss Hayes \$200.00, a new phone and

money from time-to-time. He also testified that he gave money to McFaddin. However, Konah never submitted any checks or documents to support this testimony. And McFaddin denied ever receiving money from Konah and denied that Miss Hayes received money. Nor did Miss Hayes have explained to her about the lack of any downpayment. She also denied receiving any money or things from Konah although she admitted in paragraph 5 of her verified answer that Spalding began paying outstanding taxes and related expenses.

10. Konah also met with Garland Williams (“Williams”) and executed a contract on Spalding’s behalf with him at Jim Reiser’s office (ex. 4). Although the contract represents that a \$12,000.00 down payment has been received and placed in escrow, no money changed hands.

11. Konah was going to “flip” the property to Harlem MMG through a man named Andrew Daniel, with the seller as JRM Realty Associates, LLC (JRM Realty), a LLC that Reiser had previously formed. Thus, although Miss Hayes and Williams’ contracts were with Spalding, the deed listed JRM Realty Associates LLC as the buyer. (Indenture dated May 4, 2005, ex. 3).

12. Plaintiff failed to prove by a preponderance of the evidence that Hayes actually signed the May 2005 documents: the deed of sale of the property to JRM Realty (ex. 3), Transfer Tax Return (ex. 20) and Affidavit of Compliance with Smoke Detector Requirement (ex. 24). She was admitted to Harlem Hospital, on April 26, 2005 and stayed there until the end of June. In early May, when she allegedly signed the documents, she had a bruised hand and could not write. The notary who allegedly attested to her signature did not go to the hospital. The notary, James Cuter, testified it was his signature and notary stamp but he had never notarized Miss Hayes’ or any signatures at Harlem Hospital. Nor did Konah actually see her sign. Konah said he left documents in her hospital room and Mr. McFaddin returned them to him. However,

McFaddin testified he was at the hospital all day with Miss Hayes and never saw exhibits 3 or 20. Miss Hayes confirmed in her testimony that she did not sign exhibits 3, 20 and 24 because in early May she was incapable of writing and does not remember doing so. Miss Hayes also confirmed that exhibit 5 renouncing the May 3rd deed was accurate, although printed by McFaddin, and even though she was still in the hospital at that time and was not clear at the trial who had asked her to sign it.

This note read:

“06-06-2005  
I GWENDOLYN HAYES, HAVE REVIEWED THE DEED  
DATED MAY 3RD 2005 I DID NOT SIGNED [sic] THIS  
DEED, ITS [sic] FRAUD. ANY FURTHER QUESTION/S  
PLEASE CONTACT ME AT THE HARLEM HOSPITAL.

SINCERELY,

s/Gwendolyn Hayes ”

(Exhibit 5)

During this time, Mr. McFaddin testified that Miss Hayes was very sick, so he brought the Harlem MMG documents to her and then to Harold Schwartz, Esq. Miss Hayes also told him to write exhibit 5 for her because she said exhibit 3 was void.

13. Konah testified he did not record the deed because probate approval had not come through.

14. Konah attended a closing on May 25, 2005 in Jim Reiser’s office that was supposed to be with Harlem MMG, to “flip” the property. Andrew Daniel, the title company representative, Jim Reiser and he showed up, but not Veronica Grant or anyone else from defendant Harlem MMG. They rescheduled the closing and again did not close. By June 17<sup>th</sup> Grant had faxed Reiser a copy of a deed from Miss Hayes to Harlem MMG (ex. 7) and the

statement from Miss Hayes (ex. 5). Reiser showed these to Konah.

15 Konah called Grant. He said Miss Hayes was lying. Grant told him that she had received a title report listing Miss McKenzie as Miss Hayes' attorney, called her and thereafter negotiated a contract with Miss Hayes, not knowing at that time that Miss Hayes had signed a contract of sale with Spalding.

16. On cross-examination, Mr. Konah admitted that he never got the sellers' written consents to assign their contracts from Spalding to JMG Realty even though the contract states unequivocally at paragraph 26:

**"No Assignment.** This contract may not be assigned by Purchaser without the prior written consent of Seller in each instance and any purported assignment(s) made without such consent shall be void.  
(Exhibit 1).

He also admitted that nothing in Exhibit 1 states that time is needed to clear probate. On the other hand, paragraph 15 states that the "closing shall take place at the law offices of P. Heron Dummond, located at 706 Washington Avenue, Brooklyn, New York 11238 . . . at 10:00 o'clock a.m. on or before 40 days of contract date," [January 10, 2005 so by February 19, 2005]. Konah also admitted that neither he nor his attorney ever attempted to contact Miss MacKenzie about the contract she had drafted in October 2004. Konah never gave Miss Hayes a downpayment, has no written proof he gave her money and never tendered the purchase price of \$115,000 to her. Instead he testified he gave various cash payments to her friend, Richard McFaddin, who denied receiving any money.

17. Nor does JRM Realty have a written agreement from Spalding assigning the 130 West 127th Street contracts of sale. Nor is JRM Realty a plaintiff.

18. There is no question that Miss Hayes signed exhibit 6, the deed she executed to

Harlem MMG Inc. and exhibit 7 in the presence of McFaddin.

19. James Reiser also testified. Konah retained him to represent Spalding in the purchase of the property and probate of the will to get marketable title. He understood he would only get paid when the property was sold. He took an interest in the property to secure this payment and had an appraisal of the property at \$615,000 done on May 31, 2005 (ex. 28). He used JRM's Realty Associates, LLC as a vehicle for transferring the property and gave the closing documents to Konah to be signed, even though his usual practice was to send papers to a Seller's attorney. Miss Hayes wanted to be represented by counsel and had counsel, that Reiser knew. But he gave the documents to Konah to take to the hospital anyway because Konah told him Miss Hayes was no longer represented by counsel. Reiser did not record the documents because he was going to record them at the same time as the sale to Harlem MMG, Inc. Reiser testified that he began to feel concerned about getting paid. He had given Konah \$38,000 and was owed \$22,000 for probating the will.

20. Reiser handled the attempted closings of JRM Realty with Harlem MMG and tried to show that Grant knew about Hayes' prior contract of sale but has no fax or copy of any communications with Grant before Harlem MMG's and Hayes' May 25, 2005 closing. His only communications were with MMG's attorney Harold Schwartz. The title report that Grant had did not show Spalding or JRM Realty as a contract vendee. Reiser did not send Ms. Grant a check list (ex. 11) until June 1, 2005 for the next closing that identified the seller and the subject property as 130 W. 127th Street.

21. JRM Realty has never paid Reiser and neither Konah nor Spalding has repaid him for his advances. So admittedly he has an interest in Spalding prevailing in this lawsuit.

22. Veronica Grant testified that Andrew Daniels wanted a partner to invest, specifically, Al Reich of defendant Harlem MMG, Inc. She was a mortgage broker and a part of Harlem MMG. In April - May 2005, Mr. Reiser's client was going to sell property to Harlem MMG. In May she received a call to set a closing date. Andrew Daniels negotiated the purchase price for himself and for Harlem MMG. He obtained for her the title report. She saw McKenzie listed as the seller's attorney on the title report and spoke to her. She understood it was a "flip" sale in speaking with the title company but JRM was not listed. She then negotiated with Miss Hayes. On May 25, 2005 she signed for Harlem MMG and McFaddin then took the documents to Miss Hayes and had her sign them and brought the papers back to Harlem MMG's attorney Howard Schwartz: the contract of sale (ex. 6), Indenture (ex. 7) and Sellers Affidavit of No Attorney (ex. 15). Harlem MMG Inc wrote a check for \$5,000 to Miss Hayes (ex. 22). Harlem MMG also signed a mortgage note (ex. HH).

23. The first time that Miss Grant was aware of the Spalding contract of sale was after the closing with Miss Hayes on May 25, 2005 when she received a check list from Reiser on June first. When Grant saw the JRM Realty Co. deed dated 5/3/05 (ex. 3), she took it to Miss Hayes at Harlem Hospital and received the statement in Mr. McFaddin's writing with Miss Hayes' signature dated 6/6/05 renouncing the deed dated 5/3/05 (ex. 5). She then sent this statement by fax to Reiser.

I find Miss Grant's testimony credible that she did not know who Mr. Reiser's client was until afterward and that neither Miss Hayes nor Mr. McFaddin ever told her about the prior contract when she negotiated the sale. Mr. McFaddin testified that Miss Hayes had told him that Mr. Clifford (Konah) was out of the picture and the contract was void. So he did not

tell Grant about Konah's contract when negotiating and signing the Harlem MMG contract.

24. McFaddin never received any payments from anyone except for \$5,000.00 from Ms. Grant's on December 20, 2005 (ex. 23) that replaced the contract down payment check of May 26, 2005 to Miss Hayes (ex. 22). Harold Schwartz wrote that pursuant to instructions from Miss Hayes (exs. CC, EE, FF).

25. After plaintiff started this action, it paid off the liens in July, 2006.

### **Conclusion of Law**

1. For plaintiff to obtain specific performance based on breach of contract, plaintiff must prove (1) formation of a contract between plaintiff Spalding and defendant Hayes, (2) Spalding's performance (3) Hayes' failure to perform and (4) resulting damage. (*See Furia v Furia*, 116 AD2d 694). Plaintiff has failed to meet its burden of proof by a preponderance of the credible evidence that it is entitled to specific performance, because plaintiff has not shown that Spalding performed, or that Miss Hayes breached the contract of sale or that the contract had not expired by its own terms by May. Although Miss Hayes signed the January 10, 2005 contract, Spalding made no downpayment and paid no consideration at the time. Nor, dispute Miss Moore's testimony and letter to the file, did she explain the downpayment strike out to Miss Hayes and Miss Hayes did not understand that part of the contract. Nor, from the testimony, has plaintiff proven that Miss Moore acted for the benefit of her client because she based the contract solely on Konah's input, arrived with him and barely counseled Miss Hayes. Although Konah testified he advanced monies to Miss Hayes or for the building, McFaddin and Ms. Hayes denied this and plaintiff submitted no documentary evidence such as checks in support, except for clearing the liens much later, after initiating the law suit. Plaintiff and its attorney's work to

straighten out the alleged probate problems were for plaintiff's benefit, not Miss Hayes. Further, although there was no time of the essence, the parties never formally extended the contract beyond the 40th day set forth in the contract for the closing. Nor was there a written agreement between Spalding and JRM Realty or Miss Hayes or Mr. Williams to assign Spalding's rights to another entity, JRM Realty. Since JRM was listed as the buyer on the purported deed, that deed pursuant to paragraph 26 of the contract of sale was void. Spalding's principal's conduct *vis a vis* Miss Hayes verged on the oppressive both before, during and after she signed the contract of sale.

Nor did plaintiff prove that Miss Hayes signed the May 3rd and 4th 2005 documents by a preponderance of the credible evidence. First, Miss Hayes was ill and hospitalized during the time Konah and his lawyer bypassed both Miss Mc Kenzie, Miss Hayes' original lawyer, and Moore, who had purportedly represented her at the signing. Second, Miss Hayes could not write her signature at that time. Third, I find that the contract had expired by its own terms by May. Fourth, as noted above, the buyer, JRM Realty, was not authorized to purchase the property.

The elements of a cause of action for specific performance of a contract for the sale of real property are that the purchaser substantially performed its contractual obligations and was willing and able to perform its remaining obligations, that the vendor was able to convey the property and that there was no adequate remedy at law. (*See EMF General Contracting Corp. v Bisbee*, 6 AD3d 45, 51 [1st Dept 2004]). Here, until plaintiff had the liens vacated, after starting the lawsuit, plaintiff had not fulfilled all its obligations that Konah had promised to do in return for negotiating the purchase price down from \$200,000 to \$110,000 with Miss Hayes. Nor did plaintiff Spalding prove that it was at any time willing and able to itself close on the deal. Plaintiff was immediately going to "flip" the building. Without a buyer, Spalding could not pay

the sellers, Miss Hayes and Mr. Williams. Again, because it did not clear the liens until after commencing litigation when neither Miss Hayes was willing to sell nor Harlem MMG was willing to buy, plaintiff is not entitled to specific performance. And plaintiff has an adequate remedy at law. To the extent it can prove actual expenses it incurred that inured to defendants' benefit, plaintiff may be able to recover those sums.

2. Nor has plaintiff proven that defendants Harlem MMG, Inc. and Veronica Grant intentionally interfered with plaintiff's contract rights or that Harlem MMG, Inc. is not a bona fide purchaser for value. First, the contract of sale had terminated by its own terms by the time that Grant was negotiating with Hayes. Second, the credible evidence is that Veronica Grant did not know that Spalding was Reiser's client when she began to negotiate with Miss Hayes. Her information about the closing at Reiser's office was limited and sifted through Andrew Daniel, a co-investor, not an agent of Harlem MMG. Neither he nor Harlem MMG's attorney testified. To prove that Harlem MMG, Inc was not a bona fide purchaser for value plaintiff needed to prove that Harlem MMG, Inc. "had either notice or knowledge of a prior interest or equity in the property, or one that would lead a reasonably prudent purchaser to make inquiries concerning such." (*See Chen v Geranium Dev. Corp.*, 243 AD2d 708 [2d Dept 1997]). Grant had no knowledge from the title report or conversations that the building was in contract. She then satisfied her obligation to make a good faith inquiry by speaking with Miss Hayes and Mr. McFaddin. They never told her about the Spalding contract before signing the Harlem MMG, Inc. contract. After that, Grant relied on their statements that the deed to JRM Realty was false.

3. Although almost all witnesses had an interest in the outcome of the case and several witnesses' memories were inconsistent or blurred, I find that, overall, Mr. Konah's

testimony was most colored by his interest. Further, plaintiff failed to introduce evidence to support several of its claims, as pointed out in summation: specifically the allegations in paragraphs 17, 18, 23 and 47 of the complaint.

4. As plaintiff has failed to prove Grant's and Harlem's intentional, wrongful and improper interference, the remainder of plaintiff's causes of action against them likewise fail.

5. As to the counterclaims of Harlem MMG, Inc., the first counterclaim sounds in fraud to Harlem MMG, Inc. and Gwendolyn Hayes and seeks to rescind the January 10, 2005 contract of sale between Hayes and Spalding. To prove fraud, plaintiffs must show a representation of a material fact, the falsity of that representation, the party who made the representation's knowledge that it was false when made and plaintiff's justifiable and resulting injury. (*See Serino v Lipper*, 846 NYS 2d 138 [1st Dept 2007]). These counter claimants are not parties to the contract of sale, the allegations of fraud in their counterclaim and proof at trial do not relate to that contract but to the later deed and fail to meet the clear and convincing standard of proof required. Further, there is no evidence that Konah represented a false material fact to Miss Hayes involving the contract of sale. The only evidence is that he crossed out the \$1,000.00 deposit on signing and Miss Hayes did not know about it.

6. Insofar as Harlem MMG's second counterclaim, it requests a declaration that defendant Harlem MMG, Inc. is a bona fide purchaser. It is entitled to that relief based on the credible evidence set forth *supra*. Its burden is to prove that that Harlem MMG, Inc. "had [n]either notice or [n] or knowledge of a prior interest or equity in the property, or one that would lead a reasonably prudent purchaser to make inquiries concerning such." (*See Chen v Geranium Dev. Corp.*, 243 AD2d 708, 709 [2d Dept 1997]). Based on the court's findings, *supra*, Harlem

MMG, Inc. had a valid contract of sale with Miss Hayes as well as a deed for her interest and was a bona fide purchase for value.

7. As Harlem MMG, Inc. has succeeded in its contention that it is a bona fide purchaser of Miss Hayes 50% ownership of the property, it is entitled to that declaration and appropriate injunctive relief as sought in the third counterclaim.

8. The court denies the damages sought in Harlem MMG's third counterclaim because there is no proof in the record to support them.

9. At the trial, Harlem MMG, Inc. withdrew the partition and judicial sale sought in its fifth counterclaim.

10. Miss Hayes counterclaims for coercion and undue influence. The law on undue influence requires proof of "a moral coercion, which restrained independent action and destroyed free agency, or which, by importunity that could not be resisted, constrained the testator to do that which was against his free will and desire." (*In re Camac*, 300 AD2d 11, 12 [1st Dept 2002]). The counterclaim is one usually asserted in will contests. That counterclaim is dismissed for failure to meet the high standard of proof required, even though the evidence showed that Konah influenced Miss Hayes and disregarded her attorneys, leading to the court's denying enforcement of the contract of sale.

11. Her second counterclaim for fraud likewise fails for a failure to prove by clear and convincing that plaintiff misrepresented a material fact that was false with knowledge of its falsity. See Conclusion 5 *supra*.

12. As the court has dismissed the complaint, any existing Notice of Pendency that plaintiff filed shall be vacated, as defendant Hayes requests..


13. The remainder of the relief counter claimants seek, attorneys' fees and monetary damages, is denied as without basis in the record or in the law.

Settle judgment.

Parties directed to pick up their exhibits from the Part 03 Courtroom 248 by January 31, 2008 or they will be recycled.

Dated: December 28, 2007

ENTER:

  
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J.S.C.