

<b>Sparks Assoc., LLC v North Hills Holding Co. II, LLC</b>
2008 NY Slip Op 33248(U)
November 24, 2008
Supreme Court, Nassau County
Docket Number: 3747/08
Judge: Ute W. Lally
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SCAN

SHORT FORM ORDER

mod

SUPREME COURT - STATE OF NEW YORK

Present:

HON. UTE WOLFF LALLY,

Justice

TRIAL/IAS, PART 6  
NASSAU COUNTY

SPARKS ASSOCIATES, LLC,

Plaintiff(s),

MOTION DATE: 10/22/08

INDEX No.: 3747/08

-against-

MOTION SEQUENCE NO: 1

CAL. NO.:

NORTH HILLS HOLDING COMPANY II, LLC,

Defendant(s).

The following papers read on this motion:

Notice of Motion/ Order to Show Cause.....	1-4
Answering Affidavits.....	5-7
Replying Affidavits.....	8,9
Sur-Reply.....	10,11
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Upon the foregoing papers, it is ordered that this motion by defendant for an order pursuant to CPLR 3212 granting summary judgment in its favor dismissing the plaintiff's complaint is determined as follows.

On April 29, 2006, the plaintiff contracted to purchase Unit 131 ("the Unit") at the Chatham at North Hills by signing a Purchase Agreement (the "Contract") at the price of \$1,700,000. Sparks contracted to purchase the Unit, as an investor. Its specific intention was to assign its contractual rights prior to title closing at a profit, to wit: "flip the contract." Defendant, the sponsor of the Chatham at North Hills, pursuant to the terms of the contract, permitted Sparks to "flip" the contract prior to closing. The sponsors scheduled a closing on the unit for October 17, 2007. The real estate market had declined prior to the scheduled closing date. Sparks had not been able to "flip the contract." Sparks sought and obtained a written modification agreement (the "Modification Agreement") on November 14, 2007 that provided (a) for an adjournment of the title closing date (from October 17, 2007 to January 15, 2008 as a time of the essence closing date), (b) the immediate release of the down payment to the Builder, (c) unlimited "right of access" to the unit and (d) the

payment of \$5,700. Plaintiff, by January 15, 2008, was still unable to "flip the contract" and elected to exercise its right, as contained in the Modification Agreement, to further adjourn the time of the essence title closing date from January 15, 2008 to January 30, 2008. Plaintiff, by January 30, 2008 was still unable to "flip the contract" and sought a further extension of the title closing date from the defendant. Before the January 31, 2008 deadline the parties negotiated an Extension Agreement for the Unit (Extension Agreement). The Extension Agreement was dated January 31, 2008, signed only by plaintiff, and drafted by the defendant's attorney. The Extension Agreement provided that"

1. "If Sparks tenders to the Seller on or before 5:00 pm on January 31, 2008 payment of fifteen thousand (\$15,000.00) dollars (the Extension Payment"[sic]) the time of the essence title closing set for January 31, 2008 shall be extended to March 3, 2008 at the office of Lance Roger Spodek, Esq., 330 West 58 St., Suite 306, New York, NY 10019 at 10:00 am or at the Purchaser's lender's attorneys' office."
2. "If Sparks tenders to the Seller on or before 5:00 pm on January 31, 2008 a series of four (4) post-dated checks, each in the amount of fifteen thousand (\$15,000.00) dollars, being dated March 1, 2008, April 1, 2008, May 1, 2008 and June 1, 2008 (the Further Extension Payments"[sic]) the time of the essence title closing set for March 3, 2008 shall be extended to June 30, 2008 at the office of Lance Roger Spodek, Esq., 330 West 58 St., Suite 306, New York, NY 10019 at 10:00 am or at the Purchaser's lender's attorneys' office."

The plaintiff hand delivered a check to defendant's attorney on January 31, 2008 in the sum of \$15,000.00 together with four (4) post-dated checks each in the amount of \$15,000 relying on the following e-mails dated January 31, 2008 and February 1, 2008, respectively from the defendant's attorney to the plaintiff's attorney.

"Dear George: Please see attached extension agreement. Please note the checks must be delivered today. Regards. Lance."

"Dear George: Attached is a revised Extension Agreement incorporating your comments. Also attached is a redline version. Thank you for noting the incorrect reference to the contract date, now corrected. The checks have been received. Once I have fax copies of both your signature and your client's signature I will fax back fully executed copies via fax.  
Regards, Lance

"Lance Roger Spodek, Esq.  
330 West 58 St. - Suite 306  
New York, NY 10019-1822  
T-212-586-8606  
F-212-586-8624  
Lance@Spodeklaw.com

The check in the sum of \$15,000 was negotiated by the defendants, clearing the account of defendant's attorney.

After allowing the defendant to release the down payment in the sum of \$225,000 pursuant to the first Modification Agreement dated November 14, 2007, paying \$5,700.00 to the defendant for the first extension, and \$15,000.00 pursuant to the Extension Agreement the defendant set a closing date of March 3, 2008 with time being of the essence. Plaintiff failed to appear at the closing on March 3, 2008. Defendant declared the plaintiff to be in default.

Plaintiff commenced the within action by serving a summons and complaint dated February 22, 2008 and filing a Notice of Pendency. The defendant interposed an answer and an affirmative defense alleging the statute of frauds. In the first and second causes of action plaintiff seeks return of the \$289,123 down payment, together with attorney's fees. In the third cause of action plaintiff seeks return of the \$5,700.80 paid to extend the time of essence closing date. The fourth cause of action is based on a willful *prima facie* tort for the defendant's alleged willful and tortuous refusal to comply with the obligations under the Agreements. The fifth cause of action is for specific performance.

Defendant has failed to make an adequate *prima facie* showing of entitlement to summary judgment on the first, second and third causes of action by clearly and convincingly establishing that under the doctrine of part performance, the cashing of the plaintiff's check in the sum of \$15,000 pursuant to the Extension Agreement was not part performance effectively waiving the protection offered by the statute of frauds (*Alvarez v Prospect Hospital*, 66 NY2d 320). The doctrine of part performance is based on principles of equity and recognizes that "it would be a fraud to

allow one party to a real estate transaction to escape performance after permitting the other party to perform in reliance on the agreement" (*Messner Vetere Berger McNamee Schmetterer Euro RSCG Inc. v Aegis Group PLC*, 93 NY2d 229 at 235). Further, there is a question of fact as to whether the defendants gave the plaintiff "full access" to the unit in order to show it to prospective purchasers. Also, there is a question of fact as to whether the plaintiff would have agreed to an extension of the title closing date and the payment to the sponsor of an additional \$15,000 without securing a continuing of the "right of access."

Therefore the motion for summary judgment dismissing the first, second and third causes of action is denied.

In order to state a cause of action to recover damages for the *prima facie* tort of intentional infliction of emotional distress, the conduct alleged must be so outrageous as to be considered atrocious and intolerable in a civilized society (*Leonard v Reinhardt*, 20 AD3d 510) and the complaint must allege special damages (*Cardo v Board of Managers*, 29 AD3d 930). Plaintiff has neither alleged that disinterested malevolence was the sole motivation of which it complains nor special damages. The underlying action is one sounding in breach of contract only. Thus, the fourth cause of action alleging a *prima facie* tort is dismissed (*See Freihofer v Hearst Corp.*, 65 NY2d 135).

The application to vacate the Notice of Pendency is denied. CPLR 6501 provides that:

"Notice of Pendency may be filed in any action in a court of the State or the United States in which judgment demanded would affect the title to, or the possession, use or enjoyment of, real property."

A notice of pendency may be filed only where the judgment would have a direct effect on real property (*See Savasta v Duffy*, 257 AD2d 435). This action involves real property. The plaintiff, as an alternative to the return of its down payment, in the fifth cause of action alleges it "is entitled to specific performance of the Purchase Agreement, Modification Agreement and Extension Agreement."

Although the fourth cause of action is dismissed and plaintiff may proceed on the first, second, third and fifth causes of action, there is no basis for an award of legal fees to either party. Attorney's fees are incidental to litigation and may not be recovered unless supported by statute, court rule or written agreement of the parties (*Hooper Assoc. Ltd. V AGS Computers*, 74

NY2d 487).

A preliminary conference (see 22 NYCRR 202.12) shall be held at the Preliminary Conference part, located at the Nassau County Supreme Court on the 15<sup>th</sup> day of December, 2008, at 9:00 a.m. This directive, with respect to the date of the conference, is subject to the right of the clerk to fix an alternate date should scheduling require. The plaintiff shall serve a copy of this order on the preliminary conference clerk and the attorney for the defendant.

Dated: NOV 24 2008

*U. Whalley* J.S.C.

**ENTERED**  
NOV 26 2008  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE