

**Sparks Assoc., LLC v North Hills Holding Co. II  
LLC**

2010 NY Slip Op 31373(U)

May 21, 2010

Supreme Court, Nassau County

Docket Number: 3747/08

Judge: Ute W. Lally

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SHORT FORM ORDER

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SUPREME COURT - STATE OF NEW YORK  
COUNTY OF NASSAU - PART 4

Present: HON. UTE WOLFF LALLY  
Justice

SPARKS ASSOCIATES, LLC,  
Plaintiff,

Motion Sequence #5  
Submitted April 16, 2010

-against-

INDEX NO: 3747/08

NORTH HILLS HOLDING COMPANY II LLC,  
Defendant.

The following papers were read on this motion for summary:

Notice of Motion and Affs.....	1-5
Affs in Opposition.....	6&7
Affs in Reply.....	8&9
Memoranda of Law.....	10-12a

Upon the foregoing papers, it is ordered that this motion by the defendant for an order pursuant to CPLR 3212 granting summary judgment in its favor dismissing the plaintiff's complaint, is denied.

On April 29, 2006, the plaintiff Sparks Associates, LLC ("Sparks") contracted to purchase at the price of \$1,700,000, unit 131 (the "Unit") at the Chatham at North Hills by signing a Purchase Agreement (the "Contract"). 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, i.e., "flip the contract". Defendant North Hills Holding Company II LLC, 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 sponsor scheduled a closing on the Unit for October 17, 2007. The real estate market had declined prior to the scheduled closing date and Sparks had not been able to “flip” its 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; and (c) unlimited “right of access” to the Unit. Sparks by January 15, 2008 was still unable to “flip” its 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 31, 2008 and which time Sparks was still unable to “flip” its 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 Sparks Associates LLC, 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) dollars (the [sic] Extension Payment”) 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) dollars, being dated March 1, 2008, April 1, 2008, May

1, 2008 and June 1, 2008 (the [sic] Further Extension Payments”) 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](mailto:Lance@Spodeklaw.com) “

The check in the sum of \$15,000 was negotiated by the defendant, 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. The plaintiff failed to appear at the closing on March 3, 2008. The defendant declared the plaintiff to be in default.

The 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 the plaintiff seeks return of the \$289,123 down payment, together with attorney's fees. In the third cause of action the 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 fourth cause of action was dismissed as was the demand by plaintiff for attorney fees. (Justice Lally, Short Form Order dated March 25, 2009).

Paragraph 4 of the Extension Agreement states that "Sparks hereby ratifies the contract and the Modification Agreement as valid and binding legal obligation ". . . It is specifically agreed that Spark's right as contained in the contract to inspect the unit and create a punch-list with the Seller is preserved." (emphasis added)

All parties understood that the plaintiff intended to flip the contract. Although defendant's attorney argues that the Purchase Agreement gave Sparks no right of access to show the property to its potential buyers before a closing, a reading of ¶ 10 of the Purchase Agreement contemplates that plaintiff could enter the property accompanied by a representative of the defendants. There is no doubt that the Modification Agreement gave Sparks full access to Unit 131 for the purpose of showing same to potential purchasers. (Attorney's Affirmation in Support of Motion, p. 20, ¶ 48). The right to have

reasonable access to the unit to show to prospective purchasers during the contract period is quite distinct from the right to do a walk-through inspection, prior to the closing. We have long been guided by the rule that “every contract contains an implied obligation by each party to deal fairly with the other and to eschew actions which would deprive the other party of the fruits of the agreement” (*Miller v Almquist*, 241 AD2d 181, 184; *Greenwich Village Associates v Salle*, 110 AD2d 111, 115; *Gross v Newman*, 53 AD2d 2, 5; see also *Dalton v Educational Testing Service*, 87 NY2d 384).

Issue finding, rather than issue determination, is the key to summary judgment (in *re Cuttitto Family Trust*, 10 AD3d 656; *Greco v Posillico*, 290 AD2d 532; *Gniewek v Consolidated Edison Co.*, 271 AD2d 643; *Judice v DeAngelo*, 272 AD2d 583). The court should refrain from making credibility determinations (see *S.J. Capelin Assoc. v Glode Mfg. Corp.*, 34 NY2d 338, 341; *Surdo v Albany Collision Supply, Inc.*, 8 AD3d 655; *Greco v Posillico*, *supra*; *Petri v Half Off Cards, Inc.*, 284 AD2d 444, 445), and the papers should be scrutinized carefully in the light most favorable to the party opposing the motion (*Glover v City of New York*, 298 AD2d 428; *Perez v Exel Logistics, Inc.*, 614, 615; *Dodge v City of Hornell Indus. Dev. Agency*, 286 AD2d 902; *Russell v Kraft, Inc.*, 284 AD2d 386; *Pace v International Bus. Mach. Corp.*, 248 AD2d 690, 691; *Antonucci v Emeco Indus.*, 223 AD2d 913).

The defendant argues that the plaintiff has failed and refused to produce documents reflecting the source of funds which were used to purchase Unit 143 and, the source of the funds used to fund Unit 131, the subject of this motion. In response to a demand for discovery, the plaintiff asserts the following documentation has been provided: a mortgage

commitment issued to Chandru Ramnani in the amount of \$1,250,000 in connection with the purchase of Unit 131; copies of HSBC and Capital One Bank account statements for the period commencing March 31, 2005 through July 2009; the 2006 US Tax Return of Partnership Income (form 1065) for Jagram Associates, LLC; the 2006 US Tax Return of Partnership Income (form 1065) for Sparks Associates LLC; the 2007 US Tax Return of Partnership Income (form 1065) for Jagram Associates, LLC; the 2007 US Tax Return of Partnership Income (form 1065) for Sparks Associates LLC; the balance sheets of Jagram Associates, LLC for the years 2006, 2007 and 2008; the balance sheets of Sparks Associates LLC for the years 2006, 2007 and 2008. The plaintiff also contends that the 2007 1065 tax return for Sparks Associates shows that in the beginning of the tax year the plaintiff had \$818,181.00, and \$1,922,153.00 by year's end; the 2007 1065 tax return of Jagram Associates LLC, a member entity of the plaintiff, shows total assets of \$1,440,674; and the bank account statements show varying balances of \$417,000 to \$527,000 from March, 2005 to July, 2009.

It has already been demonstrated that the plaintiff allowed the defendant to release the down payment in the sum of \$225,000 pursuant to the first Modification Agreement dated November 14, 2007, pay \$5,700.00 to the defendant for the first extension, and \$15,000.00 pursuant to the Extension Agreement. On or about December 12, 2006, plaintiff made a payment of \$85,500 for Unit 143. Defendant does not refute plaintiff's assertion that during the construction of the premises, plaintiff ordered extras to be installed, and as plaintiff was contractually bound to pay for the extras, it did so when required.

A purchaser who seeks specific performance of a real estate contract must demonstrate that he or she was ready, willing and able to perform the contract at the time of the scheduled closing (*Huntington Mining Holdings, Inc. v Cottontail Plaza, Inc.*, 60 NY2d 997, 998). Even assuming the defendant improperly cancelled the contract, the plaintiff still has the burden of showing that it had the financial capacity to purchase the property. (*Id.*; *Sau Ting Cheng v Prime Design Realty, Inc.*, 44 AD3d 644; *Djukanovic v D'amico*, 40 AD3d 576).

Plaintiff herein further argues that when the time comes to close on Unit 131, it will acquire the necessary funds through either a line of credit, cash on hand in the plaintiff's own account, or from one of its principal members. Defendant has not refuted the assertion by the plaintiff that to date the plaintiff has demonstrated through prior transactions with the defendant an ability to meet each deadline to acquire the necessary funds to close on Unit 131. In that plus the financial information provided by plaintiff establishes the existence of a triable issue of fact sufficient to defeat this summary judgment motion. (*Zeitoune v Cohen*, 66 AD3d 889; *Gindi v Intertrade International Ltd*, 50 AD3d 757; *Del Pozo v Impressive Homes, Inc.*, 29 AD3d 620; *Madison Equities, LLC v MZ Management Corp.*, 17 AD3d 639; *Paglia v Pisanello*, 15 AD3d 373; *Internet Homes, Inc. v Vitulli*, 8 AD3d 438).

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).

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 full access to show the unit to prospective purchasers.

Therefore the defendant's motion for summary judgment is denied in its entirety.

Dated: May 21, 2010

  
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UTE WOLFF LALLY, J.S.C.

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**ENTERED**  
MAY 27 2010  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE

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