

<b>Lehmann v EDM Lenox, LLC</b>
2020 NY Slip Op 30270(U)
January 6, 2020
Supreme Court, New York County
Docket Number: 653609/2018
Judge: Debra A. James
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM**

*Justice*

-----X

DAVID LEHMANN and CARYN LEHMANN,  
  
Plaintiffs,

INDEX NO. 653609/2018

MOTION DATE 1/29/2019

MOTION SEQ. NO. 001 002

- v -

EDM LENOX, LLC, EDM REALTY PARTNERS LP, HELENE  
HARTIG, and LAW OFFICES OF HELENE HARTIG,

**DECISION + ORDER ON  
MOTION**

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 75

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER

ORDER

Upon the foregoing documents, it is

ORDERED that plaintiffs' motion to dismiss defendants' counterclaims (motion sequence no. 001) is granted to the extent of dismissing the second, third and fourth counterclaims, and the second, third and fourth counterclaims are dismissed, and the motion is otherwise denied; and it is further

ORDERED that the branch of defendants' motion for summary judgment dismissing the complaint against them (motion sequence no. 002) is granted in its entirety, and the complaint against

defendants is dismissed as against them, with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the branch of defendants' motion for summary judgment on their counterclaims (motion sequence no. 002) is granted to the extent of granting summary judgment on the first counterclaim and a declaratory judgment with respect to the subject matter of the first counterclaim; and it is further

ADJUDGED and DECLARED that plaintiffs David M. Lehmann and Caryn Aviva Lehmann breached the Contract of Sale dated April 24, 2018 with defendant EDM Lenox, LLC; and it is further

ADJUDGED and DECLARED that the Contract of Sale dated April 24, 2018 between plaintiffs David M. Lehmann and Caryn Aviva Lehmann and defendant EDM Lenox, LLC is hereby rescinded; and it is further

ADJUDGED and DECLARED that defendant EDM Lenox, LLC is entitled the release of the contract deposit (the Contract Deposit) of one hundred forty-five thousand dollars (\$145,000), together with any accrued interest, currently held in escrow by defendants Helene W. Hartig, Esq. and The Law Offices of Helene Hartig, to it; and it is further

ADJUDGED and DECLARED that defendant EDM Lenox, LLC is entitled to recover its reasonable attorneys' fees incurred in this action from plaintiffs; and it is further

ORDERED that defendants Helene W. Hartig, Esq. and The Law Offices of Helene Hartig, as escrow agent, shall forthwith release the Contract Deposit of one hundred forty-five thousand dollars (\$145,000), together with any accrued interest, to defendant EDM Lenox, LLC within ten (10) days from the date of service of a copy of this order with notice of entry; and it is further

ORDERED that a motion having been made by defendant EDM Lenox, LLC, an aggrieved person, to cancel a notice of pendency herein, filed in the office of the County Clerk of New York County on August 10, 2018 affecting real property located at The Lenox Condominium, 380 Lenox Avenue, Unit 3G, New York, New York (Block 1727, Lot 1016) (NYSCEF Doc No. 12), and notice of such motion having been given as directed by the court, and due deliberation having been had thereon, and the court having determined that cancellation is appropriate, it is hereby

ORDERED that the County Clerk of New York County, upon service upon him of a copy of this order with notice of entry, shall cancel and strike from the records the aforesaid notice of pendency; and it is further

ORDERED that plaintiffs shall reimburse defendant EDM Lenox, LLC for the costs and expenses occasioned by the filing and cancellation, together with the regular costs of the action, to be determined by a referee as described further below; and it is further

ORDERED that such service upon the County Clerk shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)); and it is further

ORDERED that this matter having come before this court on February 8, 2019 on motion of the defendants for summary judgment, and the plaintiffs having been represented in connection therewith by N. Ari Weisbrot, Esq., and the defendants having been represented by Richard E. Carmen, Esq., and, pursuant to CPLR 4317, the court having on its own motion determined to consider the appointment of a referee to determine as follows, it appearing to the court that a reference to determine on consent is proper and appropriate pursuant to CPLR 4317 (b) in that an issue of damages separately triable and not requiring a trial by jury is involved, it is now hereby

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

- (1) the amount of reasonable attorneys' fees incurred by defendant EDM Lenox, LLC in this action that it may recover from plaintiffs; and

(2) the amount of costs and expenses defendant EDM Lenox, LLC may recover from plaintiffs occasioned by the filing and cancellation of the notice of pendency, together with the regular costs of the 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](http://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 report as specified above; it is further

ORDERED that counsel shall immediately consult one another and counsel for defendant EDM Lenox, LLC shall, within 15 days from the date 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; it is further

ORDERED that defendant EDM Lenox, LLC shall serve a pre-hearing memorandum within 24 days from the date of this order and plaintiffs shall serve objections to the pre-hearing memorandum 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 Special Referee for good cause shown, the trial of the issue 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 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); and it is further

ORDERED that plaintiffs' cross-motion for summary judgment dismissing the counterclaims and for summary judgment in their favor on the complaint (motion sequence no. 002) is denied.

#### DECISION

Motion sequence nos. 001 and 002 are consolidated for disposition herein.

In motion sequence no. 001, plaintiffs David M. Lehmann (David) and Caryn Aviva Lehmann (Caryn) (together, plaintiffs) move, pursuant to CPLR 3211, for an order dismissing defendants' counterclaims with prejudice.

In motion sequence no. 002, defendants EDM Lenox, LLC (EDM Lenox), EDM Realty Partners, LP. (EDM Realty), Helene W. Hartig, Esq. (Hartig) and The Law Offices of Helene Hartig (collectively, defendants) move, pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint, canceling or vacating a notice of pendency filed by plaintiffs on August 10, 2018, directing the escrow agent to release the contract deposit held in her IOLA account to EDM Lenox, and awarding defendants their reasonable attorneys' fees, costs and disbursements. Plaintiffs cross-move, pursuant to CPLR 3212, for an order granting summary

judgment in their favor on the complaint and dismissing defendants' counterclaims and defenses.

#### BACKGROUND

By contract of sale dated April 24, 2018 (the Contract), plaintiffs agreed to purchase, and EDM Lenox agreed to sell, unit 3G (Block 1727, Lot 1016), a residential condominium unit located within The Lenox Condominium, 380 Lenox Avenue, New York, New York (the Premises) for \$1.45 million (NY St Cts Elec Filing [NYSCEF] Doc No. 16, Howard Brumer [Brumer] aff, exhibit 1 at 1-3). The Contract fixed the down payment at \$145,000 (the Contract Deposit) to be held in escrow and applied to the balance of the purchase price at the closing (*id.* at 3). According to paragraph 1.21 of the Contract, plaintiffs' obligation to purchase the Premises was conditioned upon the issuance of a loan commitment letter within a certain time frame. The provision states, in part:

"1.22 If 1.21.1 or 1.21.2 applies, the 'Financing Terms' for ¶19 are: A loan of \$950,000.00 secured by a mortgage for a term of at least 30 years or such lesser amount or shorter term as applied for or as acceptable to Purchaser; and the 'Loan Commitment Date' for ¶19 is 30 calendar days after the Delivery Date (as defined in ¶1.23 below); Purchasers represent that they have been prequalified for financing with Wells Fargo Bank. In the event commitment is issued, except for issues that are unrelated to purchasers, contingency shall be deemed waived.

1.23 The 'Delivery Date' of this Contract is the date on which a fully executed counterpart of this Contract is deemed given to and

received by Purchaser or Purchaser's Attorney;"

(*id.* at 3-4). The Contract set the closing for "45 days after the full execution of this agreement or on or ~~about May 31~~, June 15, 2018, whichever is earlier"<sup>1</sup> (*id.* at 3).

A mortgage contingency provision appears in paragraph 19. The relevant portions read as follow:

"19.1.1 an 'Institutional Lender' is any of the following that is authorized under Federal or New York State law to make mortgage loans and is currently extending mortgages in the county in which the Unit is located, a bank, savings bank, private banker, trust company, savings and loan association, insurance company, governmental entity, credit union or similar banking institution whether organized under the laws of this State, the United States or any other state;

19.1.2 a 'Loan Commitment Letter' is a written offer from an Institutional Lender to make a loan on the Financing Terms (see ¶1.22) at the prevailing fixed or adjustable interest rates and on other customary terms generally being offered by Institutional Lenders ... [p]urchaser accepts the risk that, and cannot cancel this Contract if, any condition concerning Purchaser is not met.

19.2 Purchaser, directly or through a mortgage broker registered pursuant to Article 12-D of the Banking Law, shall diligently and in good faith:

19.2.1 Purchasers to apply only to an Institutional Lender for a loan on the Financing terms (see ¶1.22) on the form required by the Institutional Lender containing truthful and complete information, and submit such application together with such documents as the Institutional lender

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<sup>1</sup> In the executed version of the Contract, a line appears across the text "about May 15" and "June 15" is handwritten above it.

requires, and to pay the applicable fees and charges of the Institutional Lender, *all of which shall be performed within five (5) business days after the Delivery Date;*

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19.2.5 Purchaser is not required to apply to more than one Institutional Lender"

(id. at 17-18) (emphasis added). The Contract allowed plaintiffs to cancel the Contract if any one of four events occurred, two of which are relevant to the present action. Provided they had complied with all other provisions set forth in paragraph 19, plaintiffs could cancel the Contract under "19.3.1 [if] the Institutional Lender denies Purchaser's application in writing prior to the Loan Commitment Date (see ¶1.22); or [under] 19.3.2 [if] a Loan Commitment Letter is not issued by the Institutional Lender on or before the Loan Commitment Date" (id. at 18). If plaintiffs wished to effectuate a cancellation under to paragraph 19.3.1, paragraph 19.5 required them to deliver "a copy of the Institutional Lender's written denial of Purchaser's loan application" to EDM Lenox (id.). Paragraph 19.8 also states, in pertinent part:

"19.8 If this Contract is canceled by Purchaser pursuant to this ¶19, then thereafter neither Party shall have any further rights against, or obligations or liabilities to, the other by reason of this Contract, except that the Contract Deposit shall be promptly refunded to Purchaser and except for provisions of this Contract which by their terms survive termination . . ."

(*id.* at 19). Paragraph 10.1 of the Contract warned that a default by plaintiffs would result in their forfeiture of the Contract Deposit to EDM Lenox as liquidated damages (*id.* at 11). Paragraph 27.1 of the Contract also states, "This Contract shall not be binding or effective until fully executed by both Parties and delivered by Seller to Purchaser or Purchaser's Attorney" (*id.* at 20).

The Contract contained two riders, both of which control in the event of an inconsistency between language in the riders and the pre-printed language on the form Contract (*id.* at 24 and 27). Paragraph 43 in the first rider states that a closing shall take place on or about May 31, 2018, and that plaintiff may request up to four 30-day extensions, provided they pay \$5,000 for each of the first three extensions and \$7,500 for the fourth and final extension (*id.* at 26). Importantly, a handwritten provision in the second rider reads:

"\*Notwithstanding the foregoing, if Purchasers' proposed lender elects not to close because Purchasers have not sold and/or closed on the sale of their residence, this shall not constitute a basis to exercise the 'funding contingency.' Further, Purchasers agree that funding contingency cannot be utilized unless and until Purchasers have applied to and received a mortgage for the subject premises with a recognized lender, such as Chase, Wells Fargo and/or Citibank"

(id.). In the event that there is litigation between the parties arising out of the Contract, the parties agreed that "the non-prevailing party shall reimburse the prevailing party of its reasonable attorney's fees incurred in such action" (id. at 30).

Plaintiffs allege that on April 17, 2018, they wired the Contract Deposit to Hartig, EDM Lenox's attorney and the escrow agent identified in the Contract (NYSCEF Doc No. 38, affirmation of defendants' counsel, exhibit 20 [complaint], ¶¶ 19, 25 and 27). They further allege that they applied for a mortgage loan from nonparty FM Home Loans, LLC (FM Home) in May 2018 (id., ¶ 34), and that by letter dated June 5, 2018, FM Home denied plaintiffs' loan application, citing insufficient income and poor credit scores, among other reasons (id., ¶ 36). Plaintiffs allege their counsel sent Hartig a notice canceling the Contract, together with a copy of FM Home's denial letter on June 5, 2018, 10 days before the June 15, 2018 closing date (id., ¶ 37), that Hartig rejected the notice of cancellation on June 8, 2018 and insisted on holding a closing (id., ¶ 38), and that Hartig has since refused to release the Contract Deposit to them (id., ¶ 46).

In this action, plaintiffs assert claims for (1) a judgment declaring that the Contract has been cancelled and that they are entitled to the Contract Deposit, (2) breach of contract against EDM Lenox, (3) breach of contract against Hartig, (4) breach of fiduciary duty against Hartig, (5) enforcement of a lien against

the Premises, (6) conversion, and (7) unjust enrichment. In addition to asserting several affirmative defenses, such as waiver, estoppel and unclean hands, in their answer, defendants interposed counterclaims for a judgment declaring that EDM Lenox is entitled to retain the Contract Deposit, tortious interference with business relations, and attorneys' fees pursuant to a provision in the Contract, and a counterclaim pleading that Hartig bears no liability because the Contract Deposit remains in a separate IOLA account.

#### THE PARTIES' CONTENTIONS

Plaintiffs move to dismiss defendants' counterclaims on the ground that the counterclaims are baseless and for summary judgment on the complaint and the counterclaims. In support, plaintiffs rely upon two affidavits from David attesting to the fact that plaintiffs applied for financing with an institutional lender in accordance with the terms of the Contract in April 2018 (NYSCEF Doc No. 5, David aff, ¶ 15) or May 2018<sup>2</sup> (NYSCEF Doc No. 81, ¶ 22). David avers that FM Home, a mortgage banker licensed in this State, qualifies as an "institutional lender," as the term is defined in the Contract (NYSCEF Doc No. 5, ¶ 16). David states that upon learning that the loan application was denied, their counsel promptly forwarded a notice canceling the Contract and the denial

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<sup>2</sup> In the complaint, plaintiff had alleged that they had applied for a mortgage loan "[i]n or about May 2018" (NYSCEF Doc No. 38, ¶ 33).

letter to EDM in advance of the June 15 closing date (*id.*, ¶¶ 17 and 19). As the Contract did not require them to apply to more than one institutional lender, plaintiffs submit that they properly cancelled the Contract.

Plaintiffs argue that Hartig improperly rejected the cancellation and insisted on scheduling a closing. In an affidavit submitted in support of plaintiffs' cross motion for summary judgment, Ann Zeilingold (Zeilingold) avers that she is a vice president at FM Home, and that FM Home is a "mortgage bank, licensed [in] sixteen states, including the State of New York" (NYSCEF Doc No. 78, ¶¶ 1-2). Zeilingold states that on or about May 15, 2018, plaintiffs submitted an application for a residential mortgage loan for \$950,000 for the Premises, and that FM Home denied the application by letter dated June 5, 2018 (*id.*, ¶¶ 4-5). A copy of plaintiffs' executed loan application to FM Home reveals that David signed the application on May 23, 2018 at 9:51 a.m. and that Caryn signed the application on May 23, 2018 at 9:20 a.m. (NYSCEF Doc No. 79, Zeilingold aff, exhibit A at 4). Zeilingold signed for FM Home as the loan originator on May 17, 2018 at 11:39 a.m. (*id.*). Plaintiffs also posit that defendants misinterpret the language in the second contract rider discussing "recognized lenders" because Chase, Wells Fargo, and Citibank are only examples of what entities qualified as a recognized lender.

Plaintiffs urge the court to dismiss the first counterclaim for a judgment declaring that EDM Lenox is entitled to the Contract Deposit. They argue that the second counterclaim sounding in tortious interference lacks merit because the Contract plainly states that the Contract Deposit is a lien on the Premises. Plaintiffs maintain that the third counterclaim alleging that Hartig should not have been sued fails to state a cause of action, and that the fourth counterclaim for attorneys' fees cannot be sustained as an independent cause of action.

Defendants oppose plaintiffs' motion to dismiss and move for summary judgment in their favor on the counterclaims and for summary judgment dismissing the complaint. Tendered in support are similarly-worded affidavits from Howard Brumer (Brumer), a managing member of EDM Lenox and a vice president and general partner of EDM Realty, nonparty Monique Nelson (Nelson), EDM Lenox's real estate broker, and Hartig describing the circumstances surrounding the offer and proposed sale of the Premises.

Brumer avers that Hartig and plaintiffs' counsel negotiated the terms of the Contract, including the financing contingency (NYSCEF Doc No. 15, ¶ 23; NYSCEF Doc No. 85, Brumer reply aff, ¶ 13). He states that plaintiffs delivered the signed Contract with a June 15, 2018 closing date to Hartig's office on April 24, 2018 (*id.*, ¶¶ 29-30). As such, plaintiffs had to apply for a mortgage

loan with an institutional lender by May 1, 2018, or within five business days of delivery of the Contract (NYSCEF Doc No. 15, ¶ 38), but they inexplicably failed to do so, as evidenced in their opposing papers (NYSCEF Doc No. 85, ¶ 20). Although EDM Lenox granted plaintiffs' May 24, 2018 request for a two-week extension of the loan commitment date, EDM Lenox did not waive any other applicable provisions in paragraph 19 of the Contract (NYSCEF Doc No. 15, ¶¶ 44 and 46). Brumer complains that plaintiffs' representations about their financial qualifications induced EDM Lenox to accept their offer (id., ¶ 20), and states that he was "shocked" to learn that the loan application had been denied (id., ¶ 49). Brumer avers that the rejection letter issued by FM Home omitted information about FM Home's status as an institutional lender under the Contract, including whether FM Home was in the business of extending mortgage loans in New York County (id., ¶ 51). Brumer further avers that EDM Lenox was ready, willing and able to close, but plaintiffs failed to request and pay for an extension (id., ¶¶ 52-53). He also asked Hartig to release the Contract Deposit, but she refused in the absence of an agreement between the parties (id., ¶ 55).

Hartig avers that she has repeatedly informed plaintiffs that the Contract Deposit has been, and will remain, in her IOLA account pending an order from the court (NYSCEF Doc No. 17, Hartig aff, ¶¶ 6-7 and 9). She avers that plaintiffs should have advised

defendants of the issues pertaining to their income and credit, especially when plaintiffs' counsel had advised her in April 2018 that plaintiffs were already working with a lender (id., ¶¶ 13-16). Moreover, when seeking an extension of the loan commitment date, plaintiffs' counsel alluded to problems obtaining records from the IRS, not plaintiffs' credit problems (id., ¶¶ 17-19; NYSCEF Doc No. 88, Hartig reply aff, ¶ 7). She rejected plaintiffs' attempted termination of the Contract because the declination letter did not identify FM Home as an institutional lender and advised plaintiffs' counsel that plaintiffs had effectively waived the mortgage contingency (id., ¶ 20). Hartig also states that she rejected plaintiffs' and Brumer's requests to release the Contract Deposit because of the dispute between them (id., ¶¶ 23 and 26). According to a June 28, 2018 letter, Hartig informed plaintiffs' litigation counsel that the Contract was "clearly dated as of the date it was delivered to Mr. Greene, who acknowledged receipt. Mr. Greene and his clients were also clearly well aware of the delivery date when they asked for and received a signed, dated extension" (NYSCEF Doc No. 20, Hartig aff, exhibit 4 at 1).

Nelson avers that plaintiffs furnished her with proof of their ability to complete the transaction, including a pre-approval letter from Wells Fargo and a signed financial statement setting forth their assets and liabilities (NYSCEF Doc No. 29, Nelson aff,

¶ 7). Nelson states that "we all reasonably believed" plaintiffs had been working with Wells Fargo as their lender, given that Wells Fargo had already issued the pre-approval letter (*id.*, ¶ 15).

Defendants argue that, based on these facts, they are entitled to summary judgment. Furthermore, defendants assert that there is merit to the counterclaims. As to the second counterclaim, defendants submit that the filing of a notice of pendency is improper because plaintiffs seek money damages, not specific performance. Defendants assert that the third counterclaim pleads a claim for injury to Hartig's reputation, slander of title, and abuse of process (NYSCEF Doc No. 42, defendants' memorandum of law at 22). Lastly, defendants argue they are entitled to maintain the fourth counterclaim for attorneys' fees per the Contract.

## DISCUSSION

### A. Motion Sequence No. 001

On a motion to dismiss brought under CPLR 3211, the court must "accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (Leon v Martinez, 84 NY2d 83, 87-88 [1994] [citations omitted]). Ambiguous allegations must be resolved in the plaintiff's favor (see JF Capital Advisors, LLC v Lightstone Group, LLC, 25 NY3d 759, 764 [2015]). A motion to dismiss will be denied "if from its four corners factual allegations are discerned

which taken together manifest any cause of action cognizable at law" (Guggenheimer v Ginzburg, 43 NY2d 268, 275 [1977]). However, "the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts" (Robinson v Robinson, 303 AD2d 234, 235 [1st Dept 2003]). "[F]actual allegations . . . that consist of bare legal conclusions, or that are inherently incredible . . . are not entitled to such consideration" (Mamoon v Dot Net Inc., 135 AD3d 656, 658 [1st Dept 2016] [internal quotation marks and citation omitted]). Moreover, "[w]hen documentary evidence is submitted by a defendant 'the standard morphs from whether the plaintiff stated a cause of action to whether it has one'" (Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc., 115 AD3d 128, 135 [1st Dept 2014] [internal citation omitted]).

*1. First Counterclaim*

In their first counterclaim, defendants seek a judgment declaring that they are entitled to the funds held in escrow, a release of those funds from escrow, and a cancellation of the Contract.

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 [1st Dept 2006], *appeal dismissed* 8 NY3d 956 [2007]). On a motion seeking to dismiss a declaratory judgment claim, "the only question is whether a proper case is presented for invoking the jurisdiction of the court to make a declaratory judgment, and not whether the plaintiff is entitled to a declaration favorable to him" (Law Research Serv. v Honeywell, Inc., 31 AD2d 900, 900 [1st Dept 1969] [collecting cases]). Here, the allegations in the counterclaims, supplemented by defendants' affidavits, plead the existence of a justiciable controversy as to whether plaintiffs breached the Contract. Thus, defendants have adequately pleaded a claim for a declaratory judgment. In addition, to sustain a cause of action for breach of contract, a plaintiff must prove the existence of a contract, plaintiff's performance, defendant's breach, and damages (see Harris v Seward Park Hous. Corp., 79 AD3d 425, 426 [1st Dept 2010]). The first counterclaim pleads sufficient facts to sustain a breach of contract claim.

## *2. Second Counterclaim*

The second counterclaim alleges that plaintiffs have maliciously and intentionally interfered with EDM Lenox's business relations by filing a notice of pendency.

"The purpose of the notice of pendency is 'to afford constructive notice from the time of the filing so that any person who records a conveyance or encumbrance after that time becomes bound by all of the proceedings taken in the action'" (2386 Creston Ave. Realty, LLC v M-P-M Mgt. Corp., 58 AD3d 158, 161 [1st Dept 2008], *lv denied* 11 NY3d 716 [2008] [internal quotation marks and citation omitted]). Plaintiffs rely on Paragraph 12 of the Contract, which provides that the Contract Deposit shall be a lien on the Premises (NYSCEF Doc No. 16 at 12), thereby offering justification for the filing of the notice of pendency. Defendants counter that plaintiffs ignored the rest of the subject paragraph stating that the "lien shall not continue after default by Purchaser hereunder" (*id.*). Furthermore, plaintiffs pled a cause of action for money damages, not specific performance, and "[w]here the cause of action asserts money damages arising out of a breach of contract, the complaint will be insufficient to justify a *lis pendens*" (Borrero v East Harlem Council for Human Servs., 165 AD2d 807, 808 [1st Dept 1990]).

While defendants attack the merits of the notice of pendency, they failed to address the sufficiency of the second counterclaim. A claim for tortious interference with business relations requires the following:

"(1) that it had a business relationship with a third party; (2) that the defendant knew of that relationship and intentionally

interfered with it; (3) that the defendant acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort; and (4) that the defendant's interference caused injury to the relationship with the third party"

(Amaranth LLC v J.P. Morgan Chase & Co., 71 AD3d 40, 47 [1st Dept 2009], lv dismissed in part, denied in part 14 NY3d 736 [2010]). The party's sole motive must be to inflict injury using wrongful means (see Ticketmaster Corp. v Lidsky, 245 AD2d 142, 143 [1st Dept 1997] [citation omitted]). Wrongful means for purposes of a tortious inference claim refers to "physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure" (Guard-Life Corp. v Parker Hardware Mfg. Corp., 50 NY2d 183, 191 [1980]). Defendants have not alleged that plaintiffs' conduct was directed at a party with which defendants had a relationship (see Carvel Corp. v Noonan, 3 NY3d 182, 192 [2004]), or that plaintiffs intentionally procured a contract breach without justification (see Dermot Co. Inc. v 200 Haven Co., 58 AD3d 497, 497 [1st Dept 2009]). Nor may defendants salvage the counterclaim by alleging that they had pled claims for slander of title or abuse of process. The mere filing of the notice of pendency does not give rise to a cause of action for slander of title (see Seidman v Industrial Recycling Props., Inc., 83 AD3d 1040, 1041 [2d Dept 2011]). The counterclaim also fails to plead the elements necessary to sustain a cause of action for

abuse of process, which are regularly issued civil or criminal process, an intent to do harm without justification, and a party's use of legitimate process to seek a collateral objective or advantage (see Curiano v Suozzi, 63 NY2d 113, 116 [1984], citing Board of Educ. of Farmingdale Union Free School Dist. v Farmingdale Classroom Teachers Assn., Local 1889, AFT AFL-CIO, 38 NY2d 397, 403 [1975]). Therefore, the second counterclaim is dismissed.

### 3. Third Counterclaim

The third counterclaim alleges that the causes of action against Hartig should be dismissed because Hartig, the designated escrow agent on the Contract, bears no liability as a stakeholder. Defendants also seek an award of sanctions pursuant to 22 NYCRR 130-1.1 for plaintiffs' frivolous conduct.

Even after affording the third counterclaim every favorable inference, as the court must, defendants fail to plead a cognizable, affirmative claim against plaintiffs. To the extent the counterclaim could be interpreted to assert a claim for monetary sanctions, it is settled that there is "no independent cause of action for sanctions under section 130-1.1" (306 W. 11th LLC v ACG Credit Co., II, LLC, 90 AD3d 552, 554 [1st Dept 2011] [citation omitted]). Accordingly, plaintiffs' motion to dismiss is granted to the extent of dismissing the third counterclaim.

#### 4. Fourth Counterclaim for Attorneys' Fees

Defendants' fourth counterclaim seeks the recovery of its reasonable attorneys' fees as the prevailing party in this litigation. Attorneys' fees that are recoverable under a contract provision constitute "an element of contract damages if a breach . . . is proven" (Pier 59 Studios L.P. v Chelsea Piers L.P., 27 AD3d 217, 217 [1st Dept 2006], citing Burke v Crosson, 85 NY2d 10, 17-18 [1995]). As such, a claim for attorneys' fees cannot be maintained as a separate cause of action (see La Porta v Alacra, Inc., 142 AD3d 851, 853 [1st Dept 2016]). Thus, the fourth counterclaim is dismissed.

#### B. Motion Sequence No. 002

It is well settled that the movant on a summary judgment motion "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]). The motion must be supported by evidence in admissible form (see Zuckerman v City of New York, 49 NY2d 557, 562 [1980]), and by the pleadings and other proof such as affidavits, depositions and written admissions (see CPLR 3212). The "facts must be viewed in the light most favorable to the non-moving party" (Vega v Restani Constr. Corp., 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). Once the movant meets its burden, it is incumbent upon the non-moving

party to establish the existence of material issues of fact (*id.*, citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The “[f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, regardless of the sufficiency of the opposing papers” (*Vega*, 18 NY3d at 503 [internal quotation marks and citation omitted, emphasis in original]).

*1. The First Cause of Action and the First Counterclaim for a Declaratory Judgment*

Both plaintiffs and defendants seek a judgment declaring their rights to the Contract Deposit under the Contract. It is not disputed that the Contract is a valid agreement between plaintiffs and EDM Lenox. The Contract provides that all terms set forth in paragraph 19 must be complied with in order to effectuate a cancellation under paragraph 19.3.1. Significantly, paragraph 19.2.1 required plaintiffs to “diligently and in good faith” apply for financing from an institutional lender within five business days after the “Delivery Date” (NYSCEF Doc No. 16 at 17), which is defined as “the date on which a fully executed counterpart of this Contract is deemed given to and received by Purchaser or Purchaser’s Attorney” (*id.* at 3).

Ordinarily, a “vendee who defaults on a real estate contract without lawful excuse cannot recover his or her down payment” (*Uzan v 845 UN Ltd. Partnership*, 10 AD3d 230, 236 [1st Dept 2004], citing

Lawrence v Miller, 86 NY 131, 140 [1881])). To that end, “[w]hen a condition of a mortgage loan commitment is not fulfilled through no fault of the purchasers, their performance is excused, as long as they acted in good faith” (Buonocore v Dubois, 16 AD3d 359, 359 [1st Dept 2005], *lv denied* 5 NY3d 706 [2005], quoting Lunning v 10 Bleecker St. Owners Corp., 160 AD2d 178, 178 [1990], *lv denied* 76 NY2d 710 [1990])).

Here, plaintiffs failed to meet their prima facie burden on summary judgment by demonstrating that they filed a mortgage loan application with an institutional lender within five business days of April 24, 2018, the date a copy of the fully executed contract was delivered to plaintiffs’ counsel. While David’s averments attesting to the date on which plaintiffs applied for a mortgage are not sufficiently specific, Zeilingold states that plaintiffs submitted their application on May 15, 2018. Plaintiffs’ counsel sought a two-week extension to June 7, 2018 for plaintiffs to obtain the loan commitment letter, but the request made no reference to an extension of the five-day period within which plaintiffs had to file an application (NYSCEF Doc No. 24, Hartig aff, exhibit 8 at 1). While plaintiffs’ counsel attributed the delay to “the IRS side waiting for tax filings and transcripts” (*id.*), the request was made the day after plaintiffs signed the loan application for FM Home (NYSCEF Doc No. 79 at 4). Furthermore, plaintiffs offered no proof that they sought an

extension of time to comply with paragraph 19.2.1 (see Levine v Trattner, 130 AD2d 462, 463 [2d Dept 1987] [concluding that the plaintiff breached a contract of sale when he failed to timely apply for a mortgage and failed to demonstrate the existence of an enforceable modification granting him an extension of time to comply]). Hence, plaintiffs were aware as of May 24, 2018, the date they requested an extension of the loan contingency date, that they had not timely filed a loan application. "Thus, the plaintiffs failed to establish, prima facie, that they made a good faith effort to secure financing" (Miloslavskaya v Gokhberg, 126 AD3d 678, 679 [2d Dept 2015]; Mateo v Baek, 96 AD3d 518, 518 [1st Dept 2012] [concluding that the plaintiffs failed to submit any competent evidence that they submitted a mortgage application]). As plaintiffs failed to comply with "all applicable provisions of this Article 19" (NYSCEF Doc No. 16 at 19), they were not permitted to cancel the Contract under paragraph 19.3.1. In addition, plaintiffs' failure to apply for a mortgage with the time specified in the Contract constitutes a material breach, which entitles EDM Lenox, as the seller, to retain the Contract Deposit (see Vafa v Cramer, 212 AD2d 593, 593 [2d Dept 1995]; Levine, 130 AD2d at 463).

Consequently, plaintiffs' cross motion for summary judgment on the first cause of action is denied, and defendants' motion for summary judgment dismissing the first cause of action and for summary judgment on the first counterclaim is granted. Relief on

a declaratory judgment claim 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]). Therefore, defendants are entitled to a declaration in their favor. Defendants, as the prevailing party, are also entitled to recover their attorneys' fees pursuant to a provision in the Contract (see Sanchez v Hay, 122 AD3d 533, 534 [1st Dept 2014], *lv dismissed* 24 NY3d 1213 [2015]).

*2. The Second Cause of Action for Breach of Contract against EDM Lenox*

The second cause of action alleges that EDM Lenox breached the Contract by refusing to acknowledge their notice of cancellation and refusing to return the Contract Deposit. The court notes that the complaint fails to assert a specific allegation against EDM Realty, who is not a signatory to the Contract. As discussed supra, the Contract constitutes a valid, binding contract between plaintiffs and EDM Lenox, and plaintiffs failed to perform under its terms by providing evidence that they timely filed an application for a mortgage loan. In the absence of proof of performance, the second cause of action is dismissed.

*3. The Third Cause of Action for Breach of Contract and Fourth Cause of Action for Breach of Fiduciary Duty against Hartig*

The third cause of action alleges that Hartig, as the escrow agent, acted in bad faith or willful disregard of the Contract when she failed to remit the Contract Deposit to plaintiffs. The

fourth cause of action seeks damages against Hartig for breach of fiduciary duty as the escrow agent. Hartig's affidavits show that she acted in accordance with the terms set forth in the Contract governing the escrow agent's duties when she refused to release the Contract Deposit to plaintiffs when the present dispute arose (see Lin Shi v Alexandratos, 137 AD3d 451, 452 [1st Dept 2016], lv denied 28 NY3d 905 [2016]). Thus, the third and fourth causes of action are dismissed.

*4. The Fifth Cause of Action Seeking the Enforcement of a Lien on the Premises*

The fifth cause of action seeks to enforce a lien on the Premises pursuant to paragraph 12 of the Contract pending the outcome of this action. As paragraph 12 provides that the lien shall not continue in the event of a default by plaintiffs, the fifth cause of action is dismissed.

*5. The Sixth Cause of Action for Conversion*

A cause of action for conversion arises when "someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession" (Colavito v New York Organ Donor Network, Inc., 8 NY3d 43, 49-50 [2006], citing State of New York v Seventh Regiment Fund, 98 NY2d 249, 259 [2002]). A claim for conversion is redundant of a breach of contract where plaintiff fails to plead independent facts sufficient to give rise to tort

liability (see Kopel v Bandwidth Tech. Corp., 56 AD3d 320, 320 [1st Dept 2008]). Not only have plaintiffs failed to establish that defendants improperly converted the Contract Deposit, but Hartig's averments, which plaintiffs have not challenged, show that the funds have remained in an IOLA account. Thus, defendants are entitled to dismissal of the sixth cause of action.

*6. The Seventh Cause of Action for Unjust Enrichment*

Unjust enrichment is "the receipt by one party of money or a benefit to which it is not entitled, at the expense of another" (Abacus Fed. Sav. Bank v Lim, 75 AD3d 472, 473 [1st Dept 2010]). To state a claim for unjust enrichment, a "plaintiff must show that (1) the other party was enriched; (2) at that party's expense; and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered" (Kramer, 142 AD3d at 442 [internal quotation marks and citation omitted]). A plaintiff may plead both breach of contract and quasi-contract as alternative theories of recovery where "there is a bona fide dispute as to the existence of a contract, or where the contract does not cover the dispute at issue" (Hochman v LaRea, 14 AD3d 653, 654-655 [2d Dept 2005]). However, where a valid and enforceable written contract governing the subject matter exists, a plaintiff is precluded from recovery on a quasi-contract claim (see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382, 388 [1987]). The existence of the Contract precludes plaintiffs from

sustaining a claim for unjust enrichment. Therefore, the seventh cause of action is dismissed.

7. *Vacating the Notice of Pendency*

In view of the foregoing, the notice of pendency must be cancelled (see CPLR 6514 [a]). CPLR 6514 (c) provides that “[t]he court, in an order cancelling a notice of pendency under this section, may direct the plaintiff to pay any costs and expenses occasioned by the filing and cancellation, in addition to any costs of the action.” Such an award may include “counsel fees which flow from the wrongful filing and cancellation of such notice” (No. 1 Funding Ctr., Inc. v H&G Operating Corp., 48 AD3d 908, 911 [3d Dept 2008] [stating that “[t]he purpose of CPLR 6514 (c) is to reimburse a party for costs and expenses incurred as a result of a wrongful filing of a notice of pendency”]). Therefore, defendants may recover their reasonable attorneys’ fees (id.; see also Josefsson v Keller, 141 AD2d 700, 701 [2d Dept 1988] [cancelling a notice of pendency and awarding the defendant seller costs and expenses, including attorneys’ fees and disbursements]). The court need not condition an award upon a showing of bad faith (see Knopf v Sanford, 132 AD3d 416, 418 [1st Dept 2015]), which is a necessary element under CPLR 6514 (b) (see 551 W. Chelsea Partners LLC v 556 Holding LLC, 40 AD3d 546, 548 [1st Dept 2007]). Although defendants have not provided proof of their costs incurred in defending the action (see Saul v Vidokle, 151 AD3d 780, 782 [2d

Dept 2017] [denying the defendant costs in the absence of documentary proof to support an award]), this issue is set down for a hearing to determine the amount of reasonable attorneys' fees defendant EDM Lenox may recover from plaintiffs.

The court has considered the other arguments advanced by the parties and finds them unavailing.

<u>1/6/2020</u> DATE	<u>DEBRA A. JAMES, J.S.C.</u>			
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> SUBMIT ORDER	<input checked="" type="checkbox"/> REFERENCE
	<input type="checkbox"/> FIDUCIARY APPOINTMENT			