

At Commercial Division, Part 2 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 5<sup>th</sup> day of December, 2006.

P R E S E N T:

HON. CAROLYN E. DEMAREST,  
Justice.

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THE KYM GROUP,

Plaintiff,

- against -

**DECISION AND  
ORDER**

Index No. 24516/06

EAST PARK HOLDING CO., LLC  
and KASEY SHEMTOV,

Defendants.

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The following papers numbered 1-4 read on this Petition:

Papers Numbered:

Notice of Motion and Affidavits (Affirmations) Annexed	1
Opposing Affidavits (Affirmations)	2
Reply Affidavits (Affirmations)	3
Affidavits (Affirmations)	
Other Papers Memoranda of Law	4

Upon the foregoing papers, defendants East Park II Holding Company, LLC (“East Park”) and Kasey Shemtov (“Shemtov”) move for an order pursuant to CPLR 3211 [a] [1] and [a] [7] dismissing the complaint seeking money damages and specific performance for failure to state a cause of action and because defenses are based on documentary evidence.

## BACKGROUND

On May 30, 2006, defendant East Park and plaintiff The KYM Group, LLC (“KYM Group”) entered into a contract for the sale of certain real property located at 356 Livingston Street, Brooklyn, NY. The parties agreed that the plaintiff purchaser, the tenant in possession of 356 Livingston Street, would close the sale on August 1, 2006, time being of the essence, and that the sale was not contingent on plaintiff’s securing a mortgage. Plaintiff was unable to secure a mortgage before August 1, 2006, due in part to a conflict with the Internal Revenue Service with Keisha Franklin, a member of the KYM Group. Although this conflict was subsequently resolved, plaintiff nevertheless could not obtain a mortgage by August 1, 2006.

The parties disagree as to whether the August 1 date was flexible. Plaintiff alleges in its complaint that defendant Shemtov, principal of East Park, had orally conveyed that plaintiff was “not to worry” and that an extension of time would be granted for the closing, if it was necessary. However, in a notice dated July 24, 2006, defendant East Park stated that it “is not giving any extensions whatsoever in this matter.”

Defendants contend that documentary evidence establishes that no extensions were intended or granted by defendants, based principally on three documents: (1) the Contract of Sale dated May 30, 2006 (“Contract”); (2) a “Rider Attached To And Forming Part of Contract Dated: 5/30/2006” (“Contract Rider”); and (3) the letter from defendants’ counsel to plaintiff’s counsel dated July 24, 2006. The following are the relevant portions of these documents (all emphases and blanks included in originals):

The Contract of Sale:

23. The deed shall be delivered upon the receipt of said payments at the office of seller's attorney \_\_\_\_\_ at \_\_\_\_\_ o'clock on August 1, 2006, TIME BEING OF THE ESSENCE AGAINST THE PURCHASER ONLY.

25. It is understood and agreed that all understandings and agreements heretofore had between the parties hereto are merged in this contract, which alone fully and completely expresses their agreement, and that the same is entered into after full investigation, neither party relying upon any statement or representation, not embodied in this contract, made by the other. ...

26. This agreement is not to be changed or terminated orally. The stipulations aforesaid are to apply to and bind the heirs, executors, administrators, successors and assigns of the respective parties.

The Contract Rider:

2. MORTGAGE CONTINGENCY: There is no mortgage contingency and this contract shall become null and void if the sale does not close by August 1, 2006; TIME BEING OF THE ESSENCE AGAINST PURCHASER ONLY.

The letter from defendants' counsel to plaintiff's counsel, dated July 24, 2006:

Please be reminded of your TIME OF ESSENCE closing date scheduled for the above referenced matter on August 1, 2006.

My client has informed me that he is **not** giving any extensions whatsoever in this matter.

The sales contract will be canceled and my client will not have any further obligations to your client.

The parties also disagree as to the sale price of the property. Plaintiff contends that East Park was paid \$250,000.00 as the initial deposit, and that \$1,500,000.00 was due on closing. Defendants contend that no deposit was given, and that \$250,000.00 was the seller's accommodation as a credit against the sale price of \$1,750,000.00, based upon rent paid over the years that plaintiff had been a tenant<sup>1</sup>. Defendants assert that the price was actually

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<sup>1</sup>Defendant Shemtov explained in his Affidavit in Support that the \$1,750,000 price was set "to assist [plaintiff] in obtaining a mortgage" and then reduced by the \$250,000 credit.

\$2,200,000.00, apparently based upon an “Additional Rider” which added \$700,000.00 “to reimburse the seller for fixtures and improvements” which defendants agreed to finance as a mortgage against various properties other than the subject premises owned by plaintiffs<sup>2</sup>. Plaintiff conceded that the prior relationship between it and East Park was as landlord-tenant.

In support of their motion, defendants submitted, together with the Contract, a handwritten and unsigned “Price Rider” to the Contract, setting forth the following:

Price Rider

Sales Price	\$ 1,750,000.00
Rent Applied Purchase	(250,000)
Balance Due at Closing	<u>\$ 1,500,000.00</u>

The signed Contract Rider contains the following paragraph which expressly addresses the issue of deposit:

5. ESCROW OF DEPOSIT: There is no contract deposit. The consideration for this contract is the payment by the Purchaser of \$60,000.00 of unpaid rent, which is being paid to the seller as Landlord and is not being treated as a contract deposit and is not being held in escrow.

At no other point in any of the documents submitted by either party is there reference to a \$250,000.00 deposit or payment made or expected, nor has plaintiff adduced proof of such a payment.

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<sup>2</sup>The handwritten “Additional Rider”, signed by both parties, provides that if the plaintiff was unable to pay the additional \$700,000.00 at closing, East Park would “give a mortgage loan to be secured by [four properties] . . . and if property to loan value ratio is over 65% loan to [illegible].

## ANALYSIS

Plaintiff alleged four causes of action in the complaint: (1) breach of contract, seeking alleged monetary damages of \$1,000,000.00; (2) specific performance; (3) fraud, also alleging \$1,000,000.00 in damages; and (4) unjust enrichment based upon retention of the alleged deposit of \$250,000.00. Upon the documentary evidence, the Complaint is dismissed in its entirety.

In general, upon a motion to dismiss, a pleading must be afforded a liberal construction. *Leon v. Martinez*, 84 NY2d 83, 87 [1994]; *Casamassima v. Casamassima*, 30 AD3d 596 [2d Dep't, 2006]. It is well settled that the facts as alleged within the four corners of the complaint must be accepted as true and the plaintiff must be allowed the benefit of every possible favorable inference to determine whether the allegations fit within any cognizable legal theory. *Morone v. Morone*, 50 NY2d 481, 484 [1980]; *Casamassima v. Casamassima, supra*. "However, bare legal conclusions and factual claims which are flatly contradicted by the evidence are not presumed to be true on such a motion." *Palazzolo v. Herrick*, 298 AD2D 372 [2d Dep't, 2002]; *see also Goshen v. Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]; *511 West 232<sup>nd</sup> Street Owners Corp. v. Jennifer Realty Co.*, 98 NY2d 144,152 [2002].

### **First Cause of Action: Breach of Contract**

In a contract for the sale of real property, the parties will generally be afforded a reasonable time for performance under the contract. *Zev v. Merman*, 73 NY2d 781, 783 [1988]; *Grace v. Nappa*, 46 NY2d 560, 565 [1979]. However, when the parties establish a firm date for closing of title, and indicate that time is of the essence with respect to that date, that date may not be extended except by mutual agreement. *Grace v. Nappa*, 46 NY2d at 565; *Mosdos Oraysa*,

*Inc. v. Sausto*, 13 AD3d 838, 840 [3d Dep't, 2004]. Failure to perform on the date specified, when time is of the essence, constitutes a material breach of the contract. *New Colony Homes, Inc. v. Long Island Property Group, LLC*, 21 AD3d 1072, 1073 [2d Dep't, 2004]; *Mosdos Oraysa, Inc. v. Sausto*, 13 AD3d at 840.

Here, the contract terms explicitly provide that August 1, 2006 was the date on which title was to close. The Contract of Sale and the attached riders mention that time is of the essence twice - both times stating that time was of the essence against the purchaser only. Paragraph 2 of the Contract Rider provides that the contract as a whole would become "null and void" if the sale did not take place on August 1, 2006. In failing to close on that day, plaintiff breached the contract, rendering it "null and void".

The plaintiff argues that both of the express closing date provisions were waived by Shemtov's alleged oral statements that Keisha Williams was "not to worry", and that extensions would be granted. This argument fails in the face of the documentary evidence. The Contract of Sale contains a merger clause (paragraph 25), which expressly states neither party would rely on statements that were not contained within the written contract, and a further provision that any modification of the original agreement must be in writing (paragraph 26). Shemtov's alleged oral statements are in direct contradiction to the terms of the Contract of Sale; these statements could not therefore alter the original agreement so as to invalidate the time of the essence

provisions<sup>3</sup>. A contract which is unequivocal by its terms must be enforced in conformity with those terms. *R/S Associates v. New York Job Development Authority*, 98 NY2d 29, 32 [2002].

Moreover, the letter dated July 24, 2006 effectively removes any doubt as to whether the defendants sought to enforce the time of the essence provisions. The letter in no uncertain terms stated that “your TIME OF ESSENCE closing date [is] scheduled ... on August 1, 2006” and that the defendants were “**not** giving any extensions whatsoever in this matter.” Having been duly reminded of the terms of the Contract, and the defendants’ intention to enforce those terms, plaintiff could not rely on any oral modifications inconsistent with the Contract of Sale. Plaintiff’s argument that defendants were not prepared for the closing on August 1 is belied by the documents submitted: a title insurance report, a deed transferring title to plaintiff and a mortgage satisfaction, all prepared for the closing.

As the plaintiff materially breached the Contract by failing to close on August 1, 2006, its cause of action for breach against defendants is defeated.

### **Second Cause of Action: Specific Performance**

A court may grant a decree of specific performance only if “(1) there is a valid contract between the parties; (2) the plaintiff has substantially performed under the contract and is willing and able to perform its remaining obligations; (3) the defendant is able to perform its obligations; and (4) the plaintiff has no adequate remedy at law...” *Niagara Mohawk Power and Graver Tank & Mfg.*, 470 F.Supp 1308, 1324 [U.S. Dist. Ct, ND NY, 1979]; *Piga v. Rubin*, 300 AD2d 68, 69

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<sup>3</sup> The merger clause and no oral modification clause are further evidenced by the “Additional Rider”, discussed *supra* in footnote 2. The handwritten modification of the agreement, signed the same day as the Contract, indicates that the parties were negotiating the terms of the Contract right up until the day it was signed. This adds credence to defendants’ claim that the intention of the parties was not to modify the agreement except in writing.

[1st Dep't, 2002]. Plaintiff must demonstrate that it was ready, willing and able to perform its obligations under the contract. *Petrelli Associates, Inc. v. Germano*, 268 AD2d 513 [2d Dep't, 2000]; *Zev v. Merman*, 73 NY2d at 783.

Here, plaintiff has conceded that it was not ready, willing and able to perform on the time of essence date, because it was unable to secure a mortgage. As heretofore noted, plaintiff was itself in breach of the contract, precluding substantial performance thereunder. Therefore, plaintiff is not entitled to specific performance as a remedy.

### **Third Cause of Action: Fraud**

In an action to recover damages for fraud, “the plaintiff must prove a representation or a material omission of fact which was false and known to be false by [the] defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury.” *Richmond Shop Smart, Inc. v Kenbar Development Center, LLC*, 32 AD3d 423, 424 [2d Dep't, 2006], quoting, *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]. Furthermore, ““where ... a party asserts a fraud cause of action based upon a claim that [the party] was fraudulently induced to enter into a contract, the misrepresentations alleged in the pleadings must be more than merely promissory statements about what is to be done in the future; they must be misstatements of material facts or promises made with a present, undisclosed intent not to perform them.”” *Moon v. Clear Channel Communications, Inc.*, 307 AD2d 628 [3d Dep't 2003], quoting, *McGovern v. T.J. Best Bldg. And Remodeling Inc.*, 245 AD2d 925, 927 [3d Dep't 1997]; see also CPLR 3016 [b].

Plaintiff alleges in its complaint that “at the time of entering into the contract and subsequently thereto, the defendants falsely and fraudulently alleged and represented that they

would extend the closing date beyond August 1, 2006,” and that these “representations so made were known by the defendants to be false when made and were made with the intent to deceive and defraud the plaintiff and to induce the plaintiff into entering into the agreement.” Assuming that the defendants intended to deceive the plaintiff both before entering into the Contract of Sale and prior to the closing date, the complaint still fails to state a cause of action for fraud for three reasons.

First, the merger clause in the Contract invokes the full application of the parol evidence rule, which bars all extrinsic evidence that alters or contradicts the terms of the writing. *Jarecki v. Shung Moo Louie*, 95 NY2d 665, 669 [2001]; *Stone v. Schultz*, 231 AD2d 707 [2d Dep’t, 1996]. The parol evidence rule precludes reliance on alleged misrepresentations made prior to the execution of a written Contract of sale. Because the terms regarding the closing date expressly indicate that time was of the essence against the purchaser, any evidence of alleged oral modifications to the written contract is precluded.

Second, the plaintiff’s reliance on any oral representations was not justified. An alleged oral misrepresentation that conflicts in a meaningful manner with a particular provision in a written agreement negates any claim of reasonable reliance. *Old Clinton Corp. v. 502 Old Country Road, LLC*, 5 AD3d 363 [2d Dep’t, 2004]; *Stone v. Schultz*, 231 AD2d 707 [2d Dep’t, 1996]; *Bango v. Naughton*, 184 AD2d 961, 963 [1992]. Even absent the merger clause, the express terms of the Contract, followed by the letter dated July 24, 2006, indicate that East Park had no intention of extending the deadline. Thus, plaintiff’s claim for fraud must be dismissed because it has not established justifiable reliance, an essential element of a claim for fraud.

Furthermore, the plaintiff's fraud claim is duplicative of the contract claim. It is well settled that a fraud cause of action may not be maintained when the only fraud charged relates to the breach of Contract. *34-35th Corp. v. 1-10 Industry Assoc, LLC*, 2 AD3d 711, 712 [2d Dep't, 2003]; *Tuck Indus. v. Reichhold Chems.*, 151 AD2d 565, 566 [2d Dep't, 1989]. "To maintain a claim of fraud in such a situation, claimant must ... seek special damages that are caused by the misrepresentation and unrecoverable as contract damages." *McCluskey v. County of Suffolk* 9 Misc3d 1106[A].

Here, the alleged misrepresentations are closely related to the alleged breach of contract in that the plaintiff contends that it was fraudulently induced into the contract and relied on oral misrepresentations regarding the enforcement of the contractual provision as to the closing date. The damages alleged are identical to those alleged in the breach of contract claim. Thus, the fraud claim is indistinguishable from the contract claim and should be dismissed.

#### **Fourth Cause of Action: Unjust Enrichment**

A cause of action for unjust enrichment (or quasi-contract) requires a showing that (1) the defendant was enriched, (2) at the expense of the plaintiff, and (3) that it would be inequitable to permit the defendant to retain that which is claimed by the plaintiff. *Cruz v. McAneney*, 31 AD3d 54,29 [2d Dep't, 2006]; *Clifford R. Gray, Inc. v. LeChase Construction Services, LLC*, 31 AD3d 983[3d Dep't, 2006]. The essence of an unjust enrichment cause of action is that one party is in possession of money or property that rightly belongs to another. *Clifford R. Gray, Inc. v. LeChase Construction Services, LLC*, 31 AD3d at 983. This claim is based upon plaintiff's claim that \$250,000.00 was given to defendants as a deposit. However, the "Price Rider"

unequivocally establishes that \$250,000.00 is “Rent Applied” to the purchase price, as an accommodation for the plaintiff to reduce the purchase price.

Although neither party indicated how long plaintiff had been East Park’s tenant, Paragraph 5 of the Contract Rider indicates that at the time of the signing of the contract, “\$60,000.00 of unpaid rent” was outstanding, which was paid as “consideration for this contract,” but was not to be held in escrow. Paragraph 5 further states: “There is no contract deposit.”<sup>4</sup>

Plaintiff has not provided any evidence that there was any payment of \$250,000.00 at all. Plaintiff did not provide a canceled check, bank statement or any other evidence tending to prove that the payment had occurred, or that such a payment would be related to the purchase of 356 Livingston Street. Defendants submitted the Contract which stated the nature of the \$250,000.00 credit, and affidavits indicating that this was an accommodation to assist the plaintiff in obtaining a mortgage, although there was no mortgage contingency. In response to the defendants’ documentary evidence, plaintiff again stated the conclusory allegation that a payment was made, whereas the written evidence unequivocally disputes plaintiff’s bald allegations. The documentary proof requires that the claim of unjust enrichment be dismissed.

Furthermore, the plaintiff’s unjust enrichment claim is duplicative of the contract claim. The existence of a valid and enforceable written contract governing a particular subject matter precludes recovery under a quasi-contract theory for events arising out of the same subject

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<sup>4</sup> The handwritten “Additional Rider” concerning the \$700,000.00 price adjustment also does not mention the existence of a deposit. Even though the parties had negotiated the terms of the written modification, they did not include in the modification that a deposit would be provided.

matter. *Clark-Fitzpatrick, Inc. v. L.I.R.R.*, 70 NY2d 382, 388 [1987]. *LaBarte v. Seneca Resources Corp.*, 285 AD2d 974, 976 [4th Dep't, 2001]. Plaintiff's Fourth Cause of Action must also be dismissed as duplicative of its contract claims.

Accordingly, it is,

**ORDERED** that defendants' motion to dismiss the Complaint is granted.

The foregoing constitutes the decision and order of the Court.

E N T E R :

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J.S.C.

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