

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE THOMAS V. POLIZZI IA Part 14
Justice

AVA DISHI, <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- against -</p> CLIFFORD CAMPBELL, <p style="text-align: center;">Defendant.</p>	x x	Index Number <u>1417</u> 2005 Motion Date <u>January 10,</u> 2006 Motion Cal. Number <u>12</u>
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The following papers numbered 1 to 10 read on this motion by plaintiff for summary judgment on the first, second and third causes of action, and a cross motion by defendant for leave to amend his answer.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	1-4
Notice of Cross Motion - Affidavits - Exhibits...	5-8
Answering Affidavits - Exhibits.....	9-10

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

A purchaser seeking specific performance of a real estate contract must demonstrate that he or she was ready, willing, and able to perform the contract. (See, Madison Equities, LLC v MZ Mgt. Corp., 17 AD3d 639 [2005]; Tsabari v Haye, 13 AD3d 360 [2004]; Internet Homes, Inc. v Vitulli, 8 AD3d 438 [2004].) Plaintiff has not submitted documentation in admissible form sufficient to substantiate his assertion that he had the funds necessary to purchase the property. (See, Madison Equities, LLC v MZ Mgt. Corp., supra; Tsabari v Haye, supra; Ferrone v Tupper, 304 AD2d 524 [2003].) In addition to being unsworn, the financial statement purporting to show plaintiff's financial condition is merely a compilation of information that was represented to accountants by plaintiff. Furthermore, although plaintiff may have been entitled to choose to take title subject to the violations on the property, it cannot be said as a matter of law that when he, in effect, attempted to make time of the essence, he gave defendant a reasonable time to act. (See, Moray v DBAG, Inc., 305 AD2d 472 [2003]; see generally, Zev v Merman, 73 NY2d 781

[1988]; cf., Guippone v Gaias, 13 AD3d 339 [2004].)

Plaintiff has also failed to provide any proof in support of his third cause of action. Insofar as the third cause of action seeks to recover attorneys' fees, it is well settled that attorneys' fees are not available unless authorized by statute, court rule, or written agreement of the parties. (See, Hooper Assocs. Ltd. v AGS Computers Inc., 74 NY2d 487 [1989]; Matter of A.G. Ship Maintenance Corp. v Lezak, 69 NY2d 1 [1986]; Culinary Connection Holdings, Inc. v Culinary Connection of Great Neck, Inc., 1 AD3d 558 [2003].)

Accordingly, since plaintiff has failed to demonstrate his prima facie entitlement to judgment as a matter of law, the motion for summary judgment is denied. (See, Ayotte v Gervasio, 81 NY2d 1062 [1993]; Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985].)

In the absence of prejudice, leave to amend a pleading shall be freely given. (CPLR 3025[b]; see, Fahey v County of Ontario, 44 NY2d 934 [1978].) However, where the proposed amendment is palpably insufficient as a matter of law or totally devoid of merit, leave should be denied. (See, Barco Auto Leasing Corp. v Grant Thornton, LLP, 298 AD2d 341 [2002]; Fandy Corp. v Lung-Fong Chen, 265 AD2d 450 [1999].) The counterclaim in defendant's proposed amended answer alleging a violation of the Door-to-Door Sales Protection Act (Personal Property Law § 425 et seq.) is devoid of merit. According to defendant, the contacts between the parties to the subject contract for the sale of real property occurred only over the telephone. The Door-to-Door Sales Protection Act does not apply to transactions conducted and consummated entirely by mail or telephone, or to transactions pertaining to the sale of real property. (Personal Property Law § 426 [1][c], [e].) The second proposed counterclaim purporting to assert the intentional infliction of emotional distress is insufficient as a matter of law. The acts alleged do not rise to the level of extreme and outrageous conduct necessary to sustain a claim for intentional infliction of emotional distress. (See, Howell v New York Post Co., 81 NY2d 115 [1993]; Fischer v Maloney, 43 NY2d 553 [1978].)

Accordingly, the cross motion is granted to the extent that defendant may serve an amended answer, in the form proposed, with the exception of the first and second counterclaims. The amended answer shall be served and filed within 20 days of service of a copy of this order with notice of entry.

A copy of this order is being mailed to plaintiff's attorney and to defendant pro se.

Dated: March 27, 2006

J.S.C.