Hack v Quis
2018 NY Slip Op 33990(U)
April 24, 2018
Supreme Court, Kings County
Docket Number: 500263/2013
Judge: Karen B. Rothenberg
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At an IAS Term, Part 35 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 24th day of April, 2018.

PRESENT:

HON. KAREN B. ROTHENBERG,
Justice.

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MICHAEL HACK,

PLAINTIFF,

- AGAINST -

INDEX NO. 500263/13

ALLAN QUIS, GRACIA WALKER, ALFRED DICKENSON, II A/K/A ALFRED DICKSON II, AND TALIYA A. BASHANI, ESQ.,

DEFENDANTS.

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ALLAN QUIS, GRACIA WALKER, ALFRED DICKSON II,

PLAINTIFFS,

- AGAINST -

INDEX NO. 1056/13

MICHAEL HACK,

DEFENDANT.

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The following papers numbered 1 to 14 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-3, 4-6
Opposing Affidavits (Affirmations)	7-12
Reply Affidavits (Affirmations)	13-14

Upon the foregoing papers, under Index No. 500263/13, plaintiff Michael Hack (Hack) moves, pursuant to CPLR 3212, for partial summary judgment against defendants Allan Quis (Quis), Gracia Walker (Walker), Alfred Dickenson, II a/k/a Alfred Dickson II (Dickenson), and Taliya A. Bashani, Esq., (Bashani) on his sixth, seventh, seventeenth, eighteenth and nineteenth causes of action. Under Index No. 1056/13, defendant Hack moves, pursuant to CPLR 3212, for partial summary judgment dismissing the first, third, and seventh causes of action of the complaint of plaintiffs Walker, Dickenson, and Quis, and for reverse partial summary judgment on "Quis'" sixth cause of action.

Facts and Procedural History

This action involves a dispute regarding the ownership of a three-family dwelling located at 302 5th Street in Brooklyn (the property). Hack is the owner of the property, and sets forth one version of the facts, and Walker, Dickenson, and Quis (collectively WDQ) are tenants and subsequent title holders of the property, and set forth a conflicting version of the facts.

Hack avers in his sworn affidavit that he has been the landlord and owner of the property since 1997. In 2005, Dickenson moved into the rear unit[1] of the second floor of the property, and in 2006, Walker moved in with Dickenson.[2] Walker testified that she and Dickenson paid Hack $1,400.00 per month for rent until approximately September, 2009.

On August 4, 2008, "Quis and [Hack] agreed to an installment sale of [a] thirty percent ownership interest in the [p]remises to Quis whereupon Quis moved into the third floor unit []." In particular, Quis and Hack "agreed that, as consideration for the partial conveyance of title to the [p]remises, Quis would pay [Hack] $480,000.00" as well as $350.00 per month representing Quis' one-third share of property taxes, insurance, and

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[1]At one point in time, the first and second floor apartments were divided into a rear and front unit.

[2]Dickenson and Walker were married in 2011.

utilities (reduced by subsequent agreement to $275.00). Accordingly, Quis paid Hack a $50,000.00 down payment and in September, 2008, began making monthly loan payments to Hack in the amount of $2,309.00, and utility payments in the amount of $275.00 "since Quis required a loan from [Hack] to obtain the additional $430,000.00 needed for [his] purchase."

With respect to this transaction, Hack notes that Quis testified that he and Hack had had discussions prior to the transfer, and when asked about the percentage of interest Quis was supposed to have received, Quis replied, "I think he [Hack] said 30." Quis also testified that the monthly payment of $2,309.00 was "his monthly responsibility which [he] assumed was going to the mortgage . . . [a]nd [that] the [$]275 was for Direct TV, water, heat, [and] electric for the building." Hack also notes that his and Quis' accountant, Mr. Robert Woloshen, CPA, testified that a memorandum - which purportedly documented the sale - appeared to be in his handwriting. The memorandum states:

> "Sold 30% of House to Allan Quis on 8/1/08
> S.P. (selling price) was <u>$480,000</u>
> Mike lives in 10%, Rented 90%
> [Changed Rental][3] to 60% and
> Gain on Sale Based on 30%
> on <u>Cost</u>
> Received <u>$50,000</u> Balance on <u>Installment</u>
> Interest Received in 2008 7154
> Principal 2079
> \+ 50,000
> Asset <u>20%</u> sold 100%"

On January 12, 2009, in order to memorialize this "purchase money loan" or "purchase money mortgage," Quis executed a 30-year promissory note in Hack's name (the Note) in the amount of $430,000.00 at 5% interest, maturing on August, 2038. According

[3]These two words, while somewhat illegible, appear to be "Changed Rental."

to Hack, the Note obligated Quis to make monthly payments to him in the amount of $2,308.22 per month ($2,309.00). In particular, the Note provides as follows:

> "[Promissory] Note
>
> This agreement is between Mr. Michael Hack the lender and Mr. Allan Quis the borrower. The amount of the loan is 430 thousand dollars amortized over a 30 year period at a rate of 5 percent for the term of the loan. The repayment amount is 2,308.22 a month to be paid by the 7th of the month beginning September 2008 and ending on August 2038. Michael Hack agrees to report the interest income on the loan which was made to enable him to secure his ownership interest in 302 5th st [sic] at Brooklyn NY 11215. Michael Hack also agrees to issue a tax form 1098 stating interest income received from Allan Quis."

The Note was signed by both parties and notarized, and Quis testified that he did not sign it under duress. As further consideration for the "purchase money mortgage," Quis agreed that he would co-sign mortgage refinance loans with Hack for the entire premises, but that Hack would be responsible for making the monthly payments for those loans.

From September 2008 through 2012, while residing on the third floor of the property as owner, Quis paid for expenses relating to the third floor (roof); did not take any action with respect to the first or second floor apartments; and did not collect or receive rent from the tenants on the first and second floors, who were paying Hack directly. For tax year 2010, Quis only took a deduction of 30% of the real estate taxes for the property on his personal income taxes.

In September, 2009, Dickenson and Walker moved from the rear unit on the second floor to the rear unit on the first floor, and began paying Hack $2,000.00 a month in rent. In October, 2011, their rent was increased to $2,300.00 per month.

In August, 2011, Walker, Dickenson and Quis discussed a plan with Hack to buy out his interest in the property. Hack avers that over the next few months, Walker, Dickenson and Quis convinced him that they needed to be added to the deed in order to obtain the necessary financing to complete the buyout. During this time period, Quis hired attorney Bashani because, as co-signer of the Wells Fargo note and mortgage encumbering the property, he had begun receiving foreclosure notices indicating that the mortgage was not being paid, and feared he was going to lose the property.

According to Bashani, the plan was to refinance the Wells Fargo mortgage and home equity loan encumbering the property "in order to save [it] and buy out Hack," namely:

> "So, what happened was Wells Fargo advised that [in] order to proceed with the refinance in the name of Allan [Quis] and Gracia [Walker] and Daniel [Dickenson], because we needed their credit and income in order to refi the two mortgages in their names, that they could not order an appraisal and proceed without the deed vesting in their names for at least 30 days. So, that's how a refinance works and that's what the underwriters require. So, we all met in my office again. This is with the understanding that the value was a lot higher than it actually was. We met in my office, we signed – executed the deed, so that now Michael [Hack], Gracia [Walker], Daniel [Dickenson], and Allan [Quis] were all on the deed together. Now we have all of them, and the process was [to] allow the deed to vest, you know, [to] record the deed, allow it to vest for at least 30 days, and then proceed with the refinance, and then once the value would come back, we would do a cashout refi, pay off Michael

> [Hack]. At that time, he would sign his name off of the deed, we would transfer him off the deed, thereby leaving Gracia [Walker], Daniel [Dickenson], and Allan [Quis] as the sole owners and the only borrowers on the mortgage."

On January 31, 2012, Hack purportedly "relying upon the misrepresentations of [Walker, Dickenson, and Quis], and without having received any consideration from Walker and Dickenson, nominally added Walker and [Dickenson] to the record title for the [property] via deed recorded on February 10, 2012 in the Office of the City Registrar at CRFN 2012000057349." Hack avers, and both Walker and Dickenson testified, that the conveyance of title was accomplished solely to refinance the property to enable Walker and Dickenson (and Quis) to buy out Hack's interest. In particular, Hack points out that Dickenson testified that he did not pay anything to have his name added to the deed at the time of the transaction (contemporaneously to the execution of the deed) and Walker testified that she paid one dollar "for the deed signing."

Similarly, Quis testified that he, Dickenson and Walker were added to the deed, at the urging of Wells Fargo, in order to "make the refinance loan applications" and that Walker and Dickenson "needed to be on [the deed] for a certain amount of time"; that once the mortgages were refinanced, "Hack would be out of the building once and for all and [the building] would be owned by three people . . . 33, 33, 33"; and that as a result, he [Quis] would gain additional ownership interest in the building. Further, Walker testified that the deed "was given to [her]" in order to refinance the property and buy out Hack.

Before and after the execution of the deed, Walker, Dickenson and Quis applied for approximately four loans with Wells Fargo and Emigrant Bank, but none of the applications

were approved. In particular, Walker testified that they were not able to "execute" the refinance. In January, 2012, the property was valued at approximately $1.5 million. However, the appraisals for the property conducted by Wells Fargo and Emigrant Bank indicated that the property would have insufficient equity to buy out Hack. According to Bashani:

> " once the appraised value came back and it was a lot lower than everyone anticipated, that's when everything fell apart and that's when I directed Gracia [Walker] and Daniel [Dickenson]. . . [to] quitclaim . . . off of the deed now, because Michael [Hack] doesn't want to sell, there's not enough value in [the] property, you know, dead deal. That's when everything went awry."

Walker testified that the buyout failed because Hack "wasn't satisfied with how much money he was going to get from the refinance." Further, Hack avers that the parties never reached an agreement as to any material terms of the proposed buyout plan. In addition, according to Bashani:

> " I was the one who advised that once the appraised value came in low, that there was no deal, there was no meeting of the minds, and that I was prepared to create a new deed, as was the understanding between the parties, removing Dickson and Walker from the deed since there was no consideration."

Dickenson testified that the parties (WDQ and Hack) had never come to an agreement concerning the property prior to signing the deed. Further, when Walker was asked whether she, Dickenson, Quis and Hack had an agreement as to the terms of the buyout, she replied that they had had "a conversation about scenarios." When asked whether they had ever reached an agreement, she replied that the parties did not "speak about a specific number, because it was contingent upon the appraisal, it would be a percentage of the appraisal."

Walker also testified that she did not know how much of a percentage of the appraisal Hack was seeking or how much money he wanted from the buyout. Moreover, although Walker testified that prior to the January 31, 2012 meeting, she had had a "gentleman's handshake agreement" with Hack for the buyout and refinance, she further explained that "[t]here weren't any specific terms," namely the terms were that "we were going to refi the property full cash out and that amount would be based on the value of the property." In addition, she testified that while Emigrant Bank had approved one of the parties' loan applications, it was contingent upon making a formal agreement with Hack, but no formal agreement relating to that contingent loan was ever prepared, albeit verbal offers were made to Hack.

In January, 2012, according to Hack, Walker and Dickenson unilaterally stopped paying him rent and began paying half of the monthly payment toward the Wells Fargo mortgage encumbering the property. Walker and Dickenson never assumed the Wells Fargo mortgage, and Hack avers that he never agreed to permit Walker and Dickenson to stop paying rent. Because Walker and Dickenson never gave Hack any consideration to make them titleholders of the property, Hack demanded that they re-convey title back to him, which they refused to do.

In opposition to Hack's motions, Quis avers in his sworn affidavit that he and Hack had worked together as school teachers and had known each other since the mid-1990s. From 1997 until 2008, Hack and his brother Daniel Hack were the owners of the subject property. Quis asserts, however, that in mid-2008, it was Hack who approached him complaining of financial difficulties, and proposed that he and Quis become partners with

respect to the property. In particular, according to counsel for WDQ, Hack wanted to borrow money using the property as collateral to pay off his debts, and needed Quis' assistance because, as Hack testified, he had money and good credit, but lacked W-2 earnings.

On August 4, 2008, Hack and his brother conveyed the property to Hack and Quis, but according to Quis, *equally, as tenants in common* - not as 70%-30% owners as alleged by Hack - evidenced by the fact that the deed did not state that one party held a greater interest or estate in the property than the other. Accordingly, in exchange for receiving an interest in the property, Quis paid Hack $50,000.00 and, pursuant to a consolidated, extension and modification agreement, co-signed a Wells Fargo mortgage [$643,325.00][4] and home equity loan [$75,000.00] encumbering the property, making him jointly and severally liable with Hack in the amount of $718,325.00. Quis did not receive any money from the proceeds of the transaction. According to counsel for WDQ, as well as the Settlement Statement from the August 4, 2008 Wells Fargo closing, and Hack's testimony, Hack used $602,306.74 of the $718,325.00 to pay his debts, and received the remaining $116,018.26 ($718,325.00-$602,306.74) in cash.

Under the consolidated mortgage, Hack and Quis owed Wells Fargo $4,239.16 per month. From September, 2008 to August, 2011, Quis states he paid Hack $2,309.00 per month *toward the Wells Fargo mortgage*, and Hack in turn paid Wells Fargo the full monthly mortgage payment, for a total payment by Quis over the three year period in the amount of $83,124.00.

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[4]The mortgage states that the amount is $645,300.00.

In late 2011, Hack asked Walker, Dickenson and Quis whether they would buy out his interest in the property by refinancing and assuming its indebtedness. In order for Walker and Dickenson to proceed, they were required to be titleholders of the property. Accordingly, on January 31, 2012, Hack and Quis conveyed the property to Hack, Quis, Walker, Dickenson as tenants in common by bargain and sale deed, resulting in all four parties owning equal shares. However, during this time period, Walker, Dickenson and Quis learned that Hack had stopped making payments on the mortgage, and these defaults resulted in the denial of the mortgage refinance loans. As indicated, Hack testified that he stopped making mortgage payments to Wells Fargo in January, 2012. In February, 2012, Quis stopped paying half the monthly mortgage payment to Wells Fargo indirectly through Hack, and starting making those payments directly to Wells Fargo. According to Walker, she and Dickenson told Hack that they would also pay the other half of the mortgage directly to Wells Fargo. Walker and Dickenson paid the other half of the mortgage to insure that the property would not go into foreclosure, and to assist all parties to eventually refinance the mortgage and home equity loan so that they (and Quis) could buy out Hack. As such, at this time, according to Quis and Walker, Quis was paying one-half of the mortgage and Walker and Dickenson were paying the other half of the mortgage, to date each having paid a total of $152,823.59 to Wells Fargo for the mortgage and $9,434.00 to Wells Fargo for the home equity loan, all of which Quis and Walker claim benefitted Hack.

In addition to making the above payments on Hack's behalf, Walker and Dickenson also managed the property, spent their time and money exterminating the second floor,

maintaining the boiler, keeping the sidewalk free of debris and snow, painting the hallway leading to the third floor, pouring concrete in the backyard, and buying carpeting with Quis leading up to the second and third floor. Moreover, Quis paid to have the entire staircase painted and to fix the staircase from the first to the second floor.

According to Quis, he has "expended the sum of $288,855.79 in payments to . . . Hack, or for his benefit," in the following amounts:

> a. $83,124.00: paid $2309.00 per month from September 2008 to August 2011 toward the Wells Fargo mortgage (Hack conceded in an interrogatory dated November 14, 2014 that Quis paid him this amount "toward[] each mortgage line of credit and consolidation extension and modification agreement encumbering" the property but testified, in effect, that the answer was correct insofar as this was the "amount" Quis had paid him);
>
> b. $22,000.00: "in kind" payments to Wells Fargo (Quis buying a greater interest in the property, i.e. the second floor);
>
> c. $152,823.59: beginning February, 2012, paid directly to Wells Fargo by Quis for the mortgage when Hack stopped making mortgage payments;
>
> d. $9,434.00: beginning February, 2012, paid directly to Wells Fargo toward home equity loan when Hack stopped making payments;
>
> e. $5,500.00: paid to settle a lawsuit for which Quis and Hack were jointly liable;
>
> f. $10,425.00: for maintenance on the property ($9,625.00[5] + $800);
>
> g. $5,540.20: paid to Hack when Hack and Quis again refinanced the property in 2010 (Hack testified that this figure

[5]Hack testified that he would accept this amount subject to seeing "bills and things."

> was correct "subject to seeing the bills and things" and "receipts.").

The record further reveals that after the deal fell apart, and after Walker and Dickenson refused to remove themselves from the deed, the interests of Walker, Dickenson and Bashani "were not in line and therefore, [Bashani] was disengaged from the deal." According to Quis, he terminated Bashani because Bashani wanted to remove Walker and Dickenson from the deed.

On or about January 15, 2013, under index number 1056/13, Walker, Dickenson and Quis commenced an action against Hack seeking: a declaration that Walker, Dickenson, Quis and Hack each hold a 25% ownership interest in the property, an equitable accounting, damages from Hack for decreasing the value of the property, damages from Hack for his interference with their use and enjoyment of the property, an injunction against Hack's further interference with the property, a partition and sale of the property based upon the 25% ownership interests of the parties, damages from Hack for his conversion of equity attributable to the property and/or Hack's co-owners resulting in Hack's enrichment to the detriment of WDQ, and attorney's fees. On or about April 23, 2014, Hack interposed his answer, generally denying the allegations of the complaint.

On or about November 5, 2013, under index number 500263/13, Hack commenced an action against Walker, Dickenson, Quis and Bashani alleging causes of action for, among other things, fraud, conversion, breach of contract, an equitable mortgage, ejectment, quite title, a partition and sale of the property based upon his 70% ownership interest and Quis'

or WDQ's 30% ownership interest, and an accounting. WDQ interposed their joint answer on or about April 18, 2014, generally denying the allegations of the complaint.

By order dated March 20, 2014, under index number 1056/13, the court (Rothenberg, J.), dismissed WDQ's eighth cause of action for attorney's fees.

By order dated November 29, 2016, under Index No. 500263/13, the court (Rothenberg, J.) granted the motion of Hack for contempt against non-party Robert A. Woloshen, C.P.A. only to the extent of extending the deadline to serve and file the note of issue and certificate of readiness, and granted the motion of Mr. Woloshen to quash and for a protective order only to the extent of limiting production of certain documents, and directing that he be deposed.

In July, 2017, after discovery was complete, under index number 1056/13, Hack made the instant motion to dismiss WDQ's first cause of action (declaration that all parties own an equal 25% interest in the property), third cause of action (damages from Hack for decreasing the value of the property), seventh cause of action (damages from Hack for his conversion of equity attributable to the property and/or Hack's co-owners resulting in Hack's enrichment to the detriment of WDQ) and reverse partial summary judgment on "Quis'" sixth cause of action (a partition and sale of the property based on the 25% ownership interests of the parties) *but consistent with* Hack's 70% ownership interest, and in August, 2017, under index number 500263/13, made the instant motion for summary judgment on his sixth and seventh causes of action (rescission of the deed as to Walker and Dickenson, respectively), seventeenth cause of action (quiet title as to WDQ declaring Hack a 70% owner and Quis or

WDQ a 30% owner), eighteenth cause of action (declaring the existence of an equitable mortgage as to WDQ based on the $430,000.00 promissory note), and nineteenth cause of action (a partition and sale of the property based on Hack's 70% ownership interest and Quis' or WDQ's 30% ownership interest). These motions are presently before the court for disposition.

Discussion

Motion for Summary Judgment

Hack moves for summary judgment on his sixth, seventh, seventeenth, eighteenth and nineteenth causes of action against Walker, Dickenson and Quis.

Under the sixth and seventh causes of action, Hack seeks to rescind and void the deed as to Walker and Dickenson, respectively. Title conveyed via a valid deed provides proof of property ownership (*Sun Oil Co. v State*, 79 Misc 2d 661, 662 [Ct Cl 1974]; *see also Wood v Chapin*, 13 NY 509, 515-516 [1856]). It well-settled that "to constitute a good conveyance by way of bargain and sale, there must be a valuable consideration expressed in the deed or proved independently of it" (*Wood,* 13 NY at 517). Further, "[i]f one is expressed, no proof of its actual payment need be given, and it cannot be controverted by evidence, and it is sufficient, though the amount be merely nominal" (*id.*). In addition, "a conveyance of property is not invalid for want of consideration if that is the intent of the grantor" (*Moczan v Moczan*, 135 AD2d 692, 693 [2d Dept 1987]). Conversely, a deed may be "rescinded on the basis that there was a failure of consideration, a lack of meeting of the minds between the parties at the time the agreement was made, or because the defendant committed a material

breach of [his or] her obligations under the agreement" (*Mollin v Lerner*, 258 AD2d 444, 445 [2d Dept 1999]). Moreover, "[a] deed based on forgery or obtained by false pretenses is void ab initio, and a mortgage based on such a deed is likewise invalid" (*Deramo v Laffey*, 149 AD3d 800, 802 [2d Dept 2017]).

Hack has made a prima facie showing entitling him to rescission of the deed as to Walker and Dickenson by demonstrating that the deed was not intended to be a conveyance of property, that there was a lack of consideration for the subject conveyance, and that the parties had never reached an agreement regarding the amount of consideration to be paid to Hack for his interest in the property or any material terms of the buyout agreement.

Walker and Quis both testified that they were added to the deed as titleholders merely to enable them to obtain the financing necessary to purchase the property from Hack. In this regard, Quis testified that he, Dickenson and Walker were added to the deed, at the urging of Wells Fargo, in order to "make the refinance loan applications"; that Walker and Dickenson were "supposed to be put on the deed" because "[w]e needed them to be on the application in order to refi the property"; and that Walker and Dickenson "needed to be on [the deed] for a certain amount of time." Quis also testified that "the January [30th] 2012[6] meeting with Bashani [when the deed was conveyed]" was where "we agreed to put Gracia [Walker] and Dan [Dickenson] on the deed . . . *They had to be on the deed in order to refi, which was the only way we were going to be able to buy Hack out*," demonstrating not only that Walker and Dickenson were placed on the deed solely to obtain financing, but that the

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[6]The testimony of the parties varies with respect to whether the meeting occurred on January 30th or January 31st, 2012.

funds from the refinancing were to serve as the basis for the real consideration for the buyout (emphasis added).

Similarly, Walker testified that the deed was given to her to refinance the property and to buy out Hack, namely that the "purpose of the refinance" was "[t]o pull cash out to buy [Hack] out of his interest in the building." In addition, Bashani confirmed, and told Hack, that Wells Fargo advised that Walker and Dickenson should be added to the deed merely as a means to enable them to obtain refinancing in order to buy out Hack's interest in the property, and testified that "the parties understood that we were adding the two other parties [Walker and Dickenson] onto the deed for purposes of the refinance and the buyout," and that "the attempt to refinance the property [was] the only reason that Ms. Walker and Mr. Dickson were given title to the property."

Further, Hack testified that when the deed was executed it was not meant for Walker and Dickenson to be part owners of the property, rather it was executed for the purpose of enabling them to refinance the mortgage; that Walker and Dickenson were added to the deed because it was required by the lender; and that it was his "intention to proceed with the refinance so that [he] could be bought out of the building."

In addition, with respect to the lack of consideration paid to Hack for the conveyance, Dickenson testified that he did not pay anything to have his name added to the deed at the time of the transaction and Walker testified that she believed she paid one dollar "in January for the deed signing." Walker also testified that she did not give any money to Hack "directly prior to or after that meeting in exchange for the deed." Quis testified that he did

not recall any discussion about giving money in exchange for placing Walker and Dickenson on the deed at the January 31st 2012 meeting. Bashani testified that the "anticipated cashout to Mr. Hack [was] the only expected consideration for Mr. Hack from this deal"; that she was unaware of any other consideration paid by Quis, Walker and Dickson in exchange for [the] deed" ("[n]o, there wasn't any, at least not across my table"); and that once the appraisal revealed that the value of the property was lower than anticipated, she advised Walker and Dickenson to remove themselves from the deed because they had not paid Hack any consideration. Further, Hack testified that he did not receive any money from Walker and Dickenson for the conveyance.

Finally, Hack has established that there was no meeting of the minds to form a binding contract, oral or otherwise, between him and Walker and Dickenson (*see e.g. Greene v Rachlin,* 154 AD3d 814, 816 [2d Dept 2017]; *Eng'g & Tech. Res., Inc. v Xcel Dev. Corp.*, 139 AD3d 661, 662 [2d Dept 2016]). As Hack implicitly acknowledges, to the extent the oral argument was to make Walker and Dickenson titleholders in exchange for paying the mortgage and maintaining the property, Hack avers, and it is undisputed, that Walker and Dickenson were tenants, never assumed the mortgage from Hack, and converted their rental payments to mortgage payments without Hack's consent. Notably, when Walker was asked if Hack ever agreed to let her stop making rental payments to him, she answered unresponsively, namely: "I never said yes or no, I just let him know that in the interest of this deal happening, that we [Walker and Dickenson] were going to pay Wells Fargo directly so that the application would be approved." Moreover, Walker's testimony demonstrates the

agreement between her, Dickenson and Hack was in fact to place her and Dickenson on the deed so that they could obtain financing to buyout Hack, as opposed to an agreement that they would become titleholders in exchange for paying the mortgage and maintaining the property (*see infra*).

To the extent the agreement was to place Walker and Dickenson on the deed merely to obtain financing, Walker and Bashani testified, and it is undisputed, that the parties were never able to obtain the requisite refinancing. In particular, Walker and Bashani testified that once the appraisal revealed that the value of the property was lower than anticipated, Hack was not satisfied with the amount of money he would get from the refinancing for the buyout, and he did not want to sell his interest in the property, so the parties stopped making refinance applications. Moreover, because the appraisal was lower than expected, Bashani advised the parties "that there was no deal, there was no meeting of the minds, and that I was prepared to create a new deed, *as was the understanding between the parties*, removing Dickson and Walker from the deed since there was no consideration" (emphasis added).

Further, Hack, Walker and Dickenson never reached an agreement regarding the material terms of the proposed buyout. Dickenson testified that there was no agreement between him, Walker, Quis and Hack concerning the property prior to signing the deed. Moreover, when asked what he intended to give Hack at the January 31, 2012 meeting in exchange for obtaining his "ownership," he replied: "I don't know the exact number, but the idea was to - - I am not exactly sure [of] the exact details of that, I don't know."

Similarly, Walker testified that the amount of cash she intended to give Hack to buy out his share of the property was "dependent on the value of the property and then what the . . . real estate product would allow . . . like a certain percentage of the value of the property is what is allowed"; that she could not say whether Hack "was willing to accept a percentage of the value of the property as it came back in an appraisal"; that with respect to whether she, Dickenson, and Quis had an agreement as to the terms of the buyout, she only stated: "[w]e had conversations about scenarios" and "[w]e didn't speak about a specific number, because it was contingent upon the appraisal." Further, while she also testified that she had had a "gentleman's handshake agreement" with Hack "for a buy-out and refinance," she stated that "there weren't any specific terms, [the terms] were that we were going to refi the property full cash out and that amount would be based on the value of the property."

Moreover, when Emigrant Bank approved one of the loan applications on condition of obtaining an agreement with Hack, Walker testified that a formal agreement had never been prepared. Further, Walker testified that in 2012, when Mr. Brand, the real estate broker with whom Walker was working, wanted the parties to execute an agreement with Hack "to do a cashout and refinance," a written agreement was never made because the parties had not come to an agreement "at that stage." In addition, Walker testified that she did not sign any loan documents with Hack and Quis testified that he, Walker and Dickenson executed a "working agreement" in August, 2013 dividing up their responsibilities as co-owners "*[i]f we ever got the building*" (emphasis added). Finally, as noted above, Bashani testified that after the appraisal came back too low, she advised the parties "that there was no deal, there was no meeting of the minds . . . ."

In opposition, WDQ have failed to raise an issue of fact rebutting Hack's prima facie showing. As an initial matter, relying upon *Portnow v La Rosa* (190 Misc 695, 695 [App Term 2d 1948]), WDQ first argue that Hack's motion for summary judgment on the sixth and seventh causes of action to remove Walker and Dickenson from the deed must be denied because Quis does not join in Hack's request for this relief, and Hack cannot seek to remove Walker and Dickenson from the deed without Quis' participation. However, this argument is without merit. First, unlike *Portnow*, this action is not a summary proceeding. In any event, "[a] tenant-in-common may . . . bring . . . a summary proceeding to recover possession of the real property individually, based upon his or her undivided possessory interest" (*Caprer v Nussbaum*, 36 AD3d 176, 184 [2d Dept 2004], citing, among other authorities RPAPL 621, 721; *see also Burack v I. Burack, Inc*., 128 Misc 2d 324, 325 [Civ Ct, NY County 1985] ["It is now generally accepted that a tenant in common may commence a summary proceeding against a third party in possession of the premises, with or without the consent of the other co-owners."]). Moreover, while "[t]he rights of a tenant-in-common do not extend . . . to suing individually for damages to the common interest" (i.e. where it would be necessary that "all of the tenants-in-common join in the complaint" [*Caprer,* 36 AD3d at 184]), Hack is not seeking damages to the common interest, he is seeking damages he alone allegedly sustained.

Addressing the merits, WDQ argue that Walker and Dickenson paid sufficient consideration for the deed transfer by virtue of the $10 consideration recited in the deed, their payment of half of Hack's share of the monthly mortgage after the conveyance took place, and the time and money they spent maintaining and managing the property since February,

2012. As an initial matter, even assuming Walker and Dickenson paid Hack sufficient consideration for the conveyance of title (*see infra*), WDQ have failed to address the testimony demonstrating the absence of a valid oral agreement entitling them to own the property in exchange for paying the mortgage and maintaining the property. Notably, while Walker testified that she did not "give back the deed" to Hack because she and Dickenson "had entered into a broader [oral] agreement" pursuant to which they "had been managing the building, had invested money into the building, had given [Hack] money and had paid for the building, you know, health and well-being," she also testified that Hack had not "confirmed" that agreement, verbally or otherwise.

In any event, in a related argument, WDQ contend that Hack has "ignored the concept of 'partial performance,'" presumably their payment of consideration to Hack (*supra*). This argument is rejected. "The statute of frauds provides that a contract for the sale of, or creating an interest in, real property, is void unless memorialized in a writing subscribed by the party to be charged" (*Alayoff v Alayoff*, 112 AD3d 564, 565 [2d Dept 2013], *lv dismissed* 24 NY3d 945[2014], citing General Obligations Law § 5-703[2]). "While the statute of frauds empowers courts of equity to compel specific performance of agreements in cases of part performance [under General Obligations Law § 5-703 [4]), the claimed partial performance must be unequivocally referable *to the agreement*" (*Pinkava v Yurkiw*, 64 AD3d 690, 692 [2d Dept 2009] [internal citations and quotation marks omitted] [emphasis added]). Moreover, "[i]t is not sufficient that the oral agreement gives significance to the plaintiff's actions. Rather, the actions alone must be unintelligible or at least extraordinary, [and] explainable only with reference to the oral agreement" (*id.*). Further, "the doctrine of part

performance is based on principles of equity, in particular, recognition of the fact that the purpose of the Statute of Frauds is to prevent frauds, not to enable a party to perpetrate a fraud by using the statute as a sword rather than a shield" (*id.* [internal citations and quotation marks omitted]).

Here, WDQ fail to identify any oral agreement which preceded their alleged conduct that would render the doctrine applicable, which is fatal to their claim, and thus have failed to raise any material issue of fact demonstrating that they paid Hack consideration for the placement of the names of Walker and Dickenson on the deed.[7]

In any event, even assuming WDQ identified an oral agreement to make them titleholders in exchange for their payment of the mortgage/maintenance, the doctrine would not apply where, as here, the payment of the mortgage/maintenance by Walker and Dickenson is equally referable to their payment of rent, and is equally consistent with the agreement pursuant to which they were placed on the deed merely to obtain financing. In this regard, as noted above, Walker testified that she and Dickenson began to pay their rent directly to Wells Fargo so that their loan application would be approved (i.e not to become owners of the property) (*see Christou v Christou*, 109 AD2d 1058, 1058 [1985], *affd* 65

As noted, WDQ argue that $10 consideration alone is sufficient consideration. The deed recites that Hack, "in consideration of Ten ($10) dollars and other good and valuable consideration," conveyed the property to Walker and Dickenson. However, the $10 is only sufficient to the extent WDQ establish that they paid Hack "the other good and valuable consideration" (*see Jarns Holdings Inc. v Huang,* *5-6, Civ Ct, NY County, July 23, 2007, Finkelstein, J., index No. L&T104949/06 ["As there must be a specific amount paid in a contract for it to be valid, the 'Ten Dollars' serves as that nominal sum, or the 'peppercorn.' The 'other valuable consideration' is the language that masks the larger sum, and is what makes the consideration 'adequate' as relative to the thing being purchased."]).

NY2d 853 [1985] [increased payment by plaintiff and husband from half to all of mortgage and real estate taxes on plaintiff's brother-in-law's property, who was named on deed, after brother-in-law moved out, might be consistent with an agreement to convey but was "equally consistent with a landlord-tenant relationship, and the payment of taxes and the mortgage could be considered rent for the use of the land"]; *Alayoff*, 112 AD3d at 566 ["the defendant's (father's) act of allowing the plaintiff (daughter) to live in the apartment rent- and maintenance-free, and his seeming willingness to transfer the interest in the apartment if she was able to obtain employment and pay the maintenance, is not likely unequivocally referable to the alleged oral agreement [that if plaintiff worked for defendant, he would transfer his interest in his cooperative apartment to her], but, rather, might reasonably be explained by other factors, such as the parties' familial relationship."]; *Kurlandski v Kim*, 111 AD3d 676, 677 [2013] [payments made by plaintiff totaling $150,000.00 on condominium unit for closing costs and adjustments, improvements and common charges "did not constitute partial performance of the alleged oral agreement [that he and defendant would purchase the unit as tenants in common and that each owned an undivided one-half interest] because they are not 'unequivocally referable' to the alleged agreement."]).

WDQ next contend that their agreement with Hack was to refinance the building, which Hack frustrated by his non-cooperation. Thus, WDQ argue that Hack should not be permitted to interfere with the agreement he originally made with them and remove them from the deed, especially after they expended time and money on the property. This argument fails to raise any issue of fact. The question here is whether Walker and Dickenson are valid titleholders on the deed, not whether Hack impeded their efforts to

obtain financing. Accordingly, even assuming that Hack frustrated WDQ's attempt to obtain financing, by their own admission, WDQ do not claim that this agreement was meant to bestow an ownership interest on them in the property. Notably, WDQ do not address Hack's contention that Walker and Dickenson did not assume the mortgage and that he did not permit them to stop paying rent. And, as noted, they fail to identify any oral agreement allowing them to become titleholders in exchange for paying the mortgage and maintaining the property, which is fatal to their claim.

Nor do WDQ address their testimony that the terms of the agreement with Hack to obtain financing and buy him out were non-specific, unknown to them, and contingent upon the appraisal of the property. Tellingly, they do not address whether they and Hack ever reached an agreement as to the amount of consideration they would provide Hack for his interest in the property, or any other terms of the buyout.

Based upon the foregoing, WDQ have failed to raise a material question of fact as to whether they had a valid meeting of the minds with Hack (*see also Schwonke v Banister*, 83 AD2d 752, 753 [1981] ["In the instant case defendant's *part performance*, presumably based on the acts which she claimed constituted consideration, *was not bargained for*, and therefore, should not be considered as performance of part of the bargain."] [emphasis added]) with respect to their becoming titleholders of the property, whether they paid Hack consideration for becoming titleholders, and whether there was an oral agreement which preceded their alleged referable conduct (payment of the mortgage/maintenance).

Accordingly, Hack is entitled to summary judgment on his sixth and seventh cause of action removing Walker and Dickenson from the deed.[8] In view of this determination, that branch of Hack's motion to dismiss the first cause of action of WDQ under index number 1053/2013 for a judgment declaring that Walker, Dickenson, Quis and Hack each own a 25% interest in the property is also granted and the court declares that Walker and Dickenson do not possess any ownership interest in the subject property.[9] Similarly, based upon this finding, that branch of Hack's motion to dismiss WDQ's third and seventh causes of action, alleging that Hack's acts/omissions decreased the value of the property and WDQ's interests therein (third), and that Hack converted equity in the property to WDQ's detriment (seventh),

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[8]The court notes, and as Hack asserts, Walker and Dickenson are not without a remedy, as they may be entitled to costs paid in improving the property pursuant to an accounting.

[9]In opposition to this branch of Hack's motion to dismiss, WDQ raise the same unsuccessful arguments they made in opposition to that branch of Hack's motion for summary judgment. They also assert that this branch of Hack's motion to "dismiss/be awarded summary judgment" must be denied because Hack did not affirmatively seek a declaratory judgment in his answer to their complaint. However, is it WDQ who are seeking a declaratory judgment in their first cause of action, not Hack, and Hack is moving to dismiss this cause of action seeking a declaratory judgment. In any event, Hack's seventeenth cause of action is one to quiet title ("to compel the determination of claims to the [subject] real property," and asserts that "[u]less a declaratory judgment is rendered by the Court determining the respective rights and interests of the parties, plaintiff [Hack] will be adversely affected and plaintiff [Hack] shall continue to suffer damages as a result" and that ". . . plaintiff [Hack] requests and is entitled to a declaratory judgment that provides that the defendants have no right, title, claim or interest in the [p]remises . . . and that the plaintiff [Hack] is the owner of a 70% undivided interest in fee simple absolute of the [p]remises . . ." (*Hack v Quis,* Exh G, Amended Complaint at ¶¶135, 147, 152). In any event, summary judgment may be awarded on an unpleaded cause of action where, as here, proof supports such cause of action (i.e. the causes of action enumerated in the complaint are sufficient to apprise the defendants of the instant prayers for relief), the plaintiff has advanced this claim in support of its motion for summary judgment, and where the opposing party has not been prejudiced (*Wirth v Chambers-Greenwich Tenants, Corp*., 2010 NY Slip Op 30755[U],*15 [Sup Ct, NY County 2010]; *compare E. Tetz & Sons, Inc. v Polo Elec. Corp*., 129 AD3d 1014, 1015 [2d Dept 2015]).

is granted as to Walker and Dickenson, because these causes of action are dependent upon Walker and Dickenson's claim to ownership, which the court has voided.[10]

Hack next seeks summary judgment on his eighteenth cause of action for an equitable mortgage, which alleges that Quis, either alone or with Walker and Dickenson, owns a 30% interest in the property; that Quis financed the purchase of his interest in the property with the Note; and that he and Quis intended that the Note would be secured by Quis' interest in the property and "any successor owners' interest until paid" (*Hack v Quis*, Exh. G, Amended Complaint at ¶¶154-156). In support of this branch of his motion, Hack contends that his and Quis' testimony establishes that Quis executed the Note to memorialize the consideration given by Quis to him (Hack) for the installment sale of a partial interest in the property to Quis; that having established the validity of the Note and having demonstrated that Quis used the proceeds from this loan to purchase a 30% interest in the property, he (Hack) is entitled to an equitable mortgage encumbering the property (which is in fact a purchase money mortgage, limiting Quis' interest in the property to the amount he paid to Hack on the Note); and that Quis' "mortgage loan payments for three years" to him (Hack) ratified the loan, which estops Quis from contesting the validity of the mortgage. Accordingly, Hack asserts that he is entitled to an "equitable purchase money mortgage" for the remaining unpaid amount on his loan to Quis - that amount to be determined at a later date pursuant to an accounting.

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[10]The court notes that Hack does not argue that these causes of action should be dismissed as to Quis.

"The whole doctrine of equitable mortgages [or liens] is founded upon that cardinal maxim of equity which regards that as done which has been agreed to be done, and ought to have been done" (*Onewest Bank, FSB v Spencer*, 145 AD3d 1488, 1489 [2d Dept 2016], quoting *Sprague v Cochran*, 144 NY 104, 114 [1894]). "New York law allows the imposition of an equitable lien if there is an express or implied agreement that there shall be a lien on specific property" (*Deutsche Bank Tr. Co. Ams. v Company*, 110 AD3d 760, 761 [2d Dept 2013]), i.e. where "the facts surrounding a transaction evidence that the parties intended that a specific piece of property is to be held or transferred to secure an obligation" (*Onewest Bank, FSB,* 145 AD3d at 1489 [internal citations and quotation marks omitted]). "[T]o find an equitable lien it is necessary that an intention to create such a charge clearly appear from the language and the attendant circumstances. Strict proof of such intention is required" (*Pennsylvania Oil Prods. Ref. Co. v Willrock Producing Co.*, 267 NY 427, 434-435 [1935]; *see also Tornatore v Bruno*, 12 AD3d 1115, 1117-1118 [4th Dept 2004]; *Canandaigua Nat'l Bank & Tr. Co. v Palmer*, 119 AD3d 1422, 1424 [4th Dept 2014] ["plaintiff failed to establish as a matter of law that both parties clearly intended to secure the promissory note with the subject property"]; *J.P. Morgan Chase Bank, N.A. v Cortes*, 96 AD3d 803, 804 [2d Dept 2012], *lv denied* 20 NY3d 853 [2012] ["plaintiff failed to meet its burden of establishing the intent necessary to impose an equitable mortgage"]; *Fremont Inv. & Loan v Delsol*, 65 AD3d 1013, 1014 [2d Dept 2009] ["the plaintiff failed to meet its burden of establishing the intent necessary to impose an equitable mortgage"]; *Tornatore,* 12 AD3d at 1118 [same]).

Finally, "[a] purchase-money mortgage is generally defined as 'a mortgage executed at the time of purchase of the land and contemporaneously with the acquisition of the legal title, or afterward, but as part of the same transaction, to secure an unpaid balance of the purchase price'" (*Szerdahelyi v Harris*, 67 NY2d 42, 46 [1986], quoting 38 NY Jur, Mortgages and Deeds of Trust, § 7, at 25 [citing *Boies v Benham*, 127 NY 620 (1891)]; *see also Barone v Frie*, 99 AD2d 129, 131 [2d 1984] ["A mortgage given to secure money, borrowed for the purpose of purchasing real property, is generally held to be a purchase-money mortgage . . ."]).

Here, Hack has demonstrated his entitlement to an equitable mortgage for the remaining unpaid amount on his loan to Quis. In this regard, in conjunction with the Note, Hack avers that on August 4, 2008, he and Quis agreed to an installment sale of a 30% interest in the property whereupon Quis moved into the third floor apartment of the property (*see* Copy of Deed, recorded on August 22, 2008, identifying Hack and Quis as titleholders). Hack further asserts in his affidavit that he and Quis agreed that "*as consideration for the partial conveyance of title to the Premises, Quis would pay me $480,000.00 and $350.00 per month for Quis' share of property taxes, insurance, and utilities";* that Quis gave him a $50,000.00 down payment and began making monthly loan payments to him in September 2008 in the amount of $2,309.00 "*since Quis required a loan from me to obtain the additional $430,000.00 needed for Quis' purchase";* and that he (Hack) would not have agreed to sell thirty percent of the property but for Quis' promise to pay him the $430,000.00 with interest. Moreover, Hack avers that he memorialized the "purchase money loan" he

gave Quis on January 12, 2009, which Quis ratified by making the requisite monthly payments of $2,300.00 for three years.

Hack also points out, and the record reveals, that Quis did not sign the Note under duress. Moreover, despite Quis' contention in his affidavit that he was a 50% owner of the property in August, 2008, Hack notes that Quis testified that he never collected rent at the property, only asserting that he "really didn't think about it"; that he lived in the third floor apartment; and that he did not make any improvements to the apartments on the first and second floor, over which he had no control (albeit he made some improvements to those common areas).

Further, it is also true that Quis testified that he received a 50% ownership interest in the property. In this regard, he asserted that while he had had prior discussions with Hack wherein Hack told him he would receive a 30% ownership interest in the property, he nevertheless believed himself to be a 50% owner because the 30% figure was never documented in writing. However, Hack points out, and it is undisputed, that Quis only took a deduction of 30% on his personal income tax for the real estate taxes on the property.

Also, the court notes that Hack testified that Quis never paid the mortgage because he was merely a guarantor on the deed, which is "why . . . the amount that [Quis] paid, *corroborated with the note and not the mortgage*" and "why, when [he and Quis] did the refinance in 2010, [Quis'] payments didn't go down . . . Because if the mortgage went down . . . he didn't lower his payments, *and he knows why he didn't lower his payments. Because he wasn't paying the mortgage. That was my debt.* I deducted the interest . . [h]e didn't" (emphasis added). Notably, Quis testified and asserts in his affidavit that he paid Hack

$2,309.00 per month from September, 2008 through August, 2011, which "was going to the mortgage."[11] However, these monthly payments correspond to the monthly payments of the promissory note, not the monthly payments of the mortgage ($2,119.58 [half the monthly mortgage payment of $4,239.16]). In this regard, Quis testified that in July, 2012, instead of paying Hack, he was paying half the monthly mortgage payment directly to Wells Fargo in the amount of $2,065.43. However, he could not account for why he had previously been paying Hack $2,309.00, a difference of approximately $244.00 ($2,309-$2,065), which was also purportedly for this same monthly mortgage payment.

Further, Hack testified that Quis was liable on the Note, which is a debt, because he used it to buy his (Quis') apartment, and that Quis did not have any ownership interest in any other part of the property; that Quis paid him a $50,000.00 down payment for Quis' purchase; that in exchange for signing the Note, Quis received a 30% ownership in the property; *that Quis used the Note to secure the interest in Quis' property*; that he (Hack) paid the mortgage and deducted the interest on it; that Quis deducted the interest on the Note, and "had it in his taxes"; and that he (Hack) recorded the installment sale on his taxes as a 70%-30% ownership interest.

Finally, Hack has made a prima facie showing that Quis ratified the Note by making payments thereon to him for three years without protest, waiving his current claims (*see e.g Moweta v Citywide Home Improvements of Queens, Inc.*, 267 AD2d 438, 439 [2d Dept 1999] ["plaintiffs ratified the subject contract, note, and mortgage by making payments thereon to

[11]The court notes that $430,000.00 at 5% interest for 30 years = $2,308.33 per month.

the respondents for five years without protest, and in so doing, waived all claims sounding in fraud"]). As noted, the amount Quis purportedly paid for the mortgage was less than the amount he had paid Hack for three years, purportedly for the same monthly mortgage payment.

In opposition, WDQ have raised a material question of fact as to whether Hack is entitled to an equitable purchase money mortgage based upon Quis' contention, in his affidavit and deposition testimony, that he did not intend the Note to be an equitable mortgage, and that he owns a 50% interest in the property. In this regard, Quis testified that discussions with Hack about obtaining a possible 30% interest in the property never came to fruition, and that he believed he received a 50% ownership interest because the 30% figure was not recorded in any contract, or on any documents. He also asserts that the deed describes he and Hack as tenants in common, without setting forth any ownership percentages, and testified that his 50% interest was set forth in the deed.

In further support of this claim, Quis properly points out that Mr. Woloshen testified that the memorandum documenting the sale of 30% of the property to him was not "anywhere in [his] business records at [his] office," and that he did not recall who provided the information to him for the preparation of the memorandum. This also raises a material question of fact as to whether Quis owned 30% or 50% of the property.[12]

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[12] As noted, Hack argues that Mr. Woloshen testified that the Note appeared to be his handwriting. "[U]nder limited circumstances, a witness who is familiar with the practices of a company that produced the records at issue, and who generally relies upon such records, may have the requisite knowledge to meet the CPLR requirements for the admission of a business record, provided that the witness can also attest that (1) the record was made in the regular course of business; (2) it was the regular course of business to make such record; and (3) the record was made contemporaneously with the relevant event, thereby assuring its reliability" (*People v*

Moreover, Quis further argues and avers in his affidavit that he denies borrowing the $430,000.00 from Hack. Notably, Quis testified that he did not intend to pay the $430,000.00 "because there [was] no loan," namely his "loan's with Wells Fargo for $720,000. It is [$]650,000 first mortgage and [$]75,000 HELOC." Moreover, Mr. Woloshen testified that in 2010, Quis reported as an expense on his tax return a payment to Hack of mortgage interest in the amount of $20,919.51, suggesting Quis was in fact paying the mortgage as opposed to the monthly Note payment; and Quis avers in his affidavit that he only deducted 30% of the real estate taxes on the property on his 2010 personal income taxes solely because he relied upon the information provided by Hack, but in retrospect he should not have been so trusting.

In addition, as Quis points out, Hack conveyed his interest in property worth almost $1.4 million dollars for $50,000.00 in August, 2008, and then for another $430,000.00 on an *unsecured* Note five months later, raising a genuine issue of fact as to whether the Note was intended to secure the unpaid balance of the purchase price, and thus whether it could be considered an equitable purchase money mortgage (*see generally Szerdahelyi,* 67 NY2d at 46). Further, the court notes that the promissory note does not contain language indicating

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Brown, 13 NY3d 332, 341 [2009]). Mr. Woloshen also testified that it was his general practice to scan and save his notes and memoranda prepared when he would meet with his clients, but then testified that documents prepared by *his company* were not separately scanned and saved, and that this could have been the same procedure followed with respect to the memorandum. He also testified that it was possible that the memorandum was retained by one of his clients or returned to one of his clients but not scanned into his system. Under the circumstances, a material question of fact exists as to whether the memorandum was Mr. Woloshen's business record (*see 345 E. 69th St. Owners Corp. v Platinum First Cleaners, Inc.*, 158 AD3d 452, 452-453 [1st Dept 2018] [defendant "correctly argues that neither witness established that the records on which they relied to prove damages were plaintiff's business records"]; *People v Brown*, 13 NY3d at 341; CPLR 4518).

that the property or the unpaid balance of the purchase price constitutes a security interest for the Note.

Moreover, while Hack asserts that Quis ratified the Note by making payments on it for three years, Quis avers in his affidavit in opposition that the Note was "nothing more than a means for [Hack] to collect one half of the monthly mortgage payments due Wells Fargo from [him]" and, as he testified, was merely a means for him to "keep the peace within the building," which he signed because he "really had no choice," not wanting to jeopardize his already-established four-month tenancy there. Further, as Quis testified, he made the payments of $2,309.00 to Hack for three years to pay Wells Fargo, because he was "being held liable for a loan and a HELOC," i.e. not because he was making monthly payments on the Note, and Hack received his (Quis') monthly mortgage payments and in turn paid Wells Fargo the full monthly mortgage payment amount, taking the entire interest deduction on his personal income taxes.

Quis also testified that if Walker and Dickenson had been successful in refinancing the property in 2012, his "gain [was] more ownership" because the property would then have been owned by just three people, namely WDQ, each owning a 33% interest, in spite of the fact that he had previously testified that he owned a 50% interest in the property, and would have in fact suffered a 16% loss (in fact 17%) if they had obtained refinancing. While he then explained that removing Hack from the property was worth giving up 16% of his ownership interest in the property, and that this loss of ownership interest was in effect a "gain" because "Hack would never be seen again," his testimony raises a material issue of fact as to whether he owned a 50% interest in the property or a 30% interest in the property

pursuant to the Note, and thus whether the Note could be viably considered an equitable mortgage.

Finally, as counsel for WDQ points out, the Note states that Hack agreed that it was "made to enable him [Hack] to secure his ownership interest in 302 5th st Brooklyn NY 11215" raising a material question of fact as to the real purpose of the Note.

In view of the foregoing, that branch of Hack's motion for summary judgment on his eighteenth cause of action seeking a declaration that he is entitled to an equitable purchase money mortgage is denied. Inasmuch as a material question of fact exists as to the ownership interest of Quis in the property, that branch of Hack's motion for summary judgment on his seventeenth cause of action to quiet title, premised on the grounds that he (Hack) owns a 70% interest in the property, and Quis or WDQ own a 30% interest in the property, must also be denied. For the same reasons, that branch of Hack's motion for summary judgment on his nineteenth cause of action for a partition and sale of the property, premised upon his (Hack's) 70% ownership interest and Quis' or WDQ's 30% ownership interest, is also denied. Further, in light of this determination, that branch of Hack's motion for reverse summary judgment on "Quis'" sixth cause of action for partition and sale of the property consistent with his (Hack's) 70% ownership interest, must be denied as well.

Hack also requests that the court direct a partition and sale of the property before an accounting is performed. Hack did not seek this relief in his motion, and in any event, he has failed to demonstrate a need for an immediate sale before an accounting is performed based upon the circumstances of this case (*compare McCormick v Pickert*, 51 AD3d 1109, 1110-1111 [3d Dept 2008], *lv dismissed* 11 NY3d 838 [2008]).

In summary, the motion of Hack, under index number 500263/2013, for summary judgment on his sixth and seventh causes of action is granted, and the motion is otherwise denied. The motion of Hack, under index number 1056/2013, is granted to the extent of dismissing the first cause of action, and the third and seventh causes of action as they relate to Walker and Dickenson only, and is otherwise denied.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

Karen B. Rothenberg
Justice, Supreme Court

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