

Guja v H.D. Enters., Inc.

2009 NY Slip Op 32149(U)

September 17, 2009

Supreme Court, New York County

Docket Number: 116810/08

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

JUDITH J. GISCHE, J.S.C.

PRESENT: _____

PART 10

Index Number : 116810/2008

GUJA, SANDRA

VS.

H.D. ENTERPRISES, INC.

SEQUENCE NUMBER : 002

DEFAULT JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

SEP 22 2009

COUNTY CLERK'S OFFICE
NEW YORK

*motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.*

Dated: 9/17/09

JUDITH J. GISCHE, J.S.C.

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X

SANDRA GUJA,

Plaintiff,

-against-

H.D. ENTERPRISES, INC., WOODLANDS
INTERNATIONAL, LLC and ADAM COHEN,

Defendants.

-----X

Decision/Order

Index No.: 116810/08

Seq. No. : 002

Present:

Hon. Judith J. Gische

J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers

Numbered

Pltf's motion [d j/mt] w/JD affirm, exhs 1

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action for breach of a real estate contract and fraud. Plaintiff now moves to renew its prior motion pursuant to CPLR § 3215, for an order directing the Clerk of Court to enter a default judgment in her favor and against defendants Woodlands International LLC ("Woodlands") and Adam Cohen on the issue of liability and setting this matter down for an inquest on the issue of damages.¹ The prior motion was denied, by order dated June 19, 2009, because of several issues identified by the court in that order. Since the denial was without prejudice, permission to renew is granted. CPLR 2221 (d) (2), Foley v. Roche, 68 AD2d 558, 567 (1st Dept 1979).

¹ Although plaintiff has not styled her motion as one to renew the prior motion, the court will treat it as such.

Plaintiff now represents to the court that she has not served the summons and complaint upon H.D. Enterprises ("HD"). Therefore, since the court never obtained jurisdiction over HD in this action, there was no need for plaintiff to serve this motion upon HD. Moreover, since plaintiff has not served HD with the summons and complaint within the time provided under the CPLR, nor requested an extension of her time to do so, the complaint against HD is hereby severed and dismissed.

Plaintiff has also clarified the service of the summons and complaint on the individual defendant, Cohen. Plaintiff served Cohen by affixing a copy of the summons and complaint to Cohen's door after making several diligent attempts to personally serve Cohen. Plaintiff has now provided proof that she mailed an additional copy of the summons and complaint to Cohen, as well as the additional service required under CPLR § 3215 (g). Therefore, Cohen has defaulted in appearing in this action.

Plaintiff has also provided proof of service of the summons and complaint upon Woodlands pursuant to LLC Law § 303. Therefore, Woodlands has also defaulted in appearing in this action.

Discussion

Plaintiff is entitled to a default judgment, provided she otherwise demonstrates that she has a *prima facie* cause of action. Gagen v. Kipany Productions Ltd., 289 AD2d 844 (3rd Dept 2001). A default in answering the complaint constitutes an admission of the factual allegations therein and the reasonable inferences which may be made therefrom [Rokina Optical Co., Inc. v. Camera King, Inc., 63 NY2d 728 (1984)]. An application for a default judgment must be supported by either an affidavit of facts made by one with personal knowledge of the facts surrounding the claim (Zelnick v. Biderman

Industries U.S.A., Inc., 242 AD2d 227 [1st Dept 1997]; and CPLR § 3215 [f]) or a complaint verified by a person with actual knowledge of the facts surrounding the claim (Hazim v. Winter, 234 AD2d 422 [2d Dept 1996]; and CPLR § 105 [u]).

Plaintiff has asserted two causes of action against Woodlands and Cohen: [1] breach of contract; and [2] fraud.

Plaintiff claims in the complaint² that on or about September 11, 2008, she entered into a "Real Estate Deal Memorandum and Binder" (the "Contract") to purchase a cooperative apartment at 175 East 2nd Street, Apartment 1B, New York, NY (the "property") from HD, the seller. Under the contract, the purchase price of the property was \$360,000 and plaintiff paid \$36,000 as a deposit to Woodlands as Escrow Agent. Cohen signed the Contract as President on behalf of Woodlands. Plaintiff alleges that "[p]ursuant to the terms of the (Contract), (she) demanded the return of the entire Deposit, namely \$36,000, but all Defendants failed and refused to return said amount in breach of the (contract)."

In order to state a cause of action for breach of contract, the pleading must allege the existence of a valid and enforceable agreement, due performance by plaintiff, and a failure of performance by defendant, resulting in damages (see Furia v Furia, 116 AD2d 694, 695 [2d Dept 1986]).

The contract provides as follows:

In the event of a dispute, both Seller and Purchaser shall agree that by executing this Memorandum/Binder, in this event the Down Payment will be returned to [plaintiff] providing a contract of sale has not been entered into,

¹ The complaint is purportedly verified, but does not actually contain a verification by someone with personal knowledge of the facts alleged therein. Accordingly, the complaint is not verified.

[* 5]

in the event the contract has been executed by both parties, in this event the Down Payment will be forwarded to Seller's counsel. Providing (Woodlands) honours all of it's (sic) obligations as stated herein, (Woodlands) shall be deemed to have satisfied all of it's (sic) obligations to both Seller and Purchaser with no further recourse to either Seller or Purchaser.

Plaintiff has provided an "Affidavit of Merits" wherein she states:

I have read and reviewed the Complaint which I verify as true and my Attorney's Affirmation. Every fact in my Attorney's Affirmation is true based upon my personal knowledge as is every fact set forth in the Complaint; and I incorporate by reference in this Affidavit every fact, as set forth in both the Complaint and my Attorney's Affirmation.

Based on the foregoing, plaintiff has demonstrated a *prima facie* cause of action for breach of the contract against Woodlands. Plaintiff has not, however, established that she entered into a contract with Cohen, in his individual capacity, and therefore a breach of contract claim does not lie against Cohen. Accordingly, plaintiff is only entitled to a default judgment on her first cause of action against Woodlands.

In the second cause of action, plaintiff claims the following:

5. The Defendants each falsely represented that they owned the Parcel and falsely represented that they had the right to sell the property. These falsehoods induced the Plaintiff to sign the (contract) and to tender the Deposit; all to the (plaintiff's) financial detriment, in the amount of \$36,000. Said conduct constitutes fraud.

6. All of the aforesaid conduct was done with malice entitling the (plaintiff) to punitive damages in the amount of \$1,000,000.

7. The wrongful withholding of Escrow also constitutes grounds for the revocation of all licenses held by the Defendants.

Plaintiff's claim for fraud arises from the defendants' false representations that "they owned" a Cooperative apartment at 175 East 2nd Street, Apt. 1B, New York, New York and had the right to sell same. Plaintiff asserts that these "falsehoods induced

[* 6]
[her] to sign the [Contract] and to tender the Deposit [of \$36,000].”

To state a cause of action for fraud, plaintiff must show: (1) that the defendants intentionally made a misrepresentation or material omission of fact; (2) that the misrepresentation or material omission of fact was false or known to be false to defendants; (3) plaintiff’s reasonable or justifiable reliance; and (4) that the misrepresentation resulted in some injury to plaintiff. Held v. Kaufman, 91 NY2d 425 (1998); Vasquez v. Soto, 61 AD3d 968 (2d Dept 2009); see also Clark v. Helmsley Windsor Hotel, 214 AD2d 365 (1st Dept 1995).

Based upon the bare-bone facts alleged in the complaint, the court cannot find plaintiff’s reliance on Woodland or Cohen’s alleged misrepresentation that it owned the property and had the right to sell same to be reasonable or justifiable under the circumstances. See Serino v. Lipper, 47 AD3d 70 (1st Dept 2007). The Contract is clear insofar as it states that HD was the seller of the property, and that Woodlands was acting as an escrow agent, only. Plaintiff has, therefore, failed to establish a *prima facie* cause of action for fraud against either Woodlands or Cohen, nor is she entitled to punitive damages thereby. Moreover, the court cannot award plaintiff the relief requested in her seventh paragraph of the complaint, with respect to revoking whatever licenses plaintiff refers to therein. Accordingly, the second cause of action is hereby severed and dismissed.

Plaintiff’s damages on her first cause of action have been sufficiently pled, and there is no need to hold an inquest on these damages. Accordingly, plaintiff’s motion for default judgment is granted only to the extent that plaintiff is entitled to a default judgment against Woodlands on the first cause of action for breach of contract. Plaintiff

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is entitled to a money judgment in the amount demanded in her complaint, to wit:
\$36,000. The motion is otherwise denied and the remainder of the complaint is severed
and dismissed.

Conclusion

In accordance herewith, it is hereby:

ORDERED that plaintiff's motion is granted only to the extent that plaintiff is
entitled to a default judgment on the first cause of action against Woodlands, only; and it
is further

ORDERED that the clerk is hereby directed to enter a money judgment in favor of
plaintiff Sandra Guja and against defendant Woodlands International, LLC, in the
amount demanded in the complaint, to wit: \$36,000; and it is further

ORDERED that the motion is otherwise denied; and it is further

ORDERED that the remainder of the complaint is hereby severed and dismissed.

Any requested relief not expressly addressed herein has nonetheless been
considered by the court and is hereby denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
September 17, 2009

So Ordered:



HON. JUDITH J. GISCHE, J.S.C.

FILED
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NEW YORK