

Tsor v Warner

2007 NY Slip Op 32350(U)

July 20, 2007

Supreme Court, Kings County

Docket Number: 0030264/2004

Judge: David Schmidt

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At an IAS Term, Part NJTRP 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 20th day of July, 2007.

P R E S E N T:

HON. DAVID I. SCHMIDT,

Justice.

----- X

AVISHAI TSOR,

Plaintiff,

Index No. 30264/04

- against

LES C. WARNER AND CALVIN BROWN,

Defendants.

----- X

LES C. WARNER,

Third -Party Plaintiff,

Index No. 76120/06

- against -

PETER D. GOLDBERG AND TOWER 2000, INC.,

Third-Party Defendants.

----- X

The following papers numbered 1 to 5 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1, 2 _____
Opposing Affidavits (Affirmations) _____	3, 4 _____
Reply Affidavits (Affirmations) _____	5 _____
_____ Affidavit (Affirmation) _____	_____
Other Papers _____	_____

Upon the foregoing papers, third-party defendant Peter D. Goldberg (Goldberg) moves, pursuant to CPLR 3211(a)(1) and (7) and CPLR 3016 (b), for an order dismissing the instant third-party action on the ground that defendant/third-party plaintiff Les C. Warner (Warner) has not stated a cause of action as against him for fraud and that documentary evidence also exists which conclusively establishes a defense to the subject fraud claim. In addition, plaintiff Avishai Tsor (Tsor) moves, pursuant to CPLR 3212, for an order granting him summary judgment on his complaint for specific performance as against Warner on the ground that the evidence supporting Goldberg's motion to dismiss the complaint establishes, as a matter of law, that Warner executed a contract of sale as the seller of the subject property and, therefore, is bound to deliver title to said property to Tsor.¹

In the underlying specific performance action, Tsor avers that on or about April 30, 2004, he and Warner entered into a written contract of sale pursuant to which Warner agreed to sell real property known as 346 Saratoga Avenue, Brooklyn, New York, and designated as Block 1452, Lot 47 on the Tax Map for the City of New York, to Tsor for \$280,000. Tsor alleges that, pursuant to the subject contract, \$40,000 was to be deposited with Goldberg's attorney and the remainder of the purchase price was to be paid in cash on or about August 28, 2004 at the closing. Tsor alleges that he made the downpayment as required and

¹ The court hereby grants Tsor's request for leave to file the instant motion for summary judgment more than 120 days after the note of issue was filed. "Good cause" exists for such admittedly untimely filing given that the instant motion to dismiss was made returnable subsequent to the filing of the note of issue and, arguably, presents new facts relevant to Tsor's instant motion for summary judgment.

otherwise performed all conditions of the contract, but Warner thereafter informed him that he would not deliver the deed or proceed to close title. Tsor further alleges that, as a result of Warner's failure to close title, he is irreparably harmed, has no adequate remedy at law and, therefore, seeks specific performance of the subject contract of sale.

In his third-party complaint, Warner alleges that on or about April 15, 2004, he purchased a motor vehicle from Tower 2000 Inc. (Tower), a car dealership which employed Tsor. During the purchase negotiations, Tsor and Tower allegedly obtained Warner's credit report and learned that Warner owned two properties in Brooklyn, including the property which is the subject of the instant specific performance action. Warner avers that Tsor expressed interest in purchasing the subject property, but Warner informed him that the property was already in contract to be sold to another party and he was represented by an attorney with respect to the sale.

Thereafter, Tsor allegedly informed Warner that his credit was poor and, as a result, Tsor would have to assist him in obtaining financing for the purchase of the vehicle. Warner claims that he actually had a good credit rating. Nonetheless, he was allegedly sent by Tsor to "three different offices in order to obtain the financ[ing] he needed to purchase the subject vehicle."

Warner alleges that he met Goldberg in one of these offices and that Goldberg informed him that he was an attorney for the bank which would be financing Warner's purchase of the vehicle. Goldberg allegedly "fraudulently provided some documents to

[Warner] to execute in order to secure” said financing. Warner claims that he “unsuspectingly executed said documents believing them to be loan documents for the purchase of the subject vehicle.” In the course of doing so, Warner allegedly signed the contract of sale for the subject property. Warner avers that at the time “Goldberg made the . . . representations, [Warner] did not know that those documents were not for car financing but a fraudulent contract of sale, but believed the representations were true and made in good faith, relied upon them and [was] thereby induced to execute the . . . documents believing them to be the loan document[s] for the purchase of the subject vehicle.” Accordingly, Warner claims that Goldberg, allegedly acting in concert with Tower, caused Warner to sustain damages as a result of such fraudulent misrepresentations.

In an affidavit submitted in opposition to Goldberg’s instant motion to dismiss the third party complaint, Warner essentially reiterates the allegations contained in said complaint and also avers that he is “not soundly educated in that [he] only completed elementary school.” Further, he states that upon his review of the contract of sale “it was found that there are quite a number of discrepancies, cross outs and fraudulent alterations without my knowledge.”

In support of his motion to dismiss the third-party complaint, Goldberg submits an affidavit wherein he presents a version of the relevant events which differs substantially from the allegations asserted by Warner. Goldberg avers that he was retained by Warner to provide legal representation to him with respect to the subject contract of sale. Goldberg

claims that he met with Warner prior to his execution of the contract and explained to him the terms of same. He also states that Warner signed the contract of sale and the riders thereto in his presence and fully understood that he was selling the property to Tsor pursuant to the terms of the contract. He alleges that Tsor delivered two checks to him for deposit in his attorney escrow account and that such checks represented a \$40,000 downpayment on the property. Thereafter, the closing did not take place “because Warner complained that . . . Tsor was taking too long to close.” Goldberg states that although that was the excuse proffered by Warner for his cancellation of the contract, he later learned that Warner, without his knowledge, had contracted to sell the property to a different buyer. He also alleges that Warner never consented to the return of the \$40,000 downpayment to Tsor and, accordingly, such downpayment, to date, has not been returned.

Goldberg also denies that he represented to Warner that the documents he signed with regard to the sale of the property were related to financing for a motor vehicle. He also states that he never represented either Tsor or Tower and never had any agreements or communications with them concerning car financing. He further alleges that he never represented Warner with respect to the purchase of a motor vehicle and never made any representations to Warner concerning the purchase of a motor vehicle or financing for same. Rather, Warner allegedly informed him that he had met Tsor in connection with a motor vehicle transaction.

Goldberg's Motion to Dismiss the Third-Party Action

It is well settled that, as a general rule, on a motion to dismiss the complaint for failure to state a cause of action under CPLR 3211 (a) (7), the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true” (*Gruen v County of Suffolk*, 187 AD2d 560, 562 [1992]). Additionally, “[t]he pleading is deemed to allege whatever can be implied from its statements by fair and reasonable intendment” (*Components Direct, Inc. v European American Bank and Trust Co.*, 175 AD2d 227, 232 [1991]). “[I]f from [the complaint’s] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). “The criterion is whether the plaintiff has a cause of action and not whether he may ultimately be successful on the merits” (*One Acre, Inc. v Town of Hempstead*, 215 AD2d 359 [1995]). Accordingly, the dismissal of a complaint pursuant to CPLR 3211(a) (7), “will be warranted only in those situations in which it is conclusively established that there is no cause of action” (*Town of North Hempstead v Sea Crest Construction Corp.*, 119 AD2d 744, 746 [1986]). Similarly, a dismissal motion, pursuant to CPLR 3211 (a) (1), “may be granted where documentary evidence submitted conclusively establishes a defense to the asserted action as a matter of law” (*Goldman v Metropolitan Life Insurance Co.*, 5 NY3d 561, 571 [2005], quoting *Held v Kaufman*, 91 NY2d 425, 430-431 [1998]).

In the instant case, Goldberg is entitled to an order dismissing the third-party action as against him. It is well settled that “[a] party that signs a document is conclusively bound by its terms absent a valid excuse for having failed to read it” (*Guerra v Astoria Generating Co., L.P.*, 8 AD3d 617, 618 [2004]); *see also Lavi v Hamedani*, 234 AD2d 428, 428 [1996]). Accordingly, where a party claims that he or she was induced to sign a document based upon misrepresentations as to the document’s contents, such claim must fail if “the allegedly fraudulent misrepresentation[s] . . . could have been readily discovered upon the reading of the document” (*Morby v Di Siena Assocs. LPA*, 291 AD2d 604, 606 [2002]). This comports with the general rule that fraud and misrepresentation claims are subject to dismissal when they are based solely upon alleged discrepancies between oral misrepresentations and the written terms of the document actually executed by the parties (*see Daily News, L.P. v Rockwell International Corp.*, 256 AD2d 13, 14 [1998], *lv denied* 93 NY2d 803 [1994])[noting that a conflict between oral misrepresentations concerning the contents or purpose of a document and the written terms of the document itself which is readily discernible upon reading such document “negates a claim of reasonable reliance upon the oral representation”)].

A limited exception to the rule provides that “[i]f the signer is illiterate, or blind, or ignorant of the alien language of the writing, and the contents thereof are misread or misrepresented to him by the other party, or even by a stranger, unless the signer be negligent, the writing is void” (*Pimpinello v Swift & Co., Inc.*, 253 NY 159, 163 [1930]).

Such exception has been construed, however, to be “applicable only when the signer is free of negligence” and, therefore, “[p]ersons who are blind or illiterate are not automatically excused from complying with the terms of contracts which they sign simply because their disability might have prevented them from reading the contracts[;] [rather] [t]he cases consistently hold that a person with such a disability must make a reasonable effort to have the document read to him [or her]” (*Sofio v Hughes*, 162 AD2d 518, 520 [1990], *lv denied* 76 NY2d 712 [1990]; *accord Holcomb v TWR Express, Inc.*, 11 AD3d 513, 514 [2004]; *Shklovskiy v Khan*, 273 AD2d 371, 372 [2000]; *Maines Paper and Food Service Inc. v Adel*, 256 AD2d 760, 761-762 [1998][finding that defendant was precluded from asserting a fraudulent inducement claim where the terms of the document in question clearly contradicted the misrepresentations allegedly made by plaintiff’s representatives to defendant with respect to its contents and defendant, who claimed he had “difficulty” with the English language, admitted that he made no attempt to read the document before signing it nor did he attempt to have someone read or explain it to him]); *but see Fuentes v Aluskewicz*, 25 AD3d 727, 728 [2006][holding, in summary judgment context, that questions of fact existed with respect to the enforceability of a release where the plaintiff admitted that she signed said release, but alleged that her comprehension of written English was poor and the insurance company representative who obtained the release did not identify the document as such or explain its legal significance to her and also misrepresented the purpose of the release]).

Upon reviewing the allegations of the third-party complaint, as well as the affidavit

submitted by Warner which shall be construed by the court as rectifying any existing pleading deficiencies (*see Fresh Direct, LLC v Blue Martini Software, Inc.*, 7 AD3d 487, 487 [2004]), the court finds that Goldberg is entitled to dismissal of Warner's third-party action as against him. Warner alleges that he executed the subject contract of sale based upon the misrepresentations of Goldberg, an individual he had just met, that the documents being presented for his signature were related to motor vehicle financing. He does not allege that he is blind, illiterate or cannot understand English. He also does not allege that he was unable to read the documents or that he attempted to have Goldberg or any other individual read or explain the subject documents to him. Further, he fails to aver that he ever actually read or attempted to read the subject documents and, even in affording the allegations of the third-party complaint every favorable inference, the court construes said complaint as alleging that he, in fact, *did not* read the documents but, instead, relied entirely upon Goldberg's alleged misrepresentation that the documents in question were related to motor vehicle financing. Although Warner also states, in his affidavit, that he is "not soundly educated in that [he] only completed elementary school," he does not aver that such alleged educational deficiency impeded his ability to read the document in question. Accordingly, the court finds that "[h]aving failed to read the agreement or, because of an alleged difficulty . . . having failed to have someone else read or explain it to him, [Warner] is precluded from asserting fraudulent inducement since there cannot be justifiable reliance" (*Maines Paper*

and Food Co., 256 AD2d at 762]). As a result, Warner has failed to state a cause of action sounding in fraud as against Goldberg and such claim is subject to dismissal.²

Moreover, in reviewing the documentary evidence proffered by Goldberg, namely the contract of sale itself, the nature and purpose of such document is readily apparent from its written contents, including the signature pages, and, therefore, contradicts any alleged misrepresentations that the document was somehow related to financing for a motor vehicle. Accordingly, Goldberg has also proffered documentary evidence that conclusively establishes a defense to the asserted fraud cause of action, namely that Warner, as a matter of law, could not have reasonably relied upon Goldberg's alleged misrepresentations concerning the subject document (*see Goldman*, 5 NY3d at 571).

Tsor's Motion for Summary Judgment

Summary judgment should only be granted where there are no triable issues of fact (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). In order to prevail on a motion for summary judgment, the movant must present a prima facie case demonstrating entitlement to judgment as a matter of law (*Prince v Di Benedetto*,

² With respect to Warner's claim that the contract in question contained "quite a number of discrepancies, cross outs and fraudulent alterations without [his] knowledge," such allegations, which are not pled in the complaint but, rather, only appear in Warner's affidavit, are insufficient to state a cause of action. Given that Warner primarily alleges that he did not read the subject contract but entirely relied upon the misrepresentations of Goldberg with respect to the contents of same, and, as a result, does not aver, for instance, that the contract terms were altered from the time he initially read the contract, he is "conclusively bound" by the contents of the contract, including the deletion or insertion of certain terms, which bears his signature (*see generally Guerra*, 8 AD3d at 618).

189 AD2d 757, 759 [1993]; *Zarr v Piccio*, 180 AD2d 734, 735 [1992]). Once the movant has established his or her prima facie case, the party opposing a motion for summary judgment bears the burden of “produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact . . . mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; see also *Romano v St. Vincent’s Medical Center of Richmond*, 178 AD2d 467, 470 [1991]; *Tessier v New York City Health & Hospitals Corp.*, 177 AD2d 626 [1991]). However, if a party fails to establish his or her prima facie case, summary judgment must be denied regardless of the sufficiency of the opposing papers (see *Rentz v Modell*, 262 AD2d 545, 546 [1999]).

It is well established that “[b]efore specific performance of a contract for the sale of real property may be granted, a buyer must demonstrate that it was ready, willing and able to perform” (*Internet Homes, Inc. v Vitulli*, 8 AD3d 438, 439 [2004]; see also *Djukanovic v D’Amico*, 40 AD3d 576, 576 [2007]). Accordingly, “[w]hen a purchaser submits no documentation or other proof to substantiate that it had the funds necessary to purchase the property, it cannot prove, as a matter of law, that it was ready, willing, and able to close” (*Fridman v Kucher*, 34 AD3d 726, 728 [2006]). As a result, even where it can be demonstrated that the defendant improperly cancelled or otherwise did not comply with the contract of sale, a plaintiff seeking summary judgment on a specific performance claim is not

entitled to such relief unless said party can make a prima facie showing that he or she had the financial capacity to purchase the property (*see Internet Homes, Inc.*, 8 AD3d at 439).

Here, Tsor has failed to demonstrate, prima facie, that he has the financial capacity to purchase the subject property and, therefore, his motion for summary judgment must be denied. In support of his motion for summary judgment, Tsor primarily argues, based largely upon evidence submitted by Goldberg in support of his motion to dismiss, that the subject contract of sale was indisputably executed by Warner and improperly cancelled by him thereafter. However, even if such contract was valid and Warner improperly canceled same or otherwise failed to comply with its terms, Tsor must also establish that he is financially able to purchase the property at the contract price in order to prevail on the instant motion. Tsor, however, has failed to produce any evidence whatsoever as to his financial capacity to purchase the property in question. Accordingly, as Tsor has failed to establish his prima facie entitlement to summary judgment with respect of his claim for specific performance, the court is constrained to deny his motion for summary judgment regardless of the sufficiency of the opposing papers.

As a result, Goldberg's motion to dismiss the third-party complaint as against him is granted. Tsor's motion for summary judgment granting him specific performance of the subject contract of sale is denied.

The foregoing constitutes the decision and order of the court.

ENTER,

A handwritten signature in black ink, consisting of a stylized 'J' followed by a 'C'.

J. S. C.

HON. DAVID I. SCHMIDT