

**Choudhury v Ahmed**

2008 NY Slip Op 33303(U)

December 4, 2008

Supreme Court, Queens County

Docket Number: 19417/2008

Judge: David Elliot

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not be obtained in a motion prior to the joinder of issue (see Durkin v Durkin Fuel Acquisition Corp., 224 AD2d 574, 575 [1996]).

Plaintiff Mohamed Choudhury alleges in his complaint that he entered into an agreement with defendant Zamal Ahmed on January 1, 1996, whereby the plaintiff would pay the sum of \$27,000.00 for the purchase of the subject cooperative apartment. Plaintiff alleges that pursuant to the terms of this agreement, plaintiff paid the defendant the sum of \$4,000.00 on January 1, 1996, and \$4000.00 on January 24, 1996, and that he agreed to pay the monthly maintenance which is presently \$588.17, and the defendant's monthly coop loan for the apartment which is \$143.28. Plaintiff took occupancy of the subject apartment in January 1996. Plaintiff alleges that he had demanded that the defendant transfer the shares of stock and proprietary lease issued by Acropolis Gardens Realty Corp., in accordance with the alleged agreement and that the defendant has refused to do so. This action was commenced after defendant served the plaintiff with a 30 day notice of termination, dated July 29, 2008. Plaintiff in his first cause of action alleges breach of contract of said agreement to transfer the share of stock in the cooperative apartment and the proprietary lease; the second cause of action seeks a permanent restraining order directing defendant to deliver the shares of stock and proprietary lease; and the third cause of action alleges fraud.

Defendant in his opposing affidavit admits that he received sums totaling \$8,000.00 from the plaintiff in January 1996. Defendant, however, asserts that the plaintiff occupied the subject apartment commencing January 1996, pursuant to a written one year lease, which is no longer in his possession, and that the plaintiff agreed to pay monthly rent that was equal to the monthly coop loan payment and the monthly maintenance charge. Defendant asserts that the lease was renewed three times, until it expired at the end of 1999, and that plaintiff has remained in occupancy as a month to month tenant, on the same terms.

Defendant asserts in his cross motion that plaintiff's claim for breach of contract and for injunctive relief or specific performance is barred by the statute of frauds as the parties did not enter into a written contract; that plaintiff cannot establish any exemption from the statute of frauds; that plaintiff failed to perform conditions precedent to the purchase of the apartment, as he never sought the approval of the board of directors of the cooperative to purchase the shares of stock; that plaintiff is not entitled to specific performance as he does not allege that he is ready, willing and able to purchase the shares of stock to the cooperative apartment; that the complaint fails to state a claim

for fraud, pursuant to CPLR 3016(b); and that enforcement of the purported oral contract is barred by the statute of limitations.

In the context of a CPLR 3211 motion to dismiss, the pleadings are necessarily afforded a liberal construction (see Leon v Martinez, 84 NY2d 83 [1994]). Indeed, the court must accord plaintiffs "the benefit of every possible favorable inference" (Leon v Martinez, 84 NY2d at 87; see also Rovello v Orofino Realty Co., 40 NY2d 633, 634 [1976]). "Bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration" (Mayer v Sanders, 264 AD2d 827, 828 [1999]).

The statute of frauds prohibits the conveyance of real property without a written contract (see General Obligations Law § 5-703[1]). This statute applies as well to a contract conveying an interest in a cooperative apartment (see Moloney v Weingarten, 118 AD2d 836 [1986], lv denied 69 NY2d 608 [1987]; Lebowitz v Mingus, 100 AD2d 816, 817 [1984], appeal dismissed 63 NY2d 675 [1984]; Meyer v Nelson, 83 AD2d 422, 424 [1981]; Rosner v 80 CPW Apts. Corp., 73 AD2d 39, 41 [1980]; see also Panetta v Kelly, 17 AD3d 163, 165 [2005]; Pritsker v Kazan, 132 AD2d 507 [1987]; Anton Sattler, Inc. v Cummings, 103 Misc 2d 4 [1980]).

Here, it is undisputed that no written agreement or memorandum exists that would remove the purported agreement from the orbit of GOL § 5-703 and the statute of frauds. Therefore, plaintiff is required to satisfy an exception to the statute. Although the statute of frauds empowers courts of equity to compel specific performance of agreements in cases of part performance (General Obligations Law § 5-703[4]), the claimed partial performance "must be unequivocally referable to the agreement" (see Messner Vetere Berger McNamee Schmetterer Euro RSCG v Aegis Group, 93 NY2d 229, 235 [1999]). Plaintiff's alleged conduct is not "unintelligible or at least extraordinary" [and] explainable only with reference to the oral agreement" (Messner Vetere Berger McNamee Schmetterer Euro RSCG v Aegis Group, id. citing Burns v McCormick, 233 NY 230, 232 [1922]; Cooper v Schube, 86 AD2d 62 [1982]). Plaintiff's payment of money "is not enough" to constitute part performance (see Rosenwald v Goldfein, 3 AD2d 206, 210 [1957]). The court notes that the \$8,000.00 paid to the defendant was not held in escrow in anticipation of a sale of the cooperative apartment (cf., Pantoja v Universal Church of Truth, 40 AD3d 344 [2007]). Although "other acts, such as possession or improvements, when combined with the payment of rent, may be sufficient" to establish part performance, Club Chain v Gourmet, Ltd, (74 AD2d 277, 283 [1980]), the courts have recognized possession or improvements of the

premises as constituting partial performance only where the acts involved were extraordinary or otherwise inexplicable (see e.g., Club Chain, supra, at 283 [redesign of billboard only 90 days before lease expiration raised issue of fact regarding oral agreement to modify the lease]; Russell v Briggs, 165 NY 500 [1901] [oral contract to pay agency fee enforced where plaintiff supervised extensive alterations to premises, procured tenants and collected rents]). Here, plaintiff's occupancy of the subject apartment in January 1996 and his continued occupation and enjoyment of the premises and payment of the monthly maintenance and coop loan is insufficient to establish partial performance of the purported oral agreement (see Gilgoff v Maldonado, 8 Misc 3d 1016A [2005]).

Plaintiff's allegations and the affidavit submitted herein are insufficient to support a claim that the parties ever reached a complete oral agreement as to the material terms of the contract of sale. Plaintiff's claim that the notations made on the checks dated January 1, 1996 and January 24, 1996 in the sum of \$4,000.00 each are sufficient to satisfy the statute of frauds, is rejected. In order to satisfy the statute of frauds, a memorandum, subscribed by the party to be charged, must designate all parties, identify and describe the subject matter and state all of the essential terms of a complete agreement (see Cohen v Swenson, 140 AD2d 407 [1988]). A writing is not a sufficient memorandum unless the "full intention of the parties can be ascertained from it alone, without recourse to parol evidence" (Cooley v Lobdell, 153 NY 596, 600 [1897]). Here, the notations on the checks were made by plaintiff and not the defendant, the party to be charged. In addition, the notations on the checks, "Buy a co-op apartment," standing alone, does not identify the interest in the subject property with the degree of certainty necessary to satisfy the statute of frauds (see Conway v Maher, 185 AD2d 570, 572 [1992]; Cohen v Swenson, supra). Finally, the checks fail to disclose the intent of the parties, as they are silent as to the nature of the interest allegedly conveyed.

Notably, plaintiff does not state that there was either a closing date for the transfer of the shares of stock and proprietary lease, or a date by which the balance was to be paid. Since plaintiff does not allege that there was a meeting of the minds by the parties as to when and how the balance of the purchase price was to be paid, there is no merit to his contention that the doctrine of partial performance takes the alleged oral agreement outside the scope of the statute of frauds (see Tringle v Tringle, 40 AD3d 353 [2007]; MacKenzie v MacKenzie, 13 AD3d 1010 [2004]; Venture Mfg. [Singapore] v Matco Group, 6 AD3d 850 [2004]; 410 BPR Corp. v Chmelecki Asset Mgt., Inc., 51 AD3d 715 [2008]).

Therefore, that branch of defendant's cross motion which seeks to dismiss the first cause of action for breach of contract, and the second cause of action for specific performance, is granted.

The court further finds that even had there been an enforceable contract of sale, dismissal of plaintiff's claim for specific performance is required in light of plaintiff's failure to allege that he was financially ready, willing and able to complete the purchase of the shares of stock in the cooperative apartment at any time prior to the commencement of this action (see Keles v Morningside Heights Hous. Corp., 8 AD3d 160, 161 [2004]; Lamanna v Wing Yuen Realty, 283 AD2d 165 [2001], lv denied 96 NY2d 719 [2001]; Johnson v Phelan, 281 AD2d 394 [2001]).

That branch of defendant's complaint which seeks to dismiss plaintiff's third cause of action for fraud is granted. The elements of a claim of fraud are "(1) that the defendant made material representations that were false, (2) that the defendant knew the representations were false and made them with the intent to deceive the plaintiff, (3) that the plaintiff justifiably relied on the defendant's representations, and (4) that the plaintiff was injured as a result of the defendant's representations" (Giurdanella v Giurdanella, 226 AD2d 342 [1996]). Here, plaintiff's allegations of fraud are not pleaded with the particularity mandated by CPLR 3016(b). It is noted that the complaint alleges that the defendant made representations to the "defendant" (sic) that he would deliver the stock and proprietary lease to the plaintiff. Even if this statement contained a mere typographical error, the complaint fails to allege how plaintiff reasonably relied upon the defendant's statements and does not allege that the plaintiff was injured in any manner. Furthermore, as the Court of Appeals observed in Wills v Wills (28 NY2d 645, 647 [1971]): "the mere failure on the part of the appellant to carry out the supposed bargain could not give rise to an inference of fraud excusing the application of the statute" of frauds (see also Lebowitz v Mingus, supra at 818).

In view of the foregoing, plaintiff's motion for a permanent injunction is denied, and defendant's cross motion to dismiss the complaint in its entirety is granted.

Dated: December 4, 2008

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J.S.C.