

Stangel v Zhi Dan Chen

2009 NY Slip Op 30990(U)

April 29, 2009

Supreme Court, Queens County

Docket Number: 2992/2007

Judge: Denis J. Butler

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DENIS J. BUTLER IA Part 12
Justice

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FRANK J. STANGEL, etc., et al.,		Number <u>2992</u> 2007
- against -		Motion
ZHI DAN CHEN, et al.		Date <u>January 29,</u> 2009
	x	Motion
		Cal. Number <u>15</u>
		Motion Seq. No. <u>8</u>

The following papers numbered 1 to 19 read on this motion by defendant Hong Kong Style Construction Inc. (Hong Kong) for leave to reargue its prior motion for summary judgment dismissing the complaint asserted against it, and upon reargument, for summary judgment dismissing the complaint asserted against it; this motion by defendants Zhi Dan Chen and Yuen Liang for leave to reargue their prior motion for summary judgment dismissing the complaint asserted against them and upon reargument, for summary judgment dismissing the complaint asserted against them.

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Upon the foregoing papers it is ordered that the motions numbered 14 and 15 on the motion calendar for January 29, 2009 are determined together as follows:

Plaintiff Stangel commenced this action, asserting causes of action against defendant Hong Kong based upon fraud, fraudulent misrepresentation, conspiracy to commit fraud, intentional and negligent infliction of emotional distress, intentional interference with contractual relations and conspiracy to commit conversion, and causes of action against defendants Chen and Liang based upon fraud, fraud in inducement, fraudulent misrepresentation, intentional and negligent infliction of emotional distress, conspiracy to commit fraud, breach of contract, conversion and conspiracy to commit conversion, and "repudiation"

or rescission of the contract. Plaintiff Stangel seeks to recover damages, punitive damages and costs and expenses, including attorneys' fees.

Defendants Hong Kong, Chen and Liang previously moved for summary judgment dismissing the complaint asserted against them. By order dated August 28, 2008, the court denied the motions, with leave to renew upon proper papers. The court noted that the movants had failed to provide a copy of their answers in support of their respective motions.

Although defendants Chen, Liang and Hong Kong seek "leave to reargue" their prior motions, they are, in fact, renewing their prior motions for summary judgment dismissing the complaint and have included a copy of their answers in support of their respective motions.

It is well established that the proponent of a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact," (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; Zuckerman v City of New York, 49 NY2d 557 [1980]).

Defendants Hong Kong, Chen and Liang assert that no triable issue of fact exists relative to the claims asserted against them. In support of its motion, defendant Hong Kong offers, among other things, the affidavit of Kwok Chung Ip, its president. In his affidavit, Mr. Ip admits that defendant Hong Kong performed construction work at the premises located at 204-08 33rd Avenue, Bayside, New York, on behalf of defendants Chen and Liang as the owners of the property. Mr. Ip states that neither he, nor anyone else associated with defendant Hong Kong, had any contact with plaintiff Stangel prior to the commencement of the action, and that no contractual relationship existed between Hong Kong and Stangel. He further states that the construction work performed by defendant Hong Kong did not constitute demolition, but rather, renovation, and that the renovation left the foundation and supporting walls intact.

In support of their motion, defendants Chen and Liang assert that they are not in breach of the contract, because the construction activities performed at the premises were allowable under the terms of the first rider, and offer, among other things, the affidavits of defendant Chen and Xian Xin Ding, an architectural designer. In his affidavit, defendant Chen states that he and defendant Liang, his wife, engaged defendant Xian Feng Zou, Esq. to represent them in relation to the purchase of the

property, and that they sought, and obtained through negotiations, changes in relation to the proposed contract of sale and rider, so they could make extensions to the premises. Defendant Chen further states he and defendant Liang understood, under the terms of the contract (as negotiated), that they could engage in construction to make extensions at the property, and that the construction which subsequently was performed left more than one half of the existing exterior walls intact, including the front, side and back walls of the premises. Defendant Chen admits that the garage was demolished, but contends that the issue of whether the garage could be demolished was not addressed in the contract or rider.

Mr. Ding states in his affidavit that he designed the renovations at the premises, including the blueprints and all necessary documentation for construction permits, and filed a renovation application, known as an "Alteration Type I (A1)," for the premises. According to Mr. Ding, such an alteration type application was suitable for the planned renovations, because the project left more than 50% of the exterior load-bearing walls intact. He also states, among other things, that a demolition plan for the project was submitted along with the application, and that the demolition plan was approved by the examiner for the Building Department as suitable for an Alteration Type I application.

In opposition, plaintiff Stangel asserts that defendants Chen and Liang committed fraud and misrepresentation in relation to the purchase of the property from him, and breached the contract of sale and first rider, since they demolished the house and garage. In addition, plaintiff Stangel asserts that he has suffered severe emotional distress, mental pain, anguish and guilt as a result of the demolition. He states he had hoped to honor his mother's dying wish that her property be sold, but the building thereon not be demolished. Plaintiff Stangel presents, among other things, his own affidavit, photographs, computer printouts from the website maintained by the New York City Buildings Department, an unsworn opinion letter dated October 30, 2008 of Tauscher Cronacher Professional Engineers, P.C., and affidavits of Joyce Ferrara, and Janet McEneaney, neighbors of plaintiff Stangel's deceased mother.

To the extent plaintiff Stangel asserts causes of action based upon fraud, fraudulent misrepresentation, conspiracy to commit fraud, and rescission, in his individual capacity, "[i]t is elementary that the executors or administrators represent the legatees, creditors and distributees in the administration of the estate; that their duty is to recover the property of the estate; and that the legatees and next of kin ... have no independent cause of action, either in their own right or the right of the estate (McQuaide v Perot, 223 NY 75, 79 [1918])" (Jackson v Kessner,

206 AD2d 123, 126 [1994], lv to appeal dismissed 85 NY2d 967 [1995]; see Gaentner v Benkovich, 18 AD3d 424 [2005]). The fraud, rescission and conspiracy claims asserted by plaintiff in his individual capacity as against defendants Hong Kong, Chen and Liang are in essence claims to recover the Estate's assets, i.e. claims that the premises would have sold for a higher price and that the Estate would have been worth more had the alleged fraudulent misrepresentations not been made.

To state a cause of action for fraud, a plaintiff must allege that (1) the defendant made material representations that were false or concealed a material existing fact, (2) the defendant knew the representations were false and made them with the intent to deceive the plaintiff or remained silent regarding a concealed material existing fact with the intent to deceive the plaintiff, (3) the plaintiff was deceived, (4) the plaintiff justifiably relied on the defendant's representations or silence, and (5) the plaintiff was injured as a result of the defendant's representations (see Lama Holding Co. v Smith Barney Inc., 88 NY2d 413 [1996]; New York Univ. v Continental Ins. Co., 87 NY2d 308 [1995]; Channel Master Corp. v Aluminum Ltd. Sales, 4 NY2d 403 [1958]; Watson v Pascal, 27 AD3d 459 [2006]; Cerabono v Price, 7 AD3d 479, 480 [2004]; New York City Tr. Auth. v Morris J. Eisen, P.C., 276 AD2d 78 [2000]; American Home Assur. Co. v Gemma Const. Co., Inc., 275 AD2d 616 [2000]; Swersky v Dreyer and Traub, 219 AD2d 321 [1996]). When the cause of action alleging fraud is predicated on acts of concealment, the plaintiffs must also allege that the defendant had a duty to disclose the disputed information (see Spencer v Green, 42 AD3d 521 [2007]). "Furthermore, each of these essential elements must be supported by factual allegations sufficient to satisfy CPLR 3016(b), which requires, in the case of a cause of action based on fraud, that 'the circumstances constituting the wrong shall be stated in detail'" (Megaris Furs, Inc. v Gimbel Bros., Inc., 172 AD2d 209, 213 [1991]; see Rotterdam Ventures, Inc. v Ernst & Young LLP, 300 AD2d 963 [2002]).

To the extent plaintiff Stangel asserts claims against defendant Hong Kong based upon fraud, in his representative capacity, he makes no claim that he had any communication or relationship with defendant Hong Kong. The complaint does not contain any allegations setting forth the alleged material misrepresentations defendant Hong Kong made to the plaintiff Stangel, and plaintiff Stangel has not plead or stated specific factual details in his affidavit from which fraud on the part of defendant Hong Kong may be inferred (see Barclay Arms, Inc. v Barclay Arms Associates, 74 NY2d 644 [1989]; Cohen v Houseconnect Realty Corp., 289 AD2d 277 [2001]).

With regards to the fraud and rescission claims against defendants Chen and Liang by plaintiff Stangel in his representative capacity, plaintiff Stangel alleges that defendants Chen and Liang falsely promised they would not demolish the house except in certain circumstances, not relevant herein, and that he relied upon such promises in entering into the contract of sale on behalf of the Estate of Catherine Stangel. Although plaintiff Stangel asserts these promises were misrepresentations, the contract was sufficiently specific as to the issue of demolition, to bar him from claiming that he was fraudulently induced by defendants Chen and Liang into entering the contract on behalf of the Estate of Catherine Stangel (see Danann Realty Corp. v Harris, 5 NY2d 317 [1959]; Pais-Built Homes, Inc. v Beckett, 297 AD2d 726 [2002]; Busch v Mastropierro, 258 AD2d 492, 493 [1999]; Masters v Visual Bldg. Inspections, 227 AD2d 597 [1996]; Taormina v Hibsher, 215 AD2d 549 [1995]; Cohan v Sicular, 214 AD2d 637 [1995]; Salerno v D'Alessandro, 213 AD2d 391 [1995]; Weiss v Shaplosky, 161 AD2d 707 [1990]). Thus, the claims based upon fraud, fraudulent inducement, fraudulent misrepresentation and rescission cannot stand since the fraud alleged relates to an alleged breach of contract (see Sisters of the Divine Compassion of State of N.Y. v Pace Univ., 230 AD2d 904 [1996]; Jackson Hghts. Med. Group, P.C. v Complex Corp., 222 AD2d 409 [1995]). To the degree plaintiff Stangel alleges that defendants Chen and Liang never intended to honor the contractual provisions in the "First Rider" regarding demolition, "[a breach of] contract action may not be converted into one for fraud by the mere additional allegation that the contracting [parties] did not intend to meet [their] contractual obligation" (Hudson v Greenwich I Assocs., 226 AD2d 119 [1996]; see also Hadari v Leshchinsky, 242 AD2d 557 [1997]).

The claims for intentional and negligent infliction of emotional distress asserted against defendants Hong Kong, Chen and Liang do not state a cause of action insofar as they are asserted by plaintiff Stangel in his representative capacity. To the extent they are asserted by plaintiff in his individual capacity, the alleged acts of defendants Hong Kong, Chen and Liang do not rise to the level of extreme and outrageous conduct which is necessary to sustain a cause of action for intentional infliction of emotional distress (see Howell v New York Post Co., Inc., 81 NY2d 115 [1993]; Murphy v American Home Prods. Corp., 58 NY2d 293, 303 [1983]; Schwegel v Chiaramonte, 4 AD3d 519 [2004]; Crispino v Greenpoint Mortg. Corp., 2 AD3d 478 [2003]; Glatter v Chase Manhattan Bank, 239 AD2d 68 [1998]; Vasilopoulos on Behalf of Vasilopoulos v Romano, 228 AD2d 669 [1996]). The cause of action by plaintiff Stangel in his individual capacity to recover damages for negligent infliction of emotional distress also fails to state a claim as against defendants Hong Kong, Chen and Liang because the

alleged conduct cannot be said to have unreasonably endangered plaintiff's safety or caused him to fear for his safety (see Davidovici v Fritzon, 49 AD3d 488 [2008]; Crispino v Greenpoint Mortg. Corp., 2 AD3d at 480).

Plaintiff Stangel asserts a cause of action against defendants Hong Kong, Chen and Liang for conspiracy to commit conversion. Real property, however, cannot be converted (see Roemer and Featherstonhaugh P.C. v Featherstonhaugh, 267 AD2d 697 [1999]; Garelick v Carmel, 141 AD2d 501 [1998]). Furthermore, to the extent the claim relates to the "conversion" of the dwelling on the real property, such claim also does not lie, because plaintiff Stangel as the personal representative of the Estate of Catherine Stangel had no ownership or superior right to possession of the house at the time of its "demolition" in either his individual or representative capacities (see Estate of Giustino v Estate of DelPizzo, 21 AD3d 523 [2005]).

With respect to the claim against defendant Hong Kong for tortious interference with contractual relations, the elements of tortious interference with a contract are "(1) the existence of a contract between plaintiff and a third party; (2) defendant's knowledge of the contract; (3) defendant's intentional inducement of the third party to breach or otherwise render performance impossible; and (4) damages to plaintiff" (Kronos, Inc. v AVX Corp., 81 NY2d 90, 94 [1993]; Bernberg v Health Management Systems, Inc., 303 AD2d 348 [2003]). The interference with contractual relations must be intentional and "not merely negligent or incidental to some other, lawful purpose" (Alvord and Swift v Stewart M. Muller Constr. Co., 46 NY2d 276, 281 [1978]) (see Barry & Sons, Inc. v Instinct Productions LLC, 15 AD3d 62, 67 [2005] ["a claim for negligent interference with contractual relations ... (is) a theory of liability not recognized in New York"]). The plaintiff must demonstrate that the defendant acted with intent "in the sense of an intention to harm plaintiff without economic or other lawful excuse justification" (Alvord and Swift, 46 NY2d at 282). Plaintiff Stangel has failed to allege that defendant Hong Kong acted with an intention to harm him, or the Estate of Catherine Stangel (see Whitman Realty Group, Inc. v Galano, 41 AD3d 590 [2007]; Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker, 56 AD3d 1 [2008]).

With respect to that claims based upon conspiracy to commit fraud, "a mere conspiracy to commit a fraud is never of itself a cause of action" (Brackett v Griswold, 112 NY 454, 467 [1889]; see Alexander & Alexander of N.Y. v Fritzen, 68 NY2d 968, 969 [1986]). However, "allegations of conspiracy are permitted only to connect the actions of separate defendants with an otherwise actionable

tort" (Alexander & Alexander of New York, Inc. v Fritzen, 68 NY2d at 969; see Cash v Titan Financial Services, Inc., 58 AD3d 785 [2009]). Because there are no viable causes of action based upon tort as against defendants Chen, Liang and Hong Kong, the claims against them for conspiracy to commit fraud must fall.

To the extent plaintiff Stangel asserts a cause of action in his individual capacity against defendants Chen and Liang based upon breach of contract, he has failed to allege that he is a party to, or a signatory of, the contract in his individual capacity (see Blank v Noumair, 239 AD2d 534 [1997]; Walz v Todd & Honeywell, 195 AD2d 455 [1993]).

With respect to the claim by plaintiff Stangel against defendants Chen and Liang based upon breach of contract in his representative capacity, the contract provided that it constituted the contracting parties' full agreement, entered into after full investigation, and could not be orally modified. It also provided that neither party relied upon any statement, made by anyone else, that was not set forth in the contract. Moreover, the first rider to the contract of sale, in relevant part, provided that the contract of sale was "conditional upon and interlocutory with any agreements reached between the Buyer and Seller as it (sic) pertains to the preserving of the property," and:

"1. THAT, the premises can not be demolished except that the existing building can be horizontally and/or vertically extended and that the existing building can be converted into a legal two-family dwelling.

"2. THAT, the premises may have renovations to the original structure leaving the core foundation in tact (sic).

"3. THAT, renovations are permitted and are to be considered internal within the premises; i.e. bathrooms, bedrooms, basement."

Where a contract, "read as a whole to determine its purpose and intent," plainly manifests the intent of the parties, relief may be granted by way of summary judgment (W.W.W. Assoc. v Giancontieri, 77 NY2d 157, 162 [1990]). An agreement is ambiguous when "the agreement on its face is reasonably susceptible or more than one interpretation" (Chimart Assoc. v Paul, 66 NY2d 570, 573 [1986]). In deciding whether an agreement is ambiguous, the court must "examine the entire contract and consider the relation of the parties and the circumstances under which it was executed" (Kass v Kass, 91 NY2d 554, 566 [1998], quoting Atwater & Co. v Panama R.R.

Co., 246 NY 519, 524 [1927]; see Nappy v Nappy, 40 AD3d 825, 826 [2007]). When, however, the contractual provision relied upon is ambiguous, "the resolution of the ambiguity is for the trier of fact" (State of New York v Home Indem. Co., 66 NY2d 669, 671 [1985]; see Spano v Kings Park Cent. School Dist., ___ AD3d ___, 2009 WL 942598; Nappy v Nappy, 40 AD3d 825, 826 [2007], supra).

Contrary to the argument of defendants Chen and Liang, the contract herein is ambiguous. The contract and rider do not define "demolished," "horizontally and/or vertically extended" and "core foundation." Although defendants Chen and Liang urge this court to utilize the definition of "foundation" found in the New York City Building Code, and "demolish" found in Black's Law Dictionary, in interpreting the contract, it is unclear whether such definitions were intended by the parties to be used, or whether they had some alternative definitions in mind. Considering the contract as a whole and the circumstances under which it was executed, it is unclear whether the parties intended to obligate defendants Chen and Liang to maintain all exterior walls and the garage, or as they contend, solely to obligate them to maintain structural components that served to bear loads, e.g. exterior wall studs and interior walls which were aligned above a support beam or girder. In light of that ambiguity, the issue of whether defendant Chen and Liang violated the contract cannot be determined as a matter of law, and defendants Chen and Liang, therefore, are not entitled to summary judgment on that ground.

Plaintiff Stangel asserts causes of action against defendants Hong Kong, Chen and Liang for punitive damages. New York, however, does not recognize an independent cause of action for punitive damages (see Rocanova v Equitable Life Assur. Soc. of U.S., 83 NY2d 603, 616 [1994]; Randi A.J. v Long Island Surgi-Center, 46 AD3d 74 [2007]).

With respect to plaintiff Stangel's claim for attorneys' fees, "generally 'an attorney's fee and other expenses incurred in prosecuting an action are considered an incident of litigation and, unless authorized by statute, court rule, or written agreement of the parties, are not recoverable' (Panish v Panish, 24 AD3d 642, 643-644 [2005]; see Hooper Assoc. v AGS Computers, 74 NY2d 487, 491 [1981]; Widewaters Prop. Dev. Co., Inc. v Katz, 38 AD3d 1220 [2007]; Dupuis v 424 E. 77th Owners Corp., 32 AD3d 720 [2006]; St. George Tower & Grill Owners Corp. v Honig, 232 AD2d 475, 476 [1996])" (Adams v Washington Group, LLC, 49 AD3d 786 [2008]). Plaintiff Stangel has failed to assert any authority for his claim for attorneys' fees as against defendants Hong Kong, Chen and Liang.

The motion by defendant Hong Kong for summary judgment dismissing the complaint asserted against it is granted. The motion by defendants Chen and Liang is granted only to the extent of granting summary judgment dismissing the causes of action asserted against them based upon fraud, fraud in inducement, fraudulent misrepresentation, intentional and negligent infliction of emotional distress, conspiracy to commit fraud, conversion and conspiracy to commit conversion, and rescission.

Dated: April 29, 2009

Denis J. Butler, J.S.C.