

**Motovich Holdings, LLC v 315 W. 35TH Assoc.,  
LLC**

2009 NY Slip Op 31155(U)

May 22, 2009

Supreme Court, New York County

Docket Number: 602831/08

Judge: Judith J. Gische

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

PRESENT: JUDITH J. GISCHE, J.S.C. Justice

PART 10

Index Number : 602831/2008  
MOTOVICH HOLDINGS, LLC  
vs.  
315 W. 35TH ASSOCIATES, LLC  
SEQUENCE NUMBER : 001  
DISMISS ACTION

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**  
MAY 27 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

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

*and PC to be held  
on 7/9/09 @ 9:30am*

Dated: 5/22/09

  
J.S.C.  
**JUDITH J. GISCHE, J.S.C.**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

MOTOVICH HOLDINGS, LLC,  
  
Plaintiff,  
  
-against-  
  
315 W. 35<sup>TH</sup> ASSOCIATES, LLC,  
  
Defendant.

**Decision/Order**

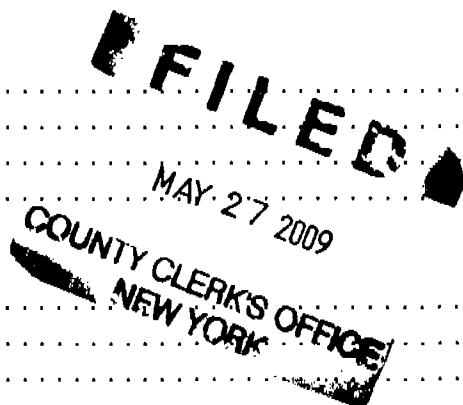
Index No.: 602831/08  
Seq. No. : 001, 002

Present:  
Hon. Judith J. Gische  
J.S.C.

-----x

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

<b>Mot. Seq. 001 - Papers</b>	<b>Numbered</b>
Def's n/m [dismiss] JKW affirm, exhs .....	1
Pltf TI affirm in opp, exhs .....	2
Def's DW reply opp .....	3
Pltf's sur reply affirm (MJS) .....	4
 <b>Mot. Seq. 002 - Papers</b>	 <b>Numbered</b>
Def's OSC, exhs .....	1
Pltf TI affirm in opp, exhs .....	2
Def's DW reply opp .....	3



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

This case arises from a purchase agreement whereby plaintiff-buyer agreed to purchase real property known as 315 West 35<sup>th</sup> Street, New York, New York (the "Premises") from defendant-seller. Defendant now moves, pre-answer, to dismiss each of the causes of action asserted in the Amended Complaint (motion sequence number 001).<sup>1</sup>

<sup>1</sup> Defendant moved to dismiss the original summons and complaint. Since that time, plaintiff served an amended complaint, which defendant now seeks to dismiss. Although the amended complaint includes a new cause of action for fraudulent inducement, defendant has not objected on procedural grounds, and the parties were

Plaintiff opposes the motion to dismiss in its entirety.

Defendant also brought an Order to Show Cause, whereby it sought to supplement the record on its motion to dismiss (motion sequence number 002). The court granted that application to the extent that the documents submitted therewith would be considered in connection with the motion to dismiss (Order, J. Gische, 4/2/09). For the reasons that follow, the motion to dismiss must be denied.

The following claims are based upon documentary evidence and the allegations contained in the Amended Complaint. Pursuant to a Purchase Agreement dated July 2007 (no day specified), "Boris Motovich (or an entity owned and controlled by him)" agreed to purchase the Premises from defendant for a total price of \$28 million. Contemporaneously with the execution of the Purchase Agreement, Motovich deposited the sum of \$1 million with First American Title Insurance Company (the "First American"), as escrow agent, for downpayment towards the purchase. The Purchase Agreement provided for a November 7, 2007 closing and granted Motovich the "one-time right" to adjourn the closing up to, but not later than, January 8, 2008, provided Motovich paid an fee.

The Purchase Agreement specifically provided as follows:

[Plaintiff] agrees that January 8, 2008 shall be "time of the essence" as against [Plaintiff]. If [plaintiff] fails to close and deliver the balance of the Purchase Price and all other sums due under this Agreement on or before January 8, 2008, [plaintiff] shall forfeit to [defendant] the downpayment and any interest earned thereon and the adjournment fee, if any.

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given an opportunity to supply additional papers and afforded due process in the context of this motion.

Plaintiff subsequently elected to extend the closing under the Purchase Agreement to January 8, 2008. By Assignment and Assumption Agreement entered into on January 8, 2008, Motovich assigned all of his right, title and interest in the Purchase Agreement to plaintiff.

In or about January 2008, plaintiff and defendant entered into an agreement entitled First Amendment to Purchase Agreement (the "First Amendment") which adjourned the closing date to March 7, 2008, and in consideration of the extension:

The Down payment of \$1,000,000.00, and any interest thereon shall be unconditionally and irrevocably released and paid by [the Title Company] directly to [Defendant]... [Plaintiff] acknowledges that the Downpayment and any interest thereon is the sole property of the [Defendant], and [Plaintiff] shall have no legal, equitable and/or contractual interest in the Downpayment. [Plaintiff] further acknowledges that the Downpayment is hereafter entirely nonrefundable to [Plaintiff] under all circumstances, including, but not limited to, whether or not the Property is transferred to [Plaintiff] for any reason other than [Defendant's] willful and intentional default by refusing to transfer the Property to [Plaintiff] pursuant to the terms of the Purchase Agreement.

At that time, plaintiff paid to defendant an adjournment fee of \$198,000 in addition to authorizing the non-refundable release of the \$1 million down payment from escrow to defendant.

On or about March 10, 2008, plaintiff and defendant entered into an agreement entitled Second Amendment to Purchase Agreement (the "Second Amendment"). The closing date was adjourned thereby to May 7, 2008, and in consideration of this extension, plaintiff paid to defendant an additional adjournment fee of \$173,725.00 and authorized the release of an additional non-refundable down payment in the sum of \$1,500,000. Otherwise, the language of the Second Amendment was identical to the First Amendment.

Plaintiff claims that throughout this time, defendant held itself out to be the sole fee

owner of the Premises, and as having the legal and equitable power and authority, and the readiness, willingness and ability to convey good and marketable title free of any other ownership claims. Plaintiff maintains, however, the defendant's representations of ownership and failure to disclose certain facts that would jeopardize plaintiff's title to the Premises were fraudulent, known to be fraudulent, were made to induce plaintiff to enter into the Purchase Agreement and subsequent amendments thereto, and to proceed with the purchase of the property. Plaintiff has asserted two causes of action for: breach of contract and fraudulent inducement.

The alleged misrepresentations and facts withheld arise from defendant's relationship with an entity known as Woodbury Development, LLC ("Woodbury"). Woodbury was formed on January 15, 2003. Deborah Harfenes and Martin Harfenes (the "Harfenes"), together own a 45% interest in Woodbury. On April 23, 2008, the Harfenes commenced an action against Ari Chitrik, Abraham Simpson and Gary H. Cohen, principals of defendant (the "principals"), claiming that the principals breached a fiduciary duty to Woodbury and the Harfenes, embezzled and diverted assets belonging to Woodbury to purchase real property, including the Premises, that the defendant is not the true owner of the Premises, that defendant holds title to the Premises in constructive trust for Woodbury's benefit, and that Woodbury is the true and beneficial owner of the Premises. That action is entitled Harfenes v. Chitrik, Index No. 105508/08 [the "Harfenes Action"]).

On or about May 6, 2008, the parties entered into another agreement entitled Third Amendment to Purchase Agreement (the "Third Amendment"), pursuant to which plaintiff agreed to pay to defendant an additional adjournment fee of \$192,353.67 and authorized

the release of a further \$1 million down payment in exchange for an adjourn date of the closing to July 21, 2008. Otherwise, the language of the Third Amendment was identical to the First and Second Amendments. Plaintiff maintains that defendant failed to disclose the Harfenes Action and the fact that it was not ready, willing and able to convey good title to the Premises.

Meanwhile, by order dated May 30, 2008, the Hon. Carol Edmead issued an order permitting defendant to intervene in the Harfenes Action, and directing, in relevant part:

The Notice of Pendency dated April 23, 2008 filed with the New York County Clerk's Office by plaintiffs and recorded against the property located at 315 West 35<sup>th</sup> Street, New York, New York, Block 759, Lot 31, is hereby vacated, canceled, and discharged of record on the express condition that upon the sale of said property, all proceeds of such sale after the payment of all fees, costs, taxes, liens, mortgages, title fees and legal fees, shall be held in escrow by the title company of the purchaser of the property. Said funds shall be held in escrow by said title company pending further order of this Court. The New York County Clerk is hereby directed to mark said Notice of Pendency discharged together with a reference to this Order.

Plaintiff alleges that on or about July 18, 2008, it discovered that the Harfenes Action had been commenced and that a Notice of Pendency had been filed. Plaintiff maintains that it notified defendant that the Harfenes Action and the Notice of Pendency were impediments to closing and that defendant was not ready, willing and able to close title on July 21, 2008.

First American also notified the parties that it would not insure title to plaintiff free and clear of the Harfenes Action and Notice of Pendency. Because of this exception, plaintiff claims defendant elected to adjourn the closing for thirty days in order to address the exception.

Thereafter, Justice Edmead amended the May 30, 2008 Order by Order dated September 3, 2008, to add the following:

It is further ORDERED that the New York City Register's Office is directed to vacate, cancel and discharge the Notice of Pendency filed against the property located at 315 West 35<sup>th</sup> Street, New York, New York, Block 759, Lot 33 (the 'Property'); and it is further

ORDERED and DIRECTED that any potential damages in this case will be strictly limited to any sums being held in escrow by the title company post-closing and shall in

By letter dated September 11, 2008, defendant claimed that it had addressed the issue raised by First American's exception and unilaterally set a time-of-the-essence closing for October 6, 2008. However, in a revised report dated October 2, 2008, First American again took exception with respect to the Harfenes Action and the Notice of Pendency filed therewith. The report provided as follows:

13. Lis Pendens filed 4/23/08, Index No. 105508/08, Action DEBORAH AND MARTIN HARFENES VS. ARI CHITRICK, ET AL in the Supreme Court, New York County. The lis pendens must be cancelled of record, the action discontinued with prejudice and any receiver appointed and discharged.

Defendant appeared at the October 6, 2008 closing, but plaintiff did not. Defendant claims that plaintiff defaulted by failing to appear and close on the property. Plaintiff maintains that it justifiably rejected defendant's tender of title on October 6, 2008 because title was not marketable.

### **Discussion**

Defendant primarily moves to dismiss this case pursuant to CPLR § 3211 (a) (1) and (7), which are respectively for a conclusive documentary defense and failure to state a cause of action. The documents relied upon are the complaint and the Deed.

On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction (see CPLR 3026; Leon v Martinez, 84 NY2d 83, 87 [1994]). The court accepts the facts as alleged by plaintiff as true, affording them the benefit of every possible

favorable inference (EBC I, Inc v Goldman, Sachs & Co., 5 NY3d 11, 19 [2005]; Sokoloff v Harriman Estates Development Corp., 96 NY2d 409, 414 [2001]; P.T. Bank Central Asia v ABN AMRO Bank NV, 301 AD2d 373, 375-6 [1<sup>st</sup> Dept 2003]), unless clearly contradicted by evidence submitted in connection with the motion (see Zanett Lombardier, Ltd v Maslow, 29 AD3d 495 [1<sup>st</sup> Dept 2006]).

Under CPLR § 3211 (a) (1), “dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claim as a matter of law” (Leon, supra). In addition, in asserting a motion under CPLR § 3211 (a) (7), the Court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint, and “the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one” (id., quoting Guggenheimer v Ginsburg, 43 NY2d 268 [1977]).

#### The fraudulent inducement claim

On its first cause of action for fraudulent inducement, plaintiff seeks rescission of the Purchase Agreement and each of the Amendments thereto and the return of its down payments and adjournment fees. The elements of a cause of action for fraudulent inducement are: defendant’s representation of a material existing fact, falsity, scienter, justifiable reliance, and damages (CPLR 3016[b]; see Raytheon Co. v. AES Red Oak, LLC, 37 AD3d 364 [1<sup>st</sup> Dept 1997]; Brown v. Wolf Group Integrated Communications, Ltd., 23 AD3d 239 [1<sup>st</sup> Dept 2005]). These elements must be plead with specificity (id.). Misrepresentations amounting to mere promises about what will be done in the future does not give rise to a fraudulent inducement claim. Deerfield Communications Corp. v. Chesebrough-Ponds, Inc. 68 NY2d 954 (1986). Rather, the mistatements must be of a

material fact or a promise made with a present, albeit undisclosed, intent not to perform them.

Defendant argues that the fraudulent inducement claim is insufficiently pled because it is based upon the mere misrepresentation of, or failure to disclose, the fact that the Harfenes might assert a claim against the defendant at or about the time that the parties executed the Purchase Agreement and the Amendments. This argument fails. Plaintiff's fraudulent inducement claim is sufficiently pled to the extent that it is premised upon the allegation that the defendant and/or its principals and agents knew, but failed to disclose or otherwise misrepresented, the fact that defendant's title to the Premises may be in jeopardy because the defendant and/or its principals breached their fiduciary duty to Woodbury, and embezzled and diverted Woodbury's assets. These allegations must be accepted as true on a motion to dismiss, and, affording the allegations contained in the complaint every favorable inference, plaintiff has easily met its burden on this motion. Based upon the same reasoning, the court rejects defendant's argument that the fraudulent inducement claim should be dismissed because it is based upon defendant's alleged breach of the Purchase Agreement.

Defendant also argues that plaintiff reaffirmed the Purchase Agreement, as a matter of law, after learning of the Harfenes' claims, by commencing another action wherein it sought specific performance of the Purchase Agreement (Motovich Holdings LLC v. 315 W. 35<sup>th</sup> Street Assoc. LLC, 109941/08 [the "Prior Motovich Action"]), and appearing at the closing and consenting to the adjournment sought by the defendant on July 21, 2008.

The Prior Motovich Action was filed on July 21, 2008, the same day that plaintiff alleges it learned about the Harfenes Action. The Prior Motovich Action was subsequently discontinued without prejudice by written stipulation signed on September 24, 2008 and a judicial determination on the merits was never rendered in that action. Since defendant has failed to establish that judicial estoppel applies, the effect, if any, of the Prior Motovich Action with respect to plaintiff's claim for rescission has not been established on this motion.

Moreover, the case law relied upon by defendant is inapposite to defendant's argument. First, the decisions relied upon by the defendant were rendered after trial or upon motions for summary judgment. Although on a dispositive motion pursuant to CPLR § 3212 or at trial, the burden will be on the plaintiff to prove its claims, plaintiff's burden now is far easier, which is to present facts that state a cause of action against the defendant. Argo Corp. v. Greater New York Mutual Insurance Company, 4 NY3d 332 (2005).

Defendant cites two cases: Brennan v. National Equitable Inv. Co., 247 NY 486 (1928) and Lumber Industries Inc. v. Woodlawn Furniture Corp., 26 AD2d 924 (1st Dept 1966). In Brennan, the Court of Appeals affirmed the Appellate Division's reversal of the trial court's judgment entered after verdict and directed a dismissal of the complaint. The Court held that rescission was unavailable to a party seeking to rescind a contract for the purchase of stock where purchaser subsequently accepted dividends despite having knowledge of the alleged fraud. Here, plaintiff never accepted the benefits of the Purchase Agreement because it did not purchase the Premises.

The First Department held in Lumber Industries that the remedy of rescission was unavailable because the defendants had accepted and even solicited extensions of time

to defray their obligations at a time when they were aware of the plaintiff's alleged antecedent fraud. Here, plaintiff alleges that it did not request the adjournment on July 21, 2008, after allegedly learning about the Harfenes' claims, but rather, that defendant exercised its ability under the Purchase Agreement to adjourn the closing date to remedy the defects in title. The adjournment does not, as a matter of law, constitute waiver. Whether there is a waiver as a matter of fact, does not warrant dismissal. Nor has defendant otherwise established that the plaintiff waived the defendant's allegedly fraudulent representations. Accordingly, defendant's motion to dismiss the fraudulent inducement claim is hereby denied.

The breach of contract claim

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]). Defendant argues that the documentary evidence establishes that it did not breach the contract because time was not of the essence as to the defendant. This argument is rejected by the court because plaintiff alleges that the defendant breached the contract by failing to deliver marketable and insurable title to plaintiff on October 6, 2008. No documentary evidence submitted on this motion clearly conclusively establishes that the defendant was able to deliver marketable and insurable title to plaintiff on the law date (see Leon, *supra*). Defendant's arguments about time not being of the essence as to defendant are irrelevant because plaintiff has not claimed that defendant breached the agreement by failing to deliver title to the plaintiff on any date prior to the October 6, 2008 closing date scheduled by the defendant and defendant did not

request an adjournment of the October 6, 2008 closing date.

Defendant also argues that the plaintiff's breach bars recovery, however, this argument is an attempt to litigate the merits of the claims and defenses in this action, which is an improper inquiry for the court to make on a motion to dismiss. This motion merely requires plaintiff to allege sufficient facts to support each cause of action, a burden which plaintiff has met for the reasons stated herein.

Defendant's motion to dismiss is, therefore, denied in its entirety.

**Conclusion**

In accordance herewith, it is hereby:

**ORDERED** that defendant's motion to dismiss is denied in its entirety; and it is further

**ORDERED** that the defendant shall answer the complaint within 10 days hereof. Plaintiff's reply, if any, shall be as per the CPLR; and it is further


**ORDERED** that a preliminary conference be held on July 9, 2009 at 9:30 a.m. at Part 10 at 60 Centre Street, Room 232.

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

This shall constitute the decision and order of the Court.

Dated: New York, New York  
May 22, 2009

So Ordered:

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

**FILED**  
MAY 27 2009  
COUNTY CLERKS OFFICE  
NEW YORK