

Burnett v Pourgol

2010 NY Slip Op 30250(U)

January 26, 2010

Supreme Court, Nassau County

Docket Number: 13130/09

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

MARK A. BURNETT,

Plaintiff,

-against-

KAMRAN POURGOL,

Defendant.

TRIAL/IAS, PART 2
NASSAU COUNTY

INDEX No. 13130/09

MOTION DATE: Nov. 9, 2009
Motion Sequence # 001

The following papers read on this motion:

- Notice of Motion..... X
- Affirmation in Opposition..... X
- Reply Affirmation X
- Memorandum of Law..... X

This motion, by defendant, for an order pursuant to CPLR 3211 (a)(1)(7)(8)(10) granting defendant's motion to dismiss the complaint, and for such other and further relief as to this Court may deem just and proper, is determined to be granted as hereinafter set forth.

Factually, the parties are shareholders in a closely-held corporation, Burnett & Pourgol Real Estate Corp. (hereinafter "BPRE"), formed for the purpose of purchase of real estate properties and construction of homes for re-sale. In one of these transactions, dated on April 12, 2006, with purchasers Craig and Alicia Gitlitz, the Building Department of the Town of North Hempstead ("Town") revoked the certificate of occupancy on August 15, 2006. A Settlement Agreement between BPRE and the Gitlitzes was entered into on

September 13, 2006, based on an inaccurate floor area measurement of 216.5 square feet, wherein BPRE would appropriately complete renovation work, and BPRE's obligation would be satisfied upon issuance of a new certificate of occupancy by the Town.

Procedurally, the plaintiff's complaint alleges that the defendant ". . . submitted incorrect plans and drawings. . ." without the plaintiff's knowledge, and the defendant took responsibility, in settlement discussions, for the error and asserted that a resolution would be accomplished for the 216.5 square foot overage. The plaintiff further alleges that the defendant, after the disclosure that the overage was actually 650 square feet, failed to do any further work and the plaintiff then purchased the premises to mitigate damages. The plaintiff, in his first cause of action, alleges a breach of fiduciary duty against the defendant. The second and third causes of action allege fraud in that there was a misrepresentation of the extent of the square footage overage to induce the plaintiff to enter into the guaranty with the Gitlitzes and causing BPRE to enter into said Agreement.

The defendant asserts that the agreement was an obligation of BPRE and was fully agreed to by the parties to this action and the parties to the agreement. The defendant's counsel asserts a factual dispute as to how the later dispute occurred between the Gitlitzes and the Town, i.e., that it was the Town that changed its determination. He also asserts that it was the defendant's position that a modification could be worked out and it was the plaintiff who "placed his own interests in front of [the corporation]", for his own personal interests, and insisted on becoming, de facto, the owner of the Gitlitz property by his purchase of an assignment of the Agreement between BPRE and the Gitlitzes. He argues that the plaintiff cannot pierce the corporate veil to sue the defendant, an individual shareholder; that the plaintiff, as assignee of the Agreement, cannot sue this defendant, who is not an obligor of Agreement, but the proper party is BPRE, of which the plaintiff is an active shareholder, and, based on documentary evidence the action must be dismissed. Counsel contends that the complaint, that lacks a copy of the agreement integrated into it, does not state a cause of action for Breach of Contract. He further contends that the defendant is not a proper party to this action as there is no proper assignment of the Agreement, nor does the Agreement provide for assignment. The defendant's counsel also cites that since BPRE is the responsible party for the construction of the premises, it must be a party to the action and in its absence, the action should be dismissed.

The plaintiff's attorney notes that the complaint alleges: breaches of fiduciary duties owed to the plaintiff as an owner and shareholders of BPRE; and fraudulent conduct by the defendant to induce the plaintiff to sign a personal guaranty of the Agreement with the

Gitlitzes. He argues that the defendant's assertion of an assignment are meritless because there is no assignment; that there is no Breach of Contract alleged in the complaint and the claims of the plaintiff are based on the defendant's fraud and breaches of fiduciary duties owed directly to the plaintiff, which are specifically and sufficiently pleaded in the complaint. He contends that the fiduciary relationship between the plaintiff and defendant is established through their relationship in BPRE, and the breaches are shown by the defendant's responsibility for the design, framing of the premises and the obtaining of the plans and permits, and the defendant's fiduciary responsibility was to provide accurate information to the Town and to the plaintiff, and the plaintiff relied on that information in executing the Guaranty and the defendant thereafter abandoned the project. He cites to case law that individual shareholders can sue other shareholders for breaches of fiduciary duty. He asserts that the fraud cause of action is fully pleaded and alleged, as is the fraudulent inducement claim regarding the guaranty execution by the plaintiff. He further asserts that this action is based only on the defendant's actions which are directed against the plaintiff personally; that the defendant's arguments that corporations are formed to protect shareholders are irrelevant to this action; and that the documents produced by the defendant do not rebut the plaintiff's claims. Because there is a wrongful assumption that there is an assignment, the plaintiff's attorney argues that, in fact, the complaint does state a cause of action, and that BPRE need not be a party herein. He also contends that dismissal for lack of personal jurisdiction is inapplicable, in that process was properly served.

In reply, the defendant's attorney repeats his argument that the agreement is central to the complaint and that it was not a part of that pleading. He asserts that the complaint is based wholly on the plaintiff's hearsay statement that is contradicted by the documentary evidence. He further asserts that there is no personal guaranty that has been submitted in evidence herein; and that as founding shareholders of BPRE, both parties have the authority to bind the corporation. With respect to the error in measurement, it was not the defendant who submitted the plans, but an architect, which generated the Town building permit, and it was BPRE which constructed the premises.

DECISION

The first cause of action of the verified complaint is based upon a factual representation that the parties herein entered into a Settlement Agreement and that, pursuant to a guaranty, the plaintiff was obligated to purchase the premises. That cause of action alleges a breach of fiduciary duty by the defendant, in that he was responsible for design and framing of the premises and he applied for and obtained all permits, and that the defendant

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misrepresented the full extent of the work necessary to obtain the certificate of occupancy and purportedly allowed the plaintiff and BPRE to execute the Settlement Agreement and Guaranty and then abandoning the project, incurring the cost of the purchase of the premises, with attendant costs and expenses. The fraud cause of action (second) alleges misrepresentations of the amount of overage of the premises (216.5 sq. ft.) and that the defendant would do the work necessary to obtain the certificate of occupancy. The third cause of action, entitled "Fraud in the Inducement", alleges that the defendant's misrepresentations were made in order to induce the plaintiff to execute the agreement and guaranty.

The Agreement, at bottom, requires, inter alia, BPRE and the parties herein to pay the Gitlitzes \$200,000 while the correction of construction is completed to the extent of reduction of the square footage of "approximately 216.5 feet". (p.3 of Agreement). BPRE and both parties herein were represented by counsel and the defendant signed the Agreement. The Agreement contains no obligation, or even suggestion, that the plaintiff, defendant, or BPRE were to purchase the house in default thereof.

The Court will address each of the grounds asserted for dismissal, seriatim:

CPLR 3211(a) 1 provides:

"(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

1. a defense is founded upon documentary evidence".

"A motion pursuant to CPLR 3211(a)(1) to dismiss a complaint on the ground that the action is barred by documentary evidence may be granted only where the documentary evidence utterly refutes the plaintiff's factual

allegations, thereby conclusively establishing a defense as a matter of law (see Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326; Farber v Breslin, 47 AD3d 873, 876)”.

(Martinez v La Colonia Restaurant, 55 AD3d 801, 866 NYS2d 307, 2nd Dept., 2008). The defendant’s documentary submission does not presumptively refute the plaintiff’s allegations or conclusively determine that none, or any of the causes of action are viable. Accordingly, this portion of the defendant’s motion is denied.

CPLR 3211(a) 7 provides:

“(a) **Motion to dismiss cause of action.** A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

7. the pleading fails to state a cause of action”.

The case law is well-settled that

“In considering a motion to dismiss for failure to state a cause of action (see CPLR 3211[a][7]), the pleadings must be liberally construed (see CPLR 3026). The sole criterion is whether ‘from [the complaint’s] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law’ (Guggenheimer v Ginzburg, 43 NY2d 268, 275; see also

Bovino v Village of Wappingers Falls, 215 AD2d 619). The facts pleaded are to be presumed to be true and are to be accorded every favorable inference, although bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration (see **Morone v Morone**, 50 NY2d 481; **Gertler v Goodgold**, 107 AD2d 481, affd 66 NY2d 946). ‘When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one’ (**Guggenheimer v Ginzburg**, *supra* at 275)”.

(**Gershon v Goldberg**, 30 AD3d 372, 817 NYS2d 322, 2nd Dept., 2006). Accordingly, each cause of action herein must be examined through the prism of this standard, i.e., whether a cause of action exists within the context of this evidentiary record. While the Settlement Agreement does not necessarily form a firm basis for the stated causes of action, it does not utterly defeat or contradict the verified complaint. The first cause of action, that seeks redress for the defendant’s breach of fiduciary duty, asserts that the fiduciary duty that exists between the two parties, the sole shareholders, was violated by the defendant’s execution of the Agreement knowing that there were factual mis-statements in the Agreement regarding the error of the square footage of the premises. Such cause of action does, indeed, allege a cause of action for breach of fiduciary duty, as it has been held that a shareholder may have a cause of action against a defendant who is the only other shareholder, in his individual capacity, independent of the corporation (see, **Tornick v Dinex Furniture Industries, Inc.**, 148 AD2d 602, 2nd Dept., 1989). Further, the complaint alleges, within its four corners, a cause of action for breach of fiduciary duty (see **Shapiro v Bergstol**, 40 AD3d 588, 835 NYS2d 644, 2nd Dept., 2007). That part of the motion which seeks dismissal of the first cause of action pursuant to CPLR 3211(a) 7 is **denied**.

With respect to the second and third causes of action for fraud and fraud in the inducement, the plaintiff has properly alleged

“proof that (1) the defendant made material representations that were

false, (2) the defendant knew the representations were false and made them with the intent to deceive the plaintiff, (3) the plaintiff justifiably relied on the defendant's representations, and (4) the plaintiff was injured as a result of the defendant's representations".

(Cohen v House Connect Realty Corp., 289 AD2d 277, 734 NYS2d 205, 2nd Dept., 2001), and that part of the motion that seeks dismissal of the second and third causes of action pursuant to CPLR 3211 (a) 7 is also **denied**.

With respect to that portion of the motion that seeks dismissal of the complaint pursuant to CPLR 3211 (a) 8, the gravamen and intent of such section is the service of process upon the defendant (see Leviton v Unger, 56 AD3d 731, 868 NYS2d 126, 2nd Dept., 2008).

Turning now to that portion of the motion that urges this Court to dismiss the action as "the Court should not proceed in the absence of a person who should be a party" (CPLR 3211 (a) 10), inasmuch as the plaintiff has properly pleaded his causes of action against this defendant in his individual capacity, as hereinbefore set forth, that part of the motion is also **denied**; an effective judgment may be promulgated in the absence of BPRE (see Siegel, New York Practice, 4th Edition, §§133, 268).

Accordingly, the defendant's motion is **denied** in its entirety. The defendant shall interpose his verified answer within 20 days after service of a copy of this order upon defendant's counsel.

A Preliminary Conference has been scheduled for March 12, 2010 at 9:30 a.m. in Chambers of the undersigned. Please be advised that counsel appearing for the Preliminary Conference **shall** be fully versed in the factual background and their client's schedule for the purpose of setting **firm** deposition dates.

Dated JAN 26 2010

ENTERED *Stephen A. Bucaria*
J.S.C.

JAN 28 2010

NASSAU COUNTY
COUNTY CLERK'S OFFICE