

<b>Wong v 2669 Owners</b>
2010 NY Slip Op 31952(U)
July 26, 2010
Supreme Court, New York County
Docket Number: 104404/2009
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD

PART 35

Justice

Index Number : 104404/2009

**WONG, HELENA**

vs.

**2669 OWNERS**

SEQUENCE NUMBER : 003

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

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

The instant motion (ssequence 003) is decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that plaintiff's and third-party defendants' motion is denied with respect to dismissing defendants' counterclaims; and it is further

ORDERED that the portion of plaintiff's and third-party defendants' motion to dismiss the second, fourth and fifth causes of action in the third-party complaint is denied; and it is further

ORDERED that the portion of plaintiff's and third-party defendants' motion to dismiss the first and third causes of action in the third-party complaint is granted; and it is further

ORDERED that defendant/third-party plaintiff's motion to compel is granted; and it is further

Dated: \_\_\_\_\_ J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**FILED**

JUL 26 2010

NEW YORK COUNTY CLERK'S OFFICE

ORDERED that plaintiff and third-party defendants shall produce to defendant/third-party plaintiff on or before September 3, 2010, responses to items numbered 8 through 23 in defendant/third-party plaintiff's Notice for Discovery and Inspection dated October 20, 2009; and it is further

ORDERED that defendant's motion for leave to amend her answer with counterclaims is granted, and the amended answer with counterclaims in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that the plaintiff shall serve an answer to the amended counterclaims or otherwise respond within 20 days from the date of said service; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this Order with notice of entry within twenty (20) days of entry on all counsel.

**FILED**

JUL 26 2010

NEW YORK  
COUNTY CLERK'S OFFICE

Dated 7/20/10

ENTER: [Signature], J.S.C.

**HON. CAROL EDMEAD**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 35

-----x  
HELENA WONG,

Plaintiff,

Index No.: 104404/09

-against-

DECISION

2669 OWNERS LTD.,

Defendant/Landlord,

-against-

HSIA CHAO YU,

Defendant.

-----x  
HSIA CHAO YU,

Third-Party Plaintiff,

-against-

ANNA WONG and TERAYA DONALDSON,

Third-Party Defendants.

-----x  
CAROL ROBINSON EDMEAD, J.:

**FACTUAL BACKGROUND**

Plaintiff Helena Wong (Wong) moves, pursuant to CPLR 3212, for summary judgment granting judgment to Wong on the complaint and dismissing defendant/third-party plaintiff's third-party complaint, and Wong, third-party defendants Anna Wong (Anna) and Teraya Donaldson (Donaldson) join to seek a declaration that: (1) Wong is the sole tenant of record for the subject apartment; (2)

Wong is a rent-stabilized tenant; (4) any current lease executed by defendant/landlord 2669 Owners Ltd. (2669) with Hsia Chao Yu (Yu) or any party other than Wong to be null and void; (4) all rents received by 2669 for the subject apartment be credited toward Wong's tenancy; and an order directing 2669 to represent to the Division of Housing and Community Renewal (DHCR), and any other government agency with authority to inquire, that Wong is the tenant of record for the subject apartment. Wong also seeks costs, damages and legal fees.

Yu cross-moves, pursuant to CPLR 3124, to compel Wong and third-party defendants Donaldson and Anna to respond to Notices for Discovery and Inspection, dated October 30, 2009, and also moves, pursuant to CPLR 3025, for leave to amend the counterclaim.

In her complaint, Wong asserts rights to the apartment that is the subject of this action as the sole and rightful tenant of record.

By order dated November 12, 2009, this court entered a default judgment as against 2669 with respect to liability only.

Wong alleges that she has lived in the subject premises her entire life. She is the daughter of the prior tenant of record, En-Tzun Wong (Mr. Wong), who died on December 15, 2004, and she currently resides in the apartment with her sister, Anna, her partner, Donaldson, and Mr. Wong's widow, Yu.

After Mr. Wong's death, Wong states that she, Yu and Anna met to discuss what would happen to the apartment and, allegedly, the three women decided that Wong, as the eldest of Mr. Wong's children, would sign the renewal lease. 2669 was contacted, and honored Wong's request by offering a new lease to Wong on November 16, 2005. Motion, Ex. O. Yu contests this assertion regarding the parties meeting to discuss the lease, and, in her affidavit in support of her cross motion, Yu states that the first discussion that she had with Wong about the lease was in 2007.

2669 allegedly told Wong that there would be a vacancy increase of 20%, which appears in the lease Wong signed. *Id.* Neither Anna nor Yu challenged Wong's right to the new lease. Wong maintains that, from November of 2005 until at least November of 2008, she bore the sole responsibility for the rent, that Anna and Yu paid to Wong their proportionate share of the rent, and that Wong secured all repairs and other services for the apartment.

In November, 2007, 2669 offered Wong a renewal lease, which she duly signed. The renewal lease covers the period from January 1, 2007 through December 31, 2009. Motion, Ex. P.

Wong alleges that, in July of 2008, during the period covered by her lease, she learned that 2669 gave Yu a lease for the apartment, and, in November of 2008, 2669 refused to accept

Wong's rent. Motion, Ex. Q. Wong has also provided a copy of a renewal lease signed by Yu for the period January 1, 2010 through December 31, 2011. Motion, Ex. R.

The present motion is supported by affidavits of Wong and Anna, who substantiate the facts recited above, and by an affidavit executed by Donaldson, that corroborates the facts recited above as they relate to the time period after she moved into the apartment, May, 2005.

Yu has asserted four counterclaims against Wong: (1) breach of fiduciary duty; (2) a declaration that Yu is the tenant of record for the subject apartment; (3) fraudulent misrepresentation; and (4) use and occupancy.

Yu alleges that Wong did not reside in the apartment between 2003 and 2005, and only moved into the apartment in May of 2005. Yu further states that, after Mr. Wong's death, she relied on Wong to deal with 2669 on her behalf, with respect to succession rights to the apartment, because her, Yu's, English was not very good. Yu also contends that she is a rent-stabilized tenant, that Wong had no rights to the apartment, and that she should be declared the sole tenant of record for the apartment. Yu asserts that Wong has attempted to evict her from the apartment, and that Wong had agreed to contribute three-quarters of the total amount paid for rent and utilities, but has not paid anything since December of 2008, for which Yu is entitled to reimbursement in

the sum of \$5,574.75, plus any use and occupancy accruing pending the resolution of the instant action.

In her third-party complaint, Yu alleges five causes of action against Anna and Donaldson: (1) aiding and abetting a breach of fiduciary duty; (2) a declaration that Yu is the sole tenant of record for the apartment; (3) misrepresentation; (4) ejectment of Wong, Anna and Donaldson from the apartment; and (5) damages in the amount of three-quarters of the rent and utilities on the apartment, plus use and occupancy accruing pending resolution of the instant action.

Yu's version of the facts is supported by an affidavit of David Kralstein, who was Yu's boyfriend and, upon information and belief, is her current husband, and Chi You Wang, a neighbor in the building who states that Wong did not reside in the apartment for the two years prior to Mr. Wong's death. Yu has also provided the affidavit of Susanna Wong (Susanna), the daughter of Yu and Mr. Wong (Wong and Anna's half-sister), who states that in October of 2004, she moved out of the subject apartment to live with Wong and Donaldson, who were living elsewhere, and that she moved back into the apartment in May of 2005. Susanna further states that Wong only moved back into the apartment after Mr. Wong died, and also avers that Mr. Wong only wanted Wong to write rent checks for the apartment so that the children could keep the apartment should he and Yu pass away. The cross motion contains

cancelled rent checks for the apartment issued by Wong from 2001 through 2007. Cross motion, Ex. D. It is noted that Susanna has a full-blood brother, Thomas Wong, who does not reside in the apartment.

Yu has amended her answer with counterclaims once, and now seeks leave to amend it a second time, seeking to modify her third counterclaim for fraud and to add a fifth counterclaim of ejectment as against Wong.

Yu asserts that, during discovery, she found out that Wong withheld from her the fact that the lease had been converted to Wong's name, misled Yu into believing that the lease was still in the name of Mr. Wong, and that Wong fraudulently misrepresented to her that she, Wong, would have the landlord change the name of the sole tenant of record from Wong to Yu. Yu maintains that this newly discovered evidence entitles her to amend her answer and counterclaim to include these factors in her third counterclaim.

Similarly, Yu alleges that, prior to her filing her counterclaim, Wong engaged in a series of acts denying Yu's rights to the apartment, specifically with respect to Wong demanding that the landlord revert the lease back to her name and cancel the one indicating that Yu is the tenant of record, and Wong serving Yu with a 30-day Notice of Termination, an unsigned copy of which is attached to the cross motion as Ex. F. These

facts, according to Yu, entitle her to amend her counterclaim to add a fifth counterclaim of ejectment as against Wong. It is noted that, in her third-party complaint, Yu is seeking the ejectment of Wong, along with Anna and Donaldson, even though Wong is not named as a third-party defendant.

#### **DISCUSSION**

"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 eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1<sup>st</sup> Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1<sup>st</sup> Dept 2006); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978).

The entire complaint, plus the second and fourth counterclaims asserted by Yu, and the second, fourth and fifth causes of action alleged in the third-party complaint, all involve a determination as to whether Wong or Yu is the lawful tenant of record for the apartment that is the subject of this

lawsuit.

Wong and third-party defendants have provided their affidavits, along with the affirmation of their attorney, attesting to their residential relationship to the apartment that is the subject of this dispute and Wong's right to be declared the tenant of record for the apartment. In opposition, Yu has provided her affidavit, along with the affidavit of her husband, neighbor and daughter, and the affirmation of her attorney, asserting her rights to be declared the tenant of record for the subject apartment. Neither side has provided conclusive documentary evidence to support their contentions, and discovery is still ongoing.

"[T]he conflicting affidavits of the parties and their representatives, based on personal knowledge of the underlying ... dispute, ... raise issues of credibility, [and] indicate that genuine material issues of fact exist requiring a trial ... ."

*Boston Concessions Group, Inc. v Criterion Center Corp.*, 200 AD2d 543, 544 (1<sup>st</sup> Dept 1994). Such conflicting affidavits not only preclude summary judgment (*Lordae Realty Corp. v Montefiore Medical Center*, 232 AD2d 338 [1<sup>st</sup> Dept 1996]), but also provide the court with no definitive basis to grant the declaratory relief sought.

Therefore, Wong's and third-party defendants' motion is denied with respect to Wong's motion for summary judgment, is

denied with respect to that portion of Wong's motion seeking to dismiss the second and fourth counterclaims, and is denied with respect to that portion of Wong's and third-party defendants' motion seeking to dismiss the second, fourth and fifth causes of action in the third-party complaint.

In her first counterclaim, Yu alleges that Wong was her agent and, as her agent, breached her fiduciary duty to Yu by not having the landlord list Yu as the tenant of record for the apartment. In her first cause of action in the third-party complaint, Yu alleges that, upon information and belief, Anna and Donaldson aided and abetted Wong in Wong's breach of fiduciary duty.

"[Agency] is a fiduciary relationship which results from the manifestation of consent of one person to allow another to act on his or her behalf and subject to his or her control, and consent by the other so to act [internal quotation marks and citation omitted]." *G.K. Alan Assoc. Inc. v Lazzari*, 66 AD3d 830, 833 (2d Dept 2009).

"Under most circumstances, intrafamilial activity will not give rise to an agency relationship ... . Nevertheless, a cognizable cause of action may be asserted against a [child] ... ." *Maurillo v Park Slope U-Haul*, 194 AD2d 142, 146 (2d Dept 1993).

"In the case at bar, the [defendant has] alleged sufficient facts to demonstrate the possibility of

a principal-agent relationship . . . . Where the circumstances alleged in the pleading raise the possibility of a principal-agent relationship, and no written authority for the agency is established, questions as to the existence and scope of the agency must be submitted to the jury [internal quotation marks and citation omitted]."

*Id.* at 147.

In her opposition to Yu's cross motion, Wong argues that, even if an agency relationship existed between the parties, any cause of action based on that oral relationship is barred by the statute of frauds. In reply, Yu contends that the agency relationship was "at will," and therefore is outside the statute of frauds.

Too many questions of fact exist for the court to be able to dismiss Yu's first counterclaim asserting a breach of fiduciary relationship, and, as a consequence, that part of Wong's motion to dismiss the first counterclaim is denied.

However, that part of third-party defendants' motion to dismiss the first cause of action appearing in the third-party complaint for aiding and abetting a breach of fiduciary duty is granted.

To state a claim for aiding and abetting a breach of fiduciary duty,

"a plaintiff must plead a breach of fiduciary duty, that the defendant knowingly induced or participated in the breach, and damages resulting therefrom. Moreover, a person knowingly participates in a breach of fiduciary duty only when he or she provides substantial assistance to the primary violator. Actual

knowledge, as opposed to merely constructive knowledge, is required and a plaintiff may not merely rely on conclusory and sparse allegations that the aider or abettor knew or should have known about the primary breach of fiduciary duty. In the absence of any allegation that the [third-party defendants] had actual knowledge of the primary wrong or that these parties rendered substantial, as opposed to inadvertent, assistance to the underlying breach of fiduciary duty, the complaint does not advance a valid claim for aiding and abetting breach of fiduciary duty on their part [internal quotation marks and citations omitted]."

*Bullmore v Ernst & Young Cayman Islands*, 45 AD3d 461, 464 (1<sup>st</sup> Dept 2007); *Stanfield Offshore Leveraged Assets, Ltd. v Metropolitan Life Ins. Co.*, 64 AD3d 472 (1<sup>st</sup> Dept 2009); *Kaufman v Cohen*, 307 AD2d 113 (1<sup>st</sup> Dept 2003).

In the case at bar, Yu has only alleged a cause of action of aiding and abetting a breach of fiduciary duty in a sparse and conclusory manner, and, therefore, this cause of action is dismissed.

Yu's third counterclaim and third cause of action in her third-party complaint allege fraudulent misrepresentation.

The crux of the counterclaim against Wong is that she misrepresented herself to the landlord as being entitled to succession rights to the detriment of Yu. In her affidavit in support of her cross motion, Yu states that Wong's misrepresentation upon which she relied was Wong's saying that she would make sure that Yu was made the tenant of record.

A party's affidavit may be used "to preserve inartfully pleaded, but potentially meritorious, claims [internal quotation

marks and citation omitted]." *Thomas v Thomas*, 70 AD3d 588, 591 (1<sup>st</sup> Dept 2010). Furthermore, on a motion to dismiss, "a plaintiff ... need only plead that [s]he relied on misrepresentations made by the defendant ... since the reasonableness of [her] reliance [generally] implicates factual issues whose resolution would be inappropriate at this early stage [internal quotation marks and citation omitted]." *Knight Securities, L.P. v Fiduciary Trust Company*, 5 AD3d 172, 173 (1<sup>st</sup> Dept 2004). Hence, at this point, the court cannot conclude that Yu's third counterclaim for fraudulent misrepresentation is totally without merit so as to be dismissed.

However, in her third-party complaint, Yu has failed to allege any facts that would support her third cause of action against third-party defendants for fraudulent misrepresentation, and so that cause of action is dismissed.

Yu's cross motion to compel Wong and third-party defendants to respond to items numbered 8 through 23 in her Notice for Discovery and Inspection dated October 20, 2009, is granted. Wong and third-party defendants failed to oppose this portion of Yu's cross motion in their opposition papers.

Lastly, the court grants Yu's motion to serve a Second Amended Answer with Counterclaims.

CPLR 3025 (b) permits a party to amend her pleadings with leave of court, which shall be freely given. In the instant

matter, Yu seeks to amend her counterclaims to assert the factual misrepresentations she alleges Wong made to her so as to enlarge upon the allegations as they originally appeared in her answer, as indicated in her affidavit in support of her cross motion discussed above. Yu further seeks to add a counterclaim seeking to eject Wong and, as previously noted, such a cause of action has already been pled in Yu's third-party action, even though Wong is not named as a third-party defendant. In both instances, allowing such amendments will not prejudice Wong at this stage in the proceedings.

#### **CONCLUSION**

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that plaintiff's and third-party defendants' motion is denied with respect to dismissing defendants' counterclaims; and it is further

ORDERED that the portion of plaintiff's and third-party defendants' motion to dismiss the second, fourth and fifth causes of action in the third-party complaint is denied; and it is further

ORDERED that the portion of plaintiff's and third-party defendants' motion to dismiss the first and third causes of action in the third-party complaint is granted; and it is further

ORDERED that defendant/third-party plaintiff's motion to compel is granted; and it is further

ORDERED that plaintiff and third-party defendants shall produce to defendant/third-party plaintiff on or before September 3, 2010, responses to items numbered 8 through 23 in defendant/third-party plaintiff's Notice for Discovery and Inspection dated October 20, 2009; and it is further

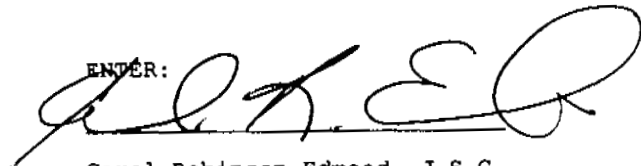
ORDERED that defendant's motion for leave to amend her answer with counterclaims is granted, and the amended answer with counterclaims in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that the plaintiff shall serve an answer to the amended counterclaims or otherwise respond within 20 days from the date of said service; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this Order with notice of entry within twenty (20) days of entry on all counsel.

Dated: July 30, 2010

ENTER:



Carol Robinson Edmead, J.S.C.

**HON. CAROL EDMED**

**FILED**

JUL 26 2010

NEW YORK  
COUNTY CLERK'S OFFICE