

Tae Joon Park v 426 W. 25th St., LLC

2010 NY Slip Op 32037(U)

June 4, 2010

Supreme Court, New York County

Docket Number: 100318/10

Judge: Eileen A. Rakower

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

PRESENT: HON. EILEEN A. RAKOWER

PART 15

Justice

Index Number : 100318/2010

PARK, TAE JOON

VS.

462 WEST 25TH STREET LLC

SEQUENCE NUMBER : 001

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

on this motion to/for _____

PAPERS NUMBERED

1-4

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

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

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED
JUN 10 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6/4/10



HON. EILEEN A. RAKOWER /s.c.

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 15

-----X
TAE JOON PARK and JONG SOOK PARK,

Index No.
100318/10

Plaintiffs,

-against-

DECISION
and ORDER

426 WEST 25th STREET, LLC, LEONID BABINSKY
and IOSIF BABINSKY,

Defendants.

FILED
JUN 10 2010
NEW YORK
COUNTY CLERK'S OFFICE

HON. EILEEN A. RAKOWER:

Plaintiffs bring this action to recover for alleged breach of contract by 426 West 25th Street LLC ("the LLC") in connection with the Contract of Sale ("the Contract") and House Lease for the Real Estate ("Lease") pertaining to the premises known as 426 West 25th Street in the County of New York ("the property").

According to the Complaint, on August 16, 2007, Plaintiffs entered into the Contract with the LLC. The contract provided a purchase price of \$5,455,000.00 for the property, with a down payment of \$545,500.00 payable at signing, to be held in escrow. The Contract further provided that, within five days of issuance of a Temporary Certificate of Occupancy ("TCO"), Plaintiff's would make an additional payment of \$545,500.00, to be held in escrow. The initial \$545,500.00 was released from escrow to defendants Leonid and Iosif Babinsky ("the Babinsky Defendants") upon their tender of a guaranty, pursuant to the agreement.

The Complaint further alleges that, on August 16, 2007, Plaintiffs and the LLC entered into the Lease for a term of one year. Plaintiffs alleged that "It was agreed that the term of the tenancy would commence 'After five (5) days of the issuance of a [TCO]'" . However, Plaintiffs alleged that the LLC failed to exercise good faith and due diligence in obtaining a TCO. On March 27, 2009, the New York City Department of Buildings issued a TCO permitting use of the property as a one-family dwelling.

* 3]

Plaintiffs allege that they were unable to tender the additional \$545,500.00 payment toward the purchase price under the Contract due to “defendants[’] unreasonable delay” in procuring a TCO. Accordingly, the parties amended the Contract on April 20, 2009. The Contract, as amended, provided that Plaintiffs would pay the LLC \$272,750.00 toward the purchase price of the property, and increased the balance due at closing. This payment was paid to escrow by Plaintiffs on April 8, 2009, and was subsequently released to the Babinsky Defendants. Combined with the \$545,500.00 payment tendered at signing, Plaintiffs paid a total of \$818,250.00 towards the purchase price of the property.

Plaintiffs further state that, by letter dated April 23, 2009, the LLC advised Plaintiffs that they were in material default under the Lease for nonpayment of rent. By correspondence dated May 19, 2009, the LLC notified Plaintiffs that they were being held in default of the Contract due to Plaintiffs’ default on the Lease, and that the \$818,250.00 paid by Plaintiffs was being retained as liquidated damages.

Plaintiffs assert that they were not in default of the Contract and the Lease, and that Defendants’ wrongfully repudiated the Contract and the Lease. They claim that the terms of the Lease were to become operative only upon the issuance of a TCO for use as a multiple dwelling, and that, since no such TCO was ever issued, Plaintiffs had no obligation to pay rent. Plaintiffs also allege that the property was “not fit for human habitation,” and that, due to the LLC’s alleged breach of the warranty of habitability, “all rent allegedly due and owing under the House Lease has been abated.” Alternatively, Plaintiffs claim that, even if they are found to be in default of the House Lease and Contract, they are entitled to recoup their second payment of \$272,750.00 on the purchase price, as this did not constitute a down payment under the Contract.

Presently before the Court is Defendants’ pre-answer motion to dismiss the Complaint pursuant to CPLR §3211(a)(1) & (7). Defendants submit an affirmation in support of their motion with the following annexed as exhibits: the Contract; the Contract Amendment; the Lease; the Amendment to Lease; a Termination of Contract dated September 8, 2009; an Order to Show Cause and a Stipulation of Settlement in a nonpayment proceeding brought by the LLC against Plaintiff’s in Civil Court; Plaintiffs’ Complaint; the TCO obtained by the LLC on March 27, 2009; and a letter dated April 8, 2009 from Plaintiffs’ attorney enclosing a check for the \$272,750.00 with the notation “5% Additional Downpayment”, and a check in the

4] amount of \$27,047.31 marked "Rent for April 2009". Defendants also submit a memorandum of law in support of their motion. Defendants claim that the documentary evidence they submit "clearly and unambiguously defeats each and every cause of action raised in the Complaint." Defendants further assert that the Babinsky Defendants should be dismissed from the action because they were not parties to the Contract or Lease, and thus are not proper parties to this lawsuit. In addition, Defendants move pursuant to 22 NYCRR §130-1.1 for sanctions against Plaintiffs and for the costs associated with defending what they claim to be a frivolous proceeding.

Plaintiff submits an affirmation in opposition. Annexed to the affirmation as exhibits are the Complaint; guarantees signed by the Babinsky Defendants wherein they guarantee the return of any payments made under the Contract in the event of a default by the LLC; and a proposed Amended Complaint. Defendants submit a reply affirmation.

CPLR §3211 provides, in relevant part:

- (a) 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; [and]
 - (7) the pleading fails to state a cause of action.

In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory." (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91[1st Dept. 2003]) (internal citations omitted) (*see* CPLR §3211[a][7]). On a motion to dismiss pursuant to CPLR §3211(a)(1) "the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007]) (internal citations omitted) "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.*

* 5] .
Ginzburg, 43 N.Y.2d 268, 275 [1977]) (emphasis added). A movant is entitled to dismissal under CPLR §3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dept. 2007]) (citation omitted).

With respect to Plaintiffs' assertion that the second payment of \$272,750.00 of the purchase price was wrongfully retained by Defendants as a down payment, that contention is flatly contradicted by the Amendment to the Contract and by Plaintiffs' own attorney in his April 8, 2009 letter which accompanied the check for \$272,750.00 marked "5% Additional Downpayment", and the check for \$27,047.31, marked "Rent for April 2009" (the latter check bounced, resulting in Plaintiffs' alleged default). There, Plaintiffs' prior counsel states:

I think we need to amend the Contract of Sale and Lease to reflect the changes: **Total downpayment held by the Seller and Seller's attorney is \$818,250.00 and monthly rent is \$27,047.31.**

This letter was followed by the executions of a modified lease and modified contract of sale, which explicitly states that the Amendment is modifying "the amount of *the additional downpayment* and the date for its tendering" (emphasis added).

Accordingly, the documentary evidence conclusively establishes that the \$818,250.00 paid by Plaintiffs, inclusive of the \$272,750.00, constitutes the "down payment" on the purchase price on the property

In addition, the Lease flatly contradicts Plaintiffs' assertion that their obligation to pay rent was conditioned upon the LLC's obtaining a TCO for a multiple dwelling. The first page of the House Lease provides that the "commencement date" of the House Lease is "After five (5) days of issuance of a Temporary Certificate of Occupancy," without further designation that it be for a multiple dwelling. However, paragraph "16(b)" of the Contract of Sale provides for the following as a condition of closing (which, under the Contract, was to take place "1 year after date of issuance of temporary certificate of occupancy):

The delivery by Seller to Purchaser of a valid and subsisting Certificate of Occupancy or other required certificate of compliance, or evidence

that none was required, covering the building(s) and all of the other improvements located on the property authorizing their use as a *one family dwelling at the date of Closing*. (emphasis added)

Once Tenant was in possession, and the Lease had commenced, the Lease described at paragraph 80(a), "Tenant's Work:"

Promptly after delivery of possession of the Premises to Tenant, Tenant will commence to perform all work required to prepare the Premises in order to obtain a Temporary Certificate of Occupancy for multiple dwelling use....

Based upon the foregoing, the documentary evidence conclusively establishes that the LLC's delivery of a TCO for a one-family dwelling on March 27, 2009 was sufficient to trigger Plaintiffs' tender of a check dated April 8, 2009 and marked "Rent for April 2009."

To the extent that Plaintiffs' Complaint *states* a cause of action for breach of contract based upon the LLC's delay in obtaining a TCO, the Court finds that the documentary evidence conclusively establishes that, rather than electing to terminate the agreements and hold the LLC in default, Plaintiffs opted to continue with the Contract and Lease. This is evidenced by the Amendments to the Contract and the Lease (which post-date delivery of the TCO); as well as Plaintiffs' tendering of a check for payment of first month's rent under the Lease (*see El-Ad 250 West LLC v. 30 Hubert Street LLC*, 2009 NY Slip Op 8458, *1 [1st Dept. 2009]) ("[B]y continuing to perform under the agreement without giving plaintiff notice of alleged defaults, defendant could not thereafter elect to terminate the agreement 'for a default which apparently it chose to disregard as a ground for termination of the contract'") (*citing Emigrant Indus. Sav. Bank v. Willow Bldrs.*, 290 N.Y. 133, 144 [1943]).

Plaintiffs' cause of action for breach of the warranty of habitability, which they assert would have absolved them of any obligation to pay rent, fails to conform to the pleading requirements of the CPLR and must be dismissed. The Complaint states in purely conclusory terms that the property "was not fit for human habitation," such that occupancy would have "subject[ed] the occupants to conditions that are dangerous, hazardous and detrimental to [their] life, health, and safety...." No facts

of any kind are provided which detail the nature and the timing of the alleged breach or breaches. This runs afoul of CPLR §3013, which states that

Statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense.

(*see Foley v. D'Agostino*, 21 A.D.2d 60, 63 [1st Dept. 1964]) (CPLR §3013 requires that pleadings contain “the essential facts required to give ‘notice’...”); (*see also Comm'rs. of the State Ins. Fund v. Ramos*, 2009 NY Slip Op 4361, *1 [1st Dept. 2009]) (defense was properly dismissed “as pleading only a bare legal conclusion without supporting facts”); (*Simon v. West End Ave. Corp.*, 7 A.D.3d 318, 320 [1st Dept. 2004] (cause of action for improper denial of access to co-op records dismissed for failure to allege when, where, and by whom plaintiffs were denied access); (*compare with Atherton v. 21 East 92nd Street Corp.*, 149 A.D.2d 354, 356 [1st Dept. 1989]) (“The pleadings... g[a]ve sufficient notice of the hazardous state of the premises to adequately apprise defendants of the transactions and occurrences upon which the amendment to the complaint is based.”).

In addition, the Court finds that Plaintiffs’ allegation in the Complaint that the LLC’s “Notice of Default is invalid and legally insufficient” is defeated by the Stipulation of Settlement entered into Plaintiffs and the LLC in the Civil Court Proceeding (*see Lomando v. Duncan*, 257 A.D.2d 649, 650 [2nd Dept. 1999]) (defects in jurisdiction may be waived where a party submits to the Court’s jurisdiction by entering into a stipulation settling the matter).

As the proposed Amended Complaint merely adds a paragraph alleging that the Babinsky Defendants executed guarantees personally guaranteeing the return of any payments by Plaintiffs in the event of a default by the LLC (an issue rendered academic in light of the foregoing), leave to amend would be futile.

Wherefore it is hereby

ORDERED that the motion to dismiss is granted and the Complaint is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

DATED: June 4, 2010



EILEEN A. RAKOWER, J.S.C.

FILED
JUN 10 2010
NEW YORK
COUNTY CLERK'S OFFICE