Abenoza v 178-184 E. Second St Condo
2010 NY Slip Op 34113(U)
April 5, 2010
Supreme Court, New York County
Docket Number: 114972/2009
Judge: O. Peter Sherwood

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

----------X

HUMBERTO ABENOZA,

Plaintiff,

-against-

178-184 EAST SECOND ST CONDO, MARIE KRIPANIDHI, AARON LEWIS and KOSSOFF & UNGER,

Defendants.

----------X

DECISION AND ORDER

Index No. 114972/2009

O. PETER SHERWOOD, J.:

Defendant Kossoff & Unger ("K & U") moves for an order pursuant to CPLR § 3211 (a) (1), (7) and (8) dismissing the complaint insofar as alleged against it (Motion Sequence No. 001). Defendants 178-184 East Second St. Condo, ("the Condo"), Marie Kripanidhi ("Kripanidhi") and Aaron Lewis ("Lewis") (collectively the "Condo Defendants") separately move for an order pursuant to CPLR § 3211 (a) (5), (7) and (8) dismissing the complaint insofar as asserted against them(Motion Sequence No. 002). Plaintiff has submitted no opposition to the motions. Motion Sequence Nos. 001 and 002 are consolidated for purposes of disposition. For the reasons that follow, the motions are granted and the complaint is dismissed on default.

Factual Background

This action has its genesis in an action plaintiff Humberto Abenoza (Abenoza" or "plaintiff") commenced in this court in 2004 against non-parties Wahid Sharaf ("Sharaf") and Isabel Fraser Sewell ("Sewell") seeking a judgment directing the named defendants to convey to him title to a condominium unit known as Apartment #5E ("the Unit") in a building located at 184 East 2nd Street, New York, New York ("the premises") (*Humberto Abenoza v Wahid Sharaf, et al*, Index No. 113631/04) (the "Prior Action"). Plaintiff alleged therein that sometime in 1999 Sharaf had entered into an oral agreement with him whereby he would sell the Unit to plaintiff under certain terms and conditions. The Unit was owned by Sharaf's brother, Siyad Sharaf ("Siyad"), who died in 1997. Abenoza moved into the Unit shortly after Siyad's death without the prior permission of the condominium board. He contended that he succeeded in stopping an action to foreclose a mortgage

encumbering the Unit and, thereafter, made mortgage payments and improvements to the Unit. Letters testamentary for Siyad's estate were not issued to Sharaf and Sewell until July 27, 2004. The named defendants sought to recover damages on their counterclaims for fraud, conversion, unjust enrichment, and trespass and to eject Abenoza from the Unit.

The Prior Action was tried before the Honorable Justice Joan B. Lobis without a jury. In a decision and judgment dated July 24, 2009 (Peterson Aff., Exhibit "3"), Justice Lobis dismissed the complaint finding that Sharaf had no legal capacity to effect a transfer of Siyad's property at the time the alleged oral agreement was made with Abenoza in 1999 and, even assuming such agreement was made, it was at best a conditional promise. Abendoza's expenditure of money on future uncertain events (Sharaf's acquiring the Unit when and if named executor of Siyad's estate) was, therefore, held not to be reasonable reliance. Justice Lobis also dismissed all the counterclaims finding that defendants failed to establish their claims except as to the ejectment counterclaim, which the Court held could be pursued in an action in the Housing Court to obtain possession of the Unit.

On October 23, 2009, Abenoza *pro se* commenced the instant action against K & U and the Condo Defendants by filing the summons and complaint. Although inartfully drawn, the complaint essentially alleges that the Condo, together with its Board Presidents, Kripanidhi and Lewis, and its lawyer Sally Unger of K & U, tortiously interfered with the agreement between plaintiff and Sharaf and caused plaintiff "great emotional and physical stress" by claiming maintenance arrears and imposing liens on the Unit and disrupting the transfer of title to the Unit from Sayed's Estate to plaintiff (Shrewsberry Aff., Exhibit "A").

In lieu of answering, K & U moves to dismiss the complaint insofar as asserted against it claiming that the Court has not acquired personal jurisdiction over it due to plaintiff's failure to properly effectuate service and further that the complaint fails to state a cause of action against it for legal malpractice.

The Condo Defendants also seek dismissal of the complaint against them on the ground that: (1) personal jurisdiction over them has not been obtained; (2) the Condo is not a proper party to the proceeding; and (3) plaintiff's claims are barred by the applicable statute of limitations and by the doctrine of collateral estoppel.

Discussion

The Court must first determine whether it has properly acquired jurisdiction over the defendants. CPLR § 3211 (a) (8) allows for dismissal of an action where the Court lacks personal jurisdiction over a defendant. While a court may overlook minor defects in the form of legal papers, the failure to serve a summons with the complaint is a jurisdictional defect requiring the dismissal of the action (*see, Cuccia v Weiner & Assocs.*, 234 AD2d 26 [1st Dept 1996]). Here, the affidavits of service annexed to the motion papers indicate that each of the defendants was served only with a complaint (*see,* Shrewsberry Aff., Ex. "B"); Peterson Aff., Ex. "4"). Accordingly, the action must be dismissed as jurisdictionally defective.

Even if the Court were not dismissing the action on jurisdictional grounds, the action would be dismissed for failure to state a cause of action. On a motion to dismiss a pleading pursuant to CPLR § 3211 (a) (7) for failure to state a cause of action, the Court's role is limited to determining whether the complaint states a cause of action (*see, Frank v Daimler-Chrysler Corp.*, 292 AD2d 118 [1st Dept 2002]). The standard on such motion is not whether a party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements a cause of action can be sustained (*see, Stendig, Inc. v Thorn Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]). The court is not called upon to determine the truth of the allegations (*see, Campaign for Fiscal Equity v State*, 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). Thus, generally, if the Court determines that the non-moving party is entitled to relief on any reasonable view of the facts stated, the inquiry is complete and the claim must be declared legally sufficient (*see, Campaign for Fiscal Equity, supra*; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). However, bare legal conclusions, as well as factual claims, that are inherently incredible or flatly contradicted by documentary evidence are not presumed to be true (*see, McKenzie v Meridian Capital Group, LLC*, 35 AD3d 676 [1st Dept 2006]; *Gershon v Goldberg*, 30 AD3d 373 [1st Dept 2006]). Where the moving party offers evidentiary material, the court must determine

whether the proponent of the pleading has a cause of action, not simply whether he, she or it has stated one (*see, Guggenheimer v Ginzburg,* 43 NY2d 268, 275 [1977]; *Kantrowitz & Goldhamer, P.C. v Geller,* 265 AD2d 529 [2d Dept 1999]).

"Tortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom" (*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 424 [1996]). Plaintiff here cannot sufficiently establish a cause of action for tortious interference with contract as Justice Lobis's decision and judgment in the Prior Action definitively establishes that plaintiff did not have a legally enforceable contract with Sharaf. Accordingly, if no contract exists, it cannot be breached.

To the extent the complaint may be read as pleading a cause of action for negligent or intentional infliction of emotional distress, it must be also be dismissed as the complaint fails to plead the requisite degree of outrageous or extreme conduct (*see e.g., Howell v New York Post Co.*, 81 NY2d 115, 121 [1993]; *Goldstein v Massachusetts Mut. Life Ins. Co.*, 60 AD3d 506, 508 [1st Dept 2009], *lv denied* 12 NY3d 714 [2009]).

Nor does the complaint plead a legally cognizable claim for legal malpractice. Absent special circumstances not present here, a claim for legal malpractice requires privity between the attorney and the aggrieved party (*see, e.g., Prudential Ins. Co. V Dewey, Ballantine, Bushby, Palmer & Wood,* 80 NY2d 377, 382 [1992]; *D'Amico v First Union Nat. Bank,* 285 AD2d 166, 172 [1st Dept 2001], *lv denied* 99 NY2d 501 [2002]). Plaintiff has failed to plead that there was any privity between himself and K & U.

In light of the foregoing conclusions, the Court need not reach any other issues raised by the parties.

Conclusion

Accordingly, it is

ORDERED, that the defendants' respective motions to dismiss the complaint (Motion Sequence Nos. 001 and 002) are granted on default, and the Clerk of the Court is directed to enter judgment in favor of defendants dismissing the complaint in its entirety; and it is further

ORDERED that a copy of this order with notice of entry shall be served on plaintiff within twenty (20) days of entry.

This constitutes the decision and order of the court.

DATED: 4/5/10

ENTER,

O. P. Sherwood

O. PETER SHERWOOD
J.S.C.