

Rein v Pollack

2011 NY Slip Op 30080(U)

January 11, 2011

Sup Ct, New York County

Docket Number: 109907/08

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

MERLE REIN,
Plaintiff,

Index No.: 109907/08

Motion Date: 03/17/10

- v -

Motion Seq. No.: 01

JOY POLLACK and AL POLLACK,
Defendants.

Motion Cal. No.: _____

The following papers, numbered 1 to 11 were read on this motion for summary judgment.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

PAPERS NUMBERED

1 - 4

5 - 8

9 - 11

FILED

Cross-Motion: Yes No

JAN 13 2011

Upon the foregoing papers,

NEW YORK
COUNTY CLERK'S OFFICE

In this breach of contract action, both defendants move separately for summary judgment dismissing the complaint and dismissing their respective cross claims (motion sequence numbers 001 and 002). For the following reasons, each motion is granted in part and denied in part.

On August 6, 1984, defendants Joy Pollock and Al Pollock (the Pollocks) executed a contract (the contract) to purchase the shares corresponding to a co-operative apartment unit (the apartment) in a building (the building), located at 140 Riverside Drive in the County, City and State of New York, from plaintiff

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):

Merle Rein (Rein). The parties closed the sale on January 28, 1986 with a purchase price of \$197,500.00. The contract provides, in pertinent part, as follows:

16. All representations, understandings and agreements had between the parties with respect to the subject matter of this agreement are merged with this agreement which alone fully and completely expresses their agreement.

17. This agreement cannot be changed, discharged or terminated orally. Purchaser may not assign this agreement or any of his rights hereunder.

Rein's complaint alleges that, at some point in 1980, she and the Pollocks had entered into an oral agreement whereby Rein conveyed to the Pollocks the ability to purchase the apartment at an "inside price" (i.e., a "price significantly less than the price which the cooperative board was going to list the Apartment to the public")¹ in return for the Pollocks' promises to: 1) pay Rein's two children \$2,000.00 per year each for as long as the Pollocks owned the apartment; and 2) split the proceeds of the sale of the apartment with Rein on a 50-50 basis, less the payments to Rein's children, should the Pollocks ever sell the apartment.

The Pollocks occupied the apartment until their divorce in 2001, whereupon Al Pollock vacated it, and Joy Pollock later sold

¹ Rein alleges that her mother had been the tenant of record, but that she inherited her mother's right to purchase the apartment at an "inside price" upon her mother's death in 1980 when the building was converted into a co-op.

it in 2002 for \$1,600,000.00. Rein alleges that both of the Pollocks have acknowledged their obligations to her under the 1980 oral agreement on numerous occasions. She presents correspondence and checks to support her allegations.

First, Rein presents a copy of a letter, dated October 4, 2001, from Al Pollock's divorce attorney, James Levien (Levien), to Joy Pollock's divorce attorney, Laura Shulman (Shulman), that states, in relevant part:

[M]y client [i.e., Al Pollock] ... said that ... he would assume the responsibility that both parties had orally agreed to with the Reins when they purchased the apartment from the estate of Merle Rein's mother.

Next, Rein presents a copy of a letter from Shulman to Levien, dated April 4, 2002, that states, in relevant part, as follows:

The deed to [the apartment] will be transferred to [Joy Pollock], pursuant to the Judgment of Divorce, with the understanding between the parties that, if Ms. Pollock chooses to sell the property, she will pay Mr. Pollock \$9600.00 and pay Merle and Herbert Rein \$75,000.00 at the time of the closing.

Next, Rein presents a letter from Levien to Shulman, dated November 6, 2002, that provides, in relevant part, as follows:

I have requested your client Joy Pollock to honor her obligation pursuant to our agreement ... to send my office checks in the amount of \$9,600.00 and \$75,000.00 from the proceeds she received from the sale of the cooperative apartment.

As of this date I have not received any funds from her and I am writing you to please explain to your client that this arrangement had been agreed upon between the parties and should be adhered to.

Next, Rein presents a copy of a handwritten letter from Joy Pollock to Levien, dated March 11, 2003, that provides, in relevant part, as follows:

I will send a partial payment now to show good faith and get everyone off my back. I am sending a check for \$25,000.00 as a 1/3 payment. I intend to send the rest in two more payments of \$25,000.00 for the following two years. I have enclosed a personal check for the amount of \$25,000.00 towards my obligation regarding the proceeds of [the apartment].

Rein further presents a copy of a letter from Levien to Joy Pollock, dated March 31, 2008, that provides, in relevant part, as follows:

As you know, there is still \$50,000.00 that is due to Merle Rein from the agreement that was entered into and filed with the court when you and Al finalized your divorce proceedings in Kingston, N.Y. ... Please get back to me and let me know how you would like to pay this \$50,000.00 balance and over how long a period of time and I will then get back to Merle ...

A further letter from Joy Pollock to Levien, dated April 3, 2008, provides, in relevant part:

I am not responsible for the remaining \$50,000.00 due to the lack of a signed contract and the amount of time that has passed since I received the proceeds of the sale of [the apartment].

Finally, Rein presents copies of 14 cancelled checks (in amounts of \$1,000.00 or \$1,500.00 for a total of \$18,000.00) that Levien sent to her, purportedly on behalf of both Pollocks, during the period of 2005 to 2008.

Al Pollock denies ever having made or authorized any payments to Rein. In any case, Rein now states that the Pollocks

owe her half of the apartment's \$1,600,000.00 sales price (less payments made). Rein further states that she has demanded payment, but that the Pollocks have refused.

Rein's complaint sets forth one cause of action for breach of contract and one for unjust enrichment. Joy Pollock filed an answer on September 15, 2008 that sets forth nine affirmative defenses and a cross-claim against Al Pollock for contribution. Al Pollock's answer sets forth the same nine affirmative defenses and a cross claim against Joy Pollock for contribution. Both defendants now move separately for summary judgment dismissing the complaint and each others' cross-claims.

The first cause of action in the complaint alleges breach of contract. Here, both defendants note that the only written contract between themselves and Rein is the August 6, 1984 contract whereby they purchased the shares of the apartment, and argue that the contract's merger clause precludes Rein's assertion of breach based on the earlier 1980 oral agreement. Rein responds that the Pollocks' reliance on the merger clause is inapposite because they both acknowledged the 1980 oral agreement, and made partial performance of that agreement. In their respective reply papers, the Pollocks both restate the argument that the 1980 oral agreement is not part of the contract, and both deny that they have made any part performance of the alleged oral agreement.

The court finds in favor of the defendants on the breach of contract claim. The contract's merger clause clearly precludes any consideration of the extraneous 1980 oral agreement, and the "no assignment" clause plainly provides that oral modifications to the written terms of the agreement are not permitted. In light of these provisions, Rein cannot establish the existence and terms of the valid, binding oral contract that she claims was breached. Gordon v Dino De Laurentiis Corp., 141 AD2d 435, 436 (1st Dept). Therefore, the court finds that her cause of action for breach of contract must fail as a matter of law.

Rein cites the Court of Appeals' decision in Rose v Spa Realty Assocs. (42 NY2d 338 [1977]) for the proposition that there is a partial performance exception to a contractual provision that modifications to an agreement be in writing. This is only a partially correct statement of the law. As the Court of Appeals stated in Messner Vetere Berger McNamee Schmetterer Euro RSCG Inc. v Aegis Group PLC (93 NY2d 229, 237 [1999]), "the doctrine of part performance is based upon [an] equitable principle," and "the acts and reliance of the suitor that are determinative of what equity requires." The rule that Rein seeks to rely on applies in the context of equitable claims rather than those that sound in breach of contract.

Here, Rein's second cause of action is an equitable claim of unjust enrichment. "The criteria for recovery under a theory of

unjust enrichment are: (1) the performance of the services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services." Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp., 296 AD2d 103, 108 (1st Dept 2002), quoting Moors v Hall, '143 AD2d 336, 337-338 (2d Dept 1988). The plaintiff's affidavit asserts that Rein agreed to assist and in fact did assist the Pollocks in purchasing the apartment at an insider price. The exhibits submitted by plaintiff in opposition to the motion - in the form of letters of defendants' divorce attorneys - can be viewed by the factfinder as evidence that the Pollocks both acknowledged that Rein was due some quantum of compensation for her assistance in their purchase of the apartment. This may be evidence that Rein's expectation of compensation was reasonable in spite of the parties' separate contraction obligations. As to the "reasonable value" of Rein's assistance, the same correspondence indicates that Joy Pollock had once settled on a figure of \$75,000.00, although she now repudiates it, and that Al Pollock had once agreed to "assume the responsibility" for paying Rein, although he now denies owing her anything. Therefore there is an open issue of fact as to this element of Rein's unjust enrichment claim.

The court finds that Rein has presented sufficient evidence, viewed in the light most favorable to the non-movant, to establish a prima facie case of all of the elements of her unjust enrichment claim. Accordingly, the court determines that both defendants' motions should be denied with respect to Rein's second cause of action.

However, recovery on Reins unjust enrichment claim is limited by the equitable principles applicable to such a claim. "Recovery on a claim premised upon quasi-contract or unjust enrichment is limited to the reasonable value of the services rendered by the plaintiff." Collins Tuttle and Co., Inc. v Leucadia, Inc., 153 AD2d 526, 527 (1st Dept 1989). Plaintiff's damages would be determined by the value provided by the plaintiff rather than benefits received by the defendants. To the extent that defendants are found liable to Rein under equitable principles any recovery would be based upon the value of Rein's assistance in purchasing the apartment rather than any expectation based upon the proffered oral agreement. See Hausen v Academy Printing & Specialty Co., 34 AD2d 792, 793 (2d Dept 1970) (where express oral contract is unenforceable plaintiff may not use the contract as evidence of the reasonable value of services in quantum meruit).

The final branch of each defendant's motion seeks summary judgment to dismiss their respective cross-claims against each

other for contribution. However, these claims are dependant upon a finding that one or both of the Pollocks is liable to Rein, and the court has already determined that Rein's equitable claim against the Pollocks is not subject to summary adjudication. Accordingly, the court determines that the defendants' motions should be denied as to the cross-claims. '

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 3212, of defendant Al Pollock is granted solely to the extent of dismissing the first cause of action in the complaint of plaintiff Merle Rein, but is otherwise denied; and it is further

ORDERED that the motion, pursuant to CPLR 3212, of defendant Joy Pollock is granted solely to the extent of dismissing the first cause of action in the complaint of plaintiff Merle Rein, but is otherwise denied; and it is further

ORDERED that all parties shall appear at a preliminary conference to ascertain the status of this action on February 8, 2011, at 9:30 A.M, in Part 59, Room 103, 71 Thomas Street, New York, New York 10013.

This is the decision and order of the court.

Dated: January 11, 2010

ENTER:

FILED

DEBRA A. JAMES J.S.C.

JAN 13 2011