

**Chiflidjanov v Brant**

2011 NY Slip Op 33080(U)

November 17, 2011

Supreme Court, Nassau County

Docket Number: 18853-10

Judge: Vito M. DeStefano

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,  
Justice

TRIAL/IAS, PART 19  
NASSAU COUNTY

ATANAS PETRO V CHIFLIDJANOV and,  
JOSEPH PEARSON (under power of attorney),  
and JOSEPH PEARSON, individually,

Decision and Order

Plaintiffs,

MOTION SUBMITTED:  
July 15, 2011  
MOTION SEQUENCE:01  
INDEX NO. 18853-10

-against-

LILLY BRANT, MILKA MESHULAM and  
EMIL TOLEDO,

Defendants.

The following papers and the attachments and exhibits thereto have been read on this motion:

Notice of Motion	1
Affidavit in Opposition	2
Reply Affirmation	3

**Factual and Procedural Background**

In this action to recover damages for, *inter alia*, breach of contract, the Defendants move for an order dismissing the Plaintiffs' complaint. The Defendants seek dismissal pursuant to CPLR 3211 (a)(2), (7), and, alternatively, pursuant to CPLR 3211 (c); 3212 & 327.

The complaint contains nine causes of action alleging: that Plaintiff Joseph Pearson has power of attorney of Plaintiff Chiflidjanov to commence the instant action; the Defendants are descendants of Joseph Mercado, who had owned certain real property in Bulgaria which was wrongfully taken by the "Nazi German regime during the World War II era and \* \* \* never returned after the war, but was retained by [t]he Communist government"; "with the assistance of Joseph Pearson, the Defendants hired Atanas Petro Chiflidjanov \* \* \* to act on behalf of the

Defendants \* \* \* to reclaim the “real property”; on August 4, 2006, “an agreement in writing and signed” provided that Chiflidjanov was to receive 40% of the amount collected on any real estate, discovered and sold or any other collective payments”; Chiflidjanov undertook to locate the stolen real property and “worked with Bulgarian personnel to achieve a land transfer to heirs of the original owner”, “Chiflidjanov worked with the assistance of Joseph Pearson who was born in Bulgaria”; Chiflidjanov and Pearson located the real property “and worked for a substantial period of time \* \* \* to establish the claim of the Defendants and transfer title”; Chiflidjanov and Pearson “spent substantial sums of their own money for lawyers, notaries, taxes, long distance telephone, and travel to establish the claim of the Defendants and transfer title”; through their efforts, title transferred to the Defendants; on November 27, 2009, the government of Sofia issued a certificate indicating the Defendants were owners of “6.67% shares of real estate situated in Sofia”, which apparently was being used to house government administrative offices; the Defendants refused to reimburse Chiflidjanov as required by their agreement and as demanded in an April 12, 2010 letter.

Accordingly, in the first cause of action for breach of contract, the Plaintiffs seek \$443,193.28, plus interest from November 27, 2009. In the second cause of action, Plaintiffs seek recovery in *quantum meruit* for the reasonable value of their services. In the third cause of action Plaintiffs seek recovery on a theory of account stated. In the fourth cause of action the Plaintiffs allege that the Defendants were unjustly enriched by their services. In the fifth cause of action Plaintiffs allege that their services were converted. In the sixth cause of action, Plaintiffs allege that the Defendants breached their duties of good faith and fair dealing. The seventh cause of action seeks recovery on a theory of *prima facie* tort. In the eighth cause of action, Plaintiffs allege that they “worked hard to earn a declaration of rent due on the real estate. \* \* \* However, Defendants prevented Plaintiffs from taking the final steps to obtain this money in an effort to thwart the commission due from this additional service. \* \* \* Under this agreement, Plaintiffs are due another \* \* \* \$153,552.00 since they undertaken all efforts to have the rent declared due by the Bulgarian authorities.” The ninth cause of action seeks punitive damages.

The Defendants acknowledge in their motion that “various agreements and power of attorney agreements with the Plaintiffs” were negotiated by the Defendants’ agent David Meshulam, who executed them in New Jersey, the state of his residence.

The August 4, 2006 document referred to by Plaintiffs and Defendants is denominated as “assignment” and reads as follows:

#### ASSIGNMENT

THIS ASSIGNMENT made this 4<sup>th</sup> day of August, 2006 by and between:

David J. Melusham, empowered by Emil Toledo, Mike Melusham and Lily Brant with address: 23 Vreeland Road, Floram Park, NJ 07932, USA, hereinafter referred to as ASSIGNOR,

and

Atanas Petrov Chiflidjanov, Civil AD: 6110196683 with address: 8, Dimitar Hadjikitzev Street, Sofia, Bulgaria, hereinafter referred to as ASSIGNEE

In conjunction with Clause 4 of the contract both parties agree to the following:

Any compensation paid to the ASSIGNEE is set to be in the amount of 40% (forty percent) of the amount collected on any real estate, discovered and sold or any other collected payments. These payments are to cover incurred expenses and remuneration.

In witness whereof, the ASSIGNOR has executed this assignment on the day and year first above written.

On November 14, 2008, the Defendants, through their agent David Meshulam, executed a "Power of Attorney" which granted Chiflidjanov authority to "[s]earch for and locate any real estate property in Bulgaria owned by the heirs of Simanto Toledo, Joseph Toledo, David Meshulam and Nissim Meshulam and file claims to recover same." In this document, the Defendants also reserved the right to revoke the power of attorney or appoint a new agent.

The Defendants concede that in April 2007 and March 2008, Chiflidjanov submitted an application to the Bulgarian government requesting information on the subject real property and that on December 12, 2008, he was informed that an administrative order was issued regarding the real property, which indicated that the government had already reverted title to the Defendants and awarded them 6.67% thereof. However, Defendants contend that the Plaintiffs never forwarded a copy of the aforementioned administrative letter to them. Moreover, although the letter indicated that Plaintiffs could sell the Defendants' 6.67% share and seek reimbursement for rents, Plaintiffs failed to timely file an application for such relief. The Defendants allege that the Plaintiffs' conduct prejudiced their right and "a claim for back rents was virtually lost" (Affirmation in Support of Motion at ¶ 13). The Defendants assert that Plaintiffs misrepresented that they recovered the real property and, as a result, this caused Defendants to enter into a Memorandum of Understanding (Affirmation in Support of Motion at ¶ 15).

The Defendants withdrew their power of attorney on March 11, 2010.

The court notes that the Defendants' answer contains six counterclaims but no relief has been sought with respect thereto.

In support of their motion to dismiss, the Defendants argue that: Plaintiffs' ninth cause of action, sounding in "punitive damages," is deficient because a punitive damages claim cannot constitute a separate cause of action; Plaintiffs' second cause for recovery is *quantum meruit*, fourth cause of action based on unjust enrichment and eighth cause of action for breach of contract for commission or lost rents are duplicative of the first cause of action which alleges breach of contract; Plaintiffs' sixth cause of action for breach of implied covenant of good faith and fair dealing and fifth cause of action for conversion, are similarly duplicative of the Plaintiffs' breach of contract claim; Plaintiffs' seventh cause of action for *prima facie* tort fails to plead special damages "outside the contract itself"; Plaintiffs' third cause of action for account stated is improper because Plaintiffs are utilizing that cause of action as "another means to attempt to collect under a disputed contract", and is, in any event, without merit because the subject property was never sold; the breach of contract claim must fail because the agreement sought to be enforced does not comply with the Statute of Frauds in that it fails to identify the location of the subject property, and, in any event was properly terminated by the Defendants; Plaintiff Pearson lacks standing to maintain the action; inasmuch as the contract was written in Bulgaria, concerns Bulgarian property, required performance of services in Bulgaria, and was executed by the Defendants' agent in New Jersey, the Doctrine of Forum Non Conveniens applies.

In an affidavit submitted in support of the motion, the Defendants' agent, David Meshulam, admits that "on or about August 4, 2006, I entered into an agreement with Plaintiffs Chiflidjanov and Pearson \* \* \* the agreement was that all expenses, commissions and any legal fees were to be taken care of by the agreed 40%" (Affidavit of David Meshulam at ¶ 3).

### **The Court's Determination**

Based on the foregoing, it is hereby ordered that: the motion is granted to the extent that the third, fifth, seventh and ninth causes of action are dismissed; in all other respects, the motion is denied. In this regard, the court notes that the Defendants correctly contend that these causes of action are either improper (*see Paisley v Coin Device Corp.*, 5 AD3d 748 [2d Dept 2004]), insufficiently pleaded and fail to state a cause of action (*see DeNaro v Rosalia*, 59 AD3d 584 [2d Dept 2009]), or merely a restatement of the breach of contract claim (*see Retty Fin., Inc. v Morgan Stanley Dean Witter & Co.*, 293 AD2d 341 [2d Dept 2002]).


Notwithstanding, the Defendants have failed to establish entitlement to dismissal of the

remaining causes of action. In this regard, there are issues of fact concerning, *inter alia*, the scope of the parties' agreements and whether the agreements were breached. In addition, the complaint states causes of action for breach of the implied duties of good faith and fair dealing, *quantum meruit*, unjust enrichment, and breach of contract concerning recovery of rents.

The Defendants' arguments regarding Plaintiffs' (alleged lack of) standing to sue and Forum Non Conveniens are without merit. Significantly, regarding the former argument, the Defendants conceded a contractual relationship with both Plaintiffs, who are represented by counsel; the complaint was verified by one of the Plaintiffs and no request for additional verification was made by Defendants (*see* CPLR 3020). In addition, regarding the latter argument, considering the nature of the claims, the different residences of the parties, the fact that Defendants' agents executed various relevant documents in New York and met with Plaintiff Pearson in New York on several occasions, and the advanced age of Pearson, Defendants have not established that New York is an inconvenient forum to litigate this matter (*see Yoshida Printing Co. v Aiba*, 213 AD2d 275 [1<sup>st</sup> Dept 1995]).

This constitutes the decision and order of the court.

Dated: November 17, 2011

  
Hon. Vito M. DeStefano, J.S.C.

**ENTERED**  
NOV 23 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE