

Shi v Shaolin Temple
2011 NY Slip Op 33821(U)
July 1, 2011
Sup Ct, Queens County
Docket Number: 20167/09
Judge: Denis J. Butler
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable DENIS J. BUTLER IAS PART 12
Justice

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YAN ZHANG SHI as Administrator of the
Estate of JI MEI WANG, Deceased,

Plaintiff,

Index No.: 20167/09

-against-

Motion Date:
May 16, 2011

SHAOLIN TEMPLE, SHAOLIN TEMPLE OVERSEA
DEVELOPMENT HEADQUARTERS, LLC, SHAOLIN
TEMPLE OVERSEAS HEADQUARTERS and
GOULIN SHI,
Defendants.

Cal. No.:52
Seq. No.: 5

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The following papers numbered 1 to 23 read on this motion by defendants, Shaolin Temple, Shaolin Temple Oversea Development Headquarters, LLC and Shaolin Temple Overseas Headquarters ("Shaolin Temple"), to dismiss the "First", "Second", "Third" and "Fifth" causes of action in plaintiff's complaint, pursuant to CPLR §3211(a) (7).

Papers
Numbered

Notice of Motion, Affirmation, Exhibits,	
Memorandum of Law.....	1-7
Affirmation in Opposition, Affidavit,	
Exhibits.....	8-22
Reply Affirmation.....	23

Upon the foregoing papers, it is ordered that this motion is determined as follows:

This motion came on to be heard by the Hon. Martin J. Ritholtz on May 16, 2011, at which time the branch of the motion seeking a stay of discovery was denied by J. Ritholtz, by memorandum decision, dated May 16, 2011. The branch of the motion seeking dismissal of the complaint was marked "Fully Submitted"

and referred to this Part for determination by J. Ritholtz on May 16, 2011.

Defendants, Shaolin Temple, move to dismiss the "First", "Second", "Third" and "Fifth" causes of action in plaintiff's complaint, pursuant to CPLR §3211(a)(7), for failure to state a cause of action.

Plaintiff commenced this action to recover damages for unpaid salary, breach of third-party beneficiary contract, conversion and unjust taking, unjust enrichment and breach of contract.

Defendant-movants contend, in their memorandum of law, that the "First" and "Fifth" causes of action should be dismissed, pursuant to CPLR §3211(a)(7), for failure of plaintiff to state a cause of action for breach of contract. With regard to the "First" cause of action, movants allege that plaintiff has failed to demonstrate the existence of an employment contract between defendants, Shaolin Temple, and the deceased plaintiff. With regard to the "Fifth" cause of action, movants allege that plaintiff has not only failed to demonstrate the existence of an employment contract, but has failed to specify any provision of said alleged employment contract which was violated. Defendant-movants contend that plaintiff could not have been a "third-party beneficiary" of a contract between defendants, Shaolin Temple, and the Immigration and Naturalization Service ("INS"), as plaintiff has failed to show the existence of a contract between movants and the INS. As such, movants contend that the "Second" cause of action should be dismissed. Movants further contend that the "Fifth" cause of action, for conversion, must be dismissed because, either, a conversion action cannot be predicated on a breach of contract, or plaintiff has failed to state an action for conversion.

Plaintiff opposes the motion to dismiss contending that the complaint sufficiently states proper causes of action for breach of contract, conversion and breach of third-party beneficiary contract.

On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction (see, Leon v. Martinez, 84 N.Y.2d 83 [1994]) and the plaintiff is to be accorded the benefit of every possible inference (see, Cueto v. Hamilton Plaza Co., Inc., 67 A.D.3d 722 [2 Dept. 2009]). In determining whether plaintiff's complaint states a valid cause of action, the court must accept each allegation as true, without expressing any opinion on plaintiff's ultimate ability to establish the truth of

these allegations before the trier of fact (see, 219 Broadway Corp. v. Alexanders, Inc., 46 N.Y.2d 506 [1979]; Tougher Industries, Inc. v. Northern Westchester Joint Water Works, 304 A.D.2d 822 [2 Dept. 2003]).

Initially, the sole criterion to dismiss a complaint is whether the pleading, and the factual allegations contained within its four corners, manifests any cause of action cognizable at law (see, Gaidon v. Guardian Life Ins. Co. Of America, 94 N.Y.2d 330 [1999]). The court must find plaintiff's complaint to be legally sufficient if it finds that plaintiff is entitled to recovery upon any reasonable view of the stated facts (see, Hoag v. Chancellor, Inc., 246 A.D.2d 224 [1 Dept. 1998]).

As such, the first branch of defendants, Shaolin Temples' motion seeking to dismiss the "First" cause of action in the complaint for failure to state a cause of action, pursuant to CPLR §3211(a)(7), for "unpaid salary" is denied. The "First" cause of action (Ex. A) contains sufficiently particular statements to afford the parties notice of the transactions and occurrences intended to be proved and the material elements of a cause of action for breach of contract (see, East Hampton Union Free School Dist. v. Sandpebble Builders, Inc., 66 A.D.3d 122 [2 Dept. 2009]). To establish the existence of an enforceable agreement, plaintiff must prove an offer, acceptance of the offer, consideration, mutual assent and intent to be bound (see, Kowalchuk v. Stroup, 61 A.D.3d 118 [1 Dept. 2009]). In the instant matter, plaintiff has met such burden.

With regard to the "Second" cause of action in plaintiff's complaint, plaintiff has failed to show that the application for an immigration visa constituted a binding contract between defendants, Shaolin Temple, and INS in this matter. To prevail in a third-party claim, plaintiff must first demonstrate that he is the intended beneficiary of a valid and binding contract between other parties (see, Nabors v. Town of Somers, 72 A.D.3d 769 [2 Dept. 2010]; Breen v. Law Office of Bruce A. Barket, P.C., 52 A.D.3d 635 [2 Dept. 2008]). As such, plaintiff has failed to sustain a proper cause of action for breach of a third-party beneficiary contract against defendants, Shaolin Temple, and the "Second" cause of action of plaintiff's complaint is hereby dismissed.

With regard to the "Third" cause of action in plaintiff's complaint, plaintiff has failed to show that any "conversion" exists, outside of the claim for breach of contract herein. Plaintiff's claim for conversion does not demonstrate a separate taking of property from plaintiff, but merely restates the

"First" cause of action to recover damages for breach of contract. A claim for conversion cannot be predicated on a mere breach of contract (see, Tornheim v. Blue & White Food Products Corp., 56 A.D.3d 761 [2 Dept. 2008]; Wolf v. National Council of Young Israel, 264 A.D.2d 416 [2 Dept. 1999]). As such, plaintiff has failed to sustain a proper cause of action for conversion against defendants, Shaolin Temple, and the "Third" cause of action in plaintiff's complaint is hereby dismissed.

With regard to the "Fifth" cause of action in plaintiff's complaint, moving defendants have failed to demonstrate that the factual allegations contained within its four corners manifest no possible cause of action cognizable at law (see, Gaidon v. Guardian Life Ins. Co. Of America, supra). The instant "Fifth" cause of action, as a matter of pleading and resolving every fair inference in support of the pleader, may be read as a cause of action for wrongful death, relying on the wilful and malicious intent on the part of defendants to commit a wrongful act. As such, the question of death by suicide could be the natural, proximate consequence of such intentional act by defendants, permitting liability to attach to the moving defendants (see, EPTL §5-4.1; Fuller v. Preis, 35 N.Y.2d 425 [1974]; Stolarski v. DeSimone, 83 A.D.3d 1042 [2 Dept. 2011]; Bickford v. St. Francis Hospital, 19 A.D.3d 344 [2 Dept. 2005]). Therefore, the branch of defendants, Shaolin Temples' motion seeking to dismiss the "Fifth" cause of action is hereby denied.

Accordingly, the branches of defendants, Shaolin Temples' motion seeking to dismiss the "Second" and "Third" causes of action in plaintiff's complaint, pursuant to CPLR §3211(a)(7), for failure to state a cause of action for breach of third-party beneficiary contract and for conversion, are hereby granted, and the "Second" and "Third" causes of action in plaintiff's complaint are hereby dismissed. The branches of defendants, Shaolin Temples' motion seeking to dismiss the "First" and "Fifth" causes of action in plaintiff's complaint, pursuant to CPLR §3211(a)(7), for failure to state a cause of action for breach of contract and for wrongful death are hereby denied.

This Constitutes the Decision and Order of the Court.

July , 2011

Denis J. Butler, J.S.C,