

Lin v Yam
2012 NY Slip Op 33429(U)
November 15, 2012
Sup Ct, Queens County
Docket Number: 2398/11
Judge: Augustus C. Agate
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SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IAS PART 24
Justice

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GENG HWA LIN,

Index No.: 2398/11

Plaintiff,

Motion Dated:
July 17, 2012

-against-

Cal. No. 22

MAN C. YAM A/K/A MAN YAM AND
BERNARD & YAM, LLP.,

m# 1

Defendants.

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MAN C. YAM A/K/A MAN YAM AND
BERNARD & YAM, LLP.,

Third-Party Index No.:
35061/11

Third-Party Plaintiffs,

-against-

FLEUR DE LIS CONDOMINIUM d/b/a FLEUR DE
LIS d/b/a FLEUR DE LIS CORP. d/b/a THE
FLEUR DE LIS CONDOMINIUM c/o IMPACT
REAL ESTATE MANAGEMENT, INC., et al.,

Third-Party Defendants.

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The following papers numbered 1 to 5 read on this motion
by third party defendant Hua Xia a/k/a Eve Xia to dismiss the
third party action insofar as asserted against her pursuant to
CPLR 3211(a)(1), (a)(5) and (a)(7).

PAPERS
NUMBERED

Notice of Motion - Affidavits - Exhibits.....	1 - 3
Replying Affirmation.....	4 - 5
Memorandum of Law by third party plaintiff	

Upon the foregoing papers it is ordered that this motion by
third party defendant Hua Xia a/k/a Eve Xia ("Xia") to dismiss
the third party action is decided as follows:

This action arises out of plaintiff's purchase of
condominium unit 1K, located at 152-72 Melbourne Avenue, in

Flushing, New York on June 13, 2008. In February 2008, plaintiff retained defendants, who are attorneys, to represent him in connection with the purchase of the premises. Plaintiff subsequently commenced an action against the defendants on February 1, 2011. The complaint alleges that defendants failed to properly investigate and obtain financial records and public documents relating to the purchase of the premises as well as financial statements of the condominium. Plaintiff asserts that as a result of defendant's failure to obtain the proper documents and perform the proper investigations, he did not learn that the condominium had unpaid water and sewer bills in the amount of \$400,000.00.

On December 22, 2011, defendants commenced a third party action against, inter alia, Xia, who is alleged in the third party complaint to be the plaintiff's real estate agent in connection with the purchase of the subject premises. The third party complaint alleges that third party defendant Xia failed to disclose all of the condominium's liabilities, including the outstanding water and sewer charges. The third party complaint alleges causes of action against Xia sounding in breach of fiduciary duty, negligence and negligent misrepresentation. Third party defendant Xia now moves to dismiss the third party complaint insofar as asserted against her.

A defendant who seeks dismissal of a complaint pursuant to CPLR 3211(a)(5) on the ground that it is barred by the statute of limitations bears the initial burden of proving, *prima facie*, that the time in which to commence an action has expired. The burden then shifts to the plaintiff to aver evidentiary facts establishing that the cause of action falls within an exception to the statute of limitations, or raising an issue of fact as to whether such an exception applies. (Texeria v BAB Nuclear Radiology, P.C., 43 AD3d 403, 404 [2007].)

In the matter at hand, although the third party action as against Xia alleges a breach of fiduciary duty, negligence and negligent misrepresentation, in reality the causes of action against Xia in the third party complaint sound in contribution. A cause of action for contribution has a six year statute of limitations and accrues on the date payment is made by the party seeking contribution. (Tedesco v A.P. Green Indus., Inc., 8 NY3d 243, 247 [2007]; Bay Ridge Air Rights, Inc. v State of New York, 44 NY2d 49, 54 [1978]; Blum v Good Humor Corp., 57 AD2d 911, 911 [1977].) Here, no payment has been made by the third party plaintiff and, thus, the statute of limitations has not yet begun to run. Therefore, the branch of the motion to dismiss the third party complaint on the ground that the statute of limitations has

expired is denied.

The court will now address the branch of the motion to dismiss the third party complaint as against Xia pursuant to CPLR 3211(a)(7). When a party moves to dismiss a complaint pursuant to CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action. (Sokol v Leader, 74 AD3d 1180, 1180-1181 [2010]; see Guggenheimer v Ginzburg, 43 NY2d 268, 275 [1977].) "In considering such a motion, the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (Sokol v Leader, 74 AD3d at 1181; see Bokhour v GTI Retail Holdings, Inc., 94 AD3d 682, 682 [2012]; Nonnon v City of New York, 9 NY3d 825, 827 [2007]; Leon v Martinez, 84 NY2d 83, 87-88 [1994].) "Whether a plaintiff can ultimately establish its allegations is not part of the calculus." (Sokol v Leader, 74 AD3d at 1181, quoting EBC I, Inc. v Goldman Sachs & Co., 5 NY3d 11, 19 [2005].)

Applying these principles to the case at bar, the court finds that the third party complaint validly sets forth a cause of action against Xia.

The elements of a common law negligence cause of action are (1) a duty owed by the defendant to the plaintiff, (2) a breach of the duty, and (3) an injury proximately resulting from the breach. (Akins v Glens Falls City School Dist., 53 NY2d 325, 333 [1981]; Jiminez v Shahid, 83 AD3d 900, 901 [2011]; Stukas v Streiter, 83 AD3d 18, 23 [2011].) Here, the third party complaint contains all the elements to state a cause of action for negligence.

The court further finds that the third party complaint states a cause of action for negligent misrepresentation. In order to state a cause of action for negligent misrepresentation or omission, the complaint must allege (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) the information was incorrect or withheld; (3) reasonable reliance on the information or omission. (J.A.O. Acquisition Corp. v Stavitsky, 8 NY3d 144, 148 [2007]; High Tides, LLC v DeMichele, 88 AD3d 954, 959 [2011].) The third party complaint contains all the requisite elements for a cause of action against Xia for

negligent misrepresentation.

The elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct. (Armentano v Paraco Gas Corp., 90 AD3d 683, 684 [2011]; Rut v Young Adult Institute, Inc., 74 AD3d 776, 777 [2010].) A real estate broker is a fiduciary with a duty of loyalty and an obligation to act in the best interests of the principal. (Dubbs v Stribling & Assocs., 96 NY2d 337, 340 [2001].) A real estate broker, as an agent for the seller, however, is under no duty to disclose to a potential buyer information about a property's reputation. (Stambovsky v Ackley, 169 AD2d 254, 256 [1991]; see Daly v Kochanowicz, 67 AD3d 78, 98 [2009].) In the case at bar, the third party complaint alleges that Xia was engaged to serve as plaintiff's real estate agent. Xia merely avers, in conclusory fashion, that she was not acting as sales agent for the plaintiff. Such averment is insufficient to grant the motion to dismiss.

Finally, the branch of the motion to dismiss the third party complaint pursuant to CPLR 3211(a)(1) is denied. On a motion to dismiss a complaint on the ground that there is a defense founded upon documentary evidence pursuant to CPLR 3211(a)(1), the evidence submitted must "resolve all factual issues as a matter of law and conclusively dispose of the plaintiff's claim." (Del Pozo v Impressive Homes, Inc., 29 AD3d 621, 622 [2006] [quoting Berger v Temple Beth-El of Great Neck, 303 AD2d 346, 347 [2003]; Dodge v King, 19 AD3d 359, 360 [2005].)

In this case, the only documentary evidence submitted by the movant is the subject contract of sale. However, the contract does not conclusively dispose of the third party's claim herein.

Accordingly, this motion by third party defendant Hua Xia a/k/a Eve Xia is denied.

Dated: November 15, 2012

AUGUSTUS C. AGATE, J.S.C.