SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. George J. Silver *Justice* PART 10

CARMEN LIZ

- v -

JOSE A. PARRA

INDEX NO. 155714-2012

MOTION DATE

MOTION SEQ. NO. 001

The following papers, numbered 1 to 4, were read on this motion for

Notice of Motion/ Order to Show Cause — Affirmation of Emergency — Affidavit(s) — Exhibits	No(s). 1, 2
Notice of Cross-Motion — Affirmation(s) — Affidavit(s) — Exhibits	No(s). 3
Affirmation in Opposition to Cross-Motion	No(s). 4

Upon the foregoing papers, the motion is decided as follows:

In this action for injunctive relief, breach of contract and the imposition of a constructive trust, plaintiff Carmen Liz ("plaintiff") moves by order to show cause for an order enjoining defendant Jose A. Parra ("defendant") from commencing a proceeding under Real Property Actions and Proceedings Law Article 7 in the Civil Court of the City of New York City to evict plaintiff from apartment 4, 503 West 11th Street, New York, New York ("apartment 4"). Defendant opposes the order to show cause and cross-moves pursuant to CPLR § 3211 [a] [1] and [7] to dismiss plaintiff's complaint.

Plaintiff's complaint alleges that she has lived in apartment 4 for approximately 15 years. The building where apartment 4 is located is owned by 503 West 111th Street Housing Development Fund Corporation, a residential cooperative corporation, The complaint alleges that defendant became the owner of apartment 4 in or around June 1995 when the building was converted to cooperative ownership. The complaint further alleges that defendant moved to the Dominican Republic in or around 2007 and repeatedly stated to plaintiff that he had no intention of returning to New York City. According to plaintiff she and defendant agreed in 1997 that plaintiff would occupy apartment 4 pursuant to an agreement that called for plaintiff to pay the monthly maintenance charges for the apartment to the owner. Plaintiff alleges that she moved into apartment 4 on 1997 pursuant to the agreement and has continuously resided there since. Plaintiff further alleges that since the commencement of her occupancy, she has paid the monthly maintenance charges and other charges related to apartment 4.

The complaint further alleges that between 1997 and November 2008 plaintiff expended $15,000 on improvements and renovations to apartment 4. Said expenditures were allegedly made with defendant's knowledge and consent. Plaintiff alleges that in addition to the $15,000 in construction expenditures, she also loaned defendant $25,000 during the period prior to November 2, 2008. Defendant's agreement to repay the sums expended by plaintiff to renovate apartment 4 and the sums loaned to defendant were memorialized in an agreement signed by plaintiff and defendant on November 12, 2008. Plaintiff alleges that this agreement also memorialized defendant's agreement to give plaintiff

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

1. Check one: ..... ■ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. Check as appropriate: MOTION IS: ☐ GRANTED ■ DENIED ☐ GRANTED IN PART ☐ OTHER
3. Check as appropriate: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

the opportunity to purchase apartment 4 from defendant, that defendant could not seek other purchasers of apartment 4 unless he and plaintiff failed to agree on a purchase price, and that plaintiff would have the right to continue to occupy apartment 4 unless and until she and defendant failed to agree to a purchase price and defendant found another purchaser.

The complaint further alleges that plaintiff loaned defendant an additional sum of $5,500 during the period between November 13, 2008 and February 3, 2011. Defendant's agreement to repay the $5,500 was memorialized in a document allegedly signed by defendant on February 3, 2011. An additional $3,000 was allegedly loaned to defendant by plaintiff in or around March 2010. According to the complaint, the agreements provided that the sums expended and loaned by plaintiff could be applied to the purchase price of apartment 4 in the event plaintiff purchased it from defendant.

The first cause of action in the complaint is for injunctive relief. Plaintiff alleges that by notice dated July 3, 2012 defendant has threatened to terminate plaintiff's occupancy in apartment 4 and to evict her on the grounds that defendant intends to resume occupancy. Plaintiff alleges that defendant's motivation in sending the eviction notice is to render apartment 4 vacant so defendant may offer it for sale to prospective purchasers other than plaintiff. Plaintiff alleges that defendant does not intend to return to New York in order to reside in apartment 4. Plaintiff alleges that if defendant is successful in evicting her from apartment 4, plaintiff's valuable rights under the agreements will have been permanently and irrevocably destroyed. Plaintiff also alleges that being forced to vacate apartment 4 would be harmful and disruptive to her life and to that of her mother, who also resides in the building and who relies upon plaintiff for her care and well-being.

Plaintiff's second cause of action, for breach of contract, alleges that defendant in indebted to plaintiff in the amount of $48,500 and that if defendant is successful in evicting plaintiff, plaintiff is entitled to damages in that amount, subject to application of $48,5000 toward the purchase price of apartment 4 in the event plaintiff and defendant reach an agreement for its purchase.

Plaintiff's third cause of action is for the imposition of a constructive trust. Plaintiff alleges that by attempting to evict her from apartment 4 her without offering her the opportunity to purchase it defendant has acted wrongfully and in derogation or plaintiff's contractual rights. Plaintiff further alleges that defendant's claim that he intends to return to New York and resume occupancy of apartment 4 is a pretext and that defendant will be unjustly enriched if he is permitted to retain plaintiff's $48,500 without selling apartment 4 to her. The complaint alleges that if defendant is successful in evicting plaintiff from apartment 4, plaintiff is entitled to a constructive trust on the proceeds of any sale of apartment 4 to any purchaser other than her, including not only the $48,500 plaintiff has advanced toward the purchase price but also including her share of profits on the sale, which amounts defendant would never have received but for plaintiff's willingness to pay the cost of renovations and as well as the monthly maintenance charges.

Paragraph three of November 12, 2008 agreement referred to in plaintiff's complaint states that plaintiff "[a]s under tenant . . . has at her own expense and with consent of [defendant] carried out extensive renovation, improvement and repairs that were necessary to make the apartment suitable to meet her needs and enhance her living conditions. The sum of money spent in renovating, improving and repairing the unit in question amounted to $15,000.00." Paragraph 4 states that defendant "admits that he has borrowed money from [plaintiff] on numerous occasions. At the present, the total amount of money that [defendant] has borrowed from [plaintiff] stands at $25,000.00." The fifth paragraph of the agreement states "[defendant] hereby grants [plaintiff] the right of first refusal in the event he decides to sell the shares appurtenant to his unit. If both parties come to an agreement with respect to the unit selling price, [defendant] will deduct $40,000.00 from the selling price or the amount still owing at the time of said transaction." The sixth paragraph provides that in the event the parties fail to reach an agreement with respect to the selling price and plaintiff decides to sell apartment 4 to another buyer, "[defendant] will paid [plaintiff] $40,000.00 or the amount still owing from his gross profit."

The February 3, 2011 document allegedly memorializing defendant's agreement to repay $5,500 plaintiff claims to have loaned between November 13, 2008 and February 3, 2011 states "I, Jose A. Parra

agreed [sic] that I am borrowing $5,500 (five thousand five hundred) today from Ms. Carmen Liz. This money should be [illegible] to previous agreement for the purpose of selling the apartment at 503 W. 111 St #4 as part of the payment's purchase."

In support of her order to show cause to enjoin defendant from commencing eviction proceedings, plaintiff's affidavit repeats the allegations set forth in her complaint. Plaintiff also avers that has not charged defendant interest on the loans she alleges she made to him because it was understood by the parties that the monies loaned would be applied to the purchase price of apartment 4. Plaintiff also avers that her decision not to charge interest was in exchange for defendant granting her the right of first refusal. Plaintiff claims that if her right to purchase apartment 4 is destroyed it is unlikely that she will again be in position to purchase a cooperative apartment.

In opposition, defendant avers that he sublet apartment 4 to plaintiff in 1995 for 2 years pursuant to a sublease agreement, which expired in 1997. Defendant contends that plaintiff has since resided in apartment 4 as a month-to-month tenant. Defendant also contends that plaintiff made numerous structural modifications to apartment 4 without his consent. Defendant also contends that he never promised plaintiff that she could live in apartment 4 indefinitely and that he never promised to sell apartment 4 to plaintiff. Defendant claims that it has always been his intention, despite his frequent trips to the Dominican Republic, to move back into apartment 4. Defendant claims that his health is failing, that he is residing with a friend in Manhattan, that he intends to use apartment 4 as his primary residence and, therefore, has no intention of selling it.

Analysis

To establish her entitlement to a preliminary injunction, plaintiff must show (1) a probability of success in the underlying action; (2) danger of irreparable injury in the absence of an injunction; and (3) a balancing of the equities in its favor (*Coinmach Corp. v Fordham Hill Owners Corp.*, 3 AD3d 312 [1st Dept 2004]). On a motion to dismiss brought pursuant to CPLR § 3211, "the court must presume the facts pleaded to be true and must accord them every favorable inference... it is also axiomatic that factual allegations that consist of bare legal conclusions are not entitled to such consideration. (*Hispanic Aids Forum v Estate of Joseph Brown*, 16 AD3d 294 [1st Dept 2005]). On a motion to dismiss pursuant to CPLR §3211[a] [1] "the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324, 865 NE2d 1210, 834 NYS2d 44 [2007]) (internal citations omitted). Such a motion "may be appropriately granted only when the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mut. Life Ins. Co. of NY*, 98 NY2d 314, 774 NE2d 1190, 746 NYS2d 858 [2002]). Documentary evidence includes "judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable"" (*Fontanetta v Doe*, 73 AD3d 78 [2d Dept 2010]).

According to well-established rules of contract interpretation, "when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms" *(W.W.W. Assocs v Giancontieri*, 77 NY2d 157, 162, 566 NE2d 639, 565 NYS2d 440 [1990]). "[C]ourts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing" (*Reiss v Financial Performance Corp.*, 97 NY2d 195, 199, 764 NE2d 958, 738 NYS2d 658 [2001] [internal quotation marks omitted]). We instead concern ourselves "with what the parties intended, but only to the extent that they evidenced what they intended by what they wrote" (*Rodolitz v Neptune Paper Prods.*, 22 NY2d 383, 387, 239 NE2d 628, 292 NYS2d 878 [1968] [internal quotation marks omitted]). Accordingly, before assessing evidence regarding what was in the parties' minds at the time of the agreement, courts must first look to the agreement itself (*Ashwood Capital, Inc. v OTG Mgt., Inc.*, 99 AD3d 1, 8 [1st Dept 2012]). In order to determine the contracting parties' intent, a court looks to the objective meaning of contractual language, not to the parties' individual subjective understanding of it (*id.*). Whether a

contractual term is ambiguous must be determined by the court as a matter of law, looking solely to the plain language used by the parties within the four corners of the contract to discern its meaning and not to extrinsic sources (*see Kass v Kass*, 91 NY2d 554, 566, 696 NE2d 174, 673 NYS2d 350 [1998]). Contracts must be read as a whole and all terms of a contract must be harmonized whenever reasonably possible (*Matter of Westmoreland Coal Co. v Entech, Inc.*, 100 NY2d 352, 358, 794 NE2d 667, 763 NYS2d 525 [2003]). Generally, the signer of a written agreement is conclusively bound by its terms unless there is a showing of fraud, duress or other wrongful act (*South St. Ltd. Partnership v Jade Sea Restaurant, Inc.* 187 AD2d 396, 397 [1st Dept 1992]).

A reading of the plain language of the November 12, 2008 contract establishes that it grants plaintiff only a right of first refusal in the event defendant decides to sell his shares in apartment 4. If defendant decides to sell, and if he and plaintiff are able to agree on a selling price for the unit, the agreement further grants plaintiff a $40,000 deduction in the selling price. The agreement does not grant plaintiff a possessory interest in apartment 4 whereby defendant would be barred from attempting to evict her. A right of first refusal, as distinguished from an option, does not "give its holder the power to compel an unwilling owner to sell; it merely requires the owner, when and if he decides to sell, to offer the property first to the party holding the preemptive right so that he may meet a third-party offer or buy the property at some other price set by a previously stipulated method" (*Metropolitan Transp. Auth. v Bruken Realty Corp.*, 67 NY2d 156, 163, 492 NE2d 379, 501 NYS2d 306 [1986]; *see also LIN Broadcasting Corp. v Metromedia, Inc.*, 74 NY2d 54, 56, 542 NE2d 629, 544 NYS2d 316 [1989]). "The right of first refusal is violated only when the landowner sells the property without first offering the optionee the right to match the purchase offer" (*Rome Sav. Bank v Husted & Son*, 171 AD2d 1048, 1049, 569 NYS2d 236 [1991]). So long as a right of first refusal is in effect, the holder of the right can enjoin a proposed sale of the property (*Johnnies Pelham Rd. Serv., Inc. v Thomas*, 26 AD3d 414 [2d Dept 2006]). Here there are no factual allegations, only speculation in plaintiff's complaint and her affidavit, that defendant intends evict her in order to render the apartment vacant so that he may offer it for sale to potential purchasers other than plaintiff. Claims that are conclusory and speculative must be dismissed (*see Harvey v Greenberg*, 82 AD3d 683 [1st Dept 2011]; (*Biondi v Beekman Hill House Apt., Corp.*, 257 AD2d 76, 82 [1st Dept 1999). Moreover, because the November 12, 2008 agreement gives plaintiff only a right of first refusal, and not the right to remain in possession of apartment 4, plaintiff does not have any contractual grounds upon which to enjoin defendant from commencing an eviction proceeding against her. Thus, plaintiff has failed to establish a likelihood of success on the merits.

Further, because the November 12, 2008 agreement does not make plaintiff's ability to exercise the right of first refusal contingent upon her being in possession of apartment 4, even if defendant is successful in evicting her, plaintiff's contractual right of first refusal will remain in effect. Thus, contrary to the allegation in her complaint, plaintiff will not lose the right to have defendant negotiate with her in good faith as to a purchase price for apartment 4, should defendant ever elect to sell, if plaintiff is evicted. If defendant decides to sell apartment 4 after plaintiff's eviction, and attempts to do so without first offering plaintiff to opportunity to purchase it, plaintiff can seek to enjoin the proposed sale. In other words, plaintiff will suffer no irreparable harm with respect to her ability to enforce her right of first refusal if she is evicted from apartment 4. Plaintiff's order to show cause is, therefore, denied and, for the same reasons, her first cause of action for injunctive relief is dismissed.

Plaintiff's breach of contract cause of action must also be dismissed. The essential elements of a cause of action for breach of contract are the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages (*Morpheus Capital Advisors LLC v. UBS AG*, 105 AD3d 145 [1st Dept 2013]). While the November 12 2008 contract and the February 3, 2011 document establish that defendant borrowed certain monies from plaintiff, both documents make clear that defendant's obligation with respect to repayment of those monies is limited to applying the amounts allegedly owed so as to reduce the purchase price of apartment 4 in the event defendant decides to sell apartment 4 and he and plaintiff are able to reach an agreement on the selling price, or, in the event plaintiff and defendant are unable to reach an agreement on a selling price and

defendant sells apartment 4 to another purchaser, defendant is required to pay plaintiff the amounts owed out of his profit on the sale of apartment. The complaint does not allege that any of these conditions have occurred. First and foremost, there is no factual allegation in plaintiff's verified complaint that defendant has decided to sell apartment 4. Plaintiff's allegations that defendant does not intend to occupy apartment 4 but instead intends to sell it to another buyer following plaintiff's eviction are, as discussed above, speculative and not to be accorded every favorable inference. However, assuming arguendo that the complaint contains a sufficient factual allegation that defendant does not intend to reside in apartment but instead has decided sell it, the complaint does not allege that defendant and plaintiff agreed upon a purchase price for apartment 4 but defendant thereafter failed to reduce that agreed upon price by the amounts allegedly owed by defendant. The complaint also does not allege that defendant sold apartment 4 to a third-party and failed to repay plaintiff the monies she loaned from the proceeds of that sale. Thus, the complaint does not sufficiently allege a breach by defendant. Moreover, as with the right of first refusal, plaintiff's right to repayment of the monies allegedly loaned by her following a sale of apartment 4, either through a credit to plaintiff as purchaser or from the proceeds of the sale to a third-party, would not be extinguished by plaintiff's eviction from apartment 4 as there is nothing in the November 12, 2008 agreement that conditions plaintiff's contractual rights on her being in possession of apartment 4.

To the extent that plaintiff's second cause of action can be interpreted to allege a claim for anticipatory breach, it must still be dismissed. The doctrine of anticipatory breach allows a party to a contract to treat the entire contract as broken and to sue immediately for the breach where there has been an anticipatory breach by the other party (*Rachmani Corp. v 9 E. 96th St. Apt. Corp.*, 211 AD2d 262, 266 [1st Dept 1995]). "Once a party has indicated an unequivocal intent to forego performance of his obligations under a contract, there is little to be gained by requiring a party who will be injured to await the actual breach before commencing suit, with the attendant risk of faded memories and unavailable witnesses. However, it is clear that there must be a definite and final communication of the intention to forego performance before the anticipated breach may be the subject of legal action" (*id.*). The verified complaint contains only plaintiff's speculation that defendant intends to breach the parties' contract and no allegation of a definite and final communication by defendant of his intent to breach the agreement.

Plaintiff's third cause of action is dismissed as well. The elements of a constructive trust are a confidential or fiduciary relationship, a promise, a transfer in reliance thereon and unjust enrichment (*Sharp v Kosmalski*, 40 NY2d 119, 121, 351 NE2d 721, 386 NYS2d 72 [1976]). The ultimate purpose of a constructive trust is to prevent unjust enrichment, and it will be imposed "[w]hen property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest" (*Broderson v Parsons*, 106 AD3d 677, 679 [2d Dept 2013] internal citations omitted]). Plaintiff's complaint does not allege that she and defendant had a confidential or fiduciary relationship and this omission warrants dismissal of plaintiff's third cause of action (*Krinos Foods, Inc. v Vintage Food Corp.*, 30 AD3d 332, 333 [1st Dept 2006]; *see also Glynn v 177 W. 26th Realty LLC*, 102 Ad3d 558 [1st Dept 2013]).

Accordingly, it is hereby

ORDERED that plaintiff's order to show cause is denied; and it is further

ORDERED that defendant's cross-motion to dismiss is granted and the complaint against him is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that defendant is to serve a copy of this order, with notice of entry, upon plaintiff within 20 days of entry.

Dated: OCT 29 2013

New York County

George J. Silver, J.S.C.

GEORGE J. SILVER