

Alayoff v Alayoff

2013 NY Slip Op 33910(U)

March 18, 2013

Supreme Court, Queens County

Docket Number: 28546 2010

Judge: Allan B. Weiss

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ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS
Justice

IA Part 2

Shereann Alayoff

Index No. : 28546 2010

Plaintiff

Motion Date: 12/12/12

-against-

Motion Cal. No.: 1

Abraham Alayoff

Motion Seq. No. 6

Defendant

2013 APR - 2 P 12: 06
QUEENS COUNTY CLERK
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The following papers numbered 1 to 19 read on this motion by defendant to dismiss the second cause of action in the complaint, pursuant to CPLR 3212; and cross motion by plaintiff for summary judgment in her favor, to strike defendant's answer and to amend the complaint pursuant to CPLR 3025[b].

| | Papers <u>Numbered</u> |
|--|---------------------------|
| Notice of Motion - Affidavits - Exhibits..... | 1 - 4 |
| Notice of Cross Motion - Affidavits-Exhibits | 5 - 9 |
| Answering Affidavits - Exhibits | 10-13 |
| Reply Affidavits | 14-19 |

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

Plaintiff in this breach of contract action alleges that defendant breached their oral agreement to transfer shares of stock for a cooperative apartment and to transfer title to an automobile to plaintiff in exchange for her employment with defendant (from August 2007 through May, 2009), in lieu of a salary. Defendant moves to dismiss the second cause of action of the complaint which alleges breach of an employment agreement. Plaintiff opposes the motion and cross moves for summary judgment in her favor, to strike defendant's answer for failure to comply with discovery and to amend her complaint. Defendant opposes plaintiff's cross motion.

* 2]

Facts

The verified complaint alleges the following. On or about October, 2003, in reliance on a promise by defendant, plaintiff (defendant's daughter) moved out of the family home of defendant. On or about March 2004, defendant purchased a co-op apartment at Meadow Apartments Corp., located at 110-34 64th Avenue, Apartment 34A, in Forest Hills, New York. On or about March, 2004, plaintiff moved into the said co-op apartment. The second cause of action in the complaint alleges that defendant breached his oral agreement to transfer ownership of the co-op apartment and title to a vehicle to plaintiff in exchange for her "working" for defendant. The terms of the "employment" are factually disputed, as well as whether in fact such relationship even existed. While plaintiff alleges that she "worked" for defendant for a period of approximately one year and a half, defendant contends that the alleged "employment" consisted of a few days when plaintiff went to defendant's office, retrieved mail and paid a few bills while defendant was out of the country. Nonetheless, plaintiff alleges that she received no salary for her employment and was instead promised an apartment and a vehicle, ownership of which defendant allegedly promised to transfer to plaintiff. Arguing that there was no "employment" relationship, defendant moves to dismiss count two.

Motion by defendant

The motion to dismiss the second cause of action asserted in the complaint is granted. The statute of frauds prohibits the conveyance of real property without a written contract (*see* General Obligations Law § 5-703[1]). This statute applies as well to a contract conveying an interest in a cooperative apartment (*see Moloney v Weingarten*, 118 AD2d 836 [1986], *lv. denied* 69 NY2d 608 [1987]). The alleged oral agreement was not simply for the purpose of allegedly conveying property to plaintiff. It also supposedly spelled out the terms by which defendant would purchase the property in the first place, before conveying it to plaintiff. Such an agreement would come squarely within the Statute of Frauds, and would, thus, be unenforceable if not in writing (*Najjar v National Kinney Corp.*, 96 AD2d 836 [1983]).

While not quite clear, it appears plaintiff is arguing that the alleged oral agreement falls within the partial performance exception of the Statute of Frauds because she fully performed by "working" for defendant for the period of August 2007 through May, 2009, without receiving a "salary" from defendant. However, the doctrine of part performance can only be invoked if the actions of the parties can be characterized as "unequivocally referable" to the agreement alleged. The actions must be explainable only with reference to the oral agreement (*Anostario v Vicinanza*, 59 NY2d 662 [1983]; *Benedict Realty Co. v City of New York*, 45 AD3d 713 (2d Dept.2007); *Cooper v Schube*, 86 AD2d 62 [1st Dept.1982], *affd*, 57 NY2d 1016; *Klein v Jamor Purveyors, Inc.*, 108 AD2d 344 [2d Dept.1985]). Here, there are other possible explanations for the actions of the parties.

* 3

While Plaintiff is correct in asserting that GOL § 5-703(4) permits the Court "... to compel the specific performance of agreements in cases of part performance" even where the Statute of Frauds would normally apply, pursuant to the plain language of the Statute and the relevant case law, this section only applies to an action for specific performance. It cannot be applied in cases seeking monetary damages only (*see Papell v Calogero*, 114 AD2d 403 [2nd Dept. 1985], *mod. on other grounds*, 68 NY2d 705 [1986]; *Mihalko v Bloody*, 86 AD2d 723 [3rd Dept. 1982]). The three causes of action asserted by Plaintiff herein seek monetary damages only.

Accordingly, the motion to dismiss the second cause of action in the complaint is granted.

Cross Motion by plaintiff

The branch of the cross motion for summary judgment in her favor is denied. "[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Manicone v City of New York*, 75AD3d 535 [2d Dept. 2010]), citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the plaintiff's opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Here, plaintiff merely alleges that defendant submitted a "disingenuous" affidavit and that summary judgment should be granted to plaintiff based upon this fact. The Court finds no legal authority for this proposition, nor does plaintiff supply any. Therefore, the branch of the cross motion which is for summary judgment in favor of plaintiff is denied.

The branch of the cross motion which is to strike defendant's answer is denied as moot. Plaintiff alleges that defendant failed to submit "copies of any and all correspondence to or from Meadow Apartments Corp., its agents, servants and representatives, including Howard Lepow, President, to or from defendant or his agents, servants or representatives, relating to the co-op apartment, 110-34 64th Avenue, Apartment 34A, Forest Hills, New York, for the period of January, 2003 through present."

Defendant has since provided the said documents and the issue is now moot.

The branch of the cross motion to amend the complaint is denied. Specifically, the complaint calls for monetary damages in the First, Second and Third Causes of Action. Plaintiff now seeks to amend the complaint to request title to the shares of the coop apartment and transfer of title to the 1996 Toyota Reva (the vehicle), as damages for all three

* 4
causes of action. Since the second cause of action is dismissed, the branch of the cross motion which is to change the damages therefor, is denied.

As for the remaining causes of action, the branch of the cross motion which is to amend the complaint to include as damages the transfer of title to the apartment and title to the vehicle, is also denied. Leave to amend a pleading rests within the trial court's discretion and should be freely granted in the absence of prejudice or surprise resulting from the delay except in situations where the proposed amendment is wholly devoid of merit. (*see* CPLR 3025; *Ramos v Baker*, 91 AD3d 930 [2nd Dept.2012]). Whether to grant or deny leave to amend is committed to the Supreme Court's discretion to be determined on a case by case basis (*Edenwald Contr. Co. v City of New York*, 60 NY2d 957 [1983]). In exercising its discretion, the court will consider how long the amending party was aware of the facts upon which the motion was predicated, whether a reasonable excuse for the delay is offered and whether prejudice will result (*Sampson v Contillo*, 55 AD3d 591 [2nd Dept.2008]). "Where a party is guilty of an extended delay in moving to amend, the court should insure that the amendment procedure is not abused by requiring a reasonable excuse for the delay and an affidavit of merit" (*Boyd v Trent*, 297 AD2d 301 [2nd Dept.2002]). Leave to amend may be denied where the opposing party has been or would be prejudiced by a delay in seeking the amendment. (*Fahey v County of Ontario*, 44 NY2d 934 [1978]). Here, plaintiff, *inter alia*, offered no reasonable excuse for the more than two-year delay in moving for leave to amend the complaint, despite her admission that the facts supporting the proposed changes to obtain specific performance instead of monetary damages, were known to her at the time she served the original complaint (*see Nehmadi v Davis*, 95 AD3d 1181 [2d Dept. 2012]; *Young v A. Holly Patterson Geriatric Ctr.*, 17 AD3d 667 [2d Dept. 2005]; *Castagne v Barouh*, 249 AD2d 257 [2d Dept. 1998]).

The court has examined plaintiff's remaining contentions and concludes they either lack merit or are unpersuasive given the Court's determination.

Accordingly, the motion is granted and the cross motion is denied.

Dated: March 8 2013



J.S.C.

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2013 APR -2 P 12:06