

Kuhn v Brown

2014 NY Slip Op 30910(U)

April 4, 2014

Supreme Court, New York County

Docket Number: 451517/11

Judge: Barbara Jaffe

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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DEANNA KUHN and NOEL CAPON,

Index No. 451517/11

Plaintiffs,

Mot. seq. no: 003

- against -

DECISION AND ORDER

ELSIE BROWN,

Defendant.

-----X
ELSIE BROWN,

Third Party-Plaintiff,

-against-

501 WEST 143 STREET HOUSING DEVELOPMENT
FUND CORPORATION, D.K. HANON & ASSOCIATES,
LLC, and JOHN DOES AND/OR JANE DOES, NUMBERED
"1" THROUGH "5" Names Being Fictitious, AND
INTENDED TO BE THE COOPERATIVE BOARD
MEMBERS OF 501 WEST 143 STREET HOUSING
DEVELOPMENT FUND CORPORATION.

Third Party-Defendants.

-----X
BARBARA JAFFE, JSC:

For third-party plaintiff:

Evan Van Leer-Greenberg, Esq.
Law Office of Van Leer & Greenberg
132 Nassau St., Ste. 219
New York, NY 10038
212-962-1596

For defendants:

Margaret Devoe, Esq.
New York City Law Department
100 Church St.
New York, NY 10007
212-356-2566

Third-party plaintiff (plaintiff) moves pursuant to CPLR 3025(b) for leave to serve a supplemental complaint upon proposed third-party defendants City and the New York City Department of Housing Preservation and Development (defendants), and to amend the caption accordingly. Defendants oppose.

I. BACKGROUND

Plaintiff, as relevant here, seeks money damages allegedly resulting from defendants' alleged breach of an agreement. By decision and order dated April 2, 2013, I granted defendants' motion to dismiss the third-party action, as plaintiff had not filed a notice of claim before commencing it, a condition precedent to suing defendants. (NYSCEF 34).

In the proposed amended third-party complaint and attached exhibits, plaintiff alleges that on or about June 26, 1990, City sold the building located at 501 West 143rd Street in Manhattan to third-party defendant 501 West 143 Street Housing Development Fund Corporation (HDFC) for \$9,500. The parties thereupon entered into a security agreement whereby HDFC agreed to pay City 40 percent of its profits from the sale of any shares in the building, and City agreed to audit HDFC no more than once every two years, waivable under certain circumstances. The parties also agreed that upon HDFC's dissolution, the agreement would terminate "unless HDFC shall be in default of any of its obligations hereto." (NYSCEF 50, Exh. G).

On or about June 23, 1993, HDFC dissolved. Thereafter, on or about January 13, 1994, plaintiff purchased an apartment in the building which, pursuant to her proprietary lease, is subject to a lien under the aforementioned security agreement. (*Id.*).

II. CONTENTIONS

In her proposed third-party action, plaintiff alleges that because HDFC mismanaged the building's finances, she was unable to sell her apartment, and that due to City's continuing breach of its duty to audit, manage, and review the building's finances pursuant to the security agreement, she has sustained damages. She also contends that having now filed a notice of claim, she may assert against defendants causes of action for breach of contract, indemnification,

and contribution. (*Id.*).

Defendants deny that plaintiff is an intended beneficiary of the security agreement, observing that the purpose of the agreement is to ensure that HDFC would not, following a sale, sell the building or any shares at a windfall, and that in such an event, City would collect 40 percent of the profits. They also observe that the audit provision of the agreement was included to ensure that City collect the 40 percent of the profits. Moreover, defendants argue, City's alleged duty to audit would have terminated in 1993 on HDFC's dissolution and as a result, plaintiff fails to state a cause of action, and the complaint is otherwise devoid of merit. They also contend that as plaintiff's third-party complaint was dismissed due to her failure to file a notice of claim, she is required to commence a new action. (NYSCEF 51, 52).

Plaintiff claims that the agreement requires that City conduct audits, that the agreement is still in effect as the parties are in default, and that, in any event, matters of contract interpretation, including plaintiff's status as a beneficiary, are for trial. Plaintiff also contends that, having filed her notice of claim, she properly commences this action by filing a motion for leave to serve a supplemental complaint. (Van Leer-Greenberg Reply Aff.).

III. ANALYSIS

Generally, leave to amend or supplement pleadings pursuant to CPLR 3025(b) should be freely granted. (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499 [1st Dept 2010]). However, in order to avoid needless and costly litigation, courts should examine the proposed complaint's underlying causes of action; if they plainly lack merit, leave must be denied. (*Mishal v Fiduciary Holdings, LLC*, 109 AD3d 885, 886 [2d Dept 2013]; *Zaid Theatre Corp. v Sona Realty Co.*, 18 AD3d 352, 354-55 [1st Dept 2005]).

A third party seeking to enforce an agreement as a beneficiary must establish: 1) the existence of a valid and binding contract between other parties; 2) that the contract was intended for her benefit; and 3) that her benefit is sufficiently immediate, rather than incidental, to evince the parties's assumption of a duty to compensate her if the benefit is lost. (*Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 336 [1983]). The contract must reflect an intent to allow the recovery sought by the purported beneficiary. (*Alicea v City of New York*, 145 AD2d 315, 317 [1st Dept 1988]). A court is to look at the agreement and circumstances surrounding the contract in determining whether the parties intended to confer such a benefit upon the alleged beneficiary, and whether those circumstances would render her reliance on the agreement both reasonable and probable. (Restatement [Second] of Contracts § 302 [d] [1981]; *Fourth Ocean Putnam Corp. v Interstate Wrecking Co., Inc.*, 66 NY2d 38, 44 [1985]).

Here, the security agreement contains no mention of plaintiff, who purchased her apartment years after it was signed. And, an intent to afford her the right to seek money damages resulting from City's failure to audit HDFC adequately is neither apparent nor reasonably inferred from the agreement. (*See Alicea*, 145 AD2d at 318 [plaintiffs not signatories, contract devoid of any language evincing intent to allow them to enforce it; plaintiffs thus lacked third-party beneficiary status]). Consequently, whether or not the agreement terminated is of no moment.

As plaintiff's breach of contract cause of action against defendants lacks merit, so do her claims for indemnification and contribution. (*See 2470 Cadillac Resources, Inc. v DHL Exp. (USA), Inc.*, 84 AD3d 697, 698 [1st Dept 2011], *lv denied* 18 NY3d 921 [2012] [claims duplicative of unsuccessful third-party beneficiary contract claim failed to state cause of action]).

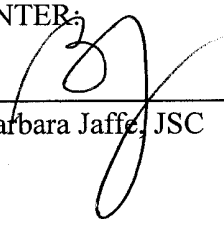
Given this result, I need not address defendants' argument that plaintiff must commence a separate action.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that Elise Brown's motion for leave to serve a supplemental third-party complaint upon the City of New York and the New York City Department of Housing Preservation and Development is denied.

ENTER:



Barbara Jaffe, JSC

DATED: April 4, 2014
New York, New York