Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, **ALLAN B. WEISS** IAS PART 2
Justice

TENG FANG JIANG, LI ZHONG JIANG and JIN LONG TENG, LLC,

Plaintiffs,

-against-

BUILDING NUMBER ONE, LLC, EDWARD L. KAVANAGH and ALFREDO PADILLA,

Defendants.

Index No: 6584/14

Motion Date: 7/14/14

Motion Seq. No.: 1

The following papers numbered 1 to 9 read on this motion by plaintiffs for an Order dismissing the defendants' counterclaims and disqualifying EDWARD L. KAVANAGH, from representing BUILDING NUMBER ONE, LLC and ALFREDO PADILLA (collectively co-defendants) in this action.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits	1 - 5
Answering Affidavits-Exhibits.....	6 - 7
Replying Affidavits.....	8 - 9

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

Plaintiffs, Teng Fang Jiang and Li Zhong Jiang (buyers) entered into a contract on December 17, 2013 to purchase the commercial real property known as 102-36 & 102-38 Corona Ave., Corona, NY from defendant, Building Number One, LLC (seller) whose principal is defendant, Alfred Padilla, for the sum of $1,150,000.00. Edward L. Kavanagh was the attorney who represented the seller for the transaction. Plaintiffs were represented by separate counsel.

The plaintiffs commenced this action against the seller, Padilla and Kavanagh for breach of contract seeking money damages including punitive damages, specific performance, injunctive and declaratory relief. The complaint alleges, inter alia, that the

defendants, breached the contract of sale by inserting an "illegal" provision in the contract, to wit, "Seller shall have the absolute right to cancel this contract at any time." Plaintiffs allege that the allegedly "illegal" provision was inserted for the purpose of compelling the purchasers to pay, "under the table", $100,000.00 in addition to the contract purchase price, which the seller later raised to $150,000.00 and threatened to cancel the contract if the sum was not paid.

The seller and Padilla, appeared by service of an answer containing counterclaims for breach of contract, fraud and slander of title. Kavanagh appeared by service of a separate answers asserting a counterclaim for contractual indemnification pursuant to "Section 10 Escrow Conditions" contained in the Contract of Sale. Kavanaugh represents all defendants in this action.

Plaintiffs now move to dismiss all the counterclaims and to disqualify Kavanaugh from representing co-defendants in this action. Although plaintiffs have not stated the basis for the dismissal of the counterclaims it appears that this is a pre-answer motion based upon CPLR 3211(a)(7), failure to state a cause of action.

In considering a motion to dismiss a claim for failure to state a cause of action pursuant to CPLR 3211 (a) (7), the allegations and the opposition papers must be accepted as true; the court must accord the plaintiff the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory (see Leon v Martinez, 84 NY2d 83, 87-88 [1994]; Rietschel v. Maimonides Med. Ctr., 83 AD3d 810 [2011]; Peterec-Tolino v Harap, 68 AD3d 1083, 1084 [2009]). "[B]are legal conclusions are not entitled to the benefit of the presumption of truth and are not accorded every favorable inference" (Ruffino v. New York City Tr. Auth., 55 AD3d 817, 818 [2d Dept 2008], quoting Morris v. Morris, 306 AD2d 449, 451 [2d Dept 2003] see Morone v. Morone, 50 NY2 d481 [1980]; Smith v Meridian Tech., Inc., 52 AD3d 685 [2008]; Peters v Accurate Bldg. Inspectors Div. of Ubell Enters., Inc., 29 AD3d 972 [2006]). Affidavits submitted in opposition to such motion may be considered by the court to remedy any defect in the pleading (see Cron v Hargro Fabrics, 91 NY2d 362, 366 [1998]; Leon v. Martinez, supra at 88). Whether the claim can ultimately be established is not part of the determination (see EBC I, Inc. v. Goldman Sachs & Co., 5 NY3d 11, 19 [2005]; Aberbach v. Biomedical Tissue Serv., Ltd., 48 AD3d 716, 717-718 [2008]).

The elements of a claim for breach of contract are the existence of a contract, the co-defendants' performance in accordance with its terms, the plaintiff's breach thereof and

damages (see Harris v. Seward Park Housing Corp., 79 AD3d 425 [2010]; Morris v. 702 E. Fifth St. HDFC, 46 AD3d 478 [2007]). In addition, the factual allegations in a claim must be sufficient to identify the provision(s) of the contract that was allegedly breached (see Barker v. Time Warner Cable, Inc., 83 AD3d 750, 751 [2011]).

The elements of a cause of action based on fraud are material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the party, and damages (see Fromowitz v. W. Park Associates, Inc., 106 AD3d 950 [2013]; Eurycleia Partners, LP v. Seeward & Kissel, LLP, 12 NY3d 553, 559 [2009]). A cause of action based upon fraud is duplicative of a breach of contract claim when the only fraud alleged is that a contracting party did not intend to meet his contractual obligation (see Neckles Builders, Inc. v. Turner, 117 AD3d 923 [2014]; Comtomark, Inc. v. Satellite Communications Network, Inc., 116 AD2d 499 [1986]). A claim that the party was fraudulently induced to enter into a contract may be joined with a cause of action for breach of the same contract where the allegations supporting this cause of action allege a duty separate from the terms of the contract that was alleged to have been breached (see New York University v. Continental Ins. Co., 87 NY2d 308, 316 [1995]; Neckles Builders, Inc. v. Turner, supra at 925; First Bank of Ams. v. Motor Car Funding, 257 AD2d 287[1999]).

With respect to Kavanagh's counterclaim the answer alleges that he acted as the attorney for the seller, that he was merely the stakeholder, that the Contract of Sale identified him as the escrow agent, and that by signing the Contract of Sale plaintiffs agreed at Parag. 10 to indemnify him from any and all liabilities claims, damages and expenses, including attorney's fees, incurred in the performance of his duties as escrow agent. In his affirmation, Kavanaugh further asserts that he has no ownership or other interest in the subject real property or the corporate seller and that the Contract of Sale, including the alleged illegal provision, was the result of arms length negotiations between the parties who were both represented by separate counsel. Such allegations are sufficient to state a cause of action for contractual indemnification.

The co-defendant's first counterclaim which merely alleges that the plaintiffs breached the Contract of Sale is insufficient to state a claim for breach of contract since it failed to allege any facts in support of the necessary elements, inter alia, the seller's performance thereunder, nor state the provisions of the contract that were allegedly violated (see Barker v Time Warner Cable, Inc., supra).

The co-defendants' twelfth affirmative defense and second counterclaim alleges that plaintiffs' claim is barred because they fraudulently induced the co-defendants to enter into the Contract of Sale by signing a writing, prepared and signed by the plaintiffs, stating that they would pay the seller $100,000.00 for construction repairing fees, that the plaintiffs representations were false and that co-defendants sustained damages as a result. Although this counterclaim is denominated as a claim for fraudulent inducement, the facts as alleged support a claim for breach of contract, i.e. the contract which was allegedly signed and prepared by plaintiffs, rather than the Contract of Sale.

The elements of a claim of slander of title are (1) a communication falsely casting doubt on the validity of complainant's title, (2) reasonably calculated to cause harm, and (3) resulting in special damages (see Hanbidge v. Hunt, 183 AD2d 700, 701[1992]; Brown v. Bethlehem Terrace Associates, 136 AD2d 222 [1988]). The co-defendants' third counterclaim for slander of title, however, is insufficient to plead a claim for slander of title as it is unsupported by any factual allegations including the required element of special damages (see Rosenbaum v. City of New York, 8 NY3d 1, 12 [2006]; Sopher v. Martin, 243 AD2d 459, 462 [1997]; 35-45 May Associates v. Mayloc Associates, 162 AD2d 389, 389 [1990]; Brown v. Bethlehem Terrace Associates, supra).

Accordingly, the plaintiffs' motion to dismiss all counterclaims is granted as to co-defendants' first and third counterclaims and denied as to co-defendants' second counterclaim and Kavanaugh's counterclaim.

The branch of the plaintiff's motion to disqualify Kavanagh from representing the co-defendants is denied. Since the plaintiffs are neither present nor former clients of the attorney, they have no standing to seek his disqualification based on an alleged conflict of interest (see Scafuri v. DeMaso 71 AD3d 755, 756 [2010]; Ogilvie v. McDonald's Corp., 294 AD2d 550 [2002]). Nor have plaintiffs established that the interests of the co-defendant and Kavanaugh are materially adverse (see Scafuri v. DeMaso, supra; Matter of Voss v. 87-10 51st Ave. Owners Corp., 292 AD2d 622, 623-624 [2002]. The plaintiffs' counsel's conclusory and speculative assertions regarding a conflict of interest are insufficient to warrant disqualification(see Hall Dickler Kent Goldstein & Wood, LLP v. McCormick, 36 AD3d 758, 760 [2007]; Giblin v. Sechzer, 97 AD2d 833 [1983]).

Nor is disqualification based upon the “advocate witness” rule in the Rules of Professional Conduct (22 NYCRR 1200.0

Rule 3.7) warranted in this case. To disqualify an attorney under this rule the movant has the burden of demonstrating that the testimony of the opposing party's attorney is necessary to the moving party's case and that such testimony would be prejudicial to the opposing party (see S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp., 69 NY2d 437, 440 [1987]; Homar v. American Home Mortg. Acceptance, Inc., 119 AD3d 901 [2014]). "Testimony may be relevant and even highly useful, but will still not be strictly necessary." (S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp., supra at 446). Disqualification will be required only when it is likely that the testimony to be given by the witness is necessary. The factors to be considered in determining whether testimony is necessary as the significance of the matters, the weight of the testimony, and availability of other evidence (see S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp., supra at 446).

Here, the plaintiffs have failed to demonstrate that Kavanaugh's testimony would be necessary to the plaintiff's case since they "failed to offer any proof as to the content or subject matter of the testimony that might be elicited from the [Kavanaugh]," nor is it "apparent from the record as to why it is necessary to call him as a witness," (Blanche, Verte & Blanche, Ltd. v. Joseph Mauro & Sons, 91 AD3d 693 [2012 quoting Bentvena v Edelman, 47 AD3d 651, 651-652 [2008]; Campbell v. McKeon, 75 AD3d 479, 481 [210]; Bentvena v. Edelman, 47 AD3d 651 [2008]; Broadwhite Associates v. Truong, 237 AD2d 162, 163 [1997]).

Accordingly, the branch of the plaintiffs' motion to disqualify EDWARD L. KAVANAGH, as counsel for all defendants is denied.

Dated: October 15, 2014
D# 50

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J.S.C.