

Chen v Huynh

2014 NY Slip Op 33117(U)

September 26, 2014

Supreme Court, Queens County

Docket Number: 12761/11

Judge: Howard G. Lane

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE**
Justice

IAS PART 6

JING CHEN,

Index No. 12761/11

Plaintiff,

Motion
Date July 30, 2014

-against-

Motion
Cal. No. 31

ALAN HUYNH a/k/a ALAN LUAN HUYNH
and JENNY LU,

Motion
Sequence No. 6

Defendants.

Papers
Numbered

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Upon the foregoing papers it is ordered that the branch of the motion by plaintiff, Jing Chen for an order dismissing the affirmative defenses of defendants', Alan Huynh a/k/a Alan Luan Huynh ("Huynh") and Jenny Lu ("Lu") pursuant to CPLR 3211(b) for failing to state any defenses and asserting defenses that lack merit is hereby decided as follows:

This is an action sounding in fraud, bona fide purchaser for value, unjust enrichment, and undue influence relating to real property located at 142-16 38 Avenue, Apartment 7A, Flushing, New York, in the County of Queens. Plaintiff and defendant Huynh were married on June 10, 2002 and divorced on April 30, 2008. In 2011, Huynh married defendant Lu. Plaintiff has alleged that while she was married to Huynh, on or about April 2003, plaintiff and her parents and sister, who are not named parties to this action, purchased the subject property in Huynh's and plaintiff's names as owners, solely for the benefit of plaintiff's parents and sister. She has further alleged that her parents paid the costs for purchasing the property, that after the divorce she received no property interest from defendant Huynh and that defendant Huynh refused to transfer the ownership of the property

to her parents. Plaintiff has further alleged that defendant Huynh presented documents for her to sign in June 2010, which she signed, that Huynh represented to her that the papers were not important, and that she did not know that one of the documents which she signed was to transfer title to the property solely to defendant Huynh. Huynh transferred title to the property to defendant Lu on August 23, 2010. Plaintiff now seeks: a declaratory judgment adjudging two (2) title conveyances dated June 4, 2010 and August 23, 2010 to be fraudulent, null, and void, and of no effect; an order directing the Clerk of Queens County to cancel and set aside the purported deeds of record; and damages based on fraud, unjust enrichment, and taking titles fraudulently and without paying any consideration as a bona fide purchaser. Plaintiff alleges that: she was the title owner of the subject premises since 2004, defendant Huynh took the title of the subject premises fraudulently and without paying any consideration, and defendant Huynh conveyed the title of the premises to defendant Lu fraudulently in order to hide and conceal the transfer between plaintiff and defendant Huynh without any consideration.

When moving to dismiss an affirmative defense, plaintiff bears the burden of demonstrating that the affirmative defense is "without merit as a matter of law" (see CPLR 3211 [b]; *Vita v New York Waste Servs., LLC*, 34 AD3d 559, 559 [2d Dept 2006]). In reviewing a motion to dismiss an affirmative defense, the court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference (see *Fireman's Fund Ins. Co. v Farrell*, 57 AD3d 721 [2d Dept 2008]). Moreover, if there is any doubt as to the availability of a defense, it should not be dismissed (see *id.*). In order for a defendant to successfully oppose such a motion, defendant must show his or her possession of a bona fide defense, i.e., one having "a plausible ground or basis which is fairly arguable and of substantial character" (*Feinstein v Levy*, 121 AD2d 499, 500 [2d Dept 1986]). Self-serving and conclusory allegations do not raise issues of fact (see *Rosen Auto Leasing, Inc. v Jacobs*, 9 AD3d 798 [3d Dept 2004]), and do not require plaintiff to respond to alleged affirmative defenses which are based on such allegations (*Charter One Bank, FSB v Leone*, 45 AD3d 958, 959 [3d Dept 2007]).

Plaintiff established a prima facie case that defendant Huynh's affirmative defenses shall be dismissed. Plaintiff established that nothing in the section of defendant Huynh's Answer labeled as "Affirmative Defenses" offers a defense to any of plaintiff's causes of action and are nothing in this narrative section is relevant to the incident that is the subject of

plaintiff's claims. Plaintiff further established that the section labeled "Affirmative Defenses" fails to provide any defense to plaintiff's claim of fraud, but rather consists of defendant Huynh merely complaining about his marriage to plaintiff and accusing her of immoral conduct that is unrelated to the incident which is the subject of plaintiff's Complaint. Plaintiff further established that defendant Huynh merely accuses plaintiff of lying to immigration authorities, withdrawing money from a joint checking account, bigamy, adultery and having several abortions and such accusations fail to provide a defense to any of plaintiff's claims. Finally, plaintiff established that the Court cannot construe the affirmative defenses as a claim for fraud asserted against plaintiff because he has not asserted the elements of fraud and has not provided any factual allegations that would support a claim for fraud. "The essential elements of a cause of action sounding in fraud are a misrepresentation or a material omission of fact which was false and known to be false by the [party], made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*Nissan Motor Acceptance Corp. v Scialpi*, 94 AD3d 1067 [2012]). Inter alia, plaintiff established that the element of damages has not been alleged.

In opposition, defendant Huynh established that the affirmative defenses shall not be dismissed as defendant Huynh has presented valid defenses of "unclean hands" via paragraphs 6 and 7 (see *Weiss v. Mayflower Doughnut Corp.*, 1 NY2d 310 [1956] holding "[t]he doctrine of unclean hands is only available when the conduct relied on is directly related to the subject matter in litigation and the party seeking to invoke the doctrine was injured by such conduct)." Additionally, defendant Huynh presented a valid defense of Agreement or Stipulation via inter alia, paragraph 28 wherein defendant Huynh alleges that plaintiff, knowingly, voluntarily and freely transferred the condo to the defendant Huynh. Additionally, a valid defense of consideration in contemplation of marriage has been stated via paragraph 30 (see *Berkowitz v Berkowitz*, 111 AD2d 434 [3d Dept 1985][holding that a transfer in consideration of marriage is a valid defense]). Accordingly, defendant Huynh's affirmative defenses shall not be dismissed.

Defendant Lu asserts six affirmative defenses.

Despite plaintiff's contentions, the first affirmative defense of defendant Lu, failure to state a cause of action, is properly interposed in the answer according to the most current legal precedent in the Appellate Division, Second Department

(see *Butler v Cantinella*, 58 AD3d 145 [2d Dept 2008]). As such, this affirmative defense shall not be dismissed.

The second affirmative defense of defendant Lu is: "The damages claimed by plaintiffs, which is expressly denied, were not proximately caused by defendant." Plaintiff established that this defense is without merit as defendant Lu benefitted from defendant Huynh's fraud upon plaintiff in obtaining ownership to the property. In opposition, defendant Lu established that defendant Lu was merely a gift receiver and had nothing to do with the alleged fraud. As such, this affirmative defense shall not be dismissed.

The third affirmative defense of defendant Lu is: "Defendant has provided sufficient consideration for the condominium in question since the condominium was given to Defendant Jenny by Defendant Alan in contemplation of marriage." The Court finds that this defense shall not be dismissed as defendant Lu has provided a prima facie case that the examination before trial transcript testimony of both defendants establishes that the house was a gift in contemplation of marriage.

The fourth affirmative defense of defendant Lu is: "Plaintiffs shall be estopped from pleading damages against defendant because plaintiff failed to present any credible evidence to substantiate Plaintiff Jing Chen's claim that she did not intend to transfer her share of the condominium to defendant Alan in 2010." As it is undisputed that discovery has not been completed yet, this defense shall not be dismissed.

The fifth affirmative defense of defendant Lu is: "Plaintiffs fail to provide any credible evidence to substantiate their claim that Plaintiff Jing Chen made the down payment on the condominium and also provided the funds to pay off the mortgages. Thus, to grant Plaintiffs' damages would constitute unjust enrichment." As it is undisputed that discovery has not been completed yet, this defense shall not be dismissed.

The sixth affirmative defense of defendant Lu is: "That there has been no discovery and, accordingly, defendant reserves the right to interpose affirmative defenses based on information disclosed during and/as a result of discovery." This statement does not constitute any cognizable affirmative defense, and as such, the sixth affirmative defense shall be dismissed.

That branch of plaintiff's motion for an order dismissing defendant Huynh's Counterclaims pursuant to CPLR 3211(a)(7) for failure to state a cause of action is hereby

decided as follows: "It is well-settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference." (*Jacobs v Macy's East, Inc.*, 262 AD2d 607, 608 [2d Dept 1999] [internal citations omitted]; *Leon v Martinez*, 84 NY2d 83) and a determination by the Court as to whether the facts alleged fit within any cognizable legal theory (1455 *Washington Ave. Assocs. v. Rose & Kiernan, Inc.*, 260 AD2d 770 [3d Dept 1999]). The court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion (see *Stukuls v State of New York*, 42 NY2d 272 [1977]; *Jacobs v Macy's East, Inc.*, *supra*), and the court will not examine affidavits submitted on a CPLR 3211(a)(7) motion for the purpose of determining whether there is evidentiary support for the pleading (see *Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633). Such a motion will fail if, from its four corners, factual allegations are discerned which, taken together, maintain any cause of action cognizable at law, regardless of whether the plaintiff will ultimately prevail on the merits (*Given v County of Suffolk*, 187 AD2d 560 [2d Dept 1992]). The plaintiff may submit affidavits and evidentiary material on a CPLR 3211(a)(7) motion for the limited purpose of correcting defects in the complaint (see *Rovello v Orofino Realty Co., Inc.*, *supra*; *Kenneth R. v Roman Catholic Diocese of Brooklyn*, 229 AD2d 159). "However, dismissal is warranted if the documentary evidence contradicts the claims raised in the complaint." (*Jericho Group, Ltd. v Midtown Development, L.P.*, 32 AD3d 294 [1st Dept 2006] [internal citations omitted]).

Applying the principles in the instant case, the Court finds that plaintiff has established a prima facie case that the Counterclaims of defendant Huynh fail to state a cause of action. Defendant Huynh's Counterclaims consist of basically two allegations, to wit: "[a]s a result of plaintiffs' baseless and frivolous lawsuit, defendant has incurred attorney's fees and litigation expenses, for which plaintiffs should be held liable" and "[p]laintiffs should also be liable to defendant Alan, for unjust enrichment, and plaintiffs should be held liable to make restitution or restoration to defendant Alan. Plaintiffs should also be held liable to defendant Alan for punitive damages." Plaintiff established that no facts or details were alleged to support any of these causes of action.

In opposition, defendant Huynh only provided factual support for the counterclaim of unjust enrichment in that plaintiff are occupying the condo rent-free, without paying and are therefore,

unjustly enriched. " "[A] person is unjustly enriched when retention of the benefit received would be unjust considering the circumstances of the transfer and the relationship of the parties'" (*Cinquemani v Lazio*, 37 AD3d 882, 883 [2007], quoting *Hornett v Leather*, 145 AD2d 814, 816 [1988], *lv denied* 74 NY2d 603 [1988]). Under the circumstances presented, when defendant Huynh's counterclaim of unjust enrichment is accorded "the benefit of every possible favorable inference," the facts, as alleged, warrant the denial of the branch of the motion seeking dismissal of the unjust enrichment counterclaim because it "fit[s] within [a] cognizable legal theory" (*Leon v Martinez*, 84 NY2d at 87-88; see *Nonnon v City of New York*, 9 NY3d at 827). However, as no factual support had been provided for the remaining counterclaims, the counterclaims other than unjust enrichment shall be dismissed.

That branch of plaintiff's motion seeking to strike statements in defendant Huynh's Amended Answer pursuant to CPLR 3024(b) that are scandalous, prejudicial and unnecessarily inserted in defendant's Answer is hereby denied as it is untimely. Pursuant to CPLR 3024(c), a motion under this rule shall be served within twenty (20) days after service of the challenged pleading. In the instant action, the Answer was served on April 15, 2014 and this motion was not served until May 15, 2014. As such, this branch of the motion is time-barred. Accordingly, this branch of plaintiff's motion is denied.

This constitutes the decision and order of the Court.

Dated: September 26, 2014

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Howard G. Lane, J.S.C.