

Keyserman v Chiu-Ping Han

2014 NY Slip Op 33147(U)

August 4, 2014

Supreme Court, Queens County

Docket Number: 21557/2013

Judge: Allan B. Weiss

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA Part 2
Justice

ALINA KEYSERMAN, RADION AMINOV,

Plaintiffs,

-against-

GRACE CHIU-PING HAN AND
WEN-CHI WEI,

Defendants.

Index
Number 21557 2013

Motion
Date March 10 & June 2, 2014

Motion Seq. Nos. 1 & 2

The following papers numbered 1 to 21 read on this motion by defendant Wen-Chi Wei (Wei) to dismiss the complaint against him pursuant to CPLR 3211(a)(1), (a)(3), and (a)(7); and, by separate notice of motion, defendant Grace Chiu-Ping Han (Han) to dismiss the complaint against her pursuant to CPLR 3211(a)(1) and (a)(7); and on this cross motion by plaintiffs for a default judgment against Han pursuant to CPLR 3215.

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Answering Affidavits - Exhibits	13 - 17
Reply Affidavits	18 - 21

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

This is an action arising out of the sale of a condominium unit located at 107-24 71st Road in Forest Hills, New York. On May 31, 2012, Han, the owner of the unit, entered into a contract of sale with plaintiffs Alina Keyserman and Yelena Aminov (buyers). In connection with the transaction, Han was represented by Wei, her attorney. Prior to the sale of the property, the unit was leased to a tenant and the lease was due to expire on September 30, 2012. Although the tenant had not vacated the premises, on November 9, 2012, the closing was held and ownership of the unit was conveyed to the buyers. At the closing, the

buyers and Han also executed an escrow agreement, in which the parties agreed, among other things, to have Wei hold \$80,000.00 in escrow to ensure that the tenant vacated the subject property in the same physical condition as stated in the contract of sale, with the exception of the floor in “as is” condition. The escrow agreement also stated that the buyers would be compensated for their mortgage interest, common charge, and real estate tax up to the date prior to possession of the unit. In February 2013, the tenant vacated the premises. Thereafter, the buyers took possession of the unit and, upon inspection by nonparty GAC Environmental, Inc., they discovered the presence of mold in certain areas of the flooring. Following the inspection, the buyers provided defendants with receipts reflecting repairs made to the floors to remedy the mold damage and requested reimbursement for those expenses. In response, Wei denied the request for reimbursement for the costs to repair the damaged flooring, stating that the buyers had agreed to accept the condition of the floor in “as is” condition. In addition, plaintiffs claimed that Han only paid for three months of mortgage payments for the period of time during which the tenant did not vacate the premises. On November 22, 2013, plaintiffs commenced this action against defendants, alleging causes of action for breach of contract, promissory estoppel, unjust enrichment, and fraud.

Initially, the court will address plaintiffs’ cross motion for a default judgment against Han pursuant to CPLR 3215. In response to Han’s motion to dismiss, plaintiffs cross moved for a default judgment against Han, arguing that Han never interposed an answer to the complaint and that her motion to dismiss is untimely. In opposition, Han contends that she served an answer, albeit late, because service of process was improper because Han was personally served at an incorrect address.

On a motion for leave to enter a default judgment pursuant to CPLR 3215, the plaintiff is required to file proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defendant’s default in answering or appearing (CPLR 3215[f]; *see Atlantic Cas. Ins. Co. v RJNJ Servs., Inc.*, 89 AD3d 649, 651 [2011]; *Allstate Ins. Co. v Austin*, 48 AD3d 720 [2008]). To avoid entry of a default judgment and to compel a plaintiff to accept an untimely answer, a “defendant who has failed to appear or answer the complaint must provide a reasonable excuse for the default and demonstrate a meritorious defense to the action to . . . extend the time to answer” (*see Ennis v Lema*, 305 AD2d 632, 633 [2003]; *Holubar v Holubar*, 89 AD3d 802 [2011]; *Wells Fargo Bank, N.A. v Cervini*, 84 AD3d 789 [2011]; *Equicredit Corp. of Am. v Campbell*, 73 AD3d 1119, 1121 [2010]). The determination of what constitutes a reasonable excuse lies within the sound discretion of the court (*see Wells Fargo Bank*, 84 AD3d at 789; *Matter of Gambardella v Ortov Light.*, 278 AD2d 494, 495 [2000]). In support of their cross motion, plaintiffs submitted the affidavit of service of a licensed process server dated December 18, 2013, which indicated that on December 10, 2013 at 7:05 p.m. at 62 Tower Road in Edison, New Jersey, Han was

personally served by delivery of a copy of the summons and verified complaint to Keith Davis, Han's son-in-law, and included a physical description of Keith Davis. The affidavit of service further indicated that, on December 12, 2013, a copy of the summons and complaint was mailed to Han at the aforementioned address. However, the court finds that the affidavit of service is defective on its face because it did not state that the address where Han was personally served with process was Han's "actual place of business, dwelling place or usual place of abode" and that the summons and complaint was mailed to Han's "last known residence or . . . actual place of business" as required by CPLR 308(2). Significantly, Han asserts that she did not reside or work at 62 Tower Road in Edison, New Jersey. Despite these defects, Han has waived the defense of improper service of process by serving an answer on January 27, 2014, only 18 days beyond the requisite time period under CPLR 320(a), and has made a sufficient showing of the existence of a potentially meritorious defense (*see e.g. Hutchinson v New York City Health & Hosps. Corp.*, 2014 NY Slip Op 4734 [2d Dept 2014]). Based on the foregoing, plaintiffs' cross motion for a default judgment against Han is denied and, in turn, the court will address the merits of Han's motion to dismiss the complaint insofar as asserted against her.

On a motion to dismiss pursuant to CPLR 3211, the court must accept the facts alleged by the plaintiff as true and liberally construe the complaint, according it the benefit of every possible favorable inference (*see Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]). The role of the court is to "determine only whether the facts as alleged fit within any cognizable legal theory" (*id.*). Where, as here, evidence is submitted by the movant in support of a CPLR 3211(a)(7) motion, the court must determine whether the proponent of the pleading has a cause of action, not whether he or she has stated one (*see Hartman v Morganstern*, 28 AD3d 423 [2006]; *Steiner v Lazzaro & Gregory*, 271 AD2d 596 [2000]). Where documentary evidence definitively contradicts the plaintiff's factual allegations and conclusively disposes of the plaintiff's claim, dismissal pursuant to CPLR 3211(a)(1) is warranted (*see DiGiacomo v Levine*, 76 AD3d 946, 949 [2010]; *Berardino v Ochlan*, 2 AD3d 556, 557 [2003]).

Applying these principles to the case at bar, the court concludes that the complaint as well as certain documentary evidence submitted by Han, including the contract of sale and the escrow agreement, do not conclusively establish as a matter of law that Han is entitled to dismissal of the breach of contract claim asserted against her. To state a cause of action for breach of contract, the complaint must allege the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and damages as a result of the breach (*see JP Morgan Chase v J.H. Elec. of N.Y., Inc.*, 69 AD3d 802 [2010]). Here, plaintiffs allege in the complaint that Han breached the contract of sale and escrow agreement by (1) failing to notify the buyers of the existence of mold prior to the purchase of the property and to reimburse the buyers for the cost of repairs to the damaged floors,

including the removal of mold and (2) failing to fully reimburse plaintiffs for the mortgage payments for the five-month period of time during which the tenant did not vacate the premises (November 2012 - March 2013). First, while the escrow agreement dated November 9, 2012 indicates that the buyers agreed to purchase the property with the “floor of the unit in ‘as is’” condition, paragraph 19(a) of the contract of sale also states that “Seller shall notify Purchaser of the occurrence of any such loss or damage to the Unit . . . within 10 days after such occurrence or by the date of the Closing, whichever first occurs, and by such notice shall state whether or not Seller elects to repair or restore the Unit.” Taking the allegations of the complaint as true, namely that Han knew of the existence of mold in the property and that Han failed to notify the buyers about the mold problem prior to the closing, Han was required under the terms of the contract of sale to notify the buyers about the mold damage before the closing on November 9, 2012, regardless of whether Han chose to make or pay for any repairs. Furthermore, it is unclear from the closing statement whether the \$4,500.00 “credit for repairs to the floor” was intended to reimburse the buyers for the repair costs associated with the alleged mold damage. Second, with respect to the issue of reimbursement of mortgage payments, the escrow agreement states that, “Purchaser will be compensated of her mortgage interest, common charge and real estate tax up to the date prior to possession by Purchaser.” However, the documentary evidence submitted on the motion demonstrates that there is a clear factual dispute as to the exact amount of mortgage interest, common charge and real estate tax that was owed to the buyers for the period of time during which the tenant did not vacate the premises.

Wei separately moved to dismiss the breach of contract cause of action insofar as asserted against him pursuant to CPLR 3211(a)(1) and (a)(7) on the ground that he was not a party to an agreement with, or otherwise in privity with, plaintiffs. Although Wei was not a party to the contract of sale, a contractual relationship existed between Wei and the buyers by virtue of the escrow agreement dated November 9, 2012. Indeed, the complaint alleges that Wei “acted as the escrow agent for sale of Subject Property” and that Wei, “Seller’s Attorney/Escrow,” breached his agreement with the buyers by refusing to reimburse them for the cost of repairs to remedy the mold problem as well as to fully reimburse them for the mortgage payments for the period of time during which the tenant did not vacate the premises. Pursuant to the escrow agreement, Wei, acting as the escrow agent, was obligated to hold \$80,000.00 to ensure that the tenant vacated the property in the same physical condition as stated in the contract of sale, with the exception of the floor in “as is” condition. The escrow agreement further stated that the buyers would be compensated for the mortgage interest, common charge, and real estate tax up to the date prior to taking possession of the unit. An escrow agent is a trustee for both parties, under a fiduciary duty not to deliver the escrow to anyone except upon strict compliance with the conditions, and subjects himself or herself to damages for the failure to so comply (*see Farago v Burke*, 262 NY 229 [1933]). Therefore, if the allegations in the complaint against Wei are taken as true, Wei could be

liable to the buyers for breach of the escrow agreement for not paying over the money for the repair costs and mortgage payments to the buyers. Therefore, Wei is not entitled to dismissal of the breach of contract cause of action asserted against him pursuant to CPLR 3211(a)(1) and (a)(7).

The second and third causes of action for promissory estoppel and unjust enrichment against defendants must be dismissed as duplicative of the breach of contract claim (*see Hoeffner v Orrick, Herrington & Sutcliffe LLP*, 61 AD3d 614 [2009]; *Celle v Barclays Bank P.L.C.*, 48 AD3d 301, 302 [2008]). In the absence of a duty independent of an express agreement between the parties, the existence of a valid contract governing the subject matter generally precludes recovery in quasi contract for events arising out of the same subject matter (*see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382 [1987]; *Parrott v Logos Capital Mgt., LLC*, 91 AD3d 488, 489 [2012]; *American Curtainwall, Inc. v NTD Constr. Corp.*, 83 AD3d 597, 598 [2011]). No such independent duty with respect to either defendant was alleged in plaintiffs' complaint. The rights and obligations between the buyers and Han were governed by the contract of sale and, as previously discussed, Wei, although not a party to the contract of sale, had a duty to the buyers under the escrow agreement in relation to that transaction.

Likewise, the fourth cause of action alleging fraud against defendants is dismissed because it is duplicative of the breach of contract claim. To state a cause of action for fraud, a plaintiff must allege that a person knowingly misrepresented a material fact, upon which the plaintiff justifiably relied, resulting in damages (*see Fromowitz v W. Park Assoc., Inc.*, 106 AD3d 950 [2013]). However, a cause of action premised upon fraud cannot lie where it is based on the same allegations as a breach of contract claim (*see Yenrab, Inc. v 794 Linden Realty, LLC*, 68 AD3d 755, 757 [2009]; *Heffez v L & G Gen. Constr., Inc.*, 56 AD3d 526, 527 [2008]). Where a claim to recover damages for fraud is premised upon an alleged breach of contractual duties and the allegations with respect to the purported fraud do not concern representations which are collateral or extraneous to the terms of the parties' agreement, a cause of action sounding in fraud does not lie (*see Yenrab*, 68 AD3d at 757). Here, in support of their separate motions, defendants submitted the contract of sale and the escrow agreement, which conclusively established that the alleged fraudulent misrepresentations at issue were not collateral or extraneous to the contracts. Specifically, plaintiffs' complaint alleges that, under the contract of sale, defendants agreed to reimburse the buyers for the cost of repairs associated with the damaged floors, including the removal of mold, that defendants knew about the mold condition prior to the purchase and failed to disclose it to the buyers, that defendants refused to reimburse the buyers for the repairs to the floors due to the mold, despite having agreed to do so, and that defendants "made a material misrepresentation of fact by representing that they would bear this cost that they later refused to pay." Additionally, the complaint alleges that defendants agreed to pay the mortgage for

the period of time during which the tenant did not vacate the premises after the sale, that defendants only made mortgage payments for three months of that time period, and that defendants “made a material misrepresentation of fact by representing that they would bear this cost that they later refused to pay.” These alleged fraudulent misrepresentations amount only to a misrepresentation of an intent to perform under the contract of sale and escrow agreement, which is insufficient to sustain a cause of action to recover damages for fraud (see *Gorman v Fowkes*, 97 AD3d 726 [2012]).

Finally, Wei moved to dismiss the complaint insofar as asserted against him pursuant to CPLR 3211(a)(3) on the ground that plaintiffs Radion Aminov and Yuriy Aminov lack standing to commence this action. To have standing in a particular dispute, a plaintiff must demonstrate “an injury in fact that falls within the relevant zone of interests sought to be protected by law” (see *Bernfeld v Kurilenko*, 91 AD3d 893 [2012]). Where, as here, the issue of standing is raised by a defendant, a plaintiff must prove its standing in order to be entitled to relief (see *Bank of N.Y. v Silverberg*, 86 AD3d 274 [2011]). The instant matter arises out of a contract relating to the sale of the subject property, but it is not alleged that either Radion Aminov or Yuriy Aminov were parties to that transaction. In addition, there are no facts indicating that Radion Aminov and Yuriy Aminov have an interest in the property. Plaintiffs failed to oppose the motion on these grounds and, therefore, that branch of Wei’s motion to dismiss the complaint asserted against him by plaintiffs Radion Aminov and Yuriy Aminov is granted.

Accordingly, those branches of Han and Wei’s separate motions to dismiss the complaint pursuant to CPLR 3211(a)(1) and (a)(7) are granted only to the extent that the causes of action for promissory estoppel, unjust enrichment, and fraud are dismissed. In addition, that branch of Wei’s motion to dismiss the complaint insofar as asserted against him pursuant to CPLR 3211(a)(3) on the ground that plaintiffs Radion Aminov and Yuriy Aminov lack standing to commence this action is granted. In all other respects, the separate motions by Han and Wei to dismiss the complaint against them are denied. Plaintiffs’ cross motion for a default judgment against Han is denied.

Dated: August 4, 2014

J.S.C.