

Bannister v Agard

2014 NY Slip Op 33498(U)

January 14, 2014

Supreme Court, Kings County

Docket Number: 11564/13

Judge: Leon Ruchelsman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF KINGS : CIVIL TERM: PART 16

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 GARNER BANNISTER,

Plaintiff,

Index No. 11564/13

- against -

PATRICIA AGARD, K&DZ CORP. and
 BUCKINGHAM DEVELOPMENT CORP.,

January 14, 2014

Defendants,

-----x
 PRESENT: HON. LEON RUCHELSMAN

The defendants K&DZ Corp., and Buckingham Development Corp., move pursuant to CPLR §3211 seeking to dismiss the complaint on the grounds it fails to state a cause of action. The plaintiff opposes the motion. Papers have been submitted by the parties and arguments have been held. After reviewing the arguments of all parties, this court now makes the following determination.

Background

As recorded in prior decisions this lawsuit concerns premises located at 18 Buckingham Road, Brooklyn, New York 11226. The property was originally owned by defendant Patricia Agard. On or about September 7, 2010 plaintiff entered into a Sale of Agreement to purchase the premises for a price of five hundred thousand dollars (\$500,000). At a later date the defendants K&DZ & Buckingham purchased the premises from defendant Agard for five hundred and ninety thousand dollars (\$590,000) and recorded a

deed as the owners of the premises. They began a holdover proceeding against Bannister and denied two requests to stay the proceeding finding that Bannister could not demonstrate a success on the merits. The plaintiff has amended the complaint alleging specific fraud against K&DZ Corp. and Buckingham Development Corp. and filed a mechanic's lien and a notice of pendency. The defendants have now moved seeking to dismiss the complaint.

Conclusions of Law

To succeed on a motion to dismiss the moving party must demonstrate that the complaint is devoid of any factual allegations which underlie wrongful conduct (Kamhi v. Tay, 244 AD2d 266 [1st Dept., 1997]). Therefore, if sufficient facts are alleged it then becomes the duty of the court to ascertain whether the facts in the complaint fit within any cognizable legal theory (Polonetsky v. Better Homes, 97 NY2d 46, Collins v. Telcoa Intern, 283 AD2d 128 [2d Dept., 2001]). The complaint must be liberally construed and a motion to dismiss will be denied where plaintiff has a valid cause of action (Weiner v. Lazard Freres & Co., 241 AD2d 114 [1st Dept., 1998]). On a motion to dismiss pursuant to CPLR §3211, the court must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiff the benefit of every

possible favorable inference and determine only whether the facts, as alleged, fit within any cognizable legal theory (Sokoloff v. Harriman Estates Development Corp., 96 NY2d 409, 729 NYS2d 405 [2001]).

A cause of action for fraud may arise when one misrepresents a material fact, knowing it is false, which another relies on to its injury (see, Ochs v. Woods, 221 NY 335, 338 [1917]). However, where a claim to recover damages for fraud "is premised upon alleged breach of contractual duties and the supporting allegations do not concern misrepresentations which are collateral or extraneous to the terms of the parties agreement, a cause of action sounding in fraud does not lie" (McKernin v. Fanny Farmer Candy Shops Inc., 176 AD2d 233, 574 NYS2d 58, [2nd Dept., 1991]).

The exceptions to this rule were set forth in Coppola v. Applied Electric Corp., 288 AD2d 41, 732 NYS2d 402 [1st Dept., 2001]. The court acknowledged that if the claimed fraud is collateral or extraneous to the contract or damages are alleged that would not be recoverable under a breach of contract claim or a special relationship gave rise to a breach of duty, separate from the breach of the contract, then a plaintiff's claim of fraud would be accepted along with the original breach of contract claim. In this case, however, the fraud, if any exists,

stems exclusively from the alleged breach of the contract between the plaintiff and Agard and hence must be dismissed. Moreover, in a prior order dated December 9, 2013 the court already held that the complaint failed to satisfy the heightened showing necessary to maintain an action based on fraud. Therefore, the motion seeking to dismiss the fraud and collusion claims are granted.

Concerning the mechanic's lien, it is well settled that a lien is only proper where the work is performed "with the consent or at the request of the owner" (see, Lien Law § 3). On December 13, 2012 the plaintiff acknowledged awareness of the corporate defendants as the owners of the property in an email to Agard. Thus, from that date any work performed can hardly be considered with the consent or request of the defendants. Thus, the lien was not timely filed and is hereby dismissed. Equally unavailing is the lis pendis that has been filed. The plaintiff has not presented any evidence why a lis pendis is appropriate against the corporate defendants. The lis pendis is hereby dismissed.

Concerning quantum meruit, the plaintiff would be entitled to any work performed and improvements made even without a contract. However, by December 13, 2012 the plaintiff was aware Agard was no longer the owner of the property and had a duty to

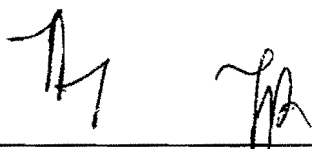
inquire whether any improvements being done should continue. Thus, the plaintiff would be entitled to quantum meruit concerning any work done from the date the corporate defendants became the owners of the property until December 12 2012, the date the plaintiff unconditionally was aware Agard was the owner of the property. The parties will be notified of a hearing wherein the issues of quantum meruit will be explored.

Therefore, the defendant's motion seeking to dismiss the amended complaint is granted, except for the quantum meruit claim which will be resolved at a hearing. The lis pendis and mechanic's lien are both hereby vacated.

So ordered.

ENTER:

DATED: January 14, 2014
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC