42nd Ave. Commons, LLC v Barracuda, LLC
2014 NY Slip Op 33782(U)
March 7, 2014
Supreme Court, Queens County
Docket Number: 704271/2013
Judge: Frederick D.R. Sampson
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Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY
Present: HONORABLE FREDERICK D.R. SAMPSON IAS TERM, PART 31
Justice

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42nd AVENUE COMMONS, LLC,

Plaintiff,

-against-

BARRACUDA, LLC,

Defendants.

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Index No: 704271/13
Motion Date: 11/14/13
Motion Cal. No: 159
Motion Seq. No: 1

The following E-filed papers numbered EF Documents #5 to 24 read on this motion for an order, pursuant to CPLR § 3211 (a) and (e), dismissing plaintiff's complaint; and, pursuant to CPLR §6514(b), canceling the Notice of Pendency of this action filed by plaintiff.

	PAPERS NUMBERED
Order to Show Cause-Affidavits-Exhibits.....	EFD# 5 - 14
Answering Affidavits-Exhibits.....	EFD# 18 - 23
Reply.....	EFD# 24

Upon the foregoing papers, it is hereby ordered that the motion is disposed of as follows:

In this pre-answer motion to dismiss, pursuant to CPLR § 3211(e), defendant seeks dismissal of plaintiff's claims for breach of contract, a preliminary injunction and specific performance based upon a defense founded upon the documentary evidence, the Statute of Frauds, and failure to state a cause of action, pursuant to CPLR § 3211 (a)(1)(5) and (7).

On a motion to dismiss the complaint for failure to state a cause of action, pursuant to CPLR § 3211(a)(7), the pleading is to be afforded a liberal construction, the facts as alleged in the complaint are accepted as true and the plaintiff is afforded the benefit of every possible favorable inference. See, Nonnon v. City of New York, 9 N.Y.3d 825 (2007); Zumpano v. Quinn, 6 N.Y.3d 666 (2006); AG Capital Funding Partners, L.P. v. State Street Bank and Trust Co., 5 N.Y.3d 582 (2005); Reid v. Gateway Sherman, Inc., 60 A.D.3d 836 (2nd Dept. 2009); Edme v. Tanenbaum, 50 A.D.3d 624 (2nd Dept. 2008); Enriquez v. Home Lawn Care and Landscaping, Inc., 49 A.D.3d 496,

(2nd Dept. 2008); Parsippany Const. Co., Inc. v. Clark Patterson Associates, P.C., 41 A.D.3d 805 (2nd Dept.2007); Klepetko v. Reisman, 41 A.D.3d 551, 839 (2nd Dept. 2007); Santos v. City of New York, 269 A.D.2d 585 (2nd Dept. 2000). The determination to be made is whether plaintiff has a cause of action, not whether one was stated. See, Gaidon v. Guardian Life Ins. Co. of America, 94 N.Y.2d 330 (1999); Walker v. Kramer, 63 A.D.3d 723 (2nd Dept. 2009); Gershon v. Goldberg, 30 A.D.3d 372 (2nd Dept. 2006); Steiner v. Lazzaro & Gregory, P.C., 271 A.D.2d 596 (2nd Dept. 2000). The determination to be made is whether the facts as alleged fit within any cognizable legal theory. See, Fitzgerald v. Federal Signal Corp., 63 A.D.3d 994 (2nd Dept. 2009); Farber v. Breslin, 47 A.D.3d 873 (2nd Dept. 2008); International Oil Field Supply Services Corp. v. Fadeyi, 35 A.D.3d 372 (2nd Dept. 2006); EBC I. Inc. v. Goldman Sachs & Co., 5 N.Y.3d 11 (2nd Dept. 2005). Here, in viewing the pleadings favorably, this Court finds that plaintiff asserts viable claims against defendant. Accordingly, that branch of the motion for dismissal for failure to state a cause of action is denied.

Defendant also moves for dismissal, pursuant to CPLR § 3211(a)(1) and (5). As a general rule, to succeed on a motion to dismiss, pursuant to CPLR § 3211(a)(1), on the ground that a defense is founded upon documentary evidence, the documentary evidence upon which the motion is predicated must be such that it utterly refutes all factual allegations and definitively disposes of the claim as a matter of law. See, Goshen v Mutual Life Ins. Co. of New York, 98 N.Y.2d 314, 326 (2002); Holster v. Cohen, 80 A.D.3d 565 (2nd Dept. 2011); Harbor View at Port Washington Home Owners Ass'n, Inc. v. Amsterdam House Continuing Care Retirement Community, Inc., 79 A.D.3d 810 (2nd Dept. 2010); Montes Corp. v Charles Freihofer Baking Co., 17 A.D.3d 330 (2nd Dept. 2005); see also, New York Schools Ins. Reciprocal v. Gugliotti Associates, Inc., 305 A.D.2d 563 (2nd Dept. 2003).

CPLR § 3211(a)(5) provides that a party may move for judgment dismissing one or more causes of action on the ground that "the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds." Further, General Obligations Law § 5-703, entitled "Conveyances and contracts concerning real property required to be in writing," states, in pertinent part, the following:

> 3. A contract to devise real property or establish a trust of real property, or any interest therein or right with reference thereto, is void unless the contract or some note or memorandum thereof is in writing and subscribed by the party to be charged therewith, or by his lawfully authorized agent.
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> 4. Nothing contained in this section abridges the powers of courts of equity to compel the specific performance of agreements in cases of part performance.

"To be enforceable, a contract for the sale of real property must be evidenced by a writing sufficient

to satisfy the statute of frauds (citations omitted). To satisfy the statute of frauds, a memorandum evidencing a contract and subscribed by the party to be charged must designate the parties, identify and describe the subject matter, and state all of the essential terms of a complete agreement (citations omitted). [T]he writing must set forth the entire contract with reasonable certainty so that the substance thereof appears from the writing alone." Del Pozo v. Impressive Homes, Inc., 95 A.D.3d 1268, 1270-71 (2nd Dept., 2012). Nonetheless, "[p]art performance by the party seeking to enforce the contract may be sufficient in some circumstances to overcome the statute of frauds, but only in an action for specific performance." Sparks Associates, LLC v. North Hills Holding Co. II, LLC, 94 A.D.3d 864,865 (2nd Dept., 2012). "While the statute of frauds empowers courts of equity to compel specific performance of agreements in cases of part performance [], the claimed partial performance 'must be unequivocally referable to the agreement' (citations omitted). Unequivocally referable conduct is conduct that 'is inconsistent with any other explanation.'" Kurlandski v. Kim, 111 A.D.3d 676 (2nd Dept., 2013).

Here, defendant moves for dismissal, pursuant to CPLR § 3211(a)(1) and (5), based upon the documentary evidence and the Statute of Frauds, contending that "plaintiff's attorney, [Jay Yackow] sent a proposed contract of sale to defendant's attorney, Alison I. Blaine, but defendant did not subscribe to or sign the aforesaid agreement." In support thereof, defendant attaches a copy of the Contract of Sale dated October 2013, executed only by plaintiff. Defendant further states that it did not "sign any other comparable document that accepted plaintiff's offer to purchase the premises; e.g., emails, contracts, agreements, writings, proposals, bids or offers." In opposition, plaintiff contends that "there was meeting of the minds on the contract to sell the property through a series of emails which resulted in a contract signed by plaintiff and a check for the down payment as agreed upon being sent to defense counsel." In support of this contention, plaintiff proffers a series of email correspondences between counsel for the respective parties from September 16 to October 2, 2013. Notwithstanding plaintiff's contentions to the contrary, the aforementioned email correspondences in the instant matter do not satisfy the Statute of Frauds subscription requirement.

The law is well settled that an e-mail transmission that bears the name of the sender at the foot of the message constitutes a writing for statute of frauds purposes [GOL § 5-701(b)(3)(a)]. Indeed, the Appellate Division, First Department, in Williamson v. Delsener, 59 A.D.3d 291(1st Dept., 2009), held the following with regard to a negotiated settlement agreement:

> The e-mails exchanged between counsel, which contained their printed names at the end, constitute signed writings (CPLR 2104) within the meaning of the statute of frauds (citations omitted). The agreement to settle at 60% of the amount demanded was sufficiently clear and concrete to constitute an enforceable contract (citations omitted). Delsener's subsequent refusal to execute form releases and a stipulation of discontinuance did not invalidate the agreement (citations omitted).
>
> The e-mail communications indicate that Delsener was aware of and

> consented to the settlement; the record contains no indication to the contrary, or that counsel was without authority to enter into the settlement (citations omitted). To the contrary, the record supports only the conclusion that counsel at least had apparent authority.

See, also, Forcelli v. Gelco Corp., 109 A.D.3d 244 (2nd Dept., 2013). Nonetheless, assuming arguendo, that an e-mail is sufficient to comply with the statute of frauds with respect to contracts for the conveyance of real property (citations omitted), the document in issue here nevertheless is clearly inadequate, since it was not subscribed, even electronically, by the defendants who are the parties to be charged, or by anyone purporting to act on their behalf (citations omitted)." Leist v. Tugendhaft, 64 A.D.3d 687, 688 (2nd Dept., 2009). Defense counsel's printed name at the end of her email correspondences are contained in two emails dated September 16 and 26, 2013. The September 16 email states, pertinently, "attached is a proposed contract of sale." The September 26 email states, in relevant part, that defendant needs to close in 30 days and has a second offer from another prospective purchaser offering to pay $50,000.00 more to close in 45 days. The email further states that "if [plaintiff] is willing to pay $50,000.00 more for the property, close in 60 days, time of the essence, we can sign the contract today. Let me know." The remaining emails, which appear to contain the essential terms of a complete agreement, only contain the printed name of plaintiff's counsel and noticeably absent is the name or subscription of defense counsel. Consequently, the subject emails do not satisfy the Statute of Frauds subscription requirement and are inadequate, since they were not electronically subscribed by defendant, or by defense counsel, with purported authority to act on defendant's behalf. Thus, this Court is constrained to grant the motion for dismissal.

Accordingly, the motion, pursuant to CPLR § 3211 (a)(1)(5)(7) and (e), dismissing plaintiff's complaint is granted to the extent that the action hereby is dismissed pursuant to CPLR § 3211 (a)(1) and (5), based upon the ground that a defense is founded upon documentary evidence and the Statute of Frauds. Moreover, that branch of the motion, pursuant to CPLR § 6514(b), canceling the Notice of Pendency of this action filed by plaintiff, is granted to the extent that the Notice of Pendency is hereby canceled based upon this Court's dismissal of the action and not based upon bad faith of plaintiff in the commencement or prosecution of this matter, and it is

ORDERED, that the Clerk of Queens County is directed, upon payment of the proper fees, if any, to cancel and discharge a certain Notice of Pendency filed in this action on October 8, 2013 against property known as Block 1977, Lot 14, and said Clerk is hereby directed to enter upon the margin of the record of same a notice of cancellation referring to this order.

Dated: March 7, 2014

J.S.C.