

**Second-Half Prods., LTD v Leoni Brothers Realty,  
LLC**

2015 NY Slip Op 32308(U)

November 30, 2015

Supreme Court, Queens County

Docket Number: 703130/15

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**

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SECOND-HALF PRODUCTIONS, LTD.,  
  
Plaintiff,  
  
-against-  
  
LEONI BROTHERS REALTY, LLC, et al.,  
  
Defendants.  
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Index No. 703130/15  
  
Motion  
Date October 23, 2015  
  
Motion  
Cal. No. 78  
  
Motion  
Seq. No. 1

	<u>Papers Numbered</u>
Notice of Motion.....	HC A
Aff. In Opposition.....	EF 11
Exhibits.....	EF 12-15
Reply.....	HC B

Upon the foregoing papers it is ordered that the motion by defendants for an order pursuant to CPLR 3211(a)(5) and 3211(a)(7) dismissing the plaintiff, Second-Half Productions, Ltd.'s Complaint against them is hereby denied.

The underlying action arises out of an alleged breach of an agreement by defendants to sell the deed for the property located at 18-64 Flushing Avenue, Ridgewood, New York to the plaintiff.

That branch of the motion seeking dismissal pursuant to CPLR 3211(a)(5) is denied. Dismissal is warranted under CPLR 3211(a)(5) on the grounds 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;”

General Obligations Law § 5-703 (The Statute of Frauds) provides:

"An estate or interest in real property, other than a lease for a term not exceeding one year, or any trust or power, over or concerning real property, or in any manner relating thereto, cannot be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the person creating, granting, assigning, surrendering or declaring the same, or by his lawful agent, thereto authorized by writing..."

"It is long settled under New York's Statute of Frauds that an oral agreement to convey an estate or interest in real property, other than a lease for a term not exceeding one year, is 'nugatory and unenforceable.'" (*Messner Vetere Berger McNamee Schmetterer Euro RSCG Inc. v. Aegis Group, PLC*, 93 NY2d 229 [1999]). In the instant action, as it is sharply disputed as to whether there was a written agreement or not, dismissal is unwarranted at this pre-Answer juncture.

That branch of the motion seeking dismissal pursuant to CPLR 3211(a)(7) is 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 [1<sup>st</sup> Dept 2006] [internal citations omitted]).

The first cause of action for breach of contract shall not be dismissed. "The elements of a cause of action for **breach of contract** are the formation of a contract between plaintiff and defendant, performance by plaintiff, defendant's failure to perform, and resulting damages." (*Beheer B.V. (Amsterdam) v. South Caribbean Trading Ltd.*, 801 NYS2d 243 [Sup Ct, NY County 2004] [internal citations omitted]).

In the instant case, a cause of action for breach of contract has been stated via, inter alia, ¶4-11 of the Verified Complaint.

The second cause of action for breach of covenant of good faith and fair dealing shall not be dismissed. Defendants have failed to establish a prima facie case in support for this branch of the motion. Defendants fail to proffer the elements of this cause of action.

The third cause of action for unjust enrichment shall not be dismissed. It is well-established law that: "[t]o prevail on a claim of **unjust enrichment**, a party must show that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered" (internal quotation marks and citations omitted) (*Blue Wolf Group, LLC. v. Gaiam, Inc.*, 847 NYS2d 895 [Civ Ct, New York County 2007]).

In the instant case, a cause of action for unjust enrichment has been stated via, inter alia, ¶19-21 of the Verified Complaint.

The fourth cause of action for constructive trust shall be dismissed. The elements of a **constructive trust** are: (1) a confidential or fiduciary relationship; (2) a promise; (3) a transfer in reliance on the promise; and (4) unjust enrichment (see, *Sharp v. Kosmalski*, 40 NY2d 119 [1976]; *Church of God Pentecostal Fountain of Love, MI v. Iglesia De Dios Pentecostal, MI*, 27 AD3d 685 [2006]; *Nastasi v. Nastasi*, 26 AD3d 32 [2005]; *Thomas v. Thomas*, 70 AD3d 588 [2010] citing *Sharp Kosmalski*, 40 NY2d at 122).

In the instant case, the Verified Complaint fails to allege any of the elements of a constructive trust cause of action, i.e. a confidential or fiduciary relationship, a promise, and a transfer in reliance on that promise (see, *Sharp*, 40 NY2d at 121).

Accordingly, the cause of action for constructive trust is dismissed.

A claim of **tortious interference with contractual relations** requires proof of: (1) the existence of a valid contract between plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional procuring of the breach, and (4) damages (*Foster v. Churchill*, 87 NY2d 744 [1996]).

In the instant case, a cause of action for tortious interference with contract has been stated via, inter alia, ¶24-27 of the Verified Complaint.

The sixth cause of action for declaratory judgment shall not be dismissed.

In an action seeking a **declaratory judgment**, to withstand a motion to dismiss the complaint pursuant to CPLR 3211(a)(7), the allegations of the complaint have to demonstrate the existence of a bona fide justiciable controversy (see, *T.V. v. New York State Dept. of Health*, 88 AD3d 290, 306 [2d Dept 2011]; *Halloran v. Halloran*, 161 AD2d 562, 565 [2d Dept 1990]; *Sysco Corp. v. Town of Hempstead*, 133 AD2d 751, 752 [2d Dept 1987]).

In the instant action, the Complaint states a cause of action for declaratory judgment via, inter alia, ¶28-32.

Furthermore, defendants have improperly sought to reach the merits of the complaint on this mere CPLR 3211(a)(7) motion (see, *Stukuls v. State of New York, supra; Jacobs v. Macy's East Inc., supra*).

This constitutes the decision and order of the Court.

Dated: November 30, 2015

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**Howard G. Lane, J.S.C.**