

YYSB Trust v Vartel N.Y. Constr. Corp.

2016 NY Slip Op 30209(U)

February 2, 2016

Supreme Court, New York County

Docket Number: 651993/2015

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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YYSB TRUST,

Plaintiff,

Index No. 651993/2015

-against-

DECISION/ORDER

VARTEL NEW YORK CONSTRUCTION CORP,
EMANUEL KANARIS, CONSTANTINO
ANTONOPOULOS a/d/a KONSTANTINO
ANTONOPOULOS, DIONYSSIOS MAROULIS
and PANAYIOTA KANARIS,

Defendants.

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HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for: _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Notice of Cross-Motion and Answering Affidavits.....	<u>2</u>
Affirmation in Opposition to Cross-Motion.....	<u>3</u>
Replying Affidavits.....	<u>4</u>
Exhibits.....	<u>4</u>

Plaintiff YYSB Trust commenced the instant action against defendants Vartel New York Construction Corp (“Vartel”), Emanuel Kanaris, Constantino Antonopoulos, Dionyssios Maroulis and Panayiota Kanaris seeking recovery for breach of contract, fraud and breach of a mortgage agreement. Plaintiff now moves for an order pursuant to CPLR § 3212 for summary judgment on all of its causes of action. Defendants Vartel, Emanuel Kanaris, Constantino Antonopoulos and Panayiota Kanaris (the “Vartel Defendants”) cross-move for an order pursuant to CPLR § 3211 dismissing, or pursuant to CPLR § 3212 for summary judgment dismissing, plaintiff’s second cause of action as against defendant Emanuel Kanaris, plaintiff’s third cause of action as against defendant Panayiota Kanaris and plaintiff’s third cause of action

in its entirety. Defendant Dionyssios Maroulis cross-moves for an order pursuant to CPLR § 3211 dismissing plaintiff's complaint as against him. For the reasons set forth below, plaintiff's motion is denied. The Vartel Defendants' cross-motion is denied except with respect to the portions of the cross-motion for summary judgment dismissing plaintiff's second cause of action as against defendant Panayiota Kanaris and plaintiff's third cause of action, which are granted. Defendant Dionyssios Maroulis's cross-motion is granted.

The complaint alleges as follows. Defendant Vartel entered into a construction contract with non-party Public Storage. Public Storage agreed to pay Vartel \$13,889,563.97 for the provision of construction services. Defendant Emanuel Kanaris approached plaintiff seeking a loan to assist Vartel in performing its obligations under its contract with Public Storage. Mr. Kanaris, Mr. Antonopoulos and Mr. Maroulis represented that they would take any steps necessary to effectuate an assignment of payments under Vartel's contract with Public Storage to plaintiff before plaintiff extended the loan. Plaintiff contacted Public Storage to confirm that Vartel had agreed to assign the Public Storage contract payments to plaintiff. Thereafter, plaintiff and Vartel entered into a loan agreement (the "Agreement") whereby plaintiff provided a "revolving line of credit" with a maximum outstanding principal balance of \$150,000.00 and a monthly interest rate of two percent. Vartel was obligated under the Agreement to repay loan proceeds within sixty days of disbursement and make interest-only payments by the first day of each month. In the event that plaintiff did not receive any interest-only payment within five business days of the date it was due, plaintiff could declare all unpaid principal and interest amounts due and payable immediately. The Agreement was memorialized in a letter signed by Emanuel Kanaris and dated July 6, 2014, which states that "[t]his letter is in acknowledgement of the assignment set between Y.Y.S.B. (Yisroel Grossman) and Vartel NY Construction. The amount due to Y.Y.S.B. is as followed. 138K in check advances. 6K inception fee and 3K per

month (for two months to date) totaling 150,000.00 due to Y.Y.S.B.”

Vartel made only one interest-only payment, in default of the Agreement. Thereafter, Vartel rescinded its assignment of the Public Storage contract payments without plaintiff's knowledge or consent. Defendants dispute plaintiff's account of the formation and terms of the Agreement, Vartel's default under the Agreement and Vartel's assignment of the Public Storage contract payments and its rescission.

Plaintiff further alleges that, on or about June 23, 2014, defendants Mr. and Mrs. Kanaris executed a mortgage to plaintiff on defendants' residence located at 70 Franklin Street, Haworth, New Jersey (the “Mortgage”). The Mortgage was executed to secure the loan to Vartel that was the subject of the Agreement. In the Mortgage document, Mr. and Mrs. Kanaris agreed to pay plaintiff a principal sum of \$150,000.00 with a monthly interest rate of sixteen percent “in monthly installments of \$3,000.00 each.” However, Mr. and Mrs. Kanaris claim that Mrs. Kanaris's signature on the Mortgage was forged by Mr. Kanaris, her husband. Further, Mr. Kanaris claims that he did not sign either the handwritten or typewritten copy of the Mortgage in the presence of a notary public.

As an initial matter, plaintiff's motion for an order pursuant to CPLR § 3212 for summary judgment is denied as premature as defendants have not joined issue by answering plaintiff's complaint. Further, the court declines to address plaintiff's request for an order of attachment pursuant to CPLR §§ 6201 and 6212 as plaintiff did not move for this relief in its notice of motion. *See* CPLR § 2214(a); *HCE Associates v. 3000 Watermill Lane Realty Corp.*, 173 A.D.2d 774 (2nd Dept 1991) (holding that the decision whether to grant relief not specifically requested in a notice of motion is discretionary with the court). This decision not to address plaintiff's request is based in part on the fact that plaintiff's affidavit of service is so deficient

that it does not establish that plaintiff properly served the summons and complaint on any defendant.

The court now turns to defendant Dionyssios Maroulis's cross-motion for an order pursuant CPLR § 3211(a)(1), (7) and (8) dismissing the instant action as against Mr. Maroulis. Mr. Maroulis contends that the complaint should be dismissed as against him pursuant to CPLR § 3211(a)(8) on the ground that the court lacks personal jurisdiction over Mr. Maroulis because plaintiff never served Mr. Maroulis. Pursuant to CPLR § 308, personal service can be effected by the delivery of the summons to the person to be served or by the delivery of the summons and complaint "to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served..." and the mailing of the summons and complaint either to the defendant's "last known residence" or "actual place of business." "With respect to personal jurisdiction, it is well established that the affidavit of a process server constitutes *prima facie* evidence of proper service." See *In re de Sanchez*, 57 A.D.3d 452, 454 (1st Dept 2008). Pursuant to CPLR § 306(a), proof of service must "specify the papers served, the person who was served and the date, time, address...and set forth facts showing that the service was made by an authorized person and in an authorized manner."

In the present case, Mr. Maroulis's cross-motion for an order dismissing plaintiff's complaint as against him is granted as plaintiff's affidavit of service was deficient and therefore plaintiff has not made a *prima facie* showing of proper service. Plaintiff has only produced Daniel Moses's affidavit of service, dated June 5, 2015, which states that he served the summons, complaint and notice of motion on that date by mailing the same in an envelope. This affidavit is deficient both because personal service cannot be effected solely by mailing the

summons and complaint and because the affidavit does not state which, if any, defendants were served, the address to which the documents were mailed or the time these documents were mailed. This deficient affidavit does not constitute *prima facie* evidence of proper service. Therefore, Mr. Maroulis's cross-motion for an order dismissing plaintiff's complaint as against him is granted.

The court now turns to the Vartel Defendants' cross-motion. The court cannot consider the Vartel Defendants' cross-motion for an order pursuant to CPLR § 3212 for summary judgment as defendants have not joined issue by answering plaintiff's complaint. However, the court may properly consider the Vartel Defendants' cross-motion for an order pursuant to CPLR § 3211 dismissing plaintiff's second and third causes of action.

On a motion addressed to the sufficiency of the complaint, the facts pleaded are assumed to be true and accorded every favorable inference. *Morone v. Morone*, 50 N.Y.2d 481 (1980). Moreover, "a complaint should not be dismissed on a pleading motion so long as, when plaintiff's allegations are given the benefit of every possible inference, a cause of action exists." *Rosen v. Raum*, 164 A.D.2d 809 (1st Dept. 1990). "Where a pleading is attacked for alleged inadequacy in its statements, [the] inquiry should be limited to 'whether it states in some recognizable form any cause of action known to our law.'" *Foley v. D'Agostino*, 21 A.D.2d 60, 64-65 (1st Dept 1977) (quoting *Dulberg v. Mock*, 1 N.Y.2d 54, 56 (1956)). However, "conclusory allegations – claims consisting of bare legal conclusions with no factual specificity – are insufficient to survive a motion to dismiss." *Godfrey v. Spano*, 13 N.Y.3d 358, 373 (2009).

The Vartel Defendants cross-move for an order pursuant to CPLR § 3211(a)(8) dismissing plaintiff's third cause of action as against Panayiota Kanaris on the ground that the

court does not have personal jurisdiction over Mrs. Kanaris. While the plaintiff's complaint need not allege that the court has a basis for personal jurisdiction, *Fischbarg v. Doucet*, 9 N.Y.3d 375 (2007), when personal jurisdiction is challenged, the plaintiff has the burden of proving a basis for personal jurisdiction. See, e.g., *Arroyo v. Mountain School*, 68 A.D.3d 603 (1st Dept 2009). New York's long-arm statute, CPLR § 302, authorizes the court to exercise personal jurisdiction over non-domiciliaries or their agents for tort and contract claims arising from a defendant's transaction of business in this state. Specifically, CPLR § 302(a)(1) provides that the court may exercise personal jurisdiction over any non-domiciliary who "transacts any business within the state or contracts anywhere to supply goods or services in the state." To determine whether long-arm jurisdiction exists under the "transacts any business" provision of CPLR § 302(a)(1), the court must decide "(1) whether the defendant transacts any business in New York and, if so, (2) whether [the] cause of action aris[es] from such a business transaction." *Wilson v. Dantas*, 128 A.D.3d 176, 181-82 (1st Dept 2015). The court may exercise jurisdiction "so long as the defendant's activities [in this state] were purposeful and there is a substantial relationship between the transaction and the claim asserted." *Fischbarg v. Doucet*, 9 N.Y.3d 375, 380 (2007). "Purposeful activities are those with which a defendant, through volitional acts, 'avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.'" *Id.*

In the present case, the portion of the Vartel Defendants' cross-motion for an order dismissing plaintiff's third cause of action as against Mrs. Kanaris is granted as Mrs. Kanaris did not transact business such that she purposefully availed herself of the privileges and protections of New York law. The Mortgage, allegedly signed by Mrs. Kanaris in New York and given to a

New York-domiciliary mortgagee, is the sole alleged basis of personal jurisdiction. The fact that plaintiff is a New York-domiciliary is not relevant to the issue of the court's jurisdiction over Mrs. Kanaris. The fact as alleged in the complaint that Mrs. Kanaris signed a Mortgage document in New York is a limited contact with New York that does not establish a transaction of business such that Mrs. Kanaris purposefully availed herself of the privileges and protections of New York law, particularly given that the mortgaged real property is located in New Jersey. *See Fischbarg*, 9 N.Y.3d at 381 (detailing the Court of Appeals' prior holdings that the placement of a single order for goods from a New York company, the transitory presence of a corporate official in New York and the communications of an out-of-state "consultant" with an in-state physician did not support long-arm jurisdiction). Therefore, the portion of the Vartel Defendants' cross-motion for summary judgment dismissing plaintiff's third cause of action as against Panayiota Kanaris is granted.

The Vartel Defendants further cross-move for an order pursuant to CPLR § 3211(a)(7) dismissing plaintiff's second cause of action as against Emanuel Kanaris on the ground that plaintiff did not plead a valid cause of action for fraud. To plead a cause of action for fraud, a plaintiff must allege misrepresentation of a material fact, falsity, scienter, reliance and injury. *See Barclay v. Barclay Arms Associates*, 74 N.Y.2d 644 (1989). Pursuant to CPLR § 3016(b), the "circumstances constituting the wrong [fraud] shall be stated in detail."

In the present case, the portion of the Vartel Defendants' cross-motion for an order dismissing plaintiff's second cause of action as against Emanuel Kanaris is denied as plaintiff has pleaded a valid cause of action for fraud in sufficient detail. Plaintiff has pleaded a valid cause of action for fraud through its allegations that Mr. Kanaris, Mr. Antonopoulos and Mr.

Maroulis represented that they would take any steps necessary to effectuate an assignment of payments under Vartel's contract with Public Storage to plaintiff, that this representation was false as said defendants thereafter rescinded the assignment of payments, that said defendants knew their representation was false, that plaintiff relied upon this representation in extending the loan and that plaintiff did not receive payments due under the Agreement that it would have otherwise received from Public Storage.

The Vartel Defendants' contention that plaintiff has failed to plead a valid cause of action for fraud because its alleged reliance was not justifiable is without merit. The Vartel Defendants argue that plaintiff did not perform its due diligence as a "sophisticated investor" to ensure that the Public Storage contract payments would be assigned to plaintiff. "Reliance must be found to be justifiable under all the circumstances before a complaint can be found to state a cause of action in fraud." *VisionChina Media Inc. v. Shareholder Representative Servs., LLC*, 109 A.D.3d 49, 57 (1st Dept 2013). Taking the facts as alleged in plaintiff's complaint as true, the court cannot find that plaintiff's reliance on defendants' alleged misrepresentations was not justifiable. Therefore, the portion of the Vartel Defendants' cross-motion for an order dismissing plaintiff's second cause of action as against Emanuel Kanaris on the ground that plaintiff did not plead a valid cause of action for fraud is denied.

The Vartel Defendants' requests for a declaratory judgment that the Mortgage is null and void and of no force or effect and for an order requiring plaintiff to cancel the Mortgage are denied as counterclaims can only be asserted in a defendant's answer pursuant to CPLR § 3011 and the Vartel Defendants have not answered plaintiff's complaint.

The court now turns to the portion of the Vartel Defendants' cross-motion for an order

dismissing plaintiff's third cause of action for breach of a mortgage agreement. The Vartel Defendants argue that plaintiff's third cause of action must be dismissed on the ground that the mortgage agreement is void pursuant to GOL § 5-701(a)(2), which provides that:

a. Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:

...

2. Is a special promise to answer for the debt, default or miscarriage of another person.

In the present case, the court grants this portion of the Vartel Defendants' cross-motion for an order dismissing plaintiff's third cause of action for breach of a mortgage agreement on the ground that plaintiff has failed to raise any opposition to the Vartel Defendants' argument that the mortgage agreement does not satisfy the requirements of the Statute of Frauds, thereby conceding the correctness of the argument.

Accordingly, plaintiff's motion is denied and the Vartel Defendants' cross-motion is denied except as follows, and it is hereby

ORDERED that the motion of defendant Panayiota Kanaris to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendant and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the motion of defendant Dionyssios Maroulis to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendant and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

