

Jun Li v Kwah
2016 NY Slip Op 30256(U)
January 26, 2016
Supreme Court, Queens County
Docket Number: 709376/2015
Judge: Thomas D. Raffaele
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE THOMAS D. RAFFAELE IA PART 13
Justice

JUN LI, HUANLE SU, and XIUPING DU, x

Index
Number 709376/2015

Plaintiffs,

-against-

Motion
Date November 16, 2015

HELEN KWAH and JOANN KWAH,

Motion Seq. No. 1

Defendants.

x

The following papers numbered 1 to 11 read on this motion by defendants to dismiss plaintiff's complaint, pursuant to CPLR 3211 (a) (1) and (a) (7).

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Affirmation - Exhibits	1-6
Answering Affidavit - Exhibits	7-9
Reply Affidavit.....	10-11

Upon the foregoing papers, it is ordered that defendants' motion is determined as follows:

In this action, arising from a proposed sale of condominium unit to plaintiffs from defendants, plaintiffs seek, *inter alia*, specific performance, declaratory relief, and damages for breach of contract. Defendants move to dismiss plaintiffs' verified complaint pursuant to CPLR 3211 (a) (1), based on documentary evidence, and CPLR 3211 (a) (7), for failure to state a cause of action. Defendants further allege that service of process was improper.

The branch of defendants' motion seeking to dismiss the complaint on the ground

that service of process was not properly effectuated, is denied. Defendants submitted the process server's affidavit of service, which constituted *prima facie* evidence of proper service on them (*see Teitelbaum v North Shore Long Island Jewish Health System, Inc.*, 123 AD3d 1006 [2014]; *Indymac Fed. Bank FSB v Quatrochi*, 99 AD3d 763 [2012]; *Miterko v Peaslee*, 80 AD3d 736 [2011]). In support of their motion, defendants also submitted their own affidavits, each stating they did not live at the subject property, where substituted service was allegedly made. However, also submitted the July 9, 2015 contract of sale between the parties, in which, two months prior to service, defendants acknowledged that their "residence" address was that of the subject property. Further, defendants' affidavits did not deny they were served with process pursuant to CPLR 308 (a) (4), failing to rebut the affidavit of service. Consequently, plaintiff herein is not required to "establish jurisdiction by a preponderance of the evidence at a hearing" (*Skyline Agency v Coppotelli, Inc.*, 117 AD2d 135, 139 [1986]; *see Wilbyfont v New York Presbyterian Hosp.*, 131 AD3d 605 [2015]).

Contrary to defendants' contention, the evidence they submitted in support of this motion to dismiss the complaint, was not "documentary" within the meaning of CPLR 3211 (a) (1), and failed to conclusively establish a defense to the plaintiff's claims as a matter of law, in that such evidence did not utterly refute plaintiff's factual allegations (*see Goshen v Mutual Life Ins. Co. of NY*, 98 NY2d 314, 326 [2002]; *Comprehensive Mental Assessment & Medical Care, P.C. v Gusrae Kaplan Nussbaum, PLLC*, 2015 WL 4097253 [N.Y.A.,D. 2015]; *DiMauro v United, LLC*, 122 AD3d 568 [2014]; *Neckles Bldrs., Inc. v Turner*, 117 AD3d 923 [2014]). For the evidence to be considered "documentary" under that statute, such evidence must be of undisputed authenticity, unambiguous and undeniable (*see Pasquaretto v Long Island University*, 106 AD3d 794 [2013]; *Kopelowitz & Co., Inc. v Mann*, 83 AD3d 793 [2011]). In the case at bar, the contract of sale, admittedly entered into on July 9, 2015, contained ambiguous information with regard to the mortgage contingency date. While the Rider stated a forty-five day allowance, the contract terms, at paragraph 22, stated a sixty day allowance. As such, defendants have failed to conclusively establish a defense to the asserted claim, based on documentary evidence, as a matter of law, and the branch of the motion seeking to dismiss the complaint on that ground is denied.

Initially, the sole criterion to dismiss a complaint, or part thereof, is whether the pleading, and the factual allegations contained within its four corners, manifests any cause of action cognizable at law (*see Gaidon v Guardian Life Ins. Co. Of America*, 94 NY2d 330 [1999]). "To withstand dismissal, the requisite elements of the cause of action must be discernable from the pleadings, and the complaint must give notice of the transactions and occurrences to be proved" (CPLR 3013; *Dolphin Holdings, Inc. v Gander & White Shipping, Inc.*, 122 AD3d 901, 902 [2014]). "Whether the complaint

will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove [his or her] claims, of course, plays no part in the determination of a prediscovery CPLR 3211 motion to dismiss” (*Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38 [2006]).

On a motion to dismiss the complaint, pursuant to CPLR §3211(a)(7), for failure to state a cause of action, the court must afford the pleading a liberal construction, accept as true all the facts alleged, give the nonmoving plaintiff the benefit of all favorable inferences, and determine only whether the alleged facts fit within any cognizable legal theory, and not whether plaintiff can ultimately prove such facts (*see J.P. Morgan Securities, Inc. v Vigilant Ins. Co.*, 21 NY3d 324 [2013]; *People ex rel. Cuomo v Coventry First LLC*, 13 NY3d 108 [2009]; *Bd. of Mgrs. of Bay Club v Borah, Goldstein, Schwartz, Altschuler & Nahins, P.C.*, 97 AD3d 612 [2012]). Construing the pleadings liberally (*see Leon v Martinez*, 84 NY2d 83 [1994]; *Hampshire Properties v BTA Building & Developing, Inc.*, 122 AD3d 573 [2014]; *Carillo v Stony Brook Univ.*, 119 AD3d 508 [2014]), plaintiffs have adequately set forth the factual bases for the first three causes of action for specific performance, declaratory relief and breach of contract. Further, defendants’ opposition “failed to demonstrate that any fact alleged in the complaint was undisputedly not a fact at all” (*Bokhour v GTI Retail Holdings, Inc.*, 94 AD3d 682, 683 [2012]).

Plaintiffs’ fourth cause of action, alleging “breach of covenant of good faith and fair dealing,” is not a viable cause of action as it is duplicative of plaintiffs’ breach of contract cause of action, both arising from the same facts and failing to allege distinct damages (*see Rosenblum v Island Custom Stairs, Inc.*, 130 AD3d 803 [2015]; *Clogher v New York Medical College*, 112 AD3d 574 [2013]).

Plaintiffs’ fifth cause of action, alleging fraud, fails to state a viable cause of action. Two of the necessary elements of a fraud cause of action are the “intent to induce reliance” and “justifiable reliance” (*Stein v Doukas*, 98 AD3d 1024 [2012]). Plaintiffs have failed to adequately state how defendants’ alleged “misrepresentation ... by failing to disclose and failing to obtain the consent of the Plaintiffs, in altering paragraph 4 of the Rider,” *i.e.*, changing the mortgage contingency period from “60 days” to “45 days,” was done with fraudulent intent, or how plaintiffs could have rationally relied on such altered term to their detriment, as plaintiffs’ own evidence demonstrated the change was disclosed to them on or about July 9, 2015.

While the instant notice of motion contains a branch seeking the cancellation of the notice of pendency filed by plaintiffs against the subject property in this action, defendants’ papers are devoid of any argument in favor of such relief. Consequently, that

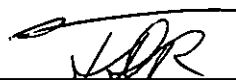
branch of defendants' motion is denied.

The parties' remaining contentions and arguments are either without merit or need not be addressed in light of the foregoing determinations.

Accordingly, the branches of defendants' motion seeking cancellation of the notice of pendency, dismissal of plaintiffs' complaint on the ground of improper service, and dismissal based upon documentary evidence, are denied. The branch of said motion seeking to dismiss plaintiffs' complaint for failure to state a cause of action, is granted solely with regard to plaintiffs' fourth and fifth causes of action, and, otherwise, denied.

Dated:

January 26, 2016



Thomas D. Raffaele, J.S.C.

FILED

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**COUNTY CLERK
QUEENS COUNTY**