

Cheng v Salguero
2016 NY Slip Op 30263(U)
January 26, 2016
Supreme Court, Queens County
Docket Number: 702716/15
Judge: Howard G. Lane
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE
Justice

IAS PART 6

HIU IAN CHENG,

Plaintiff,

-against-

CARLOS SALGUERO and 42-53 REALTY
CORP.,

Defendants.

Index No. 702716/15

Motion
Date September 17, 2015

Motion
Cal. No. 26

Motion
Sequence No. 1

Papers
Numbered

Notice of Motion.....	EF 8
Aff. In Support.....	EF 9
Affidavit.....	EF 10
Exhibits.....	EF 11-20
Affidavit.....	EF 21
Aff. In Opposition.....	EF 25-26
Exhibits.....	EF 27-39
Aff. In Reply.....	EF 41
Exhibits.....	EF 42-43
Correspondence.....	HC-A

Upon the foregoing papers it is ordered that this motion by defendants, Carlos Salguero and 42-53 Realty Corp. for an order pursuant to CPLR 3211(a): dismissing the Complaint of plaintiff, Hiu Ian Cheng, is hereby decided as follows:

Pursuant to plaintiff's Verified Complaint, "[t]he nature of this action is for legal and equitable relief arising out of the defendants' failure to transfer realty located at 42-53 and 42-55 27th Street, Long Island City, New York to the plaintiff. . . Defendants were contractually able to transfer both parcels to plaintiff (as contract vendee), but failed and refused to do so, instead improperly terminating the parties' contract and the suit followed." Plaintiff asserts causes of action sounding in fraud and reformation of contract. Defendants now move to dismiss the plaintiff's Complaint against them.

In a decision/order dated October 20, 2015, this Court held in relevant part:

Upon the foregoing papers it is ordered that this motion by defendants Carlos Salguero and 42-53 Realty Corp. to, inter alia, vacate the notice of pendency and dismiss the plaintiff's Complaint pursuant to CPLR 3211(a)(8) is granted, solely to the extent that a traverse hearing shall be held on Tuesday, January 19, 2016, 2:15 P.M., IAS Part 6, courtroom 24, 88-11 Sutphin Blvd., Jamaica, New York, to determine the propriety of service pursuant to CPLR 308 and to determine whether jurisdiction was properly obtained over defendants. Counsel are directed to contact the clerk of Part 6 at (718) 298-1113 on Friday, January 15, 2016 to ascertain the availability of the court.

Defendants' remaining requests shall be determined upon resolution of the traverse hearing.

Via correspondence sent to this Court dated November 25, 2015, defendants withdrew that branch of the motion seeking dismissal pursuant to CPLR 3211(a)(8). Accordingly, the traverse hearing is rendered moot and unnecessary.

CPLR 3211(a)(1)

That branch of defendants' motion to dismiss plaintiff's Complaint pursuant to CPLR 3211(a)(1) is denied.

CPLR 3211 provides in relevant part: "(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 1. A defense is founded on documentary evidence ***". In order to prevail on a CPLR 3211(a)(1) motion, the documentary evidence submitted "must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claim ***" (*Fernandez v. Cigna Property and Casualty Insurance Company*, 188 AD2d 700, 702; *Vanderminden v. Vanderminden*, 226 AD2d 1037; *Bronxville Knolls, Inc. v. Webster Town Center Partnership*, 221 AD2d 248). "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 [1st Dept 2006][internal citations omitted]).

"To some extent, 'documentary evidence' is a 'fuzzy' term, and what is documentary evidence for one purpose, might not be documentary evidence for another" (*Fontanetta v. John Doe 1*, 73 AD3d 78 [2d Dept 2010]). However, it is well-established law that affidavits and deposition testimony are not documentary evidence, and deeds and contracts are documentary evidence (*Id.*) "[T]o be considered 'documentary', evidence must be unambiguous and of undisputed authenticity" (*Id.*) (internal citations omitted).

The documentary evidence submitted in the instant matter consists of: a Contract of Sale, Rider to Contract of Sale, portions of a title report for the subject premises, copies of the latest deeds on record, a refund deposit check, and proof of clearance of the refund deposit check. This evidence is insufficient to dispose of the causes of action in the Complaint. The documentary evidence that forms the basis of a 3211(a)(1) motion must resolve all factual issues and completely dispose of the claim (*Held v. Kaufman* 91 NY2d 425 [1998]; *Teitler v. Max J. Pollack & Sons*, 288 AD2d 302 [2001]). Here, the evidence is insufficient to dispose of the causes of action, as factual issues remain, including whether the Contract of Sale was entered into fraudulently. Accordingly, this branch of the motion is denied.

CPLR 3211(a) (7)

That branch of defendants' motion which is for an order pursuant to CPLR 3211(a)(7) dismissing the complaint against moving defendants for failure to state a cause of action is denied.

"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; *Leon v. Martinez*, 84 NY2d 83). 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).

The second cause of action, which sounds in fraud, shall not be dismissed. To state a cause of action for fraud, plaintiff must demonstrate that defendant knowingly misrepresented a material fact, upon which plaintiff justifiably relied, resulting in an injury (*New York University v. Continental Ins. Co.*, 87 NY2d 308 [1995]). CPLR 3016(b) states that in an action for fraud, "the circumstances constituting the wrong shall be stated in detail". It is well settled that a claim for fraud must satisfy the specificity and particularity requirements of 3016(b) and allege the essential elements of a fraud claim, misrepresentation of a material fact, falsity, scienter and deception (see, *Barclay Arms, Inc. v. Barclay Arms Assocs.*, 74 NY2d 644, 647 [1989]; *Channel Master Corp. v. Aluminum Ltd. Sales, Inc.*, 4 NY2d 403 [1958]). Applying these principles in this case, the court decides that the Complaint adequately states a cause of action for fraud via ¶1-14 and 18-19.

The remaining two causes of action sound in reformation of contract. The Court finds that the complaint adequately states a cause of action for reformation of contract via inter alia, ¶1-17 and ¶20-21 of the Verified Complaint.

Accordingly, this branch of defendants' motion is denied.

Additionally, defendants have improperly sought to reach the merits of the Complaint on this mere CPLR 3211(a)(7) motion (see, *Jacobs v. Macy's East, Inc.*, 262 AD2d 607, 608 [2d Dept 1999] [internal citations omitted]; *Leon v. Martinez*, 84 NY2d 83).

Defendants may serve an Answer within twenty (20) days of service of a copy of this order with Notice of Entry.

The foregoing constitutes the decision and order of this Court.

Dated: January 26, 2016

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

FILED

FEB -1 2016

**COUNTY CLERK
QUEENS COUNTY**