

Fuller v 79 Hamilton Place Hous. Dev. Fund Corp.

2016 NY Slip Op 30909(U)

May 16, 2016

Supreme Court, New York County

Docket Number: 150028/2016

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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EMMA FULLER AND MICHAEL OVERBY,
Plaintiffs,

Index No. 150028/2016

-against-

DECISION/ORDER

79 HAMILTON PLACE HOUSING DEVELOPMENT FUND
CORPORATION,
Defendant.

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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.....	1
Affirmations in Opposition to the Motion /Cross-motion.....	2
Reply Affidavits.....	3
Exhibits.....	4

Defendant cooperative board has brought the present motion to dismiss the complaint brought by plaintiff to enforce an alleged agreement to sell plaintiffs a unit in the defendant's cooperative. As will be explained more fully below, the motion is granted in its entirety although the request for attorneys' fees is denied as without basis.

Initially, the court finds that the first cause of action for breach of contract based on defendant's refusal to sell plaintiffs the cooperative unit should be dismissed pursuant to CPLR section 3211 (a)(7) on the ground that the writings relied on by plaintiff do not satisfy the statute of frauds. General Obligations Law section 5-703(2) provides that a contract "for the sale, of any real property, or an interest therein, is void unless the contract or some note or memorandum thereof, expressing the consideration, is in writing, subscribed by the party to be charged, or by his lawful agent thereunto authorized by writing."

For a writing to satisfy the statute of frauds, there must be a memorandum signed by the party to be charged which designates the parties, identifies and describes the subject matter and states all of the essential terms. *Generas v. Hotel des Artistes*, 117 A.D.2d 563 (1st Dept 1986) (breach of contract claim based on failure of cooperative to sell unit to plaintiffs dismissed where the parties never entered into a written agreement containing all of the essential terms of a contract of sale). Moreover, no contract for the sale of real property is created “when a material element of the contemplated bargain has been left for further negotiation.” *Id.*

It is well-settled that a written agreement to purchase real property will not constitute an enforceable contract pursuant to the statute of frauds where the terms of said agreement do not include terms material to a contract of sale. *Id.* See also *Goebel v. Raeburn*, 289 A.D.2d 43 (1st Dept 2001) (“In this action alleging breach of a contract to purchase real property, the motion court properly found that a letter from plaintiff’s counsel to defendant’s counsel and a letter from defendant’s counsel to plaintiff did not constitute writings sufficient to take the alleged agreement out of the Statute of Frauds, since the relied upon writings failed to state all the material terms of a complete agreement”). See also *Keles v. Morningside Heights Housing Corp.*, 8 A.D.3d 160 (1st Dept 2004) (holding that the parties’ binder agreement was not an enforceable contract for the sale of a cooperative apartment because the agreement did not include terms material to a contract of sale); *RAJ Acquisition Corp. v. Atamanuk*, 272 A.D.2d 164 (1st Dept 2000)(the letter agreement was unenforceable since it failed to state all the material terms of a complete agreement, “a material element of the contemplated bargain ha[ving] been left for further negotiations.”).

Material terms of a real estate contract of sale, which must be in writing to be enforceable under the statute of frauds, “include those terms customarily encountered in

transactions of this nature' ...such as the purchase price, the time and terms of payment, the required financing, the closing date, the quality of title to be conveyed, the risk of loss during the sale period, adjustments for taxes and utilities, etc." *Nesbitt v. Penalver*, 40 A.D.3d 596, 598 (2d Dept 2007) (internal citations omitted). *See also Argent Acquisitions, LLC v. First Church of Religious Science*, 118 A.D.3d 441 (1st Dept 2014).

In the present case, the court finds that the cause of action for breach of contract must be dismissed on the ground that there is no enforceable written agreement between the parties which includes all the terms material to a contract of sale sufficient to satisfy the statute of frauds. The memorandum sent by the real estate broker for the defendant does not satisfy the statute of frauds because it is not a writing "subscribed by the party to be charged, or by his lawful agent thereunto authorized by writing." General Obligations Law section 5-703(2). Even assuming, *arguendo*, that the memorandum could be considered a writing signed by the party to be charged, it would be insufficient to satisfy the statute of frauds as it does not contain all the material terms of a complete agreement for the purchase of property. It does not state what the closing date for the sale will be; it does not state when the plaintiffs will be required to pay the down payment to defendant; it does not contain any provision for adjustments for taxes and utilities; it does not contain any provision regarding the risk of losses during the sales period; and it does not contain any provision regarding the quality of title to be conveyed. Although the contract of sale exchanged between the parties does contain these provisions, neither party ever signed the contract of sale or agreed to be bound by the provisions contained in the contract of sale and the plaintiffs never made the down payment required by the contract of sale. Finally, there are no other writings signed by the defendant which contain all of the material terms of an agreement to sell real property.

Defendant has also moved to dismiss plaintiff's cause of action for promissory estoppel. The elements of a promissory estoppel claim are: (i) a sufficiently clear and unambiguous promise; (ii) reasonable reliance on the promise; and (iii) injury caused by the reliance. *See Castellotti v. Free*, 27 N.Y.S.3d 507, 513 (1st Dept 2016). If a contract is barred by the statute of frauds, a promissory estoppel claim is only viable where there is an allegation "of the infliction of unconscionable injury on plaintiff as a result of any reliance he placed on defendant's alleged promises." *Melwani v. Jain*, 281 A.D.2d 276, 277 (1st Dept 2001). *See also Castellotti*, 27 N.Y.S.3d at 513 ("If a contract is barred by the statute of frauds, a promissory estoppel claim is viable in the limited set of circumstances where unconscionable injury results from the reliance placed on the alleged promise."); *Fleet Bank v. Pine Knoll Corp.*, 290 A.D.2d 792, 797 (3d Dept 2002) ("the injured party must demonstrate that it would be unconscionable to invoke the statute of frauds to bar such a claim.")

In the present case, the court finds that plaintiffs' cause of action for promissory estoppel should be dismissed on the ground that the alleged contract to sell the property is barred by the statute of frauds and plaintiffs have failed to sufficiently allege that they have suffered an unconscionable injury based on their reliance on defendant's alleged promise to sell them the cooperative unit. The only injury that plaintiffs claim to have suffered based on their reliance is that the value of the unit has gone up since defendant agreed to sell them the unit as a result of which they would have to pay a higher price for the unit if they purchased it. This is insufficient as a matter of law to constitute unconscionable injury.

To the extent that they argue that they have suffered an unconscionable injury because they have been forced to pay two years of rent for an apartment in which they no longer wish to reside, the court finds that this would not constitute unconscionable injury as a matter of law.

The court also finds that plaintiffs have failed to adequately allege reasonable reliance on any promise to sell them the unit based on the documentary evidence establishing that the contract of sale sent by defendant to plaintiffs was never signed by plaintiffs.

Defendant has also moved to dismiss plaintiffs' claim for unjust enrichment. A litigant cannot circumvent the requirement imposed by the statute of frauds that there be a writing "by the simple expedience of recasting the action as one seeking damages for unjust enrichment." *J.E. Capital, Inc. v. Karp Family Associates*, 285 A.D.2d 361, 364 (1st Dept 2001). *See also Kocourek v. Booz Allen Hamilton Inc.*, 71 A.D.3d 511 (1st Dept 2010) (A litigant may not use an unjust enrichment claim to evade the statute of frauds). *Cf. Castellotti*, 27 N.Y.S.3d at 316 (an unjust enrichment claim is not precluded by the statute of frauds where it is not an attempt to enforce the oral contract but instead seeks to recover the amount by which defendant is enriched at plaintiff's expense); *Farash v. Sykes Datatronics*, 59 N.Y.2d 500, 503 (1983) (quasi contract claim may proceed where it did not attempt to enforce an oral agreement, but merely sought to recover expenditures made by the plaintiff in reliance upon statements made by and at the request of the defendant).

In the present case, the court finds that plaintiffs' claim for unjust enrichment should be dismissed on the ground that plaintiffs' unjust enrichment claim is simply an attempt to enforce the oral contract which is barred by the statute of frauds rather than an attempt to recover expenditures made by plaintiffs in reliance on defendant's actions.

To the extent that plaintiffs argue that they have stated a claim for breach of the implied covenant of good faith and fair dealing, this argument is without merit as the law is well established that there can be no claim for breach of the implied covenant of good faith and fair dealing where there is no enforceable contract. *See Randall's Is. Aquatic Leisure, LLC v. City of*

New York, 92 A.D.3d 463 (1st Dept 2012); *Guarino v. North Country Mtge. Banking Corp.*, 79 A.D.3d 805, 807 (2d Dept 2010).

Based on the foregoing, the motion to dismiss the complaint is granted in its entirety but the request for attorneys' fees is denied as without basis. The foregoing constitutes the decision, judgment and order of the court.

Dated: 5/16/16

Enter: _____ *CK*

CYNTHIA S. KERN
J.S.C. J.S.C.