

Oster v Castel

2016 NY Slip Op 31338(U)

July 14, 2016

Supreme Court, New York County

Docket Number: 653013/2016

Judge: Arlene P. Bluth

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 32

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AVI OSTER,

Plaintiff,

Index No. 653013/2016
Motion Seq: 001

-against-

CHARLES DE VIEL CASTEL

DECISION/ORDER
ARLENE P. BLUTH, JSC

Defendant.

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Defendant’s motion, via an Order to Show Cause, to dismiss plaintiff’s complaint, to cancel the Notice of Pendency, for an award of costs and expenses, and for sanctions is granted *only* to the extent that plaintiff’s claims for fraud and promissory estoppel are severed and dismissed; the remainder of defendant’s motion is denied.

This case arises out of a failed real estate transaction. Plaintiff and defendant occupy neighboring apartments at a building located at 21 Astor Place, New York, NY. Defendant attempted to sell his apartment (6D) and entered into negotiations with plaintiff (who resides in 6E). Plaintiff claims that he reached an oral agreement to purchase defendant’s apartment for \$4.35 million. Plaintiff asserts that all terms were negotiated and agreed. Plaintiff then claims that on Friday, May 27, 2016, defendant’s counsel informed plaintiff’s counsel that defendant had received a higher offer. Defendant then accepted, via email, an offer for \$4.5 million from plaintiff and stated that “We sign today if possible and if that is the case I will not go back to the

other buyer. If it's next week I have to give the other buyer the option. Helane, [plaintiff's counsel] Please confirm that works for Avi and let's get this done" (affidavit of plaintiff, exh B).

Plaintiff contends that he and his attorney worked feverishly from the time of this email (9:41 a.m.) to get a signed copy of the contract of sale and a deposit check by the afternoon of May 27, 2016. Plaintiff's counsel was informed by defendant's counsel that defendant's counsel's office was closing early. Plaintiff's counsel allegedly emailed a copy of the purported contract to defendant's counsel at 10:41 a.m. (*id.* exh C). At 12:44 p.m., defendant's counsel sent an email to plaintiff's counsel informing her that the contract "looks good" (*id.*). Plaintiff's counsel then sent a follow up email to defendant's counsel at 3:23 p.m seeking confirmation that a hard copy of the allegedly agreed-upon contract, which included a signature from plaintiff, and the deposit check of \$450,000 was received in defendant's counsel office (*id.* exh F).

Defendant's counsel confirmed that it had been received.

On Tuesday May 31, 2016, defendant's counsel notified plaintiff's counsel that defendant would not be proceeding with the transaction and that he would be returning the deposit check. Plaintiff alleges that he was told to submit a signed contract of sale with his highest and best offer by 4 p.m. on June 1, 2016. Plaintiff claims that although he believed he had a contract, he submitted a new offer of \$4.825 million, which was subsequently rejected. Plaintiff commenced the instant action on June 7, 2016.

Discussion

"On a CPLR 3211 motion to dismiss, the court will accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Nonnon v*

City of New York, 9 NY3d 825, 827, 842 NYS2d 756 [2007] [internal quotations and citation omitted]). “A complaint should not be dismissed on a pleading motion so long as, when the plaintiff’s allegations are given the benefit of every possible inference, a cause of action exists. The material allegations of the complaint must be deemed to be true and the proper inquiry is whether a cause of action exists, not whether it has been properly stated” (*Rosen v Raum*, 164 AD2d 809, 810, 559 NYS2d 541 [1st Dept 1990]).

“In order to prevail on a motion to dismiss based on documentary evidence pursuant to CPLR 3211(a)(1), the documents relied upon must definitively dispose of plaintiff’s claim” (*Bronxville Knolls, Inc. v Webster Town Ctr. Partnership*, 221 AD2d 248, 248, 634 NYS2d 62 [1st Dept 1995] [citations omitted]). “[S]uch motion may be appropriately granted only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v Mut. Life Ins. Co. of New York*, 98 NY2d 314, 326, 746 NYS2d 858 [2002]).

In support of its motion to dismiss pursuant to CPLR 3211(a)(1), (a)(5), and (a)(7), defendant alleges that the negotiations between the parties were only informal and that other buyers were bidding at the same time that plaintiff was submitting offers. Defendant claims that this alleged bidding war culminated in defendant requesting that all prospective buyers submit their best and final offer by June 1, 2016 at 4 p.m. and that the highest bid would win. Defendant claims that he received an offer for \$5.1 million from another buyer, which he accepted.

Defendant claims that he returned the deposit check of \$450,000 from plaintiff and an additional deposit check from plaintiff for \$32,500 (to account for plaintiff’s alleged increased offer of \$4.825 million).

Defendant claims that the complaint should be dismissed because the documentary evidence demonstrates that plaintiff is trying to enforce an insufficient agreement, the statute of frauds is not satisfied, and plaintiff fails to state a cause of action.

Documentary Evidence/Breach of Contract

The elements of a breach of contract claim are “the existence of a contract, the plaintiff’s performance thereunder, the defendant’s breach thereof, and resulting damages” (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426, 913 NYS2d 161 [1st Dept 2010]).

“It is axiomatic that a party seeking to recovery under a breach of contract theory must prove that a binding agreement was made as to all essential terms. Courts look to the basic elements of the offer and the acceptance to determine whether there is an objective meeting of the minds sufficient to give rise to a binding and enforceable contract” (*Silber v New York Life Ins. Co.*, 92 AD3d 436, 439, 938 NYS2d 46 [1st Dept 2012]).

Defendant’s central claim is that no contract existed between the parties. Defendant claims that plaintiff was aware that other negotiations were ongoing and that plaintiff’s increased offer (\$4.825 million) evidences the fact that the parties did not intend to be bound. Defendant claims that the emails may not serve as the basis for a formal contract. Defendant claims that the emails sent did not contain the material terms of the alleged contract, including the closing date, the quality of title to be conveyed, or a provision about the risk of loss.

In opposition, plaintiff claims that a contract was formed and cites to two First Department cases that allegedly support the argument that a contract was formed. Plaintiff asserts that at this stage of the proceeding, dismissal is not warranted.

The Court must first consider the email sent by defendant to his attorney and plaintiff's attorney that stated "I just accepted a \$4.5 mm offer from Avi. We sign today if possible and if that is the case I will not go back to the other buyer. If it's next week I have to give the other buyer the option. Helane, [plaintiff's counsel] Please confirm that works for Avi and let's get this done" (affidavit of plaintiff, exh B). Defendant does not suggest that there are other terms to be discussed or that he will entertain other offers if plaintiff complies. Defendant also does not suggest that he wanted to review the contract or that he was planning on any future steps before he signed the contract. Plaintiff submits emails confirming that a proposed contract was sent to defendant's attorney along with a deposit check. The emails also suggest that this contract was acceptable to defendant's attorney in an email where defendant's counsel states that the contract "looks good."

In his email accepting the offer on Friday, May 27, defendant made clear that he would not go back to the other buyer if the contract was signed that day. Plaintiff had all the necessary items, including a signed contract and a deposit check, delivered to defendant within three hours of receiving the email in which defendant's attorney stated that the contract "looks good." The Court finds that, given these circumstances, plaintiff has adequately pled that there was a meeting of the minds regarding the terms of the agreement and the price for the apartment to form the basis of cognizable breach of contract claim. The *only* remaining step was for defendant to sign the contract, which plaintiff alleges he promised to do. Here, defendant failed to submit documentary evidence utterly refuting the alleged fact that defendant agreed to the price and his attorney allegedly agreed to the terms of the contract.

The case law also compels this decision. Defendant relies heavily on *Argent Acquisitions, LLC v First Church of Religious Science* (118 AD3d 441, 990 NYS2d 1 [1st Dept 2014]), in support of its argument that a contract never existed. However, the facts of that case are distinguishable. In that matter, the operative “agreement” was a **letter** that set forth *some* of the essential terms of the contract (*id.* at 441-42). A month after the seller agreed to the terms set forth in the letter, counsel for the potential buyer submitted a draft contract of sale (*id.* at 442). In the following weeks, there were various emails sent concerning the agreement in order to finalize its terms (*id.*). Further, *Argent* is distinguishable because “the contemplated transaction was unique, insofar as it was contingent on approval by the court and the Attorney General” (*id.* at 444).¹ Here, plaintiff alleges that the hard copy of the signed contract sent on Friday, May 27 was the final agreement, already approved by seller and seller’s attorney, and only needed seller’s signature.

Plaintiff points to two First Department cases in his opposition. In *PMJ Capital Corp. v PAF Capital, LLC*, (98 AD3d 429, 949 NYS2d 385 [1st Dept 2012]), the First Department overturned a trial court’s dismissal (on a motion to dismiss) in a breach of contract action for the purchase of two mortgage loans. Just as in the instant action, the contract in *PMJ* contained a clause that stated that there would be no binding obligation until the agreement was executed by both sides (*id.* at 432). Despite this clause, the Court ruled that “the totality of the circumstances

¹Plaintiff also cites to *184 Joralemon LLC v Brooklyn Law Sch.* (31 Misc3d 1201(A), 929 NYS2d 201 (Table) [Sup Ct, Kings County 2011], in support of his claim that there was no contract. In *Joralemon*, there was a provision in a contract for the sale of real property that provided that the contract would not be binding until both sides executed the contract (*id.*). However, the defendant (the president of Brooklyn Law School) in *Joralemon* sent an email stating that “she wished to review the Agreement once more before executing it” (*id.*). Defendant in the instant matter included no such qualifying language in his email accepting the offer.

raises a question of fact as to the intent of the parties, preventing dismissal at this early stage” (*id.* at 430). In *PMJ*, the defendant had notified plaintiff by email that the bid for the loans had been accepted, a loan sale agreement was prepared by defendant’s attorney, and plaintiff sent signed copies of the loan sale agreement only later to be informed by defendant that the agreement would not be signed by defendant (*id.* at 429-30).

Plaintiff also relies upon *Aristone Realty Capital, LLC v 9 E. 16th St. LLC*, (94 AD3d 519, 941 NYS2d 840(Mem) [1st Dept 2012], for the proposition that the contract that was sent by plaintiff’s counsel was accepted by defendant and that the contract constituted the final version after negotiation. In *Aristone*, the First Department found issues of fact in a failed real estate transaction where attorneys for both the buyer and seller exchanged an allegedly final version of the contract of sale via an email that did not include any qualifying language that contemplated further review (*id.* at 840-41). The Court found that the parties allegedly agreed upon the terms and conditions of the sale and that there were triable issues of fact “despite the lack of a fully executed contract” (*id.* at 841).

When considering the totality of the circumstances, the Court finds that plaintiff has stated a cognizable cause of action for breach of contract. The Court is constrained by the First Department’s rulings that the lack of a fully executed contract is not, by itself, dispositive of the existence of a contract (*see PMJ Capital*, 98 AD3d at 430, 432; *Aristone*, 94 AD3d at 841). Even the presence of a provision that the contract is not binding until the contract has been executed by both sides is not enough to dismiss an action (*PMJ Capital*, 98 AD3d at 430, 432). Therefore,

paragraph 29 of the alleged contract (titled, “Contract Not Binding Until Signed”) does not decide this matter at the motion to dismiss stage.²

Here, plaintiff has alleged that all terms were agreed upon, including the price, and points to the signed contract of sale sent by plaintiff’s counsel to defendant’s counsel and to defendant’s counsel response that the contract “looks good.” At this stage of the proceeding, that is sufficient to state a cognizable cause of action.

Defendant provides no documentary evidence to utterly refute the allegation that all terms were accepted. Upon receiving the contract from plaintiff on May 27, defendant’s attorney did not include any qualifying language about further steps and when they might be completed. Defendant’s attorney merely stated that the contract looked good. Within three hours after receiving that message, defendant’s attorney received a \$450,000 check and a signed copy of the alleged contract. At this stage of the action, defendant has not shown that the parties intended additional steps, such as the continued negotiations in *Argent*, which might evidence that there was not a meeting of the minds.³

The next communication regarding the status of the contract was on Tuesday, May 31, when defendant’s attorney stated via email that his client “is not proceeding with the transaction”

²Defendant also cites to the merger clause in the alleged contract (Paragraph 24) in support of the argument that the prior discussions between the parties cannot evidence the formation of a contract. However, plaintiff has not claimed that some prior agreement or understanding conflicts with the alleged contract. Instead, plaintiff claims that the alleged contract is the final agreement between the parties.

³The fact that plaintiff subsequently raised his offer to \$4.825 million is also not dispositive. When faced with the prospect of losing out on the apartment, plaintiff put in an additional bid. At the motion to dismiss stage, the Court declines to punish plaintiff for attempting to get the apartment immediately without resorting to litigation.

(affidavit of plaintiff, exh G). Defendant's attorney did not state that he was rejecting an offer, presenting a counteroffer or that he had accepted another offer. The language used does not clearly indicate that the defendant considered the alleged contract to be merely an offer or an agreement to agree.

In determining the intent of the parties, the Court also reviewed defendant's attorney's email on the morning of Friday May 27 which stated that "your client doesn't have any 'rights' to my client's apartment . . . under NY law there is no deal until both parties have executed a formal contract and tendered a down payment" (affirmation of defendant's counsel, exh A at 8). However, this email *preceded* defendant's own email accepting the \$4.5 million offer and defendant's attorney's email stating that the contract looked good. Further, defendant's attorney stresses that "I suggest your client simply call my client to discuss . . . I would prefer they speak directly about any terms" (*id.*). Defendant's attorney's observation about the status of New York law is not enough, given the circumstances, to definitively characterize defendant's intent because the defendant's attorney later allegedly consented to the terms of the contract and the defendant later agreed to the price.

Statute of Frauds

"It is well established that the statutorily required writing need not be contained in one single document, but rather may be furnished by piecing together other, related writings" (*William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 477, 982 NYS2d 813 [2013]). "An e-mail sent by a party, under which the sending party's name is typed, can constitute a writing for purposes of the statute of frauds" (*Newmark & Co. Real Estate Inc v 2615 East 17 St. Realty LLC*, 80 AD3d 476, 477, 914 NYS2d 162 [1st Dept 2011]).

Defendant also moves to dismiss on the ground that the Statute of Frauds is not satisfied. Defendant claims that the emails exchanged between the parties do not thoroughly identify and describe the subject matter at issue or give a specific description of the property.

In opposition to this branch of the motion, plaintiff claims that the Statute of Frauds is satisfied because plaintiff has attached emails sent by the parties and their counsel as well as the finalized form of the contract.

Here, the alleged finalized form of the contract (to which defendant's counsel stated, "looks good") and the prior emails, taken together, constitute a writing sufficient to defeat a motion to dismiss.

Specific Performance

"To obtain specific performance" a party must "show that it was ready, willing and able to fulfill its contractual obligations" (*ADC Orange, Inc. v Coyote Acres, Inc.*, 7 NY3d 484, 490, 824 NYS2d 192 [2006]).

Defendant claims that plaintiff is not entitled to specific performance because he cannot show that there was a contract to which a remedy of specific performance might be available.

As stated above, the Court found that plaintiff has stated a cognizable cause of action for breach of contract. Therefore, plaintiff might be entitled to specific performance if plaintiff prevails in this action.

Good Faith and Fair Dealing

"Implicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance" (*Dalton v Educ. Testing Serv.*, 87 NY2d 384, 389, 639 NYS2d 977 [1995]). "This embraces a pledge that neither party shall do anything which will have the effect

of destroying or injuring the right of the other party to receive the fruits of the contract” (*id.* [internal quotations and citation omitted]).

Defendant claims that this cause of action should be dismissed because it is duplicative of the breach of contract claim.

In opposition, plaintiff claims that his good faith and fair dealing claim should not be dismissed because it does not include conduct covered by the alleged contract. Plaintiff claims that defendant’s failure to return the signed contract as promised and his solicitation of further bids after he stated that he would not do so and after an allegedly valid agreement was reached is not covered in the contract and, therefore, the claim is not duplicative of the breach of contract claim.

Plaintiff is correct. The breach of contract claim relies on defendant’s failure to perform his obligations under the alleged contract. Soliciting further bids, defendant’s statement that he agreed to the offer from plaintiff, and agreeing to a contract with another buyer would not be covered in a breach of contract claim.

Fraud

“The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages” (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559, 883 NYS2d 147 [2009]). “A claim rooted in fraud must be pleaded with the requisite particularity under CPLR 3016(b)” (*id.*). “CPLR 3016(b) is satisfied when the facts suffice to permit a reasonable inference of the alleged misconduct. And, in certain cases, less than plainly observable facts may be supplemented by the circumstances surrounding the alleged fraud” (*id.*).

Defendant claims that this cause of action should be dismissed because the parties were simply engaged in a bidding war.

In opposition, plaintiff claims that defendant represented that he would sell the apartment to plaintiff and May 27 and did not.

The Court finds that this claim fails because plaintiff has not put forward allegations that give rise to a reasonable inference that there was a misrepresentation. Although plaintiff has alleged that defendant did not perform under the contract, that does not mean that defendant's email accepting the offer was a material misrepresentation at the time it was made. There is also no allegation or support for the argument that defendant had knowledge of its falsity. In other words, plaintiff has not plead with the requisite particularity that defendant knew that he was saying something false when he sent the email accepting the offer. Accordingly, this cause of action is severed and dismissed.

Negligent Misrepresentation

"A claim for negligent misrepresentation requires the plaintiff to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information" (*J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148, 831 NYS2d 364 [2007]). "It has long been the law in New York that a plaintiff in an action for negligent misrepresentation must show either privity of contract between the plaintiff and the defendant or a relationship so close as to approach that of privity" (*Sykes v RFD Third Ave. 1 Associates, LLC*, 15 NY3d 370, 373, 912 NYS2d 172 [2010] [internal quotations and citations omitted]).

“A special relationship may be established by persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified” (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 180, 919 NYS2d 465 [2011] [internal quotations and citation omitted]).

Defendant claims that this claim is duplicative of the breach of contract claims and that there was no misrepresentation.

In opposition, plaintiff alleges that there was a relationship sufficiently pled and that defendant misrepresented his willingness to enter into a contract.

The Court finds that plaintiff failed to allege that incorrect information was conveyed to plaintiff. The failure to perform pursuant to a contract does not impliedly mean that incorrect information was conveyed by defendant to plaintiff. Accordingly, the claim for negligent misrepresentation is severed and dismissed.

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” (*Castellotti v Free*, 138 AD3d 198, 204, 27 NYS3d 507 [1st Dept 2016]).

Defendant claims that plaintiff cannot claim reasonable reliance as a voluntary participant in informal negotiations with defendant during a bidding war.

Plaintiff claims that there was reasonable reliance.

The Court finds that plaintiff has pled a cognizable cause of action for promissory estoppel. Defendant is alleged to have made a clear promise to complete the transaction at the agreed upon price if the deal was completed on that day (Friday, May 27). In reliance on that

promise, plaintiff scrambled to secure and send an executed copy of the alleged contract and the deposit check to defendant within a few hours. The parties do not dispute that plaintiff completed every task required of him. However, plaintiff did not secure the apartment.

Unjust Enrichment

To plead a claim for unjust enrichment “the plaintiff must allege 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” (*Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516, 950 NYS2d 333 [2012]). “An unjust enrichment claim is rooted in the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another” (*id.* [internal quotations and citation omitted]). Although a plaintiff is “not required to allege privity, it had to assert a connection between the parties that was not too attenuated” (*id.* [citation omitted]).

Defendant claims that he was acting in his own financial interest and that this alleged voluntary bidding war does not constitute a basis for a claim of unjust enrichment.

In opposition, plaintiff claims that defendant was enriched by receiving a contract to sell the apartment for \$5.1 million at plaintiff’s expense.

The Court finds that plaintiff has adequately pled a cause of action for unjust enrichment. Plaintiff has put forth allegations sufficient to demonstrate that defendant was unjustly enriched by receiving an offer worth \$600,000 more than plaintiff’s bid after plaintiff complied with defendant’s demand to send a signed contract and deposit check in a few hours. Defendant now has a more valuable offer after allegedly agreeing to complete the contract at \$4.5 million. Plaintiff, on the other hand, has nothing to show for his efforts. Plaintiff has also alleged facts

sufficient to meet the final element; that good conscience might permit plaintiff to receive the benefit of the bargain.

Accordingly, it is hereby

ORDERED that the motion by defendants is granted only to the extent that plaintiff's claims for fraud and negligent misrepresentation are hereby severed and dismissed; and it is further

ORDERED that the remaining portions of defendant's motion are denied; and it is further

ORDERED that defendant must serve an answer to the complaint in accordance with the CPLR; and it is further

ORDERED that the parties are directed to appear for a conference on July 28, 2016 at 10:00 a.m.

This is the Decision and Order of the Court.

Dated: July 14, 2016
New York, New York



HON. ARLENE P. BLUTH, JSC