

Malekan v 701-709 Chester St LLC
2016 NY Slip Op 31455(U)
January 5, 2016
Supreme Court, Kings County
Docket Number: 10704/2014
Judge: Sylvia G. Ash
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This opinion is uncorrected and not selected for official publication.

FILED
COUNTY CLERK

2016 JAN 13 AM 8:36 ↑

At an IAS Term, Part 71 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 5th day of January, 2016.

PRESENT:

HON. SYLVIA G. ASH,

Justice.

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ISAAC MALEKAN aka ESHAGH MALEKAN
and 705 CHESTER DEV LLC,

Plaintiff(s),

DECISION AND ORDER

- against -

Index # 10704/2014

701-709 CHESTER ST LLC, TZILA WAJSFELD
and CHESTER STREET LLC,

Defendant(s).

-----X

The following papers numbered 1 to 4 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____

1, 2
3
4

Defendants move for an Order dismissing Plaintiffs' complaint as against them pursuant to CPLR §3211 on the grounds of, *inter alia*, documentary evidence, failure to state a cause of action and lack of personal jurisdiction. Plaintiffs oppose.

Background

According to the Amended Verified Complaint, in February 2014, Defendant 701-709 CHESTER ST LLC ("709 Chester St LLC") by Defendant TZILA WAJSFELD ("Wajsfeld"), member of 709 Chester St LLC, and Plaintiff ISAAC MALEKAN ("Malekan") entered into a contract of sale for the purchase of the premises known as 701 Chester Street, Brooklyn, New York (hereinafter referred to as the "Property") at the purchase price of \$1,275,000.00.

Malekan thereafter assigned the contract of sale to 705 CHESTER DEV LLC (“705 Chester”), co-Plaintiff. The contract provided that the purchaser agreed to extend to the seller a twenty-year lease and that said lease was to be given to CHESTER STREET LLC, also a Defendant herein, by 705 Chester. A closing date was scheduled for July 16, 2014, however, 709 Chester St LLC stated, by email, that the closing could not occur due to title issues that had to be resolved.

On July 22, 2014, Plaintiffs commenced the instant action alleging fraud and seeking specific performance of the contract of sale. Specifically, Plaintiffs allege that Defendants represented that all title issues would be cleared by documents in their possession; that Plaintiffs’ research showed that the main exception in the title report concerning a *lis pendens* was resolved in May 2014; and that Defendants deliberately refused to cooperate in clearing the title issue in an attempt to circumvent performance of the contract. Plaintiffs allege they were ready, willing and able to perform as evidenced by the \$63,750 check for down payment, which Defendants never deposited.

Previously, Defendants made a pre-answer motion to dismiss resulting in a Court Decision dated February 11, 2015, which partially granted Defendants’ motion to the extent Plaintiffs’ cause of action for specific performance was dismissed but denied with regards to Plaintiffs’ fraud claim. Subsequently, the parties entered into a stipulation whereby Plaintiffs would serve an amended complaint and Defendants would have 30 days from service of same to submit an answer.

Plaintiffs’ Amended Complaint added a cause of action for breach of contract. In lieu of submitting an answer, Defendants made the instant motion to dismiss the Amended Complaint. Although Defendants’ current motion is substantially similar to the motion made previously, to the extent certain issues were not addressed in this Court’s Decision dated February 11, 2015, the Court addresses them now on the basis of reargument. However, to the extent Defendants move, once again, to dismiss Plaintiffs’ fraud claim pursuant to CPLR 3211[a], that portion of the motion must be denied as barred by the “single motion rule” since Defendants previously moved for such relief and was denied (*see Bailey v Peerstate Equity Fund, L.P.*, 126 AD3d 738, 738 [2d Dept 2015]; *B.S.L. One Owners Corp. v Key Int’l Mfg.*, 225 AD2d 643, 644 [2d Dept 1996]).

Failure to Serve Defendant Chester Street LLC

Defendants argue the Amended Complaint must be dismissed as against Defendant Chester Street LLC because it was never served with process, which Plaintiffs do not dispute. Thus, this portion of Defendants’ motion is granted without opposition.

Failure to State a Cause of Action Against Wajsfeld

Defendants argue the Amended Complaint must be dismissed as against Defendant Wajsfeld because it fails to identify any violations, omissions, breaches or failures committed by Wajsfeld. In response, Plaintiffs submit Wajsfeld should remain as a defendant because she is the managing member of 709 Chester St LLC and the member that signed the contract.

Upon review of the Amended Complaint, the Court finds the complaint fails to state a cause of action against Wajsfeld. There is no factual allegation plead against Wajsfeld as an individual, such as a violation of a legal duty or any actions or omissions committed by Wajsfeld upon which personal liability could be attached (*see Kallman v Pinecrest Modular Homes, Inc.*, 81 AD3d 692, 693 [2d Dept 2011]). Accordingly, the Amended Complaint must be dismissed as against Wajsfeld.

Malekan as an Improper Plaintiff Under 3211[a][3]

It is Defendants' position that Malekan must be removed as a plaintiff in this action pursuant to CPLR §3211[a][3] because he assigned his interest in the contract to 705 Chester on April 5, 2014.

The Court finds this argument to be without merit. Defendants fail to show why Malekan lacks capacity to sue under CPLR §3211[a][3], especially in light of Malekan's fraud claim against Defendants. Thus, this portion of Defendants' motion is denied.

Defects in Plaintiffs' Pleadings

Defendants argue the complaint must be dismissed for Plaintiffs' failure to file or serve the mandatory e-filing notice and to submit a "Commercial Division Attorney's Certification" confirming the case complies with the Commercial Division guidelines. However, Defendants fail to establish why such failures would entitle Defendants to dismissal of Plaintiffs' action. Accordingly, Defendants' request for this relief is denied.

Res Judicata / Collateral Estoppel

That portion of Defendants' motion seeking dismissal of Plaintiffs' specific performance cause of action on the basis of collateral estoppel is granted. The Court previously dismissed said cause of action in its February 11, 2015 Decision.

Documentary Evidence and Breach of Contract

Defendants contend the subject contract was properly terminated because they never received the contract deposit/down payment in the amount of \$63,750. However, given Plaintiffs' allegations to the contrary, Defendants fail to establish their entitlement to dismissal of Plaintiffs' breach of contract claim in their Amended Complaint. Thus, this portion of Defendants' motion to dismiss is denied.

Conclusion

Accordingly, it is hereby

ORDERED that Defendants' motion is GRANTED to the extent that Plaintiffs' cause of action for specific performance is dismissed; it is further

ORDERED that the Amended Complaint is dismissed in its entirety as against Defendants Wajsfeld and Chester Street LLC; and it is further

ORDERED that Defendants' motion is otherwise DENIED and the case remains active against Defendant 709 Chester St LLC.

This constitutes the Decision and Order of the Court.

E N T E R,



Sylvia G. Ash, J.S.C.

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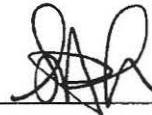
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