

Asitashvili v Saenko

2016 NY Slip Op 32329(U)

October 18, 2016

Supreme Court, Queens County

Docket Number: 710453/15

Judge: Salvatore J. Modica

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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, SALVATORE MODICA IAS PART 37
Justice

DAVID ASITASHVILI,

Plaintiff(s),

-against-

KSENIA SAENKO, LARISA SAENKO, and
VIKTORIA SAENKO,

Defendant(s).

Index No.: 710453/15

Motion Date:
April 6, 2016

Cal. No.: 10

Mot. Seq. No.: 2

FILED
OCT 21 2016
COUNTY CLERK
QUEENS COUNTY

On the Court's own motion, the decision of this Court, dated September 30, 2016, and entered on October 11, 2016, is recalled and vacated, and replaced by this decision and order. The reason for the amended decision and order is to correct a typographical error on page 6 of the opinion.

The following papers read on this motion by Defendants for an Order, pursuant to CPLR 3211(a)(1), (a)(5), (a)(7), dismissing the Complaint.

	<u>PAPERS NUMBERED</u>
Notice of Motion-Affidavits-Exhibits.....	EF 19-24
Answering Affidavits-Exhibits (Plftf).....	EF 25-27
Memorandum of Law in Opposition (Pltf).....	EF 28
Memorandum of Law in Reply (Deft).....	EF 29

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

Plaintiff commenced this action asserting, *inter alia*, breach of contract, breach of fiduciary duty, conversion, fraud, unjust enrichment, a claim for constructive trust, which causes of action arose out of an Acquisition Agreement in connection with a purchase of a cooperative property by Plaintiff to permit him and Defendant VIKTORIA SAENKO, his former fiancé to live in the property with their infant child. Pursuant to the Acquisition Agreement, Plaintiff agreed to purchase the subject property and be responsible for the down payment, legal fees, and closing costs with the balance of the purchase price to be paid through a

personal loan with Defendant LARISA SAENKO, mother to Defendant VIKTORIA SAENKO, to be repaid within one year.

In reliance on the Acquisition Agreement, Plaintiff had additional renovations performed on the property, retained a real estate attorney to prepare a contract of sale. Plaintiff alleges that between October 1, 2014 and December 30, 2014, Defendants devised a plan to purchase the property from Plaintiff, and exclude Plaintiff from residing at the property in breach of the Acquisition Agreement. Plaintiff alleged that Defendants induced the Plaintiff to amend the contract of sale to substitute Defendant KSENIA SAENKO as the grantee in place and stead of Plaintiff. On or about November 15, 2014, Plaintiff made the down payment on the property on the assumption that he would be residing at the property with his former fiancé and their child. At the closing, Plaintiff paid the legal fees, closing costs, title insurance, and homeowners insurance with the shares and the lease conveyed to Defendant KSENIA SAENKO. Despite a break down in the relationship between Plaintiff and VIKTORIA SAENKO and a subsequent brief reconciliation, Plaintiff claims he was never reimbursed for the approximately \$29,500.00 he expended on the subject cooperative. Plaintiff alleged that Defendants LARISA SAENKO and VIKTORIA SAENKO continue to reside in the property and that Defendant KSENIA SAENKO continues to be the legal owner of the property to their benefit at the detriment of Plaintiff.

A. CPLR 3211(a)(1)

That branch of defendant's 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 & Casualty Ins. Co., 188 AD2d 700, 702; Vanderminden v. Vanderminden, 226 AD2d 1037; Bronxville Knolls, Inc. v. Webster Town Ctr. Partnership, 221 AD2d 248.)

If the documentary evidence disproves an essential allegation of the complaint, dismissal is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action (see Snyder v. Voris, Martini & Moore, LLC, 52 AD3d 811 [2008]; Peter F. Gaito Architecture, LLC v. Simone Dev. Corp., 46 AD3d 530 [2007]). The evidence submitted in support of such motion must be "documentary" or the motion must be denied

(Fontanetta v. John Doe 1, 73 AD3d at 84, quoting Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C 3211:10, at 22). In order for evidence submitted under a CPLR 3211(a)(1) motion to qualify as "documentary evidence," it must be "unambiguous, authentic, and undeniable" (Granada Condominium III Assn. v. Palomino, 78 AD3d 996, 996-97 [2010] [internal quotation marks omitted]). "[J]udicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case" (Fontanetta v. John Doe 1, 73 AD3d at 84-85 [internal quotation marks omitted]). At the same time, "[n]either affidavits, deposition testimony, nor letters are considered documentary evidence within the intendment of CPLR 3211(a)(1)" (Granada Condominium III Assn. v. Palomino, 78 AD3d at 997 [internal quotation marks omitted]; see, Suchmacher v. Manana Grocery, 73 AD3d 1017 [2010]; Fontanetta v. John Doe 1, 73 AD3d at 86).

Other than a copy of the summons and complaint, there is no other documentary evidence submitted by Defendants in support of their motion sufficient to dismiss Plaintiff's complaint on this ground.

Accordingly, this branch of the motion is denied.

B. CPLR 3211(a)(7)

That branch of the motion which is for an order pursuant to CPLR 3211(a)(7) dismissing the complaint against defendant for failure to state a cause of action is decided as follows: "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 [2d Dept 1999] [internal citations omitted]; Leon v. Martinez, 84 NY2d 83) and a determination by the Court as to whether the facts alleged fit within any cognizable legal theory (1455 Washington Ave. Assocs. v. Rose & Kiernan, Inc., 260 AD2d 770 [3d Dept 1999]). 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., 40NY2d 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). "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]).

Applying these principles in this case, the court finds that the Complaint adequately states a cause of action for breach of contract. "The elements of a cause of action for breach of contract are the formation of a contract between plaintiff and defendant, performance by plaintiff, defendants's failure to perform, and resulting damages." (Beheer B.V. (Amsterdam) v. South Caribbean Trading Ltd., 801 NYS2d 243 [Sup Ct, NY County 2004][internal citations omitted]). All such elements are pled in the instant Complaint, as it is alleged that defendants owe plaintiff monies pursuant to an Acquisition Agreement.

Accordingly, this branch of the motion to dismiss the "First" cause of action for breach of contract is denied.

With respect to Plaintiff's "Second" cause of action, to prevail on a third-party claim, plaintiff must first demonstrate that he is the intended beneficiary of a valid and binding contract between other parties (see, Nabors v. Town of Somers, 72 A.D.3d 769 [2d Dept. 2010]; Breen v. Law Office of Bruce A. Barket, P.C., 52A.D.3d 635 [2d Dept. 2008]). As such, plaintiff sufficiently stated cause of action for breach of a third-party beneficiary contract against defendants. That branch of Defendants' motion to dismiss the second cause of action is denied.

With regard to the "Third" cause of action in plaintiff's complaint, plaintiff has failed to show that any "conversion" exists, outside of the claim for breach of contract herein. Plaintiff's claim for conversion does not demonstrate a separate taking of property from plaintiff, but merely restates the "First" cause of action to recover damages for breach of contract. A claim for conversion cannot be predicated on a mere breach of contract (see, Tornheim v. Blue & White Food Products Corp., 56 A.D.3d 761 [2d Dept. 2008]; Wolf v. Nat'l Council of Young Israel, 264 A.D.2d 416 [2d Dept. 1999]). As such, plaintiff has failed to sustain a proper cause of action for conversion against defendants, and the "Third" cause of action in plaintiff's complaint is hereby

dismissed.

As to the "Seventh" and "Eighth" causes of action for equitable estoppel and promissory estoppel, plaintiff appears to plead the same or similar claim. So long as plaintiff has pleaded facts forming the basis for the elements of such a claim, a motion to dismiss for failure to state a cause of action must be denied. Those elements are: (1) a clear and unambiguous promise; (2) reasonable and foreseeable reliance by the party to whom the promise is made; and (3) an injury sustained by the promisee (see AHA Sales, Inc. v Creative Bath Prods., Inc., 58 AD3d 6 [2008]; Williams v. Eason, 49 AD3d 866 [2008]). "The theory of promissory estoppel—under which a party is estopped from denying that it is bound by an otherwise unenforceable promise—may be advanced either as a substitute for contractual consideration supporting the promise, or to avoid application of the Statute of Frauds" (4A NY Prac. Com. Litig. in New York State Courts § 71:16 [3d ed.]). Accordingly, that branch of Defendants' motion to dismiss the "Seventh" cause of action, is granted, and the branch of Defendants' motion to dismiss the "Eighth" cause of action, is denied.

The "Fifth" cause of action sounds in fraud. A fraud claim should be dismissed as redundant when it merely restates a breach of contract claim, when the only fraud alleged is that the defendants made misstatements or omissions that were going to mislead Plaintiff upon the closing of the property pursuant to the Acquisition Agreement. By contrast, a cause of action for fraud may be maintained when the plaintiff pleads a breach of duty separate from, or in addition to, a breach of the contract. McKernin v. Fanny Farmer Candy Shops, 176 A.D.2d 233 (2d Dept 1991); See, Heffez v L&G General Construction, Inc., 56 AD2d 526 (2d Dept 2008.) Here, Plaintiff alleges that the fraud stemmed from Defendants VIKTORIA SAENKO and KSENIA SAENKO making representations they knew were false and thereby inducing Plaintiff to close on the property. These allegations have failed to state a claim for fraud since the same circumstances also give rise to Plaintiff's breach of contract claim. This is not sufficient to set forth a cause of action for fraud. *Id.* Accordingly, the branch of this motion to dismiss the "Fifth" cause of action for fraud is granted.

The "Ninth" cause of action, sounds in unjust enrichment. A cause of action pursuant to a quasi contract theory only applies in the absence of an express agreement and is not really a contract at all, but rather a legal obligation imposed in order to prevent a party's unjust enrichment. See, Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382, 388 (1987.) Where, as here, there is no dispute as to the existence of a contract and the contract covers

the dispute between the parties, the plaintiff may not proceed upon a theory of quantum meruit as well as seek to recover damages for breach of contract. See, Alamo Contract Builders v. CTF Hotel Co., 242 AD2d 643 (2d Dept 1997.) The logic behind this is that the contract itself and its alleged breach provide the basis for full recovery and the other quasi contract claims are unnecessary and duplicative. Accordingly, the branch of this motion to dismiss the "Ninth" cause of action for unjust enrichment is granted.

Plaintiff's "Sixth" cause of action is for conspiracy to defraud. However, New York does not recognize civil conspiracy to commit a tort, including conspiracy to defraud, as an independent cause of action (see, Alexander & Alexander, Inc. v. Fritzen, 68NY2d 968 [1986]; Cash v. Titan Financial Servs., Inc., 58 AD3d785 [2d Dept. 2009]). Thus, plaintiff's "Sixth" cause of action must be dismissed by this court.

That branch of the motion by Defendants which is for an order pursuant to CPLR 3211(a)(7) dismissing the "Tenth" cause of action, which is for the imposition of a constructive trust, is denied. The elements of a cause of action to impose a constructive trust include (1) a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance upon the promise, and (4) unjust enrichment. (Bodden v. Kean, 86 AD3d 524.) Plaintiff has adequately pled a cause of action for constructive trust. Upon a review of the complaint, Plaintiff adequately pled facts demonstrating a special or confidential relationship with the defendants. Accordingly, that branch of Defendants' motion to dismiss the "Fourth" cause of action for breach of fiduciary duty, is denied.

C. CPLR 3211(a)(5)

That branch of the motion which is for an order pursuant to CPLR 3211(a)(5) dismissing the complaint on the grounds that it is barred by the doctrines of judicial estoppel and estoppel against inconsistent positions is hereby decided as follows:

Dismissal is warranted under CPLR 3211(a)(5) on the grounds that:

"the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds;"

To the extent this branch of the motion seeks dismissal of the complaint on this ground, Defendants do not adequately state what grounds support dismissal pursuant to CPLR 3211(a)(5).

Accordingly, that branch of Defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(5) is denied.

Pursuant to CPLR 3211(f), Defendants' time to serve a pleading responsive to the complaint is extended until ten (10) days after service of a copy of this order with notice of entry.

This constitutes the decision and order of the Court.

Dated: October 18, 2016



Salvatore J. Modica

FILED
OCT 27 2016
COUNTY CLERK
QUEENS COUNTY