

Yongshuang Chen v Jian Feng Dai

2017 NY Slip Op 30137(U)

January 18, 2017

Supreme Court, New York County

Docket Number: 653501/2015

Judge: Ellen M. Coin

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 63**

YONGSHUANG CHEN, individually, and derivatively on
behalf of SFD, LLC,

Plaintiff,

—against—

JIAN FENG DAI, CYP, LLC, and CYP ENTERPRISE,
LLC,

Defendants

Index No.: 653501/2015
Subm. Date: July 6, 2016
Mot. Seq. No: 001

DECISION AND ORDER

Appearances:

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Ellen M. Coin, A.J.S.C.

In this dispute over allegedly misappropriated funds and ownership of realty, defendants move to dismiss the complaint pursuant to CPLR 3211(a) (3), (5) and (7). According to the allegations in the complaint, plaintiff Yongshuang Chen (Chen) and defendant Jian Feng Dai (Dai) formed SFD, LLC (SFD) on April 24, 2009 as a real estate development company with an initial capitalization of \$3 million (Complaint, ¶¶ 16, 18, 24). In late 2011, Chen and Dai

allegedly decided to purchase a seven-story, twelve unit mixed-use property at 108 Greenwich Street (the property) (Complaint, ¶ 29). As Dai represented to Chen that the seller refused to sell to a legal entity, they agreed that Dai would purchase the property in his individual name and would then transfer it to a newly formed company, CYP Enterprise, LLC (CYP)¹ (*id.*, ¶ 30). Plaintiff alleges that in February 2012, she transferred \$499,000 of her personal funds to Dai and allowed Dai to transfer \$3.1 million of SFD's funds to purchase the property (*id.*, ¶¶ 32-33).

CYP was formed on February 9, 2012 (*id.*, ¶ 35). Plaintiff asserts that she holds no less than a 34% interest in the newly formed company, a figure noted on the 2012 CYP tax return, which lists Chen as a member (*id.*, ¶¶ 37-38). On March 23, 2012, Dai purchased the property for \$5.1 million and then transferred it to CYP for no consideration on November 13, 2013 (*id.*, ¶¶ 36, 39-40). The very same day, Dai refinanced the property with a \$5 million mortgage (*id.*, ¶ 41). The mortgage documents recorded Dai as the sole member and operating manager of CYP (*id.*, ¶ 44). Plaintiff alleges that Dai has not accounted for the funds withdrawn by means of the refinancing and ignores all attempts at communication (*id.*, ¶¶ 42, 48-49).

The complaint asserts eight causes of action: (1) breach of contract; (2) fraud; (3) breach of fiduciary duty; (4) conversion; (5) unjust enrichment [causes of action 1-5 are claims against Dai]; (6) partition of the property; (7) an accounting of SFD and CYP; and (8) appointment of a receiver for SFD and CYP.

In support of the motion, defendants argue that the the first cause of action for breach of contract must be dismissed, because the alleged oral contract for the purchase of real estate is

¹ The complaint does not distinguish between CYP Enterprise, LLC and CYP, LLC. The exhibits to the complaint refers only to CYP Enterprise, LLC. It is thus unclear from plaintiff's submission if CYP, LLC exists. Defense counsel's brief asserts that CYP, LLC is not a proper party defendant.

barred by the Statute of Frauds (New York General Obligations Law [GOL] § 5-703). They contend that the unjust enrichment claim would circumvent the bar of the Statute of Frauds. Defendants argue that the cause of action for fraud fails to meet the specificity requirement of CPLR 3016 (b) and is duplicative of the breach of contract claim. Defendants further argue that plaintiff has not sufficiently detailed the basis of the claimed fiduciary relationship so as to state a claim for its breach and a claim for an accounting.

In addition to these deficiencies, defendants argue that plaintiff has impermissibly combined direct and derivative claims without delineating between them, and fails to satisfy the requirements for bringing a derivative action. The complaint lacks any reference to service of a pre-suit demand on CYP or an allegation of demand futility. Absent excuse of demand, defendants argue, plaintiff does not have standing to assert CYP's claims.

Lastly, defendants also note that: (1) a conversion claim does not lie with respect to real property; (2) partition is inappropriate as plaintiff is not a title owner of the property; and (3) (i) appointment of a receiver is not available under the governing statute, Limited Liability Company Law (LLCL) § 703, which applies only in the event of dissolution, and (ii) plaintiff has no standing to seek such relief, as she is not a member of CYP.

Analysis

In determining a motion to dismiss pursuant to CPLR 3211, "the court must accept the facts as alleged in the complaint as true, accord [them] the benefit of every possible favorable inference, and determine . . . whether the facts as alleged fit within any cognizable legal theory" (*Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 570-571 [2005] [internal quotation marks and citation omitted]; *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]).

Dismissal based upon documentary evidence is appropriate only where the “documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law” (*Leon v Martinez*, 84 NY2d 83, 88 [1994]). However, allegations that are bare legal conclusions or are inherently incredible or that are flatly contradicted by the documentary evidence are not accorded such favorable inferences and need not be accepted as true (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000]). Also, “[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss” (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

Breach of Contract

The elements of a cause of action for breach of contract are (1) formation of a contract between plaintiff and defendant, (2) performance by plaintiff, (3) defendant’s failure to perform, (4) resulting damages (*143 Bergen St., LLC v Ruderman.*, 144 AD3d 1002, 1003 [2d Dept 2016]). Plaintiff has sufficiently delineated the parameters of her agreement with Dai and set forth the alleged breach, claiming that Dai failed to recognize her interest in CYP, did not operate the property to the mutual benefit of both parties and misappropriated the funds delivered under the agreement.

The Statute of Frauds is no impediment to plaintiff’s claim. “It is long settled under New York’s Statute of Frauds that an oral agreement to convey an estate or interest in real property, other than a lease for a term not exceeding one year, is ‘nugatory and unenforceable’ and ‘[a] party to the agreement may legally and rightfully refuse to recognize or perform it’” (*Messner Vetere Berger McNamee Schmetterer Euro RSCG Inc. v Aegis Group plc*, 93 NY2d 229, 235 [1999] [citation omitted]; *see also Geraci v Jenrette*, 41 NY2d 660, 665-666 [1977]). Chen’s

alleged business arrangement with Dai does not implicate the Statute of Frauds for a number of reasons. First, Chen alleged that the parties agreed to jointly purchase the property, and, as between them, no interest in realty was to change hands. Second, part performance, codified in GOL § 5-703(4), may remove an alleged oral agreement from the operation of the Statute of Frauds where plaintiff's actions are 'unequivocally referable' to the oral agreement (*Anastario v Vicinanza*, 59 NY2d 662, 663-664 [1983]; *Massner*, 93 NY2d at 235). Here, delivery of nearly \$3.6 million, representing 70.6% of the purchase price, qualifies for application of this exception. Whether payment of these monies is "unequivocally referable" to the purchase of the property is a triable issue of fact precluding dismissal (*Spodek v Riskin*, 150 AD2d 358, 360 [2d Dept 1989]).

Finally, the Statute of Frauds does not apply to a contract to form a partnership or a joint venture to deal in real estate, because the interest of each partner in a partnership is deemed personalty (*see Elias v Serota*, 103 AD2d 410, 413 [2d Dept 1984]). This rule applies regardless of the legal form that the joint venture assumes, whether as a corporation, a partnership or, as here, a limited liability company (*see Barash v Estate of Sperlin*, 271 AD2d 558, 559 [2d Dept 2000]; *Walsh v Rechler*, 151 AD2d 473 [2d Dept 1989]; *cf. Magnum Real Estate Services, Inc. v 133-134-135 Assoc., LLC*, 59 AD3d 362, 363 [1st Dept 2009][claim barred by Statute of frauds where entity was one "in which plaintiff had no interest"]. While "an oral agreement for a joint venture, which has, as its object, the conveyance of an interest in real property from one venturer to another is a contract subject to the Statute of Frauds" (*Spodek*, 150 AD2d at 359; *see also Gora v Drizin*, 300 AD2d 139, 139 [1st Dept 2002]; *Najjar v National Kinney Corp.*, 96 AD2d 836 [2d Dept 1983]; *Backus Plywood Corp v Commercial Decal, Inc.*, 317 F2d 339, 342 [2d Cir

1963)), Chen's agreement with Dai does not entail a transfer of an interest in real property, but rather a transfer of money pursuant to an agreement to purchase realty and derive commercial benefit therefrom. The interest that plaintiff wishes to vindicate is that of a beneficiary of CYP's title ownership of the property, not the interest of the title holder itself. No parallels may be drawn to the facts of *Gora v Drizin* (300 AD2d 139, 139 [1st Dept 2012]), where the transfer of a membership interest served as proxy for the purchase of an ownership interest in real property from a company to which the purchaser had no other connection. Here, the complaint alleges a long-standing partnership between Chen and Dai, both of whom agreed to form CYP as an investment vehicle. Accordingly, the portion of defendants' motion that seeks dismissal of the first cause of action for breach of contract is denied.

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 [2009]; *Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 488 [2007]). A cause of action for "fraud must state in detail 'the circumstances constituting the wrong' (CPLR 3016 [b]) . . . [c]onclusory allegations or mere suspicion of fraud are wholly insufficient" (*Bank Leumi Trust Co. of N.Y. v D'Evori Intl., Inc.*, 163 AD2d 26, 32 [1st Dept 1990]; see also *Friedman v Anderson*, 23 AD3d 163, 166 [1st Dept 2005]). Also, "[a] cause of action to recover damages for fraud does not lie where the only fraud claimed relates to a breach of contract" (*Treeline 990 Stewart Partners, LLC v RAIT Atria, LLC*, 107 AD3d 788, 791 [2d Dept 2013]; see also *American-European Art Assoc. v Trend Galleries*, 227 AD2d 170, 171 [1st Dept 1996]). Here, the claim of fraud appears to be no more

than a relabeled breach of contract cause of action, with both tracing a common set of allegations and seeking the same damages. Even “a general allegation that a party entered into a contract while lacking the intent to perform is insufficient to state a cause of action to recover damages for fraud” (*Treeline 990 Stewart Partners, LLC*, 107 AD3d at 791). Accordingly, the cause of action for fraud is dismissed.

Breach of Fiduciary Duty

“[T]he elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant’s misconduct” (*Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804, 807 [2d Dept 2011] [internal citation omitted]). “A majority shareholder in a close corporation is in a fiduciary relationship with the minority [shareholder]” (*Richbell Info. Servs. v Jupiter Partners*, 309 AD2d 288, 300 [1st Dept 3003]). Similarly, the members of a limited liability company (LLC) may stand in a fiduciary relationship to one another and to the LLC (*see Jones v Voskresenskaya*, 125 AD3d 532, 533 [1st Dept 2015]). An LLC’s managing member owes a fiduciary duty to a non-managing member (*Salm v Feldstein*, 20 AD3d 469, 470 [2d Dept 2005], *see also Cottone v Selective Services, Inc.*, 68 AD3d 1038, 1039 [2d Dept 2009]).

“[A] plaintiff is required to plead a cause of action premised on breach of fiduciary duty with sufficient particularity pursuant to CPLR 3016 (b)” (*Faith Assembly v Titledge of N.Y. Abstract, LLC*, 106 AD3d 47, 61 [2d Dept 2013]; *see also Beraradi v Berardi*, 108 AD3d 406, 407 [1st Dept 2013]). For purposes of this motion, the Court accepts Chen’s allegation that Dai owed her a fiduciary duty as a fellow member of SFD and CYP (*Palmetto Partners*, 83 AD3d at

808). Effective ouster from CYP and alleged usurpation of its only corporate asset are quintessential breaches of fiduciary duty (*see Jones*, 125 AD3d at 533).² Nor is this claim duplicative of the breach of contract cause of action. While the fiduciary relationship arises out of a contract, it may nonetheless involve duties independent of the contract (*see Bullmore v Ernst & Young Cayman Is.*, 45 AD3d 461, 464 [1st Dept 2007]). Accordingly, the motion to dismiss this claim is denied.

Conversion

~~“Conversion is the unauthorized assumption and exercise of the rights of ownership over~~ goods belonging to another to the exclusion of the owner’s rights” (*Vigilant Ins. Co. of Am. v Housing Auth. of City of El Paso*, 87 NY2d 36, 44 [1995]). “Two key elements of conversion are [1] plaintiff’s possessory right or interest in [personal] property and [2] defendant’s dominion over the property or interference with it, in derogation of plaintiff’s rights” (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 50 [2006]). However, “a party may not sustain a claim for conversion of real property” (*B & C Realty Co. v 159 Emmut Props., LLC*, 106 AD3d 653, 656 [1st Dept 2013]). Also “a cause of action ‘to recover damages for conversion cannot be predicated on a mere breach of contract’” (*Schmidt v Lorenzo*, 70 AD3d 1362, 1362 [4th Dept 2010] [internal quotation marks omitted]). Here, plaintiff’s claim of conversion expressly concerns only her fee interest in the property, for which a claim of conversion does not lie.

Further, plaintiff’s claim of conversion is rooted in her claim of breach of contract, and does not allege tortious acts falling outside of the parties’ alleged agreement. Accordingly, this cause of

² With regard to SFD, plaintiff alleges complete isolation from the company’s operations, aside from receipt of monthly distribution of rental income from six of the company’s tenants.

action is dismissed.

Unjust Enrichment

“An action to recover on the theory of unjust enrichment is for restitution or on quasi contract and is based on the equitable principles that a person shall not be allowed to enrich himself unjustly at the expense of another” (*Waldman v Englishtown Sportswear, Ltd.*, 92 AD2d 833, 836 [1st Dept 1983], citing 50 NY Jur, Restitution and Implied Contract §3). “[U]njust enrichment is not a catchall cause of action to be used when others fail [but] [i]t is available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff” (*Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 790 [2012]). “An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim” (*id.*; see also *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388-389 [1987]). The one exception to this axiom is where “there is a bonafide dispute as to the existence of a contract or the application of a contract in the dispute in issue,” in which case an unjust enrichment claim may be pled in the alternative (*Goldman v Simon Prop. Group, Inc.*, 58 AD3d 208, 220 [2nd Dept 2008]) Here, although plaintiff’s unjust enrichment claim is duplicative of the breach of contract claim, the alleged contract was oral and is disputed. Therefore, plaintiff is permitted to proceed on this claim in the alternative.

Partition

“[A] party, jointly owning property with another, may as a matter of right, seek physical partition of the property or partition and sale when he or she no longer wishes to jointly use or own the property” (*Manganiello v Lipman*, 74 AD3d 667, 668 [1st Dept 2010]; see also *Cadle*

Company v Calcador, 85 AD3d 700, 702 [2d Dept 2010]; *Ferguson v McLoughlin*, 184 AD2d 294, 294 [1st Dept 1992]). However, only an owner of record may seek partition (*see Manganiello*, 74 AD3d at 668; *Ferguson*, 184 AD2d at 294). Since plaintiff does not allege record ownership of the property, the sixth cause of action for partition is dismissed.

Derivative Claims

“A plaintiff asserting a derivative claim seeks to recover for injury to the business entity” (*Yudell v Gilbert*, 99 AD3d 108, 113 [1st Dept 2012]). A major consideration in determining the derivative nature of the claim is “where shareholders suffer solely through depreciation in the value of their stock, [in which case] the claim is derivative” (*id.*).

“[A]llegations of mismanagement or diversion of assets by officers or directors to their own enrichment, without more, plead a wrong to the corporation only, for which a shareholder may sue derivatively but not individually” (*Abrams v Donati*, 66 NY2d 951, 953 [1985], *Yudell*, 99 AD3d at 114).

Additionally, a plaintiff must “make a presuit demand or adequately allege that demand was excused” (*Barone v Sowers*, 128 AD3d 484, 484 [1st Dept 2015]; Business Corporation Law § 626 [c]). “A pre-suit demand is similarly required in a derivative action involving a limited liability company” (*Najjar Group, LLC v West 56th Hotel LLC*, 110 AD3d 638, 639 [1st Dept 2013]). A member of a limited liability company such as plaintiff has standing to maintain a derivative action on behalf of the LLC (*Tzolis v Wolff*, 39 AD3d 138, 142-44 [1st Dept 2007]).

The complaint does not expressly plead a derivative claim on behalf of CYP. In fact, CYP is sued as a party defendant. Thus, the Court views all of the causes of action in the complaint as direct claims by Chen. Although the caption of the action purports to be a derivative action on

behalf of SFD, as well as an action by Chen individually, plaintiff's allegations in the complaint and the arguments of her counsel do not demonstrate that Chen is attempting to vindicate SFD's rights. There is no allegation that SFD is entitled to membership interest in CYP. Chen treats SFD's alleged wire transfer of \$3.1 million interchangeably with her own contribution of \$499,000.00. No other injury to SFD is noted in the complaint. Accordingly, so much of the complaint as is asserted on behalf of SFD, LLC, and as can be deemed to assert derivative claims on behalf of CYP Enterprise, LLC, is dismissed without prejudice.

Accounting and Appointment of a Receiver

As the basis of the portion of defendant's motion seeking to dismiss the claim of accounting under LLCL §1102(b)³ relies on the argued unenforceability of the contract and absence of a fiduciary duty flowing from Dai to Chen, both failing arguments, the motion is denied as to the seventh cause of action for accounting.

Plaintiff's eighth causes of action for appointment of a receiver must, however, be dismissed, since LLCL §703 (a)⁴, upon which plaintiff relies, applies only when a dissolution of the limited liability company is sought, a claim not asserted here. The Court declines plaintiff's invitation to use its equitable powers to appoint a receiver.

In accordance with the foregoing, it is hereby

³ LLCL §1102(b) provides,

Any member may, subject to reasonable standards as may be set forth in, or pursuant to, the operating agreement, inspect and copy at his or her own expense, for any purpose reasonably related to the member's interest as a member, the records referred to in subdivision (a) of this section, any financial statements maintained by the limited liability company for the three most recent fiscal years and other information regarding the affairs of the limited liability company as is just and reasonable.

⁴ Although plaintiff's complaint cites to paragraph (b) of Section 703 as legal authority for appointment of a receiver, this appears to be a typographical error, as it is paragraph (a) that provides for appointment of a receiver in case of judicial dissolution.

ORDERED that the motion to dismiss pursuant to CPLR 3211(a) (3), (5) is granted to the extent of dismissing the second cause of action for fraud, the fourth cause of action for conversion, the sixth cause of action for partition, the eighth cause of action for appointment of a receiver, and so much of the complaint as is asserted derivatively on behalf of SFD, LLC, CYP Enterprise, LLC and CYP, LLC, and the motion is otherwise denied; and it is further

ORDERED that movants shall answer the balance of the complaint within twenty (20) days from the date of this order.

This constitutes the decision and order of the Court.

Dates: 1/18/17

ENTER:

EMC

Ellen M. Coin, A.J.S.C.