

Garcia v Santiago

2017 NY Slip Op 31938(U)

August 10, 2017

Supreme Court, Queens County

Docket Number: 707963/2016

Judge: Pam B. Jackman-Brown

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This opinion is uncorrected and not selected for official publication.

NEW YORK SUPREME COURT - COUNTY OF QUEENS

IAS PART 19

Present: Hon. Pam Jackman Brown, JSC

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ROSA GARCIA,

Plaintiff,

-against-

ELY S. SANTIAGO AND LEONIDAS A. SANTIAGO,

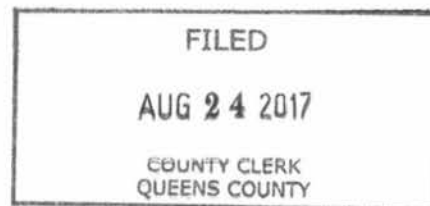
Defendant,
-----X

Index No. 707963/2016

Motion Date: 5/18/17

Cal. No. 59

Mot. Seq. No.: 1



Recitation, as required by CPLR § 2219(a), of the following papers e-file numbered 9, 11 to 16 and 37 to 39 read on this motion by Defendants for an Order: (1) dismissing the complaint and all the causes of action contained therein this action, with prejudice, pursuant to CPLR § 3212 (summary judgment) and CPLR § 3211(a)(7) (failure to state a cause of action); and (2) directing the Queens County Clerk to vacate and cancel and discharge of record the Notice of Pendency, filed in this action on July 7, 2016, against real property to wit: Queens County Block 3578, Lot 65, known as address, 1081 Seneca Ave., Ridgewood, NY 11385; and Plaintiff's Notice of Cross-Motion seeking an Order granting summary judgment under NY CPLR § 3212 against Defendants dismissing their First, Second, Third and Fourth Counterclaims, and granting such other and further relief as to the Court seems just and proper.

	<u>PAPERS E FILE NUMBERED</u>	
	Papers	Exhibits
Notice of Motion - Exhibits and Affidavits Annexed	9	
Notice of Cross-Motion- Exhibits and Affidavits Annexed	11-12	13-16
Amended Memorandum of Law in Opposition to Motion for Summary Judgment By Defendants and in Support of Cross Motion by Plaintiff for Partial Summary Judgment	37	
Opposition and Reply Affirmation	38	
Affirmation in Reply and in Further Support of Cross Motion by Plaintiff	39	

Upon the papers listed above, this Notice of Motion is hereby decided in accordance with this Decision/Order.

This is a tort and breach of contract action by Plaintiff seeking to recover against Defendants. Plaintiff alleges that over the period of 2008 through 2011, she loaned funds to Defendants and Defendants failed to repay the loan. Plaintiff alleges other alternative causes of action including breach of contract, unjust enrichment and fraud. Plaintiff commenced the instant proceeding with the filing of a summons, complaint and notice of pendency on July 7, 2016. Defendants filed an answer on July 29, 2016 and an amended answer on August 11, 2016, wherein Defendants asserted counterclaims against Plaintiff, including fraud and misrepresentation, frivolous conduct, slander of title and abuse of process.

Now, upon motion, Defendants seek dismissal of the complaint pursuant to CPLR § 3212 and CPLR § 3211(a)(7). Plaintiff opposes the application and cross-moves seeking dismissal of Defendant's counterclaims pursuant to CPLR § 3212. Defendant opposes Plaintiff's application.

In support of the application seeking dismissal of Plaintiff's complaint, Defendants submitted affidavits setting forth the facts of the instant proceeding, a copy of the deed for the premises located at 1081 Seneca Avenue, Ridgewood, New York and a copy of the first two pages of the mortgage for said premises. Plaintiff submitted an affidavit setting forth the facts of the instant proceeding and documentary evidence reflected purported transfers of money from Plaintiff to Defendants during 2008 through 2011.

Defendants proffer several arguments for dismissal of Plaintiff's complaint. Defendant argues that the cause of action seeking the imposition of a constructive trust is insufficient as there is no confidential relationship between Plaintiff and Defendants and there is no written agreement between the parties. Defendant argues that the allegations of breach of contract are insufficient as there is no evidence of a written contract, any alleged oral agreement would violate GOL 5-701(a)(1), and the cause of action is time barred. Defendant argues that the cause of action for money had and received is a conversion action and thus is time barred. Allegations of fraud are insufficient as Plaintiff has failed to plead the fraud with specificity and must be dismissed as the claim is a "re-labeled breach of contract cause of action."

Plaintiff opposes Defendants' application. Plaintiff argues that a confidential relationship existed between Plaintiff and Defendants, in that Plaintiff considered Defendants to be family. Although it is undisputed there is no written agreement, Plaintiff argues that a verbal agreement existed between the parties, and that said

agreement is not in violation of GOL 5-701, as it is possible to repay the purported loan within a period of one year. Plaintiff also argues that the statute of limitations for the cause of action of money had and received is not time barred, as the applicable statute of limitation is six years. Plaintiff further argues that there are material issues of fact as to whether Defendants committed fraud.

“The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Alvarez v Prospect Hosp.*, 68 NY 2d 320, 324 [Ct App 1986]). Upon review of Defendants’ supporting affidavits, wherein the Defendants dispute and deny Plaintiff’s allegations, the Court finds that Defendants established a *prima facie* showing of entitlement to judgment as a matter of law. The burden now shifts to Plaintiff to establish material issues of fact. The Court finds that Plaintiff’s detailed supporting affidavit is sufficient to establish material issues of fact. Accordingly, Defendants’ application seeking summary judgment is denied.

The Court now turns to the branch of Defendants’ application seeking dismissal of the complaint pursuant to CPLR § 3211(a)(7), based upon Plaintiff’s failure to state a cause of action. Plaintiff alleges that she loaned Defendants the sum of approximately \$280,000.00 and Defendants failed to repay said sum. As a result, Plaintiff commenced the instant proceeding and asserts several causes of action. In considering a motion to dismiss for failure to state a cause of action under CPLR § 3211(a)(7), the Court must accept the facts alleged in the complaint as true, accord Plaintiff the benefit of every favorable inference and determine only whether the alleged facts fit within any cognizable legal theory (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY 3d 137, 141 Ct App 2017]). “Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery” (*Id* at 141). The Court determines that Plaintiff’s complaint states a cause of action for breach of contract and money had and received. It is well settled that a Plaintiff may properly plead money had and received as an alternative to a breach of contract claim (*Goldman v Simon Prop. Group, Inc.*, 58 AD3d 208 [2d Dept 2008]). Plaintiff failed to plead facts in support of each element of these claims. Accordingly, the fourth and fifth causes of action of Plaintiff’s complaint are dismissed.

The Court now turns to Plaintiff's application seeking dismissal of Defendant's counterclaims. Although Defendant submitted opposition, said opposition by attorney affirmation is not in proper evidentiary form to refute the person with knowledge. Accordingly, Plaintiff's application seeking dismissal of Defendants' counterclaims pursuant to CPLR § 3212 is granted.

Dated: August 10, 2017
Jamaica, NY



HON. PAM JACKMAN BROWN, JSC

FILED
AUG 24 2017
COUNTY CLERK
QUEENS COUNTY