

**Cox v Gerson**

2017 NY Slip Op 32336(U)

October 31, 2017

Supreme Court, Kings County

Docket Number: 6359/2016E

Judge: Debra Silber

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This opinion is uncorrected and not selected for official publication.

At an I.A.S. Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse located at 360 Adams Street, Brooklyn, New York, on the 31<sup>st</sup> day of October, 2017.

**P R E S E N T :**

Hon. DEBRA SILBER

Justice

-----X

CAMILLE COX, as Executor of the Estate of Marjorie Cox, Deceased,

Plaintiff,

-against-

ALAN GERSON, BRUCE MONTAGUE & PARTNERS, ELI HAREL, 129 QUINCY LLC, HAREL GROUP NY PROPERTIES LLC, and XYZ CORP #1-5, and JOHN DOE and JANE DOE #1-5,

Defendants.

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**DECISION & ORDER**

Index No.: 6359/2016E

Mot. Seq. # 3

Sub.: 10/26/17

*Recitation, as required by CPLR 2219(a), of the papers considered in the review of "the Harel defendants" motion to dismiss.*

Papers	Numbered
Notice of Motion, Affirmation and Exhibits Annexed .....	<u>1-9</u>
Order to Show Cause and Affidavits Annexed .....	<u>          </u>
Affirmation in Opposition and Exhibits Annexed.....	<u>          </u>
Reply Affidavits .....	<u>          </u>
Other: <u>    Memo of Law    </u>	<u>10</u>

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

Defendants Eli Harel and Harel Group NY Properties LLC move, pursuant to CPLR 3211, to dismiss the plaintiff's complaint as against them. The motion is not opposed. For the reasons stated herein, the motion is granted and the complaint and any cross claims against defendants Eli Harel and Harel Group NY Properties LLC are dismissed.

This is the third action commenced by counsel for plaintiff Camille Cox, as Executor of the Estate of Marjorie Cox, on behalf of plaintiff or on behalf of her father, Norman Cox, based on the identical factual allegations. The plaintiffs in all three cases allege that he or she was misled by the defendants about the value of a parcel of real property at 129 Quincy Street, Brooklyn NY (Block 1971, Lot 48) and therefore signed a contract agreeing to convey the property to defendant Harel Group NY Properties LLC for less than its actual value. On the closing date, the property was conveyed, presumably by an assignment of the contract, to defendant 129 Quincy LLC. The instant complaint alleges causes of action in fraud and unjust enrichment against all of the defendants. There is also a cause of action against all defendants for "equitable relief." In addition, there is a separate cause of action solely against defendant Alan Gerson, an attorney who is alleged to have been involved in the transaction. The complaint herein asks for rescission of the sale and/or damages.

The first action, *Norman Cox v Alan Gerson, et. al.*, (Index 4508/2015) was commenced on April 13, 2015 and was dismissed on October 15, 2015 as against defendant 129 Quincy LLC (Motion Seq. #1), because the plaintiff, a beneficiary of the Estate of the late Marjorie Cox, had no standing to bring the action. His recourse, if any, is against the Executor of the Estate. On June 2, 2016, the court granted defendant 129 Quincy's motion to cancel the Notice of Pendency in this action. The

court's computer indicates the action was subsequently marked "disposed" on July 12, 2017.

The second action, *Camille Cox as Executor of the Estate of Marjorie Cox v Alan Gerson, et. al.*, (Index # 14613/2015) was commenced on December 15, 2015. Other than changing the plaintiff, the complaint is virtually identical to that in the first action. On April 13, 2016, the Court granted in part a motion by defendant 129 Quincy LLC, to the extent that it vacated the Notice of Pendency because the summons was not served within 30 days of its filing, as is required by CPLR 6512. The court's computer indicates that this action was subsequently marked as "disposed" on July 12, 2017.

Although the second action was still pending, plaintiff then commenced the instant action on November 14, 2016, by filing a summons and complaint, together with a new Notice of Pendency. Other than the some minor changes, including the correction of typographical errors, the complaint in this third action is virtually identical to those in the first and second actions.

On March 15, 2017, this court dismissed the instant action as against defendant 129 Quincy LLC (Motion Sequences #1 & 2) and cancelled the Notice of Pendency. The court noted that plaintiff could not state a cause of action against 129 Quincy LLC, as it did not exist at the time of the contract of sale. As a separate reason for the dismissal, the court noted that plaintiff cannot allege justifiable or detrimental reliance against defendant 129 Quincy LLC, which purchased the property at issue, apparently pursuant to an assignment of the contract of sale between plaintiff and movant Harel Group NY Properties LLC, which is dated January 29, 2015 and is recorded.

Defendants Eli Harel and Harel Group NY Properties LLC have now filed the instant motion, seeking dismissal on several different grounds.

Movants first seek dismissal based upon the existence of a prior pending action which involves the same parties and the same allegations. They are correct in their assertion, and CPLR 3211 (a)(4) gives the court broad discretion as to the disposition of an action when another identical action is pending. (See, *Simonetti v Larson*, 44 AD3d 1028 [2d Dept 2007]). On the date the instant action was filed, it would clearly have been eligible for dismissal on this basis. However, as noted, the prior pending actions were both marked “disposed” on July 12, 2017, before the instant motion was filed. Therefore, the case cannot be dismissed on the basis that there is a prior pending action.

Movants also seek dismissal based upon the “law of the case” doctrine, arguing that the court’s finding that plaintiff cannot allege justifiable or detrimental reliance (required for the fraud cause of action) against defendant 129 Quincy LLC, who was not a party to the sale negotiations and was not a party to the contract of sale, is somehow applicable to defendant Eli Harel, who took part in the contract negotiations and defendant Harel Group NY Properties LLC, a party to the contract of sale. The court rejects this reasoning.

Finally, movants seek dismissal on the ground that the complaint fails to state a cause of action against the moving defendants.

It is clear that the complaint fails to state a cause of action for fraud. Statements concerning the value of real property are generally not actionable under a theory of fraud or fraudulent inducement because they are only expressions of opinion. (See *Wells Fargo Bank, N.A. v Alessi*, 133 AD3d 1216 [4<sup>th</sup> Dept 2015]; *Brang v Stanchnik*, 235 AD 591, 592 [1<sup>st</sup> Dept 1932]; *affd* 261 NY 614 [1933].)

Further, it is well settled that where parties to a transaction are adverse to one

another, there can be no justifiable reliance. *Auchincloss v Allen*, 211 AD2d 417 [1<sup>st</sup> Dept 1995]. There existed no confidential relationship between the parties. *Id.* Further, the plaintiff cannot allege that her reliance, if any, upon any alleged misrepresentations by the defendants was reasonable, because the plaintiff had the means to discover the true nature of the transaction by the exercise of ordinary intelligence (such as obtaining an appraisal) and failed to make use of those means (*Kurtz v Foy*, 65 AD3d 741 [3d Dept 2009]). It is well established that "if the facts represented are not matters peculiarly within the party's knowledge, and the other party has the means available to him of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations." (*DDJ Mgt., LLC v Rhone Group LLC*, 15 NY3d 147, 154 [2010]; *Most v Monti*, 91 AD2d 606 [2d Dept 1982]; *Danann Realty Corp. v Harris*, 5 NY2d 317, 322 [1959]). In the instant matter, plaintiff's verified complaint alleges she went to the website Zillow.com and found information regarding the property after she signed the contract of sale. Clearly, it was within her power to do so prior to signing the contract.

Likewise, plaintiff fails to state a cause of action against the Harel defendants for unjust enrichment. An unjust enrichment claim requires a showing that 1) the defendant was enriched, 2) at plaintiff's expense, and 3) that it is against equity and good conscience to permit the defendant to retain what is recovered (See *Marini v Lombardo*, 79 AD3d 932, 934 [2d Dept 2010]). The essence of an unjust enrichment claim is that one party parted with a tangible benefit that was received by another at the first party's expense (See *Edelman v Starwood Capital Group, LLC*, 70 AD3d 246, 250 [1<sup>st</sup> Dept 2009]). The benefits so obtained must be specific and flow directly from plaintiff to the

defendant (See *Sperry v Crompton Corp.*, 8 NY3d 204, 216 [2007]). In the instant matter, plaintiff does not allege that the Harel defendants received any direct benefit from the plaintiff other than an arms length real estate contract.

In addition, it must be noted that the relationship between the plaintiff and the Harel Group is contractual, which precludes recovery under a quasi-contractual theory. A cause of action for unjust enrichment is not viable where it is undisputed that the parties entered into an express contractual agreement. (See *Woss, LLC v 218 Eckford, LLC*, 102 AD3d 860 [2d Dept 2013]; *Vescon Constr., Inc. V Gerelli Ins. Agency, Inc.*, 97 AD3d 658 [2d Dept 2012]).

The remaining "cause of action" asserted against the Harel defendants is for "Equitable Relief." Plaintiff avers therein that the property should, as an appropriate equitable remedy, be reconveyed to plaintiff. However, neither of the Harel defendants now owns the subject property and thus they are incapable of conveying it to plaintiff. Moreover, the party which does own the subject property was previously dismissed from the case, with prejudice. Moreover, as plaintiff's equitable causes of action, for fraud and unjust enrichment, have been dismissed, there is no equitable claim remaining for which any equitable relief can be awarded.

This constitutes the decision and order of the court.

ENTER:

  
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Hon. Debra Silber, J.S.C.

Hon. Debra Silber  
Justice Supreme Court