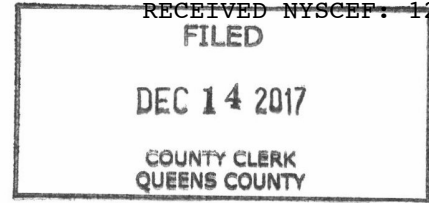


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| <b>Wenjuan Shi v Huang</b>   |
| 2017 NY Slip Op 33381(U)   |
| November 2, 2017   |
| Supreme Court, Queens County   |
| Docket Number: Index Number 701623/2017  |
| Judge: Thomas D. Raffaele  |
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE THOMAS D. RAFFAELE Justice

IA Part 13

WENJUAN SHI x

Plaintiff,

-against-

JOHN HUANG and LINH HUANG

Defendants.

Index Number: 701623/2017

Motion Date June, 19 2017

Motion Seq. No. 1

The following papers numbered EF4 to EF30 read on this motion by defendants to dismiss the complaint pursuant to CPLR 3211(a)(4) and (a)(7).

|   | <u>Papers<br/>Numbered</u> |
|---|----------------------------|
| Notice of Motion - Affidavits - Exhibits..... | EF4-EF14                   |
| Answering Affidavits - Exhibits .....         | EF17-EF25                  |
| Reply Affidavits .....                        | EF26-EF30                  |

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

Plaintiff in this breach of contract action seeks to enforce a contract of sale involving a parcel of property located at 35-05 Leavitt Street, Queens New York. In a prior action, under Index No. 710343/2016 ("Action 1"), plaintiff commenced an action for breach of contract involving the same parcel of property, namely, Shi v 57 Avenue Corp. Another complaint, under Index No. 713636/2016 ("Action 2"), involving the same parcel of land and the same parties as Action 1, was dismissed by the court in an order dated May 16, 2017, on the ground that a prior action was pending. The instant action is a completely dissimilar complaint filed pertaining to the circumstances surrounding the execution and termination of Contract of Sale for the subject property. This time, plaintiff has commenced the action

against the Vice-President and an officer of 57 Avenue Corp. In this third action, plaintiff alleges fraudulent inducement, fraud and unjust enrichment causes of action against the officers/employees of 57 Avenue Corp.

Defendants move to dismiss the instant action on the grounds that there is a prior action pending involving substantially the same parties. Plaintiff opposes the motion.

#### Facts

On or about April 1, 2013, 57 Avenue Corp entered into an agreement for the purchase and sale of real estate (the "Contract of Sale"), with plaintiff whereby defendant agreed to convey to plaintiff the premises known as 35-05 Leavitt Street, Queens, New York (Block 4961, Lot 14). The purchase price pursuant to the Contract of Sale was \$1,388,000.00. On or about March 29, 2013, plaintiff paid the sum of \$10,000 to 57 Avenue Corp., as a deposit for the purchase of the real property and the improvements as required under the Contract of Sale by check written on plaintiff's bank account at Cathay Bank. On or about April 15, 2013, plaintiff paid the sum of \$128,800.00 to 57 Avenue Corp., as a further deposit for the purchase of the real property and the improvements as required under the Contract of Sale by check written on plaintiff's bank account at Cathay Bank. On or about July 25, 2013, plaintiff paid to 57 Avenue Corp, the sum of \$138,800.00 to 57 Avenue Corp., as another deposit for the purchase of the real property and the improvements as required under the Contract of Sale, by check written on plaintiff's bank account at JP Morgan Chase Bank. 57 Avenue Corp received, accepted and retained the aforesaid sums of monies (totaling \$277,600.00) that plaintiff paid them as deposits for the purchase of the Real Property and the improvements as required under the Contract of Sale.

57 Avenue Corp. maintains its principal place of business at 36-09 Main st., Flushing, New York. This is the same location of the now defunct company 51 Management Corp., whose owners, Thomas and Alice Huang pled guilty to felony securities fraud, related to the sale of interests in real property, on June 19, 2013. Thomas and Alice Huang are the parents of, John and Linh Huang, the defendants in this action. Upon information and belief, the transactions which occurred between 57 Avenue Corp, its representatives and plaintiff are of the same type to which Tommy and Alice Huang pled guilty. Upon information and belief, no funds paid to 57 Avenue Corp were deposited into an attorney escrow account, but were applied to the Real Property and improvements thereon. At some point, 57 Avenue Corp attempted to unilaterally terminate the Contract of Sale and return Plaintiff's deposit. Termination was rejected by plaintiff. Upon information and belief, the value of the Real Property had increased since plaintiff and 57 Avenue Corp executed the Contract of Sale, and when 57 Avenue Corp attempted to wrongfully terminate the Contract of Sale.

To enforce the Contract of Sale, plaintiff Shi commenced Action No. 1 on or about August 29, 2016, together with a Notice of Pendency, under Index No. 710343/2016. The action, captioned "*Wenjuan Shi & Happy 8 Realty Corp. v 57 Avenue Corp.*", remains pending in the Supreme Court, Queens County. Plaintiff moved to amend the complaint in Action No. 1.

Plaintiff Shi commenced the second action on or about November 14, 2016, together with a Notice of Pendency, in Queens County. Action No. 2, captioned, "*Wenjuan Shi v 57 Avenue Corp*", under Index No. 713636/2016, was dismissed by the court (J. Dufficy), pursuant to CPLR 3211 (a)(4), based on the fact that there was "another pending action where there is substantial identity of the parties, the two actions were sufficiently similar and the relief sought was substantially the same." Notably, plaintiff asserted two causes of action against defendant 57 Avenue Corp, one for specific performance and the second for breach of contract. Both causes of action arise from the Contract of Sale between Shi and 57 Avenue Corp., concerning the purchase and sale of real property located at 35-05 Leavitt Street, in Queens, New York. Specifically, plaintiff alleges that defendant failed to perform its contractual obligations under the Contract of Sale, and as a result of defendant's failure to perform, plaintiff is entitled to specific performance of the Contract of Sale and or monetary damages for breach of the Contract of Sale.

This is the third complaint filed by plaintiff Shi in Supreme Court, Queens County, based on the same underlying facts and contract. The three complaints (including this one), all concern a contract for the purchase/sale of real property by and between plaintiff and 57 Avenue Corp. ("57 Ave), the entity which employs defendants in the instant action. The previous two complaints allege theories of breach of contract, breach of good faith and fair dealings, specific performance and unjust enrichment. None of the previous complaints mention any fraudulent conduct by the corporation or the individual officers and or owners of the corporation. Defendants herein are not named in the other pending actions or in the proposed amended complaint in Action 1. However, defendants in the instant complaint are the Vice-President and an officer of 57 Avenue Corp., respectively. The instant complaint was filed (on the same day) after plaintiff defaulted in responding to the motion for summary judgment in the Action No.1.

#### Discussion

CPLR 3211(a)(4) states that "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that... there is another action pending between the same parties for the same cause of action." The statute further states that "the court need not dismiss upon this ground but may make such order as justice requires." It is undisputable that there is no other action pending between the same parties for the same cause of action in any court. The claims in this action stand alone and are not in leiu of or

instead of claims made in the action entitled *Wenjuan Shi v. 57 Avenue Corp*, a breach of contract action. This action is a fraud based claim. They are two completely different actions with different causes of action, both under cognizable legal theories. Additionally this is the only claim filed by plaintiff against defendants John and Linh Huang. Accordingly, defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(4), is denied.

Pursuant to CPLR 3211(a)(7) a cause of action may be dismissed if the pleading fails to state a cause of action. This is not the case here. The courts are to accord petitioner the benefit of any foreseeable inferences, and determine whether the facts alleged fit within any cognizable legal theory. Westside Radiology, P.C. v. St. Luke's Roosevelt Hosp. Ctr., 2017 N.Y. Misc. Lexis 2135 (Supreme Court, N.Y. Co., June 2, 2017) citing Leon v. Martinez, 84 N.Y. 2d 83, 87-88 (1994). Based on the four corners of the complaint there are four cognizable causes of action brought by Plaintiff against Defendants: (i) fraud; (ii) fraud in the inducement; (iii) unjust enrichment and; (iv) piercing the corporate veil. Viewing all claims in a light most favorable to Plaintiff, it cannot be said that the pleading does not allege fact sufficient to properly make out the aforementioned causes of action. Therefore Defendant's motion to dismiss is denied.

Both causes of action, do however arise out of the same subject matter and series of alleged wrongs. As there are common questions of fact between them, the actions should be joined.

Dated: *NOVEMBER 2, 2017*

  
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Thomas D. Raffaele J.S.C.

