

Brennan v 3250 Rawlins Ave. Partners, LLC

2018 NY Slip Op 33577(U)

July 17, 2018

Supreme Court, Bronx County

Docket Number: 27745/2016

Judge: Norma Ruiz

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

PART 22

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

Case Disposed	<input type="checkbox"/>
Settle Order	<input type="checkbox"/>
Schedule Appearance	<input type="checkbox"/>

-----X
BRENNAN, MARYGRACE

-against-

3250 RAWLINS AVENUE
-----X

Index No. **0027745/2016**

Hon. **NORMA RUIZ,**

Justice Supreme Court

The following papers numbered 1 to _____ Read on this motion, **DISMISSAL**
Noticed on **March 17 2017** and duly submitted as No. _____ on the Motion Calendar of _____

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this

Motion is Respectfully Referred to:
Justice: _____
Dated: _____

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION**

Dated: **7/17/18**

Hon. 
NORMA RUIZ, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX – PART 22

-----X
MARYGRACE BRENNAN,

Index No. 27745/2016

Plaintiff,

- against -

DECISION/ ORDER

3250 RAWLINS AVENUE PARTNERS, LLC, ET AL.

Defendants.

-----X
Hon. Norma Ruiz

Upon the foregoing papers defendants RONALD RETTNER (“Rettner”) and LANCE FALOW (“Falow”) move for an order (1) dismissing plaintiff’s second cause of action for common law fraud pursuant to CPLR 3211 (a)(1)(7) and 3016(b); (2) dismissing plaintiff’s fourth cause of action for violations of the Debtor and Creditor Law pursuant to CPLR 3211 (a)(7); and (3) dismissing plaintiff’s fifth cause of action and discharging the defendant stakeholder of liability on the fifth cause of action upon his payment into Court of the disputed funds held in escrow pursuant to an Order of Discharge. The latter motion to dismiss the fifth cause of action is granted without opposition from plaintiff and necessitates no further discussion. Upon review of the papers and careful deliberation, the remaining motions are decided as discussed herein.

FACTUAL HISTORY

This action arises from plaintiff’s purchase of property at 3254 Rawlins Avenue, Bronx, New York. In 2013, plaintiff entered into a contract of sale with defendant 3250 RAWLINS AVENUE PARTNERS, LLC (“3250 Partners”) for the purchase of the premises. Defendants Rettner and Falow were members of that limited liability company, but they were not personal signatories to the agreement. The contract included the limited warranty required by Article 36-B of the New York

General Business Law that provides, *inter alia*, that the subject premises will be free from defects in construction and plumbing. Additionally, the parties executed a post-closing survival agreement whereby defendants held \$25,000 in escrow to cure certain defects that were present at the time of closing. Plaintiff alleges that the known defects were not cured pursuant to the survival agreement, causing her to undertake repairs at her own expense. More significantly, several months after the closing, sewage backed up and flooded the basement at the premises, allegedly caused by the negligent failure to uncap the sewage system for the premises. Plaintiff tendered formal notice of the defects and sought relief pursuant to the survival agreement and the limited warranty, without avail. Sometime thereafter, plaintiff alleges that Rettner and Falow intentionally depleted the assets of 3250 Partners, rendering it insolvent, and communicated to plaintiff's counsel that there could be no recovery beyond the \$25,000 held in escrow. The instant suit was commenced sounding in breach of contract, fraud, and violations of the Debtor and Creditor Law.

STANDARD OF REVIEW

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Cortlandt St. Recovery Corp. v. Bonderman*, No. 14, 2018 WL 942335, at *8 [N.Y. Feb. 20, 2018] [Rivera, J.] [internal citations, quotation marks and brackets omitted]).

DISCUSSION

In this pre-answer motion to dismiss, defendants aver first that the complaint should be dismissed entirely as to them in their individual capacities, seeking refuge behind the corporate veil.

In the alternative, defendants contend that the second cause of action must be dismissed as duplicative of the first cause of action for breach of contract and for plaintiff's failure to plead fraud with the requisite particularity. Finally, defendants move for the fourth cause of action to be dismissed alleging that plaintiff has failed to state a claim under the Debtor and Creditor Law. As discussed herein, the second cause of action is dismissed, with plaintiff granted leave to replead those claims.

A. Veil Piercing

As a threshold matter, to pierce the corporate veil, there must be a "showing that the corporation was dominated as to the transaction attacked and that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences" (*TNS Holdings v. MKI Sec. Corp.*, 92 NY2d 335, 339 [1998]). Based on the allegations in the complaint and the record before this Court, the plaintiff is entitled to discovery to determine whether the corporate veil can be pierced (*Aubrey Equities, Inc. v SMZH 73rd Assoc.*, 212 AD2d 397 [1st Dept 1995]) and thus the Court will not dismiss the complaint on that theory at this juncture.

B. Plaintiff's Second Cause of Action

Foremost, the Court is not inclined to dismiss the second cause of action as duplicative. "A warranty is not a promise of performance, but a statement of present fact. Accordingly, a fraud claim can be based on a breach of contractual warranties notwithstanding the existence of a breach of contract claim" (*First Bank of Americas v Motor Car Funding, Inc.*, 257 AD2d 287, 292 [1st Dept 1999]). To the extent plaintiff alleges that fraudulent misrepresentations by the defendants induced her to enter the transaction in the first instance, such a claim is actionable independent of her breach of contract claim. Notwithstanding, however, the second cause of action suffers from fatal pleading

infirmity that plaintiff must rectify if she wishes to proceed with a fraud claim against the instant defendants.

To state a claim for fraud, the plaintiff must demonstrate 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] [internal citations omitted]). “A claim rooted in fraud must be pleaded with the requisite particularity under CPLR 3016(b)” (*id.*). CPLR 3016(b) requires that “[w]here a cause of action or defense is based upon misrepresentation, fraud, mistake, willful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail.” Thus, a fraud claim must be pleaded with particularity, and the circumstances constituting the alleged wrong must be stated in detail (*Ramos v Ramirez*, 31 AD3d 294, 295 [1st Dep’t 2006]). In *Eurycleia*, the Court of Appeals reiterated that the “purpose underlying the statute is to inform a defendant of the complained-of incidents . . . [and] the statute should not be so strictly interpreted as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting a fraud” (*Eurycleia*, 12 NY3d at 559 [internal quotation marks and citation omitted]). Here, plaintiff alleges that defendants made a series of misrepresentations, but she fails to identify which defendant made which specific statements and when. For this reason, the individual defendants are denied the required notice of the “complained-of incidents.” Further, conflating the two individuals together may impermissibly give rise to one defendant being liable for the fraud of another. For this reason, the second cause of action must be dismissed.

C. **Plaintiff's Fourth Cause of Action**

Plaintiff's fourth cause of action runs afoul of CPLR 3014 in that she alleges multiple violations of the Debtor and Creditor Law in a single paragraph. While the Court agrees that each alleged violation of a specific section of the Debtor and Creditor Law is deserving of its own cause of action, plaintiff's stylistic choice to cram all of her alleged violations into a single cause of action is at best a defect that "shall be ignored if a substantial right of a party is not prejudiced" (CPLR 3026), and defendants can cite no such prejudice. The Court is satisfied that plaintiff's allegations, accepted as true, state a claim for both constructive fraudulent conveyance and actual fraudulent conveyance in violation of the Debtor and Creditor Law §§ 273-276-a (*see 172 Van Duzer Realty Corp. v 878 Educ., LLC*, 142 AD3d 814, 818 [1st Dept 2016]). Accordingly, that branch of defendant's motion to dismiss the fourth cause of action is denied.

CONCLUSION

For the foregoing reasons, defendants' motion to dismiss the second cause of action in plaintiff's complaint is granted, with plaintiff permitted to replead that claim. Further, that branch of defendants' motion to dismiss the fifth cause of action is granted, without opposition from plaintiff. Defendants' remaining contentions are without merit.

Accordingly, it is hereby

ORDERED that defendants' motion to dismiss the fifth cause of action is granted and defendants are directed to settle an Order of Discharge within 20 days; and it is further

ORDERED that defendants' motion to dismiss the second cause of action is GRANTED; and it is further

ORDERED that plaintiff is granted leave to serve an amended complaint as to replead the second cause of action for fraud within 20 days after service on plaintiff's attorney of a copy of this order with notice of entry; and it is further

ORDERED that, in the event that plaintiff fails to serve and file an amended complaint in conformity herewith within such time, leave to replead shall be deemed denied, and the Clerk, upon service of a copy of this order with notice of entry and an affirmation by defendants' counsel attesting to such non-compliance, is directed to enter judgment dismissing the second cause of action for fraud, with prejudice; and it is further

ORDERED that defendants' motion to dismiss the fourth cause of action is denied in its entirety.

This constitutes the decision and order of the court.

Dated: 7/17/18

ENTER,



Norma Ruiz, J.S.C.