

**Gaviria v El-Tawil**

2019 NY Slip Op 30043(U)

January 3, 2019

Supreme Court, New York County

Docket Number: 650891/2018

Judge: Joel M. Cohen

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.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. JOEL M. COHEN PART IAS MOTION 45**

*Justice*

-----X

JULIO GAVIRIA

Plaintiff,

- v -

NICHOLAS EL-TAWIL,

Defendant.

INDEX NO. 650891/2018

MOTION DATE 11/07/2018

MOTION SEQ. NO. 001

**DECISION AND ORDER**

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25

were read on this motion for SUMMARY JUDGMENT AND TO DISMISS COUNTERCLAIMS.

Upon the foregoing documents:

This is a breach of contract case. Plaintiff Julio Gaviria (“Gaviria”) and Defendant Nicholas El-Tawil (“El-Tawil”) entered into a Confidential Settlement Agreement (“Agreement”) to resolve a dispute in connection with the sale of Gaviria’s property. Gaviria alleges that El-Tawil has failed to make the payments required under the Agreement, and that Plaintiff was fraudulently induced into entering the Agreement. El-Tawil alleges that he was not required to make the payments under the terms of the Agreement and that Gaviria is not entitled to enforce the Agreement because he breached its confidentiality provision by filing this action.

Plaintiff Gaviria moves for summary judgment on his breach of contract and fraudulent inducement claims. He also moves to dismiss Defendant’s counterclaims for failure to state a cause of action under CPLR § 3211(a)(7), and seeks sanctions against Defendant for asserting frivolous counterclaims.

For the reasons set forth below, Gaviria's motion for summary judgment is granted in part and denied in part, the motion to dismiss the counterclaims is granted, and the motion for sanctions is denied.

### **Background**

El-Tawil was the listing agent for the sale of Gaviria's apartment. He produced a buyer, a price was agreed upon, and the sale closed in April 2016. El-Tawil received a commission for the sale. After closing, however, Gaviria became aware that another offer was made for \$25,000 more than the sale price, which El-Tawil did not disclose to him. El-Tawil denied any wrongdoing.<sup>1</sup> To resolve their dispute, the parties entered into the Agreement, under which El-Tawil would pay Gaviria \$30,000 in two installments, and in return Gaviria would release El-Tawil from any and all claims relating to the sale. The Agreement provided that the parties would keep the terms of the Agreement confidential for a period of five years.

It is undisputed that El-Tawil did not make the payments set forth in the Agreement.

Gaviria filed this suit for breach of contract and for fraudulent inducement on February 23, 2018. (NYSCEF 1). El-Tawil filed an Answer with counterclaims for breach of contract, breach of the implied covenant of good faith and fair dealing, a declaratory judgment invalidating the Agreement, and a declaratory judgment on liability in the underlying dispute. (NYSCEF 6). As noted above, Gaviria now moves for summary judgment on its claims and to dismiss El-Tawil's counterclaims. He also seeks sanctions. (NYSCEF 11).

### **Legal Analysis**

#### *I. Motion for Summary Judgment*

---

<sup>1</sup> The background facts are set forth in the "Whereas" clauses of the Agreement. (NYSCEF 15.)

“It is well settled that, on a motion for summary judgment, the construction of an unambiguous contract is a question of law for the court to pass on, and that circumstances extrinsic to the agreement or varying interpretations of the contract provisions will not be considered, where, as here, the intention of the parties can be gathered from the instrument itself.” *Lake Constr. & Dev. Corp. v. City of New York*, 211 A.D.2d 514, 515 (1st Dep’t 1995) (citing *Mallad Constr. Corp. v. County Fed. Sav. & Loan Ass’n*, 32 N.Y.2d 285 (1973)).

The Agreement is unambiguous. It provides in unconditional terms that: “El-Tawil agrees to pay or have paid on his behalf to Gaviria the amount of Thirty Thousand (\$30,000) Dollars. The payment *shall be made* via check in immediately available funds directed to Gaviria at the address specified above or as provided in writing to El-Tawil.” (NYSCEF 15, ¶ 1) (emphasis added). It then provides that “[s]ubject to and only after the receipt of the payment identified in Paragraph 1, and in consideration of the covenants set forth herein,” Gaviria “does hereby fully and forever” release all claims against El-Tawil. (*Id.* ¶ 3.)

El-Tawil does not deny that he has failed to make the \$30,000 payment. Instead, he contends that the Agreement gave him an *option* to make the required payment, to be exercised at his discretion *if* he desired to obtain a release. That position is meritless. By its terms, the payment obligation is unconditional. The fact that Gaviria’s *release* was to become effective upon El-Tawil’s payment, which is natural, does not mean that El-Tawil could simply walk away from his obligation to make the settlement payment. El-Tawil’s argument, if accepted, would render a wide range of settlement agreements to be unenforceable.

Given that the Agreement is unambiguous, and that there is no dispute that El-Tawil has failed to make the required payment, summary judgment in favor of Gaviria on his breach of contract claim is warranted.<sup>2</sup>

By contrast, Gaviria's allegation that El-Tawil's breach of contract gives rise to an inference that El-Tawil never intended to comply with the Agreement does not state a viable claim for fraudulent inducement. His claim is for breach of contract, not fraud. *See, e.g., Cronos Grp. Ltd. v. XComIP, LLC*, 156 A.D.3d 54, 56 (1st Dep't 2017) ("We hold that the cause of action for fraud, to the extent it is based on allegations that the defendants gave false assurances that they would perform a contractual obligation, should have been dismissed on the ground that it is duplicative of the contract claim and is not supported by allegations of specific facts giving rise to an inference that defendants did not intend to honor their assurances when they were made."). Accordingly, Gaviria's motion for summary judgment on that claim must be denied.

Finally, Gaviria is not entitled to punitive damages. In a breach of contract case, damages "will ordinarily be limited to the contract damages necessary to redress the private wrong... Punitive damages are available only in those limited circumstances where it is necessary to deter defendant and others like it from engaging in conduct that may be characterized as 'gross' and 'morally reprehensible,' and of 'such wanton dishonesty as to imply a criminal indifference to civil obligations.'" *New York Univ. v. Continental Ins. Co.*, 87 N.Y.2d

---

<sup>2</sup> El-Tawil's contention that Gaviria is not entitled to summary judgment because he did not submit an affidavit in support of his motion is meritless. *See Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092, 1093 (1985) (holding that the lack of an affidavit or merit did not defeat defendant's right to summary judgment) (citing *Gaeta v. New York News*, 62 N.Y.2d 340 (1984); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980)). The authenticity of the Agreement, which was attached to the Complaint, is not disputed by El-Tawil. Indeed, El-Tawil relies on the Agreement in support of his counterclaims. As described herein, the Agreement itself is sufficient to support summary judgment.

305, 315-316 (1995) (quoting *Rocanova v. Equitable Life Assurance Society of U.S.*, 83 N.Y.2d 603, 614 (1994) (quoting *Walker v. Sheldon*, 10 N.Y.2d 401 (1961))) (citations omitted). El-Tawil's alleged conduct in connection with the underlying dispute is not relevant. The only question is whether he breached the Agreement, which he did. Although El-Tawil's defenses are meritless, the facts here do not warrant an award of punitive damages.

## II. *Motion to Dismiss Counterclaims*

In assessing a motion to dismiss, the Court must give the complaint a liberal construction, accept its factual allegations as true, and provide the plaintiff with the benefit of every favorable inference. *Nomura Home Equity Loan, Inc. v. Nomura Credit & Capital, Inc.*, 30 N.Y.3d 572, 582 (2017); *Myers v. Schneiderman*, 30 N.Y.3d 1, 11 (2017). Gaviria moves to dismiss these counterclaims under CPLR § 3211(a)(7) for failure to state a cause of action.

### a. *Breach of Contract*

"The elements of a cause of action to recover damages for breach of contract are the existence of a contract, the performance under the contract of the party seeking relief, the other party's breach, and resulting damages." *McMahon v. McMahon*, 164 A.D.3d 1486, 1487 (2nd Dep't 2018); see also *VisionChina Media Inc. v. Shareholder Representative Services, LLC*, 109 A.D.3d 49, 58 (1st Dep't 2013).

El-Tawil asserts a counterclaim that Gaviria breached the contract by filing a copy of the confidential agreement as an attachment to the Complaint. (NYSCEF 1 at 10-12). Having failed to comply with the central obligation of the Agreement to make the payments to Gaviria, El-Tawil is in no position to make a claim against Gaviria for bringing an action in Court to enforce the Agreement.

*b. Breach of the Implied Covenant of Good Faith and Fair Dealing*

In addition to his breach of contract counterclaim, El Tawil alleges breach of the implied covenant of good faith and fair dealing. “A claim for ‘breach of the implied covenant of good faith and fair dealing... may not be used as a substitute for a nonviable claim of breach of contract.’” *Smile Train, Inc. v. Ferris Consulting Corp.*, 117 A.D.3d 629, 630 (1st Dep’t 2014) (quoting *Sheth v. New York Life Insurance Co.*, 273 A.D.2d 72, 73 (1st Dep’t 2000)). El-Tawil’s counterclaim for breach of the implied covenant of good faith and fair dealing cannot stand as a substitute for its failed breach of contract claim.

El-Tawil’s claim for breach of the implied covenant of good faith and fair dealing is also duplicative of the breach of contract claim, as both claims “arise from the same facts and seek the identical damages for each alleged breach.” *Netologic, Inc. v. Goldman Sachs Group, Inc.*, 110 A.D.3d 433, (1st Dep’t 2013) (citing *Amcan Holdings, Inc. v. Canadian Imperial Bank of Commerce*, 70 A.D.3d 423 (1st Dep’t 2010)). As such, El-Tawil’s counterclaim for breach of the implied covenant of good faith and fair dealing is dismissed.

*c. Declaratory Judgment Invalidating the Agreement*

El-Tawil asserts a counterclaim for a declaratory judgment on the ground “that Tawil has no obligation to pay Gaviria the amount provided” under the contract. (NYSCEF 6 at ¶19). For the reasons described above, this claim is meritless.

*d. Declaratory Judgment on Liability*

El-Tawil also asserts a counterclaim for a declaratory judgment that “Tawil is not liable to Gaviria for damages in connection with the purported sale of [the] 70 Washington Street [unit].” (NYSCEF 6 at ¶21). For the reasons described above, this claim is meritless.

### III. Sanctions

22 NYCRR Part 130-1.1 allows the court to award costs and attorneys' fees resulting from frivolous conduct. Conduct is considered frivolous if: "(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false." 22 NYCRR Part 130-1.1(c).

Although El-Tawil's defenses and counterclaims are meritless, the Court does not believe that an award of sanctions is warranted.

Therefore, it is:

**ORDERED** that Plaintiff's motion for summary judgment on the breach of contract claim is Granted; and it is further

**ORDERED** that Plaintiff's motion for summary judgment on the fraudulent inducement claim is Denied; and it is further

**ORDERED** that Plaintiff's motion to dismiss Defendant's counterclaims for breach of contract, breach of implied covenant of good faith and fair dealing, a declaratory judgment invalidating the agreement, and a declaratory judgment on liability is Granted; and it is further

**ORDERED** that Plaintiff's motion for sanctions against Defendant is Denied; and it is further

**ORDERED** that the Clerk of the Court is directed to enter a judgment in favor of Plaintiff and against Defendant in the sum of \$30,000, together with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs.

**[SIGNATURE ON FOLLOWING PAGE]**

This constitutes the Decision and Order of the Court.

01/03/2019

DATE



JOEL M. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE