

Slebakis v Poyiadjis

2019 NY Slip Op 31269(U)

April 15, 2019

Supreme Court, New York County

Docket Number: 655855/2018

Judge: O. Peter Sherwood

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49**

-----X
ANGELO SLEBAKIS,

Plaintiff,

-against-

**ROY S POYIADJIS & CINCINNATI TERRACE
PLAZA, LLC,**

Defendants.

-----X
O. PETER SHERWOOD, J.:

**DECISION AND ORDER
Index No.: 655855/2018**

Motion Sequence No.: 001

Under motion sequence 001, defendants move to dismiss the complaint pursuant to CPLR 3211(a)(1), (3), (5) and (7). Defendants also move for sanctions against plaintiff pursuant to NYCRR 130-1.1(a). For the following reasons, the motion to dismiss shall be granted, with leave to replead the first cause of action, and the motion for sanctions shall be denied.

I. FACTS

This case arises out of an alleged agreement in connection with a sale of real estate in Ohio. Defendant Cincinnati Terrace Plaza LLC (CTP), is a New York limited liability company (complaint ¶ 3, NYSCEF Doc. No. 1). As of May 2013, plaintiff Angelo Slebakis (Slebakis) owned 50% of 923 Cincinnati Terrace Plaza LLC (923 Cincinnati), the entity fee owner of 15 West 6th Street in Cincinnati, Ohio (the Premises) (*id.* ¶ 4). In 2013, 923 Cincinnati took out two mortgages in the total amount of \$3.6 million, secured by the Premises, and personally guaranteed by Slebakis (*id.* ¶ 5). In 2014, Slebakis obtained a single replacement mortgage from Madison Equities, LLC (Madison), owned by defendant Roys Poyiadjis (Poyiadjis) in the amount of \$3.75 million (*id.* ¶ 7). 923 Cincinnati defaulted. Madison instituted a foreclosure proceeding and obtained a judgment of foreclosure against 923 Cincinnati in July 2017 for \$1,323,889.32 plus interest and costs (the Ohio Judgment) (*id.* ¶¶ 8-9, NYSCEF Doc No. 5). Madison then assigned its equity rights in the judgment to defendant CTP, which became owner of the Premises (*id.* ¶ 9).

As majority or sole shareholder of CTP, Poyiadjis unsuccessfully tried to sell the Premises for 18 months (*id.* ¶ 10). By a series of emails (NYSCEF Doc No. 22), Poyiadjis and Slebakis entered into an agreement pursuant to which Poyiadjis agreed to provide Slebakis with certain compensation in exchange for his selling the Premises for at least \$10 million (complaint ¶¶ 11-

13, 16). The compensation promised consisted of (1) any proceeds from the sale above the \$10 million purchase price, (2) return of a \$465,000 payment representing “an amount Slebakis had paid Poyiadjis prior to closing” that was secured by a lien on a property owned by plaintiff in New York (the Sutton Place property), and (3) forgiveness of the Ohio Judgment against Slebakis related to his personal guarantee of the mortgages (*id.* ¶ 14). Rights in the Ohio Judgment were assigned to Platinum Real Estate Holdings, Inc. (Platinum), another company owned by Poyiadjis (*id.* ¶¶ 14-15).

Slebakis solicited buyers and assembled a syndicated partnership to acquire the Premises for \$11 million (*id.* ¶¶ 16-17). Poyiadjis then closed the sale of the Premises to the same syndicated partnership assembled by Slebakis on or about August 1, 2018 (*id.* ¶ 17; Dougherty affirmation, exhibit I [NYSCEF Doc No. 12]). Also, on July 31, 2018, Slebakis and Platinum executed a Mutual General Release (Dougherty affirmation, exhibit C [NYSCEF Doc No. 6]). Poyiadjis then moved the Ohio court to enter satisfaction of the Ohio Judgment on August 3, 2018 (Dougherty affirmation, exhibit J [NYSCEF Doc No. 13]). Poyiadjis has, however, failed to honor its other obligations by paying Slebakis the \$1,465,000 owed (complaint ¶ 17).

Plaintiff Slebakis brings causes of action for (1) breach of contract, (2) unjust enrichment, (3) conversion, and (4) fraud.

I. BREACH OF CONTRACT

To sustain a breach of contract cause of action, plaintiff must show: (1) an agreement; (2) plaintiff's performance; (3) defendant's breach of that agreement; and (4) damages (*see Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). “The fundamental rule of contract interpretation is that agreements are construed in accord with the parties’ intent . . . and ‘[t]he best evidence of what parties to a written agreement intend is what they say in their writing’ Thus, a written agreement that is clear and unambiguous on its face must be enforced according to the plain terms, and extrinsic evidence of the parties’ intent may be considered only if the agreement is ambiguous [internal citations omitted]” (*Riverside South Planning Corp. v CRP/Extell Riverside LP*, 60 AD3d 61, 66 [1st Dept 2008], *affd* 13 NY3d 398 [2009]). Whether a contract is ambiguous presents a question of law for resolution by the courts (*id.* at 67). Courts should adopt an interpretation of a contract which gives meaning to every provision of the contract, with no provision left without force and effect (*see RM 14 FK Corp. v Bank One Trust Co., N.A.*, 37 AD3d 272 [1st Dept 2007]).

Defendants first argue that the breach of contract claim should be dismissed on the grounds that the plaintiff signed a general release in favor of Platinum and its affiliates that covers defendants in this case (CPLR 3211 [a][5]); Dougherty affirmation, exhibit C [NYSCEF Doc No. 6]). The release states, in relevant part:

“Angelo Slebakis...hereby releases and forever discharges PLATINUM REAL ESTATE HOLDINGS, INC., a Delaware corporation... and each of Platinum’s past and present affiliates, direct and indirect subsidiaries, direct and indirect parent entities, officers, stockholders, directors, attorneys, insurers, agents and/or employees and/or their respective administrators, heirs, estates, assigns, executors and/or successors (collectively, “Platinum Releasees”)”

(*id.*). Defendants argue that defendant Poyiadjis, who owns Platinum, is an “affiliate” and “agent” of Platinum. Poyiadjis is also majority or sole shareholder of defendant CTP, which according to defendants is an “affiliate, direct and indirect” subsidiary of Platinum. Defendants do not, however, provide any evidence establishing defendants’ relationship with Platinum and their status as “Platinum Releasees” under the Mutual General Release. Because the documentary evidence does not “utterly refute” plaintiff’s claim, the motion to dismiss must be denied.

There is another reason the release does not bar plaintiff’s claim. The release signed by Slebakis is dated July 31, 2018 while the alleged breach occurred on or after August 1, 2018 and therefore is not within the scope of the release. Accordingly, the first cause of action cannot be dismissed on the basis of the release.

Defendants also argue that the claim for breach of contract should be dismissed pursuant to CPLR 3211(a)(3) because the contract plaintiff seeks to enforce is illegal, since he was not a licensed real estate broker in Ohio when the transaction took place. “No right of action shall accrue to any person, partnership, association, or corporation for the collection of compensation for the performance of the acts mentioned in section 4735.01 of the Revised Code, without alleging and proving that such person, partnership, association, or corporation was licensed as a real estate broker or foreign real estate dealer” (Ohio Rev. Code Ann. § 4735.21). The Ohio Code further provides:

“Real estate broker” includes **any person**, partnership, association, limited liability company, limited liability partnership, or corporation, foreign or domestic, who for another, whether pursuant to a power of attorney or otherwise, and **who for a fee, commission, or other valuable consideration**, or with the intention, or in the expectation, or upon the promise of receiving or collecting a fee, commission, or other valuable consideration does any of the following: (1) Sells, exchanges,

purchases, rents, or leases, or **negotiates the sale, exchange, purchase, rental, or leasing of any real estate**; (2) **Offers, attempts, or agrees to negotiate the sale, exchange, purchase, rental, or leasing of any real estate**; ... (7) **Directs or assists in the procuring of prospects or the negotiation of any transaction**, other than mortgage financing, which does or is calculated to result in the sale, exchange, leasing, or renting of any real estate..."

(Ohio Rev. Code Ann. § 4735.01).¹ Plaintiff alleges that he engaged in “finding a syndicated buyer for the premises”, “solicit[ing] buyers for the premises”, and “brought a bona fide purchaser to Poyiadjis” (complaint ¶¶ 11, 12, 16, 17). As defendants contend, these are activities that are performed by real estate brokers. They involve negotiating the sale of real estate and directing or assisting in procuring prospects for a commission or fee (*see* Ohio Rev. Code Ann. § 4735.01[A][1], [2] and [7]; *DiLuciano v Ohio Real Estate Comm’n*, 510 NE2d 837 [8th Dist App 1986] [finding that appellant was not entitled to recovery of money promised as compensation for his assistance in the purchase of a certain property where appellant claimed that he merely “introduced buyer and seller” but testimony revealed that he spent significant time on the transaction and expected compensation based on the commission “that is generally what realtors make when they sell property”]; *Binder v Trinity OG Land Dev. & Expl., LLC*, No. 4:11-CV-02621, 2012 WL1970239, at *3 [ND Ohio May 31, 2012] [finding that plaintiff’s actions fell “squarely within the broad definition of a real estate broker under Ohio Rev. Code § 4735.01” where plaintiff alleged to have acted as a “finder”, identifying landowners with whom the defendant could negotiate to obtain mineral rights, for compensation per acre].

Plaintiff offers no caselaw, or nonconclusory arguments, supporting the proposition that his actions do not fall within the scope of activities contemplated by the above-referenced portions of the Ohio Code. However, at oral argument on the motion, plaintiff’s counsel asserted for the first time that plaintiff acted as a buyer in that he is a 20% owner of the syndicate. This claim was not pleaded. The claim for breach of contract shall be dismissed on the basis of CPLR 3211(a)(3) with leave to re-plead.

¹ New York law also includes within the definition of real estate broker “any person... who, for another and for a fee, commission or other valuable consideration... offers or attempts to negotiate a sale... of an estate or interest in real estate” (N.Y. Real Prop. Law § 440).

II. UNJUST ENRICHMENT

“Unjust enrichment is a quasi contract theory of recovery, and ‘is an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned’” (*Georgia Malone & Co., Inc. v Rieder*, 86 AD3d 406, 408 [1st Dept 2011], *affd.* 19 NY3d 511 [2012], quoting *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]). In order to plead a claim for unjust enrichment, the plaintiff must allege “that the other party was enriched, at plaintiff’s expense, and that ‘it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered’” (*Georgia Malone & Co.*, 86 AD3d at 408, quoting *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]).

The cause of action for unjust enrichment is based on Poyiadjis’s refusal to turn over funds pursuant to the alleged contract, and is duplicative of the contract claim (complaint ¶ 25). In any event, and regardless of whether there was a contract, plaintiff cannot claim a right to funds that he procured illegally, in this case, by performing the functions of a real estate broker without a license. New York courts will not enforce a contract to commit an unlawful act (*Scotto v Mei*, 219 AD2d 181, 183 [1st Dept 1996]).

III. CONVERSION

“The tort of conversion is established when one who owns and has a right to possession of personal property proves that the property is in the unauthorized possession of another who has acted to exclude the rights of the owner” (*Republic of Haiti v Duvalier*, 211 AD2d 379, 384 [1st Dept 1995]). The elements of conversion are (1) plaintiff’s possessory right or interest in certain property and (2) defendant’s dominion over the property or interference with it in derogation of plaintiff’s rights (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43 [2006]; *see also Employers’ Fire Ins. Co. v Cotton*, 245 NY 102 [1927]). A plaintiff need only allege and prove that the defendant interfered with plaintiff’s right to possess the property. The defendant does not have to have taken the property or benefitted from it (*Hillcrest Homes, LLC v Albion Mobile Homes, Inc.*, 117 NYS2d 755 (4th Dept 2014)). A conversion claim may not be maintained where damages are merely sought for a breach of contract (*see Sutton Park Dev. Trading Corp. v Guerin & Guerin*, 297 AD 2d 430, 432 [3d Dept 2002]).

Plaintiff’s conversion claim is premised on conclusory statements that plaintiff has a “possessory right and interest in the \$1,465,000 that was unlawfully withheld by Poyiadjis” (complaint ¶¶ 29-32). In the opposition, plaintiff appears to argue that the conversion claim is

really only about \$465,000. Plaintiff believes he is owed this money because defendants induced him to take out a mortgage on his Sutton Place property in order to acquire funds to advance part of the purchase price of the Premises to defendants. Pursuant to the alleged Agreement, defendants were supposed to return this money. As discussed in the context of the two prior claims, plaintiff has not pled a right to possession of the property he claims he is owed. Further, there are no identifiable escrow funds over which there can be a claim of dominion. This claim must be dismissed.

IV. FRAUD

“To state a cause of action for fraud, a plaintiff must allege a representation of material fact, the falsity of the representation, knowledge by the party making the representation that it was false when made, justifiable reliance by the plaintiff and resulting injury” (*Kaufman v Cohen*, 307 AD2d 113, 119 [1st Dept 2003] citing *Monaco v New York Univ. Med. Ctr.*, 213 AD2d 167, 169 [1st Dept 1995], *lv. denied* 86 NY2d 882 [1995]; *Callas v Eisenberg*, 192 AD2d 349, 350 [1st Dept 1993]).

Plaintiff’s fraud claim relies on the allegation that “[o]n or about the date of closing of the sale of the premises, Poyiadjis misrepresented to Slebakis that he would pay him the \$1,465,000.00”, that the statement was false when made, that Slabakis relied on the statement and that Slabakis was damaged (complaint ¶¶ 33-39). But “[a]llegations that a party entered into a contract without intent to perform do not state a cause of action for fraud” (*Orix Credit Alliance, Inc. v R.E. Hable Co.*, 256 Ad2d 114, 115 [1st Dept 1998]). The cause of action for fraud must therefore be dismissed.

V. SANCTIONS

The Administrative Rules of the Unified Court System provide that “[t]he court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court . . . costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney’s fees, resulting from frivolous conduct as defined in this Part” (22 N. Y.C.R.R. 130-1.1[a]). Frivolous conduct is defined as follows:

“(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.”

(*Id.* at 130-1.1[c]). Defendant’s request for sanctions is predicated upon the general release signed in connection with the Ohio Judgment. However, defendants have not established that they are “Platinum Releasees” and covered by the release. Further, as discussed above, the release does not extend to events that took place after July 31, 2018. Plaintiff’s claim is not “completely without merit”. Accordingly, the request for sanctions must be denied.

VI. CONCLUSION

For the reason stated above, the motion to dismiss shall be granted in its entirety with leave to re-plead the first cause of action. Accordingly, it is hereby

ORDERED that defendants’ motion to dismiss is GRANTED and the complaint is dismissed in its entirety with leave to replead the first cause of action; and it is further

ORDERED that defendants’ motion for sanctions is DENIED.

This constitutes the decision and order of the court.

DATED: April 15, 2019

ENTER,


O. PETER SHERWOOD J.S.C.