| **Thomas v Lynch** |
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| 2019 NY Slip Op 32476(U) |
| August 21, 2019 |
| Supreme Court, New York County |
| Docket Number: 101217/2016 |
| Judge: David Benjamin Cohen |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. DAVID BENJAMIN COHEN** **PART** **IAS MOTION 58EFM**

***Justice***

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**INDEX NO.** 101217/2016

JOI THOMAS

**MOTION DATE** 09/27/2018

Plaintiff,

**MOTION SEQ. NO.** 002

- v -

WILLIAM LYNCH,

**DECISION + ORDER ON MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 6, 7, 8, 9, 10, 11, 12, 13, 14

were read on this motion to/for AMEND CAPTION/PLEADINGS.

Upon the foregoing documents, it is

Plaintiff commenced this action on August 1, 2016. Issue was joined on January 4, 2017. A motion to amend the Complaint was filed and ultimately withdrawn. Plaintiff's husband Jarett Adams ("Proposed Intervenor") filed the instant motion to intervene for permissive intervention under CPLR 1013. CPLR 1013 provides that "upon timely motion, any person may be permitted to intervene in any action when a statute of the state confers a right to intervene in the discretion of the court, or when the person's claim or defense and the main action have a common question of law or fact." In deciding a motion pursuant to CPLR 1012 or 1013, a Court may exercise its discretion and considers multiple factors, including the timeliness of the motion and whether proposed intervenor has a real or substantial interest in the pending action. (*In re HSBC Bank U.S.A.*, 135 AD3d 534 [1st Dept 2016]; *Acadia Realty Ltd. Partnership v Ringel*, 129 AD3d 511, 512 [1st dept 2015]).

A Court must first ask if the motion is timely (*RKH Holding Corp. v 207 Second Ave. Realty Corp.*, 236 AD2d 254, 255 [1st Dept 1997]). In examining the timeliness of the motion,

courts do not engage in mere mechanical measurements of time. Rather, the Court considers whether the delay in seeking intervention would cause a delay in resolving the action or would prejudice a party (*Yuppy Puppy Pet Products, Inc. v Street Smart Realty, LLC*, 77 AD3d 197 [1st Dept 2010]). Under the circumstances of this case, the motion to intervene is untimely. Proposed Intervenor is not just plaintiff's husband and a potential witness but was the original counsel to plaintiff. Proposed Intervenor obviously knew of this action's existence since it was commenced in September 2016. Despite intimate knowledge of the pending action, proposed intervenor waited eight months between withdrawal of a previous motion to intervene (which sought to add Proposed Intervenor) and the instant motion to intervene currently before the court (*Castle Peak 2012-1 Loan Trust v Sattar*, 140 AD3d 1107 [2d Dept 2016] [four-month delay in leave to intervene was untimely]. Proposed Intervenor offers no compelling reason why he waited eight months to file this motion despite his absolute familiarity with this matter; the motion is untimely for the delay it causes in the resolving the action (*see id.*; *HSBC Bank.*, 135 AD3d 534 [1st Dept 2016]; *Chang v Liu*, 1 AD3d 156 [1st Dept 2003]; *Vacco v Herrera*, 247 AD2d 608 [2d Dept 1998]).

However, the inquiry does not end there. Proposed Intervenor also has no real or substantial interest in any of the proposed causes of action alleged in the amended complaint. (*Amalgamated Bank v Helmsley-Spear, Inc* 109 AD3d 418, 420 [1st Dept 2013]). Proposed Intervenor was not a party to the lease, nor was he ever given any clear and unambiguous promises by defendant and there is no allegation that Proposed Intervenor ever had any discussion with defendants prior to entering the lease. Additionally, Proposed Intervenor has not demonstrated that any interest he does have in the pending action, will not be adequately represented by his wife, the plaintiff. (*Trent v Jackson*, 129 AD3d 1062 [2d Dept 2015]).

Specifically, the proposed Complaint states four causes of action: (1) breach of contract (2) promissory estoppel (3) promissory estoppel due to outlays and (4) *quantum meruit*. In the breach of contract cause of action, the proposed Complaint makes allegations wholly to the lease entered into by Proposed Intervenor's wife and defendant. This lease was not signed or entered into by Proposed Intervenor, a fact admitted in Paragraph 39 of the proposed Complaint. That cause of action also discusses breach of the warranty of habitability. However, as Proposed Intervenor is not on the lease, he cannot assert a cause of action relating to the lease and accordingly, does not state a claim for breach of contract in the first cause of action.

Additionally, the alleged lease does not comport with the statute of frauds since, according to plaintiff, the lease was for 24 months, is for the leasing of real property, and is not in writing (NY Gen Oblig §5-703[2]). Specifically, the alleged lease is in violation of N.Y. Gen. Oblig § 5-703 (2) which provides that "a contract for the leasing for a longer period than one year...of any real property...is void unless the contract or some note or memorandum thereof, expressing the consideration, is in writing, subscribed by the party to be charged...". (*Ruha v Guior*, 277 AD2d 116 [1st Dept 2000]). Thus, even if Proposed Intervenor was a party to the alleged lease, it is not an enforceable contract.

The second proposed cause of action seeks damages for promissory estoppel. Proposed Intervenor alleges that he detrimentally relied on a promise, made by defendant, that the premises would be habitable "very briefly after the leases were entered into," a promise not kept. First, to the extent that this cause of action takes issue with the premises not being habitable, this cause of action is duplicative of the first cause of action. Second, the Amended Complaint and other papers in this matter do not allege any communication, let alone a promise, from defendant to Proposed Intervenor, and that even if such promises were indeed made, they were made to

plaintiff Thomas. In order to plead promissory estoppel, a party must prove that (1) a promise was made that is sufficiently clear and unambiguous (2) there was reasonable reliance on the promise and (3) there was an injury as a result of that reliance (*Schroeder v Pinterest Inc.*, 133 AD3d 12, 32 [1st Dept 2015]). Here, both the original and proposed amended Complaint allege that communications prior to any move did not occur with Proposed Intervenor. In fact, in Proposed Intervenor's own affidavit, he claims that he detrimentally relied on promises made by Defendant William Lynch II to Joi Thomas. Therefore, Proposed Intervenor cannot satisfy the first element of promissory estoppel, since a clear and unambiguous promise was never explicitly made to him.

Moreover, promissory estoppel cannot be used to circumnavigate an agreement barred by the statute of frauds unless enforcement of the statute of frauds would result in unconscionability (*in re Estate of Hennel*, 29 NY3d 487 [2017]).[1] Here, Proposed Intervenor, at that time someone who was just completing law school – a party who was either familiar or should have been familiar with the statute of frauds. Hence, enforcing the statute of frauds here would not result in an unconscionable result. Because Proposed Intervenor cannot satisfy the elements of promissory estoppel, and even if he could, it could be barred by the statute of frauds, he has no cause of action in promissory estoppel or promissory estoppel due to outlays.

Similarly, a cause of action for *quantum meruit* is based upon the sweat equity allegedly expended in connection with the breach of the lease. A *quantum meruit* claim is not valid where a breach of contract action is barred by the statute of frauds (*Snyder v Bronfman*, 13 NY3d 504 [2009]; *American-European Art Associates, Inc. v Trend Galleries, Inc.*, 227 AD2d 170, 171 [1st

[1] Unconscionability is not alleged here. In any event, for there to be unconscionability, there needs to be inequality "so strong and manifest as to shock the conscience and confound the judgment of any person of common sense" (Estate of *Hennel* at 495).

Dept 1996]). Since the base breach of contract cause of action is barred, the *quantum meruit* is also not permitted.

The final cause of action, promissory estoppel due to outlays is duplicative of the first promissory estoppel cause of action and the *quantum meruit* cause of action. Proposed intervenor was never given a clear or unambiguous promise by defendant upon which he could have detrimentally relied, thus precluding him from asserting a cause of action through promissory estoppel (*Schroeder v Pinterest Inc.*, 133 AD3d 12, 32 [1st Dept 2015]; *Steele v Delverede S.R.L.*, 242 AD2d 414, 415 (1st Dept 1997]; *Ginsberg v Fairfield-Noble Corp.*, 81 AD2d 318 [1st Dept 1981]). It is not unconscionable to enforce the statute of frauds in this alleged agreement because Proposed Intervenor was not forced to make improvements to make the apartment habitable as he was not on the lease and was under no legal obligation to reside in that apartment.

As Proposed Intervenor cannot join in any of the proposed causes of action, he has no real or substantial interest in the pending action. Moreover, he has failed to show how any interest he might have in the pending action would not be adequately represented by the current plaintiff, his wife and has not stated any meritorious and independent causes of action in this motion. Finally, there has been no explanation as to the length of time in between the withdrawal of the original motion to intervene and the current motion to intervene in front of the Court. Accordingly, the portion of the motion to intervene is denied.

Plaintiff has also sought to join Stacy Rae Lynch and Mary Frances Lynch pursuant to CPLR 1001(a). CPLR 1001(a) provides that "persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants". The proposed

additional defendants to be joined collectively own 75% of the building involved in the pending action. Since defendants to be joined collectively own such a large share of the building, and any judgment in this action might inequitably affect them, the standard under CPLR 1001(a) has been met and the portion of the motion to join Stacy Rae Lynch and Mary Frances Lynch is granted. It is therefore

ORDERED that the motion to intervene is denied; and it is further

ORDERED that the motion to join Stacy Rae Lynch and Mary Frances Lynch as defendants is granted. Plaintiff shall file and serve on the new defendants an Amended Complaint consistent with this decision within 20 days of the date of this Order.

8-21-2019
~~8/7/2019~~
DATE

DAVID BENJAMIN COHEN, J.S.C.

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| CHECK ONE: | | CASE DISPOSED | | | X | NON-FINAL DISPOSITION | |
| | | GRANTED | | DENIED | X | GRANTED IN PART | OTHER |
| APPLICATION: | | SETTLE ORDER | | | | SUBMIT ORDER | |
| CHECK IF APPROPRIATE: | | INCLUDES TRANSFER/REASSIGN | | | | FIDUCIARY APPOINTMENT | REFERENCE |