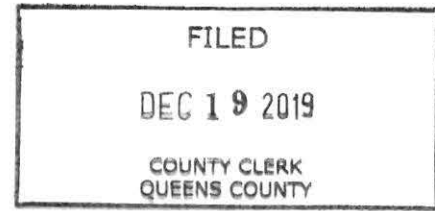


Vista Pointe, LLC v Waterfront Resorts, Inc.
2019 NY Slip Op 33878(U)
December 11, 2019
Supreme Court, Queens County
Docket Number: 719165/2018
Judge: Leonard Livote
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE LEONARD LIVOTE
Justice

IA Part 33

VISTA POINTE, LLC,
Plaintiff,
-- against --

Index
Number 719165 2018

WATERFRONT RESORTS, INC., KINGS USA
GROUP, INC., CHOY LIN LAM,
individually, CHING LAM, individually,
CATHAY BANK, CATHAY GENERAL BANK
CORP.,

Motion
Seq. No: 2
Date May 7 2019

The following papers EF numbered below read on this motion by defendant Cathay Bank and defendant Cathay General Bancorp. for, inter alia, an order pursuant to CPLR 3211(a)(7) dismissing the complaint against them.

Table with 2 columns: Paper Description and Papers Numbered. Includes entries for Notice of Motion, Cross Motion, Answering Affidavits, Reply Affidavits, and Memoranda of Law.

Upon the foregoing papers it is ordered that: The branch of the motion which is for an order pursuant to CPLR 3211(a)(7) dismissing the complaint against defendant Cathay Bank and defendant Cathay General Bancorp is granted. The branch of the motion which is for an order pursuant to CPLR 3211(a)(1) dismissing the complaint against defendant Cathay Bank and defendant Cathay General Bancorp is denied as moot. The

branch of the motion which is for an order pursuant to 22 NYCRR 130-1.1 imposing costs and attorney's fees upon the plaintiff is denied.

I. The Allegations Of The Complaint

Defendant Choy Ling Lam (Choy) and defendant Ching Lam (Ching) are officers and shareholders of defendant Waterfront Resorts, Inc. (Waterfront) and defendant King USA Group (King). (These four defendants are collectively referred to herein as the debtor defendants or the defendant debtors.) The debtor defendants engage in real estate acquisitions, construction, development, management, and financing.

On January 6, 2013, plaintiff Vista Pointe, LLC (VP) and defendant Choy entered into a contract of sale and lease agreement whereby the latter leased premises known as 109-09 15th Avenue, College Point, Queens, New York from the former for a term of twelve months. Plaintiff VP gave defendant Waterfront and defendant Choy (its president) the option to purchase the property for \$8,210,000 at the end of the lease term. On January 18, 2014, defendant Waterfront and defendant Choy agreed to purchase the property, which they intended to develop, from the plaintiff for \$8,210,000.

On March 10, 2014, defendant Choy and defendant Ching executed two promissory notes, the first in the amount of \$1,750,000 and the second in the amount of \$750,000, which they used to pay part of the purchase price for the property. The two promissory notes also gave VP the right to purchase units/apartments in the development at a discounted price. In March, 2014, defendant Waterfront and defendant Kings "merged equity" and subsequently obtained refinancing for the developed property from defendant Cathay Bank and defendant Cathay General Bancorp (collectively Cathay).

In September, 2015, plaintiff VP, defendant Waterfront, and defendant Kings entered into negotiations concerning the purchase by the plaintiff from the defendants of certain units within the condominium development. By letter dated June 18, 2018, plaintiff VP gave notice to the debtor defendants that it was exercising its option to purchase the units.

The debtor defendants committed breached of contract by refusing to allow plaintiff VP to purchase units in the condominium.

II. Discussion

A. CPLR 3211(a)(7)

The complaint asserts six causes of action, and all except the first are asserted against defendant Cathay, among others. Defendant Cathay has moved for, *inter alia*, an order pursuant to CPLR 3211(a)(7) dismissing the complaint against it.

In determining a motion brought pursuant to CPLR 3211(a)(7), “the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory ***.” (*Antoine v. Kalandrishvili*, 150 AD3d 941,941 [2d Dept 2017]; *1455 Washington Ave. Assocs. v. Rose & Kiernan*, 260 AD2d 770, 770-771 [3d Dept 1999]; *Esposito-Hilder v. SFX Broadcasting Inc.*, 236 AD2d 186 [3rd Dept.1997.) “Although the facts pleaded are presumed to be true and are to be accorded every favorable inference, bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration, nor are legal conclusions or factual claims which are inherently incredible entitled to any such consideration ***.” (*Everett v. Eastchester Police Dep't*, 127 AD3d 1131, 1132 [2nd Dept 2015] [internal citations and quotation marks omitted]; *Cruciata v. O'Donnell & McLaughlin, Esqs.*, 149 AD3d 1034 [2nd Dept 2017].)

Since defendant Cathay seeks to dismiss the complaint with prejudice, the court notes that “when a motion to dismiss is predicated on a claim of failure to state a cause of action, the plaintiff must be afforded an opportunity to seek leave to replead within the prescriptions of CPLR 3211(e).” (*Varo, Inc. v. Alvis PLC*, 261 AD2d 262, 267 [1st Dept 1999]; *see, also, Prosthetic Home Servs., Inc. v. Fidelis Care of New York W. Region*, 154 AD3d 1283 [4th Dept. 2017].) Moreover, a dismissal for failure to state a cause of action is generally not on the merits and will not be given *res judicata* effect. (*In re Hock*, 125 AD3d 722 [2nd Dept. 2015].)

B. The Second Cause of Action

The second cause of action alleges the following: Defendant Cathay “provided refinancing directly to the Defendants Waterfront Resorts, Inc. and King USA Group,” but “willfully failed to provide for and require” that the debtor defendants “pay [their] financial obligations owed to Vista Pointe, LLC under the two promissory notes executed” by the defendant debtors. The debtor defendants failed to make required payments due on the promissory notes from the funds provided by defendant Cathay, and the debtor defendants presently owe the plaintiff \$2,500,000. In other words, the second cause of action alleges that defendant Cathay failed to notify plaintiff VP of the closing of construction financing and then disbursed funds to the debtor defendants without ensuring that they paid the promissory notes given to the plaintiff.

It is clear to neither the attorney for defendant Cathay nor to this court what type of cause of action the plaintiff intended to plead against defendant Cathay. The possibilities of contract and negligence suggest themselves.

“The essential elements of a cause of action to recover damages for breach of contract are (1) the existence of a contract, (2) the plaintiff’s performance pursuant to the contract, (3) the defendant’s breach of its contractual obligations, and (4) damages resulting from the breach ***.” (*Starker v. Trump Vill. Section 4, Inc.*, 162 AD3d 946 [2nd Dept 2018]; *All Seasons Fuels, Inc. v. Morgan Fuel & Heating Co.*, 156 AD3d 591 [2nd Dept 2017].) In the case at bar, there was no contract or agreement between defendant Cathay and plaintiff VP. “It is axiomatic that ‘[w]ithout [an] agreement ... there can be no contract [and][w]ithout a contract there can be no breach of the agreement’ ***.” (*Schaffe v. SimmsParris*, 82 AD3d 867, 868 [2nd Dept 2011], quoting *Franklin v. Carpinello Oil Co.*, 84 AD2d 613, 613 [3rd Dept 1981].) Defendant Cathay was not a signatory to any contract between the plaintiff and the debtor defendants. (*See, Balk v. 125 W. 92nd St. Corp.*, 24 AD3d 193, 193 [1st Dept 2005] [“ Since the individual defendants are not signatories to the proprietary lease, the only agreement specifically identified by plaintiffs, no cause of action for breach of contract can be asserted against them ***.”].)

Plaintiff VP did not show that it was a third party beneficiary of a contract between defendant Cathay and the debtor defendants. “Parties asserting third-party beneficiary rights under a contract must establish (1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for [their] benefit and (3) that the benefit to [them] is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate [them] if the benefit is lost.” (*Mendel v. Henry Phipps Plaza West, Inc.*, 6 NY3d 783, 786 [2006], quoting *Burns Jackson Miller Summit & Spitzer v. Lindner*, 59 NY2d 314, 336 [1983].) Plaintiff VP did not allege sufficient facts supporting these elements. (*See, Howard Sav. Bank v. Lefcon P’ship*, 209 AD2d 473 [2nd Dept 1994]. [Contractor was not third-party beneficiary of provisions of building loan agreement outlining rights and obligations of developer and lender].)

Plaintiff VP did not adequately allege a cause of action for negligence against defendant Cathay. “It is settled that a duty of reasonable care owed by a tortfeasor to a plaintiff is elemental to any recovery in negligence ***.” (*Miglino v. Bally Total Fitness of Greater New York, Inc.*, 92 AD3d 148, 159 [2nd Dept 2013].) Plaintiff VP had no relationship with defendant Cathay that would give rise to a duty of care.

The court can discern no other cognizable cause of action sounding in tort.

C. The Third Cause Of Action

The third cause of action alleges the following: Defendant Cathay and the debtor defendants “willfully Worked in Concert to conceal the location, day and time of the refinancing closing to advert making the required payments due Plaintiff under the two Promissory Notes at the time of the closing of the refinancing acquired ***,” [The defendants] Worked in Concert and have perpetrated Fraud through its Deceptive Practices over Plaintiff by willfully concealing information and ceasing all communications and negotiations with Plaintiff involving its Right to Purchase units/apartments in the development and by concealing the identity of individuals Purchasing said apartments ***.”

A cause of action based on fraudulent concealment requires a plaintiff to allege

“(1) a misrepresentation or an omission of material fact which was false and known to be false by the defendant, (2) the misrepresentation was made for the purpose of inducing the plaintiff to rely upon it, (3) justifiable reliance of the plaintiff on the misrepresentation or material omission, and (4) injury,[and] in addition, a cause of action to recover damages for fraudulent concealment requires ... an allegation that the defendant had a duty to disclose material information.” (*Ozelkan v. Tyree Bros. Envtl. Servs.*, 29 AD3d 877, 878 [2nd Dept 2006] [internal citations and quotation marks omitted]; *Bannister v. Agard*, 125 AD3d 797, [2nd Dept 2015].) The plaintiff’s complaint does not allege a basis for imposing a duty on defendant Cathay to make any disclosures to the plaintiff. (*See, Bannister v. Agard, supra.*)

The plaintiff’s vague allegations of acting in concert or in a conspiracy do not suffice to save the third cause of action. (*See, JP Morgan Chase Bank, N.A. v. Hall*, 122 AD3d 576, 580 [2nd Dept 2014] [“Considering their status as lender and assignee, respectively, it cannot be inferred that RHF or Wells Fargo was aware of the alleged fraudulent scheme and agreed to “cooperate” by issuing a loan and allowing the funds issued to be distributed to, among others, the other third-party defendants”]; *Marren v. Nathan*, 2 AD3d 230 [1st Dept 2003].)

Plaintiff VP did not adequately allege a cause of action under General Business Law §349. General Business Law § 349 “Deceptive acts and practices unlawful,” a broad consumer protection statute, declares unlawful “[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state.” (General Business Law § 349[a]; *see, North State Autobahn, Inc. v. Progressive Ins. Group Co.*, 102 AD3d 5 [2nd Dept 2012].) “The elements of a cause of action to recover damages for deceptive business practices under General Business Law § 349 are that the defendant engaged in a deceptive act or practice, that the challenged act

or practice was consumer-oriented, and that the plaintiff suffered an injury as a result of the deceptive act or practice.” (*Valentine v. Quincy Mut. Fire Ins. Co.*, 123 AD3d 1011, 1015 [2nd Dept 2014]; *Nafash v. Allstate Ins. Co.*, 137 AD3d 1088 [2nd Dept. 2016].) “A party claiming the benefit of General Business Law § 349 must, as a threshold matter, charge conduct that is consumer oriented,” i.e., conduct that has a broad impact on consumers at large.” (*JP Morgan Chase Bank, N.A. v. Hall*, 122 AD3d 576, 581 [2nd Dept 2014][internal quotation marks and citation omitted]). In the case at bar, the dispute between the parties does not involve consumer-oriented conduct.

D. The Fourth Cause of Action

The fourth cause of action is labeled “Unconscionable Conduct and Deceptive Behavior in Business Practices Displayed by [the defendants].” The fourth cause of action is comprised of a jumble of allegations making reference to, inter alia, fraudulent concealment, deceptive business practices, and “Unconscionable nature.” As discussed above, the complaint does not adequately state causes of action for fraudulent concealment and violation of General Business Law §349, and as far as unconscionable conduct is concerned, “[t]he doctrine of unconscionability is to be used as a shield, not a sword, and may not be used as a basis for affirmative recovery. Under both the UCC and common law, a court is empowered to do no more than refuse enforcement of the unconscionable contract or clause ***.” (*Super Glue Corp. v. Avis Rent A Car Sys., Inc.*, 132 AD2d 604, 606, [2nd Dept 1987]; *Fortune Limousine Serv., Inc. v. Nextel Commc'ns*, 35 AD3d 350 [2nd Dept 2006].)

E. The Fifth Cause Of Action

The fifth cause of action, labeled “Bad Faith of [the defendants], ” is duplicative of the prior causes of action and fails to state a claim against defendant Cathay.

F. The Sixth Cause Of Action

The sixth cause of action is labeled “Punitive Damages Against [the defendants].” There is no independent cause of action for punitive damages, and a demand for punitive damages is not viable absent its attachment to a substantive cause of action. (*Podesta v. Assumable Homes Dev. II Corp.*, 137 AD3d 767, [2nd Dept 2016].) Plaintiff VP has no substantive cause of action against defendant Cathay.

Accordingly, the motion is granted and it is,

Ordered, that the action is dismissed as against defendants Cathay Bank and Cathay General Bancorp.

This constitutes the Order of the Court.

Dated: December 11, 2019


A.J.S.C.

FILED
DEC 19 2019
COUNTY CLERK
QUEENS COUNTY