

Asamblea De Iglesias Christianas, Inc. v Devito

2020 NY Slip Op 30667(U)

February 10, 2020

Supreme Court, Kings County

Docket Number: 522506/2018

Judge: Richard Velasquez

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.

At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 10th day of FEBRUARY 2020.

P R E S E N T:
HON. RICHARD VELASQUEZ

Justice.

-----X
ASAMBLEA DE IGLESIAS CHRISTIANAS, INC.
(ASSEMBLY OF CHRISTIAN CHURCHES, INC.)
And JUAN CASTILLO,

Plaintiffs,

Index No.: 522506/2018

-against-

Decision and Order

JASON DEVITO, 249 58TH STREET CORP., JIN HU
JIN HU & ASSOCIATES PLLC, 249 58 LLC, LESLIE
SULTAN PC, KONG CHEN, LORENZO LUGARA AND
LUGARA PLLC,

Defendants.

-----X
The following papers numbered 39 to 107 read on this motion:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion/Order to Show Cause	
Affidavits (Affirmations) Annexed _____	39-41; 43-47; 48-53; 54-68
Opposing Affidavits (Affirmations) _____	70-71; 80-81; 90-91
Reply Affidavits (Affirmations) _____	102; 104; 107
Memorandum of Law _____	57; 69; 79; 89; 99; 100; 106

KINGS COUNTY CLERK
FILED
2020 FEB 20 AM 9:33

After oral argument and a review of the submissions herein, the Court finds as follows:

M3
3, 4, 5, 6

Defendants, LORENZO LUGARA AND LUGARA PLLC (hereinafter LUGARA), move pursuant to CPLR 3211(a)(7), dismissing complaint in its entirety. Plaintiff opposes the same. (MS #3)

Defendants, LESLIE SULTAN PC and KONG CHEN move pursuant to 3211(a)(7) and CPLR 3016(b) dismissing plaintiff's complaint. Plaintiff opposes the same. (MS #4)

Defendants, 249 58 LLC, move pursuant to 3016(b) and 3211(a)(1)(3)&(7) dismissing the complaint. Plaintiff opposes the same. (MS #5)

Defendants, JIN HU and JIN HU & ASSOCIATES PLLC, (hereinafter HU defendants) move pursuant to 2016(b) and 3211(a)(7) dismissing plaintiffs' complaint. Plaintiff opposes the same. (MS #6)

BACKGROUND

This action arises from the sale of real property located at 249-261 58th Street Brooklyn, New York. Plaintiff seeks to void the sale and specific performance to compel the sellers to convey the property to plaintiff based upon a Contract of Sale. The complaint also seeks damages for tortious interference with contract and fraud.

It is alleged, on October 19, 2016 defendants JASON DEVITO and 249 58th STREET CORP (sellers) entered into a written contract of Sale with plaintiffs, whereby 249 58th STREET CORP agreed to sell to the plaintiffs the real property known as 249-261 58th Street Brooklyn New York for the sum of \$4,600,000.00 (hereinafter contract 1). It is undisputed Plaintiff paid \$135,000.00 down payment for the property pursuant to the contract of sale. It is undisputed that said down payment was accepted and has never been returned. It is undisputed on February 16, 2017 the contract was amended by rider

to replace CASTILLO with ASAMBLEA DE IGLESIAS CRISTIANAS, INC. as the purchaser and to make CASTILLO a guarantor for any financing that plaintiffs obtained from Seller. For contract 1 seller was represented by defendants LUGARA. It is alleged that on November 4, 2018 plaintiffs discovered that seller was in contract with another entity known as 249 58 LLC for the sale of the property in question 249-261 58 Street, Brooklyn, New York (hereinafter this contract will be referred to as contract 2). For contract 2 seller was represented by defendant JIN HU. In addition, for contract 2 buyer 249 58 LLC was represented by the SULTAN defendants and it is undisputed that defendant CHEN was an agent of SULTAN defendants. It is also alleged that shortly after discovering the existence of contract 2 the SULTAN defendants were notified that plaintiff had an earlier contract and plaintiff filed a Summons with Notice along with a Notice of Pendency on defendants DEVITO and 249 58 STREET CORP.

Sometime thereafter the plaintiff alleges LUGARA communicated with plaintiff's lawyer that LUGARA was representing DEVITO and 249 58th STREET CORP and that defendant HU no longer represented DEVITO and 249 58th STREET CORP. It is alleged that in January of 2019 defendant LUGARA informed counsel for the plaintiffs that a closing was scheduled for February 18, 2019 to close on the premises in question with the plaintiff as the buyer. Plaintiff further alleges on January 8, 2019 they discovered that 249 58th STREET CORP sold the subject premises to 249 58 LLC rather than plaintiff and that the transfer purportedly occurred on December 27, 2018. This action follows.

ANALYSIS

Pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (see, CPLR 3026). 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 (*Morone v. Morone*, 50 NY2d 481, 484, 429 NYS2d 592, 413 NE2d 1154; *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 634, 389 NYS2d 314, 357 NE2d 970). **“The criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one”** (*Guggenheimer v. Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182, 372 NE2d 17; *Rovello v. Orofino Realty Co.*, 40 NY2d at 636, 389 NYS2d 314, 357 NE2d 970). **“[B]are legal conclusions and factual claims which are flatly contradicted by the evidence are not presumed to be true on such a motion”** (*Palazzolo v. Herrick, Feinstein, LLP*, 298 AD2d 372, 751 NYS2d 401). **“Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims ... plays no part in the determination of a pre-discovery 3211[a][7] motion to dismiss”** (*Shaya B. Pac., LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38; see *EBC I, Inc. v. Goldman Sachs & Co.*, 5 NY3d 11, 832 NE2d 26, 799 NYS2d 170 (Ct of Appeal 2005; *Guggenheimer v. Ginzburg*, 43 NY2d 268, 275, 372 NE2d 17 (1977)).

When a party, usually the defendant, moves for a motion to dismiss, it is asking the court to make that determination instead. “Courts are not infallible. In undertaking such a task, a court should be mindful to prevent errors which could result in the dismissal of a worthy claim, even if it means risking an unworthy claim proceeding to trial. In other

words, it must err on the side of the plaintiff..." *Poolt v. Brooks*, 38 Misc. 3d 1216(A), 967 NYS2d 869 (Sup Ct 2013).

First, the court shall address the plaintiff's cause of action claims sounding in tortious interference with contracts. Defendants LUGARA contend plaintiff fails to sufficiently allege LUGARA induced a 3rd party to breach plaintiff's alleged contract and that the plaintiff fails to allege that but for LUGARA's conduct the contract would have been completed. Defendants, SULTAN contend the plaintiffs fail to state any actions they made that satisfies the elements for tortious interference with contract. Defendants 249 58 LLC join in SULTAN defendants' contentions. In opposition plaintiff contends all four elements are met for tortious interference with contract.

As previously stated, the determination to be made on a motion to dismiss is not whether there is a claim but whether the plaintiff has stated one. The elements of tortious interference with contractual relations are "(1) the existence of a contract between plaintiff and a third party; (2) defendant's knowledge of the contract; (3) defendant's intentional inducement of the third party to breach or otherwise render performance impossible; and (4) damages to plaintiff" (*Kronos, Inc. v. AVX Corp.*, 81 N.Y.2d 90, 94, 595 N.Y.S.2d 931, 612 N.E.2d 289; see, *Guard-Life Corp. v. Parker Hardware Mfg. Corp.*, 50 N.Y.2d 183, 189-190, 428 N.Y.S.2d 628, 406 N.E.2d 445); quoting *M.J. & K. Co. v. Matthew Bender & Co.*, 220 A.D.2d 488, 490, 631 N.Y.S.2d 938, 940 (1995).

In the present case, the first element is satisfied as it is undisputed there was a contract for sale between the plaintiff and the defendants JASON DEVITO & 249 58th STREET CORP. The second element is satisfied because ALL of the named defendants

in the present case were aware of and parties to, or counsel representing the parties to the contract for sale of real property. The third element is satisfied as the plaintiff has alleged the defendants LUGARA, and the SULTAN defendants, and the HU defendants were all aware of the contract between the plaintiff and defendants JASON DEVITO & 249 58th STREET CORP for the sale of the real property and that the defendants LUGARA also represented the defendant JASON DEVITO & 249 58th Street Corp in selling the property to a different buyer defendant 249 58 LLC during the time that they were aware of the previous contract of sale. Additionally, it is alleged defendants LUGARA made representations to the plaintiff that the property was not going to be sold to the defendants 249 58 LLC but would be sold to plaintiffs. Finally, the fourth element is satisfied because damages clearly exist in the form of real property, and in addition plaintiffs gave to defendants a deposit of \$135,000.00 on the contract of sale which has never been returned to the plaintiffs. In the present case, affording the plaintiff all favorable inferences, the plaintiff has alleged sufficient facts to satisfy each of the above elements for a cause of action for tortious interference with contractual relations..." (see *Kelly v Bank of Buffalo*, 32 AD2d 875); quoting *Guggenheimer v. Ginzburg*, 43 NY2d 268, 275, 372 NE2d 17 (1977).

Next the court shall address the plaintiff's cause of action sounding in fraud. "The elements of a cause of action to recover damages for fraud are (1) a misrepresentation or a material omission of fact which was false, (2) knowledge of its falsity, (3) an intent to induce reliance, (4) justifiable reliance by the plaintiff, and (5) damages" (*Fox Paine & Co., LLC v. Houston Cas. Co.*, 153 AD3d 673, 677, 60 NYS3d 294; see *Eurycleia*

Partners, LP v. Seward & Kissel, LLP, 12 NY3d 553, 559, 883 NYS2d 147, 910 NE2d 976; *Introna v. Huntington Learning Ctrs., Inc.*, 78 AD3d 896, 898, 911 NYS2d 442). In addition to alleging all of the elements of a fraud cause of action, CPLR 3016(b) provides that “the circumstances constituting the wrong shall be stated in detail.” The purpose of this heightened pleading requirement “is to inform a defendant with respect to the incidents complained of” and “should not be confused with unassailable proof of fraud” (*Pludeman v. Northern Leasing Sys., Inc.*, 10 N.Y.3d at 491–492, 860 N.Y.S.2d 422, 890 N.E.2d 184); Quoting, *Minico Ins. Agency, LLC v. B & M Cleanup Servs.*, 165 AD3d 776, 777–78, 86 NYS3d 515, 517–18 (NY App Div 2018).

In the present case, the plaintiff’s submissions, allege all of the elements constituting fraud, and further state “the basic facts to establish [those] elements,” as required by CPLR 3016(b) (*Pludeman v. Northern Leasing Sys., Inc.*, 10 N.Y.3d at 492, 860 N.Y.S.2d 422, 890 N.E.2d 184). In particular, the plaintiff alleged a specific misrepresentation, intentionally made by LUGUARA (*cf. Polonetsky v. Better Homes Depot*, 97 N.Y.2d at 55, 735 N.Y.S.2d 479, 760 N.E.2d 1274; *High Tides, LLC v. DeMichele*, 88 A.D.3d 954, 958, 931 N.Y.S.2d 377), in the context of purchasing property, the plaintiff relied upon the misrepresentation to its detriment that the property would not be sold to the 248 58 LLC defendants, of which said property was later sold to those defendants, after they were informed and aware of the pending contract of sale to the plaintiffs. Assuming the facts alleged to be true and according the plaintiff the benefit of every favorable inference, these allegations set forth a cognizable cause of action alleging fraud and stated in sufficient detail the facts constituting the wrong (see *Fox Paine & Co.*,

LLC v. Houston Cas. Co., 153 AD3d at 677, 60 NYS3d 294; *see also, J & D Evans Constr. Corp. v. Iannucci*, 84 A.D.3d 1171, 1172, 923 N.Y.S.2d 864; *WIT Holding Corp. v. Klein*, 282 A.D.2d 527, 528, 724 N.Y.S.2d 66); *Quoting, Minico Ins. Agency, LLC v. B & M Cleanup Servs.*, 165 AD3d 776, 777–78, 86 NYS3d 515, 517–18 (NY App Div 2018).

Next the court shall address the plaintiffs cause of action sounding in specific performance. It is also well established, before specific performance of a contract for the sale of real property may be granted, a buyer must demonstrate that he or she was ready, willing, and able to perform on the original day, or, if time was not of the essence, on a subsequent date fixed by the parties or within a reasonable time thereafter (*see Nuzzi Family Ltd. Liab. Co. v. Nature Conservancy*, 304 AD2d 631, 632, 758 NYS2d 364); (*Dairo v. Rockaway Blvd. Props. LLC*, 44 AD3d 602, 602, 843 NYS2d 642). In the present case, defendants 349 58 LLC, contend the church failed to establish they were ready willing and able to purchase because they failed to plead in their complaint that the board voted to approve the purchase of the property. In opposition the plaintiffs point to the Castillo affidavit which states the contrary, i.e. the board voted unanimously to approve the purchase before the contract of sale was entered. Contrary to defendant's contention, the plaintiff purchaser has alleged facts establishing that the church was ready, willing, and able to perform obligations under the subject contract. *See Paglia v. Pisanello*, 15 AD3d 373, 789 NYS2d 715, 715 (2 Dept 2005). In opposition the defendants have failed to proffer any evidence to the contrary.

Therefore, affording the complaint a liberal construction, accepting the facts as alleged therein as true, and granting plaintiff the benefit of every possible inference, it is

the opinion of this Court that the complaint sufficiently states a cause of action for all contended claims; at this pre-discovery stage of the proceedings (*Shaya B. Pac., LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, supra* at 38). Although facts sufficient to justify opposition may exist, they currently reside almost exclusively within the knowledge of the officers or employees of defendants (see CPLR 3211[d]). See also *Iommarini v. Mortg. Elec. Registration Sys., Inc.*, 54 Misc 3d 1225(A) (NY Sup Ct. 2017). Moreover, in the case at bar, Plaintiff's sworn complaint constitutes evidence that there is a basis for all the causes of action. How credible that evidence is irrelevant at this juncture. Plaintiff must still make out a *prima facie* case against them at trial through competent evidence, but when it comes to "he said, she said," merely raises a question of credibility for the jury to decide (see *Communications & Entertainment Corp. v. Hibbard Brown & Co., Inc.*, *supra*, 202 AD2d 191, 608 NYS2d 214). As such, the plaintiff has plead facts sufficient to state a cause of action and the defendant has failed to submit any documentary evidence to the contrary.

Additionally, any contentions regarding the plaintiff being required to obtain Attorney General approval to purchase a piece of real property and that the plaintiff did not obtain the same are without merit. Pursuant to Not-for-profit Law 509(b), attorney General approval is only required when selling a substantial asset. That is not the case here, as this is for the purchase of real property. It is well established that when the terms of a contract are clear and unambiguous those terms shall be enforced. "When the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving practical interpretation to the language

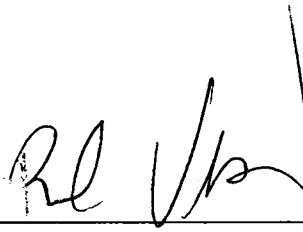
employed and the parties' reasonable expectations " (*Willsey v. Gjuraj*, 65 AD3d 1228, 1230, 885 NYS2d 528, *quoting Franklin Apt. Assoc., Inc. v. Westbrook Tenants Corp.*, 43 AD3d 860, 861, 841 NYS2d 673; *see Greenfield v. Philles Records*, 98 NY2d 562, 569, 750 NYS.2d 565, 780 NE2d 166; *Correnti v. Allstate Props., LLC*, 38 AD3d 588, 590, 832 NYS2d 594). "Thus, a **written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms**" *see (Willsey v. Gjuraj*, 65 AD3d at 1230, 885 NYS2d 528, *quoting Greenfield v. Philles Records*, 98 NY2d at 569, 750 NYS2d 565, 780 NE2d 166; *see W.W.W. Assoc. v. Giancontieri*, 77 NY2d 157, 162, 565 NYS2d 440, 566 NE2d 639); *quoting Lobacz v. Lobacz*, 72 AD3d 653, 654, 897 NYS2d 516, 517–18 (2 Dept 2010). Moreover, within the four corners of the contract of sale and the subsequent rider nowhere does it contain a term that states the sale of the real property in question in this action i.e. 249-261 58th Street Brooklyn New York is subject to attorney general approval. Nor is there a term that states the sale of 249-261 58th Street Brooklyn New York is subject to the plaintiff obtaining attorney general approval to sell the other property the plaintiff's owned (the church). The term in question simply states the church is being sold and that will require attorney general approval and such approval may take additional time and should the plaintiff exercise this clause of the rider they shall have an additional 90 days to close on the subject premises. There is no language contained in the rider that makes the purchase contingent on the church selling their property or obtaining attorney general approval as the parties in this matter seem to allege. It should be noted that the plaintiffs never elected to exercise such clause as there was no need to do so.

Accordingly, Defendants, LUGARA, motion to dismiss plaintiffs complaint in its entirety (MS#3), is hereby denied; Defendants, LESLIE SULTAN PC and KONG CHEN motion dismissing plaintiff's complaint (MS #4), is hereby denied in its entirety; Defendants, 249 58 LLC, motion dismissing the complaint (MS #5), is hereby denied in its entirety; Defendants, JIN HU and JIN HU & ASSOCIATES PLLC, motion dismissing plaintiffs' complaint (MS #6) is hereby denied in its entirety, for the reasons stated above.

This constitutes the Decision/Order of the Court.

Date: FEBRUARY 10, 2020

2020 FEB 20 AM 9:33
 FILED
 KINGS COUNTY CLERK



 RICHARD VELASQUEZ, J.S.C.

So Ordered
 Hon. Richard Velasquez

FEB 10 2020