

Man Kwan Ng v Yonghe Ye

2020 NY Slip Op 31095(U)

April 28, 2020

Supreme Court, New York County

Docket Number: 160271/2016

Judge: Margaret A. Chan

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. MARGARET A. CHAN PART IAS MOTION 33EFM

Justice

-----X

MAN KWAN NG a/k/a MANDY NG,

Plaintiff,

- v -

YONGHE YE, a/k/a WINSTON YE, and MEI LI,

Defendants.

-----X

INDEX NO. 160271/2016

MOTION DATE 12/23/2019

MOTION SEQ. NO. 007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 007) 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

Plaintiff, a dealer in purchasing cars in the United States and selling them in China, commenced an action for fraud, unjust enrichment, and related claims seeking to recover \$927,335 that she paid for a number of cars that were never delivered. Plaintiff now moves pursuant to CPLR 3212 for summary judgment on a breach of contract claim that was not pled in her complaint. Defendants oppose plaintiff's motion.

BACKGROUND

In May 2013, plaintiff Man Kwan Ng and co-defendant Mei Li (Li) formed a company named K&G International Trading, Inc (K&G). Plaintiff, the president of K&G, owned eighty percent of the company and Li twenty percent. As relevant here, the parties' business relationship operated as follows: Li's husband, co-defendant Yonghe Ye, would inform K&G about the cars available for purchase; K&G would purchase the cars from Ye's companies in the United States - Long River International New York, Inc. (Long River), Ocean Breeze NY Inc. (Ocean Breeze), North Port International NY Inc. (North Port), and LYI Intertrade, Inc. (LYI); Ye would then ship those cars to China to be sold; K&G would wire the funds for the purchase of the cars to either one of Ye's companies or directly to the car seller. The parties did not enter into a written agreement defining the scope of their responsibilities.

The business appeared to be running smoothly until 2014 when, according to plaintiff, she neither received the thirteen cars for which K&G paid, nor did she

receive a refund. In the months between June and October 2014, Ye requested from K&G a payment of \$568,750 for seven luxury cars. K&G wired the payments to North Port, LYI, and Long River. Ye, through his companies, purchased the cars from a company named LA Auto Deals 4 Less (LA Auto). Plaintiff alleges that sometime between November 2013 through January 2014, Ye entered into an agreement with LA Auto for the purchase of an additional six Ford “Raptor” cars on behalf of K&G for \$358,585. Plaintiff claims that Ye caused K&G to wire the payment for the six Ford “Raptors” in part directly to LA Auto, and in part to Ye’s entities. Plaintiff claims that K&G never received the cars and the payment was never returned.

In March 2015, Long River and Ocean Breeze filed an action against LA Auto, its president, and an individual named Tony Hong Wang, in New York State Supreme Court, Queens County, entitled *Long River International New York, Inc., et; al. v. LA AutoDeals 4 Less*, Index No. 702286/2015, seeking damages for breach of contract, unjust enrichment, and conversion. In that action, the plaintiffs claimed that they paid LA Auto for several cars that were supposed to be delivered to K&G, but the cars were never delivered, and the money paid for the cars was never returned (NYSCEF # 104 - Ye tr dated November 7, 2018 at 105:25-106:8). After an inquest, the court awarded judgment in favor Long River and Ocean Breeze in the amount of \$507,700.90 (NYSCEF #124 - Judgment). Collection efforts have failed.

While there is no written agreement governing the subject transactions, on or about November 14, 2014, after the alleged breach, K&G, Ocean Breeze, and another company named EBM Development Co. Ltd. (EBM), entered into a guarantee agreement wherein Ocean Breeze agreed to guarantee the loan in the amount of \$1 million from EMB to K&G (NYSCEF # 121 - guarantee agreement). The guarantee agreement states that “Ocean Breeze . . . is the management and operational company for K & G . . . It is responsible for all the transactions and decisions for K & G [] such as car purchasing, car exporting, and the price mark-up” (*id.*; NYSCEF # 100 - verified complaint, ¶¶ 9-10). Plaintiff signed the guarantee agreement on behalf of K&G, and Ye signed on behalf of Ocean Breeze.

DISCUSSION

Plaintiff first contends that a contract was formed between plaintiff and Ye for each car purchase since Ye would send plaintiff and a K&G employee the information for K&G to purchase the subject cars, and K&G purchased them. Plaintiff argues that Ye breached the agreements by failing to deliver the cars or refunding the payment. Essentially, plaintiff’s position is that the agreement to purchase the cars was between plaintiff and Ye, and K&G provided the funds to purchase the cars.

In opposition, defendants disagree with plaintiff about the formation of any contracts between Ye and plaintiff. Specifically, defendants contend that the e-mails sent by Ye for the purchase of certain cars were sent to EBM, and not to plaintiff individually, and that Ye did not receive consideration for the cars (NYSCEF # 128, e-mails). Defendants further contend that he was acting as the principal of Ocean Breeze when he requested funds from plaintiff to purchase the cars. Defendants also contend that the motion should be denied as against co-defendant Li as she was not involved in running the company. Defendants further argue that plaintiff's remaining causes of action should be dismissed pursuant to CPLR 3212(c).

In reply, plaintiff contends that Ye's testimony demonstrates that he entered into the contracts an individual. Specifically, plaintiff contends that Ye consistently referred to himself when describing his part in entering into the agreements. Plaintiff further contends that defendants are judicially estopped from arguing that the parties did not enter into contracts to purchase cars. Plaintiff concedes that co-defendant Li may not be liable under a breach of contract claim. Thus, the motion is denied as to Li.

Initially, while the cause of action for breach of contract was not pleaded, summary judgment may be awarded "if the proof supports such cause and if the opposing party has not been misled to its prejudice" (*Rubenstein v Rosenthal*, 140 AD2d 156, 158 [1st Dept 1988]; see *Valenti v Camins*, 95 AD3d 519, 522 [1st Dept 2012]; *Boyle v Marsh & McLennan Companies, Inc.*, 50 AD3d 1587, 1588 [4d Dept 2008]). The complaint here alleged sufficient facts to place defendants on notice of a possible cause of action for breach of contract (NYSCEF # 100 - complaint, ¶¶ 12-23). Indeed, defendants' Verified Answer also contemplates the existence of an agreement between the parties (NYSCEF # 100, Verified Answer). As such, there is no prejudice to defendants in bringing the instant motion for summary judgment for an unpleaded cause of action for breach of contract.

On the same token, plaintiff's argument that defendants waived their lack of standing defense is a non-starter. Defendants could not have known to raise an affirmative defense of lack of standing in the context of a breach of contract claim since the claim was first raised as part of the instant motion.

"Summary judgment must be granted if the proponent makes 'a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the moving party fails to make a prima facie showing, the court must deny the motion, "regardless of the sufficiency of the opposing papers" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008] [internal quotation omitted]). The court views the evidence in

the light most favorable to the non-movant (*see Milone v Scottsdale Ins. Co.*, 138 AD3d 459, 459 [1st Dept 2016]).

Here, plaintiff fails to demonstrate that no issues of fact exist as to whether the plaintiff and Ye entered into enforceable contracts. “To establish the existence of an enforceable agreement, a plaintiff must establish an offer, acceptance of the offer, consideration, mutual assent, and an intent to be bound” (*Kasowitz, Benson, Torres & Friedman, LLP v Duane Reade*, 98 AD3d 403, 404 [1st Dept 2012], *aff’d* 20 NY3d 1082 [2013] [internal citations omitted]). To prevail on a claim for breach of contract, a plaintiff must show the existence of a contract, the plaintiff’s performance under the contract, the defendant’s breach of that contract, and resulting damages (*Harris v Seward Park Housing Corp.*, 79 AD3d 425, 426 [1st Dept 2010]).

Specifically, plaintiff fails to show that plaintiff, in her individual capacity, and Ye entered into the agreements to purchase the cars and that Ye received any consideration. The evidence demonstrates, and plaintiff admits, that K&G paid Ye’s companies for the initial seven cars and that Ye purchased those cars from LA Auto through his entities. Indeed, in a letter dated June 18, 2015, from K&G to LYI, North Port and Long River, K&G indicates that K&G, not plaintiff, sought \$568,750 paid to those entities for the initial seven cars (NYSCEF # 126 - June 18, 2015 letter from K&G to Ye’s entities). Plaintiff also admits that K&G wired the payment for the six additional cars to Ye’s entities and LA Auto. Notably, there is no evidence that plaintiff was acting in her individual capacity, and not as the president of K&G, when she entered into any of the agreements with Ye to purchase the cars.

Even if plaintiff arguably demonstrated that she, in her individual capacity, entered into the agreements with Ye, plaintiff does not show that Ye was acting in his individual capacity when he agreed to purchase the cars for K&G or when he directed K&G to directly pay LA Auto for the cars (*see Lido Beach Towers v Denis A. Miller Ins. Agency*, 128 AD3d 1025, 1026 [2d Dept 2015] [finding that “corporate officers may not be held personally liable on contracts of their corporations, provided they did not purport to bind themselves individually under such contracts”]; *see also Lichtman v Mount Judah Cemetery*, 269 AD2d 319, 320 [1st Dept 2000]). In fact, plaintiff acknowledges that Ye used his companies to sell cars to K&G (NYSCEF # 131 - *aff in reply*, ¶¶ 20-21). Thus, plaintiff’s motion for summary judgment is denied.

Defendants’ request that the court dismiss plaintiff’s remaining claims for fraud, aiding and abetting, unjust enrichment, equitable estoppel and promissory estoppel pursuant to CPLR 3212(c) is denied. CPLR 3212(c) addresses the immediate trial of issues of fact raised by the motion but do not indicate the section’s relevance here.

Accordingly, it is hereby ORDERED that plaintiff Man Kwan Ng's motion for summary judgment on an unpleaded claim for breach of contract is denied; and it is further

ORDERED that counsel for defendants shall serve a copy of this order upon plaintiff within notice of entry, within fourteen (14) days of entry.

This constitutes the Decision and Order of the court.


MARGARET A. CHAN, J.S.C.

4/28/2020
DATE

MARGARET A. CHAN, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE