

High Class Realty SB LLC v Nasimov

2020 NY Slip Op 31668(U)

June 1, 2020

Supreme Court, Kings County

Docket Number: 524312/2019

Judge: Devin P. Cohen

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**Supreme Court of the State of New York
County of Kings**

Index Number 524312/2019

Part 91

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

HIGH CLASS REALTY SB LLC,

Plaintiff,

against

AYZIK NASIMOV AND ILITE REALTY INC.,

Defendants.

Papers	Numbered
Notice of Motion and Affidavits Annexed	1
Order to Show Cause and Affidavits Annexed...	_____
Answering Affidavits.....	2
Replying Affidavits.....	3
Exhibits	_____
Other.....	_____

Upon the foregoing papers, defendants’ motion to dismiss pursuant to CPLR 3211(a)(4), CPLR 3211(a)(5), 3013, 3014, 3016(b) and 3211(a)(7), is decided as follows:

Procedural History

The relevant procedural history concerns a prior, related action and this action. The court will address each in turn.

The Prior Action

Prior to this action, Ayzik Nasimov, the defendant in this case, commenced an action against the plaintiff in this case, High Class Realty SB LLC (“High Class”) and Svetlana Borovskiy (Index No. 518848/2017, Sup. Ct., Kings County). In that action, Nasimov sued for nonpayment of commissions he claimed he was owed for his work as a real estate agent. He asserted claims for breach of contract, unjust enrichment, quantum meruit, conversion, and tortious interference with contract.

High Class and Borovskiy answered and asserted defenses and counterclaims. These defenses include: (1) failure to state a claim; (2) plaintiff’s damages caused by his own alleged culpable conduct; (3) reduction of damages pursuant to CPLR 4545(c); (4) failure to mitigate; (5)

plaintiff's damages caused by his own alleged culpable conduct (this appears to be duplicative of the second affirmative defense); (6) unclean hands; (7) lack of privity of contract; and (8) breach of the duty of loyalty. The counterclaims were: (1) violation of some unidentified duty or fraud; (2) frivolous litigation; (3) false allegations in the complaint; and (4) malicious prosecution.

Mr. Nasimov moved to dismiss the counterclaims and certain affirmative defenses. By order, dated July 9, 2018, the court (Baynes, J.) dismissed the defenses of failure to state claim, damage reduction pursuant to CPLR 4545(c), failure to mitigate, and unclean hands. The court also dismissed all of the counterclaims. Regarding the first counterclaim, the court concluded that High Class and Borovskiy had not identified any duty that Nasimov allegedly breached or how Nasimov defrauded them. With regard to the remaining counterclaims, the court concluded that there were no allegations to support a claim that Nasimov's suit against them was undue harassment. Plaintiff did not move to reargue or appeal the order.

The Present Action

High Class commenced this action against Nasimov and Ilite Realty on November 6, 2019. In the complaint, High Class alleges that it employed Nasimov as a real estate agent pursuant to an agreement. High Class alleges that, when Nasimov ceased working for High Class in March 2015, he made a copy of High Class's "listings, client's information and companies [sic] proprietary information." High Class also alleges that Nasimov delayed signing a broker agreement with clients until after he left in order to deprive High Class of any broker commissions. High Class alleges that, subsequently, Ilite Realty employed Nasimov, and that Ilite Realty took High Class's listings and clients. High Class asserts claims for breach of contract, unjust enrichment, breach of the covenant of good faith and fair dealing, conversion, prima facie tort, tortious interference, and faithless servant.

Analysis

Nasimov and Ilite Realty first move to dismiss pursuant to CPLR 3211(a)(4), which vests a court with broad discretion to consider whether to dismiss an action on the basis that there is another pending action with substantial identity of the parties, sufficiently similar actions, and substantially the same relief requested (*Cooper v Thao*, 162 AD3d 980, 981 [2d Dept 2018]). Complete identity of parties is not necessary. Instead, there must be “substantial” identity of parties, “which generally is present when at least one plaintiff and one defendant is common in each action” (*Jaber v Elayyan*, 168 AD3d 693, 694 [2d Dept 2019], quoting *Morgulas v Yudell Realty*, 161 AD2d 211, 213 [2d Dept 1990]). If there is such identity of parties and causes of action, dismissal should be considered to prevent conflicting rulings between the actions (*Diaz v Philip Morris Cos., Inc.*, 28 AD3d 703, 705 [2d Dept 2006]).

Here, there is substantial identity of parties. There is one plaintiff and defendant in common in both actions, and only one plaintiff and one defendant not in common. However, the actions do not involve the same causes of action and do not seek the same relief. In the present action, High Class seeks remuneration for Nasimov’s and Ilite Realty’s alleged misappropriation of clients and client information. High Class asserts, among other causes of action, breach of contract, unjust enrichment, conversion, tortious interference, and faithless servant. In the prior pending action, High Class and Borovskiy asserted different causes of action which, in any event, were dismissed. At best, High Class and Borovskiy assert a defense of faithless servant, but a defense will not entitle to High Class to affirmative relief.

Although there is not sufficient basis to dismiss this action, the two actions should be joined for trial so they can be adjudicated together (*see, e.g., Clark v Clark*, 93 AD3d 812, 815 [2d Dept 2012]; *Spector v Zuckermann*, 287 AD2d 704, 706 [2d Dept 2001]; *Laquila Group v*

Pure Earth Transp. & Disposal, Inc., 32 Misc 3d 1226[A], 2011 NY Slip Op 51428[U], *4-5 [Sup Ct, Kings County 2011]).

Defendants also argue that High Class has not sufficiently pled its claims for breach of contract, unjust enrichment, breach of the covenant of good faith and fair dealing, and tortious interference. On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), “the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). “The complaint must be construed liberally, the factual allegations deemed to be true, and the nonmoving party granted the benefit of every possible favorable inference” (*Nestor v Putney Twombly Hall & Hirson, LLP*, 153 AD3d 840, 841 [2d Dept 2017], citing *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

“The elements of a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff’s performance under the contract, the defendant’s breach, and resulting damages” (*Detringo v South Is. Family Med., LLC*, 158 AD3d 609, 609 [2d Dept 2018]). High Class alleges that:

6. Plaintiff High Class Realty SB LLC hired defendant Ayzik Nasimov as a real estate agent in December, 2011.

7. As set forth above, pursuant to the initial Agreement, plaintiff was required to pay defendant a commission for all transactions procured by Nasimov that closed title.

8. For over three years, plaintiff fulfilled to [sic] payment obligations to Nasimov pursuant to the parties’ Agreement.

* * *

18. As set forth and in the alternative, Defendant breached the Agreement

by failing to 'pay the Plaintiff's brokers commissions due and owing to her [sic].

19. Defendant Nasimov delayed having clients sign a broker agreement with High Class Realty while still employed with High Class Realty, so that said listings would be listed under defendants' name, preventing Plaintiff from getting a broker commission.

* * *

26. Nasomiv was required to pay the plaintiff a broker commission but failed to do so. Nasimov was required to split commissions but failed to do so.

* * *

28. Plaintiff agreed that defendants would pay plaintiff for any clients originally procured by plaintiff.

29. That due to defendants' breach of contract, the plaintiff has been damages in the sum of FOUR THOUSAND-TWNTY [sic] DOLLARS (\$428,000.00) and statutory interest pursuant to CPLR 5001.

Thus, High Class has alleged the elements of a breach of contract claim against Nasimov, including the material terms of the contract that were allegedly breached (*Reznick v Bluegreen Resorts Mgt., Inc.*, 154 AD3d 891, 893 [2d Dept 2017]). However, High Class does not sufficiently plead a claim for breach of contract against Ilite Realty because he alleges no agreement between them.

Likewise, in every contract there is an implied covenant of good faith and fair dealing, which is "a pledge that neither party to the contract shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruit of the contract, even if the terms of the contract do not explicitly prohibit such conduct" (*Gutierrez v Govt. Employees Ins. Co.*, 136 AD3d 975, 976 [2d Dept 2016]). Based on the same allegations set forth above, High Class has sufficiently pled a claim for breach of the implied covenant of good faith and fair dealing against Nasimov, but not against Ilite Realty.

To sufficiently plead a claim for unjust enrichment, High Class must allege that (1) defendants were enriched, (2) at High Class's expense, and (3) that it is against equity and good conscience to permit the defendants to retain the enrichment (*Main Omni Realty Corp. v Matus*, 124 AD3d 604, 605 [2d Dept 2015]). Defendants' receipt of some benefit, standing alone, is not sufficient to support an unjust enrichment claim (*Goel v Ramachandran*, 111 AD3d 783, 791 [2d Dept 2013]). There must have been a transaction between the parties that the court determines is unjust (*id.*).

As quoted above, plaintiff alleges that Nasimov redirected clients to Ilite Realty while it was still employed by High Class, such that Nasimov and Ilite Realty received the broker commissions that, High Class claims, should have been paid to High Class. High Class further alleges that Nasimov and Ilite Realty misappropriated client information that belongs to High Class. By alleging that both defendants took client information from High Class, High Class has sufficiently alleged a relationship between them and High Class. Accordingly, High Class has sufficiently alleged a claim for unjust enrichment against both defendants.

To properly assert a claim for tortious interference with contract, High Class must allege: "(1) the existence of a contract between plaintiff and a third party; (2) defendants' knowledge of the contract; (3) defendants' intentional inducement of the third party to breach or otherwise render performance impossible; and (4) damages to plaintiff" (*Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94 [1993]). The plaintiff must also establish that the defendant intentionally procured the breach of contract "without justification" (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]). Additionally, High Class must allege that the "contract would not have been breached but for the defendant's conduct" (*Ferrandino & Son, Inc. v Wheaton Bldrs., Inc., LLC*, 82 AD3d 1035, 1036 [2d Dept 2011], quoting *Burrowes v Combs*, 25 AD3d 370, 373 [1st Dept

2006]).

High Class alleges that:

22. While working for plaintiff, defendant [Nasimov] interfered with plaintiff's clients and steered them to the defendant Ilite Realty.

23. While working for plaintiff, defendant [Nasimov] had persons list with defendant Ilite Realty.

24. Defendant was completely against plaintiff while still employed with the plaintiff.

25. The plaintiff maintained a number of listings in which defendant Ayzik Nasimov stole and took them to his new employer, defendant, Ilite Realty. These include:

- 355 Kings Highway, Apt. 4F-5F;

- 2590 Ocean Avenue;

- 2752 East 27 Street;

- 135 Bay 50 Street, 3B; [and]

- 2806 East 27th Street, 2C[.]

* * *

51. At all times mentioned, Defendants have anticipated [that their] tortious acts would have consequences in the State of New York.

52. That defendant Nasimov knew of the relationship with the plaintiff's listings and intentionally interfered with it.

53. That the defendant Nasimov acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort.

54. That the defendants' interference caused injury to the relationship with the owners of the property and plaintiff.

55. Without justification, defendants intentionally stole plaintiffs' listings.

56. Due to the foregoing, the Court could assess monetary damages at least in the amount of approximately \$428,000.

Based on these allegations, High Class sufficiently pled a claim for tortious interference with contract against Nasimov, but not against Ilite Realty. Specifically, High Class does not allege that Ilite Realty knew of the contract between High Class and its clients, or that Ilite Realty intentionally sought to induce the clients to breach their agreement with High Class.

In addition, defendants argue that High Class does not sufficiently allege a claim for faithless servant against Ilite Realty. Indeed, High Class does not allege any fiduciary or other special relationship between High Class and Ilite Realty. Therefore, High Class has not sufficiently pled a claim for faithless servant against Ilite Realty.

Defendants also argue that High Class did not sufficiently plead claims for conversion and prima facie tort. High Class states in its opposition that it voluntarily discontinues these claims, but defendants object. CPLR 3217(a)(1) states that “[a]ny party asserting a claim may discontinue it without an order . . . by serving upon all parties to the action a notice of discontinuance at any time before a responsive pleading is served or, if no responsive pleading is required, within twenty days after service of the pleading asserting the claim and filing the notice with proof of service with the clerk of the court”. It appears that the Second Department has not opined as to whether a motion to dismiss serves as a “responsive pleading”, and other courts do not agree (*BDO USA, LLP v Phoenix Four, Inc.*, 113 AD3d 507, 511 [1st Dept 2014] [holding that a motion to dismiss is a responsive pleading]; *1129 N. Blvd., LLC v Astra Group, Inc.*, 43 Misc 3d 137[A], 2014 NY Slip Op 50704[U], *1 [App Term, 9th and 10th Jud Dists 2014] [same]; *but see Harris v Ward Greenberg Heller & Reidy LLP*, 151 AD3d 1808, 1809 [4th Dept 2017]). I agree that a motion to dismiss is a responsive pleading for these purposes. Such an interpretation of the statute ensures finality to claims that may be unsupportable and prohibits

claimants from withdrawing claims in the face of dismissal, only to bring them back.

Accordingly, High Class's offer to discontinue its claims for prima facie tort and conversion is a nullity, and the court will review the pleading of each claim.

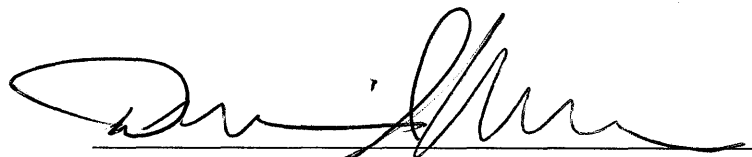
Claims for prima facie tort and conversion are both subject to a three-year statute of limitations (*Obstfeld v Thermo Niton Analyzers, LLC*, 168 AD3d 1080, 1083 [2d Dept 2019]; *Marine Midland Bank, N.A. v Renck*, 208 AD2d 688, 688 [2d Dept 1994]). As alleged in the complaint, defendants' tortious acts occurred while Nasimov was still employed by High Class, which was prior to March 2015. High Class commenced this action on November 6, 2019. Accordingly, these claims are time-barred and dismissed.

Conclusion

For the foregoing reasons, defendants' motion is granted to the extent that plaintiff's claims for prima facie tort and conversion are dismissed with prejudice as against both defendants, and that plaintiff's claims for breach of contract, breach of the implied covenant of good faith and fair dealing, tortious interference with contract, and faithless servant are dismissed, without prejudice, as against Ilite Realty, with leave to replead if and as appropriate. The remainder of the motion is denied. This action shall be joined for trial with *Nasimov v High Class Realty SB LLC*, Index No. 518848/2017.

This constitutes the decision and order of the court.

June 1, 2020
DATE


DEVIN P. COHEN
Justice of the Supreme Court