

Hossain v Chowdhury
2020 NY Slip Op 33279(U)
August 6, 2020
Supreme Court, Queens County
Docket Number: 706151/2019
Judge: Maureen A. Healy
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NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HONORABLE Maureen A. Healy IAS Part 13
Justice

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ABDUL HOSSAIN, Index No.: 706151/2019
Plaintiff, Motion Date: 10/2/19
- against - Motion Seq. No: 1

FILED

ZAKIR H. CHOWDHURY, TANVIR A. MILON,
ZM 74TH STREET BROADWAY CORP., and
MONWARA NOUSHAD, INC.,

**8/10/2020
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Defendants.

**COUNTY CLERK
QUEENS COUNTY**

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The following papers read on this motion by defendants ZAKIR H. CHOWDHURY and ZM 74TH STREET BROADWAY CORP., (hereinafter "the Chowdhury defendants") for an order dismissing plaintiff's First, Second, Third and Fourth causes of action pursuant to NY CPLR § 3211(a)(1) and § 3211(a)(7).

	<u>Papers</u> <u>Numbered</u>
Notice of Motion-Affirmation-Exhibits-Service....	EF 11-15
Memorandum of Law in Opposition	EF 16
Reply	EF 17

Upon the foregoing electronically filed papers, the motion is hereby decided in accordance with this Decision/Order.

Now, upon motion, the Chowdhury defendants move for an Order pursuant to CPLR § 3211(a)(1) and (7) dismissing the complaint based on the fact that the defense is founded upon documentary evidence; and that the complaint fails to state a cause of action upon which relief can be granted, and awarding costs and reimbursements associated with the motion. Plaintiff opposes the application.

This is an action by Plaintiff for specific performance, breach of contract, unjust enrichment and an equitable accounting. Plaintiff alleges that he entered into an agreement with defendants Chowdhury and Milon, whereby each would contribute \$50,000.00 to finance the purchase of the

deed to a residential home located at 161-44 Grand Central Parkway in Jamaica, and to renovate and re-sell the property for profit. It is undisputed that the parties were aware at the time that the property was the subject of a foreclosure action against the owner of the property Luz Carrillo and others, in Supreme Court, Queens County, under index number 23788/2007. The three parties purchased the deed from non-party Carrillo on October 30, 2015 for \$90,000.00, of which plaintiff contributed \$50,000.00. Thereafter, on January 22, 2016, the parties entered into a written agreement purporting to memorialize their agreement to share profits one-third each after repayment of expenses and capital contributions regarding the property, with \$50,000.00 returned to each party representing their contribution. However, pursuant to the Judgment of Foreclosure and Sale, the property had been sold at auction on February 13, 2015, almost a year prior to the written agreement and eight months prior to the deed purchase.

Plaintiff then brought this action for specific performance, breach of contract, unjust enrichment and an equitable accounting, claiming that despite all three parties being defrauded by the seller Carrillo into purchasing a deed to a property he had lost in foreclosure, defendant Chowdhury falsely represented to plaintiff that he had already purchased the property out of foreclosure in 2016, and acted as the owner of the property. In reliance thereon, plaintiff claims to have obtained personal loans and extended another \$40,000.00 renovating the property. Plaintiff further alleges that Chowdhury obtained the winning bid at auction for the property through defendant Monwara Noushad, Inc. ("MNI") which then transferred the property to defendant ZM 74th Street Broadway Corp. ("ZM 74th Street") for \$10.00, and as such, that he is entitled to a declaration that he is a one-third owner of the property.

In support of their motion, the Chowdhury Defendants incorporate all of the arguments made by the plaintiff to argue that the documentary evidence establishes that plaintiff's causes of action are without merit. They allege that the 2015 deed purchase between plaintiff, Chowdhury and Milon and Carrillo was *void ab initio*, as Carrillo had no authority to sell the deed for the subject property, and as such, each lost the money they had invested in the purchase. Furthermore, they argue that any agreement stemming from the 2015 deed purchase became null and void. Defendants contend that the purchase of the property in February of 2019 by MNI, an entity admittedly controlled by defendant Chowdhury, from

HSBC Bank USA, and conveyed to defendant ZM 74th Street, an entity also controlled by defendant Chowdhury, at a cost of \$482,436.00, was a bonafide purchase with plaintiff having no ownership right or claim thereto. Defendants contend that plaintiff's only legal recourse was to obtain restitution from Carrillo, whose whereabouts are unfortunately unknown.

The Chowdhury Defendants' Motion to Dismiss

CPLR § 3211(a)(7) provides that a party may move for dismissal of an action where the pleading fails to state a cause of action. In considering a motion to dismiss for failure to state a cause of action, the court accepts the facts as alleged in the complaint as true, accords plaintiff the benefit of every possible favorable inference and determines whether the facts as alleged fit within any cognizable legal theory. See, *Connaughton v Chipotle Mexican Grill, Inc.*, 29 N.Y.3d 137, 141 (2017). "Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery". *Id.* at 142. "Where evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one and, unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate". See, *Agai v. Liberty Mut. Agency Corp.*, 118 A.D.3d 830, 832 (2nd Dept. 2014); see *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977).

CPLR § 3211(a)(1) provides that a party may move for dismissal of an action on the grounds that a defense is founded upon documentary evidence. The evidence submitted in support of a motion pursuant to CPLR § 3211(a)(1) must constitute "documentary" evidence that is "unambiguous, authentic and undeniable". See, *Attias v Costiera*, 120 A.D.3d 1281, 1282-1283 (2nd Dept. 2014) quoting *Granada Condominium III Assn. v Palomino*, 78 A.D.3d 996, 996-997 (2nd Dept. 2010). Additionally, in considering a motion to dismiss a complaint pursuant to CPLR §3211(a)(1), "the documentary evidence must utterly refute the plaintiff's factual allegations, conclusively establishing a defense as a matter of law". See, *Gould v. Decolator*, 121 A.D.3d 845, 847 (2nd Dept. 2014).

However, on a CPLR § 3211(a)(1) motion, "[i]t is well settled that bare legal conclusions and factual claims, which are either inherently incredible or flatly contradicted by documentary evidence ... are not presumed to be true on a motion to dismiss for legal insufficiency." *O'Donnell, Fox & Gartner v. R-2000 Corp.*, 198 A.D.2d 154, 154 (1st Dept. 1993). The court is not required to accept factual allegations that are contradicted by documentary evidence or legal conclusions that are unsupported in the face of undisputed facts. See, *Zanett Lombardier, Ltd. v. Maslow*, 29 A.D.3d 495, 495 (1st Dept. 2006).

Plaintiff asserts four causes of action against defendants (i) breach of contract, (ii) specific performance, (iii) unjust enrichment and (iv) equitable accounting.

Plaintiff's Cause of Action for Breach of Contract

The entire Agreement dated January 11, 2016 and signed by plaintiff Hossain, and defendants Chowhury and Milon provides as follows:

We, the undersigned hereby agree that upon the sale of 161-44 Grand Central Parkway, Jamaica, NY 11432 the profit will be split 1/3 to each after all the expenses are paid and capital contributions are returned. \$50,000.00 to be returned to each party representing their contribution.

The essential elements of a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of its contractual obligations, and damages resulting from the breach. See, *Legum v. Russo* 173 A.D.3d 998, 999 (2nd Dept. 2019).

When dealing with issues of contract interpretation, courts must construe the agreement according to the parties' intent, and the best evidence of what parties to a written agreement intended is what was indicated by the language used. See, e.g., *Slatt v. Slatt*, 64 N.Y.2d 966, 967 (1985). Courts may not fashion a new contract for the parties under the guise of interpreting the writing. See, e.g., *Tonking v. Port. Auth. of N.Y. & N.J.*, 3 N.Y.3d 486, 490 (2004) (holding that the

court may not "rewrite the contract and supply a specific obligation the parties themselves did not spell out").

Plaintiff asserts two breaches of the alleged agreement, the first being that defendants Chowdhury and Milon failed to each contribute \$50,000.00 "as required" instead contributing a total of \$40,000.00. Plaintiff fails to plead how the alleged failure of defendants to pay their initial \$50,000.00 contribution has caused resulting damage. Had they each paid \$50,000.00, the result would be no different, they would still have a useless deed to a property that had already been sold at auction. Second, plaintiff alleges defendant Chowdhury purchased the property in the name of defendant Noushad who in turn transferred the property to defendant ZM 74th Street. Said transaction took place several years after the property was sold at auction and plaintiff fails to set forth how defendant breached a contractual obligation in this regard under the 2016 agreement. The claims in the complaint based upon contract, or the agreement, must fail, and are dismissed pursuant to CPLR § 3211 (a) (1) upon the documentary proof provided by defendant Chowdhury.

Plaintiff's Cause of Action for Specific Performance

Plaintiff seeks specific performance of the January 11, 2016 agreement such "that plaintiff is a 1/3 owner of the property."

"The elements of a cause of action for specific performance of a contract are that the plaintiff substantially performed its contractual obligations and was willing and able to perform its remaining obligations, that defendant was able to convey the property, and that there was no adequate remedy at law". See, *E & D Grp., LLC v Vialet*, 134 A.D.3d 981, 982-983 (2nd Dept. 2015) (internal quotations omitted). "A contract to devise real property or establish a trust of real property, or any interest therein or right with reference thereto, is void unless the contract or some note or memorandum thereof is in writing and subscribed by the parties to be charged therewith, or by his lawfully authorized agent". GOL §5-703(3). Moreover, specific performance is not available to a contract which is incomplete and requires parol evidence to ascertain the substance of the agreement. See, *O'Brien v West*, 199 A.D.2d 369, 370 (2nd Dept. 1993).

Here, although plaintiff seeks a declaration that he is

a part owner of real property, the complaint fails to allege any elements of a real estate sale contract, what if any the defendants' obligations were pursuant to the contract or that they were able to convey the real property under the Contract. As such, the complaint fails to state a cause of action for specific performance and the cause of action for same is dismissed pursuant to CPLR § 3211(a)(7).

Plaintiff's Cause of Action for Unjust Enrichment

Unjust enrichment is essentially a quasi-contractual claim where the law creates "an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties". See, *IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132, 142 (2009).

To plead unjust enrichment, the plaintiff must allege "that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered" See, *Mandarin Trading Ltd. V. Wildenstein*, 16 N.Y.3d 173, 182 (2011). Unjust enrichment "does not require the performance of any wrongful act by the one enriched. Innocent parties may frequently be unjustly enriched". *Cruz v. McAneney*, 31 A.D.3d 54, 59 (2nd Dept. 2006) (internal citations omitted). Here, plaintiff properly alleged sufficient facts to establish a "relationship between the parties that could have caused reliance or inducement" to support an unjust enrichment claim. See, *Philips Int'l Investments, LLC v. Pektor*, 117 A.D.3d 1, 3 (1st Dept. 2014). Plaintiff claims that defendants were unjustly enriched and financially benefitted from his payment of \$50,000.00 with regard to the property, as well as additional monies spent on renovations and capital improvements on the property, now presently owned by defendants. At this early stage, plaintiff has alleged sufficient facts to support a claim of unjust enrichment in that a benefit may have accrued to defendants to the detriment of the plaintiff. Thus, that branch of defendants' motion to dismiss the cause of action for unjust enrichment is denied.

Plaintiff's Cause of Action for Equitable Accounting

Plaintiff asserts a claim for an equitable accounting based on his payment of \$50,000.00, which he claims defendants Chowdhury and Milon received "entrusting them to

use those funds to purchase the property" and that their "misconduct requires an equitable accounting to determine the full extent of the damages".

The right to an equitable accounting is premised on the existence of a confidential or fiduciary relationship, and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest. See, *Adam v Cutner & Rathkopf*, 238 A.D.2d 234 (1st Dept 1997). Here, the complaint alleges that there is a fiduciary relationship between the parties because the plaintiff entrusted the defendants to purchase the deed to the property.

Giving every favorable inference to the plaintiff, he has stated a cause of action for equitable accounting. Defendants' argument that the plaintiff is not entitled to an equitable accounting because the funds the plaintiff claims he initially invested are fully accounted for, is without merit. Where, as here, the plaintiff alleges a fiduciary relationship between the parties, there is an absolute right to an accounting. See, *Webster v. Forest Hills Care Center, LLC*. 164 A.D.3d 1499, 1501(2nd Dept. 2018). As such, that branch of defendants' motion to dismiss the cause of action for an equitable accounting is denied.

Conclusion

Defendants' motion to dismiss the complaint is granted with regard to the plaintiff's causes of action for breach of contract and specific performance, and is denied with regard to the plaintiff's causes of action for unjust enrichment and an equitable accounting. Defendants shall answer the complaint within 30 days of service of this order upon them with Notice of Entry.

This constitutes the decision and Order of this Court.

Dated: 8/6/20

FILED

**8/10/2020
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**COUNTY CLERK
QUEENS COUNTY**



Maureen A. Healy, J.S.C.