

Goldfein v Bencardino
2020 NY Slip Op 33828(U)
November 17, 2020
Supreme Court, New York County
Docket Number: 652063/2020
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

<p>PRESENT: <u>HON. ARLENE P. BLUTH</u></p> <p style="text-align: right;"><i>Justice</i></p> <p>-----X</p> <p>MORTON GOLDFEIN, A/K/A MORT GOLDFEIN, JUDY LOEB GOLDFEIN,</p> <p style="text-align: center;">Plaintiff,</p>	<p>PART <u>IAS MOTION 14</u></p> <p>INDEX NO. <u>652063/2020</u></p> <p>MOTION DATE <u>10/23/2020</u></p> <p>MOTION SEQ. NO. <u>001</u></p>
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- v -

PATRICIA BENCARDINO, A/K/A, PATRICIA A.
BENCARDINO, A/K/A, PATRICIA BRAVERMAN
BENCARDINO, LOUIS A. BENCARDINO TRUST, LOUIS A.
BENCARDINO JR 2004 TRUST, HAMPTON RENTALS,
INC.

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 23, 26, 27, 28, 29

were read on this motion to/for DISMISS.

Defendants' motion to dismiss is granted in part and denied in part.

Background

In January 2020, the parties to this action entered into an agreement for plaintiffs to rent defendants' home in Southampton from May 22, 2020 to July 30, 2020. Three payments were to be made; the first upon signing the lease, the second in March, and the final payment in April. It is undisputed that the first two payments were successfully made. On April 1, 2020, the real estate broker for the property emailed defendant Bencardino and indicated that plaintiffs would feel more comfortable not renting the property due to the pandemic, but that they would honor the lease if Bencardino was unable to secure another tenant for the time (NYSCEF Doc. No. 27 at 11). On April 14, 2020, Ms. Bencardino informed plaintiffs that she had not received the April payment and considered the contract "null and void" (NYSCEF Doc. No. 17 at 13).

Defendants move to dismiss six causes of action as set forth in the complaint. They seek to dismiss the first cause of action, breach of contract, arguing that they have submitted sufficient documentary evidence (NYSCEF Doc. No. 15). They argue that the second cause of action for fraud must be dismissed on the ground that plaintiff has not alleged any facts supporting the allegation (*id.*). As for the third cause of action, conversion, they argue that it is duplicative of their breach of contract claim and it requires its own details (*id.*). They seek to dismiss the fourth cause of action, “violation of statute,” because the statute in question does not allow for private causes of action (*id.*). They claim the fifth cause of action, punitive damages, should be dismissed because punitive damages are not available for a breach of contract claim (*id.*). They seek to dismiss the sixth cause of action, for legal fees, on the ground that plaintiff is not entitled by statute, contract, or court order to seek such fees (*id.*). They also move to dismiss every cause of action against Louis A. Bencardino Trust, Louis A. Bencardino Jr. 2004 Trust, and Hamptons Rentals, Inc. (the “Entity Defendants”) claiming said defendants were not in privity with plaintiff (*id.*).

Plaintiffs oppose and argue that the motion to dismiss is premature, that they need to engage in discovery to learn the exact role of each of the defendants, and that the documents provided in the instant motion should be considered to bolster the complaint (NYSCEF Doc. No. 26). Plaintiffs argue that defendant unilaterally rescinded the contract to obtain a better price on the market (*id.*).

Defendants’ reply reiterates its arguments in the instant motion and notes that plaintiffs do not oppose every item in the motion to dismiss (NYSCEF Doc. No. 28).

Discussion

“[O]n a motion addressed to the sufficiency of a complaint pursuant to CPLR 3211 (a) (7), the facts pleaded are presumed to be true and accorded every favorable inference, nevertheless, allegations consisting of bare legal conclusions, as well as factual claims either inherently

incredible or flatly contradicted by documentary evidence, are not entitled to such consideration” (*Matter of Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995]).

First Cause of Action - Breach of Contract

Defendants argue that the claim for breach of contract must be dismissed based on documentary evidence provided and cites to a lease that the parties allegedly entered into for the subject property (NYSCEF Doc. No. 19). This Court finds three problems with defendants’ argument. First, the lease provided is unsigned (*id.*). This Court has no way to determine whether this is the lease to which the parties agreed.

Second, even if the lease was signed, it does not support defendants’ argument. Defendants maintain that the lease entitles defendants to keep the monies paid by plaintiffs if they default. But the lease submitted does not provide for that remedy; the submitted lease reads that “[i]f Tenant [plaintiffs] should default on this agreement prior to taking possession, Tenant shall pay to Landlord [defendants] the amount of the Initial Payment, which shall be considered Landlord’s liquidated damages” (*id.*). It is undisputed that the initial payment was \$12,600. Bencardino admits that she received the first check “in the amount of \$12,600” and a second check, both of which “cleared”, totaling \$26,200 (NYSCEF Doc. No. 16 ¶ 9-10). It is also undisputed that defendants kept a total of \$26,200 (NYSCEF Doc. No. 18 ¶ 24). Even if the lease indicates that defendants may keep the initial payment – \$12,600 – as liquidated damages, it says nothing about defendants’ entitlement to the second payment.

Third, Ms. Bencardino claimed the lease was “null and void.” That means that it is of no legal validity, force or effect; that it binds no one and gives no rights or obligations to anyone. In that case, to go back to the positions the parties were in without the lease, defendants should have returned all the money.

Because plaintiffs' claim is not "flatly contradicted by documentary evidence", this Court denies defendants' motion with respect to dismissing plaintiffs' cause of action for breach of contract.

Second Cause of Action – Fraud

"To state a cause of action for fraud, plaintiff must allege 'a material misrepresentation of fact, knowledge of its falsity, an intent to induct reliance, justifiable reliance by the plaintiff, and damages'" (*Cohen Bros Realty Corp., v Mapes*, 181 AD3d 401, 403 [1st Dept 2020]). "Such a claim must be pleaded with particularity (CPLR 3016[b]" and "[A]ctual knowledge ... need only be pleaded generally, [given], particularly at the pre-discovery state, that a plaintiff lacks access to the very discovery materials which would illuminate a defendant's state of mind." (*id.*).

In *Cohen Bros Realty Corp.*, plaintiffs successfully pleaded a fraud cause of action by "alleging the creation and presentation for payment to plaintiff of false, force or inflated purchase orders" (*id.* at 404). The defendants "knew the word described on the bogus purchase orders or invoices and other contract was entirely falsely stated, overcharged or not provided, and knew that Plaintiffs would rely on these falsities ..." (*id.*). And "that plaintiffs 'relied on these purchase orders, invoices and other contract forms in making unnecessary payments to defendants to their detriment..." (*id.*).

Here, plaintiffs have failed to establish a cause of action for fraud. Plaintiffs have not alleged any facts that defendants knowingly misrepresented any facts or intended to induce plaintiffs' reliance on said false facts. Plaintiffs claim that Bencardino unilaterally ended their contract and rented her property to a third party for a higher price. While this might constitute some other cause of action, it is not materially misrepresenting a fact to induce plaintiff to act based on a falsity and so does not constitute a fraud.

This Court grants defendants' motion with respect to dismissing plaintiffs' cause of action for fraud.

Third Cause of Action - Conversion

Defendants moved to dismiss plaintiffs' cause of action for conversion, arguing that it is duplicative of their breach of contract claim. Plaintiffs did not oppose. This Court grants defendants' motion with respect to dismissing plaintiffs' cause of action for conversion.

Fourth Cause of Action - Violation of Statute

Defendants moved to dismiss plaintiffs cause of action for "violation of statute" of NY General Business Law § 396-r, an anti-price gouging law, on the ground that the statute does not provide for a private cause of action. Plaintiffs agree that this claim should be dismissed when they indicate that "based on the foregoing, save for the claim of price gouging, defendants [sic] motion should be denied." (NYSCEF Doc. No. 26 ¶ 35). This Court grants defendants' motion with respect to dismissing plaintiffs' cause of action for "Violation of Statute".

Fifth Cause of Action - Punitive Damages

"A separate cause of action for punitive damages is not legally cognizable ... Rather, punitive damages 'are merely an element of the total claim for damages on ... underlying causes of action,' and a separate cause of action based solely upon them must be dismissed" (*Jean v Chinitz*, 163 AD3d 497, 498 [1st Dept 2018]).

Defendants moved to dismiss plaintiffs' demand for punitive damages and argue that there is no basis for recovery because the complaint only supports a breach of contract case. Plaintiffs did not oppose. The Court observes that plaintiffs' fifth cause of action is solely for punitive damages and therefore must be dismissed in accordance with New York law.

Sixth Cause of Action - Attorney's Fees

Defendants moved to dismiss plaintiffs' cause of action for attorney's fees, arguing that plaintiffs can only seek attorney fees if the terms of the lease, or a statute, or a court rule permits as much, none of which are applicable here. Plaintiffs did not oppose. This Court grants defendants' motion with respect to dismissing plaintiffs' cause of action for legal fees.


Entity Defendants

Defendants moved to dismiss all of plaintiffs' claims against Louis A. Bencardino Trust, Louis A. Bencardino Jr. 2004 Trust, and Hamptons Rentals, Inc. (the "Entity Defendants") on the grounds that there is no basis for privity between the Entity Defendants and plaintiffs, and that the only parties to the lease are plaintiffs and Bencardino herself. This Court finds that defendants' unsigned lease is insufficient to support their claim (NYSCEF Doc. No. 18). This Court denies defendants' motion with respect to dismissing all causes of action as against the Entity Defendants.

Accordingly, it is

ORDERED that the motion is granted only to the extent that the second, third, fourth, fifth and sixth causes of action in the complaint are severed and dismissed and denied as to the remaining branches of the motion.

Remote Conference: December 3, 2020 at 10:00AM

<p><u>11/17/2020</u> DATE</p>			 <hr/> <p>ARLENE P. BLUTH, J.S.C.</p>			
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE