

**Gross v Brach**

2021 NY Slip Op 30205(U)

January 21, 2021

Supreme Court, Kings County

Docket Number: 525341/2019

Judge: Lillian Wan

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  
 COUNTY OF KINGS: PART 17

-----X  
 FAIGY GROSS,

Plaintiff,

– against –

NATHAN BRACH,

Defendant.  
 -----X

Index No.: 525341/2019  
 Motion Date: 1/20/20  
 Motion Seq.: 02, 03 and 04

**DECISION AND ORDER**

The following e-filed documents, listed by NYSCEF document number (Motion 02, 03 and 04) 15-20, 22-37, 39-48, 51-56 and 58-63 were read on this motion for summary judgment.

The defendant moves to dismiss the complaint based on CPLR § 3211 (a), and the plaintiff cross moves by motion sequence 03 and 04, for various forms of relief. For the reasons set forth below the defendant's motion for dismissal and the plaintiff's cross motions are denied in their entirety.

This action arises from a contract for the sale of real property located at 280 Kosciuszko Street, Brooklyn, NY. According to the amended complaint, on December 23, 2013, the defendant, Nathan Brach, the owner, and plaintiff, Faigy Gross, the purchaser, entered into the contract for the purchase price of \$880,000. The plaintiff paid a down payment of \$190,000 with the remainder to be paid at closing. According to the amended complaint, on April 27, 2014, the contract was amended, and the purchase price was reduced to \$725,000. The contract provided for the plaintiff to hold a lien against the property for the amount of the down payment. The closing was to take place on February 27, 2014. A notice of pendency was filed against the property by the plaintiff on or about October 1, 2019. Issue has not been joined.

The closing did not take place on February 27, 2014 and thereafter the plaintiff sent a time is of the essence closing notice on August 7, 2014 for a closing to take place on September, 9, 2014. The plaintiff indicated that no extension of the closing had been granted by the plaintiff. Plaintiff claims that the defendant rejected the time of the essence closing and has therefore breached the contract. The amended complaint alleges breach of contract for failure to close title, promissory estoppel, breach of implied covenant of good faith and fair dealing, breach of contract based on defendant's failure to return the down payment to plaintiff in the amount of \$190,000, and specific performance of the contract. It also seeks a declaratory judgment that the contract was breached by the defendant, and that plaintiff retains a lien against the premises in the amount of the down payment.

**MOTION 2**

Although the defendant has not enumerated the specific subsections of CPLR § 3211(a) upon which he relies, it appears that the defendant seeks dismissal of the amended complaint pursuant to CPLR § 3211(a) (5) (7) (8) and (10), based on: arbitration and award, payment,

release, and/or statute of frauds; the complaint fails to state a cause of action for breach of contract; lack of personal jurisdiction over the defendant; the Court should not proceed in the absence of a person who should be a party, i.e. Rabbi Eliezer Berl; and compelling the plaintiff to arbitrate pursuant to CPLR § 7503. Defendant submits the amended complaint and the attachments, which include a version of the contract that excludes an entire page containing the purchase price terms, the plaintiff's canceled check for the down payment in the amount of \$190,000, and the time is of the essence letter of August 7, 2014.

Subsequently, approximately three weeks after his initial filing the defendant submitted a supplemental affidavit in support of his motion without leave of the Court. The submission included the affidavit of Adele Brach, the defendant's wife, stating she was never served with the amended complaint and its exhibits. This later submission by the defendant attached as an exhibit a complete copy of the contract of sale, including the page containing the purchase price of the sale of the premises.

The plaintiff opposes the motion and submits the pleadings, including the amended complaint, affidavit of service of the summons and complaint, affidavit of service of the amended summons and complaint, and the amended affirmation of service of the summons and amended complaint. The plaintiff also submits her own affirmation stating that the matter was never arbitrated and that there was never an agreement to arbitrate; she never released any claims she has against the defendant; she never agreed to pay anyone relative to her claims against the defendant, and that Rabbi Eliezer Berl is not a necessary party to this action. Plaintiff submits a photograph of the defendant's wife accepting service of the amended complaint, and the affirmation of William Robbins, an individual who witnessed Jonathan David Bachrach, the plaintiff's attorney, serve the summons and amended complaint upon Mrs. Brach. Mr. Robbins avers that he took the photograph of Mrs. Brach accepting service of the papers.

The plaintiff submits an affidavit of service of Di Cong-Jiang, a process server, which states that Nathan Brach was personally served with the notice of pendency and summons and complaint at his home on December 4, 2019 at 8:50 a.m. He provided a description of Mr. Brach and proof that Mr. Brach was not in the military service at the time. The defendant has not submitted proof rebutting the plaintiff's submissions. He simply states that he was never served. Likewise, the defendant does not assert that the affidavits of service submitted by the plaintiff are defective. As to the service of the amended summons and complaint, the plaintiff submits the affidavit of his attorney, Mr. Bachrach, stating that he personally served the defendant's wife, Mrs. Brach, on March 6, 2020 at 11:25 a.m. at her home, and that a copy was mailed to Nathan Brach. "A process server's affidavit of service constitutes prima facie evidence of proper service and, therefore gives rise to a presumption of proper service." *Bethpage Federal Credit Union v Grant*, 178 AD3d 997, 997 (2d Dept 2019). Moreover, a conclusory denial of service is insufficient to rebut the presumption of proper service based on the affidavit of the process server. *Id* at 997-998. Therefore, the defendant has failed to establish his entitlement to dismissal based on lack of personal jurisdiction.

The defendant's assertion that the complaint fails to state a cause of action for breach of contract is without merit. In considering a motion to dismiss a complaint pursuant to CPLR §

3211(a)(7), a court “must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” *Lubonty v U.S. Bank N.A.*, 159 AD3d 962, 963 (2d Dept 2018) (internal quotation marks omitted). The essential elements for pleading 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 his or her contractual obligations, and damages resulting from the breach. *See Dee v Rakower*, 112 AD3d 204 (2d Dept 2013). In the case at bar, the amended complaint sufficiently sets forth a cause of action based on breach of contract.

The defendant's assertion that the contract violates the statute of frauds must also fail. He argues that the written contract setting forth the purchase price as \$880,000 is contradicted by the allegation in the amended complaint that the contract was later amended to reflect a reduced purchase price of \$725,000, which was not in writing. In order to satisfy the requirements of the statute of frauds the writing must not only designate the parties, identify and describe the subject matter and be signed by the parties, it must also state all of the essential terms of the parties' agreement. *See Donner v Septimus*, 137 AD2d 484 (2d Dept 1988). The defendant's statute of frauds claim, based on GOL §§ 5-703(1) and (2), is without merit because the first contract of sale was reduced to writing and contained all of the essential elements required by the statute.

The defendant claims that the complaint fails to allege promissory estoppel. According to the defendant, the plaintiff has failed to set forth the elements of the promissory estoppel cause of action. He further alleges that a promissory estoppel claim will be dismissed as duplicative of a breach of contract cause of action where there is an absence of a duty independent and extraneous to the contract. This claim is premature at this early stage of the litigation where issue has not been joined and no discovery has taken place.

Lastly, there is no merit to the defendant's claim that the cause of action for breach of the implied covenant of good faith and fair dealing cannot substitute for an “unsustainable” breach of contract claim. The defendant argues that the plaintiff's failure to attach a contract containing all of the essential terms cannot establish a basis for a breach of implied terms of the contract. However, it is apparent from the NYSCEF filings that the plaintiff submitted a “corrected” contract of sale as an exhibit to her amended complaint which contained the express terms of the contract, including the purchase price and down payment. This belies the defendant's argument concerning the implied covenant that applies to every contract.

Accordingly, the defendant's motion to dismiss is denied.

### **MOTION 3**

The plaintiff cross moves for an order, *inter alia*, pursuant to “CPLR and Rule 130.1”, barring the defendant from making any reference to his alleged religious affiliations or alleging the existence and applicability of orthodox Jewish law to any matter at issue; barring defendant from interposing hearsay obligations as to the service of process upon his wife as the defendant was not a witness to service upon her; ordering defendant to produce surveillance tapes and/or

records recorded by him or at his residence on the morning of December 4, 2019 and March 6, 2020; imposing monetary sanctions upon defendant, pursuant to Rule 130 for frivolous conduct for making a motion to dismiss while admitting under oath that he was served, and making a motion to dismiss based on prior arbitration, while admitting under oath that there never was any prior binding arbitration; and leave to amend the complaint if it is deemed defective. This motion is denied as no sufficient legal basis has been articulated in support of the relief sought. Additionally, the plaintiff's submissions are not sufficient to warrant the Court's imposition of discretionary financial sanctions under 22 NYCRR 130-1.1; *See Pinnock v Mercy Medical Center*, 180 AD3d 1086 (2d Dept 2020).

#### **MOTION 4**

The plaintiff has cross moved seeking, *inter alia*, that if it is proven at a traverse hearing that the defendant's wife, Adele Brach swore falsely the Court shall refer to the Kings County District Attorney's office the affirmations of Ms. Brach, pursuant to Penal Law §210.0 (Perjury in the Second Degree). This motion is denied as there is no sufficient legal basis provided for relief sought premised on hypothetical events.

The defendant and plaintiff's remaining contentions are without merit.

Accordingly, it is hereby

**ORDERED**, that the defendant's motion to dismiss (motion 02) is denied in its entirety; and it is further

**ORDERED**, that the plaintiff's motions (motion 03 and motion 04) are denied in their entirety.

This constitutes the decision and order of the Court.

Dated: January 21, 2021



HON. LILLIAN WAN, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated 4/20/20