

Liangcheng Zou v Hang Liu

2021 NY Slip Op 30452(U)

February 16, 2021

Supreme Court, Kings County

Docket Number: 500026/2020

Judge: Richard Velasquez

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At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 16th day of FEBRUARY, 2021

P R E S E N T:
HON. RICHARD VELASQUEZ, Justice.

-----X

LIANGCHENG ZOU,

Plaintiff,

Index No.: 500026/2020
Decision and Order

-against-

HANG LIU AND DAN DAN LIU,

Defendants,

-----X

The following papers NYSCEF Doc #'s 16 to 25 read on this motion:

<u>Papers</u>	<u>NYSCEF DOC NO.'s</u>
Notice of Motion/Order to Show Cause Affidavits (Affirmations) Annexed_____	16-20
Opposing Affidavits (Affirmations)_____	23-25

After having heard Oral Argument on OCTOBER 28, 2020 and upon review of the foregoing submissions herein the court finds as follows:

Defendant, DAN DAN LIU, move pursuant to CPLR 3211(a)(7) for an order dismissing plaintiff's complaint in its entirety and granting defendants motion to amend her answer to include a cross-claim against defendant Hang Liu. (MS#1). Plaintiff opposes the same.

ANALYSIS

Pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (see,

CPLR 3026). We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Morone v. Morone*, 50 N.Y.2d 481, 484, 429 N.Y.S.2d 592, 413 N.E.2d 1154; *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 634, 389 N.Y.S.2d 314, 357 N.E.2d 970). In assessing a motion under CPLR 3211(a)(7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint (*Rovello v. Orofino Realty Co.*, 40 N.Y.2d at 635, 389 N.Y.S.2d 314, 357 N.E.2d 970) and **“the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one”** (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 372 N.E.2d 17; *Rovello v. Orofino Realty Co.*, 40 N.Y.2d at 636, 389 N.Y.S.2d 314, 357 N.E.2d 970). Further, the court may consider any factual submissions made in opposition to a motion to dismiss a pleading in order to remedy pleading defects (see *Quinones v. Schaap*, 91 A.D.3d 739, 740, 937 N.Y.S.2d 262; *Daub v. Future Tech Enter., Inc.*, 65 A.D.3d at 1005, 885 N.Y.S.2d 115). *Minovici v. Belkin BV*, 109 A.D.3d 520, 521, 971 N.Y.S.2d 103, 106 (2013) “[B]are legal conclusions and factual claims which are flatly contradicted by the evidence are not presumed to be true on such a motion” (*Palazzolo v. Herrick, Feinstein, LLP*, 298 A.D.2d 372, 751 N.Y.S.2d 401). If the documentary proof disproves an essential allegation of the complaint, dismissal pursuant to CPLR 3211(a)(7) is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action (see *McGuire v. Sterling Doubleday Enters., LP*, 19 A.D.3d 660, 661, 799 N.Y.S.2d 65). **“Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to**

prove its claims ... plays no part in the determination of a pre-discovery 3211[a][7] motion to dismiss” (*Shaya B. Pac., LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38; see *EBC I, Inc. v. Goldman Sachs & Co.*, 5 NY3d 11, 19).

The elements required to maintain an action for breach of contract are (1) the existence of a contract between Plaintiff and Defendant; (2) consideration; (3) performance by the Plaintiff; (4) breach by the Defendant; and (5) damages as a result of the breach. *Ascoli v. Lynch*, 2 A.D.3d 553, 769 N.Y.S.2d 567 (2d Dep’t 2003). In the present case, the complaint states each of the above elements, whether or not the plaintiff will be able to prove such allegations is not the subject of a motion to dismiss.

To establish the elements of fraud, a plaintiff must show that a material misrepresentation, known to be false, has been made with the intention of inducing reliance upon the misstatement which caused the plaintiff to reasonably rely on the misrepresentation, as a result of which he sustained damages. See *Nigra v. Lee*, 63 AD3d 1490 (2009); *Clearmont Prop., LLC v. Eisner*, 58 AD3d 1052 (2009); *Cohen v. Colistra*, 233 A.D.2d 542 (1996). In the present case, it is alleged in the complaint that Defendant Hang Liu made false claims to induce Plaintiff to invest with Defendants and Plaintiff, to his detriment, paid significant amount of money to Defendants on the basis of these misrepresentations.

In order to plead unjust enrichment, a plaintiff must assert that (a) the defendant was enriched; b) the enrichment was at plaintiff’s expense; c) the defendant’s retention of that benefit would be unjust. *S.S. Silberblatt, Inc. v. East Harlem Pilot Block*, 608 F.2d 28, 37 (2d Cir. 1979). In the present case, the plaintiff’s complaint alleges each of these elements, whether or not the plaintiff will be able to prove such allegations is not the

subject of a motion to dismiss.

It is well-settled that the doctrine of promissory estoppel may be invoked where it would be unconscionable to deny the oral promises on which the promisee has relied. See *Shapiro v. Shorestein*, 157 A.D. 2d 833 (2d Dep't 1990); *Ackerman v. Landes*, 112 A.D. 2d 1081 (2d Dep't 1985). Here, Plaintiff pleaded each of the elements of a claim for promissory estoppel, whether or not the plaintiff will be able to prove such allegations is not the subject of a motion to dismiss.

Next, the court shall address the conversion claim. The three-year Statute of Limitations period, applicable in conversion and replevin actions (CPLR 214(3)), ordinarily runs from the date the conversion takes place. However, where possession is originally lawful, a demand is necessary. The period within which the action must be commenced is computed from the time when the right to make the demand is complete. *Berman v. Goldsmith*, 141 AD2d 487 (2d Dep't 1988); See CPLR 206[a]; *Al-Roc Prods. Corp. v. Union Dime Sav. Bank*, 74 A.D.2d 834, 455 N.Y.S.2d 525, appeal dismissed 50 N.Y.2d 928; *Federal Ins. Co. v. Fries*, 78 Misc.2d 805, 355 N.Y.S.2d 741; 23 NY Jur 2d Conversion, § 62). Here, there are issues of fact as to when the statute of limitations begins to accrue. Therefore without further discovery, the court is unable to determine the precise point in time when the alleged conversion occurred.

Therefore, in the present case, affording the complaint a liberal construction, accepting the facts as alleged therein as true, and granting plaintiffs the benefit of every possible inference, it is the opinion of this Court that the complaint sufficiently states a cause of action for, (i) Breach of Contract; (ii) Unjust Enrichment; (iii) Conversion; (iv) Misrepresentation and Fraud; and (v) Promissory Estoppel at this pre-discovery stage of

the proceedings (*Shaya B. Pac., LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, supra* at 38). Although facts sufficient to justify opposition may exist, they currently reside almost exclusively within the knowledge of the defendants (see CPLR 3211[d]). See also *Iommarini v. Mortg. Elec. Registration Sys., Inc.*, 54 Misc. 3d 1225(A) (N.Y. Sup. Ct. 2017).

When a party, usually the defendant, moves for a motion to dismiss, it is asking the court to make that determination instead. “Courts are not infallible. In undertaking such a task, a court should be mindful to prevent errors which could result in the dismissal of a worthy claim, even if it means risking an unworthy claim proceeding to trial. In other words, it must err on the side of the plaintiff. Toward this aim, many rules and standards have evolved for the court to follow.” *Poolt v. Brooks*, 38 Misc. 3d 1216(A), 967 N.Y.S.2d 869 (Sup. Ct. 2013)

Moreover, in the case at bar, Plaintiff's sworn complaint constitutes evidence that defendants, benefited from the plaintiff. How credible that evidence is irrelevant at this juncture. Plaintiff must still make out a *prima facie* case against them at trial through competent evidence, but when it comes to “he said, she said,” merely raises a question of credibility for the jury to decide (see *Communications & Entertainment Corp. v. Hibbard Brown & Co., Inc.*, *supra*, 202 A.D.2d 191, 608 N.Y.S.2d 214). As such, the plaintiff has plead facts sufficient to state a cause of action and defendant has failed to submit any documentary evidence to the contrary. As such, it is inappropriate to dismiss such claims before any discovery has been conducted and both parties can renew their request upon the completion of discovery.

It is well-established that leave to amend pleadings under CPLR 3025(b) should

be freely given, absent prejudice or surprise resulting from a delay. *McCaskey, Davies & Assoc. v. New York City Health & Hosps. Corp.*, 59 N.Y.2d 755, 757, 463 N.Y.S.2d 434, 450 N.E.2d 240 (1983); CPLR § 3025(b); *Lindo v. Brett*, 149 A.D.3d 459, 52 N.Y.S.3d 308 (1st Dep't. 2017). Prejudice in this context is only shown where the nonmoving party is "hindered in the preparations of his case or has been prevented from taking some measure in support of his position." *Loomis v. Civetta Corinno Constr. Corp.*, 54 N.Y.2d 18, 23, 429 N.E.2d 90, 44 N.Y.S. 2d 571 (1981); *Schron v. Grunstein*, 39 Misc. 3d 1213(A), 1213A (N.Y. Sup. Ct. 2013). In the present case, the proposed amendments will not cause any prejudice or delay, as the case has yet to proceed to the preliminary conference stage, and no discovery (or discovery schedule) has been effectuated in this action. Thus, each party will have a full opportunity to inquire and commence discovery on all the relevant claims without having incurred the time and expense of drafting discovery demands.

Accordingly, Defendant, DAN DAN LIU's motion to dismiss plaintiff's complaint is hereby denied, with leave to renew upon completion of discovery. Defendants request to amend its answer to include counter-claims is hereby granted.

This constitutes the Decision/Order of the court.

Dated: Brooklyn, New York
FEBRUARY 16, 2021

ENTER FORTHWITH:


HON. RICHARD VELASQUEZ