

Harris v Golan

2022 NY Slip Op 30558(U)

February 17, 2022

Supreme Court, Kings County

Docket Number: Index No. 512198/2020

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
ANTHONY HARRIS and ELLEN HARRIS,

Index No.: 512198/2020
Motion Seq.: 01

Plaintiffs,

- against -

DECISION AND ORDER

YUVAL GOLAN, SAMIEL HANASAB, KEW
GARDENS DEVELOPMENT CORP., 132 DEAN
STREET CORP., 132 LA SOLIKA LLC, and
BRICK FORT CAPITAL LLC,

Defendants.

-----X

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

The following e-filed documents, listed by NYSCEF document number 15-17 and 20-35, were read on this motion to dismiss the complaint.

In this action to recover damages for, inter alia, fraud and breach of contract, defendants Yuval Golan, Samiel Hanasab, Kew Gardens Development Corp., 132 Dean Street Corp., and 132 La Solika LLC (the moving defendants) move for an Order dismissing the complaint pursuant to CPLR §§ 3211(a)(1) and (7). After oral argument and upon consideration of the parties' submissions, the motion is granted.

This action brought pursuant to Article 15 of the New York Real Property Actions and Proceedings Law (RPAPL) arises out of an allegedly fraudulent transfer of a deed to real property. The plaintiffs' complaint sets forth eight causes of action: 1) fraud; 2) violation of the NY Deceptive Trade Practices Act (General Business Law § 349(a)); 3) breach of contract; 4) tortious interference with contract; 5) unjust enrichment; 6) civil conspiracy; 7) specific performance; and 8) punitive damages. Plaintiffs Anthony Harris and Ellen Harris are siblings, and they each acquired a 50% interest in the premises located at 132 Dean Street, Brooklyn, New York pursuant to a deed from their mother, Margaret Harris, dated August 9, 2013.

The moving defendants state that the parties agreed on a contract price of \$700,000.00 for Anthony's 50% share of the subject property, located at 132 Dean Street, Brooklyn, NY 11201, to Kew Gardens. Moving defendants further assert that the sale would be completed by a payment of \$150,000.00 with Anthony lending the balance to Kew Gardens, which the defendants describe as being similar to a purchase money mortgage with no concomitant mortgage encumbering the property. Moving defendants state that on July 2, 2015, Anthony executed a modification agreement that modified the original note and allowed for renovations to take place by crediting the original note in favor of defendants for said renovations to be done.

Ellen and Mr. Golan, one of the alleged owners of the corporate defendants, also entered into a November 16, 2015 agreement to renovate Ellen's 50% share of the property. Moving defendants assert that the plaintiffs entered these agreements freely, voluntarily, and of their own accord. Moving defendants further state that Kew Gardens' interest in the property was later transferred to Dean St., and that Dean St. then took out a "gap mortgage" in the amount of \$550,000.00 from mortgagee Brick Capital.

Moving defendants state that Anthony executed a December 11, 2017 promissory note which adjusted the balance due to \$200,000.00 and replaced the amounts recited in the July 2015 agreement, and that contemporaneous with the 2017 note is a December 13, 2017 general release in which plaintiff Anthony expressly recognized the validity of Defendant's 50% share of the property and agreed to release Kew Gardens and its successors and assigns, from any claims whatsoever relating to the property, except for issues solely related to the promissory note:

ANTHONY J. HARRIS ... as RELEASOR ... KEW GARDENS DEV CORP ... as RELEASEE ... releases and discharges KEW GARDENS DEV CORP, the RELEASEE, RELEASEE's heirs, executors, administrators, successors and assigns from all actions, causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims, and demands whatsoever, in law, admiralty or equity, which against the RELEASEE, the RELEASOR, RELEASOR's heirs, executors, administrators, successors and assigns ever had, now have or hereafter can, shall or may, have for, upon, or by reason of any matter, cause or thing whatsoever from the beginning of the world to the day of the date of this RELEASE. See Exhibit J, NYSCEF Doc. No. 17.

Moving defendants also note that there is a related partition action against Ellen with index number 523816/2019.

Moving defendants argue that the first cause of action, for fraud, is barred by equitable estoppel, the merger doctrine, the many subsequent agreements (including the promissory note), and the general release Anthony signed. Moving defendants argue that finding fraud would be "unconscionable" in that it would strip the defendants of their property. Moving defendants contend that the fraud claim should also be dismissed because it is redundant to the plaintiffs' breach of contract claim. Defendants also contend that the doctrine of merger applies because all of the plaintiffs' claims relating to the contract of sale were extinguished at closing, citing to *Crowley Marine Associates v Nyconn Associates, L.P.*, 292 AD2d at 334 (2d Dept 2002) ("[t]itle to the property had closed and the deed was delivered. Therefore, any claims the purchaser might have had arising from any contract of sale were extinguished by the doctrine of merger unless there was a clear intent evidenced by the parties that a particular provision of the contract would survive delivery of the deed."). Defendants further state that the first cause of action does not apply to plaintiff Ellen.

With regard to the second cause of action, violation of the NY Deceptive Trade Practices Act (GBL § 349), moving defendants argue that the plaintiffs cannot show that the alleged conduct was consumer-oriented, and that plaintiffs cannot demonstrate that the alleged acts have

a broad impact on consumers at large because this was a private sale of private property. Moving defendants further assert that this cause of action is barred by a three-year statute of limitations.

Moving defendants also argue that the breach of contract cause of action must fail because there was no breach and, in any event, any alleged breach is barred by the general release. Moving defendants contend that the Court should grant defendants' motion to dismiss the first, second, fourth, fifth, and sixth causes of action on the grounds that they are all duplicative of the breach of contract cause of action. Defendants further make similar arguments that the fourth, fifth, sixth, seventh, and eighth causes of action are also barred by equitable estoppel, the merger doctrine, the subsequent agreements, and the general release, and/or are otherwise improperly pleaded or not recognized as standalone causes of action in New York.

In opposition, the plaintiffs state that on the same date and place that the contract of sale was allegedly executed, plaintiff Anthony Harris was deceived into executing a deed notwithstanding that the balance of the purchase price was not paid, and that defendant Kew Gardens fraudulently acquired title to Anthony Harris' entire interest in the subject property for \$150,000.00 without paying the balance of \$550,000.00. The plaintiffs allege that though Mr. Harris read through the contract and was assured verbally by defendants that he would be paid the entire agreed upon price, the defendants fraudulently switched one page of the contract out for another, removing the provision that states that defendants would pay Mr. Harris \$550,000.00 at closing. Plaintiffs further assert that Mr. Hanasab and Mr. Golan control and operate Kew Gardens, 132 Dean St. Corp., and La Solika. Plaintiffs also allege that Ms. Harris no longer has clean title to the property as a result of these fraudulent transactions and never had a relationship with any of the defendants. The plaintiffs argue that the defendants unconscionably forced Anthony Harris to sign several documents after they had already fraudulently obtained 50% title in the subject property.

With regard to the plaintiffs' second cause of action, for violation of the NY Deceptive Trade Practices Act, plaintiffs assert that defendants have engaged in predatory, fraudulent tactics against property owners, and that the plaintiffs have also been damaged by these practices. Plaintiffs also contend that the causes of action for breach of contract and tortious interference with contract are not barred by the general release in that the signature on this document was also obtained through fraud. Plaintiffs similarly argue that all remaining causes of action are adequately pleaded in their complaint and not barred by the general release, subsequent agreements, or any other allegedly controlling document.

A party seeking dismissal pursuant to CPLR § 3211(a)(1) on the ground that its defense is founded upon documentary evidence has the burden of submitting documentary evidence that resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim. *Mazur Bros. Realty, LLC v State of New York*, 59 AD3d 401 (2d Dept 2009); *Epifani v Johnson*, 65 AD3d 224 (Dept 2009); *see also Leon v Martinez*, 84 NY2d 83 (1994). A motion to dismiss based on CPLR § 3211(a)(1) may be granted only where the documentary evidence utterly refutes the plaintiff's factual allegations, conclusively establishing a defense as a matter of law. *Porat v Rybina*, 177 AD3d 632 (2d Dept 2019); *see also Phillips v Taco Bell Corp.*, 152 AD3d 806 (2d Dept 2017); *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314 (2002).

The moving defendants also seek dismissal based on CPLR § 3211(a)(7). In considering a motion to dismiss a pleading 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); *Nonnon v City of New York*, 9 NY3d 825, 827 (2007) (internal quotation marks omitted).

With regard to the plaintiffs’ claims of fraud and deception, “[a] plaintiff asserting a cause of action alleging fraud must plead all of the following elements: (1) a material misrepresentation or a material omission of fact which was false and which the defendant knew to be false, (2) made for the purpose of inducing the plaintiff to rely upon it, (3) the plaintiff’s justifiable reliance on the misrepresentation or material omission, and (4) injury.” *Nabatkhorian v Nabatkhorian*, 127 AD3d at 1043, 1043-1044 (2d Dept 2015). “[I]n any action based upon fraud, the circumstances constituting the wrong shall be stated in detail.” *Id.* at 1044 (internal quotation marks removed); *see also* CPLR § 3016(b). “[A]n essential element of any fraud [claim] is that there must be reasonable reliance, to a party’s detriment, upon the representations made’ by the defendant against whom the fraud claimed has been asserted.” *Id.* at 1044, quoting *Water St. Leasehold LLC v Deloitte & Touche LLP*, 19 AD3d 183, 185 (1st Dept 2013); *see also* *New York Military Academy v NewOpen Group*, 142 AD3d 489 (2d Dept 2016). Furthermore, to successfully assert a claim that the defendants violated the NY Deceptive Trade Practices Act, “a plaintiff must allege that a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice.” *City of New York v Smokes-Spirits.Com, Inc.*, 12 NY3d 616 (2009).

Here, even affording the complaint a liberal construction, accepting all facts as true, and according the plaintiffs the benefit of every inference, the plaintiffs have failed to plead their causes of action for fraud and for violation of the NY Deceptive Trade Practices Act. *See* *Lubonty v U.S. Bank N.A.*, 159 AD3d 962, 963 (2d Dept 2018); *see also* *Nabatkhorian* at 1043-1044; *Smokes-Spirits.Com* at 616. The complaint fails to state with sufficient particularity how the plaintiffs justifiably relied on misrepresentations or material omissions made by the moving defendants, how the misrepresentation was made for the purpose of inducing the plaintiffs to rely on it, and how the plaintiffs have now been injured by these alleged misrepresentations or omissions. *See* *Water St. Leasehold* at 185; *see also* CPLR § 3016(b). The plaintiffs’ claim pursuant to NY Deceptive Trade Practices Act (General Business Law § 349(a)) also fails because the plaintiffs have not identified that the injury resulted from consumer-oriented practices rather an isolated example of fraudulent behavior. *See* *Lum v New Century Mortg. Corp.*, 19 AD3d 558 (2d Dept 2005).

Turning to the remaining causes of action, 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 resulting damages.” *Ayers v City of Mount Vernon*, 176 AD3d 766, 769 (2d Dept 2019); *see also* *Webb v Greater New York Auto. Dealers Ass’n, Inc.*, 123 AD3d 1111 (2d Dept 2014); *Dee v Rakower*, 112 AD3d 204 (2d Dept 2013). “The elements of a cause of action alleging tortious

interference with contract are: (1) the existence of a valid contract between the plaintiff and a third party, (2) the defendant's knowledge of that contract, (3) the defendant's intentional procurement of a third-party's breach of that contract without justification, and (4) damages.” *Tri-Star Lighting Corp. v Goldstein*, 151 AD3d 1102, 1107 (2d Dept 2017), quoting *Nagan Constr., Inc. v Monsignor McClancy Mem. High Sch.*, 117 AD3d 1005, 1006 (2d Dept 2014). Furthermore, with regard to specific performance, “[i]t is axiomatic that in order to be entitled to specific performance of a contract, a plaintiff must demonstrate that he was ready, willing and able to perform his obligations under the contract regardless of the defendant's anticipatory breach.” *Zev v Merman*, 134 AD2d 555, 557 (2d Dept 1987). With regard to unjust enrichment, the theory “lies as a quasi-contract claim and contemplates an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties.” *Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 (2012) (internal quotation marks removed).

Here, the defendants have established that the merger doctrine bars any claims arising out of the contract of sale, requiring dismissal of the plaintiffs’ causes of action for breach of contract, tortious interference with contract, and specific performance. In a real estate transaction, the merger doctrine provides that once title to the property closes and the deed is delivered, “any claims the plaintiff[s] might have had arising from the contract of sale [are] extinguished.” *See Rosner v Bankers Standard Insurance Company*, 172 AD3d 1257, 1257 (2d Dept 2019). The plaintiffs’ argument that the merger doctrine should not apply because its application would be contrary to the intentions of the parties is unavailing. The plaintiffs have also not pointed to any contract provision upon which they rely that expressly states that it survives closing, which would preclude the application of the merger doctrine. *See Bibbo v 31-30, LLC*, 105 AD3d 791 (2d Dept 2013) (finding that claims related to the contract of sale are extinguished after the closing and transfer of the deed unless the provision allegedly breached explicitly states that it survives the closing). In particular, the contract states that “[e]xcept as otherwise expressly set forth in this contract, none of Seller's covenants, representations warranties or other obligations contained in this contract shall survive Closing.” *See* NYSCEF Doc. No. 24. Similarly, the plaintiffs fail to state a cause of action for unjust enrichment. The complaint alleges that the defendants “unjustifiably and fraudulently acquired 50% interest in the subject property without paying the consideration of \$700,000.00,” but does not state that there is no “actual agreement between the parties” and fails to state how injustice would be prevented. *See Georgia Malone & Co.* at 516; *see also* Summons and Complaint, NYSCEF Doc. No. 1.

Further, civil conspiracy is not recognized as an individual cause of action in New York, though “a plaintiff may plead the existence of a conspiracy in order to connect the actions of the individual defendants with an actionable, underlying tort and establish that those actions were part of a common scheme.” *Faulkner v City of Yonkers*, 105 AD3d 899, 900 (2d Dept 2013), quoting *Litras v Litras*, 254 AD2d 395 (2d Dept 1998). Since there is no individual cause of action for civil conspiracy recognized in New York, and because the underlying cause of action for fraud has also been dismissed, that cause of action must fail. *See Faulkner* at 900.

Lastly, to sustain a demand for punitive damages, the plaintiffs must allege “conduct of such an egregious nature directed at the plaintiffs” or “a pattern of such conduct directed at the public in general sufficient to sustain a demand for punitive damages.” *Podesta v Assumable Homes Development II Corp.*, 137 AD3d 767, 770 (2d Dept 2016) (internal quotation and

punctuation marks removed). The plaintiffs must also allege an underlying cause of action upon which a demand for punitive damages can be based, as “a demand or request for punitive damages is parasitic and possesses no viability absent its attachment to a substantive cause of action.” *Id.*; see also *Rocanova v Equitable Life Assur. Soc. of U.S.*, 83 NY2d 603 (1994). Accordingly, the plaintiffs’ claim for punitive damages must also fail on the grounds that it is not a viable cause of action standing on its own. Accordingly, the motion is granted in its entirety.

The remaining contentions are without merit.

Accordingly, it is hereby

ORDERED, that the motion by defendants Yuval Golan, Samiel Hanasab, Kew Gardens Development Corp., 132 Dean Street Corp., and 132 La Solika LLC to dismiss the complaint is **GRANTED** in its entirety and the complaint is dismissed as against these defendants.

This constitutes the decision and order of the Court.

DATED: February 17, 2022



HON. LILLIAN WAN, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020.