

**Tsai v Lo**

2022 NY Slip Op 30839(U)

March 10, 2022

Supreme Court, New York County

Docket Number: Index No. 653375/2020

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 59

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MAY TSAI,		INDEX NO. <u>653375/2020</u>
Plaintiff,		MOTION DATE <u>11/30/2020</u>
- v -		MOTION SEQ. NO. <u>001</u>
MARK PAUL LO and LI YU YEN		
Defendants.		<b>DECISION + ORDER ON MOTION</b>

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HON. DEBRA JAMES:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 17, 18, 19, 20, 21, 22, 23, 24, 25

were read on this motion to/for DISMISSAL.

ORDER

Upon the foregoing documents, it is

ORDERED that the motion of plaintiff pursuant to CPLR 3211(a)(1) and 3211(a)(7) to dismiss the first counterclaim for breach of contract, the second counterclaim for specific performance, the third counterclaim for detrimental reliance, the fourth counterclaim for fraud and misrepresentation, and the fifth counterclaim for breach of fiduciary duty that defendants interposed in their Amended Answer with Counterclaims is GRANTED, and the first, second, third, fourth, and fifth counterclaims of the Amended Answer with Counterclaims are dismissed; and it is further

ORDERED that counsel shall transmit to SFC-Part59@nycourts.gov and post on NYSCEF a proposed preliminary conference order or proposed competing preliminary conference order(s) at least two days before April 6, 2022, on which date counsel shall appear via Microsoft Teams, unless such appearance is waived by the court.

#### DECISION

Plaintiff is correct that defendants' first counterclaim for breach of contract to sell a fifty percent membership interest in Kissena HTL, LLC (KHTL), whose sole asset is the property known as 41-60 Kissena Boulevard, Flushing, New York, fails as violative of General Obligations Law § 5-703(2) (Statute of Frauds). In their Amended Answer with Counterclaims, which is not verified by either defendant (NYSCEF Document No. 16), defendants merely state that "Plaintiff promised that they would agree to a sale of the property two years after closing to allow a third party to purchase a 50% membership interest in KHTL." Nowhere in such pleading or the defense counsel affirmation in opposition are there any allegations of a memorandum, signed by the party to be charged that states the essential terms of a complete agreement, including, but not limited to, the sales price of such property. See Generas v Hotel Des Artistes, Inc., 117 AD2d 563, 566 (1986).

This court concurs with plaintiff that the first cause of action also fails because it alleges an agreement to agree, which is unenforceable. See Joseph Martin, Jr., Delicatessen, Inc. v Schumacher, 52 NY2d 105, 109-110 (1991). In addition, the second cause of action for specific performance, which is a remedy for breach of contract and not a claim, also lacks merit for the same reasons. Ibid.

Furthermore, as argued by plaintiff, defendants' third, fourth and fifth counterclaims sounding in fraud and breach of fiduciary duty are duplicative of the first and second counterclaims for breach of contract and are thus not sustainable. See Newport East Inc. v Sviba Floral Decorators, Inc., \_\_\_ NY3d \_\_\_, 2022 NY Slip Op 00819 (1<sup>st</sup> Dept 2022); Kamyr, Inc. v Combustion Engineering, Inc., 198 AD2d 44 (1<sup>st</sup> Dept 1993); and William Kaufman Organization, Ltd. v Graham & James LLP, 269 AD2d 171, 173 (1<sup>st</sup> Dept 2000) ("A cause of action for breach of fiduciary duty which is merely duplicative of a breach of contract claim cannot stand.") See also Manas v VMS Associates, LLC, 53 AD3d 451, 454-455 (1<sup>st</sup> Dept 2008):

"Rather, because they are merely '[g]eneral allegations that defendant(s) entered into a contract while lacking the intent to perform it[,the allegations} are insufficient to support [the fraud-based] claim[s]'. . .

"Additionally, the fraud-based causes of action must be dismissed for another, independent reason. \*\*\*Here, plaintiff did not allege that she sustained any damages that would not be recoverable under her breach of contract cause of action. . . .Thus, the fraud-based causes of action are duplicative of the breach of contract cause of action."

*Debra A. James*

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3/10/2022

DATE

DEBRA JAMES, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE