

<b>Bingzhe Liu v Jing Guo</b>
2023 NY Slip Op 30099(U)
January 9, 2023
Supreme Court, New York County
Docket Number: Index No. 651334/2022
Judge: Louis L. Nock
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

<p><b>PRESENT:</b> <u>HON. LOUIS L. NOCK</u></p> <p style="text-align: center;"><i>Justice</i></p> <p>-----X</p> <p>BINGZHE LIU,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- v -</p> <p>JING GUO, HUIJIE LIU, and SMILE INTERNATIONAL LLC,</p> <p style="text-align: center;">Defendants.</p> <p>-----X</p>	<p><b>PART</b> <span style="float: right;"><b>38M</b></span></p> <p><b>INDEX NO.</b> <u>651334/2022</u></p> <p><b>MOTION DATE</b> <u>04/28/2022, 07/06/2022</u></p> <p><b>MOTION SEQ. NO.</b> <u>001 003</u></p> <p style="text-align: center;"><b>DECISION + ORDER ON MOTION</b></p>
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The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 8, 9, 10, 11, 25, 26, 27, 28, 29, 30, 31, 32, 37, and 38

were read on this motion to CANCEL/EXTEND LIS PENDENS.

The following e-filed documents, listed by NYSCEF document numbers (Motion 003) 33, 34, 35, 36, and 39

were read on this motion to DISMISS.

Upon the foregoing documents, it is ORDERED that defendants Jing Guo and Smile International LLC's (the "moving defendants") motion to cancel the notice of pendency (Mot. Seq. No. 001) is granted, for the reasons set forth in the moving and reply papers (NYSCEF Doc. Nos. 9, 32) and the exhibits attached thereto, in which the court concurs. As more specifically set forth therein, a notice of pendency may be filed "in any action in a court of the state or of the United States in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property" (CPLR 6501). The statutory requirements must be strictly complied with, and an action unrelated to real property as set forth in the statute cannot support a notice of pendency (*5303 Realty Corp. v O & Y Equity Corp.*, 64 NY2d 313, 321 [1984]). Further, the notice of pendency must be evaluated based on the face of the original complaint; "a subsequent, amended complaint cannot be used to justify an earlier notice of pendency" (*id.*).

Here, the original complaint alleges claims for breach of contract, unjust enrichment, fraud, and civil conspiracy, and seeks only money damages. Accordingly, the notice of pendency in this case is improper and must be canceled. Plaintiff's amended complaint, which seeks to impose and foreclose upon an equitable mortgage as well as money damages, cannot justify an earlier filed and defective notice of pendency (*id.*). Moreover, plaintiff is not entitled to file an amended notice of pendency based upon the amended complaint. Successive notices of pendency are forbidden by statute, save for one exception not applicable herein (CPLR 6516[c]). Where a party has filed an improper notice of pendency, that party may not, by filing an amended pleading, file a successive notice of pendency (*Old World Custom Homes, Inc. v Crane*, 33 AD3d 600, 600-01 [2d Dept 2006]); and it is further

ORDERED that the Clerk of New York County is directed to cancel the original and amended notices of pendency filed in this action (NYSCEF Doc. Nos. 6 and 22) and indexed to the premises identified as 149 E. 29th Street, New York, New York 10016, located at Block 885 and Lot 39 within New York County.

AND IT IS FURTHER

ORDERED that the moving defendants' motion to dismiss the fourth cause of action for fraud, fifth cause of action for civil conspiracy, and plaintiff's claim for punitive damages (Mot. Seq. No. 003) is granted, for the reasons set forth in the moving and reply papers (NYSCEF Doc. Nos. 34 and 39), in which the court concurs. As more specifically set forth therein, a fraud claim may only be pleaded alongside a breach of contract claim where the plaintiff alleges a misrepresentation of fact collateral to the contract itself, and not simply that the defendant entered a contract it had no intent to perform (*Wyle Inc. v ITT Corp.*, 130 AD3d 438, 439 [1st Dept 2015]). Further, if the plaintiff alleges misrepresentations of present fact, such

misrepresentations cannot support a separate fraud claim where they are “within the scope of the parties’ rights and obligations under the terms of the [contract]” (*Panwest NCA2 Holdings LLC v Rockland NCA2 Holdings, LLC*, 205 AD3d 551, 552 [1st Dept 2022]). Here, plaintiff alleges various misrepresentations by defendants regarding the ownership status of the property at the center of the dispute, and the validity in New York of a Deed of Trust that was given to plaintiff to secure defendants Jing Guo and Huijie Lie’s repayment of a loan from plaintiff in the amount of \$300,000 (amended complaint, NYSCEF Doc. No. 15, ¶ 49). These allegations concern defendants’ obligations under the parties’ agreement and therefore cannot support a separate claim for fraud. Further, the complaint is devoid of allegations that defendant Smile International LLC ever made any misrepresentations to plaintiff.

The claims for civil conspiracy and punitive damages must be dismissed as well. New York does not recognize an independent cause of action for civil conspiracy (*Alexander & Alexander of New York, Inc. v Fritzen*, 68 NY2d 968, 969 [1986]). Further, plaintiff did not submit opposition to dismissal of the claim for punitive damages, and, in any case, the complaint does not allege sufficient conduct directed towards the public to justify an award of punitive damages (*Pier 59 Studios L.P. v Chelsea Piers L.P.*, 27 AD3d 217 [1st Dept 2006] [“The demand for punitive damages should also have been dismissed for lack of allegations of egregious tortious conduct independent of a breach of contract and aimed at the public generally”]); and it is further

ORDERED that the fourth and fifth causes of action and the claim for punitive damages are dismissed against defendants Jing Guo and Smile International LLC, and the Clerk of the Court is directed to enter judgment in favor of said defendants dismissing those claims; and it is further

ORDERED that the remainder of the action is severed and continued; and it is further  
 ORDERED that defendants Jing Guo and Smile International LLC shall serve an answer  
 to the complaint within twenty days of the filing hereof; and it is further  
 ORDERED that counsel shall appear for a status conference in Room 1166, 111 Centre  
 Street, on February 8, 2023, at 2:00 PM.  
 This constitutes the decision and order of the court.



<u>1/9/2023</u> DATE					<hr/> LOUIS L. NOCK, J.S.C.
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED		<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:		SETTLE ORDER			OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	FIDUCIARY APPOINTMENT
				<input type="checkbox"/>	REFERENCE