

Jiang v Howe

2023 NY Slip Op 31304(U)

April 19, 2023

Supreme Court, Kings County

Docket Number: Index No. 522911/2021

Judge: Leon Ruchelsman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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JAMES JIANG, SHERRY HOU, and RICH
BENEFIT LLC,

Plaintiffs,

Decision and order

- against -

Index No. 522911/2021

TINA HOWE,

Defendant,

April 19, 2023

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PRESENT: HON. LEON RUCHELSMAN

Motion Sequence #2

The defendant has moved seeking to dismiss the lawsuit pursuant to CPLR §3211. The plaintiff opposes the motion. Papers were submitted by the parties and reviewing all the arguments this court now makes the following determination.

According to the complaint on July 31, 2019 plaintiffs Jiang and Hou invested \$400,000 with the defendant to be used for the purchase, repair and resale of real estate. Specifically, the plaintiffs, through defendant Rich Benefit LLC invested \$400,000 to purchase properties located at 1018 38th Street, and 239 55th Street, both situated in Kings County. In the ensuing months inquiries by the plaintiffs concerning their investment yielded unsatisfactory responses. The plaintiffs commenced this action alleging the defendant breached the contract with the plaintiffs and defrauded them. The plaintiffs assert the defendant failed to invest any of her own funds thereby exposing the plaintiffs to all the risk involved. They maintain that conduct was not agreed upon when the investment was first

proposed.

The defendant has now moved seeking to dismiss the lawsuit on various grounds. As noted, the motion is opposed.

Conclusions of Law

It is well settled that upon a motion to dismiss the court must determine, accepting the allegations of the complaint as true, whether the party can succeed upon any reasonable view of those facts (Ripa v. Petrosyants, 203 AD3d 768, 160 NYS3d 658 [2d Dept., 2022]). Further, all the allegations in the complaint are deemed true and all reasonable inferences may be drawn in favor of the plaintiff (BT Holdings, LLC v. Village of Chester, 189 AD3d 754, 137 NYS2d 458 [2d Dept., 2020]). Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR §3211 motion to dismiss (see, Redwood Property Holdings, LLC v. Christopher, 211 AD3d 758, 177 NYS3d 895 [2d Dept., 2022]).

Pursuant to BCL §1312 and Limited Liability Law §808 a foreign corporation not authorized to do business in the state of New York may not maintain any actions within the state (Pergament Home Centers, Inc. v. Net Realty Holding Trust, 171 AD2d 736, 567 NYS2d 292 [2d Dept., 1991]). The precise definition of 'doing business' is fact specific, and must be decided on a case by case

basis (Highfill Inc., v. Bruce and iris Inc., 50 AD3d 742, 855 NYS2d 635 [2d Dept., 2008]). There are no precise activities that demonstrate 'doing business' and the party relying on the statute must demonstrate that the activities of the foreign corporation were systematic and regular and manifested a continuity of activity within the jurisdiction (Construction Specialists, Inc., v. Hartford Insurance Company, 97 AD2d 808, 468 NYS2d 675 [2d Dept., 1983]). Thus, in Uribe v. Merchants Bank of New York, 266 AD2d 21, 697 NYS2d 279 [1st Dept., 1999] the court held the foreign corporation was not 'doing business' in New York where there was no evidence the foreign corporation maintained any business office, maintained a business telephone number, owned real estate and had any employees in the state. The court found that the activities of the foreign corporation consisted of "solicitation of business and facilitating the sale and delivery of its merchandise incidental to its business in interstate and international commerce" and the court concluded that was insufficient to demonstrate the foreign corporation was 'doing business' in New York. Moreover, without evidence of doing business there is a presumption the corporation then does business in its area of incorporation (Household Bank (SB), NA v. Mitchell, 12 AD3d 568, 785 NYS2d 116 [2d Dept., 2004]). To rebut that presumption the party seeking to prevent the foreign business from maintaining jurisdiction has the burden of

demonstrating the business activities of the foreign corporation were systematic and regular as to manifest continuity of activity within New York (Gemstar Canada Inc., v. George A. Fuller Co., Inc., 127 AD3d 689, 6 NYS3d 552 [2d Dept., 2015]).

The defendant asserts the plaintiff Rich Benefit LLC is not authorized to do business in New York. While there is no dispute the plaintiff entity is not authorized to do business in New York, the defendant has failed to demonstrate that in fact the plaintiff entity actually conducted business in New York foreclosing the right to maintain this action. Indeed, the defendant has failed to rebut the presumption the plaintiff does business in the jurisdiction of its incorporation. The defendant does not cite any facts at all attempting to demonstrate the plaintiff entity conducts business in New York. Therefore, based on the foregoing, the defendant has failed to demonstrate the plaintiff cannot maintain an action in New York. Consequently, the motion seeking to dismiss the complaint on this basis is denied.

It is further well settled that to succeed upon a claim of breach of contract the plaintiff must establish the existence of a contract, the plaintiff's performance, the defendant's breach and resulting damages (Harris v. Seward Park Housing Corp., 79 AD3d 425, 913 NYS2d 161 [1st Dept., 2010]). Moreover, the existence of an oral agreement is generally a question of fact

which cannot be summarily determined on a motion to dismiss (see, Martin v. Cohen, 17 Misc3d 1116 (A), 851 NYS2d 64 [Supreme Court Suffolk County 2007]). The plaintiffs assert the individual plaintiff's entered into an oral agreement with the defendant "upon her promise that such monies would be repaid within three months, with interest" (see, Affirmation in Opposition, ¶54 [NYSCEF Doc. No. 48]). However, the Verified Complaint specifically states that "Howe informed Plaintiffs that their \$400,000 investment would be split into two portions. One part of the \$400,000 would be used to purchase 1018 38th Street, Brooklyn, New York (the 38th Street Property)". The other part would be used to purchase 239 55th Street, Brooklyn, New York (the "55th Street Property")" (see, Verified Complaint, ¶¶10,11 [NYSCEF Doc. No. 2]). Thus, the funds were specifically utilized for the purchase of real property. The Statute of Frauds provides that "an estate or interest in real property cannot be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the person creating, granting, assigning, surrendering or declaring the same, or by his lawful agent, thereunto authorized by writing" (General Obligations Law §5-703(1)). Thus, there can be no oral contract made between the parties. Consequently, the motion seeking to dismiss the breach of contract claim as to the individual plaintiff's is granted.

Turning to the motion seeking to dismiss the fraud claim, it is well settled that to succeed upon a claim of fraud it must be demonstrated there was a material misrepresentation of fact, made with knowledge of the falsity, the intent to induce reliance, reliance upon the misrepresentation and damages (Cruciata v. O'Donnell & McLaughlin, Esqs, 149 AD3d 1034, 53 NYS3d 328 [2d Dept., 2017]). These elements must each be supported by factual allegations containing details constituting the wrong alleged (see, JPMorgan Chase Bank, N.A. v. Hall, 122 AD3d 576, 996 NYS2d 309 [2d Dept., 2014]). At this juncture the complaint adequately alleges the defendant induced the plaintiff's to invest in properties whereby the defendant misrepresented the nature of her investments as well undermining the comfort the plaintiff's would have felt knowing the defendant was likewise incurring the risk of the investment. The Verified Complaint alleges specific and detailed misrepresentations which support a fraud claim. While further discovery will sharpen the fraud alleged, at this juncture the allegations state a claim for fraud. Consequently, the motion seeking to dismiss that cause of action is denied.

Lastly, the defendant asserts the breach of contract claim must be dismissed as to Rich Benefit LLC because a condition precedent has not been fulfilled.

It is well settled that a condition precedent is an "act

or event, other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the agreement arises" (Oppenheimer & Company Inc., v. Oppenheim, Appel, Dixon and Co., 86 NY2d 685, 636 NYS2d 734 [1995]). Thus, a condition precedent is an act or an event that must occur before the obligations of the parties become operative. If such condition is not fulfilled then the parties are excused from performing under the contract. For example where a broker maintains a contract for the commission of a fee upon closing of title a condition precedent to the contract requires the title actually close (Levy v. Lacey, 22 NY2d 271, 292 NYS2d 455 [1968]). Generally, it is for the court to decide whether a term of a contract is in fact a condition precedent (Rooney v. Slomowitz, 11 AD3d 864, 784 NYS2d 189 [3rd Dept., 2004]). It must be clear from the contract itself the parties intended a provision to operate as a condition precedent (Kass v. Kass, 235 AD2d 150, 663 NYS2d 581 [2d Dept., 1997]). Therefore, if there ambiguity in the language such language will not be treated as a condition precedent (id).

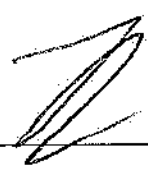
The Verified Complaint alleges the plaintiffs invested \$400,000 on July 31, 2019 (see, Verified Complaint, ¶13 [NYSCEF Doc. No. 2]) and that after the properties were renovated they would be sold for a profit. The Verified Complaint asserts the defendant failed to honor her commitment to invest her own funds

along with the plaintiffs. The document to which the defendant refers states that the money would be repaid to the plaintiffs after the properties are sold. However, that agreement is not a condition precedent concerning the initial investment. Rather, that agreement was an attempt to repay the plaintiffs following two years of inaction. That agreement does not mean the plaintiff cannot pursue its initial claim that the defendant breached the agreement regarding the initial investment. Therefore, the motion seeking to dismiss any claims against Rich Benefit LLC is denied.

So ordered.

ENTER:

DATED: April 19, 2023
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC