

**Goldberg v KOSL Bldg. Group LLC**

2023 NY Slip Op 34863(U)

May 31, 2023

Supreme Court, Westchester County

Docket Number: Index No. 61968/2022

Judge: Damaris E. Torrent

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

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MICHAEL GOLDBERG and KATIE GOLDBERG,

Plaintiffs,

-against-

**DECISION AND ORDER**

**Index No.: 61968/2022**

**Motion Date: 4/11/2023**

**Seq. No. 2**

KOSL BUILDING GROUP LLC, COOPER LOTS,  
LLC, BOBBY BEN-SIMON, XYZ COMPANIES,  
and JOHN OR JANE DOES,

Defendants.

-----X

**DAMARIS E. TORRENT, A.J.S.C.**

The following papers were read on the above referenced motion by plaintiffs for an order pursuant to CPLR 3211(a)(1), (2), (3), (5), (7), and (10) and other laws, dismissing the counterclaims asserted against plaintiffs in the answer to first amended complaint filed on January 17, 2023, or alternatively, directing a more definite statement of claims pursuant to CPLR 3024(a), and for such other and further relief as this Court deems just and proper.

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion / Memorandum of Law in Support / Affirmation in Support / Exhibits / Goldberg Affidavit / Exhibits	1-11
Affirmation in Opposition / Exhibits / Memorandum of Law in Opposition	12-16
Memorandum of Law in Reply / Goldberg Affidavit in Reply / Exhibits	17-22

This action arises out of a failed real estate transaction pursuant to which plaintiffs entered into contracts with defendants for the purchase of a parcel of real property in Scarsdale, New York (the land contract) and the construction thereon of a luxury home (the building contract). Pursuant to the contracts, plaintiffs delivered two down payments to an escrow agent, a down payment of

\$210,000 pursuant to the land contract, and an initial down payment of \$328,800 pursuant to the construction contract. Plaintiffs allege that the construction contract also obligated plaintiffs to make a second down payment of \$328,800 in the event they closed on the purchase of the property (Plaintiff's Memorandum of Law, p. 2-3). Defendants argue that the land contract was breached without cause when plaintiff Katie Goldberg did not go to a time of the essence closing, and plaintiffs have no right to demand a return of the deposit on the land contract. Defendants allege that by failing to appear at the closing on the land contract on June 27, 2022, plaintiffs willfully defaulted under the building contract (Defendants Memorandum of Law, p. 6, 9).

Defendants filed a pre-answer motion to dismiss the complaint. Plaintiffs filed an amended complaint as of right pursuant to CPLR 3025(a). Defendants' reply to the motion to dismiss was addressed to the amended complaint. By decision and order dated December 28, 2022, this Court granted defendants' motion to the extent of dismissing the first, second, third and fifth causes of action in the first amended complaint and any claim to pierce the corporate veil, and the motion was otherwise denied (NYSCEF doc #27). Plaintiffs' motion for an order granting reargument was denied (NYSCEF doc #69).

In defendants' answer to the first amended complaint, defendants asserted five counterclaims, alleging breach of the land contract, declaratory judgment under the building contract, breach of the building contract, and reimbursement of attorney's fees under the building contract (Plaintiff's Exhibit 1). In considering a motion to dismiss for failure to state a cause of action, the pleading must be liberally construed. The Court must accept the facts as alleged as true, accord the nonmoving party the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. However, bare legal conclusions are not presumed to be true and are not accorded every favorable inference (*Grant v DiFeo*, 165 AD3d 897 [2d Dept 2018]). The standard is whether the pleading states a cause of action (*Houtenbos v Fordune Assn., Inc.*, 200 AD3d 662 [2d Dept 2021]). When the moving party submits evidentiary

material in support of the motion, the criterion becomes whether the proponent of the pleading has a cause of action, not whether he has stated one (*Sokol v Leader*, 74 AD3d 1180 [2d Dept 2010]). Whether a party can ultimately establish the allegations is not part of the calculus (*Dee v Rakower*, 112 AD3d 204 [2d Dept 2013]).

Additionally, dismissal of an action on the ground that a defense is founded upon documentary evidence pursuant to CPLR 3211(a)(1) is warranted only when the documentary evidence utterly refutes the plaintiff's factual allegations, conclusively establishing a defense as a matter of law. "To constitute documentary evidence, the evidence must be unambiguous, authentic, and undeniable, such as judicial records and documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable" (*Karpovich v City of New York*, 162 AD3d 996 [2d Dept 2018])[internal quotations and citations omitted]. The evidence submitted on such a motion must be documentary; affidavits, letters and deposition testimony do not qualify (*Granada Condominium III Assn. v Palomino*, 78 AD3d 996 [2d Dept 2010]). Where evidence submitted on the motion establishes that a material fact, as claimed, is not a fact at all and there is no significant dispute, dismissal is warranted (*see Greenstein v Danzy*, 2022 NY Slip Op 06232 [2d Dept 2002]).

In the first counterclaim for breach of the land contract, defendants allege Cooper Lots, LLC performed all of its obligations to the Goldbergs under the land contract, and the Goldbergs breached the land contract by failing to appear at the scheduled time of the essence closing. It is alleged that the Goldbergs' failure to close the transaction resulted in damages to Cooper Lots, LLC and Cooper Lots, LLC may retain the land deposit of \$210,000 under paragraph 23(a) of the land contract.

In the fourth counterclaim for breach of the building contract, defendants allege the building contract is a valid agreement between KOSL Building and the Goldbergs. It is alleged that KOSL Building performed under the building contract. It is alleged that the Goldbergs

breached the building contract by failing to provide the second building deposit at the time of the essence closing date of the land contract and by failing to close on the transaction contemplated by the land contract, which did not permit the construction of the one family residence. Defendants allege that the Goldbergs' breach of the building contract resulted in damages to KOSL Building, including lost profits and costs already incurred (i.e. architect/engineer fees and permit fees) (Plaintiff's Exhibit 1, p. 24). The fifth counterclaim seeks reimbursement of attorney's fees pursuant to the terms of the building contract (Plaintiff's Exhibit 1, p. 25).

Plaintiffs contend that defendants' counterclaims should be dismissed pursuant to CPLR 3211(a)(1) on the grounds that the building contract expressly states that defendants are not entitled to any recovery under the building contract if plaintiffs failed to close on the land contract. Plaintiffs argue that the contracts limited the total exposure of the plaintiffs exclusively to the land deposit in the event that they did not proceed with the land contract for any reason (Plaintiffs' Memorandum of Law, p. 10). Plaintiffs rely in part on an email from defendants' counsel, Michele Luzio, and her comments on a contract draft to explain the meaning of paragraph 7(b) of the building contract (Goldberg Affidavit, Exhibit 3). As the email and comments may be controverted by other evidence, they do not constitute documentary evidence within the meaning of CPLR 3211(a)(1) (*see Xu v Van Zwiennen*, 212 AD3d 872 [2d Dept 2023]; Goldberg Affidavit, Exhibit 3).<sup>1</sup> Contrary to plaintiffs' arguments, the documentary evidence submitted on this motion fails to utterly refute defendants' factual allegations on the counterclaims. The subject contracts do not conclusively establish a defense to the counterclaims as a matter of law (Goldberg Affidavit, Exhibit 1, 2).

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<sup>1</sup> The Court notes that a comment on a draft of the building contract to Keith, presumably the Goldbergs' attorney Keith Schutzman, states "[t]he money is held in escrow until closing and must be released at closing. If the sale of land does not close, this gets returned."

In the second counterclaim, defendants seeks a declaratory judgment under the building contract, alleging that pursuant to paragraph 7(b) of the building contract, the first building deposit is non-refundable. It is alleged that KOSL Building performed under the building contract, the Goldbergs have demanded the return of the first building deposit, and the parties dispute whether failing to close the transaction contemplated by the land contract permits KOSL Building to retain the first building deposit. KOSL Building alleges that it does not have an adequate remedy at law, and it seeks a judicial determination that it may retain the first building deposit for \$328,800 (Plaintiff's Exhibit 1, p. 22).

In the third counterclaim, defendants seek a declaratory judgment under the building contract, alleging that pursuant to paragraph 7(c) of the building contract, the second building deposit of \$328,800 was due at the time of the essence closing date of the sale of the land contemplated by the land contract. It is alleged that the Goldbergs failed to appear at the closing date on the land contract, breaching the land contract and failing to provide the second building deposit at that time. KOSL Building alleges that it does not have an adequate remedy at law and it seeks a judicial determination that it may collect the second building deposit (Plaintiff's Exhibit 1, p. 23).

As a general rule, a cause of action for declaratory judgment is unnecessary and inappropriate when the party asserting the claim "has an adequate, alternative remedy in another form of action, such as breach of contract" (*187 Schermerhorn Owners Co., LLC v Board of Mgrs. of the Be @Schermerhorn Condominium*, 186 AD3d 1467, 1468 [2d Dept 2020] [citations omitted]). The second and third counterclaims seeking declaratory judgment under the building contract are duplicative of the fourth counterclaim for breach of the building contract. The second and third counterclaims specifically reference paragraphs in the building contract, asserting rights to a deposit paid and a deposit allegedly owed under the building contract. It appears the second and third counterclaims are unnecessary and inappropriate, as the allegations and relief sought

therein may be properly asserted in the breach of contract cause of action. Defendants present no authority to the contrary and make no persuasive argument as to why defendants do not have an adequate remedy under the fourth counterclaim for breach of the building contract. As such, the second and third counterclaims are dismissed as duplicative.

Defendants contend that dismissal of the second and third counterclaims should be without prejudice to defendants filing an amended answer alleging KOSL Building has a right to retain the first building deposit and seeking damages for failure to pay the second building deposit (Defendants' Memorandum of Law, p. 22). Defendants' request is granted to the extent that they may within ten (10) days file an amended answer for the limited purpose of including the allegations asserted in the second and third counterclaims within the counterclaim for breach of the building contract.

Plaintiffs' request for oral argument on this motion is denied. The parties' remaining contentions have been considered and are without merit.

Accordingly, it is hereby

ORDERED that the plaintiffs' motion is granted to the extent that defendants' second and third counterclaims seeking declaratory judgment under the building contract are dismissed; and it is further

ORDERED that defendants may within ten (10) days serve an amended answer for the limited purpose set forth herein; and it is further

ORDERED that plaintiffs may serve a reply to counterclaims within ten (10) days of service of the amended answer (CPLR § 3211[f]); and it is further

ORDERED that plaintiffs shall serve a copy of this Decision and Order with notice of entry upon all parties and file proof of service on NYSCEF within ten (10) days; and it is further

ORDERED that all parties shall comply with the dates in the April 18, 2023 compliance conference order; and appear for a virtual compliance conference on June 20, 2023 at 11 a.m.; and it is further

ORDERED that counsel shall not file any further motions in this matter prior to filing a letter to NYSCEF requesting a pre-motion conference to attempt to resolve the issue.

The foregoing constitutes the Decision and Order of the Court.

Dated: May 31, 2023  
White Plains, New York

**ENTER:**

  
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HON. DAMARIS E. TORRENT, A.J.S.C.

TO: All parties via NYSCEF

FILED VIA NYSCEF