Xinni Zhang v Chu
2024 NY Slip Op 31639(U)
May 8, 2024
Supreme Court, New York County
Docket Number: Index No. 156407/2022
Judge: Nancy M. Bannon

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY M. BANNON** **PART** **61M**

Justice

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XINNI ZHANG,

Plaintiff,

- v -

STEPHEN CHU, YO-YO LIN, LAW OFFICE OF SANDOR KRAUSS, P.C.,

Defendants.

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INDEX NO. 156407/2022

MOTION DATE 12/19/2023

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 153, 154, 155, 156, 157, 158, 159, 160, 161, 163, 164, 165, 166

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

I. INTRODUCTION

This action arises from the aborted sale of an apartment located at 75 Wall Street in Manhattan pursuant to a contract of sale between the plaintiff, Xinni Zhang ("Zhang"), as purchaser, and defendant Stephen Chu ("Chu"), as seller. Chu now moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint as against him and, in effect, granting him judgment on his counterclaim for breach of contract, for which he seeks to recover Zhang's deposit payment as liquidated contract damages, as well as contractual attorneys' fees. Zhang opposes the motion. The motion is granted in part.

II. BACKGROUND

On February 11, 2022, Chu and Zhang executed a Contract of Sale (the "Contract") for a condominium located at 75 Wall Street in Manhattan (the "Unit"). Upon execution, Zhang paid $137,500 into escrow (the "Contract Deposit"), to be held by defendant Law Office of Sandor Krauss, P.C. ("Escrow Agent") and paid to Chu at the closing. Pursuant to Section 10.1 of the Contract, in the event of a default by Zhang, Chu's sole remedy would be to retain the Contract Deposit as liquidated damages. The Contract did not contain a mortgage contingency

provision; to the contrary, it expressly provided, in Section 1.21.2, that "[Zhang's] obligation to purchase under this Contract is not contingent upon" her ability to secure financing for the purchase. The Contract stated that the parties' attorneys could extend "in writing" any of the time limitations set in the Contract, but that any other contract provisions could only be changed or waived in a writing signed "by the Party or Escrowee to be charged." Pursuant to Section 29, the parties agreed that, in the event of litigation to enforce the Contract or recover for a breach thereof, the prevailing party would be entitled to recover all associated costs and expenses, including reasonable attorneys' fees. The Contract set a closing date "on or about 30 days from the date herein," which would have been on or about March 12, 2022. The closing did not occur as contemplated in the Contract.

On April 25, 2022, Chu sent a letter to Zhang informing her that she was in default, having failed to close by the on-or-about date provided in the Contract, and setting an extended, "time of the essence" closing date of May 25, 2022, to allow Zhang to cure her default. Zhang responded by letter dated May 11, 2022, rejecting the time of the essence closing date of May 25, 2022, citing her inability to secure financing, and requesting a refund of the Contract Deposit. Zhang thereafter failed to appear for the closing on May 25, 2022.

By letter dated June 1, 2022, Zhang again demanded that Chu refund the Contract Deposit and asserted that a failure to do so would be a breach of the Contract. Zhang again wrote to Chu on July 1, 2022, asserting that "this transaction is not complete, negotiations regarding the above-referenced transaction are still ongoing," and that Chu's actions in relisting the Unit was a breach of the Contract. Chu's attorney responded by email the same day, asking "When is the buyer ready to close the title? Can a mutually convenient date be chosen to close?" Zhang responded on July 5, 2022, offering a firm closing date of August 5, 2022 on the condition that: (1) the $137,500 Contract Deposit, together with accrued interest, be applied as part of the purchase price; (2) the purchase price be reduced to $1,255,000 to account for changed market conditions; and (3) Chu's property listing "represent[] that the property is under contract."

On July 6, 2022, Chu counteroffered, stating that he was "willing to reduce the purchase price from $1,375,000.00 to $1,355,000.00," rather than the $1,255,000 reduced price requested by Zhang, and that if this was acceptable the closing could move forward on August 5, 2022. On July 12, 2022, Zhang responded with an offer to close on August 12, 2022, at a

reduced price of $1,295,750. Chu replied on July 19, 2022, with an offer to reduce the purchase price to $1,350,000. On July 21, 2022, having received no response to his last offer, Chu notified Zhang through counsel that her silence evidenced a failure to negotiate in good faith, and that an immediate closing was demanded pursuant to the Contract's original terms. Zhang again refused to close.

By letter dated July 22, 2022, Zhang informed Chu that the previously agreed-upon Contract no longer applied because the parties undertook to negotiate "a new contract of sale price and a new closing date," and again demanded a refund of the Contract Deposit based on the impasse in negotiations. Chu responded the same day, reiterating that, the attempts to renegotiate the purchase price having stalled, the unaltered terms of the Contract obligated Zhang to purchase the Unit at the originally agreed-upon price; that Zhang was in default, having failed to appear on the time of the essence closing date of May 25, 2022; and that her claimed inability to obtain financing did not excuse her default given that the Contract has no mortgage contingency. Zhang responded on July 26, 2022, stating that Chu's assertions were "false" and again demanding a return of the Contract Deposit.

Zhang commenced this action on August 2, 2022, asserting three causes of action: (1) conversion, based on the refusal to return the Contract Deposit; (2) a declaratory judgment declaring that Chu breached the Contract and directing a return of the Contract Deposit; and (3) unjust enrichment, based on the failure to return the Contract Deposit. In his answer, Chu asserted three counterclaims: (1) breach of contract by Zhang based on her failure to close, (2) a judgment declaring that Zhang beached the contract, and (3) sanctions for frivolous conduct. Discovery commenced and a Note of Issue was filed on June 30, 2023. In the meantime, by an order dated September 25, 2023, the court granted a motion by defendant Law Office of Sandor Krauss, P.C., escrow agent, to pay the escrowed sum, $137,500, into court and be released of all further liability (MOT SEQ 004). The instant motion ensued.

III. DISCUSSION

On a motion for summary judgment, the moving party must make a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824 (2014); Alvarez v Prospect Hosp., 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980).

Once the movant meets this burden, it becomes incumbent upon the party opposing the motion to come forward with proof in admissible form to raise a triable issue of fact. See Alvarez v Prospect Hospital, supra; Zuckerman v City of New York, supra. A breach of contract claim requires the proponent to demonstrate (1) the existence of a contract, (2) the plaintiff's performance under the contract, (3) the defendant's breach of that contract, and (4) resulting damages. See Second Source Funding, LLC v Yellowstone Capital, LLC, 144 AD3d 445 (1st Dept. 2016); Harris v Seward Park Housing Corp., 79 AD3d 425 (1st Dept. 2010).

(A) Chu's Breach of Contract Counterclaim

In support of his motion, Chu submits, *inter alia*, the pleadings; the Contract; his time of the essence letter to Zhang, dated April 25, 2022, which set a closing date of May 25, 2022; and Zhang's letter in response, dated May 11, 2022, rejecting the closing date of May 25, 2022, citing her inability to secure financing, and demanding the return of the Contract Deposit based on the Contract's purported cancellation. Chu also submits his own sworn affidavit, in which he lays the foundation for his other submissions, and states, *inter alia*, that he had complied with his contractual obligations and was ready, willing, and able to convey marketable title to the Unit on the May 25, 2022, closing date, but that the plaintiff did not appear, and failed to close, on the appointed date.

By these submissions, Chu demonstrates, *prima facie*, his entitlement to judgment as a matter of law on his counterclaim for breach of contract. Specifically, Chu's submissions demonstrate that he performed his obligations under the Contract and was ready, willing, and able to transfer title, but that Zhang defaulted on the Contract by failing to close on either the date originally stipulated—on or around March 12, 2022—or on the time of the essence date of May 25, 2022. The submissions further demonstrate that Zhang's sole stated basis for refusing to close—her inability to secure financing—was invalid, as the Contract not only does not contain a mortgage contingency clause, but expressly states, in Section 1.21.2, that Zhang's obligation to purchase is not contingent upon her ability to secure financing. Because Zhang defaulted, Chu is entitled, pursuant to Section 10.1 of the Contract, to recover the Contract Deposit, which has now been paid into court, as liquidated damages and, pursuant to Section 29 of the Contract, to recover his attorneys' fees from Zhang.

In opposition, and in addition to the documents submitted by Chu, Zhang submits, *inter alia*, her own affidavit and the affidavit of her former counsel, Serge Mekhityev, both of which

state that Chu orally agreed to adjourn the closing date during a conference call held on May 19, 2022; the deposition transcript of Sandor Krauss on behalf of the Escrow Agent, in which Krauss likewise states that the May 25, 2022 closing date was adjourned; Chu's deposition transcript, in which he testifies, *inter alia*, regarding an unpaid mortgage balance and common charges encumbering the Unit; numerous letters and emails exchanged by Zhang's, Chu's, and the Escrow Agent's attorneys subsequent to May 25, 2022 related to Zhang's attempts to renegotiate the purchase price for the Unit and/or demand the return of the Contract Deposit; online listings for the Unit; and various documents related to the encumbrances on title to which Chu testified, including the outstanding mortgage balance and unpaid common charges, which Chu was contractually obligated to pay in order to deliver clear title at closing. These submissions fail to raise a triable issue of fact.

Zhang argues that she did not default by failing to close because the May 25, 2022, date was not a binding time of the essence closing date. This argument is unavailing. "Where, as here, the original contract does not make the designated closing date 'time of the essence', either party may set a reasonable closing date after the initially scheduled closing date has passed and declare that the newly scheduled date is 'time of the essence', and that failure to perform on such date will be considered a default." Madison Park Owner LLC v Schneiderman, 93 AD3d 555, 556 (1st Dept. 2012); see REEC West 11th Street LLC v 246 West 11th St. Corp., 162 AD3d 472 (1st Dept. 2018). "Time may be made of the essence by clear, distinct, and unequivocal notice to that effect giving the other party a reasonable time in which to act." Revital Realty Grp., LLC v Ulano Corp., 112 AD3d 902, 904 (2nd Dept. 2013) (internal quotation marks omitted). "What constitutes a reasonable time to perform turns on the circumstances of the case." Id. Here, Chu's April 25, 2022, letter, which was sent approximately 45 days after the original date set for the closing, gave "clear, distinct, and unequivocal" notice that time was of the essence. Moreover, the letter gave Zhang a reasonable time in which to close, providing an additional 30 days, until May 25, 2022, on top of the approximately 45 days that had already elapsed since the original closing date set in the Contract, for her to close. See REEC West 11th Street LLC v 246 West 11th St. Corp., supra (two-month adjournment of original closing date was reasonable); 2626 Bway LLC v Broadway Metro Assocs., LP, 85 AD3d 456 (1st Dept. 2011) (three-week adjournment of closing date found reasonable); compare Miller v Almquist, 241 AD2d 181 (1st Dept. 1998) (15-day adjournment of closing date not reasonable).

Also unavailing is Zhang's contention that Chu agreed to adjourn or otherwise waived the May 25, 2022, closing date. In support of this argument, Zhang relies on the parties' correspondence after May 25, 2022, as well the affidavit and deposition testimony concerning Chu's purported oral agreement to adjourn the closing date during a conference call held on May 19, 2022. However, the Contract, by its express terms, provides that any extension of time limitations or waiver of contract provisions must be in writing. Zhang's submissions include no such writing. The affidavit and deposition testimony on which she relies relate to a purported oral modification of the closing date, which would be invalid pursuant to the Contract's express terms. And the parties' correspondence subsequent to May 25, 2022, merely reflects attempts to negotiate a resolution of the default that had already occurred, but does not reflect an agreement, reduced to writing, to further extend the closing date. To the extent new closing dates were discussed as part of these negotiations, they were always conditional upon the acceptance of additional terms, none of which were ever accepted.

Zhang also argues that Chu failed to perform in that he was not ready, willing, and able to close on May 25, 2022, and that Chu repudiated the Contract and breached the implied covenant of good faith and fair dealing by relisting the Unit subsequent to May 25, 2022. In support of these contentions, Zhang submits a number of online listings for the Unit, as well as Chu's deposition testimony and various documents related to encumbrances on title, including an outstanding mortgage balance and unpaid common charges, which Chu was contractually obligated to pay in order to deliver clear title. These submissions are likewise insufficient to raise a triable issue of fact. The contention that Chu failed to perform his obligations under the Contract by not paying off a mortgage balance and outstanding common charges prior to the closing date is unavailing because the Contract, in Section 2.13 and paragraph R8 of the Purchaser's Rider Clauses, provides for these encumbrances to be paid off at the closing out of the proceeds of the sale. As such, and given that the closing did not occur, the mere fact that these encumbrances existed and were not yet paid does not raise a triable issue of fact as to Chu's performance under the Contract.

Nor was Chu's relisting of the Unit an anticipatory breach of the Contract or a breach of the implied covenant of good faith and fair dealing. "An anticipatory breach of contract by a promisor is a repudiation of [its] contractual duty before the time fixed in the contract for . . . performance has arrived." Princes Point LLC v Muss Dev. L.L.C., 30 NY3d 127, 133 (2017) (internal quotation marks omitted). "For an anticipatory repudiation to be deemed to have

occurred, the expression of intent not to perform by the repudiator must be positive and unequivocal." Id. "[A] wrongful repudiation of the contract by one party . . . entitles the nonrepudiating party to immediately claim damages for a total breach" (Id. [internal quotation marks omitted]), and "relieves the nonrepudiating party of its obligation of future performance" (Am. List Corp. v U.S. News & World Rep., Inc., 75 NY2d 38, 44 [1989]). Chu's relisting of the Unit after May 25, 2022 cannot constitute an anticipatory breach because the "time fixed in the contract for . . . performance"—*i.e.*, the original closing date, followed by the May 25, 2022 time of the essence closing date—had already come and gone. Moreover, even leaving aside Zhang's own actual breach of the Contract by failing to close, her letter dated May 11, 2022, rejecting the time of the essence closing date on the expressly invalid basis of her inability to secure financing and demanding the return of the Contract Deposit, was itself a "positive and unequivocal" anticipatory repudiation of the Contract, which relieved Chu of any further obligation to perform. Similarly, the implied covenant of good faith and fair dealing "embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." Forman v Guardian Life Ins. Co. of Am., 76 AD3d 886, 888 (1st Dept. 2010) (internal quotation marks omitted). Only Zhang violated that covenant. Upon Zhang's own breach, Chu's relisting of the Unit could not have injured any of Zhang's rights under the Contract.

For these reasons, the court grants the branch of Chu's summary judgment motion seeking judgment in his favor on his counterclaim for breach of contract. The branch of Chu's summary judgment motion seeking dismissal of Zhang's complaint is likewise granted.

(B) Zhang's Causes of Action

Zhang's cause of action for conversion, a tort, is improperly asserted in the first instance. The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter." Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382, 388 (1987). "A simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated." Id. at 389; see Superior Officers Council Health & Welfare Fund v Empire HealthChoice Assur., Inc., 85 AD3d 680 (1st Dept. 2011). That is not the case here as this is quintessentially a breach of contract action.

Similarly, as a general rule, where a plaintiff seeks to recover under an express

agreement, no cause of action lies to recover for unjust enrichment. See Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382 (1987); JDF Realty, Inc. v Sartiano, 93 AD3d 410 (1st Dept. 2012). In any event, Zhang cannot demonstrate that "it is against equity and good conscience to permit [Chu] to retain what is sought to be recovered." Paramount Film Distrib. Corp. v State, 30 NY2d 415, 421 (1972) (citations omitted). To the contrary, because it was Zhang, and not Chu, who breached the contract, the court is granting him summary judgment and permitting him to retain the Contract Deposit, per the parties' contract.

The parties' respective causes of action purportedly for a declaratory judgment that the other breached the contract are not viable here. "A cause of action for a declaratory judgment is unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action, such as breach of contract." Apple Records v Capitol Records, 137 AD2d 50, 54 (1st Dept. 1988); see CPLR 3001; NMC Residual Ownership L.L.C. v U.S. Bank N.A., 153 AD3d 284 (1st Dept. 2017); Singer Asset Fin. Co., LLC v Melvin, 33 AD3d 355 (1st Dept. 2006). That is, "[i]t is well settled that a declaratory judgment action should be not be entertained where it parallel[s] a breach of contract claim, and merely seek[s] a declaration of the same rights and obligations." Colfin SNP-1 Funding, LLC v Security Natl. Props. Servicing Co., LLC, 199 AD3d 406 (1st Dept. 2021) (internal quotation marks and citation omitted).

(C) Chu's Remaining Counterclaim and Requests for Relief

In addition to his counterclaims for breach of contract and declaratory relief, Chu asserts a cause of action for sanctions, in the form of attorney's fees, for frivolous conduct. That branch of his motion is denied. Zhang's action, though found to be without merit, does not constitute frivolous conduct within the meaning of 22 NYCRR 130-1.1(a). Moreover, having prevailed in obtaining summary judgment dismissing Zhang's complaint in its entirety and an award of summary judgment on his breach of contract counterclaim, Chu is already entitled to recover contractual attorneys' fees and costs pursuant to Section 29 of the Contract.

"To determine whether a party has 'prevailed' for the purpose of awarding attorneys' fees, the court must consider the 'true scope' of the dispute litigated and what was achieved within that scope (see Excelsior 57th Corp. v Winters, 227 AD2d 146 [1996]). To be considered a 'prevailing party", one must simply prevail on the central claims advanced, and receive substantial relief in consequence thereof (see Board of Mgrs. of 55 Walker Condo. v Walker St.,

6 AD3d 279 [2004])." Sykes v RFD Third Ave. I Assocs., LLC, 39 AD3d at 279 (1st Dept. 2007). Chu has clearly prevailed here. However, Chu has not submitted any affirmation, billing records, invoices or other proof to establish the amount of fees and costs incurred. He may submit supplemental proof, if so advised, within 30 days.

The branch of Chu's motion that seeks an order directing Zhang to pay the attorneys' fees and cost of the Escrow Agent incurred in this action is likewise denied, without prejudice. The Escrow Agent, defendant Law Office of Sandor Krauss, P.C., is no longer a party to this action, having been released from liability to any party by a prior order. Further, while Section 13.2 of the Contract provides that the parties are jointly and severally liable, with a right of contribution, to indemnify the Escrow Agent against, *inter alia*, its attorney's fees and costs incurred in this action, Chu's request, in effect, for contribution from Zhang, is premature, as the Escrow Agent has yet to seek indemnification from the parties.

Finally, the complaint is dismissed in its entirety because, as noted, defendant Law Office of Sandor Krauss, P.C. was released from the action by a prior order, and Chu's motion necessarily resolves any claims asserted against defendant Yo-Yo Lin, who is alleged in the complaint to be, along with Chu, an owner of the subject unit, but who is not a party to the Contract and has not filed an answer in this action.

IV. CONCLUSION

Accordingly, upon the foregoing papers and this court's prior orders, it is

ORDERED that the motion of defendant Stephen Chu for summary judgment dismissing the complaint and awarding judgment in his favor on his counterclaims, is granted to the extent that the movant is granted summary judgment on his counterclaim for breach of contract, the complaint is dismissed in its entirety, and the motion is otherwise denied; and it is further

ORDERED that the New York City Department of Finance, Treasury Division, Client Services, located at 1 Centre Street, Room 2200, New York, New York 10007, is directed, upon receipt of a certified copy of this order, a Certificate of Deposit duly issued by the Department of Finance upon the deposit with the court of funds by defendant Law Office of Sandor Krauss, P.C., and any other forms required by the Department (http://www.nyc.gov), to turn over to

defendant Stephen Chu the funds deposited with that Department constituting the funds deposited with the court by defendant Law Office of Sandor Krauss, P.C. as reflected in the Certificate, less the fee of the Department; and it is further

ORDERED that defendant Stephen Chu shall file supplemental papers to demonstrate the attorney's fees and costs incurred in this action, within thirty (30) days of the date of this order, and shall notify the Part 61 Clerk of any such filing by emailing SFC-Part61-Clerk@nycourts.gov; and it is further

ORDERED that that the Clerk shall enter judgment accordingly.

This constitutes the Decision and Order of the court.

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

5/8/2024
DATE

CHECK ONE:	X	CASE DISPOSED					NON-FINAL DISPOSITION	
		GRANTED		DENIED	X		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER					SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN					FIDUCIARY APPOINTMENT	REFERENCE