

**CC8 LLC v Wong**

2024 NY Slip Op 33481(U)

September 12, 2024

Supreme Court, Kings County

Docket Number: Index No. 530304/2021

Judge: Ingrid Joseph

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 83, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 12<sup>th</sup> day of September, 2024.

PRESENT: HON. INGRID JOSEPH, J.S.C.  
SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS

-----X  
CC8 LLC,

Plaintiff,

Index No. 530304/2021

-against-

**DECISION & ORDER**

SAMUEL WONG,

Motion #1

Defendant.  
-----X

The following e-filed papers read herein:

NYSCEF Doc. Nos.:

Notice of Motion/Affirmation and Affidavits in Support/Exhibits Annexed.	7 – 25
Answering Affirmation/Exhibits Annexed.....	26 – 27; 29 – 33
Memorandum of Law in Reply .....	34

In this matter, Samuel Wong (“Defendant”) moves by notice of motion (Motion Seq. 1) to dismiss the complaint filed by CC8 LLC (“Plaintiff”), pursuant to CPLR § 3211(a)(1) and upon dismissal of the action, Defendant seeks an award of costs and attorney fees incurred to defend against this action. In its opposition, Plaintiff argues that there are issues of fact as if Defendant’s motion was one for summary judgment. In its reply, Defendant contends that dismissal and/or summary judgment is warranted.

Plaintiff is the former owner of condominium unit 8L located at 138-35 39<sup>th</sup> Avenue, Flushing, New York 11354 (the “Property”). In or around July 2021, Plaintiff was seeking to sell his condo and Defendant expressed interest in purchasing the Property. Vincent Pang of Ritz Realty NY Corp (the “Broker”) is the real estate broker tasked with the sale of the Property. The parties agreed in a written contract that the purchase price would be \$998,000 dollars and that a deposit of \$100,000 would be payable to Plaintiff’s counsel as escrowee.

Initially, Defendant signed a commission agreement with the Broker (the “Buyer Brokerage Agreement”), dated July 22, 2021, agreeing to pay the Broker’s commission of \$42,000. Plaintiff did not sign the Buyer Brokerage Agreement, nor was Plaintiff a party to the Buyer Brokerage Agreement. On August, 6, 2021, Plaintiff and Defendant entered into a contract whereby Plaintiff agreed to sell the Property

to Defendant (the “Contract”). Both parties were represented by counsel, and it was Plaintiff’s counsel that prepared both the Contract and the rider to the Contract (the “Rider”).

Section 18 of the Contract, in part, reads as follows:

**Broker:** ... The Broker(s) shall be paid a commission by Seller pursuant to separate agreement.

Section 13 of the Rider reads, in part, as follows:

Seller shall pay the commission due pursuant to separate agreement ... This paragraph shall survive the closing.

Section 22 of the Contract contains a merger clause and reads as follows:

**Entire Contract:** All prior understandings and agreements between the Parties are merged in this Contract and this Contract supersedes any and all understandings and agreements between the Parties and constitutes the entire agreement between them with respect to the subject matter hereof.

Section 26 of the Contract reads as follows:

**No Oral Changes:** This Contract cannot be changed or terminated orally. The Attorneys may extend in writing any of the time limitations stated in this Contract. Any other provisions of this Contract may be changed or waived only in writing signed by the Party or Escrowee to be charged.

Between October 4 and 8, 2021, Plaintiff’s counsel and Defendant’s counsel exchanged emails regarding the adjustment and checks that Plaintiff was requesting that Defendant prepare (the “October emails”).<sup>1</sup> On October 5, 2021, Defendant’s counsel confirmed that after revised adjustments and crediting the \$100,000 deposit to Defendant, the balance to Plaintiff would be \$898,844.31. On October 8, 2023, Plaintiff’s counsel asked Defendant’s counsel to prepare checks for: \$42,000.00 to the Broker, \$18,413.50 to Liberty Land Abstract, and “Balance to seller” with no specific amount listed.

On October 13, 2021, Defendant closed on the purchase of the Property from Plaintiff. On or about October 14, 2021, Plaintiff’s counsel notified Defendant’s counsel that Plaintiff’s final amount received was \$42,000 short because Defendant had deducted the Broker’s fee from the final proceeds due to the Plaintiff. Plaintiff then forwarded a copy of the Buyer Brokerage Agreement to Defendant’s counsel. In response, Defendant contended that the express terms of the Contract and rider state that the Plaintiff is responsible for the broker’s fee and that, in accordance with the October emails, the payment to the Broker should come out of the sale price. Plaintiff then commenced this action by the filing of a Summons and Verified Complaint on November 28, 2021, asserting that the Contract and Rider contained an error as to whose responsibility it was to pay the broker’s fee and that Defendant had been unjustly enriched. In his

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<sup>1</sup> Defendant Samuel Wong’s Affidavit Exhibit C.

answer, Defendant asserted a counterclaim for breach of contract, alleging that Plaintiff failed to perform its obligation to pay the Broker's fee and requested compensatory damages, legal fees, costs and disbursements incurred.

Defendant filed this motion on August 30, 2022. In support of his motion, Defendant argues that Plaintiff's claims are barred by documentary evidence as section 18 of the Contract and section 13 of the Rider states that the seller, plaintiff, shall pay the broker's commission fee. Further, Defendant contends that the Contract and Rider supersede the Buyer Brokerage Agreement because section 22 of the Contract contains a merger clause. Notwithstanding the merger clause, Defendant points out that the Buyer Brokerage Agreement was neither signed by Plaintiff nor was Plaintiff a party to the Buyer Brokerage Agreement.

In opposition, Plaintiff claims that mutual mistake, or unilateral mistake as a result of a fraud, are grounds for rescinding or reforming a contract. Plaintiff argues that extrinsic evidence is permitted in certain circumstances, even when the terms of the contract are not ambiguous. Plaintiff argues that a party seeking to reform a contract based on situations like mutual mistake may rely on extrinsic evidence even if the agreement is not ambiguous. In addition, Plaintiff asserts that Defendant has been unjustly enriched.

In reply, Defendant claims that although Plaintiff alleged that the Contract contained a mistake, its Complaint makes no request or allegation that the Contract should be reformed and it makes no mention of mutual or unilateral mistake. Even if a form of mistake was in Plaintiff's complaint, Defendant argues that Plaintiff's contentions would be without merit. For a unilateral mistake, Defendant states that Plaintiff's complaint has failed to plead with particularity a misrepresentation of material fact, falsity, scienter, or deception. For a mutual mistake, Defendant argues that there is no evidence that the purported mistake was a mutual one. Further, Defendant contends that Plaintiff did not submit any affidavit stating that the alleged mistake was material or substantial<sup>2</sup> and the complaint did not contain such a statement. Lastly, Defendant alleges that Plaintiff's unjust enrichment claim cannot survive because the Contract, which explicitly provides that it is Plaintiff's obligation to pay the broker, is an actual agreement between the parties.

In considering a motion to dismiss pursuant to CPLR 3211, "the court will 'accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory'" (*Nonnon v City of NY*, 9 NY3d 825, 827 [2007], quoting *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Where a motion to dismiss is made under CPLR 3211 and not converted to summary judgment, affidavits, even though they may be considered, "are generally intended to remedy pleading defects and not to offer evidentiary support for properly pleaded claims" (*id.*; see *Rovello v Orfino Realty, Co.*, 40 NY2d 633, 635-636 [1979]).

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<sup>2</sup> Defendant noted that while a purported statement to this effect was made in Plaintiff's affidavit in opposition to the instant motion, the affidavit contained no signature and should be disregarded in its entirety.

Upon a motion to dismiss pursuant to CPLR 3211(a)(1), dismissal is warranted where documentary evidence refutes plaintiffs factual allegations and establishes a defense as a matter of law (*Leon* at 88; *Goshen v Mut. Life Ins. Co.*, 98 N.Y.2d 314 [2002]; *Biro v Roth*, 121 A.D.3d 733 [2d Dept 2014]). 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 (*Granada Condominium III Assn. v Palomino*, 78 AD3d 996 [2d Dept 2010]; *Prott v Lewin & Baglio, LLP*, 150 AD3d 908 [2d Dept 2017]). An affidavit is not documentary evidence because its contents can be controverted by other evidence, such as another affidavit (*Yan Ping Xu v Van Zwiennen*, 212 A.D.3d 872 [2d Dept 2023]; *Phillips v Taco Bell Corp.*, 152 AD3d 806 [2d Dept 2017]; *Fontanetta v John Doe 1*, 73 AD3d 78 [2d Dept 2010]).

Where documentary evidence contradicts the allegations of the complaint, the court need not assume the truthfulness of the pleaded allegations (*West Branch Conservation Ass'n, v County of Rockland*, 227 AD2d 547 [2d Dept 1996]; *Greene v Doral Conference Center Associates*, 18 AD3d 429 [2d Dept 2005]); *Penato v George*, 52 AD2d 939, 941 [2d Dept 1976]). Allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141 [2017]; *Duncan v Emerald Expositions, LLC*, 186 A.D.3d 1321, [2d Dept 2020]; *Dinerman v Jewish Bd of Family & Children's Services Inc.*, 55 AD3d 530 [2d Dept 2008]; *Nisari v Ramjohn*, 85 AD3d 987, 989 [2d Dept 2011]). The defendant bears the burden of demonstrating that the proffered evidence "conclusively refutes plaintiff's factual allegations" (*Kokhins v Evolution Mkts. Inc.*, 31 NY3d 100, 106 [2018], citing *Goshen v Mutual Life Ins. Co. of NY*, 98 NY2D 314 [2002]; see also *Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]).

"A court's fundamental objective in interpreting a contract is to determine the parties' intent from the language employed and to fulfill their reasonable expectations" (*Harmony Rockaway, LLC v Gelwan*, 200 AD3d 863 [2d Dept 2021]). A written agreement will be enforced, according to the plain meaning of its terms, if it is complete, clear and unambiguous (*Greenfield v Philles Recs., Inc.*, 98 NY2d 562, 569 [2002]). "[I]n order that a reformation may be adjudged, there must be mutual mistake or inadvertence or the excusable mistake of one party and fraud of the other" (*Metzger v Aetna Ins. Co.*, 227 NY 411, 417 [1920]).

Here, the court finds that Defendant's documentary evidence of the Contract and Rider conclusively disposes of Plaintiff's claims. In *Dogwood Residential, LLC v Stable 49, Ltd.*, a plaintiff made a representation that he would be responsible for structural repairs prior to the parties entering into a lease; however, the lease "unambiguously provides that structural repairs are the defendant's sole responsibility" (159 AD3d 490, 491 [1st Dept 2018]). Accordingly, the First Department found that the plaintiff's

“representation cannot be considered for the purpose of contradicting the terms of the lease” (*id.* at 491). Similarly, despite Defendant agreeing to pay the Broker’s fee in the Buyer Brokerage Agreement, the Contract and Rider supersede this agreement and they definitively establish Plaintiff’s obligation to pay the fee.

The merger clause in section 22 of the Contract specifically contains language declaring the document “the entire agreement between [Plaintiff and Defendant] with respect to the subject matter hereof.” Moreover, “[u]nder New York law, a subsequent contract regarding the same subject matter supersedes the prior contract” (*Ind. Energy Corp. v Trigen Energy Corp.*, 944 F Supp 1184, 1195 [SDNY 1996]). Here, the Buyer Brokerage Agreement and Contract both concern the same subject matter—the payment of the Broker’s fee—and since the Contract was executed last it controls. Thought the Court acknowledges that Plaintiff was not a party to the Buyer Brokerage Agreement, “to inject an entirely different obligation into the parties’ [] contract [of sale] would not only modify the requirements spelled out in that agreement, it would also negate the merger clause, which states that the [contract] . . . supersed[es] all other understandings” (*Schron v Troutman Sanders LLP*, 20 NY3d 430, 437 [2013]).

Furthermore, the Plaintiff’s claim of mutual mistake is without merit. The pleadings and the evidence taken together fail to support a finding that both parties shared a mistaken belief as to their obligation under the Contract at the time the Contract was entered. A party asserting mutual mistake must demonstrate that the mistake existed at the time the agreement was entered into (*People v Perretta*, 187 AD3d 1076, 1077 [2d Dept 2020]). While the Buyer Brokerage Agreement showed that at some point prior to entering into the Contract Defendant agreed to pay the Broker’s fee, it does not establish that at the time the Contract was entered into that the parties understood that Defendant would pay the commission. In addition, the court finds that Plaintiff has failed to establish a unilateral mistake where the showing of fraud is required. As the Court of Appeals stated, “[one] who signs or accepts a written contract, in the absence of fraud or other wrongful act on the part of another contracting party, is conclusively presumed to know its contents and to assent to them and there can be no evidence for the jury as to his understanding of its terms” (*Metzger*, 227 NY at 416 [1920]).

With respect to attorney’s fees, section 1 of the Optional Rider Provisions from the Contract states as follows:

Notwithstanding anything set forth in ¶ 10.1 to the contrary, in the event either of the Parties seeks to enforce the provisions of this Contract or to obtain redress for the breach or violation of any of its provisions, whether by litigation or other proceedings, the prevailing Party shall be entitled to recover from the other Party all costs and expenses associated with such proceedings, including reasonable attorney’s fees.

It is well settled that attorney’s fees “are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule” (*Pickett*

v 992 *Gates Ave. Corp.*, 114 AD3d 740, 741 [2d Dept 2014], quoting *Hooper Assoc., Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 491 [1989]). As Defendant is seeking to enforce section 18 of the Contract and section 13 of the Rider which states that seller, Plaintiff, shall pay the broker's fee, Defendant is entitled to attorney's fees and costs in defending this action.


Accordingly, it is hereby,

ORDERED, that Defendant's motion (Mot. Seq. No. 1) is granted and Plaintiff's complaint is dismissed; and it is further

ORDERED, that the matter is referred to a judicial hearing officer or referee to determine Defendant's costs and reasonable attorney's fees.

All other issues not addressed herein are either without merit or mot.

This constitutes the decision and order of the court.

  
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Hon. Ingrid Joseph J.S.C.