Sheldon et al v. Khanal et al Doc. 280

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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DAVE SHELDON, et al.,

Plaintiffs,

MEMORANDUM AND ORDER
08-cv-3676(KAM)(LB)

-against-

TARA KHANAL, et al.,

Defendants.
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MATSUMOTO, United States District Judge:

Plaintiffs *pro se*, Dave Sheldon ("Sheldon") and Darren Kearns ("Kearns"), commenced this action in the United States District Court for the District of Kansas against defendants Tara Khanal ("Khanal"); Abu Athar ("Athar"); David Melo and the law firm of David J. Melo, Esq. (the "Melo defendants"); Shams Uddin, and Network Mortgage, Inc. (the "Uddin defendants"); Rosemarie Klie and the law firm of Sweeney, Gallo, Reich & Bolz, LLP (the "Klie defendants"); New York Community Bank, James Cantanno, and the law firm of Forchelli, Curto, Schwartz, Mineo, Carlino & Cohn, LLP (the "NYCB defendants"); Option One Mortgage Corp. ("Option One"); and Julie Wong and Winzone Realty, Inc. (the "Wong defendants"). Under New York State law, plaintiffs asserted claims against the various defendants for breach of contract (Count I); bad faith (Count II); breach of fiduciary duty (Count III); negligent and intentional abuse of process

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(Counts IV and V); negligent and intentional slander of title (Counts VI and VII); common law negligence (Count VIII); negligent misrepresentation (Count IX); fraud by misrepresentation (Count X); fraud by silence (Count XI); common law conspiracy (Count XII); and tortious interference with business relationships and economic prospects (Counts XIII and XIV). The action was transferred by order dated August 19, 2008 to the Eastern District of New York. (See ECF No. 176, Order Transferring Case; ECF No. 183, Case Transferred in from District of Kansas.) By Memorandum and Order dated September 30, 2009, this court dismissed plaintiffs' claims against all defendants. *See Sheldon v. Khanal*, No. 08-CV-3676, 2009 U.S. Dist. LEXIS 91599 (E.D.N.Y. Sept. 30, 2009). (*See also* ECF No. 253, Order Granting Motion to Dismiss for Lack of Jurisdiction, dated 9/30/2009.) On October 15, 2010, the Court of Appeals for the Second Circuit affirmed the district court's dismissal of all claims, with the exception of the breach of contract claim against Khanal, which was remanded to this court for further proceedings. *See Sheldon v. Khanal*, 396 F. App'x 737 (2d Cir. 2010). (*See also* ECF No. 260, Mandate of USCA as to Notice of Appeal, dated 10/15/2009.)

Now pending before the court are Khanal's motion to dismiss plaintiffs' breach of contract claim and plaintiffs' motion to change venue to Kansas. For the reasons set forth

below, Khanal's motion to dismiss is granted and plaintiffs' motion to transfer venue is denied.

BACKGROUND

I. Allegations in the Complaint

The factual and procedural history of this case was set forth in the court's Memorandum and Order dated September 30, 2009. *See Sheldon*, 2009 U.S. Dist. LEXIS 91599, at *5-14. The court will repeat those facts herein only as necessary.

The remaining claim in this case involves a dispute concerning property located at 148-18 Laburnum Avenue, Flushing, New York ("the property"), specifically a breach of contract claim against the remaining defendant, Khanal. On approximately September 3, 2006, defendant Wong presented Khanal to plaintiffs as a potential buyer for the property, which plaintiffs owned at that time. (ECF No. 90, First Amended Complaint ("Am. Compl.") ¶¶ 10, 21.) Khanal signed a preliminary offer to purchase the property for $675,000 and plaintiffs accepted Khanal's offer. *See Sheldon v. Khanal*, No. 07-CV-2112, 2007 U.S. Dist. LEXIS 87973, at *31 (D. Kan. Nov. 29, 2007). (*See also* ECF No. 78, Memorandum and Order and Order To Show Cause, dated 11/29/2007, at 16; ECF No. 90, Am. Compl. ¶ 21.) Wong advised plaintiffs that Khanal was pre-qualified for the purchase and that the closing would transpire within 30-45 days. (ECF No. 90, Am. Compl. ¶¶ 10, 22.) Wong did not mention to plaintiffs that

Khanal had any credit problems or that she was married. (*Id.*) Plaintiffs allege that Wong advised plaintiffs on several occasions between September 3, 2006 and November 8, 2006 that Khanal had a loan commitment from Network Mortgage, Inc. (*Id.* ¶¶ 5, 23-25, 31, 32, 38, 39.)

Prior to September 14, 2006, plaintiffs and Khanal, through her attorney, the Melo defendants, negotiated a contract of sale (the "contract"). (*Id.* ¶¶ 5, 26; *see* ECF No. 273-2, Residential Contract of Sale ("Contract").) The contract contained a "Mortgage Commitment Contingency" clause, which provided that Khanal's obligation to purchase the property was contingent on her ability to secure a commitment for $525,000 from an institutional lender within 30 days. (ECF No. 273-2, Contract ¶ 8(a).) Paragraph 23 of the contract, "Defaults and Remedies," provided:

> (a) If Purchaser defaults hereunder, Seller's sole remedy shall be to receive and retain the Downpayment as liquidated damages, it being agreed that Seller's damages in case of Purchaser's default might be impossible to ascertain and that the Downpayment constitutes a fair and reasonable amount of damages under the circumstance and is not a penalty.

(*Id.* ¶ 23.) A Rider to the contract, which the parties also executed, provided at paragraph 38:

> (c) If Purchaser willfully defaults or willfully fails to carry out any of the provisions of this

> Contract as set forth herein, the Seller shall have the option to cancel this Contract. Seller shall notify Purchaser's attorney by mail and upon receipt of such notice this agreement shall become null and void and the Seller shall be entitled to retain the deposit paid by Purchaser hereunder, as liquidated damages. The Seller reserves the right to bring any legal proceedings or action which may be deemed necessary to protect his interest hereunder all at the sole expense of the Purchaser including, and not limited to, attorney fees.

(*Id.* ¶ 38.) The contract provided that Khanal would pay $50,000 into an escrow account as a downpayment. (*Id.* ¶ 3(a).) On September 13, 2006, Khanal "wrote the down payment check" for $50,000. (ECF No. 90, Am. Compl. ¶ 5(a).) Plaintiffs executed the contract in Kansas on September 14, 2006. (*Id.* ¶¶ 5, 26.)

On September 22, 2006, Melo and Khanal ordered a title policy for the property. (*Id.* ¶ 28.) On October 4, 2006 Khanal had a termite inspection completed. (*Id.* ¶ 29.) On October 4, 2006, Melo and Khanal also advised plaintiffs that the parties' contract had been sent to a second lender. (*Id.* ¶ 29.) Plaintiffs understood this to mean that Khanal was seeking a better interest rate than the previous commitment. (*Id.*) On October 10, 2006, the Wong defendants advised plaintiffs that Khanal had a loan commitment and that she planned to close on October 20, 2006. (*Id.* ¶ 31.)

On October 18, 2006, Melo told Kearns that Khanal did not have a loan commitment, and plaintiffs granted Khanal an extension of the closing date. (*Id.* ¶ 33.) On November 2, 2006, Melo advised plaintiffs that Network Mortgage, Inc., and its broker Shams Uddin, wanted Khanal to buy the property in her cousin's name and transfer the deed back to her after closing. (*Id.* ¶ 34.) On November 7, 2006, Uddin, through Network Mortgage, Inc., advised plaintiffs that Khanal's husband had three accounts in collection, that Khanal had a loan commitment, that Khanal refused to accept a co-signer to obtain a second loan commitment at a lower interest rate, and that Sheldon could co-sign a second mortgage at a lower rate with no problem. (*Id.* ¶ 38.) Because of Khanal's husband's poor credit, Khanal needed five percent of the purchase price in a second mortgage or a co-signor. (*Id.* ¶ 39.) Sheldon agreed to co-sign the loan, but Khanal refused. (*Id.*) On November 7, 2006, Melo told plaintiffs that he was canceling the contract with Khanal because she could not qualify for a loan. (*Id.* ¶ 36.) In response, plaintiffs requested liquidated damages and advised the escrow agent that they objected to the release of any escrow funds to Khanal. (*Id.* ¶ 40.)

On November 7, 2006, Khanal asked Option One "to verify her inability to obtain a loan." (*Id.* ¶ 34.) Plaintiffs allege that Option One provided Khanal with a denial. (*Id.*

¶ 9.) Plaintiffs sold the property to a third party on February 16, 2007 for $630,000. (*See* ECF No. 276, Reply Memorandum of Law In Further Support of Defendant's Motion To Dismiss for Lack of Subject Matter Jurisdiction ("Def. Reply") at 5, Ex. A.)

II. Procedural History

On February 1, 2007, Khanal filed suit in New York State court against plaintiff Sheldon, seeking return of her $50,000 downpayment. *See Khanal v. Sheldon*, 851 N.Y.S.2d 58, 2007 NY Slip Op 51855U, at *2 (N.Y. Sup. Ct. Sept. 19, 2007). The court granted Khanal summary judgment and ordered plaintiffs to return the downpayment. *Id.* at *3; *see also Khanal v. Sheldon*, 867 N.Y.S.2d 460, 461 (2d Dep't 2008) (reducing the amount of the judgment entered by the New York Supreme Court on October 25, 2007 to $50,000). The New York Court of Appeals denied plaintiffs' motion for leave to appeal on June 24, 2009. *See Khanal v. Sheldon*, 12 N.Y.3d 714 (2009). The New York State court decision in favor of Khanal was reversed in 2010. *See Khanal v. Sheldon*, 904 N.Y.S.2d 453 (2d Dep't 2010).

On March 14, 2007, plaintiffs filed the instant action in the United States District Court for the District of Kansas. (*See* ECF No. 1, Complaint, dated 3/14/2007.) In April 2007, defendants filed motions to dismiss the federal action under Fed. R. Civ. P. 12(b)(1)-(3), and (5)-(6). (*See* ECF Nos. 33; 34; 40; 45.) On November 29, 2007, United States District Judge

Katherine H. Vratil of the District of Kansas dismissed all claims against the Melo defendants and the Uddin defendants for lack of subject matter jurisdiction. *Sheldon*, 2007 U.S. Dist. LEXIS 87973, at *75. She ordered plaintiffs to show good cause as to why the court should not dismiss for lack of subject matter jurisdiction plaintiffs' claims against Khanal, the Klie defendants, and the Wong defendants. (*Id.* at *56, *75-76.) Additionally, Judge Vratil dismissed for lack of personal jurisdiction claims against the NYCB defendants. (*Id.* at *30-31, *76.) The court dismissed claims against Option One for improper venue. (*Id.* at *62, *76.) As clearly stated in Judge Vratil's November 29, 2007 Memorandum and Order To Show Cause, the defendants who remained in the case at that time were Khanal, the Klie defendants, and the Wong defendants. (*Id.* at *77.)

On December 12, 2007, plaintiffs filed their response to the court's order to show cause, along with a motion for reconsideration and a motion for leave to amend the complaint. (*See* ECF No. 80, Response to Order To Show Cause, Motion for Reconsideration, and Motion for Leave to Amend Complaint.) Judge Vratil denied plaintiffs' motion for reconsideration, but granted their motion for leave to amend the complaint to cure the defects identified in the November 29, 2007 Memorandum and Order. *Sheldon v. Khanal*, No. 07-CV-2112, 2008 U.S. Dist. LEXIS

13222, at *5-6, *14 (D. Kan. Feb. 19, 2008). (*See also* ECF No. 89, Memorandum and Order, dated 2/19/2008, at 3, 7.) On February 27, 2008, plaintiffs filed the amended complaint, which asserted claims against all of the originally-named defendants. (*See* ECF No. 90, Am. Compl.)

After the amended complaint was filed, defendants again moved to dismiss plaintiffs' claims. (*See* ECF Nos. 117; 121; 124; 126; 132; 134; 136; 137.) On June 27, 2008, Judge Vratil again dismissed plaintiffs' claims against the NYCB defendants for lack of personal jurisdiction. (ECF No. 165, Memorandum and Order Granting Motion to Dismiss, dated 6/27/2008.) Plaintiffs then moved for reconsideration or in the alternative, leave to transfer the case to cure the jurisdictional defect. (ECF No. 166, Motion for Reconsideration, dated 7/11/2008.) On August 1, 2008, the court ordered plaintiffs to show cause why the entire action should not be transferred to the United States District Court for the Eastern District of New York pursuant to 28 U.S.C. §§ 1404(a) and 1631. *Sheldon v. Khanal*, 605 F. Supp. 2d 1179, 1189 (D. Kan. 2008). (*See also* ECF No. 168, Order and Order To Show Cause, dated 8/1/2008.) In so ordering, the court stated:

> Many of these factors [that courts consider when deciding whether to transfer a case] favor the Eastern District of New York. Without question, the vast majority of witnesses are located in New York, outside

> this Court's subpoena power. Much of the documentary evidence – especially that of the New York companies – is presumably located in New York. Any judgment which plaintiffs obtain will likely be enforced in New York. To the extent that this case involves questions of New York law, New York courts are best equipped to consider those questions. Weighing against these factors is plaintiffs' choice of forum. Although the Court affords some deference to plaintiffs' choice of forum, that factor is not determinative and its import is diminished in this case by plaintiffs' willingness to transfer at least part of the case to another forum. Overall, considerations of convenience and fairness favor the transfer of this case to the Eastern District of New York.

Sheldon, 605 F. Supp. 2d at 1189. On August 19, 2008, the Kansas district court found that plaintiffs had failed to show good cause why the case should not be transferred, and the case was subsequently transferred to this district. (See ECF No. 176, Order Transferring Case; ECF No. 183, Case Transferred in from District of Kansas.)

Once again, the Melo defendants, Uddin defendants, Wong defendants, Klie defendants, NYCB defendants, and defendant Option One filed motions to dismiss.[1] (*See* ECF Nos. 201; 204; 205; 221; 231; 237.) On February 20, 2009, the NYCB defendants additionally filed a motion for sanctions and injunctive relief barring plaintiffs from further litigation arising from the

[1] Khanal did not file a renewed motion to dismiss after the case was transferred to the Eastern District of New York.

events that are the subject matter of the instant case. (*See* ECF No. 232, First Motion for Sanctions.)

On September 30, 2009, the court dismissed all claims against all defendants who filed motions to dismiss. *Sheldon*, 2009 U.S. Dist. LEXIS 91599, at *56-57. In addition, even though Khanal had not filed a renewed motion to dismiss, the court dismissed all claims against Khanal. *Id.* In particular, with respect to the breach of contract claim, the court noted that "[t]he claims alleged against Khanal arise from the same transaction that was the subject of the prior state court proceeding . . . [in which] [p]laintiffs had the opportunity to raise their claims and, in fact, raised the issue of defendant Khanal's breach of contract for sale . . . ." *Id.* at *56. Plaintiffs appealed the decision. (*See* ECF No. 255, Notice of Appeal, filed 10/8/2009; ECF No. 258, Amended Notice of Appeal, filed 11/2/2009.)

By order dated June 8, 2010, the New York State Appellate Division reversed the earlier state court judgments awarding Khanal $50,000, finding that the trial court had "improvidently exercised its discretion" and that Sheldon had "established a potentially meritorious defense by proffering evidence that [Khanal] failed to comply with the mortgage contingency clause set forth in the subject contract for the purchase of real property." *Khanal v. Sheldon*, 904 N.Y.S.2d at

454. The court remanded the case to the trial court for further proceedings. *Id.*

On October 15, 2010, the Second Circuit Court of Appeals affirmed the district court's dismissal of all claims against all defendants, with the sole exception of the breach of contract claim against Khanal.[2] *Sheldon*, 396 F. App'x at 740. The Court of Appeals found that because the district court had relied on the New York State court judgment that was subsequently reversed, it could not affirm the dismissal on *res judicata* grounds. *Id.* at 739. In remanding the contract claim against Khanal to this court for further proceedings, the Court of Appeals noted, "[w]e do not ourselves conclude that plaintiffs have adequately pleaded such a contract claim, and we doubt the likelihood of the plaintiffs' ultimate success on this claim." *Id.* at 740.

On October 21, 2010, plaintiffs filed a letter asking the court to transfer the case back to the District of Kansas. (*See* ECF No. 261, Letter Motion To Change Venue.) On December 15, 2010, plaintiffs served Khanal with their motion to change venue. (*See* ECF No. 277, Motion and Memorandum of Law In Support of Transferring Venue to Kansas.) On the same date,

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[2] In addition, although the Second Circuit Court of Appeals noted that "[p]laintiffs' conduct during the course of this litigation has been, on the whole, highly troubling," the court denied a motion by the NYCB defendants to impose sanctions against plaintiffs pursuant to Fed. R. App. P. 38. *Sheldon*, 396 F. App'x at 740.

Khanal served plaintiffs with the instant motion to dismiss. (*See* ECF No. 272, Notice of Motion; *see also* ECF No. 274, Memorandum of law In Support Of Defendant Tara Khanal's Motion To Dismiss for Lack of Subject Matter Jurisdiction ("Def. Mem.").) On January 4, 2011, the parties opposed each other's respective motions. (*See* ECF No. 275, Plaintiffs' Joint Response Affirmations In Opposition To Tara Khanal's Motion for Summary Judgment ("Pl. Opp."); ECF No. 278, Memorandum of Law of Defendant Tara Khanal In Opposition To Plaintiffs' Motion To Transfer Venue to Kansas.) Replies were served and the fully briefed motions were filed with the court on January 11, 2011. (*See* ECF No. 276, Def. Reply; ECF No. 279, Reply In Support of Motion and Memorandum To Transfer Venue to Kansas.)

DISCUSSION

I. Motion to Dismiss for Lack of Subject Matter Jurisdiction Pursuant to Rule 12(b)(1)

Khanal moves to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction. Federal subject matter jurisdiction exists only when a "federal question" is presented under 28 U.S.C. § 1331, or, as provided in 28 U.S.C. § 1332, where the plaintiffs are of diverse citizenship from all the defendants and the amount in controversy exceeds $75,000. At any point in the litigation, where the district court determines that jurisdiction is

lacking, the court must dismiss the complaint without regard to its merits.[3] *Nowak v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182, 1188 (2d Cir. 1996); *Lyndonville Sav. Bank & Trust Co. v. Lussier,* 211 F.3d 697, 700-01 (2d Cir. 2000) ("If subject matter jurisdiction is lacking, the action must be dismissed."); *Manway Constr. Co. v. Hous. Auth. of Hartford*, 711 F.2d 501, 503 (2d Cir. 1983) ("[A]ny party or the court sua sponte, at any stage of the proceedings, may raise the question of whether the court has subject matter jurisdiction; and if it does not, dismissal is mandatory.").

As the party "seeking to invoke the subject matter jurisdiction of the district court," *Scelsa v. City Univ. of New York*, 76 F.3d 37, 40 (2d Cir. 1996), the plaintiff must demonstrate by a preponderance of the evidence that there is subject matter jurisdiction. *Aurecchione v. Schoolman Transp. Sys., Inc.*, 426 F.3d 635, 638 (2d Cir. 2005). In considering a motion to dismiss for lack of subject matter jurisdiction

[3] Plaintiffs argue that both the Kansas district court and the Second Circuit Court of Appeals determined that federal subject matter jurisdiction was proper. (ECF No. 275, Pl. Opp. at 2, 7-9.) However, neither of those courts conclusively found that the requirements for subject matter jurisdiction were satisfied. Instead, Judge Vratil of the District of Kansas noted that "the Court is therefore satisfied that *at this point*, it should not dismiss for lack of subject matter jurisdiction." *Sheldon*, 2008 U.S. Dist. LEXIS 13222, at *13 (emphasis added). Further, the Second Circuit Court of Appeals did not address the amount in controversy requirement at all. *See Sheldon*, 396 F. App'x at 740 ("Accordingly, we need not address plaintiffs' challenge to the district court's amount-in-controversy analysis."). Because this court is obligated to dismiss the complaint if it finds that it lacks subject matter jurisdiction over the action, it is proper to consider this issue now. *Manway Constr. Co.*, 711 F.2d at 503.

pursuant to Rule 12(b)(1), federal courts "need not accept as true contested jurisdictional allegations." *Jarvis v. Cardillo*, No. 98-CV-5793, 1999 U.S. Dist. LEXIS 4310, at *7 (S.D.N.Y. Apr. 6, 1999). Rather, a court appropriately may resolve disputed jurisdictional facts by referring to evidence outside the pleadings, such as affidavits. *See Zappia Middle E. Constr. Co. Ltd. v. Emirate of Abu Dhabi*, 215 F.3d 247, 253 (2d Cir. 2000); *Filetech S.A. v. France Telecom S.A.*, 157 F.3d 922, 932 (2d Cir. 1998); *Sanchez v. Velez*, No. 08-CV-1519, 2009 U.S. Dist. LEXIS 64744, at *1 n.1 (S.D.N.Y. July 24, 2009) (considering on motion to dismiss grievances referenced in the complaint but submitted to the court in connection with the motion to dismiss).[4] Although "no presumptive truthfulness attaches to the complaint's jurisdictional allegations," *Guadagno v. Wallack Ader Levithan Assocs.*, 932 F. Supp. 94, 95 (S.D.N.Y. 1996), a

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[4] Khanal's motion is titled a "motion to dismiss." (*See* ECF No. 274, Def. Mem.; ECF No. 276, Def. Reply.) However, the Declaration of Rashel M. Mehlman filed in connection with Khanal's motion states that it is submitted "in support of the defendants [sic] motion for summary judgment and to dismiss the plaintiffs' breach of contract claim." (ECF No. 272-2, Declaration of Rashel M. Mehlman, dated 12/15/2010 ("Mehlman Decl.") ¶ 2.) In addition, Khanal's Memorandum of Law in support of her motion contains a "Concise Statement of Material Facts Not In Dispute Pursuant to Local Civil Rule 56.1," (ECF No. 274, Def. Mem. at 7), which is required by Local Civil Rule 56.1 only "[u]pon any motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure." Local Civil Rule 56.1. Further, plaintiffs' opposition is titled "Plaintiffs' Joint Response Affirmations In Opposition To Tara Khanal's Motion for Summary Judgment." (*See* ECF No. 275, Pl. Opp.) Nevertheless, because the motion is framed as a motion to dismiss and the court is permitted to refer to evidence outside the pleadings in support of a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), the court will consider Khanal's motion as a motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1). *See Zappia*, 215 F.3d at 253; *Filetech*, 157 F.3d at 932; *Sanchez*, 2009 U.S. Dist. LEXIS 64744 at *1 n.1.

court should "'constru[e] all ambiguities and draw[] all inferences' in a plaintiff's favor." *Aurecchione,* 426 F.3d at 638 (quoting *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000)).

Here, plaintiffs allege jurisdiction pursuant to 28 U.S.C. §§ 1332(a) and 1367. (ECF No. 90, Am. Compl. ¶ 14.) Under 28 U.S.C. § 1332(a), federal district courts have original jurisdiction over all civil actions where there is diversity of citizenship between the parties and "the matter in controversy exceeds the sum or value of $75,000." 28 U.S.C. § 1332(a). Plaintiffs allege, and Khanal does not dispute, that there is diversity of citizenship because Sheldon is a citizen of Kansas, Kearns is a citizen of Missouri, and Khanal is a citizen of New York. (ECF No. 90, Am. Compl. ¶¶ 1-3.) However, Khanal alleges that dismissal for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) is warranted because plaintiffs have not met the amount in controversy requirement of 28 U.S.C. § 1332(a) in that plaintiffs' breach of contract claim cannot exceed the statutorily required amount of $75,000. (ECF No. 274, Def. Mem. at 9.)

A. The Amount in Controversy Requirement

For the purpose of determining the amount in controversy pursuant to 28 U.S.C. § 1332(a), the amount that plaintiffs allege in the complaint controls if the claim is

apparently made in good faith. *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288 (1938). A plaintiff must establish "to a 'reasonable probability' that the claim is in excess of the statutory jurisdictional amount." *Tongkook Am., Inc. v. Shipton Sportswear Co.*, 14 F.3d 781, 784 (2d Cir. 1994). While the Second Circuit "recognizes a rebuttable presumption that the face of the complaint is a good faith representation of the actual amount in controversy," *Wolde-Meskel v. Vocational Instruction Project Cmty. Servs., Inc.*, 166 F.3d 59, 63 (2d Cir. 1999), a court must dismiss the case for want of subject matter jurisdiction if, "from the face of the pleadings, it is apparent, to a legal certainty, that the plaintiff cannot recover the amount claimed or . . . that the plaintiff never was entitled to recover that amount, and that his claim was therefore colorable for the purpose of conferring jurisdiction." *Tongkook*, 14 F.3d at 784 (citing *St. Paul*, 303 U.S. at 288-89). Although "[t]he amount in controversy is determined at the time the action is commenced," a subsequent discovery that the true amount in controversy is below the minimum statutory jurisdictional amount requires dismissal for lack of subject matter jurisdiction. *Id.* at 784, 786.

1. *Attorneys' Fees*

Here, plaintiffs assert that they have satisfied the jurisdictional amount by demanding liquidated damages plus

attorneys' fees for a total of $75,000. (ECF No. 275, Pl. Opp. at 9-10.) Specifically, Count One of the amended complaint alleges that Khanal breached the contract, entitling plaintiffs to "liquidated damages of $50,000.00 and attorney fees that will exceed $25,000.00." (ECF No. 90, Am. Compl. ¶ 105(a).) Further, in response to Judge Vratil's November 29, 2007 Memorandum & Order To Show Cause, plaintiffs submitted sworn statements as part of their proposed amended complaint stating that attorneys' fees would exceed $25,000. (*See* ECF No. 80-3, Affidavit of Dave Sheldon, dated 12/12/2007; ECF No. 80-4, Affidavit of Darren K. Kearns, dated 12/12/2007.)

Although the addition of $25,000 to plaintiffs' claimed liquidated damages would exceed the amount in controversy required for diversity jurisdiction, "[attorneys'] fees may not properly be included in determining the jurisdictional amount unless they are recoverable as a matter of right" pursuant to a statute or contract. *Givens v. W.T. Grant Co.*, 457 F.2d 612, 614 (2d Cir. 1972). Under New York law, attorneys' fees are not recoverable in actions for breach of contract, absent a contractual provision stating otherwise. *U.S. Fid. & Guar. Co. v. Braspetro Oil Servs. Co.*, 369 F.3d 34, 74-75 (2d Cir. 2004). Therefore, in order for attorneys' fees to be counted toward the jurisdictional amount, Khanal must be contractually obligated to pay such fees.

Here, paragraph 23 of the contract between plaintiffs and Khanal provides that in the event Khanal defaults under the contract, plaintiffs' "sole remedy shall be to receive and retain the Downpayment as liquidated damages." (ECF No. 273-2, Contract ¶ 23.) Accordingly, if plaintiffs' allegation is that Khanal breached the contract, plaintiffs' damages are limited by the terms of the contract to the $50,000 downpayment, which falls far short of the statutory amount of $75,000.[5]

In addition, the contract also provides at paragraph 38 that if Khanal "willfully defaults or willfully fails to carry out any of the provisions of this Contract," plaintiffs may enforce their rights under the contract at Khanal's expense, "including, and not limited to, attorney fees." (*Id.* ¶ 38.) Thus, if Khanal willfully breached the contract, she would be contractually obligated to compensate plaintiffs for fees they

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[5] Under New York law, liquidated damages clauses are enforceable provided that the liquidated amount is not plainly disproportionate to the probable loss anticipated when the contract was executed. *United Air Lines, Inc. v. Austin Travel Corp.*, 867 F.2d 737, 740 (2d Cir. 1989); *U.S. Fid. & Guar. Co.*, 369 F.3d at 70; *Truck Rent-A-Center, Inc. v. Puritan Farms 2nd, Inc.*, 41 N.Y.2d 420, 424 (1977). Further, a party may not recover liquidated damages and actual damages. *U.S. Fid. & Guar. Co.*, 369 F.3d at 70 ("[L]iquidated and actual damages are mutually exclusive remedies under New York law." (citing *X.L.O. Concrete Corp. v. John T. Brady & Co.*, 482 N.Y.S.2d 476 (1st Dep't 1984)); *195 Lombardy St., LLC v. McCarthy*, 831 N.Y.S.2d 355, 2006 NY Slip Op 52078U, at *2 (N.Y. Sup. Ct. Jan. 4, 2006). Further, under New York law, "[w]here a buyer wrongfully refuses to close title under a contract for the sale of real property, [the] seller's damages are measured by the difference between the purchase price and the market value of the property. As an alternative, the seller may retain the buyer's down payment as liquidated damages." *1776 Assocs. Corp. v. Broadway W. 57th St. Assocs.*, 585 N.Y.S.2d 316, 317 (1st Dep't 1992) (Rubin, J., dissenting) (internal citations and quotation marks omitted). Thus, plaintiffs' recovery for breach of the contract is limited by contract and by law to the downpayment amount of $50,000.

paid to attorneys in connection with enforcing their rights under the contract.[6]

Nevertheless, even if plaintiffs were to prevail on a theory that Khanal willfully breached the contract, they would not be entitled to attorneys' fees as a matter of law. It is settled law that a *pro se* litigant who is not a lawyer is not entitled to attorneys' fees. *See Kay v. Ehrler*, 499 U.S. 432, 435 (1991) ("The Circuits are in agreement, however, on the proposition that a *pro se* litigant who is *not* a lawyer is *not* entitled to attorney's fees."); *Barash v. Ford Motor Credit Corp.*, No. 06-CV-6497, 2007 U.S. Dist. LEXIS 44641, at *17 n.11 (E.D.N.Y. June 20, 2007) (concluding that a *pro se* plaintiff is not entitled to attorneys' fees "as a matter of law" and accordingly declining to "consider such fees in determining whether the relief sought satisfies the jurisdictional amount" under 28 U.S.C. § 1332(a) (citing *Kay*, 499 U.S. at 435-38)). Further, numerous courts in this Circuit, as well as the Supreme Court, have concluded that *pro se* litigants may not claim attorneys' fees pursuant to statutory fee-shifting provisions, even if they are lawyers. *See Kay*, 499 U.S. at 438 (concluding

[6] Khanal repeatedly and incorrectly argues that the contract lacks any provision permitting either party to recover attorneys' fees. (*See* ECF No. 274, Def. Mem. at 8, 9, 12, 18.) In fact, while the New York State Appellate Division held that the contract lacked a provision authorizing attorneys' fees in favor of Khanal, the court did not find that plaintiffs could not recover attorneys' fees. *See Khanal*, 867 N.Y.S.2d at 462 ("The agreement at issue here does not include a provision for [Khanal] to recover an attorney's fee in this action.").

that a *pro se* attorney is not entitled to recover attorneys' fees for representing himself in an action under 42 U.S.C. § 1988); *Hawkins v. 1115 Legal Serv. Care*, 163 F.3d 684, 694 (2d Cir. 1998) (holding that a *pro se* attorney litigant is not entitled to recover attorneys' fees in a Title VII or a Section 1981 action); *Kurz v. Chase Manhattan Bank*, 273 F. Supp. 2d 474, 481 (S.D.N.Y. 2003) ("One thing is quite clear: [plaintiff] is not eligible to recover attorneys' fees, even if he prevails, because an attorney *pro se* does not qualify for such reimbursement in this Circuit."); *Texaco Inc. S'holder Deriv. Litig.*, 123 F. Supp. 2d 169, 172-73 (S.D.N.Y. 2000) (citing line of cases in the Second Circuit denying attorneys' fees for *pro se* lawyers).

In establishing the rule that a *pro se* attorney may not recover attorneys' fees, the Supreme Court in *Kay v. Ehrler* reasoned that representation by independent counsel has distinct advantages over even a skilled lawyer who represents himself. The Court explained that a *pro se* attorney litigant would be "deprived of the judgment of an independent third party in framing the theory of the case, evaluating alternative methods of presenting the evidence, cross-examining hostile witnesses, formulating legal arguments, and in making sure that reason, rather than emotion, dictates the proper tactical response to unforeseen developments in the courtroom." *Kay*, 499 U.S. at

437. The Supreme Court concluded that the policy of "furthering the successful prosecution of meritorious claims" was best served by a rule that "creates an incentive to retain counsel in every such case." *Id.* at 438. Permitting a fee award to a *pro se* litigant, even one who is a lawyer, would instead "create a disincentive to employ counsel." *Id.*

In the instant case, both plaintiffs are proceeding *pro se*.[7] Although Kearns is the only plaintiff who signed the amended complaint and he referred to himself therein as the "Attorney for Plaintiffs," (*see* ECF No. 90, Am. Compl. at 58), subsequent filings signed by both plaintiffs indicate that they are *pro se*. (*See, e.g.,* ECF No. 159, Response by Plaintiffs Dave Sheldon, Darren K. Kearns re Motion to Disqualify Counsel, dated 5/29/2008, at 2 ("Sheldon and Kearns are proceeding pro se"); ECF No. 261, Letter Motion To Change Venue, dated 10/21/2010; ECF No. 275, Pl. Opp. at 11; ECF No. 277, Motion and Memorandum In Support of Transferring Venue to Kansas, dated 12/15/2010, at 10.) Further, although Kearns is an attorney admitted to practice law in New York State, he is not admitted to practice law in this court and he has not been admitted *pro hac vice*. Moreover, the court notes that on May 7, 2008, Kearns filed a motion to withdraw as counsel for Dave Sheldon, which

[7] Kearns is a licensed attorney in New York. (*See* ECF No. 272-9, Motion for Attorney's Fees, dated 10/28/2010.) Yet, he signed numerous submissions "*pro se*," as detailed above.

Magistrate Judge David J. Waxse of the District of Kansas granted on May 12, 2008. (*See* ECF No. 142, Motion To Withdraw as Attorney; ECF No. 148, Order Granting Motion To Withdraw.) Therefore, because Sheldon is not represented by independent counsel, he is not entitled to attorneys' fees as a matter of law.

Further, even though Kearns is an attorney, he may not receive attorneys' fees for representing himself. The Supreme Court's analysis in *Kay v. Ehrler* is particularly applicable here, as it is evident that plaintiffs would have benefited from the judgment and skills of independent counsel in evaluating the arguments and framing the issues. Without such assistance, plaintiffs filed a complaint - which the Kansas district court described as "rambling, poorly-organized and often incomplete," *Sheldon*, 2007 U.S. Dist. LEXIS 87973, at *8 n.2 - that asserted claims, all but one of which have been dismissed. The Kansas court further stated that it was "wholly unimpressed with plaintiffs' advocacy in this case. Many of plaintiffs' arguments are fragmented, legally unsupported and generally unprofessional." *Id.* at *57 n.15. Indeed, although the Second Circuit Court of Appeals declined to impose sanctions on plaintiffs, the court observed that plaintiffs' conduct during the course of the litigation was "highly troubling." *Sheldon*, 396 F. App'x at 740. Accordingly, even though Kearns is an

attorney and may have expended significant time prosecuting his own case, he was not entitled to an award of attorneys' fees for his own time. Although it is true that as of the time plaintiffs commenced the instant action, they could have retained an attorney for whose services they would be entitled to attorneys' fees, they did not do so then, nor have they done so now. Because the *pro se* plaintiffs in this case are not entitled to attorneys' fees as a matter of law, such fees may not be counted toward the statutory amount in controversy.

Moreover, even if plaintiffs had retained independent counsel, plaintiffs nonetheless have not established to a reasonable probability that any fees owed to counsel would satisfy the jurisdictional amount in controversy. Although plaintiffs claim that their attorneys' fees in prosecuting the case will exceed $25,000, this estimate is entirely speculative. The contract does not indicate what amount of attorneys' fees plaintiffs would be entitled to collect should they bring an action to protect their interests thereunder. (*See* ECF No. 273-2, Contract ¶ 38.) *See also Houston v. Scheno*, No. 06-CV-2901, 2007 U.S. Dist. LEXIS 56076, at *4, *8 (E.D.N.Y. July 31, 2007) (although "reasonable attorneys' fee" had to be included in jurisdictional amount because lease agreement required payment of those fees, where the lease agreement did not define or quantify such fees, defendant failed to meet his burden of

establishing that the jurisdictional amount was satisfied). *Cf. Rescuecom Corp. v. Chumley*, 522 F. Supp. 2d 429, 438 (N.D.N.Y. 2007) (where the agreement stipulated that reasonable attorneys' fees would consist of 25 percent of any money judgment, the court found no need for proof that such fees would exceed the jurisdictional amount); *Window Headquarters v. MAI Basic Four*, Nos. 91-CV-1816, 93-CV-4135, 92-CV-5283, 1994 U.S. Dist. LEXIS 17104, at *28 (S.D.N.Y. Nov. 28, 1994) (where lease agreement stated that if lessee failed to make payments it must pay attorneys' fees of 20 percent on the balance due, court found that the addition of such fees would satisfy the jurisdictional amount). Nor have plaintiffs provided any evidence that their attorneys' fees going forward would be sufficient to surmount the jurisdictional threshold of $75,000.[8] *See Houston*, 2007 U.S. Dist. LEXIS 56076, at *8; *Ins. Co. of the State of Pennsylvania v. Waterfield*, 371 F. Supp. 2d 146, 149 (D. Conn. 2005) (where defendants provided no evidence in support of their expected attorneys' fees, the court found that the amount of such fees was speculative and defendants failed to establish to a reasonable probability that the amount in controversy exceeded the jurisdictional amount); *Fallstrom v. L.K. Comstock & Co., Inc.*, No. 3:99-CV-952, 1999 U.S. Dist. LEXIS 12339, at *6-7 (D.

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[8] The court notes that on October 28, 2010, plaintiffs filed a motion for attorney's fees in the Second Circuit. Although that motion attached an invoice for Kearns's legal fees, the entries therein were general and vague. (*See* ECF No. 272-9, Motion for Attorneys' Fees dated 10/28/2010.)

Conn. July 13, 1999). Accordingly, even if attorneys' fees could properly be included, plaintiffs have failed to meet their burden of demonstrating by a preponderance of the evidence that the amount in controversy in this case will exceed $75,000.

2. *Punitive Damages*

Finally, plaintiffs assert that they are entitled to $500,000 in punitive damages, which, when added to the $50,000 in liquidated damages provided under the contract, will exceed the statutorily required amount in controversy. (*See* ECF No. 275, Pl. Opp. at 4, 10; *see also* ECF No. 273-2, Contract ¶ 119.) This argument also fails. Under New York law, punitive damages are not recoverable in a breach of contract action unless they are necessary to vindicate a public right. *See Volt Delta Res. LLC v. Soleo Commc'ns, Inc.*, 816 N.Y.S.2d 702, 2006 NY Slip Op 50497U, at *6 (N.Y. Sup. Ct. Mar. 29, 2006) (citations omitted); *Career Initiatives Corp. v. Palmer*, 893 F. Supp. 295, 296 (S.D.N.Y. 1995) (refusing to count claim for punitive damages for purposes of satisfying the amount in controversy because plaintiffs made no showing that defendants' conduct was directed at the public). Indeed, "even a breach committed willfully and without justification does not warrant the imposition of punitive damages." *Livingston v. Singer*, No. 01-CV-6979, 2003 U.S. Dist. LEXIS 22471, at *13 (S.D.N.Y. Dec. 16, 2003) (quoting *Keles v. Yale Univ.*, 889 F. Supp. 729, 735 (S.D.N.Y. 1995)).

Here, the amended complaint does not allege that Khanal's conduct was directed at the public or that plaintiffs seek to vindicate any public right. Therefore, as a matter of law, plaintiffs may not recover punitive damages on their breach of contract claim against Khanal, and punitive damages may not be invoked to augment the amount in controversy in this case.

* * *

Because plaintiffs have failed to demonstrate that, if successful, they could recover more than $75,000, the court lacks subject matter jurisdiction to adjudicate plaintiffs' breach of contract claim against Khanal. Accordingly, plaintiffs' breach of contract claim against Khanal is dismissed pursuant to Fed. R. Civ. P. 12(b)(1).[9]

II. Motion to Change Venue to Kansas

Plaintiffs move to change venue to Kansas pursuant to 28 U.S.C. § 1404(a). (*See* ECF No. 277, Motion and Memorandum In Support of Transferring Venue to Kansas, dated 12/15/2010.) Because plaintiffs' sole remaining claim against Khanal is dismissed, the motion to change venue is denied as moot.

[9] Because the complaint is dismissed for lack of subject matter jurisdiction, the court need not consider Khanal's request in the alternative to stay the action pending the resolution of the parallel state court action. (*See* ECF No. 276, Def. Reply at 7.)

CONCLUSION

For the foregoing reasons, Khanal's motion to dismiss is granted and plaintiffs' motion to change venue is denied. The Clerk of the Court is respectfully requested to close the case.

SO ORDERED.

Dated: August 31, 2011
Brooklyn, New York

/s/
KIYO A. MATSUMOTO
United States District Judge
Eastern District of New York