Chupack v Gomez
2016 NY Slip Op 30051(U)
January 8, 2016
Supreme Court, New York County
Docket Number: 151348/14
Judge: Joan A. Madden

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

----------X

CINDY CHUPACK,

Plaintiff,

INDEX NO. 151348/14

-against-

REBECCA GOMEZ a/k/a REBECCA FLORES,
IRINA VELICHKO, and MICHAEL FLORES,

Defendants.

----------X

JOAN A. MADDEN, J.:

In this action, plaintiff Cindy Chupack seeks damages in the amount of $29,200.00, which include a $15,000 fee paid for the short term rental of an apartment in Manhattan. Defendants move for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint in its entirety, and other relief (motion seq. no. 004). Plaintiff opposes and moves to amend the complaint (motion seq. no. 005) and to compel discovery (motion seq. no. 002). The motions are consolidated for disposition herein.

The First Amended Complaint (the "complaint") asserts causes of action for fraud, fraud in the inducement, deceptive business practices in violation of General Business Law §349, and conversion. The complaint alleges that defendants "engaged in a scheme to defraud potential visitors to New York City," by posting a listing on various "owner-rental websites" for the short-term rental of an apartment at 13 East 9th Street, New York, NY, and including false "visitor-reviews." Plaintiff alleges she intended to travel to New York City with her family and was interested in renting the apartment. On January 15, 2014, plaintiff sent defendant Rebecca Gomez a check in the amount of $15,000. According to plaintiff, Gomez described the $15,000

payment as a "hold fee" that was "applicable to the lease if entered into and refunded in the event [Gomez] rejected Plaintiff or found other potential tenants." Plaintiff alleges Gomez told her "she would endeavor to rent the apartment if Plaintiff could not take it, and that it would be easy to do so, and that she would then return the funds to Plaintiff." The next day, January 16, 2014, plaintiff informed Gomez that she was "uncomfortable with the concept of a 'hold fee' and did not want to pursue the apartment," but when Gomez received the check that same day, she cashed it and "refused to refund it." Plaintiff alleges Gomez "subsequently falsely reported that four (4) people wanted the apartment during the early part of January 16, 2014, and that she had refused those offers in the few hours in which the check was in her possession and prior to depositing it." Plaintiff alleges defendants "never intended to rent the apartment" to her or "or anyone, and used the apartment for the sole purpose of defrauding Plaintiff (and others like Plaintiff)." Plaintiff alleges she relied on defendants' false representations and provided the $15,000 payment, and also "made arrangements for pet travel, travel arrangements, child care and other arrangements, and other costs . . . estimated to be $14,200." Plaintiff alleges defendants' "intent from moment" defendant Gomez asked for "the purported 'hold fee' was to defraud Plaintiff," and to "convert Plaintiff's funds."

Defendants are moving for granting summary judgment dismissing the complaint in its entirety as without merit, and granting summary judgment to defendant Rebecca Gomez in the amount of $5,000 on her first counterclaim for breach of contract. Defendants also seek an order assessing costs and sanctions against plaintiff for frivolous litigation, disqualifying plaintiff's counsel for not having a physical office in New York as required by Judiciary Law §470, and transferring the action to Civil Court. In separate motions, plaintiff moves to compel discovery,

and for leave to amend the complaint to add a fifth cause of action for fraudulent conveyance in violation of Debtor Creditor Law §§276 and 278(1)(a), and a sixth cause of action for breach of contract, and to name a new defendant, 13 East 9th Street LLC a/k/a 13th East 9th Street LLC.

At the outset, the court will address the issue raised by defendants as to whether plaintiff's counsel is in compliance with Judiciary Law §470, which requires him, as an attorney admitted to practice in New York who is not a New York resident, "to maintain a physical law office within the State." Schoenfeld v. State of New York, 25 NY3d 22 (2015).[1] The penalty for failure to comply with Judiciary Law §470 is dismissal of the complaint without prejudice in

---

[1]Judiciary Law §470 is currently the subject of a constitutional challenge in federal court. In Schoenfeld v. State of New York, 907 FSupp2d 252 (NDNY 2011), the federal district court held that the statute violated the Privileges and Immunities Clause of the U.S. Constitution. On appeal, the Second Circuit indicated that the requirement for a physical office in New York would likely implicate the Privileges and Immunities Clause, but turned to the New York Court of Appeals for the interpretation of Judiciary Law §470 by certifying the question as to the minium requirements for satisfying the statutory mandate to maintain an "office for the transaction of law business." Schoenfeld v. State of New York, 748 F3d 464 (2nd Cir 2014).

On March 31, 2015, the Court of Appeals answered the certified question and held that Judiciary Law §470 requires nonresident attorneys to maintain a physical office in New York. Schoenfeld v. State of New York, 25 NY3d 22 (2015). On June 4, 2015, the Second Circuit held argument and has not yet issued a decision.

The Court of Appeals opinion by Chief Judge Lippman, examines the purpose of section 470, noting that while New York "does have an interest in ensuring that personal service can be accomplished on nonresident attorneys admitted to practice here . . . . it is clear that service on an out-of-state individual presented many more logistical difficulties in 1862, when the provision was originally enacted." Id. Explaining that "[u]nder our own court rules, the admission of attorneys who neither reside nor have full-time employment in the State is conditioned upon designating the clerk of the Appellate Division in their department of admission as their agent for service of process for actions or proceedings brought against them," Chief Judge Lippman concludes that "there would appear to be adequate measures in place relating to service upon nonresident attorneys and, of course, the legislature always remains free to take any additional action deemed necessary." Id. Chief Judge Lippman did not consider the constitutionality of section 470. However, the First Department Appellate Division has held that Section 470 does not violate the Privileges and Immunities Clause of the U.S. Constitution. Lichtenstein v. Emerson, 251 AD2d 64 (1st Dept 1998).

the First Department. See Webb v. Great New York Automobile Dealers Association, Inc, 93 AD3d 561 (1st Dept 2012); Empire HealthChoice Assurance, Inc v. Lester, D.C., 81 AD3d 570 (1st Dept 2011); Kinder Morgan Energy Partners, LP v. Ace American Insurance Co, 51 AD3d 580 (1st Dept 2008).[2]

It is undisputed that plaintiff's attorney, her husband Ian Wallach, is a California resident who was admitted to the practice of law in New York in 2000. Wallach is also admitted to the practice of law in California, where he maintains an office. When plaintiff commenced this action in February 2014, the complaint listed Wallach's address as 312 N. Atlantic Street, 2nd Floor, Brooklyn, New York 10201, and a California telephone number.[3] On August 18, 2014, Wallach filed a Notice of Change of Address listing the Brooklyn address his "old firm information" and his "new firm information" as "The Law Offices of Ian Wallach, 43 West 43rd Street, Suite 036, New York, NY 10036-7424," again with California telephone and fax numbers.

Defendants contend that neither the Brooklyn nor the 43rd Street address satisfies the requirement of Judiciary Law §470 to maintain a physical office in New York. Specifically with respect to the Brooklyn address, defendants' attorney submits an affirmation that he mailed

---

[2]The Second Department does not require dismissal of the complaint. See Sovereign Bank v. Calderone, 84 AD3d 778 (2nd Dept), lv app dism 17 NY3d 849 (2011); Elm Management Corp v. Sprung, 33 AD3d 753 (2nd Dept 2006). The Third Department imposes disciplinary sanctions. See Matter of Marin, 250 AD2d 997 (3rd Dept 1998), lv app den 92 NY2d 818 (1999); Matter of Haas, 237 AD2d 729 (3rd Dept 1997).

[3]The complaint contained a typographical error. The correct address is "Atlantic Avenue," and not "Atlantic Street." Wallach explains: "Near the commencement of this action, I received a call from a process server for Counsel Fleishell [plaintiff's counsel] who stated that she could not locate my work address. We realized the typographical error and this was communicated to his process server."

Wallach a letter to the Brooklyn address on April 29, 2014, which the post office returned on May 4, 2014. Defendants submit a copy of the envelope with the post office's marking: "Return to Sender, Not Deliverable as Addressed, Unable to Forward." As to the 43rd Street address, defendants submit an affidavit from Nicole Lisa, an employee of defendants' counsel, stating that on August 21, 2014, she "attempted to serve a Notice" on Wallach at 43 West 43rd Street. She explains that when she arrived at that address, she "saw a plaque posted on the entrance door informing visitors to use the entrance at 42 West 44th Street," and when she went to 42 West 44th Street, "there was a sign indicating that the building was the Association of the Bar of New York." She states she entered the building "and told the concierge that I had papers for Ian Wallach, Esq. in Suite 036," and the "concierge told me that there were no suites in the building and that Ian Wallach, Esq. was not listed as having an office in the building." She states the concierge directed her "to the Bar Building at 36 West 44th Street," and at that building, the concierge told her "there were no suites there and that Ian Wallach, Esq. was not listed as having an office in the building."

In response, Wallach submits an affirmation that when he commenced this action in February 2014, he maintained a "physical office" at 312 Atlantic Avenue, 2nd Floor, Brooklyn, New York, where he has the use of an office on the second floor, which "is mine to use, and has a desk, telephone, fax machine, computer and anything else I may need." He states he is "able to accept service of process at this address (and have)," he is "immediately notified of any calls, service of documents, or mailings, and all documents are immediately forwarded to me via email and post to my residence," and he "can meet clients there if and when needed." Wallach further states that in addition to the office in Brooklyn, during the pendency of this action, on or about

June 1, 2014, "I also availed myself of the Virtual Law Firm Program of the New York City Bar Association (with an address of 43 West 43rd Street, Suite 036)," which he asserts, "constitutes a 'physical office' in New York." Wallach submits an affidavit from the owner of the building at 312 and 314 Atlantic Avenue, Bertrand Delacroix,[4] an affidavit from Bret Parker, Esq., the Executive Director of the City Bar, a letter from the City Bar's General Counsel, Alan Rothstein, and a letter from Alla Roytberg, Director of the City Bar's Small Law Firm Center.

The court concludes that under the circumstances presented, Wallach has made a sufficient showing that his office in Brooklyn and his membership in the VLF program at the City Bar, meet the requirement under Judiciary Law §470 to maintain a physical office in New York. The owner of the building in Brooklyn, Bertrand Delacroix states that he has known Wallach since "about 2003," as they "are mutual clients for each other's profession," and since 2011, Wallach "has access to one of the offices on the second floor whenever he needs it," where he has "access to a desk, telephone, fax machine, computer." Delacroix states that he and his staff are "able to accept service of process on [Wallach's] behalf at this address (and have)," and "immediately notify Ian Wallach of any calls, service of documents, or mailings (and all such documents are immediately forwarded to him via email and post to his residence or office in Los Angeles, California, unless he is here, in New York, in which case he picks them up)." Delacroix also states that Wallach "can meet clients there if and when he needs to (and has)," and that "business services and facilities" have been available since "around 2011,"and Wallach has handled a legal matter from me in the past, and used this address for all purposes related to that

[4]Wallach submits an Supplemental Statement dated July 2, 2015 informing the court of Delacroix's death on July 20, 2015.

matter."

In his affidavit, the Executive Director of the City Bar, Brett Parker, Esq., states that Wallach has "subscribed" to the VLP since June 1, 2014, and the "postal address" for attorneys using the VLP services is 43 West 43rd Street, New York, NY 100036. Parker explains that the "information desk" at the City Bar has a list of attorneys who use VLP services, City Bar staff collect mail and deliveries addressed to attorneys who use the VLP services, and "attorneys who subscribe to the detailing mailing services, including Mr. Wallach, are then notified that mail or deliveries have arrived, and then can either pick up those items or arrange to have them forwarded by mail or overnight delivery." He further states that on "August 21, 2014, Mr. Wallach was on the list of attorneys who subscribe to the VLO Services and could receive mail and deliveries at the postal address of 43 West 43rd Street, New York, NY 10036" and "has remained on that list and is so today [July 17, 2014]."

When Wallach subscribed to the VLF program, he received a letter from Alla Roytberg, Director of the Small Law Firm Center, welcoming him to the program and providing information that "will help you in connection with your Virtual Law Firm." The letter advised, *inter alia*, that Wallach's "Virtual Law Firm Address" is "43 West 43rd Street, Suite 036, New York, NY 10036-7424," and noted to "please direct all delivers of express mail and parcels as well as messenger services with in-person delivery to our service entrance, located to the left of 43 West 43 Street at '45 West 43rd Street,'" and that "[a]ll items requiring signature will be signed for during NYC Bar's regular hours of operation." The letter provided the name, telephone number and email of the person to contact to "inquire whether you have received mail and/or requested mail forwarding," and explained that mail could be retrieved in person by

"[t]elling the staff at the Front Desk in the lobby that you are a Virtual Law Firm Member and then proceed to the 4th floor," and "[y]our mail will be located in the Library Staff Office." The letter listed the persons to contact for "general questions about the VLF program," to "reserve a free conference room," and to "reserve a paid meeting room," and gave the hourly rates for a paid meeting room. With respect to service of process, the letter advised that "[b]y becoming a member of the Virtual Law Firm Program, you are agreeing that we will accept service of process and registered/certified mail and sign for it on your law firm's behalf." The letter also noted that when "visitors show-up unexpectedly and ask to see you," they will be told to "contact you directly by telephone or email and that your office hours are by appointment only."

Wallach also submits a letter dated June 23, 2015, from the City Bar's General Counsel Alan Rothstein, responding to Wallach's "inquiry as to whether the Virtual Law Firm (VLF) program" of the City Bar "complies with the current state of the law regarding Section 470 of the Judiciary Law." Rothstein advises that while the City Bar "is not in a position to give you a legal opinion . . . we can provide you with the details of the program that you can evaluate in the context of that statute and the recent Court of Appeals decision in *Schoenfeld v. State of New York*." Rothstein states that the VLF program gives City Bar members the opportunity "to receive mail and service of process at an office address in the New York City Bar building." He explains that "you can have your mail forwarded to you or you can pick it up," and they "provide for a daily description of the mail origin to be emailed to you." He also explains that "you may utilize the office and conference rooms of the Small Law Firm Center located in the New York City Bar Building for the transaction of law business," and "I understand you do indeed make use of those facilities." He states that "you have access to the onsite research facilities of the New

York City Bar Library," and that "VLF participants may have phone calls answered in Manhattan at the participant's own area code 212 phone number," including a "live answering service during business hours and a separate voice mail box" or "choose to have calls directly transferred to you at a number you provide."

Based on the foregoing, Wallach has adequately established compliance with Judiciary Law §470. As stated above, the statute permits an nonresident attorney to practice law in New York if he or she maintains an office "for the transaction of law business" in New York, which the Court of Appeals has interpreted as "requiring nonresident attorneys to maintain a physical law office within the State." Schoenfeld v. State of New York, supra. Although the Court of Appeals just recently issued its decision in Schoenfeld, the Appellate Divisions have consistently reached the identical conclusion over the years. See Reem Contracting v. Altschul & Altschul, 117 AD3d 583 (1st Dept 2014); Sovereign Bank v. Calderone, 84 AD3d 778 (2nd Dept), lv app dism 17 NY3d 849 (2011); Tatko v. McCarthy, 267 AD2d 583 (3rd Dept 1999); Lichenstein v. Emerson, 251 AD2d 64 (1st Dept 1998); Matter of Haas, 237 AD2d 729 (3rd Dept 1997); Matter of Scarcella, 195 AD2d 513 (2nd Dept 1993); Matter of Larsen, 182 AD2d 149 (2nd Dept 1992), app dism 81 NY2d 1008 (1993); Rosenshein v. Ernstoff, 176 AD2d 686 (1st Dept 1991).

Here, the record shows that at the commencement of this action in February 2014, Wallach had the use of an office in Brooklyn with a desk, conference area, computer and other office equipment, and was able to receive mail and meet clients at that location. The now deceased owner of the building submitted a sworn affidavit that he and his staff are "able to accept service of process" on Wallach's behalf at the Brooklyn address, and indicated that they had in fact done so. Wallach used the Brooklyn address on the complaint and other legal papers

filed in this action. Although a single letter addressed to Wallach at the Brooklyn address was returned as undeliverable to defendants' attorney, that fact alone does not suffice to rebut Wallach's evidence. Thus, based on the office in Brooklyn, Wallach was in compliance with Judiciary Law §470 when he commenced this action. See Miller v. Corbett, 177 Misc2d 266 (City Court, City of Yonkers 1998).

Notwithstanding the foregoing conclusion, even if Wallach was not in compliance with Judiciary Law §470 when he commenced this action, four months later in June 2014, he complied with the statute when he joined the City Bar's VLF program. As a member of the VLF program, Wallach is provided with an office address for the receipt of mail and service of process, and other office-related services, including mail forwarding, in-person mail pick-up, a local New York telephone number, live telephone answering and transferring services, and telephone voice mail. Significantly, the VLF program also provides Wallach with the use of an office and conference room where he can meet with clients, as well the research facilities of the City Bar law library. Wallach designated his VLF address as the location of his New York office, on both the change of address notice filed in this action in June 2014, and his attorney registration filed with the Office of Court Administration in August 2014. The affidavit of the employee of defendants' counsel, who was unable to find Wallach physically present at the 43 West 43rd Street address, is not material, as it is undisputed that the VLF program does not provide each and every member with actual offices of their own, but only access to an office or conference room on an as-need basis. The printed information prepared by City Bar explicitly explains that when visitors appear "unexpectedly" and ask to see him, they will be told that his office hours are "by appointment only," and that he can be contacted directly by telephone or

email.

In view of the nature and extent of the business services and facilities provided to Wallach as a member of the City Bar VLF program, the court concludes that he has sufficiently satisfied the mandate of Judiciary Law §470 to maintain a physical law office within the State. As one court has noted, "nothing in the statute states the size or type of office to be maintained." Austria v. Shaw, 143 Misc2d 970, 971-972 (Sup Ct, NY Co 1989). Thus, the branch of defendants' motion to disqualify plaintiff's counsel or to dismiss the complaint based a violation of Judiciary Law §470, is denied.

Turning to the balance of defendants' motion, defendants move pursuant to CPLR 3212 for summary judgment dismissing the complaint in its entirety as without merit, and submit affidavits from defendants Rebecca Gomez and Irina Velichko, an attorney's affirmation, the pleadings, the internet listing for the apartment at issue, and the parties' email correspondence relating to the rental of the apartment.

In opposition, plaintiff has not submitted an affidavit, and relies solely on an affirmation from her attorney who argues that each cause of action in the complaint has been "properly asserted"; defendants have refused to respond to plaintiff's discovery demands; the motion was not properly noticed and is based on "hearsay statements"; and defendants did not file a motion to dismiss the complaint.

Where as here defendants are moving for summary judgment pursuant to CPLR 3212 on the ground the complaint fails to state a cause of action, the "application by its nature is not addressed solely to the pleadings," as is a pre-answer motion to dismiss pursuant to CPLR 3211(a)(7). Lindquist v. County of Schohaire, 126 AD3d 1096, 1997 (3rd Dept 2015). Rather,

on a summary judgment motion premised on CPLR 3211(a)(7), "failure to state a cause of action in pleadings would not be sufficient to permit unconditional summary judgment in favor of defendant, as a matter of law, if plaintiff's submissions provided evidentiary facts making out a cause of action." Id (quoting Alvord & Swift v. Muller Construction Co, 46 NY2d 276, 280 [1978]). In this "unusual procedural setting," defendants are not required "to meet their customary statutory burden of establishing a prima facie right to judgment as a matter of law on the substantive merits" of plaintiffs claims. Id at 1097-1098. Instead, defendants will meet their burden on their procedural claims, which are addressed to the pleadings and not to the merits, "by identifying a defect in plaintiffs' complaint, and in this manner [will trigger] plaintiffs' obligation to reveal an evidentiary basis in its submissions that [is] sufficient to present facts curing the defect or supplying the deficiency." Id at 1098 (quoting Weinstein Korn Miller, NY Civ Prac ¶3212.10 [2nd ed. 2014]).

As to the first and second causes of action for fraud and fraud in the inducement, plaintiff must prove a misrepresentation or a material omission of fact that was false and known to be false by defendant, made for the purpose of inducing plaintiff to rely on it, plaintiff's justifiable reliance on the misrepresentation or omission, and injury. See Mardarin Trading Ltd v. Wildenstein, 16 NY3d 173 (2011). The complaint alleges that Gomez falsely represented that she would find another tenant and refund plaintiff's deposit if plaintiff no longer needed the apartment, plaintiff relied on that representation when she sent Gomez the $15,000 deposit, and Gomez made no effort to find another tenant and refused to refund plaintiff's deposit. The complaint further alleges that Gomez falsely represented that she intended to rent the apartment and induced plaintiff to pay $15,000 "with nothing in exchange."

"A fraud based cause of action is duplicative of a breach of contract claim 'when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract. Manas v. VMS Associates, LLC, 53 AD3d 451, 454 (1st Dept 2008). In other words, "[a] cause of action for fraud does not arise when the only fraud charged relates to a breach of contract." Id; see Linez Nuova, S.A. v. Slowchowsky, 62 AD3d 473 (1st Dept 2009).

Here, the alleged misrepresentations as to Gomez's intentions to rent the apartment, find another tenant and refund plaintiff's deposit, arise solely out of the Gomez's agreement to rent the apartment to plaintiff in exchange for plaintiff's payment of a $15,000 "hold fee" or deposit. Since these alleged misrepresentation relate solely to Gomez's performance under the contract, they are insufficient to support a claim for fraud or fraudulent inducement. See Manas v. VMS Associates, LLC, supra; Linez Nuova, S.A. v. Slowchowsky, supra. In addition, plaintiff cannot maintain a claim for fraud since she has failed to allege that she sustained any damages that would not be recoverable under a breach of contract claim. See Manas v. VMS Associates, LLC, supra at 454. Defendants, therefore, are entitled to summary judgment dismissing the first and second causes of action.

Defendants are likewise entitled to summary judgment dismissing the third cause of action for deceptive business practices in violation of General Business Law §349. The instant action is not based upon "consumer oriented" conduct affecting the public at large, but involves a dispute over an agreement for the short-term rental of a single apartment, which is unique to the parties. See New York University v. Continental Insurance Co, 87 NY2d 308, 320-321 (1995); Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., 85 NY2d 20, 24-27 (1995); Biacone v. Bossi, 24 AD3d 582 (2nd Dept 2005). Plaintiff's bare and conclusory

assertion that defendants "engaged in a scheme to defraud visitors to New York," is insufficient to support a claim under General Business Law §349.

The fourth cause of action for conversion is also dismissed. To maintain a claim for conversion, plaintiff must allege facts establishing that prior to the conversion, she exercised rights of ownership, possession, or control over the property or funds at issue. See M.D. Carlisle Realty Corp v. Owners & Tenants Electric Co, Inc, 47 AD3d 408, 409 (1st Dept 2008). "A claim for conversion cannot be predicated on a mere breach of contract." Wolf v. National Council of Young Israel, 264 AD2d 416 (2nd Dept 1999); see M.D. Carlisle Realty Corp v. Owners & Tenants Electric Co, Inc, supra. Here, plaintiff's allegations that Gomez converted her funds by cashing the $15,000 check after plaintiff informed her not to do so, are predicated on a "mere breach of contract," and as such are insufficient to support a claim of conversion. Id. Moreover, plaintiff cannot maintain a claim for conversion since she is not seeking any damages other than those for breach of a contract. See Daub v. Future Tech Enterprise, Inc, 65 AD3d 1004 (2nd Dept 2009).

Based on the foregoing, defendants' motion for summary judgment dismissing the complaint in its entirety, is granted. Plaintiff, however, is moving to amend the complaint to add new causes of action for breach of contract and fraudulent conveyance, and to name as an additional defendant, 13 East 9th Street, LLC a/k/a 13th East 9th Street LLC.

"Leave to amend a pleading should be 'freely given' (CPLR 3025[b]) as a matter of discretion in the absence of prejudice or surprise." Zaid Theatre Corp v. Sona Realty Co, 18 AD3d 352, 355-356 (1st Dept 2005)(internal citations and quotations omitted). The movant need not establish the merits of her proposed new allegations, but simply submit sufficient support to

show that the proposed amendment is not "palpably insufficient or clearly devoid of merit." MBIA Ins Corp v. Greystone & Co, Inc, 74 AD3d 499 (1st Dept 2010); see Fairpoint Companies LLC v. Vella, __ AD3d __, 2015 WL 9464842 (1st Dept 2015). In addition, "[o]nce a prima facie basis for the amendment has been established, that should end the inquiry, even in the face of a rebuttal that might provide the ground for a subsequent a motion for summary judgment" Pier 59 Studios, LP v. Chelsea Piers, LP, 40 AD3d 363, 365 (1st Dept 2007).

The motion to amend is granted with respect to the proposed claim for breach of contract. Plaintiff alleges that defendants failed to perform their obligation under the contract to mitigate the damages by finding another tenant to rent the apartment. Plaintiff further alleges that Gomez "repeatedly maintained that she would take all available efforts to mitigate the damages and rent the apartment, and represented that she would do so," but she "failed to even relist the apartment and made no efforts to mitigate the damages." In opposition, defendant Gomez asserts that she had no duty to mitigate, and even if she had such a duty, she submits an affidavit stating that she made efforts to secure another tenant. As noted above, defendant's assertions could be considered in the context of a motion for summary judgment, but not the instant motion to amend. See id. Thus, given plaintiff's allegations as to Gomez's duty to mitigate, a sufficient basis exists for her to assert a breach of contract claim.

Leave to amend is likewise granted with respect to the proposed cause of action for fraudulent conveyance pursuant to Debtor Creditor Law §§276 and 278(1)(a), and to add 13 East 9th Street, LLC as a party-defendant in connection with those claims. Debtor Creditor Law §276 addresses actual fraud, and provides that "[e]very conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or

defraud either present or future creditors, is fraudulent as to both presents and future creditors." See Wall Street Assocs v. Brodsky, 257 AD2d 526 (1st Dept 1999). Plaintiff's claim is based on the statements in Gomez's affidavit, that they refinanced their mortgage in July 2014 to take advantage of the lower interest rates, and at the same time "heeding the advice of our real estate attorney handling the re-finance transaction for us, we formed a domestic limited liability company and conveyed title to the building to the newly-formed entity, 13th East 9th Street, LLC, in order to insulate us from potential personal liability in connection with the ownership of the building." Plaintiff alleges that the "sole reason for the conveyance was to avoid collection in this action," and that the conveyance "was made with the intent to hinder, delay, or defraud either present or future creditors, including Plaintiff, and is fraudulent as to Plaintiff." Given Gomez's admitted conveyance and her admitted reason for the conveyance, a basis exists for plaintiff to assert a claim for fraudulent conveyance under Debtor Creditor Law §§276.

Plaintiff may likewise assert a claim to set aside the fraudulent conveyance under Debtor Creditor Law §278(1)(a), as the purpose of section 278 "is to permit the plaintiff to 'establish his debt, whether matured or unmatured, and challenge the conveyance in the compass of a single suit." Kendzia v. Gregian, 222 AD2d 1008 (4th Dept 1995) (quoting Goldstein v. Wagner, 228 AD 847 [2nd Dept 1930] [quoting American Surety Co v. Conner, 251 NY 1, 8 [1929]). Since defendants admit the ownership of the property was conveyed to 13 East 9th Street LLC, that entity shall be added as a party-defendant to the fraudulent conveyance cause of action.

The branch of defendants' motion for summary judgment on defendant Rebecca Gomez's first counterclaim for breach of contract, seeking the $5,000 balance due for the rental of the apartment, is denied as premature since discovery is outstanding.

The branch of defendants' motion for an award of costs and sanctions for frivolous litigation and to transfer this action to Civil Court pursuant to CPLR 325(d), is denied.

Finally, plaintiff's motion to compel discovery is granted only the extent the parties are directed to appear for the preliminary conference previously scheduled for January 21, 2016.

Accordingly, it is

ORDERED that plaintiff's motion to amend the First Amended Complaint (motion seq. 005) is granted, and within 20 days of the date of this decision and order, plaintiff shall serve and file a Second Amended Complaint consistent with the court's determination herein, and within 20 days of such service defendants shall serve and file an answer to the Second Amended Complaint; and it is further

ORDERED that the branch of defendants' motion for summary judgment (motion seq. no. 004) dismissing the first, second, third and fourth causes of action in the First Amended Complaint is granted, and those causes of action are dismissed; and it is further

ORDERED that the branch of defendants' motion for summary judgment (motion seq. no. 004) on defendant Rebecca Gomez's first counterclaim for breach of contract is denied as premature; and it is further

ORDERED that plaintiff's motion to compel discovery (motion seq. no. 002) is granted only to the extent the parties are directed to appear for the preliminary conference previously scheduled for January 21, 2016 at 9:30 am, in Part 11, Room 351, 60 Centre Street.

DATED: January 8, 2016

ENTER:

HON. JOAN A. MADDEN
J.S.C.