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| <b>Quinn v Quinn</b>   |
| 2017 NY Slip Op 30339(U)   |
| February 16, 2017  |
| Supreme Court, New York County   |
| Docket Number: 653817/16   |
| Judge: Frank P. Nervo  |
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

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CAROLINE QUINN,

DECISION AND ORDER

Plaintiff,

Index Number

-against-

653817/16

PETER QUINN,

Defendant.

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FRANK P. NERVO, J:

Defendant moves to dismiss the complaint, pursuant to CPLR 3211. Although the notice of motion does not specify which provisions of 3211 he relies on, it is apparent that from reading the affirmation in support of the motion, he is relying on 3211 (a)(1), a defense founded upon documentary evidence, and 3211 (a)(7), the complaint fails to state a cause of action. As defendant seeks such other and further relief that the court deems just and proper, the court will decide the motion on the basis of the latter CPLR provisions, despite defendant's neglect to specify them in the notice of motion.

The court, in deciding a motion under CPLR 3211(a)(7), must determine whether the plaintiff has a cause of action, not merely that he or she has failed to state one. The court must treat the allegation as being true and must interpret the allegation liberally, in the most favorable light to the party. The court may make limited use of affidavits the parties submit on the motion. (see *Liberty Affordable Housing, Inc. v. Maple Court Apartments*, 125 AD3d85) The court has done so in this case.

In determining a motion under CPLR 3211(a)(1), the court must find that the document the movant relies on is unambiguous, undeniably authentic and undeniable. (see *Fontanetta v. Doe*, 33 AD3d 78)

Plaintiff seeks to reform or rescind the separation agreement between the parties that provides, in part, for the transfer of the marital residence. She alleges that she was unable to fulfill her obligation under the agreement because she could not obtain financing from First Republic Bank that she needed to pay a distributive award of \$985,000 to defendant. Unless she paid this amount to defendant, within a certain amount of time, he was not obligated to transfer the property to her. Plaintiff alleges that she could not obtain financing from First Republic Bank unless she first had title to the property. She alleges that the contract was based on mutual mistake, the product of fraud, impossible for her to perform and that enforcing it would unjustly enrich defendant.

Defendant argues that the agreement speaks for itself and that there is no factual basis for plaintiff's allegations that the agreement was the product of mutual mistake, the first cause of action, no fraudulent inducement, second and third causes of action, no impossibility of performance, the fourth cause of action, and no unjust enrichment, the fifth cause of action.

Applying the appropriate standards of review under CPLR 3211(a)(1) and 3211(a)(7), the court agrees with defendant and dismisses the complaint. In making its decision, the court reviewed the complaint, the agreement and the affidavits both parties submitted. The affidavits show that both parties were represented by their own attorney at the time the agreement was drafted and executed. That agreement is unambiguous and authentic. Plaintiff's affidavit contains only conclusory allegations that fail to support the allegations in her complaint.

In her first cause of action, plaintiff alleges that she believed that Article VII, ¶ 2 (a)(1) of the agreement, the provision providing for the transfer of the property, would be sufficient for her to obtain financing. She states, "on information and belief, defendant was of the same belief." She provides no facts giving the basis for this belief. She further alleges that performance of the agreement to transfer the property is impossible because of First Republic's requirement that she have title to the property before it would finance the transfer. Plaintiff does not allege that she was unable to obtain financing from other sources; it does not even allege that the parties contemplated plaintiff's need to obtain financing in order to effect the transfer provision.

The first cause of action must be dismissed. A claim predicated on mutual mistake must be pleaded with the specificity required by CPLR 3016(b). (*Simkin v. Blank*, 19 NY3d 46,52) Plaintiff fails to comply with that provision, as she does not allege facts demonstrating a mutual mistake that would allow for the contract's reformation; she makes no factual showing that defendant made a mistake relating to the need for financing. "To obtain relief there must be evidence that the mistake or misrepresentation was a matter of mutual concern. Absent an allegation of a mistake based on a matter of mutual concern, there is no cause of action stated. At best, plaintiff's alleges her own, unilateral, mistake. (*Brauer v. Central Trust Company*, 77AD2d 239, 243) Moreover, the mutual mistake must go the foundation of the agreement. (*id.*) At best, the question of financing, which is not even mentioned in the agreement, is a collateral issue that does not go to the heart of the contract. The contract makes no mention of how plaintiff would obtain funding, or even that she contemplated the need for financing at the time she signed the contract.

At most , plaintiff is attempting to assert only her own, unilateral mistake. While unilateral mistake may be the basis for rescission, that mistake must be fraudulently induced by the other party (*id.*) As will be discussed, the complaint fails to state a cause of action for fraud. In fact, both parties were represented by attorneys and plaintiff alleges no facts showing how defendant could have made her act against competent legal advice Further, plaintiff

acknowledged, in the contract, that it was fair. This acknowledgment negates any argument that she was fraudulently induced to sign it.

The second cause of action seeking reformation based on defendant's alleged fraudulent misrepresentation is dismissed.

"To properly plead a cause of action [based on] fraud, the plaintiff must allege that(1) defendant made a false representation of fact, (2) the defendant had knowledge of the falsity, (3) the misrepresentation was made in order to induce plaintiff's reliance (4) there was justifiable reliance on the part of the plaintiff and (5) the plaintiff was injured by the reliance." (*Pace v. Raisman & Associates, Esqs., LLP*, 95 AD3d 1185,1189, citing *Eurycleia Partners, LP. Seward & Kissel, LLP*, 12 NY3d 553) Further, the cause of action alleging fraud must be pleaded with specificity, pursuant to CPLR 3016(b). (*Pace v. Raisman & Associates, Esqs., LLP*,*id.*,*Eurycleia Partners, LP v. Steward & Kissel, LLP*, 12 NY3d at 559). Finally, the allegation must show that the alleged fraud was the proximate cause of harm to a plaintiff. (*Friedman v. Anderson*, 23 AD3d 163,166, citing *Laub v. Faessel*, 297 AD2d 28, 30) Conclusory allegations are insufficient to meet the specificity requirement of CPLR 3016 (b), *supra*. Plaintiff's causes of action based on fraud cannot withstand scrutiny under these standards, as she cannot show that defendant had the requisite intent to deceive her with his allegedly false statements; and, she cannot show that she reasonably relied on the alleged misrepresentation.

Plaintiff alleges that defendant said something to her that induced her to sign the agreement, despite the fact that he should have known that she could not obtain financing. The allegation does not specifically state what he said. The allegation is factually insufficient under CPLR 3016 (b) *supra*., as it does not "... inform ...defendant of the complained of incidents." (*Eurycleia Partners LP v. Seward & Kissel, LLP.*, *id.*)

The fraud cause of action must be dismissed for the additional reason that the allegations, even if true, fail to show that plaintiff could have reasonably relied on defendant's alleged misrepresentation. There is no dispute that plaintiff was represented by an attorney during the settlement process and that the representation continued up to the time plaintiff signed the agreement. The complaint fails to allege justifiable reliance. Plaintiff cannot demonstrate this reliance because despite her access to her own counsel, she claims to have relied on defendant's advice. Thus, she relied on an adverse party's advice rather than that of her own attorney's advice, and failed to contact her bank to learn of its requirements prior to signing the agreement. Plaintiff could not have reasonably relied on the advice of a person whose interests are adverse to her own interests. (see *Mann v. Rusk*, 14 AD3d 909). She cannot, as a matter of law, demonstrate reasonable reliance, as she failed, by her own allegations, to show that she exercised due diligence. (*MAFG Art Fund, LLC v. Gagosian*, 123 AD3d 458, 459) As plaintiff fails to demonstrate due diligence, the cause of action is insufficient as at best, it shows that the proximate cause of her alleged loss was her own failure to act properly and was not caused by defendant.

Accordingly, it is

ORDERED that the motion is granted and the complaint dismissed; and it is further

ORDERED that the Clerk shall enter a judgment in favor of defendant dismissing the complaint.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: February 16, 2017

ENTER:



JSC

HON. FRANK P. NERVO

