Chupack v Gomez
2017 NY Slip Op 30956(U)
May 2, 2017
Supreme Court, New York County
Docket Number: 151348/2014
Judge: Margaret A. Chan
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 33

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CINDY CHUPACK,

Plaintiff,

DECISION/ORDER
Index No. 151348/2014

-against-

REBECCA GOMEZ, IRINA VELICHKO, MICHAEL FLORES, 13 EAST 9TH STREET, LLC (A/K/A 13TH EAST 9TH STREET LLC)

Defendants.

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MARGARET CHAN, J.:

Before this court are two motions. Motion sequence (MS) 6 is plaintiff's motion to terminate sanctions for discovery issues. Plaintiff withdrew the motion in his reply brief, thus MS 6 is deemed withdrawn. The remaining motion, MS 7, is plaintiff's motion for summary judgment on defendant's first, second, and third counterclaims. Defendants submitted opposition and a cross-motion seeking dismissal of plaintiff's newly asserted causes of action, summary judgment on their counterclaims, and sanctions against plaintiff for commencing and prosecuting this frivolous lawsuit.

In a prior round of dispositive motions before another judge of this court, defendants' motion for summary judgment for failure to state a cause of action pursuant to CPLR 3211(a)(7) was granted and the complaint was dismissed in its entirety. However, plaintiff was granted leave to amend her complaint to add new causes of action for breach of contract and fraudulent conveyance, and to add an additional defendant (Order of Hon. Joan Madden, dated January 8, 2016).

Plaintiff's instant motion, MS 7, was bereft of any support as set forth in CPLR 3212(b), and was otherwise defective. Her reason for non-compliance with CPLR 3212(b) is baffling since attaching the amended pleadings to support her motion is not beyond her reach or influenced by discovery issues. In any event, plaintiff corrected this error in her reply, but neglected to cure the defect with the out-of-state affidavit. Defendants urge dismissal of the motion because of these defects. And plaintiff urge dismissal defendants' cross-motion because it is untimely. However, given the parties' penchant for motion practice, and in the interest of judicial economy to stave off yet another round of motions, plaintiff's motion will be addressed, but the out-of-state affidavit will not be considered. Defendant's cross-motion will be addressed as well especially since the cross-motion largely deals with the same issues as plaintiff's motion.

As a backdrop, plaintiff, a noted screenwriter and movie producer, sought to rent an apartment in Manhattan for three months so she can work on the movie, Sex and the City, that was to be filmed in New York City. She found the subject apartment on a Vacation Rentals By Owner (VRBO) website and contacted the owner. Plaintiff expressed her interest in renting the apartment listed for $20,000 per month for a three-month period, and remitted a non-refundable hold fee of $15,000. The filming of the movie did not commence as planned,

and rather than lose her deposit, plaintiff negotiated with defendant owner to rent the apartment for one month. Defendant Gomez agreed, but plaintiff did not go through with the rental, and demanded defendants to refund the $15,000 hold fee.

Both parties now move for summary judgment. A party moving for summary judgment must make a prima facie showing that it is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1980]). Once a showing has been made, the burden shifts to the parties opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). It is well settled that summary judgment may not be granted where there is any doubt as to the existence of a triable issue (*see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]), or where the existence of an issue is arguable (*see Sillman v Twentieth Century–Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Summary judgment motions are viewed in the light most favorable to the party opposing the motion (*see Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997]).

Breach of Contract

Plaintiff's newly asserted sixth cause of action is for breach of contract, arguing that despite the absence of a signed lease between the parties, defendants failed to mitigate in good faith, and a duty to mitigate and the covenant good faith and fair dealing are implied in their contract (Pltf's Reply, exh A, p 8 at ¶ 48). This assertion is aligned with defendants' argument in their first counterclaim for breach of contract. They argue that while there is no written contract, there are e-mails supporting an agreement between the parties.

While plaintiff argues defendants breached their contractual duty to mitigate, the thrust of her argument is that there is no contract to show that plaintiff was to pay $20,000 per month as rent. Plaintiff points to the absence of any tax information from defendants, but does not elaborate as to how that supports her argument.

Plaintiff's argument that no written lease and no tax records equal no contractual obligation to pay $20,000 per month for the apartment rental is diffused by defendants' evidence. There was e-mail correspondence that reflected the parties' agreement for plaintiff to rent defendants' apartment for three months at $20,000 per month. Further e-mail correspondence evidenced plaintiff's assent to the required hold fee of $15,000. This assent was supported by plaintiff's remittance of a $15,000 check that was posted on January 14 (Fleishell Aff, exhs F and L). While e-mails preceding the remittance of the hold fee showed plaintiff's initial impression that the hold fee was refundable, her January 10 e-mail to her accountant clarified her understanding that it was non-refundable: "[a]s I understand it, the 15K (due today by cashier's check or wire) is non-refundable hold fee so that Rebecca [Gomez] doesn't rent the apartment to anyone else. . . ." (*id.*, exh F). Hence, defendants' evidence showed that there was an offer, an acceptance, and consideration, and an agreement and understanding as to the terms of the contract.

This contract was later renegotiated by plaintiff to shorten the rental period. On February 1, 2014, at 5:43 P.M., plaintiff asked to rent the apartment for $20,000 from February 8 to March 8, if they brought their dog, or, alternatively, from February 15 to March 1 for $15,000 if they don't bring their dog. Defendant Gomez responded on the same

day at 7:27 P.M. stating: "Okay, Let's do 2/8 to 3/8" (*id.*, exh H). This was the last e-mail exchange before plaintiff's attorney e-mailed defendant Gomez on February 2 demanding the return of the $15,000 fee and threatening litigation and other action (*id.*, exh K).

By the parties' actions and communications, it is clear that a contract was formed, which plaintiff breached. The e-mail exchanges show that plaintiff understood that the hold fee was non-refundable if the apartment was not re-rented by the agreed-upon move-in date.

Plaintiff argues that while there is no written lease here, there is a contract, and implied in every contract is the covenant of good faith and fair dealing, which defendants breached as they did not mitigate. Defendants point out that "[a] landlord has no duty to mitigate damages arising from the landlord's non-rerental of the premises if the tenant vacates the premises before the lease expires" (*88th Street Realty, LP v Maher*, 21 Misc3d 190 [Civ Ct, NY Cty, 2008]).

The duty to mitigate is on defendants, the non-breaching party, to limit its injuries, not that of the breaching party (*see Clark Oil Trading Co. v J. Aron & Co.*, 256 AD2d 196, 199 [1st Dept 1998]). Contrary to plaintiff's assertion, defendant did attempt to rerent. Plaintiff's February 1 e-mail sent at 1:06 A.M. shows defendants did show the apartment to rerent it:

> Rebecca, I'm hoping the apartment rents tomorrow – so glad to hear you are showing it. If it hasn't rented by February 6, I would like to take the apartment from Feb 7–Feb 28. If you secure a tenant for the month of Feb for the $20K before 2/6, I will be happy not to come and to get my money refunded, but I think this is the best solution given that it's January 31. My husband and I can just make a working vacation out of it

(Fleishell Aff, exh I).

But, even if defendants did not attempt to rerent, they did nothing improper here given the short timeframe plaintiff's husband/attorney gave them. Plaintiff's own actions in this claim must be considered. The day after plaintiff renegotiated with defendants that entailed her interest in retaining the apartment from February 7 for a shorter period of time to stave off losing her deposit, plaintiff's husband/attorney threatened to commence a lawsuit against them on or before February 14, 2014, (Defts' Aff, exh K). This adversarial act, coming the day following defendants' acceptance of plaintiff's request for a shorter stay, shows that plaintiff is the party who acted in bad faith.

Plaintiff has not presented any evidence or made any arguments to the contrary that warrant granting her motion for summary judgment to dismiss defendants' cause of action for breach of contract. Therefore, plaintiff's sixth cause of action in her amended complaint is dismissed. Defendants' motion for the same against plaintiff is granted.

Detrimental Reliance and Equitable Estoppel

The branch of plaintiff's motion for summary judgment on defendants' second counterclaim for detrimental reliance and equitable estoppel is granted on other grounds. The basis for plaintiff's motion is that there is no independent cause of action for detrimental reliance, and defendant failed to allege any false representation or prejudicial changes.

Here, the hold fee was for defendants to keep the apartment for plaintiff and not to rent it out to other parties. Given the remittance of the hold fee, and defendants' knowledge and agreement to plaintiff's shortening of her stay from three months to one month, defendants do not have a cause of action for detrimental reliance and equitable estoppel.

Defamation

Defendants' third counterclaim is for libel, slander and defamation. Plaintiff's motion for summary judgment as to this claim is granted. The claim arose from an on-line post by plaintiff's attorney husband, Ian Wallach. Whether Wallach acted as plaintiff's lawyer at the time he wrote the alleged defamatory statement is unknown. In the VRBO website, Wallach wrote that Gomez did not own the apartment, and that she stole $15,000 from them through the use of the VRBO website (Defts' Aff, exh L). On February 2, Wallach wrote on plaintiff's behalf as her attorney demanding the return of $15,000 plus expenses in the amount of $13,500 plus, and threatened litigation if the apartment was not rerented by February 8 (*id.*, exh K). On April 15, 2014, the HomeAway[1] Customer Support wrote to defendants regarding the complaint it received from plaintiff's husband. Defendant Gomez responded informing HomeAway that plaintiff had given her a non-refundable deposit of $15,000, and wanted the money back when she canceled at the last minute. The deposit was non-refundable because she had to reject other clients due to her deposit, and due to plaintiff's representation that she would take the apartment in February for one month "rain or shine" (*id.*, exh L).

The post does not appear to be a website review; rather it seems to be a complaint and request for action. VRBO took action to sort out the problem by writing to Gomez about the situation. In any event, whether Wallach's statement was defamatory is not the issue here. The counterclaim here is against plaintiff, not her husband. Plaintiff did not make the statement. Therefore, this cause of action is dismissed.

Fraudulent Conveyance

Plaintiff's fifth cause of action is for fraudulent conveyance/transfer citing New York Debtor Creditor Law § 278(1)(a) in her second amended complaint. Plaintiff alleged that defendants Gomez and Flores engaged in a scheme to defraud visitors by listing an apartment they allegedly owned for short-term rentals and perpetuated this fraud by creating their own reviews through the use of other people's names. Plaintiff also claimed that after this action commenced Gomez and Flores transferred the apartment to defendant 13 East 9th Street, LLC (the LLC) for the purpose of defrauding creditors (Second Amended Complaint at ¶¶ 10-12). Plaintiff insinuates that because the attorney who advised defendants to set up the LLC is the same attorney in this matter, the conveyance was a fraud just to hinder, delay or defraud present and future creditors, specifically to avoid paying plaintiff in this matter (*id.* at ¶¶ 41-43).

Debtor Creditor Law § 278(1)(a) states, as follows:

> 1. Where a conveyance or obligation is fraudulent as to a creditor, such creditor, when his claim has matured, may, as against any person except

[1] HomeAway is a parent company to VRBO.

> a purchaser for fair consideration without knowledge of the fraud at the time of the purchase, or one who has derived title immediately or immediately from such a purchaser,
>
> a. Have the conveyance set aside or obligation annulled to the extent necessary to satisfy his claim . . .

Without delving into the merits of this claim, plaintiff's cause of action for fraudulent conveyance fails for insufficiency. While the words "defendants' intent to hinder, delay or defraud present or future creditors" are stated in the amended complaint, the pleading is bare of any detailed facts as required by CPLR 3016 [b] (*see Wildman & Bernhardt Const., Inc. v BPM Associates, LP*, 273 AD2d 38 [1st Dept 2000]; *IDC (Queens) Corp. v Illuminating Experiences, Inc.*, 220 AD2d 337 [1st Dept 1995]). The allegations are mainly conjectures by plaintiff's attorney, which are insufficient to support a cause of action alleging fraud (*see RTN Networks, LLC v Telco Group, Inc.*, 126 AD3d 477 [1st Dept 2015]). It is noted that plaintiff was permitted to, and did, add the LLC as a party defendant thereby dissolving her claim of injury borne by the conveyance.

Sanctions

Defendants move for sanctions against plaintiff for bringing this lawsuit which they describe as meritless and "nothing more than an exercise by this 'power couple' to wield their position, influence and fame [sic] and try to intimidate defendant Gomez and her husband, to 'outspend' or 'out resource' defendants and force Gomez to capitulate to the return of the $15,000.00 that rightfully belongs to her" [parenthetical omitted] (Fleishell Aff at ¶ 68). Plaintiff is an acclaimed screenwriter and movie producer; her husband and attorney of record, makes media appearances as a legal news commentator and has worked on notable and renowned cases (*id.* at ¶¶ 64, 66).

Sanctions are warranted if plaintiff's suit or conduct was frivolous.

> [C]onduct is frivolous if:
> (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
> (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
> (3) it asserts material factual statements that are false.

(22 NYCRR 130-1-1). In determining whether conduct is frivolous, the court shall consider "the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel" (*Borstein v Henneberry*, 132 AD3d 447, 450 [1st Dept 2015] quoting 22 NYCRR 130–1.1[c]). The conduct found to be frivolous must be set forth in compliance with 22 NYCRR 130-1.2.

This case is essentially about plaintiff's attempt to have the non-refundable $15,000 hold fee returned to her. The facts bear out that plaintiff agreed to remitting the $15,000 hold fee and understood that it was non-refundable. Indeed, she renegotiated the terms of her rental so that she would not lose the $15,000 fee. The negotiation to make use of the fee went

from renting the house for one month at $20,000 and be permitted to bring her dog to renting it for under a month, without bringing her dog, and using the $15,000 paid fee as rent. The negotiation shows a clear understanding about the $15,000 fee as being non-refundable. This clarity is compounded in plaintiff's e-mail dated January 10, 2014: "As I understand it, the 15K (due today by cashier's check or wire) is a non-refundable hold fee so that Rebecca doesn't rent the apartment to anyone else, and so she can tell the current resident she has to be out by 2/8" (*id.*, exh F).

Plaintiff has not presented a reasonable argument how there was a mistake or misunderstanding that requires Supreme Court judicial intervention. Her arguments, consisting of conjectures and irrelevant points made to obfuscate the issue, have no legal basis and warrants imposition of sanctions (*see Brady v Blitttner*, 268 AD2d 224 [1st Dept 2000]). Plaintiff's husband, using his law offices and position as an attorney, turned this simple short-term rental from a HomeAway website that his wife booked with the understanding that the fee was "non-refundable", into a 'con job' by defendants (*id.*, exhs K and L). Plaintiff's attorney also informed defendant Gomez that if she did not return the hold fee, that he would do the following:

> [c]ommencing on March 7, 2014, at least two times a week, we will search for postings related to the 13 East 9th Street property, and any other property that we learn that you may have an interest in. (I promise that no matter how you describe it, or any others, we will find them). We will inform the operators of those websites that you are simply engaging in a scheme to defraud potential visitors, and post the following review/comment on each occasion:
>
> BE CAREFUL – THIS IS A SCAM RENTAL.
>
> We saw this beautiful apartment and leapt at the opportunity to stay there. The owner – Rebecca Gomez – conned my wife into giving her a $15,00 "hold fee", falsely stating that there were others who wanted the apartment and this was the only way to secure it. . . . Do not send this woman one penny unless you are sure that you are not being scammed

(*id.*, exh K [capitalization in original]).

And while plaintiff's attorney blames defendant Gomez's "constant shifting in positions and demands for additional monies" for causing him and plaintiff to incur additional costs, which are unsubstantiated, the evidence shows plaintiff to be the one who constantly shifted her positions. It was not defendants' doing that the filming of the movie was canceled. Defendants did not ask for a three-month rental and changed it to one month, then three and two weeks, and defendants were not the ones to decide on whether plaintiff should bring her dog. It is an unfortunate commentary on the legal field when an attorney uses his law office as an imprimatur to denigrate and harass defendants.

It is equally unfortunate for courts to consider imposing sanctions on members of the bar. "Sanctions are retributive, in that they punish past conduct. They also are goal oriented, in that they are useful in deterring future frivolous conduct not only by the particular parties, but also by the bar at large. The goals include preventing the waste of judicial resources . . . ." (*Levy v Carol Management Corp.*, 260 AD2d 27, 34 [1st Dept 1999]). Plaintiff engaged in frivolous conduct as defined in Section 130-1.1 of the Rules of the Chief Administrative Judge, but plaintiff is not alone in this. Plaintiff's husband appears to be the driving force behind this litigation. In less than twenty-four hours of plaintiff's e-mail to defendants that

she would take the apartment for three weeks for the $15,000 paid fee, plaintiff's husband threatened litigation and acts to injure defendants' business and reputation. His directive to defendants – "[a]nd do not contact Cindy. She compromises. I do not" – shows his determination to get back the fee, no matter what it takes (Fleishell Aff, exh K). While it is proper to inform the opposing party to direct all communications to the attorney once his client has legal representation, Wallach's statement did not go to that.

In sum, both plaintiff and attorney Ian Wallach bear the sanctions equally. An award of $5,000 sufficiently sends a message to punish and deter such frivolous conduct (*see Tsabbar v Auld*, 26 AD3d 233 [1st Dept 2006]). While the award may not fully compensate defendants for defending this lawsuit, defendants were able to prosecute their counterclaim against plaintiff. To be clear, the sanctions amount of $5,000 is separate and apart from the $5,000 judgment awarded on the first counterclaim.

Accordingly, it is

ORDERED that plaintiff's motion to terminate sanctions for discovery issues is withdrawn; it is further

ORDERED that plaintiff's motion for summary judgment dismissing defendants' first, second, and third counterclaims is denied as to defendants' first counterclaim for breach of contract; and granted as to defendants' second counterclaim for detrimental reliance and third counterclaim for libel and defamation; it is further

ORDERED that defendants' cross-motion for summary judgment on their first counterclaim for breach of contract is granted; it is further

ORDERED that defendants are awarded a judgment in the amount of $5,000.00 on their first counterclaim; it is further

ORDERED that defendants' cross-motion to dismiss plaintiff's fifth and sixth causes of action for fraudulent conveyance and breach of contract, respectively, is granted; it is further

ORDERED that plaintiff's complaint is dismissed; it is further

ORDERED that defendant's cross-motion for sanctions pursuant to 22 NYCRR 130-1-1 is granted; and it is further

ORDERED, that the Court having determined that plaintiff and attorney Ian Wallach have engaged in frivolous conduct as defined in 22 NYCRR 130–1.1(c) as set forth above, defendants are awarded the sum of $5,000 to be paid in equal shares by plaintiff and attorney Ian Wallach.

This constitutes the decision and order of the court.

DATE : 5/2/2017

MARGARET A. CHAN, J.S.C.