47-53 Chrystie Holdings LLC v Thuan Tam Realty Corp.
2017 NY Slip Op 31404(U)
June 27, 2017
Supreme Court, New York County
Docket Number: 651896/2015
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 39

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47-53 CHRYSTIE HOLDINGS LLC and
THEODORE WELZ,

Plaintiffs,

Index No.: 651896/2015

-against-

Mtn. Seq. No. 002

THUAN TAM REALTY CORP., WING YUI CHOI, RUDOLPH TRAN, DIANE CHOI, WILLIAM CHOI, CAM THIS TAI, LISA QUACH f/k/a LISA FONG, CHUNG TEM CHOI, and JONATHAN CHOI,

Defendants.

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SALIANN SCARPULLA, J.S.C.:

In this action to recover damages for, inter alia, breach of contract, defendants Diane Choi ("Diane"), William Choi ("William"), Cam Thi Tai ("Cam"), Lisa Quach f/k/a Lisa Fong ("Lisa"), Chung Tem Choi ("Chung"), and Jonathan Choi ("Jonathan") (collectively, the "moving Individual Defendants") and Thuan Tam Realty Corp. ("Realty") (together with the "moving Individual Defendants," the "moving Defendants") move to dismiss the amended verified complaint (the "Amended Complaint") for failure to state a cause of action and based on documentary evidence.[1]

[1] Defendants Rudolph Tran ("Rudolph") and Wing Yui Choi ("Wing") (together the "non-moving Individual Defendants" and collectively with the moving Individual Defendants, the "Individual Defendants") have not taken any action with respect to this litigation.

Plaintiff Theodore Welz ("Welz") formed plaintiff 47-53 Chrystie Holdings LLC ("Chrystie Holdings") to acquire 47-53 Chrystie Street, New York, NY (the "Property"). The Property is owned by Realty and the Individual Defendants own 171 3/7 out of a total of 200 shares of Realty.

In 2014, Welz learned that the Individual Defendants were interested in selling their Realty shares and began negotiating with the Property's manager and realtor. One non-defendant shareholder, De Thi Tai, was not interested in selling his 28 4/7 shares, but Welz continued negotiations for the remaining shares. The Amended Complaint alleges that William is the only Individual Defendant who resides in NY and speaks fluent English, and that William was the Individual Defendants' representative during the negotiations.

On July 14, 2014, the parties entered into a Common Stock Purchase Agreement (the "Purchase Agreement"), under which Welz would acquire all the Individual Defendants' shares in Realty. Pursuant to the Purchase Agreement, Welz paid a $900,000 deposit to the Individual Defendants' counsel. The Purchase Agreement provided that Welz would have the right to a due diligence period of twenty business days, and could cancel the contract and receive his deposit back if he decided not to go forward during that period. Plaintiffs allege that, because the property manager and realtor represented "that there were no [c]orporate [d]ocuments," the Purchase Agreement provided that the individual defendants would "give [Plaintiffs] and [their]

duly appointed representatives reasonable access to the premises of [Realty] and the books and records of [Realty], and furnish to [Plaintiffs] such data and information pertaining to [Realty] as [Plaintiffs] from time to time may reasonably request."

During the due diligence period, Welz requested Realty's books and records but none were provided. William allegedly told Welz that there were no corporate documents and that the few documents that were turned over were all that existed. On July 15, 2014, unspecified defendants represented to Welz that Realty had no shareholders' agreement, corporate bylaws, share ownership history, share certificates, or adopted resolutions, and had never held a shareholders' meeting.

The due diligence period was extended twice, to August 22, 2014 and then to September 5, 2014, so that Welz could continue investigating Realty and the Property. During this time, the Individual Defendants allegedly continued to represent to Welz that there were no corporate documents, books or records left to turn over. Welz eventually terminated the Purchase Agreement, and sent written notice of the termination to the Individual Defendants on September 3, 2014. On September 18, 2014, the Individual Defendants acknowledged the termination and returned Welz's deposit.

Despite having canceled the Purchase Agreement, Welz continued negotiating with the Individual Defendants. On November 10, 2014, Welz and the Individual Defendants allegedly agreed to revive the Purchase Agreement, on the condition that a "court of competent jurisdiction issues a declaratory judgment as to the holdout

shareholder's rights, if any, in [Realty]." Having done so, however, the Individual Defendants demanded an additional $2,000,000 for their shares, for a total of $21,500,000. After Welz agreed to the increased price, William and unspecified other Individual Defendants located books, records, and corporate documents for Realty.

Per the Amended Complaint, the Individual Defendants were aware of these documents' existence throughout the course of the parties' dealings and misled Welz to gain a more favorable deal. Plaintiffs further allege that William convinced the other Individual Defendants to demand a higher price for their shares. On June 1, 2015, plaintiffs filed this action and sought a preliminary injunction to prevent the Individual Defendants from transferring their shares.

While the action was pending, the parties continued negotiations. In November 2015, the parties agreed to a Second Common Stock Purchase Agreement (the "Second Purchase Agreement"), pursuant to which Plaintiffs would acquire the Individual Defendants' shares in Realty for $20,946,600. On November 24, 2015, Welz sent a signed copy of the Second Purchase Agreement to the Individual Defendants with a deposit of $2,094,660. The Individual Defendants acknowledged receipt on the same day. At around the same time, William allegedly demanded $800,000 from Welz outside of the contract to ensure that the transaction was completed. William threatened to scuttle the deal unless Welz paid the additional money but Welz refused.

Plaintiffs allege, upon information and belief, that on December 22, 2015 there was a shareholders' meeting, at which the Individual Defendants: 1) agreed to proceed with the Second Purchase Agreement; 2) amended the by-laws to remove any restrictions on the transfer of their shares; and 3) signed the Second Purchase Agreement. The Individual Defendants' attorney represented to Welz that he would deliver the signed agreement at the closing.

The parties agreed to close on December 24, 2015 and Plaintiffs incurred expenses in preparation for the closing. The Individual Defendants adjourned the closing to December 29th but sent a "Closing Checklist" to Plaintiffs. Next, the Individual Defendants adjourned the closing to December 31, 2015 but then refused to close on that date, prompting Plaintiffs to send a "Time of the Essence notification" to them with a scheduled closing of January 15, 2016. On January 15, the Individual Defendants once again failed to close and subsequently demanded, through William, an additional $3,800,000 to complete the transaction.

All defendants except Rudolph and Wing now move, pursuant to CPLR 3211 (a) (1) and (7), to dismiss the amended complaint. The moving Individual Defendants & Realty also seek an order, pursuant to CPLR 6514 (b), directing the clerk to cancel Plaintiffs' notice of pendency, and for costs and expenses pursuant to CPLR 6514 (c).

Discussion

"On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction" and a court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). However, when a complaint's allegations "consist of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, they are not entitled to such consideration." *Ullmann v. Norma Kamali, Inc.*, 207 A.D.2d 691, 692 (1st Dept. 1994). Moreover, on a motion pursuant to CPLR § 3211(a)(7), "a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and 'the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one.'" *Leon,* 84 N.Y.2d at 88 (internal quotation marks and citations omitted).

1. The Fraud Cause of Action

"Generally, in a claim for fraudulent misrepresentation, a plaintiff must allege a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury." *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 178 (2011). In addition, all five elements must be plead with particularity. *See* CPLR § 3016(b).

The moving Individual Defendants argue that the Amended Complaint fails to allege fraud with sufficient specificity because it: 1) groups all defendants together without alleging which Individual Defendants made misrepresentations; 2) plaintiffs cannot show reasonable reliance on the alleged misrepresentations because the Purchase Agreement explicitly disclaims reliance; and 3) contains damages claims not covered by the "out of pocket" rule that applies to fraud claims.

At minimum, a sufficiently pled fraud claim must allege who spoke, what they said, and the date on which they said it. *E1 Entertainment U.S. LP v. Real Talk Entertainment*, 85 A.D.3d 561, 562 (1st Dept. 2011). Here, Plaintiffs fail to allege any specific misrepresentations by defendants Diane, Cam, Lisa, Chung, and Jonathan, let alone when or to whom they were made. Hence, the fraud claim against these defendants must be dismissed.

Plaintiffs' assertion that William, as the only defendant who speaks English, was the representative for the Individual Defendants in discussions with Welz and other parties involved with the transaction, does not render the other Individual Defendants liable for William's statements absent specific allegations. Indeed, allegations about the Individual Defendants as a group are insufficient. *See Aetna Cas. & Sur. Co. v. Merchants Mut. Ins. Co.*, 84 A.D.2d 736, 736 (1st Dept. 1981) (dismissing complaint because the causes of action were "pleaded against all defendants collectively without any specification as to the precise tortious conduct charged to a particular defendant.")

Plaintiffs' fraud claims against William and Realty were sufficiently pled in that the Amended Complaint contains detailed allegations that, at certain times, William and other representatives of Realty made misrepresentations to Welz regarding the non-existence of books, records, and corporate documents for Realty. Further, the Amended Complaint contains detailed allegations that these misrepresentations were material, that William and Realty knew of the misrepresentations' falsity to be false when they were made (because William and Realty were aware that such documents did exist), and that Plaintiffs detrimentally relied on the misrepresentations, incurring expenses in putting together the transaction, closing costs for the adjourned closings, and increased sale price.

The moving Defendants argue that the fraud claims against William and Realty fail for the additional reason that the Purchase Agreement expressly disclaims reliance, by if Plaintiffs "[have] had access to all information [they] consider [] necessary or appropriate to make an informed investment decision . . . [and] an opportunity to ask questions and receive answers from [Realty] regarding the terms and conditions of the offering of shares." Such language, however, does not expressly disclaim reliance. *Basis Yield Alpha Fund [Master] v. Goldman Sachs Group, Inc.*, 115 A.D.3d 128, 137 (1st Dept. 2014) (finding that "a buyer's disclaimer of reliance cannot preclude a claim of justifiable reliance on the seller's misrepresentations or omissions unless (1) the disclaimer is made sufficiently specific to the particular type of fact misrepresented or undisclosed; and (2) the alleged misrepresentations or omissions did not concern facts

peculiarly within the seller's knowledge."). In this case, the Purchase Agreement lacks specific language that Plaintiffs were not relying on any representations or omissions relating to the specific subject matter of the fraud claim and, therefore, the moving Defendants cannot rely on the Purchase Agreement to bar Plaintiffs' fraud claim. *See id.* Moreover, reasonable reliance is not an issue generally resolved on a motion to dismiss. *ACA Fin. Guar. Corp. v. Goldman, Sachs & Co.*, 25 N.Y.3d 1043, 1045 (2015).

Finally, the moving Defendants' contention that Plaintiffs have not sufficiently pleaded damages is unavailing. New York's "out of pocket" rule limits damages for fraud to the "'actual pecuniary loss sustained as the direct result of the wrong.'" *Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413, 421 (1996) (citations omitted). Plaintiffs allege that they expended considerable "expenses and costs in preparation for the closing" of the stock purchase. Taking Plaintiffs' allegations as true, they have sufficiently alleged damages recoverable under the out of pocket rule. *See Starr Foundation v. American Intern Group, Inc.* 76 A.D.3d 25, 28 (1st Dept. 2010) (citation omitted) (damages "'calculated to compensate plaintiffs for what they lost because of the fraud'" are recoverable under the out of pocket rule).

For the foregoing reasons, I grant the moving Defendants' motion to dismiss the fraud cause of action as to defendants Diane, Cam, Lisa, Chung, and Jonathan and deny it as to defendants William and Realty.

2. Breach of Contract

Plaintiffs argue that if they cannot have specific performance of either the Purchase Agreement or the Second Purchase Agreement, then they are entitled to damages for the moving Defendants' breaches of both contracts.[2] A breach of contract claim requires allegations of "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages." *Harris v. Seward Park Hous. Corp.*, 79 A.D.3d 425, 426 (1st Dept. 2010).

Plaintiffs contend that Defendants breached the Purchase Agreement by failing to turn over relevant documents and records during the due diligence period, and breached the Second Purchase Agreement by failing to transfer their shares to Plaintiffs.

The moving Defendants argue that neither of the agreements was breached because: 1) Plaintiffs unilaterally terminated the Purchase Agreement, which provided that Plaintiffs received all the information needed to make an informed decision; and 2) the Second Purchase Agreement was never fully formed and violates the Statute of Frauds.

The Purchase Agreement's due diligence provision provided that Welz could terminate the contract and receive his contract deposit back. The Purchase Agreement

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[2] Because "specific performance is an equitable remedy for a breach of contract, rather than a separate cause of action," *Warberg Opportunistic Fund, L. P. v. GeoResources, Inc.*, 112 A.D.3d 78,86, 973 N.Y.S.2d 187(1st Dept. 2013) (internal citation omitted), I will first consider Plaintiffs' breach of contract claims and then address their claim for specific performance."

did not provide that any obligations or claims for breach were preserved after termination.[3] Thus, once Plaintiffs terminated the Purchase Agreement, they lost any potential claims for its breach. *See Rosenbaum v. Atlas & Design Contrs, Inc.*, 66 A.D.3d 576, 576 (1st Dept. 2009) ("Having terminated the construction contract pursuant to its at-will termination provision, plaintiff was not entitled to damages for breach.").

As for the Second Purchase Agreement, Plaintiff sufficiently alleges, and the moving Defendants do not challenge, all the elements of a claim for breach based on the moving Defendants' failure to close. Further, there are issues of fact, including whether the Second Purchase Agreement satisfies the statute of frauds, that cannot be resolved on this dismissal motion. Therefore, I grant the Defendants' motion to dismiss the breach of contract claim as to the Purchase Agreement but deny the motion as to the breach of the Second Purchase Agreement.

3. Rescission of Termination of First Purchase Agreement and Specific Performance

Plaintiffs seek to rescind their termination of the Purchase Agreement, and demand specific performance. Rescission is available as a remedy when there is not a "'complete and adequate remedy at law and where the status quo may be substantially

[3] *cf. 104 E. 30th St. LLC v. Munshi Bishan Singh Kochhar Found., Inc.*, 143 A.D.3d 644, 644–45 (1st Dept. 2016) (sustaining cause of action for breach where the contract explicitly stated that the plaintiff could terminate and receive its deposit back or have specific performance).

restored.'" *Sokolow, Dunaud, Mercadier & Carreras LLP v. Lacher*, 299 A.D.2d 64, 71 (1st Dept. 2002) (citation omitted). Further, a Plaintiff must show either "mutual mistake or a fraudulently induced unilateral mistake." *Goldberg v. Manufacturers Life Ins. Co.*, 242 A.D.2d 175, 179 (1st Dept. 1998). Rescission is not available where the plaintiff has an adequate damages remedy. *MBIA Ins. Corp. v. Merrill Lynch*, 81 A.D.3d 419, 420 (1st Dept. 2011).

Similarly, specific performance is not available as a remedy where money damages are adequate. *Van Wagner Adv. Corp. v. S & M Enters.*, 67 N.Y.2d (1986). Specific performance has been deemed an appropriate remedy "in actions for breach of contract for the sale of real property or when the uniqueness of the goods in questions makes calculation of money damages too difficult or uncertain." Cho v. 401-403 57th street Realty Corp., 300 A.D.2d 174, 175 (1st Dept. 2002). Specific performance is also appropriate in actions for breach of "agreement[s] to convey stock in a close corporation." *Matter of Fontana D'Oro Foods [Agosta]*, 65 N.Y.2d 886, 888 (1985).

The moving Defendants argue that Plaintiffs gave up the right to revival of the Purchase Agreement by negotiating and entering into the Second Purchase Agreement. Plaintiffs respond that they are entitled to rescind the Purchase Agreement's cancellation because it was procured by fraud, and that specific performance is necessary to restore the parties to the status quo prior to their decision to terminate.

Here, the Purchase Agreement gave Welz a unilateral right to terminate the contract during the due diligence period, which he exercised. And, once a contract has been terminated, the remedy of specific performance is no longer available. *See Miles v. Gladstein*, 214 A.D.2d 706, 707 (2d Dept. 1995). Further, Plaintiffs do not allege a mutual mistake of fact that would justify rescinding Welz's termination.[4] *Jerome M Eisenberg, Inc. v. Hall*, 147 A.D.3d 602, 607 (1st Dept. 2017).

Accordingly, I deny Plaintiffs' request to rescind their termination of the Purchase Agreement.

4. Specific Performance of the Second Purchase Agreement

Plaintiffs state that if they cannot have specific performance of the Purchase Agreement, in the alternative, they are entitled to specific performance of the Second Purchase Agreement.

A. Existence of a Contract

"Specific performance may be awarded only where there is a valid existing contract for which to compel performance." *Roland v. Benson,* 30 A.D.3d 398, 399 (2d Dept. 2006). It is the moving Defendants' position that there cannot be specific

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[4] Plaintiffs cite *Mad Scientists Brewing Partners, LLC v. Deptula*, 38 Misc. 3d 1226[A], 2013 NY Slip Op 50288[U], *6 (Sup. Ct., Kings County 2013), for the proposition that a "mutual rescission of a contract is itself treated as a contract, and where such a rescission was procured by fraud or entered into under mutual mistake of fact, said rescission may be invalidated by the court." *Mad Scientists* is a non-binding decision and, in any event, it is distinguishable because it concerned a mutual rescission rather than the unilateral termination involved in this case.

performance of the Second Purchase Agreement because no contract was formed. Indeed, at oral argument, counsel for the moving Defendants claimed that the moving Defendants neither signed the Second Purchase Agreement nor delivered it back to Plaintiffs. However, counsel for non-moving Defendant Wing represented to the Court that Wing signed the Second Purchase Agreement and saw other Individual Defendants sign it as well.

Actual physical delivery of a fully executed copy of the contract is not a requirement for contract formation. *219 Broadway Corp. v. Alexander's, Inc.*, 46 N.Y.2d 506, 512 (1979); *see also Birch v. McNall*, 19 A.D.2d 850, 850 (4th Dept. 1963) ("A binding contract... may be made without a physical delivery of the instrument evidencing the contract."). To be an effective delivery "requires acts or words or both acts and words which clearly manifest that it is the intent of the parties that an interest in the land is, in fact, being conveyed to the lessee." *219 Broadway Corp.*, 46 at 512.

Here, Plaintiffs allege that after signing the Second Purchase Agreement and sending it to Defendants: 1) Welz, the Individual Defendants, and their attorneys "devoted diligent efforts into ensuring a successful consummation of the Second Purchase Agreement;" 2) the Individual Defendants signed the Second Purchase Agreement at a shareholder's meeting convened for that purpose; 3) Defendants' counsel represented that the agreement was fully executed and stated that he would deliver it at the time of closing; and 4) the moving Defendants scheduled several closing dates,

assured Welz that the closing would occur before the end of 2015, sent Welz a closing checklist, and "went back and forth dealing with [Welz's attorney] in connection with the preparation of various [c]losing [d]ocuments" throughout December 2015.

Accepting Plaintiffs' allegations as true, I find that Plaintiffs sufficiently allege actions by the moving Defendants that may evidence an intent to enter into the Second Purchase Agreement sufficient to constitute delivery. *See 219 Broadway Corp.*, 46 NY2d at 512. The cases cited by the moving defendants to the contrary are factually distinguishable.[5] On account of this issue of fact as to whether the Second Purchase Agreement was fully executed, and, thus, enforceable against the moving Defendants, I deny Defendants' motion to dismiss Plaintiffs' claim for specific performance of the Second Purchase Agreement.[6]

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[5] *See Manhattan Theatre Club v. Bohemian Benevolent and Literary Assn. of City of N.Y.*, 64 N.Y.2d 1069, 1070 (1985) (no manifestation of intent because defendant's membership objected to the sale); *Moulton Paving, LLC v. Town of Poughkeepsie*, 98 A.D.3d 1009, 1012 (2d Dept. 2012) (no manifestation of intent where neither party signed the agreement); *Felipe v. 2820 W. 36th St. Realty Corp.*, 20 A.D.3d 503, 504 (2d Dept. 2005) (no manifestation of intent where physical delivery was required by the contract); *Bergman*, 19 A.D.3d at 187 (letter agreement unenforceable because it lacked essential contract terms); *Senzamici v. Young*, 174 A.D.2d 831, 831–32 (3d Dept. 1991) (defendant withdrew offer before delivery).

[6] Also, whether a plaintiff may be entitled to specific performance is an issue that should not be determined on a motion to dismiss, *see, e.g., Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 415 (2001); *Cho v. 401–403 57th St. Realty Corp.*, 300 A.D.2d 174, 175 (1st Dep't 2002); *Fillmore West Fund, L.P. v. JP Morgan Chase Bank*, N.A., 2013 WL 5745286, at *5 (NY Sup. Ct. Oct. 15, 2013).

B. Statute of Frauds

The moving Defendants also note that the Second Purchase Agreement was not attached to the complaint, and that a fully executed copy was never physically delivered to the Plaintiffs. Thus, the moving Defendants maintain that without a signed writing, Plaintiffs' claim for specific performance of the Second Purchase Agreement is barred by the Statute of Frauds.

The Statute of Frauds provides that "[a] contract . . . for the sale, of any real property, or an interest therein, is void unless the contract or some note or memorandum thereof, expressing the consideration, is in writing, subscribed by the party to be charged, or by his lawful agent thereunto authorized by writing." General Obligations Law § 5-703 (2). This requirement extends to sales of stock in a corporation whose sole asset is real property. *Bergman v. Krausz*, 19 A.D.3d 186, 186–87 (1st Dept. 2005).

On a motion to dismiss based on the Statute of Frauds, plaintiffs are required to produce a signed writing or provide an explanation as to the failure to do so. *American-European Art Assocs., Inc. v. Trend Galleries, Inc.*, 227 A.D.2d 170, 171 (1st Dept. 1996); *Mendelsohn v. Levine*, 24 A.D.2d 1007, 1007 (2d Dept. 1965). Here, Plaintiffs sufficiently provide an explanation as to the absence of a copy of the Second Purchase Agreement – *i.e.*, Defendants did not deliver the signed Second Purchase Agreement at closing, as promised, as the sale never closed. Hence, on this preanswer motion to

dismiss, the Statue of Frauds does not preclude Plaintiffs from seeking specific performance.

5. Defamation

Plaintiffs allege reputational injury to Welz, sounding in defamation. As per the Amended Complaint, due to Defendants' actions, Welz was unable to close the transaction thereby damaging his reputation as a real estate investor with both the investors that were a part of the deal and potentially with future investors.

The elements of defamation are "a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se." *Dillon v. City of New York*, 261 A.D.2d 34, 38 (1st Dept. 1999). In addition, defamation must be pled with particularity. CPLR § 3016 (a).

Plaintiffs fail to allege any false statements made by Defendants to any third parties, when such statements were made, or the specific words used. *See, e.g. Dillon*, 261 A.D.2d at 38 (for a defamation cause of action, the complaint must "allege the time, place and manner of the false statement and specify to whom it was made."); *Sorge v. Parade Publ., Inc.*, 20 A.D.2d 338, 342 (1st Dept. 1964) (libel claim requires allegation that the statement was brought to the attention of a third person). Thus, I dismiss Plaintiffs' defamation claim.

6. Tortious Interference with Contract

To establish a claim for tortious interference with a contract, "the plaintiff must show the existence of its valid contract with a third party, defendant's knowledge of that contract, defendant's intentional and improper procuring of a breach, and damages." *White Plains Coat & Apron Co., Inc. v. Cintas Corp.*, 8 N.Y.3d 422, 426 (2007).

Plaintiffs allege that defendant William tortiously interfered with the Purchase agreement between Plaintiffs and Realty, as well as with the Second Purchase Agreement.

As the moving Defendants point out, it is settled law that a party to a contract cannot be liable for tortious interference with that contract. *Bradbury v Cope-Schwarz*, 20 A.D.3d 657, 660 (3d Dept. 2005) (finding that the "seller could not tortiously interfere with [her own contract] as a matter of law"); *see also Hoag v. Chancellor, Inc.*, 246 A.D.2d 224, 228 n (1st Dept. 1998) ("[N]o claim for tortious interference can be made against a contracting party"). William is a party to both the Purchase Agreement and the Second Purchase Agreement and therefore Plaintiffs cannot state a tortious interference claim against him. Accordingly, I dismiss this claim.

7. The Notice of Pendency

The moving defendants move, pursuant to CPLR 6514 (b), to cancel the notice of pendency on the Property dated January 28, 2016. Defendants also seek costs and attorney's fees.

At oral argument before the court on August 4, 2016, I instructed Plaintiffs' counsel to remove the notice of pendency on the Property. *See 5303 Realty Corp. v. O&Y Equity Corp.*, 64 NY2d 313, 316 (1984) ("[A] suit to specifically perform a contract for the sale of stock representing a beneficial ownership of real estate will not support the filing of a notice of pendency.")

A review of the docket shows that the notice has not been vacated. Accordingly, I grant the moving Defendants' motion to cancel the notice of pendency. The moving Defendants, however, have not shown that Plaintiffs were using the notice of pendency for an ulterior purpose. *Lessard Architectural Group, Inc., P.C. v. X & Y Dev. Group, LLC*, 88 A.D.3d 768, 770 (2d Dept. 2011). Thus, while cancellation of the notice is appropriate, I exercise my discretion and decline to award costs and expenses.

Accordingly, it is hereby

ORDERED that the moving Defendants' motion to dismiss Plaintiffs' first cause of action (fraud) is granted as to defendants Diane Choi, Cam Thi Tai, Lisa Quach f/k/a Lisa Fong, Chung Tem Choi, and Jonathan Choi and denied as to defendants William Choi and Thuan Tam Realty Corp.; and it is further

ORDERED that the moving Defendants' motion to dismiss Plaintiffs' fourth cause of action (breach of contract) is granted as to the Purchase Agreement but denied as to the Second Purchase Agreement; and it is further

ORDERED that the moving Defendants' motion to dismiss Plaintiffs' third cause

of action (request for specific performance of the Second Purchase Agreement) is denied; and it is further

ORDERED that the moving Defendants' motion to dismiss Plaintiff's second (rescission of Purchase Agreement termination), fifth (defamation) and sixth (tortious interference with contract) causes of actions is granted; and it further

ORDERED that the above defendants are directed to serve an answer to the remainder of the amended complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the moving Defendants' motion to cancel the notice of pendency is granted, and the clerk of the court is directed to cancel the notice of pendency dated January 18, 2016 filed against the property located at 47-53 Chrystie Street, New York, NY and indexed under Block 303, Lot 30.

This constitutes the decision and order of the Court.

Dated: 6/27/17

HON. SALIANN SCARPULLA, J.S.C.