

Marugan v Marugan

2017 NY Slip Op 32633(U)

December 12, 2017

Supreme Court, New York County

Docket Number: 655124/16

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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ENRIQUE MARUGAN,

Plaintiff,

Index No. 655124/16

-against-

Mot. seq. nos. 002, 003, 004

DECISION AND ORDER

MIREYA MARUGAN,

Defendant.

-----X
BARBARA JAFFE, J.

In this action, plaintiff seeks to compel defendant, his ex-wife, to execute all documents necessary to record her transfer to him of her one-half interest of shares in a cooperative apartment bought by them during their marriage, and awarding him compensatory, incidental, and consequential damages for her failure to do so.

By notice of motion under sequence number 002, defendant moves pre-answer pursuant to CPLR 3211 and General Obligations Law (GOL) § 5-703 to dismiss the complaint on the ground that plaintiff lacks an enforceable written agreement for the sale of the apartment's lease and shares, and pursuant to CPLR 3024 and 4547 to strike portions of the complaint as confidential, privileged communications made during settlement negotiations. (NYSCEF 42). Plaintiff opposes. (NYSCEF 47).

By order to show cause under sequence number 003, plaintiff moves for an order permitting him to file sur-reply papers in further opposition to defendant's motion to dismiss and to file the papers under seal. (NYSCEF 59). Defendant opposes. (NYSCEF 89).

By notice of motion under sequence 004, plaintiff moves for an order vacating the discovery stay and compelling defendant to respond to his discovery demands. (NYSCEF 81).

Defendant opposes. (NYSCEF 88).

I. MOTION TO DISMISS

A. Statute of frauds

Pursuant to GOL § 5-703(1), an interest in real property “cannot be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the person creating, granting, assigning, surrendering or declaring the same . . .” Accordingly, an interest in real property may be evidenced by a memorandum, signed by the party to be charged, which designates the parties, identifies and describes the subject matter, and states all of the essential terms of a complete agreement. (*Piller v Marsam Realty 13th Ave., LLC*, 136 AD3d 773 [2d Dept 2016]). While the memorandum expressing the contract need not be contained in a single document, and may consist of separate signed and unsigned writings, the writings read together must clearly refer to the same transaction and contain all of the essential terms of a binding agreement. (*Solartech Renewables, LLC v Vitti*, __ AD3d __, 2017 WL 6043561 [3d Dept 2017]).

Plaintiff relies on two documents to argue that there was a sufficient writing transferring the shares to him. The first is a handwritten note, dated February 5, 1999, signed by defendant, which provides a summary of

everything that [she has] already collected for the sale of [her] shares regarding the apartment at 4 West 16th Street (#2A) in New York:

Sept. 8, '98 \$14,000

Dec. 16, '98 \$9,000

Feb. 1, '98 \$27,000

maybe in January: Jan. 28 or 29

I don't have the “balance” I've already collected a total of \$50,000 for the sale of my shares to Enrique Marugan Carnicer. What remains pending will be paid later, in 1999.

(NYSCEF 2).

The second document is an email dated May 13, 2016, from defendant's attorney responding to an email from plaintiff's attorney, in which plaintiff's counsel asks if counsel has heard further from defendant, stating that "[w]e would like to get the contract signed and the transfer effectuated as soon as possible." Defense counsel replies:

The transaction is more complicated than I had originally understood. After talking to my client and the accountant I think the best way to handle this is to have both parties remain on the shares for any sale, to allocate the purchase price at closing to reflect what I understand has been a \$60,000 advance in full consideration of [defendant's] interest and to hold any tax payable on the sale in escrow pending the filing of returns which would reflect this division of proceeds. Any costs for the transaction would be borne by [plaintiff], including co-op fees, additional legal fees, accounting and an indemnification for any liability including in the event an assessment determined that [defendant] should bear a greater responsibility for any taxes.

(NYSCEF 9).

Absent any dispute by defendant that the February 1999 handwritten note was written by her, and given her admission therein that she agreed to sell her shares of the apartment to plaintiff, the statute of frauds provides no defense here. As in *Cole v Macklowe*, "the statute [of frauds] was not enacted to enable defendants to interpose it as a bar to a contract fairly and admittedly made," and thus, "in light of defendant's admission that [s]he agreed to this sale," the statute of frauds defense is rejected. (40 AD3d 396 [1st Dept 2007]; see also *Matisoff v Dobi*, 90 NY2d 127 [1997] [agreements violative of statute of frauds nonetheless enforceable when party to be charged admits to having entered into agreement]).

B. Statute of limitations

As plaintiff does not oppose dismissal of his claims for breach of contract, breach of the implied covenant of good faith and fair dealing, or unjust enrichment on the ground that they are

time-barred, they are dismissed.

C. Striking portions of complaint

The discussions between the parties referenced in the complaint, which defendant characterizes as occurring during settlement negotiations and to which she objects, did not constitute offers to compromise a claim which was disputed, especially as neither party disputes that defendant sold her shares to plaintiff. (CPLR 4547). Rather, the parties set forth their respective positions on how to effectuate the transfer and resolve any tax and other secondary issues. (*See Nineteen Eighty-Nine, LLC v Icahn*, 96 AD3d 603 [1st Dept 2012] [neither e-mails between counsels nor draft agreement presented offer to compromise claim; draft expressed plaintiff's position on issue and email set forth defendant's position]). That counsel labeled one email as "confidential and without prejudice for settlement purposes only" does not transform the document into a settlement document. (*Id.* at 607 [inclusion in draft of language that it was in "context of settlement" irrelevant to whether it contained offer to compromise]).

In any event, nothing in the documents address "proof of liability for or invalidity of the claim or the amount of damages." (CPLR 4547). Rather, in them, the parties discuss the terms necessary to effectuate the transfer of the shares. There is thus no basis on which to strike the portions of the complaint related to the emails and discussions between counsel.

II. MOTION TO SUBMIT SUR-REPLY

In light of the denial of defendant's motion to dismiss except as to granting dismissal of certain claims as time-barred, and as plaintiff does not address these claims in his sur-reply, the motion to submit a sur-reply is denied as academic.

III. MOTION FOR DISCOVERY

Given the partial denial of defendant’s motion to dismiss, plaintiff’s motion for discovery is granted solely to the extent of directing the parties to appear for a preliminary conference.

IV. CONCLUSION

Accordingly, it is hereby

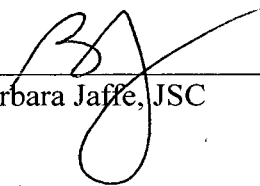
ORDERED, that defendant’s motion to dismiss (sequence 002) is granted to the extent of dismissing plaintiff’s claims for breach of contract, breach of the implied covenant of faith and fair dealing, and unjust enrichment, and otherwise denied; it is further

ORDERED, that defendant is directed to file and serve her answer to the remaining claims in the complaint within 30 days of the date of this order; it is further

ORDERED, that plaintiff’s motion for permission to file a sur-reply (sequence 003) is denied; and it is further

ORDERED, that plaintiff’s motion to compel discovery (sequence 004) is granted solely to the extent of directing the parties to appear for a preliminary conference on January 31, 2018 at 2:15 pm at 60 Centre Street, Room 341, New York, New York.

ENTER:



Barbara Jaffe, JSC

DATED: December 12, 2017
New York, New York