

Edward Bldrs., Inc. v Kushnerik
2018 NY Slip Op 30459(U)
March 15, 2018
Supreme Court, Kings Coutny
Docket Number: 1367/2017
Judge: Sylvia G. Ash
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At an IAS Term, Comm-11 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 15th day of March, 2018.

PRESENT:
HON. SYLVIA G. ASH,

Justice.

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EDWARD BUILDERS, INC., EDWARD DUKSHTEIN
and BELLA DUKSHTEIN

Plaintiff(s),

- against -

VADIM KUSHNERIK, FRANK V. CARONE, ESQ.,
MARIO VACCARO and CHC SURGICAL CENTER,
INC.

Defendant(s).

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The following papers numbered 1 to 3 read herein:

DECISION AND ORDER
Mot. Seq. |
Index # 1367/2017

Papers Numbered

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1
Opposing Affidavits (Affirmations) _____	2
Reply Affidavits (Affirmations) _____	_____

After oral argument and upon the foregoing papers, Defendant's motion to dismiss is hereby DENIED in part and GRANTED in part.

Background

This is an action whereby defendant CHC, an ambulatory surgical center, entered into a contract with plaintiff Edward Builders, Inc. whereby Edward Builders, Inc. was obligated to construct a facility for CHC to operate. Additionally, plaintiffs Edward Duxshtein and Bella Duxshtein entered into a written contract with CHC whereby they would furnish a \$500,000 loan to CHC in return for a 7.5% membership interest in CHC. CHC later commenced an action (*CHC Surgical Center, LLC v. Edward Builders, Inc.* Kings County, Index No. 503270/2015) against Edward Builders, Inc., Edward Duxshtein and Bella Duxshtein (hereinafter "Plaintiffs") alleging

that Edward Builders, Inc. failed to construct the facility in a workman-like manner and that Edward and Bella Dukshstein failed to pay \$400,000 of the agreed upon \$500,000 loan.

The prior action was marked off the court's calendar for non-appearance and was disposed of on January 19, 2017. Plaintiffs then commenced the above-captioned action against CHC, Vadim Kushnerik, Frank V. Carone, Esq., and Mario Vaccaro (hereinafter "Defendants") alleging breach of contract, unjust enrichment and fraud. On August 13, 2017, Defendants moved by notice of motion (Mot. Seq. 1) seeking an order: (1) pursuant to CPLR § 3211(a)(4), dismissing Plaintiffs' complaint on the basis that there is a prior action pending alleging the same transactions and occurrences; or in the alternative (2) an order pursuant to CPLR 3211(a)(7), dismissing Plaintiffs' complaint as against all Defendants for failure to state a cause of action upon which relief can be granted.

Defendants' Motion to Dismiss

Defendants' motion seeks to dismiss Plaintiffs' claims pursuant to CPLR § 3211(a)(4) and (7). First, Defendants seek to dismiss the above-captioned action on the basis that there is a prior action between the same parties arising out of the same transactions and occurrences entitled *CHC Surgical Center, LLC v. Edward Builders, Inc.* Kings County, Index No. 503270/2015. Defendants, who are the plaintiffs in the earlier action, acknowledge that the matter was marked off for nonappearance and later disposed, however, alleges that it is in the process of being restored.

Next, Defendants seek to dismiss Plaintiffs' complaint for failure to state a claim upon which relief can be granted. Specifically, Defendants claims that Plaintiffs' complaint contains conclusory language and fails to state which specific provision of the contract has been breached. Defendants also seek to dismiss Plaintiffs' fraud claim on the grounds that the alleged fraudulent act is merely a breach of contract and does not meet the criteria for fraud. Similarly, Defendants also seek to dismiss Plaintiffs' unjust enrichment claim alleging that it is duplicative of the breach of contract claim and that it is precluded by the existence of the convertible loan agreement signed by the parties. Lastly, Defendants seek to dismiss all causes of action against the individual defendants in their personal capacity, as they are protected by the corporate veil.

In opposition, Plaintiffs argue that Defendants' first claim regarding duplicative actions fails because Defendants never moved to restore the prior action. Plaintiffs also contend that the complaint contains a viable complaint upon which relief can be granted because it states a cause of action for breach of a contract on a matter where Plaintiffs performed but Defendants failed and refused to make the required payments as agreed. With regards to their fraud claim, Plaintiffs claim that their claim should survive because there was an undisclosed intention not to perform the contract which, therefore, constitutes fraud. As it relates to their unjust enrichment claim, Plaintiffs argue that this claim arises from two separate allegations that: (1) Defendants received loans from Plaintiffs; and (2) Defendants failed to pay for the construction work performed. Lastly, Plaintiffs argue that they are entitled to pierce the corporate veil because they are alleging that the individual defendants committed fraud against Plaintiffs in their personal capacity.

Discussion

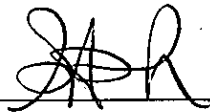
A party may move for judgment dismissing one or more causes of action asserted against him on the ground that there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires (CPLR§ 3211[a][4]). On a motion to dismiss a plaintiff's claim pursuant to CPLR 3211[a][7] for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (see *Campaign for Fiscal Equity v State*, 86 NY2d 307, 317 [1995]). Rather, the court is required to afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference (*Kamchi v Weissman*, 125 AD3d 142, 150 [2d Dept 2014]). The court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (see *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

The existence of valid and enforceable written contracts precludes recovery under the causes of action sounding in promissory estoppel and unjust enrichment (*Grossman v New York Life Ins. Co.*, 90 AD3d 990, 991-92 [2d Dept 2011]). Moreover, "a contract claim cannot be converted into a fraud claim by the addition of an allegation that the promisor intended not to perform when he made the promise" (*Bell Sports, Inc. v Sys. Software Assoc., Inc.*, 45 F Supp 2d 220, 227 [EDNY 1999]).

Based upon the foregoing, the portion of Defendants' motion to dismiss the above-captioned action on the grounds that there is another action pending is DENIED on the basis that the prior action was marked off the court's calendar for non-appearance and later disposed of. Furthermore, there is no indication that any steps have been taken to restore the action to the court's calendar. The portion of Defendants' motion to dismiss Plaintiffs' complaint for failure to sufficiently plead their breach of contract claim is DENIED, as this court finds that Plaintiffs' complaint sufficiently alleges facts to discern a breach of contract action. The portion of Defendants' motion to dismiss Plaintiffs' fraud claim is hereby GRANTED, as an undisclosed intention not to perform a contract cannot constitute fraud. Consequently, the portion of Defendants' motion to dismiss Plaintiffs' claims against the individuals is hereby GRANTED due to the dismissal of Plaintiffs' fraud claim and Plaintiffs' failure to otherwise allege facts sufficient to pierce the corporate veil. Lastly, the portion of Defendants' motion to dismiss Plaintiffs' unjust enrichment claim is hereby GRANTED, as the court finds that the existence of the written contracts preclude Plaintiffs from asserting unjust enrichment.

This constitutes the decision and order of the court.

E N T E R,



SYLVIA G. ASH, J.S.C.