Rubin v Woodstone Dev.
2018 NY Slip Op 31714(U)
March 26, 2018
Supreme Court, New York County
Docket Number: 159534/2017
Judge: David B. Cohen

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID BENJAMIN COHEN **PART** 58
Justice

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STEPHEN RUBIN,

Plaintiff,

- v -

WOODSTONE DEVELOPMENT, STEVEN DUBROVSKY, HOWARD SCHOOR, DREAM HOTEL GROUP

Defendant.

INDEX NO. 159534/2017

MOTION DATE 11/30/2017

MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48

were read on this application to/for DISMISSAL.

Upon the foregoing documents, it is

Plaintiff brought this action for damages relating to a home built by defendants in White Lake, New York. The Complaint alleges that defendants built the home in a manner where the physical building was partially located on land not belonging to plaintiff. In 2011, after the neighboring landowner complained about the encroachment, plaintiff contacted defendants about the issue and assured plaintiff that they would resolve the problem at their expense. When plaintiff requested a letter from defendants confirming that they would resolve the problem at defendants' expense, plaintiff was asked to withdraw such request so defendants would not have to notify their insurance carrier of the claim. Plaintiff agreed to do so but defendants failed to resolve the issue. Sometime later, the neighboring land was sold and in July 2012, the new

neighbor commenced a suit regarding the encroachment. After discovering that another portion of the work done by defendants also encroached on the neighboring property, plaintiff and the neighbor entered into a settlement where plaintiff purchased the encroaching property for $26,739.60. During this period, defendants allegedly assured plaintiff that they "would do the right thing." Upon defendants' failure to reimburse plaintiff, the instant action was commenced. Plaintiff seeks damages for (1) breach of contract as defendants contracted that they would "construct a residence for plaintiff on land owned by Plaintiff and that the work would be performed in a 'good, skillful and workmanlike manner';" (2) breach of warranty on the construction; (3) negligence by building on land not owned by plaintiff; and (4) fraud. Plaintiff brought the instant motion (a) seeking a change in venue; (2) to dismiss pursuant to CPLR 3211(a)(3) and (7); (3) to disqualify plaintiff from acting as *pro se* attorney and (4) sanctions. Plaintiff cross-moved for disqualification of defendants' attorney.

The motion to change venue pursuant to CPLR 507 is denied. Generally, venue is proper in the county in which one of the parties resided when it was commenced (CPLR 503(a). In the instance where a party resides in more than one county, said party is deemed a resident of each county where it resides (*id.*). CPLR 507 provides "the place of trial of an action in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property shall be in the county in which any part of the subject of the action is situated." It carries forward the traditional rule that an action affecting real property, such as a mortgage foreclosure, must be brought in the county where the property is located. Here, plaintiff resides in New York county. Although the claims asserted involve a dispute regarding the building of a house in Sullivan County, the dispute is not about title, possession or use of that property. Rather the dispute is about damages that allegedly arose from a contract between the parties.

When deciding a motion to dismiss pursuant to CPLR §3211, the court should give the pleading a "liberal construction, accept the facts alleged in the complaint to be true and afford the plaintiff the benefit of every possible favorable inference" (*Landon v. Kroll Laboratory Specialists, Inc.*, 22 NY3d 1, 5-6 [2013]; *Faison v. Lewis*, 25 NY3d 220 [2015]). However, if a complaint fails within its four corners to allege the necessary elements of a cause of action, the claim must be dismissed (*Andre Strishak & Associates, P.C. v. Hewlett Packard & Co.*, 300 AD2d 608 [2d Dept 2002]. Under CPLR § 3211(a)(7), the court "accepts as true the facts as alleged in the complaint and affidavits in opposition to the motion, accords the plaintiff the benefit of every possible favorable inference, and determines only whether the facts as alleged manifest any cognizable legal theory" (*Elmaliach v Bank of China Ltd.*, 110 AD3d 192, 199 [1st Dept 2013] (quoting *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001])).

The portion of the motion pursuant to CPLR 3211(a)(3) is denied. Although defendants' have submitted proof that the construction contract was between Woodstone Development, LLC and Eileen Grossman (plaintiff's wife) and not plaintiff, plaintiff contends that he is the successor in interest to Eileen and that she assigned him all rights. Plaintiff also argues that although the contract was with his wife and the deed for the property was in his wife's name, the parties understood that this was only a formality and that both he and his wife were the clients. Giving plaintiff all favorable inferences, this Court finds that plaintiff as the current owner and assignee has standing to maintain this action.

However, the motion to dismiss based upon statute of limitations is granted. The construction contract was dated August 1, 2002 and a certificate of occupancy was issued June 25, 2003. Plaintiff's first two causes of action are breach of the construction contract and breach

of warranty. Both are subject to a six-year statute of limitations and have long expired.[1] Similarly, plaintiff's third cause of action for negligence was subject to a three-year statute of limitations and has long expired. Thus, these causes of action are dismissed.

The fraud cause of action is described in two ways. First, plaintiff alleges that in 2010, upon learning about the encroachment, he requested a letter from defendants confirming defendants would resolve the problem, and withdrew said request upon the fraudulent assurances from defendants that they would fully resolve the problem at their expense. Second, over the next few year, plaintiff relied upon defendants' continued assurances that they would "do the right thing" and held off on commencing and action against defendants.

A claim rooted in fraud must be pleaded with the requisite particularity (CPLR 3016(b)). The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553 [2009]). The statute of limitations for fraud is "the time within which the action must be commenced shall be the greater of six years from the date the cause of action accrued or two years from the time the plaintiff or the person under whom the plaintiff claims discovered the fraud (CPLR 213(8)). The Complaint states two actions done in reliance of the alleged fraud: (1) withdrawal of the request for a letter; (2) holding off on commencing an action.

The cause of action for fraud is dismissed. First, the Complaint does not comply with the particularity requirements of CPLR 3016(b). Specifically, the Complaint fails to provide dates of the conversations, the statements that were fraudulent at the time made, and the specific promises that were made. All the Complaint alleges is some vague and defined promise to

[1] Even from the time period that plaintiff first was told that the home was built on the neighboring property through the time that this action was commenced was likely more than six years.

resolve the issue and do the right thing. Further, the Complaint alleges that in October 2011, upon learning of the encroachment it promptly notified defendants of the issue, requested that defendants resolve the issue and after discussing a resolution withdrew its request to formalize their arrangement. The Complaint fails to state what damages occurred through the withdrawl of the request to formalize the arrangement. Even taking the allegation as true, plaintiff could have commenced an action, plaintiff could have sought an alternative means of securing the promise or plaintiff could have set a time frame for performance. At that time, the neighbor had not commenced suit and the Complaint admits that defendants took steps to look into the issue by having the property re-surveyed. The Complaint further alleges that from that time through July 2012, when the neighbor commenced suit and past the settlement with the neighbor and related payment up and as recently as May 2017, defendants promised "to do the right thing." This was a promise to do something in the future, not a representation of current fact. A promise to do something in the future is not actionable as fraud (*Cinque v Schieferstein*, 292 AD2d 197, 198 [1st Dept 2002]). Although a false statement of intention is sufficient to support an action for fraud if it was the basis of the inducement for the contract (*Deerfield Communications Corp. v Chesebrough-Ponds, Inc.*, 68 NY2d 954 [1986]), here, that is not the case. According to the Complaint, because of those constant alleged promises "plaintiff refrained from securing a written acknowledgement of liability from defendants and refrained from bringing legal action against the defendants." This was a unilateral decision by plaintiff to refrain. The Complaint does not allege that defendants, at any time from the time the neighbor commenced action through May 2017, sought either of those things, or that the parties entered into any contract. In addition, the Complaint does not allege that plaintiff withdrew his request to formalize the arrangement as part of the consideration for the promise. On the contrary, the Complaint first

states that defendants promised to resolve at their expense and discussed the withdrawal of his request.

Additionally, any of the alleged statements made in assuring plaintiff about resolving the issues at defendants' expense prior to October 26, 2011 are beyond the statute of limitations. Further, defendants have submitted an email from plaintiff dated August 15, 2012, where plaintiff sought a tolling of the statute of limitations for claims relating to the initial construction contract. Defendants did not sign this agreement. This email was dated more than a year after the neighbor filed the action and more than eighteen months from the first (of many) alleged promises to do the right thing. Plaintiff is a partner at a large law firm who clearly, as demonstrated by his email, knew of statute of limitations issues. The Complaint alleges that for five years, despite defendants' constant refusal to make good on their alleged promise to pay and do the right thing, and despite defendants' lack of signing the tolling agreement and despite plaintiff's only receiving promises, plaintiff failed to commence suit and withdrew his request. Under these facts, particularly, plaintiff's knowledge and understanding of the statute of limitations and defendants' failure to sign a tolling agreement, plaintiff cannot have justifiably relied on a vague and undefined promise to do the right thing. Accordingly, it therefore

ORDERED, that the motion to dismiss the Complaint is granted.

This constitutes the decision and order of the Court.

3/26/2018
DATE

DAVID BENJAMIN COHEN, J.S.C.
HON. DAVID B. COHEN
J.S.C.

CHECK ONE:	X	CASE DISPOSED				NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
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