SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 47
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Louis Zazzarino,

Plaintiff,

Index Number:

-against-

157490/2017

13-21 East 22nd Street Residence Corp., Wallack Management Corp., Inc., JP Morgan Chase Bank, N.A., Elizabeth Garvin a/k/a Elizabeth R. Garvin,

Defendants.
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Paul A. Goetz, J.:

Defendants 13-21 East 22nd Street Residence Corp. (the Coop) and Wallack Management Corp., Inc. (Wallack, together the Coop Defendants) move, pursuant to CPLR 3211 (a) (1) and (7), to dismiss plaintiff's complaint for failure to state a claim. Plaintiff has cross-moved to convert the Coop Defendants' motion into a motion for summary judgment, to grant him summary judgment on certain causes of action and for a default judgment against Elizabeth Garvin (Garvin). The action has been discontinued against JP Morgan Chase Bank, N.A. (Chase), pursuant to a stipulation dated February 5, 2018.

Underlying Allegations

This action involves the shares allocated to Apartment 2A (the Apartment)in a building located at 13-21 East 22nd Street,

New York, New York (the Building). The Building is owned by the Coop, Wallack is the Coop's managing agent, Garvin resides in the Apartment and has done so for many years.

Plaintiff alleges that, on March 29, 2017, a non judicial foreclosure sale was held for the Apartment's shares and that he was successful bidder in the amount of $50,000 (amended complaint, §§ 8-9). He states that on May 15, 2017, Wallack sent him a letter on behalf of the Coop, informing him that the Coop has denied his proposed purchase of the Apartment (*id.*, § 11). He further states that, in August 2017, Chase renoticed the Apartment for auction and that on August 22, 2017, plaintiff commenced this action (*id.*, §§ 13-14).

Plaintiff states that, on September 8, 2017, Chase advised him that it had cancelled the proposed auction, since Garvin had exercised her right of redemption of her debt to Chase that was the basis of the auction (*id.*, §§ 15-16). In the amended complaint, plaintiff has asserted claims for breach of contract, breach of duty of good faith, tortious interference with contract, breach of fiduciary duty, prima facie tort, conversion, discrimination, equitable estoppel, injunctive and declaratory relief, all based upon his contention that he "is the rightful owner of the [Apartment]" (*id.*, § 18).

The Coop Defendants have presented the Chase loan documents, the Chase notice of sale and its terms, the April 4, 2017 email

from Wallack to plaintiff indicating the requirement for "full board approval" and the concern about not evicting a person from their home (the April 2017 Email), the June 1, 2017 email from Wallack to plaintiff indicating that the Coop's board rejected plaintiff's application (the Rejection Email) and the proprietary lease (the Lease).

The Lease includes a paragraph (paragraph 39 [c]) that provides "[i]f the purchase by the Lessee of the shares allocated to the [A]partment was financed by a loan made by a bank . . . and a default . . . shall have occurred under the terms of the security agreement . . . and [if the appropriate notice is given] . . . an individual designated by the Secure Party . . . shall become entitled to become the owner of the shares [subject to] the consent of the Lessor's then managing agent, which shall not be unreasonably withheld." The Lease also includes a paragraph (paragraph 39 [b]) dealing with situations where the "[L]ease is terminated by the Lessor." The Chase Loan taken out by Garvin was a home equity loan, not a loan taken out for the purchase of the Apartment and the Lease was not terminated by the Coop.

The Coop Defendants contend that these documents establish that plaintiff has no claim, since he was only a prospective purchaser, that the amended complaint has no factual allegations of malice or wrongful conduct and that plaintiff's unspecific assertions of "legitimate concern" are insufficient to raise an

inference of discrimination. They assert that they had no duty to plaintiff and also, that Wallack acted as an agent for a disclosed principal. Accordingly, the Coop Defendants seek dismissal of plaintiff's complaint against them.

Dismissal Standard

In determining a motion to dismiss pursuant to CPLR 3211, "the court must accept the facts as alleged in the complaint as true, accord [them] the benefit of every possible favorable inference, and determine . . . whether the facts as alleged fit within any cognizable legal theory" (*Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 570-571 [2005] [internal quotation marks and citation omitted]; *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). Dismissal based upon documentary evidence is appropriate only where the "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]). However, allegations that are bare legal conclusions or are inherently incredible or that are flatly contradicted by the documentary evidence are not accorded such favorable inferences and need not be accepted as true (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000]). Also, "[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d

11, 19 [2005]).

Procedural Issues

Generally, "courts are statutorily required to . . . notify the parties . . . that it was treating [plaintiff's] cross motion as a cross motion for summary judgement [pursuant to CPLR 3211 (c)]" (*Hendrickson v Philbor Motors, Inc.*, 102 AD3d 251, 256 [2d Dept 2012]). Similarly, the court may not consider a request for summary judgment under CPLR 3211(c) unless the defendants "'unequivocally' chart[ed] a course for summary judgement" (*Primedia Inc., v SBI USA LLC*, 43 AD3d 685, 686 [1st Dept 2007], *quoting Four Seasons Hotels v Vinnik*, 127 AD2d 310, 320 [1st Dept 1987]; *see also Island Intellectual Property LLC v Reich & Tang Deposit Solutions, LLC*, 155 AD3d 542, 542 [1st Dept 2017]). Furthermore, a cross motion is improper where it seeks "relief against nonmoving parties" (*Sanchez v Metro Builders Corp.*, 136 AD3d 783, 785 [2d Dept 2016]; *Gaines v Shell-Mar Foods*, 21 AD3d 986, 987-988 [2d Dept 2005]).

Contract Claim

"[A] party seeking to recover under a breach of contract theory must prove that a binding agreement was made as to all essential terms . . . [, there must be] sufficiently definite terms and the parties must express their assent to those terms" (*Silber v New York Life Ins. Co.*, 92 AD3d 436, 439 [1st Dept 2012]; *see also Carione v Hickey*, 133 AD3d 811, 811 [2d Dept

2015]).

Contract Interpretation

Generally, "when parties set down their agreement in a clear, complete document, their writing should . . . be enforced according to its terms . . . [and extrinsic evidence] is generally inadmissible to add to or vary the writing" (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). It is improper for the court to rewrite the parties' agreement and the best evidence of the parties' agreement is their written contract (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). Put another way, "[c]ourts will give effect to the contract's language and the parties must live with the consequences of their agreement [and] [i]f they are dissatisfied . . . , the time to say so [is] at the bargaining table" (*Eujoy Realty Corp. v Van Wagner Communications, LLC*, 22 NY3d 413, 424 [2013] [internal quotation marks and citation omitted]; *see also McFarland v Opera Owners, Inc.*, 92 AD3d 428, 428-429 [1st Dept 2012]; *Crane, A.G. v 206 W. 41st St. Hotel Assoc., L.P.*, 87 AD3d 174, 180 [1st Dept 2011]).

Tortious Interference with Contract

The elements of tortious interference with a contract are "[1] the existence of a valid contract, [2] defendants' knowledge of the contract, [3] defendants' intentional procurement of a breach of the contract, and [4] breach of the contract" (*RLR*

Relty. Corp. V Duane Reade, Inc., 145 AD3d 444, 445 [1st Dept 2016]). However, "mere contentions . . . offered with no factual basis to support the allegations are insufficient to state a cause of action for tortious interference with contractual relations" (*M.J. & K. Co. v Matthew Bender & Co.*, 220 AD2d 488, 490 [2d Dept 1995]).

Breach of Fiduciary Duty

"'[T]he elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct'" (*Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804, 807 [2d Dept 2011] [internal citation omitted]).

Duplicative Claims

A "cause of action for breach of fiduciary duty [is] properly deemed duplicative of the breach of contract claim [when] it alleges the very same facts as the breach of contract claim" (*Mosaic Caribe, Ltd. v AllSettled Group, Inc.*, 117 AD3d 421, 423 [1st Dept 2014]). Similarly, "unjust enrichment [claims] which are based on the same allegations and seek the same damages as the breach of contract . . . claims should [be] dismissed as duplicative" (*Ullmann-Schneider v Lacher & Lowell-Taylor, P.C.*, 121 AD3d 415, 416 [1st Dept 2014]).

Conversion

"Conversion is the unauthorized assumption and exercise of the rights of ownership over goods belonging to another to the exclusion of the owner's rights" (*Vigilant Ins. Co. of Am. v Housing Auth. of City of El Paso*, 87 NY2d 36, 44 [1995] internal quotation omitted). "Two key elements of conversion are [1] plaintiff's possessory right or interest in the property and [2] defendant's dominion over the property or interference with it, in derogation of plaintiff's rights" (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 50 [2006] internal citations omitted).

Duty of Good Faith

"In New York, all contracts imply a duty of good faith and fair dealing in the course of performance . . . [which] embraces a pledge that 'neither party will do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract'" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002], *quoting Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 [1995]; *see also ADC Orange, Inc. v Coyote Acres, Inc.*, 7 NY3d 484, 490 [2006]; *Sorenson v Bridge Capital Corp.*, 52 AD3d 265, 267 [1st Dept 2008]). However, there is a "well-established principle that the implied covenant of good faith and fair dealing will be enforced only to the extent that it is consistent with the provisions of

the contract . . . [since] the negotiated terms of the contract [are binding]" (*Phoenix Capital Invs. LLC v Ellington Mgt. Group, L.L.C.*, 51 AD3d 549, 550 [1st Dept 2008]; *see also Randall's Is. Aquatic Leisure, LLC v City of New York*, 92 AD3d 463, 464 [1st Dept], *lv denied* 19 NY3d 804 [2012]).

Discrimination

Discrimination claims in contracting follow the same rules as a party claiming discrimination in the employment context (*see Sayeh v 66 Madison Ave. Apt. Corp.*, 73 AD3d 459, 461 [1st Dept 2010]). A plaintiff claiming discrimination in employment has the initial burden of establishing a prima facie case by showing that he was a member of a protected class, that he was qualified for the position, that he was terminated or suffered another adverse employment action and that the adverse employment action "occurred under circumstance giving rise to an inference of discrimination" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004]).

"In order to make a prima facie showing of retaliation, [a plaintiff] must show: (1) participation in a protected activity known to defendant; (2) an adverse employment action; and (3) a causal connection between the protected activity and the adverse employment action" (*id.* at 327).

The courts have applied "the three-step burden-shifting approach set forth in *McDonnell Douglas Corp. v Green* (411 US 792

[1973])" in which the plaintiff makes the "minimal showing [that he is in a protected class and that an adverse employment action has been taken against him, then] the burden shifts to the defendant to articulate through competent evidence nondiscriminatory reasons [for its action and] ... then plaintiff must show those reasons to be false or pretextual" (*Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 34, 35-36 [1st Dept 2011], *lv denied* 18 NY3d 811 [2012]).

Thus, a plaintiff claiming discrimination in contracting must make a showing of membership in a protected class, an adverse action based upon such membership in a protected class under circumstances giving rise to an inference of discrimination and being otherwise qualified (*see Sayeh*, 73 AD3d at 461).

Discussion

Initially, the portion of plaintiff's cross motion that seeks default judgment against Garvin must be denied, since a cross motion may not seek relief against a non moving party (*see Sanchez*, 136 AD3d at 785). The portion of plaintiff's cross motion that seeks to convert the Coop Defendants' motion to dismiss into a motion for summary judgment is also denied, since no notice was given by the Court and the Coop Defendants did not "unequivocally chart a course for summary judgment" (*Primedia*, 43 AD3d at 686).

Plaintiff's claim, in essence, is that he is the rightful

owner of the shares and that the Coop had an obligation to approve the purchase, since he was the successful bidder at the auction. However, while he asserts that the Coop acted in "bad faith", he does not set forth factual allegations of an agreement with the Coop for the sale of the shares. Therefore, he has not adequately alleged "a binding agreement as to all essential terms . . . [that] the parties [expressed] their assent to those terms" (*Silber*, 92 AD3d at 439). Rather, plaintiff was, at best, a potential purchaser and neither a party to the Lease nor a thrird-party beneficiary of the Lease and therefore has no claim for breach of contract (*85 Fifth Ave. 4th Foor, LLC v L. A. Selig, LLC*, 45 AD3d 349, 349-350 [1st Dept 2007]; *Woo v Irving Tenants Corp.*, 276 AD2d 380, 380 [1st Dept 2000]). Moreover, the Lease provisions are not applicable to this case, since the Lease was not terminated by the Coop and the Chase Loan was not entered for purchase of the shares. Consequently, the portion of the Coop Defendants' motion that seeks dismissal of the breach of contract cause of action must be granted. Additionally, since Wallack was an agent for the Coop and plaintiff was aware that it was acting on behalf of the Coop, it is also entitled to dismissal of the action against it as an agent for a disclosed principal (*see Savoy Record Co. v Cardinal Export Corp.*, 15 NY2d 1, 4 [1964]; *JDF Realty, Inc. v Sartiano*, 93 AD3d 410, 410 [1st Dept 2012]).

Dismissal of the contract cause of action mandates dismissal of the breach of duty of good faith cause of action, the breach of fiduciary duty claim and the tortious inference with contract claim, since these are duplicative of the contract claim and dependent upon a valid contract (*see Phoenix Capital*, 51 AD3d at 550; *Mosaic Caribe*, 117 AD3d at 423; *Hersh*, 131 AD3d at 1119). The prima facie tort and equitable estoppel claims must be dismissed, since plaintiff has not alleged malice or wrongful conduct. The discrimination claims must also be dismissed since plaintiff has not alleged facts that set forth an inference of discrimination based upon national origin (*see Sayeh*, 73 AD3d at 461). Finally, the conversion claims must be dismissed, since plaintiff's claim to a possessory right is based upon his contractual claim (*see Colavito*, 8 NY3d at 50).

Accordingly, the Coop Defendants' motion for dismissal of plaintiff's complaint against them must be granted.

Order

It is, therefore,

ORDERED that the motion of 13-21 East 22nd Street Residence Corp. and Wallack Management Corp., Inc. to dismiss plaintiff's complaint against them is GRANTED, the complaint is dismissed against said parties, with costs and disbursements as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the action is severed and continued against the remaining defendant; and it is further

ORDERED that the caption be amended to reflect the dismissal and the discontinuance and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that within 30 days of entry of this order the movant shall e-file a 'Notice to County Clerk' (NYSCEF Form EF-22, using document type of same title) attached to a copy of this order for the County Clerk to be properly notified pursuant to CPLR 8019(c) and thereby effect the change in caption; and it is further

ORDERED that plaintiff's cross motion is DENIED.

Dated: October 12, 2018

ENTER:

Hon. Paul A. Goetz, JSC