

Park v Ji Rook Kim

2018 NY Slip Op 32850(U)

October 19, 2018

Supreme Court, New York County

Docket Number: 654528/2017

Judge: Margaret A. Chan

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. MARGARET A. CHAN PART IAS MOTION 33EFM

Justice

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MICHAEL PARK, 470 WEST 42 STREET GOURMENT, INC.,

Plaintiffs,

- v -

JI ROOK KIM, UNSPACE, INC., ARTIKULATION, INC., MKT
WERKS, INC., AVENTADOR CONSTRUCTION, INC., CORE
CONTINENTAL CA, LLC, CORE CONTINENTAL
CONSTRUCTION, LLC, CORE CONTINENTAL CONSTRUCTION
2, LLC, CORE CONTINENTAL CONSTRUCTION 3, LLC, CORE
CONTINENTAL CONSTRUCTION V, LLC, CORE CONTINENTAL
CONSTRUCTION 6, LLC, CORE CONTINENTAL MANAGEMENT
CORP., CORE CONTINENTAL MANAGEMENT SERVICES,
EDDIE WANG, JOHN DOE BYUN, JOHN DOES OR JANE DOES
1 THROUGH 10,

Defendants.

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INDEX NO. 654528/2017

**MOTION DATE 08/07/2017,
06/01/2018**

MOTION SEQ. NO. 001 002

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 15, 16, 17, 18, 19, 21, 22, 23, 24 and NYSCEF document number (Motion 002) 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, were read on these motions for DISMISSAL.

In this action, plaintiff 470 West 42 Street Gourmet, Inc., and its owner, plaintiff Michael Park, rented a commercial space for its use as a “deli/café”. Plaintiffs allege that defendants breached their contract to renovate the space because they failed to timely complete the work. This decision and order resolves two motions sequences – motion sequence 001(MS1) and 002 (MS2), as follows:

In MS1, defendants Eddie Wang, Aventador Construction, Inc., Core Continental Ca, LLC, Core Continental Construction, LLC, Core Continental Construction 2, LLC, Core Continental Construction 3, LLC, Core Continental Construction V, LLC, Core Continental Construction 6, LLC, and Core Continental Management Corp. (collectively, the Wang defendants) move to dismiss the action pre-answer. Defendants Ji Rook Kim, Unspace, Inc., Artikulation, Inc., and Mkt Werks, Inc. (collectively, the Kim defendants), seek the same relief. Plaintiffs cross-move to transfer the action to the Commercial Division. Oral argument of MS1 was heard on April 25, 2018.

At oral argument, this court granted defendants’ motions to the extent that plaintiff was given leave of court to file an amended complaint within 30 days. Plaintiffs’ cross-motion to transfer the action to the Commercial Division was denied as it was not timely made, nor did plaintiffs’ initial complaint meet the

monetary threshold for actions before the Commercial Division (*see* Uniform Rules for NY State Trial Courts § 202.70).

Pursuant to this court's decision at oral argument of MS1, plaintiffs filed an amended complaint on May 7, 2018 (NYSCEF Doc. No. 25). In turn, the Kim defendants filed MS2 to dismiss the amended complaint. Plaintiffs oppose the motion, to which the Kim defendants reply. The Kim defendants assert that plaintiffs' claims are precluded based on documentary evidence pursuant to CPLR 3211(a)(1), and, in any event, the amended complaint fails to state a cause of action pursuant to CPLR 3211(a)(7).

The amended complaint sets forth that plaintiffs and defendants agreed by way of written and oral contracts to deliver a "turn key" store in under a year for the contract price of \$1,960,000 (NYSCEF Doc. No. 25 – Complaint, ¶ 2). The alleged written contract was not provided. Plaintiffs explain that the work had to be timely completed so that it could receive up to a million dollars in incentives, also referred to as "tenant improvement" amounts and "matching tenant credits" contributions from the landlord (*id.* at ¶ 3 and ¶ 23). Plaintiffs indicate without elaboration that the construction was not "properly completed" (*id.* at ¶ 6).

The amended complaint is, at best, confusing. It asserts that plaintiffs agreed on October 18, 2013, with defendant Kim and his company, defendant Unspace Inc., to complete the construction and renovation for \$2,750,000 (*id.* at ¶ 26). However, after months of negotiation, defendant Kim and another one of his companies, defendant Artikulation Inc., proposed doing the work for \$1,960,000 in February 2014 (*id.* at ¶ 26). Plaintiffs agreed to hire defendant Kim and "his company" for work to be completed in nine months¹ (*id.* at ¶¶ 27-30). Plaintiffs assert that its lender, non-party Newbank, paid the construction costs directly to defendants. Construction was eventually complete in December 2016 for a cost of \$2 million dollars (*id.* at ¶¶ 34-36).

Plaintiffs claim that the delay and overcharges were from "defendants' mismanagement of the payment time line." (*id.* at ¶38). The amended complaint also discusses a \$500,000 payment that defendants received from the sale of 830 Gourmet (*id.* at ¶39). 830 Gourmet is not a party to this action and its involvement in this case is unclear. The remainder of the allegations assert that defendants' construction delays resulted in plaintiffs having to secure additional funding from a private lender, non-party KJY Investments, LLC. Plaintiffs allege that they would not have had to secure the additional loan had it not been for "Newbank's inept draw-down procedures and defendants' excessive charging and over-charging for the construction job." (*id.* at ¶45).

¹ An apparent typo in the complaint indicates that the contract was executed in 2016, for work in 2014 (Complaint ¶30).

The complaint asserts six causes of action: (1) fraud in the inducement; (2) breach of contract; (3) misappropriation; (4) breach of the covenant of good faith and fair dealing; (5) tortious interference with a contract; and (6) breach of a fiduciary duty, for which plaintiffs seek compensatory damages, punitive damages, disgorgement, restitution, and fees and costs. The Kim defendants seek attorney's fees in MS2 for having to defend against these claims.

In support of their motion to dismiss pursuant to CPLR 3211(a)(1), the Kim defendants motion submit a "Release and Waiver of Claims" document (hereafter, the Release) it executed with plaintiffs. The Release, which was executed on May 31, 2016, designates plaintiffs as the "Releasor" and the Kim defendants as several of the "Releasees". It provides that in exchange for a \$250,060.00 loan, the receipt of which is acknowledged in the Release, plaintiffs agreed to:

Waive and release any claim or dispute that may arise by the Company and Releasor as a result of 1) Delay of the construction project by the Releasor, and 2) the Company and Releasor will defend the Releasee against any lawsuit filed against the Releasee raised by the shareholders, directors, officers of the Company, and 3) Releasor shall defend the Releasee against any claim and/or lawsuit by KJY Investment LLC for the personal guaranty of Ji Rook Kim and the Releasor's request.

(NYSCEF Doc. No. 31 – the Release). A plain reading of the Release bars plaintiffs from bring this action for construction delays.

In opposition, plaintiffs take issue with the jurat of the notary public that signed the Release. The jurat on the Release states that the plaintiff Michael Park, as President and Shareholder of 470 W. 42nd Street Gourmet Food Inc., and his mother, Ryunghee Cho, as Shareholder, signed the document in the State and County of New York. The notary public is qualified in Bronx County. And plaintiff Park claims he "did not sign the document at all before a Bronx notary public, or if [he] did sign the document the document was not notarized simultaneously with the alleged signing and the signing was induced by misrepresentation as to the nature of the document." Park also asserts that he does not visit the outer boroughs of New York City and would not go to the Bronx. Park claims that "the purported Release was procured by misrepresenting underlying facts []; by misrepresenting the document and the document was never negotiated in the manner sought to be used currently" (NYSCEF Doc. No. 33, Park Aff, ¶9).

On a CPLR 3211(a)(1) motion to dismiss on the grounds that the action is barred by documentary evidence, the motion may only be granted where the documentary evidence utterly refutes plaintiffs' factual allegations, conclusively establishing a defense as a matter of law (*see Goshen v Mut. Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]). Defendant has the burden of demonstrating that the documentary evidence resolves all factual issues (*see Fortis Fin. Services, LLC v*

Fimat Futures USA, Inc., 290 AD2d 383 [1st Dept 2002]). Bare legal conclusions and factual claims, which are either inherently incredible or flatly contradicted by documentary evidence need not be taken as true on a motion to dismiss for legal insufficiency (*see O'Donnell, Fox & Gartner v R-2000 Corp.*, 198 AD2d 154 [1st Dept 1993]). “[W]here documentary evidence and undisputed facts negate or dispose of claims in the complaint or conclusively establish a defense” dismissal is warranted (*Zanett Lombardier, Ltd. v Maslow*, 29 AD3d 495, 495 [1st Dept 2006]).

The Kim defendants argue that the Release bars this action, and this court agrees. “As a general rule, a valid release that is clear and unambiguous on its face constitutes a complete bar to an action on a claim which is the subject of the release absent fraudulent inducement, fraudulent concealment, misrepresentation, mutual mistake or duress.” (*Global Precast, Inc. v Stonewall Contr. Corp.*, 78 AD3d 432, 432 [1st Dept 2010]). “A release will not be treated lightly because it is a jural act of high significance without which the settlement of disputes would be rendered all but impossible.” (*Allen v Riese Org., Inc.*, 106 AD3d 514 [1st Dept 2013] [internal quotation marks and citation omitted]). The notary being qualified in the Bronx does not demand that the document be physically signed in Bronx County. Ironically, Park’s affidavit was notarized by a notary public who is qualified in Queens County (NYSCEF Doc. No. 33, Park Aff).

Here, the Kim defendants have come forward with a Release which unequivocally bars the claims here; all the claims against them stem from their purported construction delays. In opposition, plaintiffs raise the disingenuous quibble that they did not sign the document in the Bronx, which as discussed is not implied in the jurat. This narrative that the document cannot be credited because plaintiff park does not travel to the Bronx does not sufficiently raise an issue of fraud, misrepresentation, mistake or duress, to challenge its validity (*Global Precast, Inc. v Stonewall Contr. Corp.*, 78 AD3d 432, 432). It is also worth noting that the Release was provided in the movants’ submission, however the original contract, on which plaintiffs’ claims are based, was not. At bottom, plaintiffs’ opposition does not overcome the plain meaning of the Release, which defeats this action as against the Kim defendants.

As this motion is decided on documentary evidence pursuant to CPLR 3211(a)(1), this court need not address the Kim defendants’ arguments to dismiss the complaint for failure to state a claim pursuant to CPLR 3211(a)(7). It is noted that those arguments were not addressed by plaintiffs’ in opposition.

The Kim defendants’ request for attorney’s fees is denied at this juncture, but plaintiffs’ counsel is cautioned that frivolous claims and vague or spurious allegations will not be countenanced by the court.

Accordingly, it is hereby

ORDERED that on motion sequence 001, defendants' motion to dismiss the complaint is moot as plaintiff was given leave of court to replead, which was done on April 25, 2018; it is further

ORDERED that Plaintiffs' cross-motion to transfer the action to the Commercial Division is denied, and it is further

ORDERED that on motion sequence 002, the Kim defendants' motion to dismiss the action as against them is granted. The complaint is dismissed as against defendants Ji Rook Kim, Unspace, Inc., Artikulation, Inc., and Mkt Werks, Inc. The clerk of the court may enter judgment in favor of these defendants as written.

This constitutes the decision and order of the court.

HON. MARGARET A. CHAN

10/19/2018

DATE

MARGARET A. CHAN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE