

Kaur v Lema

2018 NY Slip Op 33923(U)

October 23, 2018

Supreme Court, Dutchess County

Docket Number: 53067/2017

Judge: James D. Pagonis

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

-----X
SURJEET KAUR and TEJPAL SANDHU,

Plaintiffs,

DECISION AND ORDER

Index No. 53067/2017

-against-

JOSE LEMA a/k/a JOE LEMA, LMP REALTY, LLC, 3455 ROUTE 9 PROPERTIES, INC., LEMA-BEDOYA IMPORT & EXPORT CORP., and 8 GRANDCHILDREN, INC.,

Defendants.

-----X

PAGONES, J D., A.J.S.C.

Defendants move for an order, pursuant to CPLR 3211(a)(1)¹ and (7), dismissing the plaintiffs' complaint. Plaintiffs cross-move for an order, pursuant to CPLR 3025, granting leave to serve and file an amended verified complaint.

The following papers were read:

Notice of Motion-Affirmation-Affidavit-Exhibits A-Y-	1-29
Affidavit of Service	
Memorandum of Law	30
Notice of Cross-Motion-Affidavit-Affirmation-Affirmation-Exhibits A-C	31-37
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By way of background, the complaint alleges that defendant Lema operates an automotive salvage and scrap metal business on

¹ While not specifically delineated as such in the Notice of Motion, the defendants' memorandum of law relies heavily on and specifically indicates that the defendants are also moving pursuant to CPLR 3211(a)(1). Accordingly, as plaintiffs clearly have notice of the defendants' intention to move both pursuant to CPLR 3211(a)(1) and (7), the Court will consider the motion pursuant to both subsections.

real property known as 3455 Route 9, Cold Spring, New York 10516. The complaint further alleges that defendant Lema is also in the business of holding real estate for long-term value including, but not limited to, real property known as 2273 Route 9D, Wappingers Falls, New York 12590 and an adjoining, unimproved lot, fronting on Route 9D, in Wappingers Falls, New York. It is further alleged that defendant Lema and plaintiff Sandhu have had prior business dealings, leading to defendant Lema approaching plaintiff Sandhu to sell the salvage/scrap business and 9D properties. Plaintiffs agreed to purchase the aforementioned properties, based upon the alleged representations of defendant Lema, for the sum of Two Million Dollars (\$2,000,000.00). Plaintiffs state that they paid Two Hundred Twenty-Five Thousand Dollars (\$225,000.00) in cash to defendant Lema, representing a down payment toward the purchase. Plaintiffs further allege that they wrote two checks in the amount of Three Hundred Thousand Dollars (\$300,000.00) and One Hundred Thousand Dollars (\$100,000.00) towards the purchases. Approximately, one (1) month after making the down payments, defendants' attorney prepared three (3) contracts to effectuate the above referenced purchases. By asset purchase agreement dated June 2, 2016 between defendants Lema and 3455, Inc. as sellers and plaintiff Kaur as purchaser, which obligations plaintiff Sandhu personally guaranteed, the parties agreed that plaintiff Kaur would purchase the 9D properties for Two Million Dollars (\$2,000,000.00). Within the body of that contract, plaintiffs allege, the record

owner of the Route 9D lots is LMP Realty and Import Corp. Plaintiffs maintain that 3455, Inc. and "Import Corp." were both dissolved in 2011 and 2010, respectively. By second asset purchase agreement, dated May 27, 2016, between defendant Grandchildren, Inc. as seller and plaintiff Kaur as purchaser, the parties agreed that plaintiff Kaur would purchase all issued and outstanding stock in Expressway Auto Parts, Inc. (i.e. the salvage/parts business) of which Grandchildren, Inc. allegedly owned all issued and outstanding shares of stock. A third purchaser asset agreement, dated June 2, 2016, between defendant Lema as seller, and plaintiff Kaur as purchaser, transferred all membership units in LMP Realty to Kaur for Three Hundred Thousand Dollars (\$300,000.00).

Plaintiffs allege that after executing the contracts and providing the down payments, defendant Lema allowed the plaintiff to operate the salvage business on an interim basis until closing. Defendant Lema also permitted plaintiff Sandhu and his immediate family to reside in a single-family residential dwelling located on the 9D property. Plaintiff Sandhu began occupying the property and soon discovered that the dwelling lacked a certificate of occupancy and necessary approval, allegedly in contradiction to defendant Lema's representations. Shortly thereafter, plaintiffs began operating the salvage business and they discovered the finances were not as profitable or lucrative as the representations made by defendant Lema. Plaintiffs vacated the salvage business and surrendered the keys.

On July 20, 2016, plaintiffs through their attorneys transmitted their intention to rescind the contracts and demanded return of their down payments totaling Six Hundred Twenty-Five Thousand Dollars (\$625,000.00). Defendants' attorney refused, and attempted to enforce the contract by issuing notices to cure and then scheduling a closing with time being of the essence. Plaintiffs refused to close with the defendants.

The complaint asserts seven causes of action: (1) breach of contract; (2) rescission and lien foreclosure; (3) fraud in the inducement; (4) imposition of a constructive trust; (5) declaratory judgment; (6) unjust enrichment; and, (7) quantum meruit.

Dismissal is warranted under CPLR 3211(a)(1) only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (see *Leon v. Martinez*, 84 NY2d 83 [1994]). Further, on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action (see *Guggenheimer v. Ginzburg*, 43 NY2d 268 [1977]). In considering such a motion, the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (see *Nonnon v. City of New York*, 9 NY3d 825 [2007]). Whether plaintiffs can ultimately establish their allegations is not part of the calculus (see *EBC I, Inc. v.*

Goldman, Sachs & Co., 5 NY3d 11 [2005]).

Breach of Contract

The essential elements of a breach of contract cause of action are the existence of a contract, the plaintiffs' performance pursuant to the contract, the defendants' breach of his or her or its contractual obligations, and damages resulting from the breach (see *Canzona v. Atanasio*, 118 AD3d 837 [2nd Dept 2014]). The test to be applied is whether the complaint "gives sufficient notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from its averments (see *JP Morgan Chase v. J.H. Elec. of N.Y., Inc.*, 69 AD3d 802 [2nd Dept 2010]).

As pled, the plaintiffs fail to state a cause of action for breach of contract. In order to state a cause of action to recover damages for a breach of contract, the plaintiffs' allegations must identify the provisions of the contract that were breached (see *Reznick v. Bluegreen Resorts Mgt., Inc.*, 154 AD3d 891 [2nd Dept 2017]). The plaintiffs' complaint fails to allege that the defendants breached a specific provision or provisions of the contracts at issue, nor do plaintiffs attach or incorporate the portion or portions of the contracts allegedly breached by the defendants (see generally *Woodhill Elec. v. Jeffrey Beamish, Inc.*, 73 AD3d 1421 [3rd Dept 2010]; *Kraus v. Visa Intl. Serv. Assn.*, 304 AD2d 408 [1st Dept 2003]; *Shields v.*

School of Law of Hofstra Univ., 77 AD2d 867 [2nd Dept 1980]).

Assuming arguendo that the plaintiffs did in fact reference which contract provision or provisions were breached by the defendants, the cause of action still fails. Plaintiffs' complaint alleges that: "Defendant did not have the proper capacity or legal authority to execute the Contracts because Import Corp. and 3455, Inc. had been dissolved nearly five (5) years prior to executing the instruments." Business Corporation Law §1005(a)(2) expressly provides that after dissolution the "corporation shall proceed to wind up its affairs, with power to fulfill or discharge its contracts, collect its assets, sell its assets for cash at public or private sale, discharge or pay its liabilities, and do all other acts appropriate to liquidate its business." Accordingly, there is clear statutory authority possessed by defendant Lema as president, director and sole shareholder of the aforementioned dissolved corporation to effectuate the sale of the real property and business.

Rescission and Lien Foreclosure

As a general rule, rescission of a contract is permitted for such a breach as substantially defeats its purpose (see *RR Chester, LLC v. Arlington Bldg. Corp.*, 22 AD3d 652 [2nd Dept 2005]). It is not permitted for a slight, casual, or technical breach, but only for such as are material and willful, or, it not willful, so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract (*id.*).

Here, the complaint alleges that prior to contract execution, defendants represented to the plaintiffs that the salvage lot business was yielding annual profits and was valuable and marketable. The complaint further alleges that defendant Lema should have known that these representations were not factually accurate and that the plaintiffs would be unable to use the salvage lot to conduct a profitable business.

In support of their motion, defendants intertwine theories of dismissal, specifically CPLR 3211(a)(1) and CPLR 3211(a)(7), by referencing the contract provisions, specifically, the Route 9D and "Junkyard" contracts contained the following provisions:

"Seller makes no representation as to the assets transferred herein including the condition of the Premises, except as specifically set forth in this Agreement. Purchaser acknowledges that it has conducted its own investigation as to the assets and has not relied upon any statement made by Seller or any one else on Seller's behalf, unless specifically stated in this Agreement. Purchaser takes all of the assets 'AS IS'."

Further in the "Junkyard" property contract there is a provision entitled "Condition of Property" which states:

"Purchaser acknowledges and represents that Purchaser is fully aware of the physical condition and state of repair of the Premises and of all other property included in this sale, based on Purchaser's own inspection and investigation thereof, and that Purchaser is entering into this contract based solely upon such inspection and investigation and not upon any information, data, statements or representation, written or oral, as to the physical condition, state of repair, use, cost or operation or any other matter related to the Premises or the other property included in the sale, given or made by Seller or its representative, and shall accept the same 'AS IS'..."

Here, the contractual language establishes that plaintiffs cannot prove that the defendants misrepresented a material fact

or intentionally concealed a material fact upon which the plaintiffs relied upon to their detriment, as the contractual onus was upon the plaintiffs to determine the viability of the salvage business (see generally CPLR 3211[a][1]; *Almap Holdings v. Bank of Leumi Trust Co. of N.Y.*, 196 AD2d 518 [2nd Dept 1993] leave to appeal denied by 83 NY2d 754). As to the right to foreclose upon an alleged lien; as the cause of action for rescission falls, so must the right to a "valid" lien.

Fraud in the Inducement

The elements of a cause of action sounding in fraud are a material misrepresentation of an existing fact, made with knowledge of the falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation, and damages (see *Orchid Constr. Corp. v. Gottbetter*, 89 AD3d 708 [2nd Dept 2011]).

The Court citing the above referenced contractual provisions denote that the plaintiffs, in the plainest language, announced and contracted that they were not relying on any representations as to the very matter as to which they now claim that they were defrauded (see *Danann Realty Corp. v. Harris*, 5 NY2d 317 [1959]). Such a specific disclaimer destroys the allegations in plaintiffs' complaint that the contracts they executed were made in reliance upon these contrary oral representations (*id.*). Accordingly, dismissal as to plaintiffs' third cause of action is warranted.

Imposing a Constructive Trust

A constructive trust is an equitable remedy and its purpose is to prevent unjust enrichment (see *Sanxhaku v. Margetis*, 151 AD3d 778 [2nd Dept 2017]). To obtain the remedy of a constructive trust, a party is generally required to establish four factors, or elements, by clear and convincing evidence: (1) a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance thereon, and (4) unjust enrichment flowing from the breach of the promise (*id.*).

For the reasons and contract provisions aforesated, the plaintiffs' cause of action seeking the imposition of a constructive trust fails, as any alleged promise made by defendant Lema was nullified by the clear language of the parties' contract requiring the plaintiffs to exercise their own due diligence in the inspection into the profitability and feasibility of the salvage business. Moreover, the complaint fails to set forth how the defendants have been unjustly enriched.

Declaratory Judgment

Plaintiffs seek a judgment declaring the rights and other legal relations as between plaintiffs and 3455, Inc. in relation to the "Junkyard" contract as void and unenforceable. This cause of action fails as 3455, Inc. had legal capacity to contract as stated above. Additionally, any statement concerning defendant Lema's alleged misrepresentation has been addressed numerous

times throughout this decision.

Unjust Enrichment

To state a cause of action for unjust enrichment, plaintiffs must show that: (1) the other party was enriched, (2) at that party's expense, and, (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered (*see Mandarin Trading Ltd. v. Wildenstein*, 16 NY3d 173 [2011]). However, a claim alleging unjust enrichment may not be maintained where there is a valid and express agreement between the parties which explicitly covers the same specific subject matter (*see PRG Brokerage Inc. v. Aramarine Brokerage, Inc.*, 107 AD3d 559 [1st Dept 2013]). Here, there is a clearly a contractual agreement between the parties, governing the exact subject matter of the plaintiffs' cause of action for unjust enrichment. Moreover, the liquidated damages clause of the contract succinctly states what happens with the monies deposited in the event of a default. Accordingly, this cause of action is simply without merit in law or fact.

Quantum Meruit

The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter (*see Clark-Fitzpatrick v. Long Island R. Co.*, 70 NY2d 382 [1987]). As the defendants have introduced evidence of a valid and enforceable written contract, the plaintiffs' cause

of action sounding in quantum meruit must fail (see CPLR 3211[a][1]).

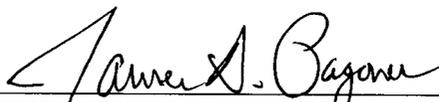
Based upon the foregoing, the defendants' motion to dismiss is granted in its entirety. The plaintiffs' cross-motion to amend their complaint is denied as academic. To the extent filed, any notices of pendency filed against the properties by the plaintiffs and which are the subject of this action are hereby vacated as a matter of law.

This constitutes the decision and order of this Court.

This decision and order has been filed electronically.

Dated: October 23, 2018
Poughkeepsie, New York

ENTER



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