Knopp v RNG NAB Revocable Trust
2019 NY Slip Op 33654(U)
December 10, 2019
Supreme Court, Kings County
Docket Number: 523506/18
Judge: Carolyn E. Wade

At an IAS Term, Part 84 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 10th day of December, 2019.

PRESENT:

HON. CAROLYN E. WADE,
Justice.

----------X

IGOR KNOPP AND NADIA KNOPP,

Plaintiffs,

- against -

RNG NAB REVOCABLE TRUST, REGINA BENDER, A/K/A REGINA BENNDER, KATZ & MATZ, P.C. AS ESCROW AGENTS, DIGIROLOMO & COMPANY, P.C., AS ESCROW AGENT,

Defendants.

----------X

DECISION and ORDER

Index No. 523506/18

Motion Seqs. 4, 5, 6, 7, 8, 9

The following e-filed papers read herein:	NYSCEF No.:
Notice of Motion/Cross Motion, Affirmation (Affidavit), and Exhibits Annexed	80-81, 94 88, 103. 95, 129-132, 142-143, 161-163
Affirmation (Affidavit) in Opposition and Exhibits Annexed	124, 119, 181
Reply Affirmation (Affidavit) and Exhibits Annexed	158, 128, 150

Defendants RNG NAB Revocable Trust, Regina Bender a/k/a Regina Bennder (collectively, "Defendants-Sellers"), and DiGirolomo & Company, P.C. move (motion sequence 4), pursuant to CPLR 3211, for an order dismissing the action as asserted against them.

Plaintiffs Igor Knopp and Nadia Knopp ("Plaintiffs-Buyers") move (motion sequence 5), by order to show cause, for an order of contempt against Defendants-Sellers and to compel the same to transfer certain funds pursuant to this court's February 8, 2019 order ("default order").

Defendants-Sellers and DiGirolomo & Company, P.C. move (motion sequence 6), by order to show cause, pursuant to CPLR 5015 (a) and CPLR 2005, to vacate the default order

and restore their prior motion; Plaintiffs-Buyers cross-move (motion sequence 7) for default judgment against Defendants-Sellers and DiGirolomo & Company, P.C.

Plaintiffs-Buyers move (motion sequence 8) for an order amending the caption.

Defendant Katz & Matz, P.C. move (motion sequence 9) for leave to reargue the court's June 11, 2019 decision and order to the extent that it denied its motion to dismiss.

Factual Background

The underlying action was commenced by Plaintiffs-Buyers to recover a $125,000.00 downpayment from Defendants-Sellers; Katz & Matz, P.C., as the initial escrow agent/Defendants-Sellers' attorney, and DiGirolomo & Company, P.C., as the subsequent escrow agent/Defendants-Sellers' attorney, pursuant to the terms of a contract of sale. The contract concerned the Plaintiffs-Buyers' purchase of a unit at Murano Condo Place Condominium, located at 412 Kings Highway, Brooklyn, New York, from Defendants-Sellers. After entering into the contract of sale, Plaintiffs-Buyers sought to secure financing to complete the purchase; however, were ultimately denied the requisite financing to complete the purchase. Plaintiffs-Buyers purportedly informed Defendants-Sellers and Katz & Matz, P.C. of the denial of finance and sought return of the downpayment, pursuant to the contract. Katz & Matz, P.C. refused to return the funds and eventually transferred the downpayment to DiGirolomo & Company, P.C. Thereafter, DiGirolomo & Company, P.C. allegedly released the funds to Defendants-Sellers.

Procedural History

Shortly after commencing this action, Plaintiffs-Buyers filed an order to show cause, seeking among other relief, that the funds constituting the downpayment be transferred into

the care of a receiver and enjoining Defendants-Sellers from disturbing the funds (motion sequence 1). Defendants-Sellers and DiGirolomo & Company, P.C. then moved for dismissal of the action (motion sequence 2); followed by Katz & Matz, P.C. moving for the same relief (motion sequence 3).[1] On February 8, 2019, motion sequences 1 and 2 were heard, and upon Defendants-Sellers and DiGirolomo & Company, P.C.'s non-appearance, motion sequence 1 was granted on default, and motion sequence 2 was marked off the motion calendar. The default order directed, among other things, that Defendants-Sellers transfer $125,000.00 to the IOLA account of Plaintiffs-Buyers' attorney. Motion sequence 3 was later denied due to a defect in the moving papers ("June 2019 Order").

Thereafter, Defendants-Sellers and DiGirolomo & Company, P.C. filed motion sequence 4, again seeking dismissal. On April 1, 2019, Plaintiffs-Buyers filed motion sequence 5, seeking an order compelling compliance with the default order and contempt against Defendants-Sellers. On April 17, 2019, Defendants-Sellers and DiGirolomo & Company, P.C. filed motion sequence 6, seeking a vacatur of the default order and restoration of their motion to dismiss the action. In response, Plaintiffs-Buyers cross-moved, motion sequence 7, for default judgment against Defendants-Sellers and DiGirolomo & Company, P.C. Plaintiffs-Buyers then filed motion sequence 8, seeking to amend the caption. Subsequently, Katz and Matz, P.C. filed motion sequence 9, seeking leave to reargue the June 2019 Order. The court shall address the motions in the most prudent order.

---

[1] All parties have filed numerous motions, many brought by order to show cause, which resulted in a convoluted and non-collated record. Though motion sequences 1 and 2 are denoted as two distinct and separate motions, per the substance of the papers, motion sequence 2 is actually a cross motion and in opposition to motion sequence 1.

Motion Sequence 6 - Motion to Vacate Default Order/Motion to Restore

The Parties' Positions

Defendants-Sellers and DiGirolomo & Company, P.C. argue that the default order should be vacated, motion sequence 1 denied, motion sequence 2 restored to the court's active calendar, and ultimately granted, dismissing the action. They contend that they have a reasonable excuse for their default and meritorious positions as to their sought relief. To this end, Defendants-Sellers and DiGirolomo & Company, P.C. provide the affirmation of their attorney, Ms. Renee M. DiGirolomo, who attests that she was under the mistaken belief that the motions had been adjourned to a future date due to an email she received from the court. Exhibited to Ms. DiGirolomo's affirmation is a copy of the email correspondence. Further, Defendants-Sellers and DiGirolomo & Company, P.C. assert that they possess meritorious arguments supporting the dismissal of the action, and denial of the preliminary relief sought by Plaintiffs-Buyers in motion sequence 1.

Among other documents, they attach a copy of their initial motion papers addressing dismissal of the action, pursuant to CPLR 3211 (a) (1). Defendants-Sellers and DiGirolomo & Company, P.C. argue that Plaintiffs-Buyers failed to adhere to the terms of the contract and engaged in misrepresentation during the negotiation, and therefore are not entitled to a refund of the downpayment. As such, they maintain motion sequence 2 should be restored and the default order vacated.

In opposition, Plaintiffs-Buyers contend that Defendants-Sellers and DiGirolomo & Company, P.C.'s assertion of law office failure is not sufficiently detailed nor credible to constitute a reasonable excuse for either restoration or vacating the default order. Further,

they assert that the instant motion is not supported by an affidavit by one of the defendants, and thus the underlying motion to dismiss, motion sequence 2, is defective and cannot form the basis of a potentially meritorious defense. Beyond this, Plaintiffs-Buyers maintain that they complied with the terms of the contract of sale and that Defendants-Sellers and DiGirolomo & Company, P.C.'s arguments are wholly unsupported.

Motion to Restore - Discussion

The court possesses broad discretion when considering restoring a motion and/or vacating a prior order due to default (*see generally Mortgage Elec. Registration Sys., Inc. v Dort-Relus*, 166 AD3d 961, 962 [2d Dept 2018]; *Nunez v Olympic Fence & Railing Co., Inc.*, 138 AD3d 807, 808 [2d Dept 2016]; *cf. Diamond v Leone*, 173 AD3d 686, 687 [2d Dept 2019]). A motion marked off the court's calendar due to a movant's default in appearance may be restored where a) movant presents a reasonable and substantiated excuse for their default, b) there is not a substantial delay between the default and the motion to restore, c) there is no prejudice to the non-moving party, and d) that the movant demonstrates a potentially meritorious position on its motion (*see Hobbins v North Star Orthopedics, PLLC*, 148 AD3d 784, 787 [2d Dept 2017], *lv denied* 29 NY3d 913 [2017]).

Defendants-Sellers and DiGirolomo & Company, P.C. presented a reasonable and substantiated excuse for their default through the affirmation of their attorney identifying the circumstances constituting law office failure. They moved with limited delay (69 days) from their default and the motion being marked off. Further, there is no prejudice to Plaintiffs-Buyers as no substantial rights will be impaired by the restoration. Finally, they demonstrate

a potentially meritorious position in support of the motion by proffering their prior motion papers, seeking dismissal pursuant to CPLR 3211 (a) (1) and annexing the purported contract, constituting the basis for dismissal. Accordingly, motion sequence 6 is granted to the extent that Defendants-Sellers and DiGirolomo & Company, P.C.'s prior motion to dismiss the action (motion sequence 2) is restored to the court's active calendar.

As such, the court shall consider Defendants-Sellers and DiGirolomo & Company, P.C.'s motion to dismiss on its merits. "'To succeed on a motion to dismiss based upon documentary evidence pursuant to CPLR 3211 (a) (1), the documentary evidence must utterly refute the plaintiff's factual allegations, conclusively establishing a defense as a matter of law'" (*Magee-Boyle v Reliastar Life Ins. Co. of N.Y.*, 173 AD3d 1157, 1159 [2d Dept 2019], *quoting Gould v Decolator*, 121 AD3d 845, 847 [2d Dept 2014]). Put another way, the submitted documentary evidence must "[r]esolve[] all factual issues as a matter of law and conclusively dispose[] of the plaintiff's claim[s]" (*255 Butler Assoc., LLC v 255 Butler, LLC*, 173 AD3d 655, 656 [2d Dept 2019] [internal quotation marks and citations omitted]). To qualify as "documentary," the evidence must be "unambiguous, authentic, and undeniable" (*Granada Condominium III Assn. v Palomino*, 78 AD3d 996, 996-997 [2d Dept 2010]). "[J]udicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case" (*Fontanetta v John Doe 1*, 73 AD3d 78, 84-85 [2d Dept 2010] [internal citation omitted]). "Conversely, letters,

emails, and affidavits fail to meet the requirements for documentary evidence" (*25-01 Newkirk Ave., LLC v Everest Natl. Ins. Co.*, 127 AD3d 850, 851 [2d Dept 2015]).

As aforementioned, Defendants-Sellers and DiGirolomo & Company, P.C. present the purported contract of sale and various other documents allegedly relating to Plaintiffs-Buyers' financials. Initially, the court notes that the various documents relating to Plaintiffs-Buyers' financials do not qualify as documentary evidence for the purposes of CPLR 3211 (a) (1). The first document is a "Purchase Pre-Approval Letter" from Freedom Mortgage informing Plaintiffs-Buyers that they had been pre-approved for a mortgage loan in the amount of $800,000.00. This letter, however, is ambiguous, as it does not guarantee a loan in that amount. It is merely a conditional approval of a certain loan amount and expressly states that "[t]his pre-approval letter is not a commitment to lend or final approval of your loan" (Exhibit D, motion sequence 2). As such, the letter fails to qualify as documentary evidence for the purposes of CPLR 3211 (a) (1). The other financial document attached simply provides that Plaintiffs-Buyers were ultimately denied a $1,000,000.00 loan from Freedom Mortgage Corporation, which is part and parcel to Plaintiffs-Buyers' case-in-chief to recover their downpayment from the defendants. As such, neither of these two documents conclusively establishes a defense to the action as a matter of law, resolving all facts.

Finally, the contract of sale fails to utterly refute Plaintiffs-Buyers' factual allegations of a breach, nor does it conclusively establish a defense to the action. Principally, Plaintiffs-Buyers allege that Defendants-Sellers breached the contract by retaining the downpayment despite their obligation to return the sum (*see* Plaintiffs-Buyers complaint at 7-9), and that a constructive trust was established when DiGirolomo & Company, P.C. accepted the

downpayment from Katz & Matz, P.C. (*see* Plaintiffs-Buyers complaint at 19-21). The proffered contract merely identifies the obligations and duties of each party. Accepting all the allegations as true, the contract does not utterly refute Defendants-Sellers alleged breach. Similarly, the contract fails to refute any allegations which would constitute the imposition of a constructive trust on DiGirolomo & Company, P.C. Accordingly, the contract presents no basis to dismiss the action pursuant to CPLR 3211 (a) (1).

Defendants-Sellers and DiGirolomo & Company, P.C.'s remaining arguments concerning Plaintiffs-Buyers' purported misrepresentation or acts constituting a breach present no basis to dismiss the action. Accordingly, Defendants-Sellers and DiGirolomo & Company, P.C.'s motion to dismiss is denied.

Motion to Vacate - Discussion

As aforementioned, the court possesses broad discretion when considering to restore motions and/or vacate orders (*see generally Mortgage Elec. Registration Sys., Inc.*, 166 AD3d at 962; *Nunez*, 138 AD3d at 808; *cf. Diamond*, 173 AD3d at 687). "In order to vacate a default in opposing a motion pursuant to CPLR 5015 (a) (1), the moving party is required to demonstrate a reasonable excuse for his or her default and a potentially meritorious opposition to the motion" (*Rocco v Family Foot Ctr.*, 94 AD3d 1077, 1079 [2d Dept 2012] [internal citation omitted]). Further, a motion pursuant to CPLR 5015 (a) provides the court with the authority to "relieve a party from [an order] upon such terms as may be just." "Whether to impose a condition to granting a motion to vacate a default order or judgment is a discretionary determination" within the power of the court (*Ort v Ort*, 168 AD3d 754,

755 [2d Dept 2019], citing *Hudson v Gouldbourne*, 83 AD3d 1001, 1001 [2d Dept 2011]; *Island Seafood v Anchor Fish Distribs.*, 269 AD2d 426, 426 [2d Dept 2011]; *Mairena v Charlemagne*, 102 AD2d 814, 814 [2d Dept 1984]).

Here, the focus of the instant motion is the default order of this court, dated February 8, 2019, resolving motion sequence 1, which directed Defendants-Sellers and DiGirolomo & Company, P.C. to, among other things, transfer the downpayment to the care of Plaintiffs-Buyers' attorney. As such, to be relieved of that order, Defendants-Sellers and DiGirolomo & Company, P.C. must present a reasonable excuse for their default as to motion sequence 1 and potentially meritorious opposition to said motion (*Rocco*, 94 AD3d at 1079). As previously stated, Defendants-Sellers and DiGirolomo & Company, P.C. presented a reasonable and substantiated excuse for their default through the affirmation of their attorney identifying the circumstances leading to his belief motion sequences 1 and 2 had been adjourned to a future date. Further, they presented *potentially* meritorious opposition to motion sequence 1 in the form of their cross motion to dismiss. Accordingly, that branch of Defendants-Sellers and DiGirolomo & Company, P.C.'s motion (motion sequence 6) seeking to vacate the default order is granted, and said order is hereby vacated. As such, the court shall consider motion sequence 1 on its merits.

The principal relief sought by Plaintiffs-Buyers in motion sequence 1 is an order:

> "A. Enjoining any sale of the property that forms the basis of this dispute, located at 412 Kings Highway, Apt. 8B, Parking P7, and Roof R2, Brooklyn, New York 11223 by [Defendants-Sellers].

> B. Enjoining [Defendants-Sellers] from using, accessing, spending, diluting, or otherwise interacting with, in a manner contrary to [Plaintiffs-Buyers'] interests, One-Hundred-Twenty-Five-Thousand Dollars ($125,000.00) constituting the down payment belonging to [Plaintiffs-Buyers] that was unlawfully and improperly released from escrow into the possession of [Defendants-Sellers].
>
> C. Imposing a restraining order on any and all bank accounts owned by or under the control of [Defendants-Sellers].
>
> D. Requiring that One-Hundred-Twenty-Five-Thousand Dollars ($125,000.00) constituting the down payment belonging to [Plaintiffs-Buyers] that was unlawfully and improperly released from escrow into the possession of [Defendants-Sellers] be immediately returned to Plaintiff Igor Knopp or transferred into the escrow account and care of his attorneys SINAYSKAYA YUNIVER, P.C.
>
> E. Appointing a receiver for One-Hundred-Twenty-Five-Thousand Dollars ($125,000.00) constituting the down payment belonging to [Plaintiffs-Buyers] that was unlawfully and improperly released from escrow into the possession of [Defendants-Sellers]" (NY St Cts Elec Filing [NYSCEF] Doc No. 16, order to show cause).

Plaintiffs-Buyers contend that the defendants' actions necessitate the imposition of a preliminary injunction and appointment of a temporary receiver. They argue that in order to protect their interests and maintain the status quo, Defendants-Sellers must be enjoined from disturbing the funds constituting the downpayment. Plaintiffs-Buyers further argue that simply because there *may be* factual disputes, this does not negate their position that they will likely succeed on the merits of the action. Additionally, they note that a preliminary injunction is appropriate as the downpayment has already changed hands several times and it is the only way to preserve their asset. Beyond this, Plaintiffs-Buyers argue that without

the temporary restraining order, they will lose their "bargained for" contractual right for a return of the downpayment, and that the balance of equities require enjoining the defendants from interacting with the funds.

Addressing the appointment of a temporary receiver, Plaintiffs-Buyers assert that they have a good faith belief that the downpayment, or portions thereof, will be wrongfully appropriated, converted and/or diluted by defendants. Since they claim to have a meritorious action against the defendants, Plaintiffs-Buyers contend that the appropriate remedy is the appointment of a receiver to maintain the funds at issue. The court notes that the Plaintiffs-Buyers make no arguments to support their request to have the funds transferred to their attorneys' IOLA account.

Defendants-Sellers and DiGirolomo & Company, P.C.'s opposition does not specifically address the sought injunctive relief, but rather seeks the aforementioned and previously discussed dismissal of the action.

To be entitled to a preliminary injunction, the movant must demonstrate (1) a likelihood of ultimate success on the merits of the action; (2) irreparable injury absent the granting of the preliminary injunction; and (3) that a balancing of equities favor the movant's position (*see Mobstub, Inc. v www.staytrendy.com,* 153 AD3d 809, 810 [2d Dept 2017]). "The movant must show that the irreparable harm is 'imminent, not remote or speculative'" (*Family-Friendly Media, Inc. V Recorder Tel. Network*, 74 AD3d 738, 739 [2d Dept 2010], quoting *Golden v Steam Heat*, 216 AD2d 440, 442 [2d Dept 1995]). Further, "[e]conoimc loss, which is compensable by money damages, does not constitute irreparable harm" (*Matter*

of Rice, 105 AD3d 962, 963 [2d Dept 2013]). "'Where . . . a litigant can fully be recompensed by a monetary award, a preliminary injunction will not [be] issue[d]'" (*Id.*, quoting *Dana Distribs., Inc. v Crown Imports, LLC*, 48 AD3d 613, 613 [2d Dept 2008]). Moreover, "[t]he decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court" (*Goldfarb v Town of Ramapo*, 167 AD3d 1009, 1010 [2d Dept 2018] [internal quotation marks and citation omitted]).

Here, Plaintiffs-Buyers seek three preliminary injunctions, the first enjoining Defendants-Sellers ability to sell the subject premises, the second enjoining Defendant-Sellers from interacting with the downpayment in a way adverse to Plaintiffs-Buyers' interests, and the third, restraining all bank accounts maintained by Defendants-Sellers. Plaintiffs-Buyers have demonstrated a likelihood of success on the merits by proffering the affidavit of plaintiff Igor Knopp. Mr. Knopp avers that he and his wife entered into a contract of sale for the premises, but ultimately failed to secure financing for the purchase of the property. Mr. Knopp attests that in accordance with the contract of sale, he, by way of his attorney, reported the denial of financing to Defendants-Sellers, and therefore is entitled to a return of the downpayment.

However, Plaintiffs-Buyers have failed to demonstrate irreparable injury absent the granting of the preliminary injunctions. Per their own arguments, "in the context of a preliminary injunction, irreparable injury is harm that cannot be remedied through a monetary award" (affirmation of Plaintiffs-Buyers counsel, motion sequence 1, at 10, ¶ 39; citing *Walsh v Design Concepts, Ltd.*, 221 AD2d 454, 455 [2d Dept 1995]; *Fischer v Deitsch*, 168

AD2d 599, 601 [2d Dept 1990]; *see also Di Fabio v Omnipoint Communications, Inc.*, 66 AD3d 635, 636-637 [2d Dept 2009]). None of the relief sought in the action relates to specific performance of the property, and Plaintiffs-Buyers "failed to allege damages of a noneconomic nature and, thus, failed to demonstrate irreparable harm in the absence of a preliminary injunction" (*Di Fabio*, 66 AD3d at 637, citing *Automated Waste Disposal, Inc. v Mid-Hudson Waste, Inc.*, 50 AD3d 1072, 1073 [2d Dept 2008]; *Dana Distribs., Inc. v Crown Imports, LLC*, 48 AD3d 613 [2d Dept 2008]; *cf. Winzelberg v 1319 50th Realty Corp.*, 52 AD3d 700 [2d Dept 2008]; *Stockley v Gorelik*, 24 AD3d 535 [2d Dept 2005]). Accordingly, there is no basis to enjoin Defendants-Sellers from marketing and selling the premises, nor is there a basis to impose a preliminary injunction of any kind relating to the funds constituting the downpayment. As such, all sought preliminary injunctions against Defendants-Sellers are denied.

With respect to Plaintiffs-Buyers' request that the funds constituting the downpayment be transferred to their attorneys to be held in escrow, the court notes that Plaintiffs-Buyers fail to make any showing that this relief is appropriate. Indeed, they present no precedent, contractual terms, or statutory authority, indicating their attorneys are entitled to hold the downpayment. Thus, upon this court's consideration of this issue on the merits, rather than unopposed on default, Plaintiffs-Buyers' request for such relief is denied.

Finally, Plaintiffs-Buyers failed to demonstrate entitlement to the appointment of a temporary receiver. "A party moving for the appointment of a temporary receiver must submit clear and convincing evidence of irreparable loss or waste to the subject property and that a temporary receiver is needed to protect their interest" (*Board of Mgrs. of Nob Hill*

Condominium Section II v Board of Mgrs. of Nob Hill Condominium Section I, 100 AD3d 673, 673 [2d Dept 2012] [internal quotation marks and citations omitted]). Plaintiffs-Buyers submit no evidence of irreparable loss, as there are only money damages alleged. Further, the proffered evidence does not meet the heightened standard of clear and convincing evidence of waste. Accordingly, motion sequence 1 is denied in totality.

Motion Sequence 9 - Reargue Motion to Dismiss

The Parties' Positions

Katz & Matz, P.C. argues that this court misapprehended the law by denying motion sequence 3 for failing to annex the pleadings to the motion papers. Specifically, Katz & Matz, P.C. maintains that neither statute nor case law requires a moving party to furnish papers that have been e-filed. Katz & Matz, P.C. asserts that as the instant action is e-filed, the failure to exhibit the pleadings in its motion to dismiss does not render it defective.

Katz & Matz, P.C. further contends that upon reargument, its motion to dismiss should be granted. It maintains that pursuant to the contract of sale, both Plaintiffs-Buyers and Defendants-Sellers must indemnify it against any suits concerning its conduct as the escrow agent, and that it may only be held liable for conduct relating to its role as escrow agent that is willful or qualifies as gross negligence. Additionally, it asserts, and presents, various communications which it contends demonstrate that Plaintiffs-Buyers did not object to the transferring of funds to DiGirolomo & Company, P.C. Katz & Matz, P.C. also argues that the Plaintiffs-Buyers' breach of fiduciary duty, promissory estoppel, and breach of implied covenant of good faith and fair dealing claims against it must be dismissed as duplicative of their breach of contract claim.

In opposition, Plaintiffs-Buyers argue that this court did not misapprehend the law as it relates to the necessity of the pleadings in a motion to dismiss. They argue that where a movant seeking dismissal fails to attach the pleadings, the court must deny the motion as there is no way to determine the sufficiency of the pleadings without the pleadings being proffered. As such, Plaintiffs-Buyers adamantly maintain motion sequence 9 should be denied.

Alternatively, Plaintiffs-Buyers argue that if the court should grant reargument, the motion to dismiss must be denied. Initially, they argue that Katz & Matz, P.C.'s motion is brought pursuant to CPLR 3211 (a) (1), and that the documentary evidence proffered, that is the contract of sale, fails to utterly refute any factual allegations; nor does it present an absolute defense as a matter of law. Beyond this, Plaintiffs-Buyers maintain the pleadings are afforded liberal readings and that the various allegations against Katz & Matz, P.C. constitute cognizable causes of actions for breach of contract, breach of fiduciary duty, promissory estoppel, and breach of implied covenant of good faith and fair dealing.

In reply, Katz & Matz, P.C. reassert its various arguments in support of its reargument motion and the ultimate sought relief of dismissal. Further, Katz & Matz, P.C. contend that various communications indicate that Plaintiffs-Buyers were aware of the transfer of the downpayment to DiGirolomo & Company, P.C. Additionally, though the initial moving papers asserted substantive arguments relating to the duplicity of certain causes of actions, for the first time in reply, Katz & Matz, P.C. assert that the complaint should be dismissed pursuant to CPLR 3211 (a) (7).

Discussion

A motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion" (CPLR 2221 [d] [2]). "While the determination to grant leave to reargue a motion lies within the sound discretion of the court, a motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided" (*Anthony J. Carter, DDS, P.C. v Carter*, 81 AD3d 819, 820 [2d Dept 2011] [internal citations and quotations marks omitted]). At the same time, a motion to reargue is not designed "to present arguments different from those originally presented"(*id.*).

While this court's rules require hard copy submissions of all motion papers, motion sequence 9 is granted to the extent it seeks reargument. Initially, the court notes its inherent powers, pursuant to CPLR 2001, to permit a mistake or omission at any stage of the action if such error does not prejudice a substantial right of a party. Further, strong public policy favors a motion to be considered on its merits. Finally, Katz & Matz, P.C. corrected its omission by exhibiting the pleadings to the instant motion to reargue. As such, this court shall consider Katz & Matz, P.C.'s motion to dismiss on its merits.

As previously stated, "'[t]o succeed on a motion to dismiss based upon documentary evidence pursuant to CPLR 3211 (a) (1), the documentary evidence must utterly refute the plaintiff's factual allegations, conclusively establishing a defense as a matter of law'" (*Magee-Boyle*, 173 AD3d at 1159, quoting Gould, 121 AD3d at 847). Here, the only

documentary evidence proffered by Katz & Matz, P.C. is the contract of sale, as the various communications presented do not constitute documentary evidence within the context of CPLR 3211 (a) (1) (*see Fontanetta*, 73 AD3d at 84-85). Considering the contract of sale, it includes certain provisions concerning Katz & Matz, P.C.'s duties as escrow agent, Plaintiffs-Buyers and Defendants-Sellers' obligations to Katz & Matz, P.C., and the standard of care to which Katz & Matz, P.C. must adhere to be entitled to indemnification.

The contract of sale does not conclusively dispose of Plaintiffs-Buyers' claims (*see 255 Butler Assoc., LLC*, 173 AD3d at 656). Whether Katz & Matz, P.C. may be ultimately indemnified for their conduct does not constitute a basis for dismissal; further, Plaintiffs-Buyers principal allegations are that Katz & Matz, P.C. breached the contract by deliberately releasing the funds to DiGirolomo & Company, P.C. after knowing the funds were disputed (Plaintiffs-Buyers complaint at 10, ¶¶ 46-49). As such, the proffered contract fails to utterly refute the factual allegations and dispose of the complaint as a matter of law (*see generally 255 Butler Assoc., LLC*, 173 AD3d at 656).

Katz & Matz, P.C.'s assertion that Plaintiffs-Buyers' causes of action are duplicative is primarily unfounded.[2] Only where a plaintiff asserts identical facts and seeks identical damages are claims deemed to be duplicative (*cf. Refreshment Mgt. Servs., Corp. v Complete Off. Supply Warehouse Corp.*, 89 AD3d 913, 915 [2d Dept 2011]; *Canzona v Atanasio*, 118 AD3d 841, 843 [2d Dept 2014]; *Chowaiki & Co. Fine Art Ltd. v Lacher*, 115 AD3d 600, 600

[2] The court shall only address Katz & Matz, P.C.'s motion to dismiss pursuant to CPLR 3211 (a) (7) to the extent the causes of action asserted against it may be duplicative, as such arguments were presented in its initial moving papers, and therefore, Plaintiffs-Buyers had sufficient notice of such arguments.

[2d Dept 2014]; *Cortazar v Tomasino*, 150 AD3d 668, 670 [2d Dept 2017]). Here, Plaintiffs-Buyers assert various and distinct misconduct against Katz & Matz, P.C., each constituting separate causes of action for breach of contract, breach of fiduciary duty, and breach of implied covenant of good faith and fair dealing. Such misfeasance included failure to release the downpayment to Plaintiffs-Buyers possession, transferring the downpayment to DiGirolomo & Company, P.C., and failing to properly notice the transfer of funds.

However, Plaintiffs-Buyers' causes of action for breach of contract and promissory estoppel assert identical factual allegations and seek identical damages. Beyond this, as there is no dispute that a written contract exists and governs the parties' obligations, the promissory estoppel claim must be dismissed (*see Grossman v New York Life Ins. Co.*, 90 AD3d 990, 991-992 [2d Dept 2011]; *see also Pacella v Town of Newburgh Volunteer Ambulance Corps. Inc.*, 164 AD3d 809, 814 [2d Dept 2018]). Accordingly, Katz & Matz, P.C.'s motion to dismiss is granted to the extent that the sixth cause of action for promissory estoppel is hereby dismissed. The remaining causes of action asserted against Katz & Matz, P.C. remain.

Motion Sequence 8 - Motion to Amend

"Leave to amend should be freely granted in the absence of prejudicial delay and where the proposed amendment is neither palpably improper nor patently devoid of merit" (*TIA of N.Y., Inc. v I.J. Litwak Realty 1, LLC*, 142 AD3d 606, 607 [2d Dept 2016]). Plaintiffs-Buyers' motion to amend the caption to include further aliases of Defendants-Sellers is granted without opposition, as there is no prejudicial delay, it is not improper, nor

devoid of merit. Plaintiffs-Buyers are directed to serve and file an amended complaint within 30 days of the entry of this order.

Motion Sequence 4 - Motion to Dismiss

In light of Defendants-Sellers and DiGirolomo & Company, P.C.'s motion to dismiss the complaint (motion sequence 2) being restored, and ultimately denied, defendants' motion sequence 4 must be denied pursuant to CPLR 3211 (e), as no more than one motion to dismiss on the grounds set forth in CPLR 3211 (a) may be brought by the same parities. Accordingly, motion sequence 4 is denied.

Motion Sequence 7 - Default Judgment Against Defendants-Sellers and DiGirolomo & Company, P.C.

Similarly, in light of this court's resolution of motion sequence 2, Plaintiffs-Buyers' cross motion for a default judgment against Defendants-Sellers and DiGirolomo & Company, P.C. (motion sequence 7) is denied since defendants' time to answer or appear has not expired. Accordingly, motion sequence 7 is denied.

Motion Sequence 5 - Contempt and Compel

As the default order of this court, dated February 8, 2019, has been vacated, Plaintiffs-Buyers' motion for contempt and to compel (motion sequence 5) is denied as moot.

To the extent not specifically addressed herein, the court finds the parties remaining contentions to be moot and/or without merit. Accordingly, it is

ORDERED, that motion sequence 4 is denied; and it is further,

ORDERED, that motion sequence 5 is denied; and it is further,

ORDERED, that motion sequence 6 is granted, and upon restoration and vacatur of the default order, motion sequences 1 and 2 are hereby denied; and it is further,

ORDERED, that motion sequence 7 is denied; and it is further,

ORDERED, that motion sequence 8 is granted and Plaintiffs-Buyers are directed to serve and file an amended complaint within 30 days of the entry of this order; and it is further,

ORDERED, that motion sequence 9 is granted, and upon reargument, the previous order is modified so far as to dismissing the sixth cause of action, asserting promissory estoppel as against Katz & Matz, P.C.

This constitutes the decision and order of the court.

ENTER,

A.J.S.C.

Hon. Carolyn E. Wade
Acting Supreme Court Justice

KINGS COUNTY CLERK
FILED
2019 DEC 13 AM 8:08