

<b>Pang Lee v Wei Chao Tan</b>
2021 NY Slip Op 33327(U)
December 14, 2021
Supreme Court, Kings County
Docket Number: Index No. 504111/21
Judge: Lillian Wan
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: PART 17

-----X  
PANG LEE, KIT WONG LEE and 125 BAY 46<sup>th</sup>  
STREET, LLC,

Plaintiffs,

Index No.: 504111/21  
Motion Seq.: 01 & 02

-against-

WEI CHAO TAN, XIAO JUAN LI, GUO SHENG  
TAN, and MIAO NA TAN,

Defendants.

-----X

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of the defendant’s motion seeking dismissal, pursuant to CPLR § 3211 and plaintiff’s summary judgment motion.

The following e-filed documents, listed by NYSCEF document number (Motion 01) 4-18 were read on the motion by the defendant seeking dismissal pursuant to CPLR § 3211, and (Motion 02) 22-28; 30, 32, and 33 on plaintiffs’ cross-motion for summary judgment.

The defendants move to dismiss the complaint and vacate the lis pendens pursuant to CPLR §3211(a)(7), arguing that the complaint fails to state a cause of action for breach of contract and conversion (Motion 01). The plaintiffs cross-move for summary judgment and seek a judgment against the defendants in the amount of \$168,000.00 (the amount of plaintiffs down payment) plus plaintiffs' title and survey charges in the amount of \$1,150.00 plus interest, costs, and disbursements; and for punitive damages on their conversion cause of action (Motion 02). After oral argument and careful consideration of the parties’ submissions, the defendants’ motion is denied in part and granted in part, and the plaintiff’s motion is denied.

This action arises from a contract of sale entered into between the parties on or about September 2, 2020 for the purchase of the premises located at 125 Bay 46<sup>th</sup> Street, Brooklyn, NY. The complaint sets forth two causes of action based on breach of contract and conversion. The plaintiffs, Pang Lee and Kit Wong Lee, incorporated under the corporate name 125 Bay 46<sup>th</sup> Street, LLC. Upon execution of the contract the plaintiffs provided a down payment to the defendants in the sum of \$168,000. Thereafter, the plaintiffs assert that they canceled the contract because the defendants failed to remedy an HPD violation which appeared on the title report, despite their repeated requests for the defendants to do so. They also contend that the title report noted a possible out-of-possession piece of land on the property. The defendants refused the plaintiffs’ demand for a return of the down payment, asserting that they were entitled to retain the funds as liquidated damages for plaintiffs’ breach of the contract. The defendants

argue that the violations were remedied, and that the out-of-possession piece of land did not present a defect in title, and that the title company was willing to issue an insurance policy.

The defendants contend that the plaintiffs breached the contract because they failed to close on the premises, pursuant to the prescribed time period in the contract, after the plaintiffs obtained the mortgage commitment. The defendants also assert that the plaintiffs never provided defendants with a mortgage commitment or corporate documents for the plaintiffs' LLC. The contract closing date was scheduled to take place on or about December 1, 2020. The defendants assert that they were ready, willing and able to deliver title on that date.

The basis of the defendants' argument for dismissal of the breach of contract cause of action is that the complaint failed to state the necessary elements of a breach of contract claim based on the plaintiffs' violation of the terms of the contract. Further, the defendants argue that the cause of action for conversion must be dismissed because the defendants had the right under the contract to retain the down payment as liquidated damages under clause 23(b), based on the plaintiffs' breach.

In considering a motion to dismiss a Complaint pursuant to CPLR § 3211(a)(7), a court "must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Lubonty v U.S. Bank N.A.*, 159 AD3d 962, 963 (2d Dept 2018) (internal quotation marks omitted); *see also TMCC, Inc. v Jennifer Convertibles, Inc.*, 176 AD3d 1135 (2d Dept 2019). The Court may consider evidentiary material submitted by the movant in support of a motion to dismiss for failure to state a cause of action. However, where a party offers evidentiary proof on a motion to dismiss a complaint for failure to state a cause of action, the focus of the inquiry turns from whether the complaint states a cause of action rather than whether the plaintiff actually has one. *See Louzon v Gentry Apts., Inc.*, 191 AD3d 776 (2d Dept 2021); *Bonavita v Government Employees Insurance Company*, 185 AD3d 892 (2d Dept 2020). Dismissal results only if the movant demonstrates conclusively that the plaintiff has no cause of action, or that a material fact, as claimed by the pleader to be one, is not a fact at all, and unless it can be said that no significant dispute exists regarding it. *See Matter of Valderrama*, 184 AD3d 650 (2d Dept 2020); *MJK Building Corp. v Fayland Realty, Inc.*, 181 AD3d 860 (2d Dept 2020).

The essential elements of a cause of action to recover damages for breach of contract are: "the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of its contractual obligations, and resulting damages." *Ayers v City of Mount Vernon*, 176 AD3d 766, 769 (2d Dept 2019); *see also Webb v Greater New York Auto. Dealers Ass'n, Inc.*, 123 AD3d 1111 (2d Dept 2014); *Dee v Rakower*, 112 AD3d 204 (2d Dept 2013).

Further, to establish a cause of action to recover damages for conversion a plaintiff must show “legal ownership or an immediate superior right of possession to a specific identifiable thing and must show that the defendant exercised an unauthorized dominion over the thing in question to the exclusion of the plaintiff’s rights.” See *RD Legal Funding Partners, LP v Worby Groner Edelman & Napoli Bern, LLP*, 195 AD3d 968, 970 (2d Dept 2021), quoting *National Ctr. for Crisis Mgt., Inc. v Lerner*, 91 AD3d 920 (2d Dept 2012) (internal quotation marks omitted). “Conversion occurs when funds designated for a particular purpose are used for an unauthorized purpose.” See *Petrone v Davidoff Hutcher & Citron, LLP*, 150 AD3d 776, 777 (2d Dept 2017), quoting *East Schodack Fire Co., Inc. v Milkewicz*, 140 AD3d 1255 (2d Dept 2016) (internal quotation marks omitted). “Tangible personal property or specific money must be involved.” See *RD Legal Funding Partners, LP* at 971, quoting *Independence Discount Corp. v Bressner*, 47 AD2d 756 (2d Dept 1975) (internal quotation marks omitted).

In the context of a conveyance of real property, a seller’s refusal to return a buyer’s down payment does not constitute a cause of action for conversion if it is established that the seller was rightfully in possession of the down payment. See *Green Complex, Inc. v Smith*, 107 AD3d 846 (2d Dept 2013). “Where one is rightfully in possession of property, one’s continued custody of the property and refusal to deliver it on demand of the owner until the owner proves his [or her] right to it does not constitute a conversion.” *Id.* at 849, quoting *Trans-World Trading, Ltd. v North Shore Univ. Hosp. at Plainview*, 64 AD3d 698 (2d Dept 2009) (internal quotation marks omitted).

In the instant action, affording the complaint a liberal construction, and accepting all facts as alleged in the complaint to be true, the plaintiff has stated sufficient factual allegations to state a cause of action based on breach of contract, and therefore that branch of the defendants’ motion seeking dismissal of the breach of contract claim is denied. However, the plaintiff has failed to state a cause of action alleging conversion of the down payment. The complaint does not allege that the defendants were not rightfully in possession of the funds, and in any event the defendants’ refusal to deliver the down payment to the plaintiffs until they prove their right to it does not constitute a conversion. As such, that prong of the defendants’ motion seeking dismissal of the plaintiffs’ second cause of action for conversion is granted.

The plaintiffs’ cross-motion seeking summary judgment (Motion 02) is denied. The plaintiffs’ submissions which include, inter alia, the sworn affidavit of Kenneth Chin, Esq., the attorney who represented the plaintiffs in the real estate transaction, and the affirmation of plaintiff Pang Lee, are sufficient to establish the plaintiffs’ prima facie entitlement to summary judgment on the breach of contract claim. In opposition, the defendants rely on the exhibits attached to their motion to dismiss (Motion 01), including, inter alia, various letters and emails that were exchanged between the parties, which raise genuine issues of fact concerning whether the plaintiffs or the defendants were in breach of the contract of sale. The plaintiffs contend that

the defendants breached the contract by failing to correct violations contained in the title report, and the defendants argue that the plaintiffs are in breach because they received a mortgage commitment letter, and thereafter failed to close title on the property according to the time period set forth in the contract. Moreover, in compliance with the Court's order, dated October 20, 2021, the defendants have submitted a counterstatement of material facts, pursuant to 22 NYCRR § 202.8-g(b) . As such, genuine triable issues of fact exist that preclude a grant of summary judgment.

The remaining contentions are without merit.

Accordingly, it is hereby

**ORDERED**, that defendants' motion is granted only to the extent that the cause of action for conversion is dismissed, and the balance of the motion is denied; and it is further

**ORDERED**, that the plaintiffs' summary judgment motion is denied.

This constitutes the decision and order of the Court.

Dated: December 14, 2021

  
\_\_\_\_\_  
HON. LILLIAN WAN, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020.