Zeyu Wang v 44th Dr. Owner LLC
2022 NY Slip Op 30436(U)
February 8, 2022
Supreme Court, New York County
Docket Number: Index No. 652985/2020
Judge: Louis L. Nock
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **38M**

Justice

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ZEYU WANG,

Plaintiff,

- v -

44TH DRIVE OWNER LLC,

Defendant.

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INDEX NO. 652985/2020

MOTION DATE 09/03/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, and 33 were read on this motion for DISMISSAL.

LOUIS L. NOCK, J.

Upon the foregoing documents, it is hereby ordered that defendant's motion to dismiss the complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7) is granted based upon the following memorandum decision.

Background

In this action to recover a security deposit, plaintiff Zeyu Wang ("plaintiff") asserts two causes of action for breach of contract, and seeks rescission of the contract and return of the deposit (first cause of action) or, alternatively, damages in the amount of the deposit (second cause of action). Defendant 44th Drive Owner LLC ("defendant") moves to dismiss the entire amended complaint for failure to state a cause of action.

Defendant is the sponsor of the condominium building located at 21-30 44th Drive, Long Island City, New York (NYSCEF Doc. No. 2, ¶ 3). On November 24, 2018, the parties entered into a purchase agreement (the "agreement"), pursuant to which plaintiff, a resident and citizen of the People's Republic of China, agreed to purchase Unit 7-F of the condominium (the "Unit")

(NYSCEF Doc. No. 23). Plaintiff agreed to pay $1,525,000 for the Unit, and an additional $95,000 for a parking space, including within the total a $162,000 deposit due upon signing the agreement (*id.*, ¶ 4.1; Rider, ¶ 1.1). The agreement provides that plaintiff would default under the agreement if, *inter alia*, it failed to close on the scheduled closing date (*id.*, ¶ 13.1[i]). Upon any such default, defendant was entitled to cancel the agreement and retain the deposit as liquidated damages (*id.*, ¶ 13.2). Further, plaintiff agreed that his obligations under the agreement were not contingent on obtaining financing of the purchase price and remained in effect even if plaintiff was ultimately unable to obtain financing (*id.*, ¶ 29).

On November 18, 2019, defendant sent notice to plaintiff that the closing date for the Unit would be December 18, 2019 (NYSCEF Doc. No. 2, ¶ 10). Plaintiff alleges that, prior to defendant sending the notice, the Chinese government's State Administration of Foreign Exchange "implemented regulations and rules intended to curb the flow of capital out of China, including without limitation, for the purpose of purchasing real estate abroad" (*id.*, ¶ 11). Accordingly, plaintiff was unable to transfer funds out of China to pay the balance of the purchase price for the Unit (*id.*, ¶ 14). The parties adjourned the closing date several times, during which plaintiff represented that he was attempting to obtain alternate financing of the purchase price (*id.*, ¶¶ 15-18; NYSCEF Doc. Nos. 10-15). Ultimately, on May 29, 2020, defendant declared that it was cancelling the agreement due to plaintiff's failure to close on the Unit as required (NYSCEF Doc. No. 2, ¶¶ 19-20). Plaintiff demanded the return of the deposit without success (*id.*, ¶¶ 21).

Plaintiff commenced this action by filing a summons and complaint on July 8, 2020, which he then amended on July 20, 2020 (NYSCEF Doc. Nos. 1-2). Defendant appeared and

now moves to dismiss the amended complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action.

Standard of Review

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). "[The court] accept[s] the facts as alleged in the complaint as true, accord[ing] plaintiffs the benefit of every possible favorable inference, and determin[ing] only whether the facts as alleged fit within any cognizable legal theory" (*Id.* at 87-88). Ambiguous allegations must be resolved in plaintiff's favor (*JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015]). "The motion must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [internal citations omitted]). "[W]here ... the allegations consist of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, they are not entitled to such consideration" (*Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1st Dept 1994]).

Discussion

In effect, plaintiff alleges a single claim for breach of contract with two separate proposed remedies: rescission of the contract and return of the deposit, or damages in the amount of the deposit. The parties do not dispute the sequence of events described above, but part ways as to the result; plaintiff asserts that the Chinese government's restrictions on wiring money outside of China to purchase real estate rendered his performance of the contract impossible, while defendant argues that plaintiff's performance was not objectively impossible, and that the terms of the contract allow it to retain the deposit in the event of plaintiff's default.

"Impossibility excuses a party's performance only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible. Moreover, the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract" (*Kel Kim Corp. v Central Mkts.*, 70 NY2d 900, 902 [1987]). "[W]here impossibility or difficulty of performance is occasioned only by financial difficulty or economic hardship, even to the extent of insolvency or bankruptcy, performance of a contract is not excused" (*407 E. 61st Garage, Inc. v Savoy Fifth Ave. Corp.*, 23 NY2d 275, 281 [1968]). "[A]bsent an express contingency clause in the agreement allowing a party to escape performance under certain specified circumstances, compliance is required even where the economic distress is attributable to the imposition of governmental rules and regulations or the inability to secure financing" (*Stasyszyn v Sutton E. Assocs.*, 161 AD2d 269, 271 [1st Dept 1990]).

Here, plaintiff alleges that he was unable to wire money out of China or otherwise obtain financing to close on the unit. In signing the agreement, however, plaintiff agreed that he would be obligated to fulfill the agreement even if unable to obtain financing (NYSCEF Doc. No. 23, ¶ 29). Thus, the parties expressly foresaw that this type of situation might occur, but that plaintiff would still be obligated to proceed to closing (*see, Kel Kim Corp.*, 70 NY2d at 902). Even taking plaintiff's allegations regarding Chinese money transfer regulations as true, plaintiff does not allege that the means of performance have been totally destroyed, *i.e.*, that he could not have found a way to purchase the Unit without a wire transfer from a Chinese bank (*id.*). Moreover, there is no contingency clause in the agreement that would allow plaintiff to escape performance due to the actions of nonparty State actors, and thus plaintiff cannot claim that his performance was impossible due to those actions (*Stasyszyn*, 161 AD2d at 271).

Absent impossibility of performance, plaintiff has no defense for his failure to close on the Unit as required by the agreement. The agreement expressly provides that in the event that plaintiff fails to close, defendant may cancel the agreement and retain the deposit (NYSCEF Doc. No. 23, ¶¶ 13.1-13.2). Accordingly, plaintiff cannot establish that defendant has breached the contract, or that the contract should be rescinded (*e.g. Bisk v Cooper Sq. Realty, Inc.*, 115 AD3d 419, 419 [1st Dept 2014] [rescission requires "a material and willful breach, so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract"]).

Accordingly, it is hereby

ORDERED that the motion of defendant 44th Drive Owner LLC to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant

This constitutes the Decision and Order of the Court.

ENTER:

2/8/2022
DATE

LOUIS L. NOCK, J.S.C.

CHECK ONE:	X	CASE DISPOSED			☐	NON-FINAL DISPOSITION	
	X	GRANTED	☐	DENIED	☐	GRANTED IN PART	☐ OTHER
APPLICATION:	☐	SETTLE ORDER			☐	SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN			☐	FIDUCIARY APPOINTMENT	☐ REFERENCE