

Yao v Wright

2022 NY Slip Op 30621(U)

March 11, 2022

Supreme Court, Kings County

Docket Number: Index No. 523477/2018

Judge: Lillian Wan

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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

Index No.: 523477/2018
 Motion Seq.: 06, 07

-----X
 BASILIA YAO,

Plaintiff,

- against -

DECISION AND ORDER

CAROL WRIGHT and THE LAW OFFICES OF
 JAMIE LATHROP, P.C., as Escrow Agent,

Defendants.

-----X
 Recitation, as required by CPLR § 2219(a), of the papers considered in the review of these motions.

The following e-filed documents, listed by NYSCEF document number (Motion 06) 164-194 and 216-224, and (Motion 07) 196-211 and 225-233, were read on these motions for summary judgment.

In this action to recover damages for breach of contract, the plaintiff moves for an Order (Motion 06) granting Plaintiff summary judgment pursuant to CPLR § 3212 on each of the four causes of action set forth in the Second Amended Verified Complaint. The defendants also cross move for an Order (Motion 07) pursuant to CPLR § 3212 granting summary judgment on the defendants' first two counterclaims and dismissing the plaintiff's complaint in its entirety. After oral argument and upon consideration of the papers, Motion 06 is denied and Motion 07 is granted in part.

The plaintiff pleads four causes of action in the complaint: 1) breach of contract; 2) conversion; 3) promissory estoppel; and 4) fraud (only as against defendant Carol Wright). *See* NYSCEF Doc. No. 166. The defendants plead three counterclaims in their Verified Amended Answer with Counterclaims but only seek summary judgment on the first two, for breach of contract and declaratory judgment.

In support of her motion (Motion 06), Ms. Yao submits, inter alia, the pleadings, her affidavit, a copy of the contract of sale for real property, and various copies of checks and invoices. Ms. Yao states in her affidavit that she is a small business owner who focuses on developing small-scale residential properties in New York. On or about July 12, 2018, Ms. Yao and Ms. Wright executed a contract for the sale of real property located at 246 Fenimore Street in Brooklyn, New York, with Ms. Yao as the purchaser and Ms. Wright as the seller. Pursuant to the contract, Ms. Yao agreed to pay \$2,185,000.00 for the property and paid a \$327,500.00 down payment to Mr. Lathrop's firm as escrow agent. The initial closing was scheduled to take place on August 26, 2018, but it did not go forward on account of title defects encumbering the property, namely outstanding liens and judgments, which Ms. Yao asserts include but are not limited to: a Notice of Pendency filed by both the current owner in a guardianship proceeding and the first mortgage holder on the property (which possessed a Judgment of Foreclosure and

Sale); utilities liens; a Department of Environmental Protection violation; a federal tax liability lien; and a lien for unpaid child support. *See* NYSCEF Doc. No. 168. Ms. Yao further states that the contract specified that time was of the essence, accounting for the fact that the property was in foreclosure. *See* NYSCEF Doc. No. 167.

Ms. Yao alleges that, after the missed closing date, Ms. Wright made misrepresentations about her ability or willingness to correct the title defects. Though Ms. Yao asserts that she had the right to terminate the contract upon the missed closing date, she states that she relied upon Ms. Wright's alleged misrepresentations when she agreed to extend the closing date to November 1, 2018. Ms. Yao states that Ms. Wright, both individually and through her representatives, consistently reassured her that the closing would go forward. However, this new closing date of November 1, 2018, which defendants assert was set unilaterally by plaintiff, was also missed. Ms. Yao states that she then asked the defendants to return her down payment along with costs and expenses in connection with the purchase of the property, but the defendants did not fulfill this request and instead opted to keep the down payment. The plaintiff claims that the defendants have breached the contract by failing to return the down payment, and that in addition to this loss, she has incurred other damages related to the defendants' alleged breaches and misrepresentations, including: \$15,129.12 to an architectural firm named S M Tam Architect, PLLC to, among other things, obtain an architectural survey and hydrant flow test of the property; \$2,500.00 to have soil samples conducted at the property; and \$8,500.00 in legal fees relating to the property. Plaintiff also claims that she has been forced to forego other opportunities to purchase property because her funds were already designated for the purchase of the subject property, and that one such missed opportunity cost her an estimated \$2,400,000.00 in lost potential earnings.

In opposition to the plaintiff's motion and in support of their cross motion (Motion 07), the defendants submit, inter alia, the pleadings, copies of email communications between the parties, and a copy of a proposed amendment to the contract. Counsel for Ms. Wright, Mr. Lathrop, states that after accepting the bid from Ms. Yao, he drafted a contract of sale but was specifically concerned about the ability of the buyer to be able to close in a short amount of time, so he added handwritten language in the form of paragraph 29, which stated that there was a pending foreclosure, that a judgment of foreclosure and sale had been signed, and that an auction would be scheduled shortly requiring that time is of the essence. *See* NYSCEF Doc. No. 167. Mr. Lathrop asserts that the "time is of the essence" clause specifically refers to the foreclosure proceeding and pending auction. Mr. Lathrop further asserts that plaintiff and her counsel were aware that clearing up certain defects, such as the child support liens, could take a significant amount of time. Mr. Lathrop also states that the ability to develop the lot was never a contingency of the contract, because had Ms. Wright known of Ms. Yao's desire to develop the property, she would not have sold it to her.

The plaintiff argues that she is entitled to summary judgment on the first cause of action for breach of contract because there is no dispute that the defendants have failed to return the down payment to her. Plaintiff further contends that she allowed the defendants ample time to clear the defects with the title to the property, yet they were unable or unwilling to do so. The plaintiff relies upon *Ashkenazi v Miller*, 190 AD3d 668 (2d Dept 2021) to support the proposition that she made "a time of the essence closing date, and that, although [plaintiff was] ready,

willing, and able to close,” “the [defendants were] not ready, willing, and able to close.” *Id.* at 668. Plaintiff contends that time was made of the essence both by the contract itself and by the letter she sent to the defendants. Plaintiff argues that Ms. Wright will receive a windfall if permitted to keep the down payment. Plaintiff also asserts that she is entitled to recover consequential damages suffered as a result of Ms. Wright’s breach, citing to *Achieve It Sols., LLC v Lewis*, 186 AD3d 49 (2d Dept 2020).

Plaintiff also argues that she is entitled to summary judgment on her cause of action for conversion because she has shown, with regard to the escrow agent and his retention of the down payment: “(1) legal ownership or an immediate right of possession to a specific identifiable thing and (2) that the defendant exercised an unauthorized dominion over the thing in question to the exclusion of the plaintiff’s right.” *Giardini v Settanni*, 159 AD3d 874, 875 (2d Dept 2018). Plaintiff argues that she has an immediate right of possession over the down payment because she properly terminated the contract in accordance with its terms. Plaintiff likewise contends that she is entitled to summary judgment on promissory estoppel, asserting that she relied upon Ms. Wright’s clear and unambiguous promises throughout September and October 2018 that she would be able to clear the defects to title, and that plaintiff refrained from terminating the contract as a result. Plaintiff further asserts that she should be granted summary judgment on her fourth cause of action, for fraud, on the ground that Ms. Wright knew the promises she was making were false when she made them.

The defendants argue in opposition that the plaintiff is not entitled to summary judgment because she cannot demonstrate that she was ready and able to perform under the contract. The defendants argue that the plaintiff did not show any proof that she had the ability to pay the title charges that she would have incurred because no certified checks made payable to the title company were submitted in connection with the closing, and that the plaintiff’s application must be denied on this ground, citing to *Fridman v Kucher*, 34 AD3d 726 (2d Dept 2006). Defendants also argue that, pursuant to the contract, time was only of the essence as it related to the seller, and that the plaintiff is essentially adding terms to the contract when she claims that time was also of the essence for the purchaser. Defendants also contend that the parties did not conduct themselves as if bound by a “time is of the essence” provision because they agreed to extend the closing date.

Defendants also assert that they are entitled to dismissal of the plaintiff’s claim for conversion in that such a claim may not be maintained where damages are sought for a breach of contract, and that plaintiff’s conversion claim is duplicative, citing to *Daub v Future Tech Enterprise, Inc.*, 65 AD3d 1004 (2d Dept 2009). Defendants likewise claim that they are entitled to dismissal of the plaintiff’s cause of action for promissory estoppel, because Ms. Wright’s “promises” were actually “statements of intention,” which defendants assert are not actionable. Defendants further contend that the fraud claims should be dismissed because they are also duplicative of the breach of contract claim, and that fraud claims cannot stand where the only misrepresentations alleged are as to “intent to perform the contractual obligations at the time they were made,” citing to *Demetre v HMS Holdings Corp.*, 127 AD3d 493, 494 (1st Dept 2015).

In support of the cross motion, defendants assert that they are entitled to summary judgment on their first counterclaim, for breach of contract, because a purchaser cannot recover

their down payment if they default on a real estate contract without a lawful excuse when the seller did not initiate the breach. Defendants assert that it is clear that the plaintiff attempted to cancel the contract when she discovered that she would not be able to develop the property. Defendants further argue that they are also entitled to summary judgment on their second counterclaim, for declaratory judgment.

In opposition to the defendants' cross motion, plaintiff argues that Ms. Wright has contradicted herself several times in this matter, and that therefore her representations cannot now be relied upon. Plaintiff also argues that she was not required to demonstrate that she was ready and able to close on the closing date because this is not required by the contract. Plaintiff contends that her only burden is to demonstrate her "financial ability" to pay the purchase price, citing to *Skyline Restoration, Inc. v Roslyn Jane Holdings, LLC*, 95 AD3d 1203 (2d Dept 2012). Plaintiff also contends that time was of the essence for both parties to the contract, and that the plaintiff never waived these provisions. Plaintiff asserts that the defendants are not entitled to dismissal of the conversion claim because a misuse of escrow funds constitutes conversion. In support of her argument that she may maintain her promissory estoppel claims, plaintiff relies upon *Imperial Cap. Bank v 11-13-15 Old Fulton D, LLC*, 88 AD3d 652, 653–654 (2d Dept 2011), and asserts that unfulfilled promises made after the execution of a contract can serve as a basis for promissory estoppel claims. Plaintiff further asserts that the cross motion is untimely as it was filed seven months after the note of issue was filed.

Summary judgment is a drastic remedy and may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986); *see also Phillips v Joseph Kantor & Co.*, 31 NY2d 307 (1972). The moving party is required to make a prima facie showing of entitlement to judgment as a matter of law, and evidence must be tendered in admissible form to demonstrate the absence of any material issues of fact. *Alvarez* at 324; *see also Zuckerman v City of New York*, 49 NY2d 557 (1980). The papers submitted in the context of the summary judgment application are always viewed in the light most favorable to the party opposing the motion. *Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 (2d Dept 1990). If the prima facie burden has been met, the burden then shifts to the opposing party to present sufficient evidence to establish the existence of material issues of fact requiring a trial. CPLR § 3212 (b); *see also Alvarez* at 324; *Zuckerman* at 562. Generally, the party seeking to defeat a motion for summary judgment must tender evidence in opposition in admissible form, and "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." *Zuckerman* at 562.

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).

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." *RD Legal Funding Partners, LP v Worby Groner Edelman*

& Napoli Bern, LLP, 195 AD3d 968, 968 (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.” *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). 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).

Furthermore, “[t]o establish a viable cause of action sounding in promissory estoppel, a plaintiff must allege (1) a clear and unambiguous promise, (2) reasonable and foreseeable reliance by the party to whom the promise is made, and (3) an injury sustained in reliance on the promise.” *Rogers v Town of Islip*, 230 AD2d 727, 727 (2d Dept 1996).

With regard to the plaintiff’s fourth cause of action for fraud, “[a] plaintiff asserting a cause of action alleging fraud must plead all of the following elements: (1) a material misrepresentation or a material omission of fact which was false and which the defendant knew to be false, (2) made for the purpose of inducing the plaintiff to rely upon it, (3) the plaintiff’s justifiable reliance on the misrepresentation or material omission, and (4) injury.” *Nabatkhorian v Nabatkhorian*, 127 AD3d at 1043, 1043-1044 (2d Dept 2015). “[I]n any action based upon fraud, the circumstances constituting the wrong shall be stated in detail.” *Id.* at 1044 (internal quotation marks removed); see also CPLR § 3016(b). “[A]n essential element of any fraud [claim] is that there must be reasonable reliance, to a party’s detriment, upon the representations made’ by the defendant against whom the fraud claimed has been asserted.” *Id.* at 1044, quoting *Water St. Leasehold LLC v Deloitte & Touche LLP*, 19 AD3d 183, 185 (1st Dept 2013); see also *New York Military Academy v NewOpen Group*, 142 AD3d 489 (2d Dept 2016).

Here, the plaintiff has failed to eliminate all triable issues of fact with regard to any of her causes of action. Regarding the plaintiff’s cause of action for breach of contract, there remain issues of fact as to whether the contract was actually breached and, if so, by which party, as the conduct of the parties may have evidenced an intent to voluntarily waive the “time is of the essence” provision, specifically in that the plaintiff initially agreed to adjourn the initial closing date. “Generally, the existence of an intent to forgo such a right is a question of fact.” *Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Management, L.P.*, 7 NY3d 96, 104 (2006). As a result, because factual questions remain as to the parties’ intent and whether they were ready and able to close on the second closing date, the plaintiff’s proofs have not eliminated all triable issues of fact with regard to the “plaintiff’s performance pursuant to the contract” and “the defendant’s breach of its contractual obligations.” *Ayers* at 769. Similarly, the plaintiff has failed to eliminate all material triable issues of fact with regard to the remaining causes of action for conversion, promissory estoppel, and fraud. With regard to conversion, the plaintiff has not established prima facie that the down payment was wrongfully possessed by the

seller here, nor has she established that the escrow agent misused the funds in some manner. *See Green Complex* at 849. Likewise, the plaintiff failed to establish her cause of action for promissory estoppel because she did not demonstrate as a matter of law that Ms. Wright made clear and unambiguous promises that the plaintiff reasonably relied upon, and further failed to show that she was fraudulently induced into signing the contract as a result of these alleged promises, especially in light of the plaintiff's own admission that she is "an experienced small business owner, local property developer and former employee of New York City government." *See* NYSCEF Doc. No. 165. Accordingly, the plaintiff's motion is denied.

Turning to the defendants' cross motion, although it is technically untimely, "an untimely motion or cross motion for summary judgment may be considered by the court where, as here, a timely motion for summary judgment was made on nearly identical grounds." *Grande v Peteroy*, 39 AD3d 590, 591-592 (2d Dept 2007); *see also Homeland Ins. Co. of New York v National Grange Mut. Ins. Co.*, 84 AD3d 737 (2d Dept 2011). As the Court herein is considering the merits of the plaintiff's complaint, the defendants' cross-motion for, inter alia, summary judgment dismissing those same causes of action can be said to have been made on "nearly identical grounds." *Grande* at 591-592.

Here, the defendants have demonstrated an entitlement to judgment as a matter of law only as to dismissal of the plaintiff's second, third, and fourth causes of action, and the plaintiff has failed to raise triable issues of fact opposition. The defendants have demonstrated that the plaintiff's claim for conversion must be dismissed here because "a cause of action alleging conversion cannot be predicated upon a mere breach of contract," and the defendant established that their conduct did not constitute "breach of a duty distinct from, or independent of, the breach of contract." *Connecticut New York Lighting Company v Manos Business Management Company, Inc.*, 171 AD3d 698, 699 (2d Dept 2019). The defendants established that Ms. Wright, as the seller on a contract for real property, was rightfully in possession of the down payment, and that the defendants' refusal to return the down payment did not constitute a conversion. *See Green Complex* at 849. The defendants also established prima facie entitlement to summary judgment dismissing the plaintiff's cause of action for promissory estoppel, as it is undisputed that there existed a valid and enforceable written contract, which precludes recovery under a cause of action "sounding in promissory estoppel... which arise[s] out of the same subject matter." *Grossman v New York Life Ins. Co.*, 90 AD3d 990, 991-992 (2d Dept 2011). Finally, the defendants also established their prima facie entitlement to judgment as a matter of law on the plaintiff's claims for fraud on the ground that "[t]he gravamen of the plaintiff's causes of action is breach of contract, and the amended complaint does not support a fraud cause of action." *McMorrow v Angelopoulos*, 113 AD3d 736, 740 (2d Dept 2014). In any event, even if these causes of action were not duplicative of the breach of contract claims, the plaintiff failed to raise a triable issue of fact as to whether her reliance on the alleged promises of Ms. Wright and her agents was reasonable or justifiable in light of the plaintiff's extensive experience in conducting real estate transactions and developing properties. *See Goldman v Strough Real Estate, Inc.*, 2 AD3d 677 (2d Dept 2003); *see also Whitehead v Town House Equities, Ltd.*, 8 AD3d 367 (2d Dept 2004).

However, the defendants failed to eliminate all triable issues of fact with regard to the plaintiff's cause of action for breach of contract and are therefore not entitled to summary

judgment on their counterclaims or dismissal of the plaintiff's first cause of action. Accordingly, the defendants' cross motion is granted only to the extent that the plaintiff's second, third, and fourth causes of action are dismissed.

The remaining contentions are without merit.

Accordingly, it is hereby

ORDERED, that the plaintiff's motion for summary judgment (Motion 06) is **DENIED**, and it is further

ORDERED, that the defendants' cross motion for summary judgment (Motion 07) is **GRANTED** only to the extent that the plaintiff's second, third, and fourth causes of action are dismissed, and is in all other respects denied.

This constitutes the decision and order of the Court.

DATED: March 11, 2022



HON. LILLIAN WAN, J.S.C.

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