

Golden Bridge Realty LLC v 72nd Rd. Holdings LLC
2020 NY Slip Op 33939(U)
October 14, 2020
Supreme Court, Queens County
Docket Number: 700435/20
Judge: Leonard Livote
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10/19/2020
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QUEENS COUNTY

SHORT FORM ORDER

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: Honorable Leonard Livote
Acting Supreme Court Justice

IAS TERM, PART 33

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GOLDEN BRIDGE REALTY LLC
Plaintiff,

Index No: 700435/20

-- against --

Motion Date: 8/11/20

72ND ROAD HOLDINGS LLC and ALICE HUANG Seq. No: 1
Defendants.

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The following papers numbered EF3 to EF26 read on this motion by [plaintiff/defendant] for an Order An Order, Pursuant to CPLR §3211(a)(1), (3) and (7) granting Defendants' motion to dismiss the Complaint, and for attorneys fees.

PAPERS
NUMBERED

Notice of Motion, Affirmation, Affidavits and Exhibits.....	EF3 - EF11
Cross Motion, Affirmation, Affidavits and Exhibits.....	
Answering Affirmations, Affidavits and Exhibits.....	EF12 - EF25
Reply Affirmations, Affidavits and Exhibits.....	EF26
Other.....	

Upon the foregoing papers, the motion is granted in part and denied in part.

On June 14th, 2018, Defendant 72nd Road Holdings, as seller, and Chun Kwai Lam, as buyer, entered into an agreement (the "Agreement") for the purchase and sale of the real estate located at 43-06 102nd Street, Corona, NY 11368, block 1619 and lot 161 (the "Property"). On June 22, 2018, Chun Kwai Lam formed and registered a domestic limited liability company, Golden Bridge Realty LLC and on August 25, 2018, Lam executed an Assignment of the Contract, whereby he assigned his rights and interests under the Agreement to Golden Bridge.

On June 14th, 2018, Defendant Alice Huang signed a personal Guaranty (the "Guaranty"), whereby she, as the sole member of 72nd Road Holdings, personally guaranteed the performance of 72nd Road Holdings under the Agreement and in addition, in the event of the failure of the performance by 72nd Road Holdings pursuant

to the Agreement, she personally guaranteed the refund of the down payment to Kwan.

Paragraph 16 of the Agreement specified that the Agreement is expressly contingent upon Purchaser obtaining approval of a mortgage loan in the amount of One Million Two Hundred Sixty Thousand Dollars (\$1,260,000.00) within 60 (sixty) days of receipt of Seller's notice that a Certificate of Occupancy is obtained. The Agreement further provided that "[t]he contingency shall be deemed waived unless Purchaser shall notify Seller in writing by certified or registered mail, return receipt requested no later than said [] days seller agree to extend a 30 day period of this inability to obtain said approval. If the Purchaser so notifies, this Agreement shall be deemed cancelled, null and void and all deposits made hereunder shall be returned to Purchaser. The Purchaser agrees to apply for the mortgage loan immediately after the Seller notified Purchaser that all signoff has been completed" (*sic*).

On November 8, 2019, Plaintiff/Purchaser's Lender denied the Purchaser's mortgage loan application due to the fact that after evaluating the Property, the Lender had determined that it was not worth enough to secure the proposed loan amount. Following the Denial Letter, on November 27, 2019, Plaintiff through its prior attorney Fengli Guo, Esq. from the Law Offices of Fengli Guo sent a letter to the Defendants requesting a cancellation of the Agreement pursuant to paragraph 16, as same was contingent upon Plaintiff securing a mortgage loan in the amount of One Million Two Hundred Sixty Thousand Dollars (\$1,260,000.00), and the return of the down payment in the amount of Eight Hundred Forty Thousand Dollars (\$840,000.00) to the Plaintiff immediately. On December 18, 2019, Plaintiff sent a follow up letter via email through the undersigned requesting one more time to cancel the Agreement pursuant to Paragraph 16 and to return the paid proceeds in the amount of Eight Hundred Forty Thousand Dollars (\$840,000.00) to the Plaintiff immediately. Defendants did not refund the down payment. Defendant moves to dismiss the complaint.

As a general rule, when considering a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR §3211(a)(7), the plaintiff's complaint is to be liberally construed in the light most favorable to the plaintiff's; and all factual allegations are accepted as true. (See, *Lo Pinto v. Mays, Inc.* 107 AD2d 582 [1991]). To grant a motion to dismiss due to "a defense that is founded upon documentary evidence" pursuant to CPLR §3211(a)(1), the evidence in question must "utterly refute the plaintiff's allegations and establish a defense as a matter

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of law." (See, *Goshen v. Mutual Life Ins. Co.*, 98 NY2d 314, [2002]). "To be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" (*Fontanetta v Doe*, 73 AD3d 78, 86 [2d Dept 2010]).

The first cause of action alleges breach of contract for failing to return the downpayment. Defendants argue that "Plaintiff failed to allege that Plaintiff sent any notices to terminate the Real Estate Contract to Defendant 72nd Road Holding LLC at its principal place of business located at 36-09 Main Street, Suite 3A, Flushing, New York 11354 as required by the terms of the Real Estate Contract." However, the Agreement does not specify where the notice must be sent, only that the seller be notified. Moreover, "strict compliance with contractual notice provisions need not be enforced where the adversary party does not claim the absence of actual notice or prejudice by the deviation" (*Fortune Limousine Serv., Inc. v. Nextel Communications*, 35 A.D.3d 350, 353 [2d Dept] 2006). Accordingly, the motion is denied as to the first cause of action.

The second cause of action alleges breach of contract against defendant Alice Huang on the Guarantee. The documentary evidence establishes that the Guarantee is between Alice Huang and Chun Kwai Lam, and was never assigned to plaintiff. Accordingly, there is no privity between the parties and the second cause of action is dismissed.

The third cause of action alleges unjust enrichment. "An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim" (*Corseello v Verizon New York, Inc.*, 18 NY3d 777, 790 [2012]). In the instant case, the third cause of action duplicated the breach of contract claim and must be dismissed.

The fourth cause of action alleges fraud. However, the fraud claim is based upon identical allegations to the breach of contract claim and did not allege that a misrepresentation resulted in any loss independent of the damages allegedly incurred for breach of contract (*Doukas v Ballard*, 135 AD3d 896, 897 [2d Dept 2016]).

Accordingly, the motion is granted to the extent that it is,

ORDERED, that the second, third and fourth causes of action are dismissed.

Any other or further relief not specifically addressed is denied.

This constitutes the Order of the Court.

Dated: October 14, 2020

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Leonard Livote, A.J.S.C.

FILED

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QUEENS COUNTY**