

Joseph v Joseph

2024 NY Slip Op 34030(U)

November 14, 2024

Supreme Court, Kings County

Docket Number: Index No. 500873/2024

Judge: Leon Ruchelsman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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STEPHEN JOSEPH,

Plaintiff,

Decision and order

- against -

Index No. 500873/2024

PAMELA JOSEPH & CGMM PROPERTIES LLC,

Defendants,

November 14, 2024

-----X
PRESENT: HON. LEON RUCHELSMAN

Motion Seq. #3

The defendant has moved seeking a default or in the alternative summary judgement regarding counterclaims filed. The plaintiff has opposed the motion. Papers were submitted by the parties and reviewing all the arguments this court now makes the following determination.

The facts have been adequately presented in the prior order and need not be repeated herein. The court dismissed the complaint in the prior decision but declined to rule on the sufficiency of the counterclaims without a motion. Indeed, the court ordered the plaintiff to respond to the counterclaims within thirty days. The plaintiff filed responses to the counterclaims two days late. The request for a default for the failure to timely respond to the counterclaims is denied.

Turning to the defendant's motion seeking summary judgement on the counterclaims, the defendants assert five counterclaims for fraud, unjust enrichment, conversion, use and occupancy and attorney's fees.

To successfully plead fraud the pleadings must contain

allegations of a representation of a material fact, falsity, scienter, reliance and injury (Moore v. Liberty Power Corp., LLC, 72 AD3d 660, 897 NYS2d 723 [2d Dept., 2010]). Further, the allegations must be "stated in detail" (CPLR §3016(b)) and must include dates, details and items to the extent relevant (see, Orchid Construction Corp., v. Gottbetter, 89 AD3d 708, 932 NYS2d 100 [2d Dept., 2011]). Moreover, it is well settled that "although fraud may exist in the inducement of a contract, where, as here, it is based solely on the failure to perform a promised future act, plaintiff's remedy lies in an action on the contract" (see, Locascio v. James V. Acquavella M.D. P.C., 185 AD2d 689, 586 NYS2d 78 [4th Dept., 1992]). Therefore, to assert a misrepresentation, the misrepresentation must concern a present fact, not a future promise (see, Scialdone v. Stepping Stones Associates L.P., 148 AD3d 953, 50 NYS2d 413 [2d Dept., 2017]). The counterclaim in this case does not allege any misrepresentation of any present fact. Rather, it solely concerns itself with promises made to the plaintiff that were not kept. The counterclaim alleges that the plaintiff promised "he would manage and care for the Property" (see, Answer, ¶59 [NYSCEF Doc. No. 23]) and failed to do so. However, that failure, even if true, is simply not fraud. Therefore, the motion seeking summary judgement on the first counterclaim is denied.

Regarding the remaining counterclaims they all concern a

management agreement entered into between the plaintiff and defendant whereby the plaintiff allegedly agreed to manage the property, collect rent and utilize the funds for the benefit of the parties. The counterclaims assert the plaintiff converted the rental space to his own personal living space and lived there without paying rent. The counterclaims also assert that the plaintiff "used the funds gained from the Property to purchase lavish homes in Texas and Georgia and elsewhere" (see, Answer, ¶63(e) [NYSCEF Doc. No. 23]). The remaining counterclaims are all based upon that alleged conduct. However, the plaintiff could not convert the space to living quarters for himself and at the same time rent it out and keep the rental income unless there are other units in the property. The counterclaims do not contain any information regarding the rental space, how many units were there, if more than one, how much space was rented and at what rate. Likewise, other than conclusory assertions, the counterclaims do not provide any information regarding the amount the plaintiff allegedly utilized. More importantly, the counterclaims are heavily disputed by the plaintiff contending the facts alleged are not true. There is no evidence presented, other than the counterclaims themselves which substantiate them. Surely, there can be no summary determination, at this juncture, that there are no questions of fact about them.


Therefore, based on the foregoing, the motion seeking

summary judgement on the counterclaims is denied.

So ordered.

ENTER:

DATED: November 14, 2024
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC