

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

-----	X	Index No.: 10645/2017
	X	
JIMMY KING,	X	
<i>Plaintiff,</i>	X	
	X	
- against -	X	
	X	
BARBARA KING,	X	
<i>Defendant.</i>	X	
	X	
-----	X	

MEMORANDUM OF LAW IN OPPOSITION
TO MOTION TO DISMISS

This Memorandum of Law is respectfully submitted in in opposition to Defendant Barbara King's Motion to Dismiss dated October 23, 2019 and filed October 29, 2019 (“**Motion**”).

Defendant’s motion should be dismissed in its entirety.

Plaintiff clearly has stated a cause of action. Plaintiff stated that he agreed to vacate the Premises known as 35-17 214 Place, Bayside, New York 11361, upon the sale thereof by Defendant and Defendant would pay Plaintiff \$50,000.00. (Verified Complaint of Jimmy King dated July 22, 2019, filed July 25, 2019 (“**Complaint**”); NYSEF Doc. No.: 14; ¶3-9; Exhibit A.)

In fact, Defendant clearly admits that she did not pay Plaintiff as agreed - she sold the Property but never tendered payment to Plaintiff.

Plaintiff vacated the Premises without disruption on his part and without any legal liabilities on Defendant’s part (except her promise to pay Plaintiff \$50,000).

Plaintiff has stated a cause of action.

Plaintiff also has standing to demand an accounting of the Estate of Theodore King (“Estate”), Plaintiff and Defendant’s deceased father. Defendant expressly conditioned payment upon the availability of funds from, and settlement of, the Estate. Since Defendant states that she realized \$400,000 from the sale (Affidavit of Barbara King in Support of Motion to Dismiss dated October 11, 2019 (“Def. Aff.”; NYSEF Doc. No.: 16; ¶8), and the buyer agreed to pay transfer taxes and assume any tenancies at the Premises, she should have had sufficient funds to pay Defendant. Since Defendant has failed and refused to pay Plaintiff as agreed, Plaintiff is entitled to know whether the estate has been settled and whether sufficient funds were available from the Estate to pay Defendant as Plaintiff agreed.

Plaintiff has stated a Claim.

“In the context of a motion to dismiss pursuant to CPLR 3211, the court must afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference.” (EBC I v. Goldman, Sachs & Co., 5 NY3d 11, 20 (2005).)

Taking Plaintiff’s allegations as true demonstrates clearly that he has stated a claim: Plaintiff and Defendant had a written agreement conditioned on the sale of the Premises; Defendant sold the Premises; Plaintiff vacated; Defendant did not pay.

“When a party moves to dismiss a complaint pursuant to CPLR 3211 (a) (7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action (see Guggenheimer v Ginzburg, 43 NY2d 268, 275 [1977]; Foley v D’Agostino, 21 AD2d 60, 64-65 [1964]). In considering such a motion, the court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable

inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (Nonnon v City of New York, 9 NY3d 825, 827 [2007], quoting Leon v Martinez, 84 NY2d 83, 87-88 [1994]). ‘Whether a plaintiff can ultimately establish its allegations is not part of the calculus’ (EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 [2005]). (Sokol v. Leader, 74 AD 3d 1180, 1181 (2d Dept. 2010).)

Plaintiff has stated a claim, and the Motion should be denied in its entirety.

Plaintiff has standing to demand an Accounting.

“Standing to sue requires an interest in the claim at issue in the lawsuit that the law will recognize as a sufficient predicate for determining the issue at the litigant's request (see New York State Assn. of Nurse Anesthetists v Novello, 2 NY3d 207, 211 [2004]).” (Caprer v. Nussbaum, 36 AD 3d 176, 182 (2d Dept. 2006).)

Because the Defendant’s promise to pay Plaintiff was conditioned in part on funds being available to her from the Estate, and Defendant has refused to pay Plaintiff, Plaintiff’s demand for an accounting states a “sufficient interest” “that the law will recognize as a sufficient predicate for determining the issue.” Defendant sold the Premises, Plaintiff vacated the Premises, Defendant did not pay Plaintiff as promised. Plaintiff has an extremely personal interest in determining whether Defendant had the funds to pay him, and denying Defendant the defense of lack of funds.

Plaintiff has standing to request an accounting of the Estate.

Conclusion.

For all of the reasons set forth herein, in Plaintiff's Verified Complaint, and such other and further reasons as the Court may adduce, Defendant's Motion should be denied in its entirety.

Dated: November 7, 2019
Long Island City, New York

Respectfully submitted,
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