

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF QUEENS

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CENTURY HOMES REALTY GROUP LLC,

Index No. 711325/2017

Plaintiff,  
-against-

**MEMORANDUM OF LAW  
IN OPPOSITION TO MOTION  
TO DISMISS**

MAN TUNG CHENG, BENJAMIN CHUNG-TENG  
LIN, TENG FEI REN, HORKEEN CHENG, ESQ.,  
LAW OFFICES OF HORKEEN CHENG, PLLC,

Defendants.

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**PRELIMINARY STATEMENT**

This is an action for breach of contract, and a violation of provisions of the Rules of Professional Conduct, raising certain ethical issues in connection with a blatant disregard of a third party's rights regarding escrow, and the CHENG defendants misrepresentation to Plaintiff's agent pertaining to the provisions of C.P.L.R. 294-b.

As set forth in the Plaintiff's Affirmation in Opposition to the Motion to Dismiss by HORKEEN CHENG and the LAW OFFICES OF HORKEEN CHENG, PLLC (hereinafter the CHENG Defendants), as attorney CHUANG only represents the CHENG Defendants, extraneous references to other Defendants in this matter, should be disregarded other than to the extent that they have bearing on the defense of the CHENG Defendants, and are also facts that are supported by verified statements, not an attorney's Memorandum of Law.

For a complete recitation of the facts herein, Plaintiff respectfully directs the Court to the Affirmation of Barbara Lee Ford, attorney for the Plaintiff, the Verified Complaint, and the exhibits in support.

**ARGUMENT**

**THE MOTION TO DISMISS BY THE CHENG DEFENDANTS SHOULD BE DENIED**

The CHENG Defendants move this Court to dismiss Plaintiff's claims against them pursuant to C.P.L.R. § 3211 (a) (7), for failure to state a cause of action. There is no question that the standard for a dismissal pursuant to C.P.L.R. § 3211(a) provides for a high bar to be overcome by the movant.

On a motion to dismiss made pursuant to CPLR 3211,

“the pleading is to be afforded a liberal construction (*see*, CPLR 3026). We 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 (*Morone v. Morone*, 50 N.Y.2d 481, 484, 429 N.Y.S.2d 592, 413 N.E.2d 1154; *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 634, 389 N.Y.S.2d 314, 357 N.E.2d 970). Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (*see, e.g., Heaney v. Purdy*, 29 N.Y.2d 157, 324 N.Y.S.2d 47, 272 N.E.2d 550). In assessing a motion under CPLR 3211(a)(7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint (*Rovello v. Orofino Realty Co., supra*, 40 N.Y.2d at 635, 389 N.Y.S.2d 314, 357 N.E.2d 970) and “the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one” (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 372 N.E.2d 17; *Rovello v. Orofino Realty Co., supra*, 40 N.Y.2d at 636, 389 N.Y.S.2d 314, 357 N.E.2d 970).

Leon v. Martinez, 84 N.Y.2d 83 at 88, 614 N.Y.S.2d 972 at 974, 638 N.E.2d 511 at 513 (1994)

Informative here, the Court of Appeals in the Leon case rejected the, “law firm defendant’s argument that compliance with the alleged assignment would have required them to violate their ethical duties to their client. . . (the court found) Even if the sole attorney-client relationship that existed here was between defendants and Martinez . . . we conclude that defendants’ argument fails for two reasons. First, the cited Disciplinary Rule mandates only that an attorney pay to the client those funds in the possession of the attorney ‘which the client . . . is entitled to receive’ ( . . . DR9-102 [C][4]) which is not the case to the extent that the client has conveyed a right to those funds by and enforceable assignment. Second, DR 9-102 explicitly creates ethical duties running to third parties as to funds in the possession of the attorney to

which those third parties are entitled (*see*, DR 9-102 [C] [1] [2]). Leon v. Martinez, *Id.* at 89-90, 614 N.Y.S.2d 972 at 975, 638 N.E.2d 511 at 514 (1994). *See also*, Part 1200, January 2017, Rules of Professional Conduct, Rule 1.15 (b) (4) (Funds belonging in part to a client or third person, and in part, currently or potentially to the lawyer or law firm shall be kept in such special account or accounts, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client or third person, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.)

There is no question here, that there were commissions claimed by the Plaintiff, that there is a dispute between the parties, that an Affidavit of Entitlement was filed with the County Clerk (Docket #4, Amended Complaint, Exhibit C), and that the seller, MAN TUNG CHEN, was required to escrow the commission. Moreover, the CHENG defendants were not at liberty to disburse the funds that were required to be escrowed with the County Clerk. The CHENG defendants not only disbursed the funds, they engaged in a subterfuge, misleading the Plaintiff's agent at the point of closing, by assuring her that the funds were being escrowed.

*See also*, Goshen v. Mutual Life Insurance Company of New York, 98 N.Y.2d 314, 746 N.Y.S.2d 858, 774 N.E.2d 1190 (As to the New York plaintiffs, however, the allegations are sufficient to withstand a CPLR 3211(a) (7) challenge. In the context of a CPLR 3211 motion to dismiss, the pleadings are necessarily afforded a liberal construction (*see Leon*, 84 N.Y.2d 83, 614 N.Y.S.2d 972, 638 N.E.2d 511; *see also* CPLR 3026). Indeed, we accord plaintiffs "the benefit of every possible favorable inference" (*Leon*, 84 N.Y.2d at 87, 614 N.Y.S.2d 972, 638 N.E.2d 511; *see also* *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 634, 389 N.Y.S.2d 314, 357 N.E.2d 970 [1976])).

**CONCLUSION**

For the foregoing reasons, this Court should deny the motion to dismiss in its entirety, and grant such other and further relief that this Court deems just and proper

  
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF QUEENS

CENTURY HOME REALTY GROUP LLC,

Plaintiff,

-against-

MAN TUNG CHENG, BENJAMIN CHUNG-TENG LIN,  
TENG FEI REN, HORKEEN CHENG, ESQ., and  
LAW OFFICES OF HORKEEN CHENG, PLLC,  
Defendant.

MEMORANDUM OF LAW

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BARBARA LEE FORD

Attorney for

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Pursuant to 22 NYCRR 130-1.1-a, the undersigned, an attorney admitted to practice in the courts of New York State, certifies that, upon information and belief and reasonable inquiry, (1) the contentions contained in the annexed document are not frivolous and that (2) if the annexed document is an initiating pleading, (i) the matter was not obtained through illegal conduct, or that if it was, the attorney or other persons responsible for the illegal conduct are not participating in the matter or sharing in any fee earned therefrom and that (ii) if the matter involves potential claims for personal injury or wrongful death, the matter was not obtained in violation of 22 NYCRR 1200.41-a.

Dated: 12/23/17

Signature

Print Signer's Name

Barbara Lee Ford, Esq.

Service of a copy of the within

is hereby admitted.

Dated:

Attorney(s) for

PLEASE TAKE NOTICE

Check Applicable Box

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NOTICE OF  
ENTRY

that the within is a (certified) true copy of a  
entered in the office of the clerk of the within-named Court on

20

☐

NOTICE OF  
SETTLEMENT

that an Order of which the within is a true copy will be presented for settlement to the  
Hon. , one of the judges of the within-named Court,  
at  
on

20

, at

M.

Dated:

THE LAW OFFICE OF  
BARBARA LEE FORD

Attorney for

**PLAINTIFF**  
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FLORAL PARK, NEW YORK 11001

To:

Attorney(s) for