

**FILED**

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

**5/13/2020  
11:18 AM**Present: HONORABLE JANICE A. TAYLOR  
JusticeIAS Part 15**COUNTY CLERK  
QUEENS COUNTY**-----x  
JIMMY KING,

Index No.:712109/19

Plaintiff(s),

Motion Date:11/12/19

- and -

BARBARA KING,

Motion Seq. No: 3

Defendant(s).  
-----x

The following papers numbered 1 - 8 read on this motion by defendant for an order dismissing the complaint.

Papers  
Numbered

Notice of Motion-Affirmation-Exhibits-Service..... 1 - 4

Memorandum of Law..... 5

Reply Affirmation-Exhibits-Service..... 6 - 8

Upon the foregoing papers it is **ORDERED** that the motion is decided as follows:

This is an action for breach of contract, unjust enrichment, fraud and an accounting. It is undisputed that the parties are siblings, that the defendant was the owner of 35-17 214<sup>th</sup> Place, Bayside, New York after inheriting the property from the parties' father and that the plaintiff resided at the subject property.

In his complaint, plaintiff asserts that, after the defendant found a buyer for the subject property, she agreed to pay the plaintiff the sum of \$50,000 out of the sale proceeds, if he agreed to vacate the premises. Plaintiff asserts that he did vacate the property, but that the defendant failed to pay the agreed sum. Plaintiff's complaint seeks damages for breach of contract, unjust enrichment and fraud based on the defendant's alleged failure to honor their agreement. Plaintiff also seeks an accounting of the sale of the property and an accounting of the estate of the parties' deceased father.

Defendant now moves, pursuant to CPLR §3211(a)(3)(7), for an order dismissing the complaint. On a motion to dismiss a complaint, pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the complaint must be construed liberally, the factual allegations

deemed to be true, and the nonmoving party must be given the benefit of all favorable inferences" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Dolphin Holdings, Ltd. v Gander & White Shipping, Inc.*, 122 AD3d 901, 902 [2d Dept 2014]). The sole criterion for the court is whether the factual allegations in the complaint, taken together, manifest the requisite elements of any cause of action (see *Polonetsky v Better Homes Depot*, 97 NY2d 46, 54 [2001]; *Dolphin Holdings, Ltd.*, 122 AD3d at 902). However, where the court considers evidentiary material submitted in support of the motion, the criterion then becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Bokhour v GTI Retail Holdings, Inc.*, 94 AD3d 682, 683 [2d Dept 2012; *Sokol v Leader*, 74 AD3d 1180, 1181-1182 [2d Dept 2010], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

In order to successfully plead a cause of action for breach of contract, plaintiff must assert that a contract existed between the parties, consideration, performance by the plaintiff, breach by the defendant and damages (see, *JP Morgan Chase v. J.H. Electric Co.*, 69 AD3d 802 [2d Dept. 2010]; *Furia v. Furia*, 116 AD2d 694 [2d Dept. 1986]). To state a viable cause of action for unjust enrichment, a plaintiff must allege that he conferred a benefit upon the defendants, and that the defendants will obtain such benefit without adequately compensating plaintiff therefor (see, *Smith v. Chase Manhattan Bank*, 293 Ad2D 598 [2d Dept., 2001]; *Nakamura v Fujii*, 253 AD2d 387 [2d Dept. 1998]).

This court's review of the plaintiff's complaint reveals that he has sufficiently pled causes of action for breach of contract and unjust enrichment. Accordingly, that portion of the defendant's motion which seeks to dismiss these causes of action is denied.

Defendant also seeks an order dismissing plaintiff's third cause of action for fraud. In his complaint, plaintiff asserts that the defendant defrauded him when she told him that she would pay if he vacated the premises. However, it is well-settled that such a cause of action cannot be maintained where the only charges of fraud exist in connection to an alleged breach of contract (see, *Del Ponte v. 1910-12 Ave. U Realty Corp.*, 7 AD3d 562 [2d Dept. 2004]; *Kotick v. Desai*, 123 AD2d 744 [2d Dept. 1986]). In the instant action, it is clear that plaintiff's entire allegations of fraud are based on the alleged breach of the agreement. Accordingly, that portion of the instant motion which seeks to dismiss plaintiff's third cause of action, pursuant to CPLR §3211(a)(7), is granted.

Finally, defendant seeks an order, pursuant to CPLR §3211(a)(3), dismissing plaintiff's fourth cause of action which calls for an accounting of the sale of the subject property and of the estate of the parties' deceased father. CPLR §3211(a)(3) gives this court the authority to dismiss a complaint where the movant

demonstrates that a plaintiff lacks standing to sue. A review of the contract of sale of the subject property reveals that the plaintiff was not a party to the contract. Moreover, there is no proof, nor has plaintiff asserted, that he was an intended third-party beneficiary to the contract of sale. Thus, plaintiff is without standing to sue for an accounting of the sale of the subject property. Additionally, plaintiff's request for an accounting of the estate of the parties' deceased father is properly made in the Surrogates Court of the State of New York, Queens County, not in this court. Accordingly, that portion of the instant motion which seeks dismissal of plaintiff's fourth cause of action for an accounting is granted.

**FILED**

Dated: May 8, 2020

**5/13/2020****11:18 AM****COUNTY CLERK  
QUEENS COUNTY**  
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**JANICE A. TAYLOR, J.S.C.**

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