DBD-CV-18-5014197-S SUPERIOR COURT

PLATINUM LUXURY AUCTIONS, LLC JUDICIAL DISTRICT

V. OF DANBURY

THOMAS J. BARBARIE MAY 2, 2019

MEMORANDUM OF DECISION

Defendant Thomas J. Barbarie ("Buyer") has moved to strike the complaint of plaintiff Platinum Luxury Auctions, LLC (the "Auctioneer") based on provisions of a contract to purchase certain real property on the ground that the sellers of the subject property, Julian and Stefan Abbruzzese ("Sellers"), are not parties to this action. For the reasons stated below, the motion to strike is denied.

The Standards for Deciding a Motion to Strike

"The purpose of a motion to strike is to contest . . . the legal sufficiency of the allegations of any complaint . . . to state a claim upon which relief can be granted." (Internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC* v. *Alves*, 262 Conn. 480, 498, 815 A.2d 1188 (2003). "[A] motion to strike challenges the legal sufficiency of a pleading and, consequently, requires no factual findings by the trial court . . . [The court] construe[s] the complaint in the manner most favorable to sustaining its legal sufficiency . . . Thus, [i]f facts provable in the complaint would support a cause of action, the motion to strike must be denied . . . Moreover, [the court notes] that [w]hat is necessarily implied [in an allegation] need not be expressly alleged . . . It is fundamental that in determining the sufficiency of a complaint challenged by a defendant's motion to strike, all well-pleaded facts and those facts necessarily implied from the allegations are taken as admitted . . . Indeed, pleadings must be construed broadly and realistically, rather than narrowly and technically." (Internal quotation marks omitted.) *Coppola*

Construction Co. v. *Hoffman Enterprises Ltd. Partnership*, 309 Conn. 342, 350, 71 A.3d 480 (2013). "If any facts provable under the express and implied allegations in the plaintiff's complaint support a cause of action . . . the complaint is not vulnerable to a motion to strike." *Bouchard* v. *People's Bank*, 219 Conn. 465, 471, 594 A.2d 1 (1991). On the other hand, "[a] motion to strike is properly granted if the complaint alleges mere conclusions of law that are unsupported by the facts alleged." (Internal quotation marks omitted.) *Santorso* v. *Bristol Hospital*, 308 Conn. 338, 349 (2013).

"'Whenever a party wishes to contest . . . the legal sufficiency of any such complaint . . . or any count thereof, because of the absence of any necessary party . . . that party may do so by filing a motion to strike the contested pleading or part thereof.'" *Wilson* v. *Bradley*, 50 Conn. Supp. 234, 237 (2007) (*Aurigemma, J.*) quoting *George* v. *St. Ann's Church*, 182 Conn. 322, 325 (1980).[1] Practice Book §10-39 provides: "(d) A motion to strike on the ground of the non-joinder of a necessary party or noncompliance with Section 17-56 (b) must give the name and residence of the missing party or interested person or such information as the moving party has as to the identity and residence of the missing party or interested person and must state the missing party's or interested person's interest in the cause of action." Because of the requirement that the missing party's interest be stated in a motion to strike for failure to join an interested party, "speaking" motion to strike are permitted to comply with the rule. See *O'Connell* v. *Zehring*,

[1] The failure to join an indispensable party does not deprive the Court of subject matter jurisdiction unless a statute requires such joinder. See *Izzo* v. *Quinn*, 170 Conn. App. 631, 639 (2017). "'It is well established . . . that an action cannot be defeated due to the nonjoinder or misjoinder of parties, and failure to notify or join indispensable parties does not deprive a court of subject matter jurisdiction. General Statutes § 52-108 . . . . Instead, the remedy for nonjoinder of parties is by motion to strike.'" Id. quoting *Fountain Pointe, LLC* v. *Calpitano*, 144 Conn. App. 624, 648-49 (2013).

2017 WL 2837822 *3 (Conn. Super. 2017) (*Moore, J.*) citing *Bloom* v. *Miklovich*, 11 Conn. App. 323, 332 n.6 (2007).

The Sellers Are Not Necessary Parties to the Claims Asserted.

"'Necessary parties . . . have been described as [p]ersons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. . . . [B]ut if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties.'" *Costello* v. *Goldstein and Peck*, 187 Conn. App. 486, 495 (2019) quoting *Sturman* v. *Socha*, 191 Conn. 1, 6-7 (1983).[2]

Defendants argue that the Sellers are necessary parties because they, not plaintiff, are signatories to the real estate contract with the Buyers (the "Contract"). This argument contradicts allegations in the complaint and ignores the provisions in the operative agreements which require the Buyers to provide the funds to pay the Auctioneer the commission fees agreed to by the Buyers and the Sellers.

The Complaint has two counts: breach of contract and promissory estoppel. The complaint alleges the Sellers hired the Auctioneer to auction the subject property. The Buyer signed the terms of sale as a bidder which required the Buyer to provide a cashier's check to the settlement agent in the amount of $100,000. Prior to the auction the Buyer made an offer to purchase which was accepted by the Sellers. The Auctioneer canceled the auction planned for

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In *Costello*, 187 Conn. App. 495 n.7, the Appellate Court notes the "somewhat archaic" distinction between a "necessary" and an "indispensable" party noted in *Sturman*, 191 Conn. at 6-7.

later that day. The Buyer and Sellers entered into a non-contingent purchase and sale agreement that included as an attachment an "Auction Addendum to Purchase and Sale Agreement." The Buyer failed to close and failed to tender the $170,500 deposit called for in the agreement that was ten percent of the purchase price of $1,705,000.

In support of the motion to strike the Buyer provided a copy of the Contract which acknowledged the "auction-marketing services" provided by the Auctioneer and stated: "[t]he parties hereby acknowledge that the gross offer of $1,705,000.00 is derived from the sum of a bid basis of $1,550,000.00 plus a 10% Buyer's Premium of $155,000.00." The auction addendum signed by the Buyer and Sellers affirmed that, in accordance with the terms of sale delivered to the Buyer prior to execution, the contract price includes a ten percent "Buyer's Premium charged to Buyer", which "shall be utilized to pay the agreed upon commissions due to" the Auctioneer. After the Buyer makes the contract deposit to the closing agent, the agent "will disburse such commissions. . ." to the Auctioneer.

The terms of the operative agreements tend to establish the Auctioneer was a third party beneficiary of the Contract and in equity the Buyer is estopped to deny payment of the "Buyer's Premium" to be paid thereunder for use in paying commissions due the Auctioneer.

In *Hilario's Truck Center, LLC* v. *Rinaldi*, 183 Conn. App. 597, 604-605 (2018), the Appellate Court discussed when a non-party may enforce a contract as a third party beneficiary:

"'A third party beneficiary may enforce a contractual obligation without being in privity with the actual parties to the contract.' . . . 'Therefore, a third party beneficiary who is not a named obligee in a given contract may sue the obligor for breach.' . . . '[T]he ultimate test to be applied [in determining whether a person has a right of action as a third-party beneficiary] is whether the intent of the parties to the contract was that the promisor should assume a direct

obligation to the third party [beneficiary] and . . . that intent is to be determined from the terms of the contract read in the light of the circumstances attending its making, including the motives and purposes of the parties. . . . Although . . . it is not in all instances necessary that there be express language in the contract creating a direct obligation to the claimed third party beneficiary . . . the only way a contract could create a direct obligation between a promisor and a third party beneficiary would have to be . . . because the parties to the contract so intended.' . . . '[B]oth contracting parties must intend to confer enforceable rights in a third party'; . . . in order to give the third party standing to bring suit. This requirement 'rests, in part at least, on the policy of certainty in enforcing contracts,' which entitles each party to a contract 'to know the scope of his or her obligations thereunder.'" (Citations omitted.)

It is evident the parties to the Contract intended that the buyer's premium was to provide the funds to be paid to the Auctioneer as commissions. The Sellers' closing agent was merely a conduit to pay the Auctioneer the commissions it was due. Buyer breached the terms of the addendum by failing to pay the deposits due under the contract, which were to be used to pay the commissions.

The Buyer could also be found to be estopped to deny its promise to make the payment that was supposed to be used to pay the commission to the Auctioneer. In *U.S. Bank Nat. Assoc.* v. *Eichten*, 184 Conn. App. 727, 766-67 (2018), the Appellate Court discussed the doctrine of promissory estoppel:

"'[U]nder the doctrine of promissory estoppel [a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. . . . A fundamental element of promissory estoppel, therefore, is the

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