

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. EILEEN A. RAKOWER

PRESENT: _____

PART 15

Index Number : 652142/2013
JIA, XI MEI
vs
INTELLI-TEC SECURITY SERVICE
Sequence Number : 001
DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). 1, 2

Answering Affidavits — Exhibits _____ No(s). 3, 4

Replying Affidavits _____ No(s). 5

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 9/25/13

[Signature] J.S.C. HON. EILEEN A. RAKOWER

- 1. CHECK ONE: ... CASE DISPOSED ... NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ... MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: ... SETTLE ORDER ... SUBMIT ORDER ... DO NOT POST ... FIDUCIARY APPOINTMENT ... REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
XI MEI JIA, AS ADMINISTRATOR OF THE
ESTATE OF MARTY J. McMILLAN,
Plaintiff,

Index No.
652142/13

**DECISION
and ORDER**

- v -

Mot. Seq. 1

INTELLI-TEC SECURITY SERVICES, INC.,
RUSSELL R. MACDONNELL and
FRANK A. BOLZ,
Defendants.

-----X
HON. EILEEN A. RAKOWER, J.S.C.

In this action, Plaintiff Xi Mei Jia (“Plaintiff”), as administrator of the Estate of Marty J. McMillan (“the Estate”), asserts claims for breach of contract and fraud as against defendant Intelli-Tec Security Services, Inc. (“Intelli-Tec”) and its shareholders and officers Russell R. MacDonnell and Frank A. Bolz based on Defendants’ failure to reimburse her, as administrator of the estate of Marty L. McMillan, for tax liabilities that the Estate incurred as a result of Mr. McMillan’s (“the Decedent”) ownership of shares in Intelli-Tec. Decedent died on November 30, 2008.

Presently before the Court is Defendants’ motion to dismiss Plaintiff’s Complaint pursuant to CPLR §3211(a)(7) and (c). In support, Defendants submit the attorney affirmation of Laura A. Torchio and the affidavit of Russell R. MacDonnell, the Chief Executive Officer of Intelli-Tec. Attached to MacDonnell’s affidavit is a copy of a letter agreement that Intelli-Tec entered into with the Estate of Decedent pursuant to which the Estate sold 100% of its shares back to Intelli-Tec which Plaintiff, as the administrator of the Estate, signed.

CPLR §3211 provides, in relevant part:

(a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

- (1) a defense is founded upon documentary evidence;
- (7) the pleading fails to state a cause of action.

In determining whether dismissal is warranted for failure to state a cause of action, the court must “accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory.” (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91 [1st Dept. 2003]) (internal citations omitted) (*see* CPLR §3211[a][7]).

On a motion to dismiss pursuant to CPLR §3211(a)(1) “the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007]) (internal citations omitted). “When evidentiary material is considered, 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 [1977]) (emphasis added). A movant is entitled to dismissal under CPLR §3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint. (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dept. 2007]) (citation omitted).

Here, Defendants assert that Plaintiff’s breach of contract and fraud claims should be dismissed based on the terms of the letter agreement that Plaintiff signed on behalf of the estate, dated December 21, 2010, which they argue made no promise to reimburse the Estate’s tax liabilities and included a merger clause. In opposition, Plaintiff submits an affidavit, acknowledging that she signed the letter agreement that transferred the stocks but stating that the open issue always remained reimbursement of the Estate’s tax liabilities. Furthermore, Defendants assert that Plaintiff’s fraud claim fails to state a viable claim because it is duplicative of Plaintiff’s breach of contract and that it fails to satisfy the pleading requirements of CPLR §3016(b).

Plaintiff's first cause of action is for breach of contract. "The elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage." (*Flomenbaum v New York Univ.*, 2009 NY Slip Op 8975, *9 [1st Dept. 2009]). Here, the Complaint alleges that Decedent and Defendants, all shareholders of Intelli-Tec, "agreed that, in addition to any salary and benefits they would receive, Intelli-Tec would pay them an annual amount to cover their tax obligations arising from the pass-through of Intelli-Tec's income to its shareholders", that Intelli-Tec thereafter reimbursed Decedent annually for his tax liabilities, and then stopped making payments pursuant to the agreement upon his death although they continued to report income of the corporation as received by Decedent and taxable. Based on these allegations, the Complaint asserts that Defendants have breached their contract and agreement with Decedent by failing to reimburse the Estate as agreed upon causing the Estate to expend the sum of \$136,886.00 to pay the taxes. Turning to the four corners of the Complaint and accepting all allegations as true, Plaintiff has stated a cause of action for breach of contract.

Plaintiff's second cause of action is for fraud. "The elements of a cause of action for fraud are (1) the false representation or concealment of a material existing fact, (2) scienter, (3) deception, (4) reliance, and (5) injury." *House of Spices (India), Inc. v SMJ Servs., Inc.*, 2011 N.Y. Misc. LEXIS 1922 (N.Y. Misc. 2011). "[E]ach of these essential elements must be supported by factual allegations sufficient to satisfy CPLR 3016(b), which requires, in the case of a cause of action based on fraud, that 'the circumstances constituting the wrong shall be stated in detail.'" (*Id.*)(citations omitted).

Plaintiff's second cause of action alleges fraud based on allegations that: "Defendants lured plaintiff into selling Decedent's stock back to the company [Intelli-Tec.] at a reduced price with promise that a separate arrangement would be made to pay her to cover the tax liabilities the Estate incurred," that "Defendants knew when they made these statements that they were false, untrue, and that they had no intention of paying the Estate for tax obligations," that the Estate sold the shares back to Intelli-Tec in reliance on Defendants' false promises that they would cover the Estate's tax obligations. Based on the allegations, Plaintiff alleges that the sale was the result of fraud and should be set aside, or supplemented to reflect the true value of the shares.

However, Defendants submit the letter agreement that Plaintiff signed on behalf of the Estate, dated December 21, 2010, that sets forth the terms of the sale and transfer of the Estate's stocks back to Intelli-Tec. That agreement makes no promise or representation that Intelli-Tec agreed to reimburse the Estate's tax liabilities, and further contains the following merger clause:

5. Entire Agreement. This Agreement represents the entire understanding and agreement between the parties hereto and supersedes any prior understanding, agreements or representations by and between the parties, written or oral, with respect to the subject matter hereto. This Agreement may not be amended, supplemented or discharged, and no provision hereof may be modified or waived except expressly by an instrument in writing signed by all parties hereto.

As such, Defendants have provided documentary evidence that flatly contradicts the factual and legal allegations contained in the second cause of action of the Complaint.

Wherefore, it is hereby

ORDERED that defendants' motion to dismiss is granted only to the extent the second cause of action for fraud contained in Plaintiff's Complaint is dismissed; and it is further

ORDERED that defendants shall file and serve an answer within 20 days of receipt of a copy of this Order with Notice of Entry thereof.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED:

9/25/13



EILEEN A. RAKOWER, J.S.C.