

Rudman v Gail E. Corrale, O.D., PLLC

2010 NY Slip Op 30357(U)

February 16, 2010

Supreme Court, Nassau County

Docket Number: 023002/2009

Judge: Ira B. Warshawsky

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SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

P R E S E N T :

HON. IRA B. WARSHAWSKY,

Justice.

TRIAL/IAS PART 8

ROBERT K. RUDMAN,

Plaintiff,

INDEX NO.: 023002/2009

MOTION DATE: 01/22/2010

MOTION SEQUENCE: 002 and 003

-against-

Action Two

(Formerly Suffolk County Action

Index No. 036847/2009)

GAIL E. CORREALE, O.D., PLLC and

GAIL E. CORREALE, O.D.,

Defendants.

The following papers read on this motion:

Notice of Motion, Affidavit & Exhibits Annexed	1
Notice of Cross Motion, Affirmation, Affidavit & Exhibits Annexed	2
Affirmation of John J. Vizzi & Exhibits Annexed	3
Affirmation in Reply to Opposition to Cross Motion of Harry R. Thomasson, Jr.	4
Supplemental Affirmation of John J. Vizzi & Exhibits Annexed	5
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Supplemental affirmation in Opposition to Motion for Summary Judgment of Harry R. Thomasson, Jr.	7

PRELIMINARY STATEMENT

Robert K. Rudman (hereinafter "Rudman") sued Gail Correale, O.D. and Gail Correale, O.D., PLLC. (hereinafter collectively "Correale") in Suffolk County seeking to recover \$76,506.92 plus interest that is owed under a promissory note and a signed personal guarantee relating to the sale of an optometry practice by Rudman and Frank S. Verdone (hereinafter "Verdone") to Correale. Correale sued Rudman, Verdone and Lenscrafters, Inc (hereinafter "Lenscrafters") in Nassau County seeking damages for fraud and deceit, violation of the New

York Consumer Protection Act, breach of contract, violation of state anti-trust laws, unjust enrichment and seeking equitable relief in the form of a permanent injunction rescinding the promissory note and personal guaranty. The two actions were consolidated in the Commercial Division of the Nassau County Supreme Court for purposes of discovery. Rudman moved for summary judgment in lieu of an answer arguing, *inter alia*, that summary judgment is appropriate based upon the promissory note and the personal guarantee.

Rudman and Verdone entered into an agreement with Correale to sell their optometry practice for the sum of \$500,000; \$375,000 was paid in cash and a promissory note and a personal guarantee were executed by the parties for the remaining sum. Verdone assigned his interest in the sale to Rudman. After the purchase was complete Correale became aware that Lenscrafters was modifying its policy so that its independently owned practices could no longer be sold by the optometrists who owned them to anyone except Lenscrafters. Correale alleges, in a sworn affidavit, that Rudman and Verdone knew about these material changes at the time of the sale and that these changes in Lenscrafters' policy substantially decrease the value of the practice.

Rudman argues that summary judgment is appropriate because of the personal guarantee executed by Correale backing the promissory note. Rudman argues that the very existence of the note and the personal guaranty establish a *prima facie* case and the burden moves to the opposing party to establish the existence of a triable issue of fact or a bona fide defense. Rudman characterizes Correale's opposition to his motion as failing to set forth the claimed defense of fraud in the inducement and as such requests summary judgment as a matter of law. Rudman claims that Correale did not set forth a misrepresentation, the required first element of fraud in the inducement. Additionally it is claimed that Rudman and Verdone did not know of the changes in policy instituted by Lenscrafters at the time of the sale.

Rudman cites a provision in the promissory note and a similar one in the personal guarantee that payment must continue despite any dispute that should arise between the parties as warranting the granting of summary judgment. He characterizes this provision as specifically stating that Correale was obligated to continue payments even if Lenscrafters did not allow the transfer of the practice. (Rider to Contract at 4.). Lastly, Rudman argues that notwithstanding

any fraud that may exist in the sale of the practice, the obligation created by the personal guaranty is unconditional and, consequently, the motion for summary judgment should be granted. (*See Citibank, N.A. v. Plapinger*, 66 N.Y.2d 90, 92 [1985]).

Correale argues that Rudman has failed to sustain his burden necessary to obtain summary judgment since he has failed to demonstrate that Correale does not have a valid defense to the promissory note and personal guaranty. (*See Thornock v. Kinderhill Corp.*, 749 F.Supp 513 [S.D.N.Y. 1990]). Correale contends that if given the chance to prove her allegations at trial rescission will be found to be a proper remedy and defense to the note and guaranty. (*Id.*). The thrust of Correale's argument for rescission is that the failure to reveal the material changes in Lenscrafters' policy constituted fraud, fraudulent inducement and fraud by concealment. Consequently Correale states that had this information been known to her she never would have agreed to buy the practice at all.

Correale argues that the "specific disclaimer" contained in the agreement does not constitute a waiver of Correale's right to rescind on the grounds that the practice may not be transferable to a third party. She contends that in order to waive a fraud claim, she must have known of the facts constituting the fraud, which she did not, and in any case her knowledge or lack thereof of these facts cannot be determined without a trial and ensuing discovery. (*See Citizens and Southern Security Corp. v. Braten*, 733 F.Supp. 655 [S.D.N.Y. 1990]).

Summary judgment exists to expedite civil matters in court by eliminating from the trial calendar those claims which can be resolved as a matter of law. (*Andre v. Pomeroy*, 35 N.Y.2d 361, 364 [1974]). The function of the court, when faced with a motion for summary judgment, is "not to determine credibility or to engage in issue determination, but rather to determine the existence or non-existence of material issues of fact." (*Quinn v. Krumland*, 179 A.D.2d 448, 449 – 450 [1st Dept. 1992]); *see also* (*S.J. Capelin Associates, Inc. v. Globe Mfg. Corp.* 34 N.Y.2d 338, 343 [1974]).

To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented. (*Stillman v. Twentieth Century-Fox Corp.*, 3 N.Y.2d 395, 404 [1957]). Summary judgment is considered a drastic remedy, procedurally equivalent to a trial, and will

not be granted if there is any doubt as to the existence of a triable issue. (*Moskowitz v. Garlock*, 23 A.D.2d 94 [3d Dept. 1965]; (*Crowley's Milk Co. v. Klein*, 24 A.D.2d 920 [3d Dept. 1965]).

On a motion for summary judgment, the evidence will be considered in a light most favorable to the opposing party. (*Weill v. Garfield*, 21 A.D.2d 156 [3d Dept. 1964]). The proof submitted in opposition will be accepted as true and all reasonable inferences drawn in favor of the opposing party. (*Tortorello v. Carlin*, 260 A.D.2d 201, 206 [1st Dept. 2003]). The opposing party is obliged to come forward and bare its proof, by affidavit of an individual with personal knowledge, or with an attorney's affirmation to which appended material in admissible form, and the failure to do so may lead the court to believe that there is no triable issue of fact. (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]).

DISCUSSION

It is clear that the possibility of the existence of fraud in the agreement to purchase the optometry practice precludes summary judgment on the personal guarantee since it presents a material issue of fact. Correale, in her sworn affidavit, is alleging fraud in the sale of the optometry practice. Rudman responds by arguing that even if there was fraud, Correale waived it by the specific language in the agreement that he claims constitutes a waiver of the claims or defenses asserted. Rudman's position overreaches; in order to constitute a waiver of legal rights, the party that is claiming fraud must have acted with full knowledge of his or her rights and of the material facts constituting the fraud. (*Citizens and Southern Securities Corp.*, 733 F.Supp. at 668). For purposes of a motion for summary judgment, the Court gives weight to the lack of any pleading by Rudman that he did not know of the policy changes prior to the sale of the practice nor any pleading that the policy changes were revealed to Correale in a timely manner. Simply put, discovery is necessary to determine the facts necessary for the interpretation of the waiver.

Rudman's argument that Correale's claim for fraud in the inducement cannot stand because she has failed to set forth an affirmative misrepresentation of fact cannot be determined without inquiry into the knowledge of the parties at the time that the agreement was reached and entered into. It seems to the Court that there is a material issue of fact as to whether there was an affirmative misrepresentation by Rudman and Verdone.

Further, Rudman's claim that the specific disclaimer precludes this action from moving forward is without merit. Rudman's argument that the waiver prohibits liability even if Lenscrafters did not allow sale or transfer of the practices is not immediately clear from the text of the document. To accept Rudman's interpretation of the waiver provision, one is required to both look beyond the four corners of the document and to infer that claims of fraud were what Correale intended to waive when she agreed to the terms of the purchase. The language of the waiver clause of the note is exceedingly broad and does not say on its face that it was meant to include waiver of claims for fraud, fraud in the inducement, fraud by concealment and deceit. The courts have been reluctant to enforce disclaimers of liability when there are allegations of fraud, misrepresentation and bad faith even when such disclaimers are so broadly stated. (*Laudisio v. Amoco Oil Co.*, 437 N.Y.S.2d 502, 505 [Sup Ct 1981]). Such allegations are present here and the Court concludes that summary judgment on the personal guarantee is inappropriate at this stage.

Rudman next relies on the argument that the guarantees of payment contained in the promissory note and the personal guaranty are unconditional regardless of whether there was any fraud in the agreement to purchase the optometry practice. Given Correale's allegations of fraud in the underlying transaction, it would be inappropriate to order enforcement of that guarantee as a matter of law at this stage. A well established principle of contract law holds that "all contemporaneous instruments between the same parties relating to the same subject matter are to be read together and interpreted as forming part of one and the same transaction." (*TBS Enter., Inc. v. Grobe*, 114 A.D.2d 445, 446 [2d Dept 1985], quoting *Evans Prod. Co. v. Decker*, 52 A.D.2d 991, 992 [3d Dept 1976]). Since the promissory note and the personal guaranty relate to the same subject matter between the same parties and there are allegations of fraud in the agreement to purchase the optometry practice the Court finds it inequitable to grant summary judgment at this time. There remains a triable issue of fact as to the existence of fraud in the agreement. Summary judgment is therefore denied.

Any requested relief not specifically granted herein is denied.

A Preliminary Conference (see NYCRR 202.12) shall be held on this matter and Correale v. Lenscrafters, Index No. 012201/2008, on March 22, 2010, at 9:30 A.M., before the undersigned in the Supreme Court of Nassau County.

Counsel for all parties are reminded that this matter has been assigned to the Commercial Division of the Supreme Court of Nassau County and the parties are directed to follow the Rules of this Division.

This constitutes the decision and order of the Court.

Dated: February 16, 2010


J.S.C.

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NASSAU COUNTY
COUNTY CLERK'S OFFICE