

Redi Corporation U.S.A. v Karabashev

2004 NY Slip Op 30004(U)

March 18, 2004

Supreme Court, New York County

Docket Number: 0602224

Judge: Diane A. Lebedeff

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. DIANE A. LEBEDEFF PART 8
Justice

Redi Corporation U.S.A.

INDEX NO. 602224/03
MOTION DATE 1/8/04
MOTION SEQ. NO. 001
MOTION CAL. NO. 06

- v -

Karabashev, Ali

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

Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibtr ...
Answering Affidavits — Exhibtr _____
Replying Affidavits _____

PAPERS NUMBERED

_____ } 1-6

Cross-Motion: Yes No

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

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

CASE IS RESPECTFULLY REFERRED TO

J.S.C.

FILED
MAR 23 2004
COUNTY CLERK'S OFFICE
NEW YORK

MAR 18 2004

Dr

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: I.A.S. PART 8

-----X

REDI CORPORATION U.S.A. and SAM KISLIN,

Plaintiffs,

-against-

Index No. 602224/03
Mot. Seq. No. 001

ALT KARABASHEV, individually and doing
business as "N.P.K.O. Mals," and MIKHAIL I.
SHAMIS,

Defendants.

-----X

DIANE A. LEBEDEFF, J.:

Defendant Mikhail Shamis moves to dismiss the first cause of action for fraud on the grounds that it does not state a cause of action (CPLR 3211 [a][7]). Defendant has withdrawn the branch of the motion seeking dismissal on the grounds of lack of personal jurisdiction, conceding that if plaintiff's assertions concerning the location of events is demonstrated then the assertion of personal jurisdiction is proper pursuant to **CPLR 302 (a)(2)**.

When considering a motion to dismiss, it is well settled that "the sole criterion is whether the pleading states a cause of action, **and** if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail" (*Guggenheimer v. Ginzburg*, **43 N.Y.2d 268,275** [1977]). The factual allegations of the complaint are to be taken as true, and the complaint must be interpreted in a fair and reasonable manner (see, e.g., *Tobin v. Grossman*, **24 N.Y.2d 609**,

612 [1969]; *Williams v. Williams*, 23 N.Y.2d 592 [1969]). Affidavits “may be received ... to remedy defects in the complaint” (*Rovello v. Orofino Realty Co., Inc.*, 40 N.Y.2d 633 [1976]).

In order to plead a *prima facie* case of fraud, a plaintiff must allege defendant made a misrepresentation of material fact with *scienter*, and that plaintiff reasonably relied thereon, resulting in injury (*LaSalle Nut. Bunk v. Ernst & Young LLP*, 285 A.D.2d 101, 109 [1st Dept. 2001]; *Skillgames, LLC v. Brody* 1 A.D.3d 247 [1 Dept. 2003]). Each element must be pleaded with sufficient particularity “to clearly inform a defendant with respect to the incidents complained of” (CPLR 3016[b]), but the requirement “is not to be interpreted so strictly as to prevent an otherwise valid cause of action in situations where it may be ‘impossible to state in detail the circumstances constituting a fraud’” (*Lanzi v. Brooks*, 43 N.Y.2d 778, 780 [1977], quoting *Jered Contracting Corp. v. New York City Tr. Auth.*, 22 N.Y.2d 187, 194 [1968]).

The complaint alleges that plaintiff Redi Corporation (“Redi Corp.”) sold frozen chicken parts to companies owned or controlled by defendant Shamis, for export to buyers in Russia and Eastern Europe, and that those companies owe plaintiffs an aggregate balance of over \$1.5 million. Plaintiffs further allege that at some point in early or mid-1999, defendants Shamis and Rarabashev represented to plaintiff Kislin, that Karabashev would pay \$1.5 million to Redi-Corp., and that, as collateral, Karabashev would arrange for an interest in a certain copper mill he owned in Russia to be issued to Kislin or Redi Corp., and Karabashev would sign a promissory note (complaint, para. 10). No payment has been made; Karabashev did provide a promissory note in the principal sum of \$1.5

million, payable by August 24,2000.

The first cause of action alleges that both defendants defrauded plaintiffs; the second cause of action is a breach of contract claim to collect on the promissory note against Karabashev. The fraud claim asserts that the representations concerning collateral (Complaint, para. 10), were false in that Karabashev did not own any interest in a Russian copper mill, and did not intend to honor his obligation under the promissory note. Plaintiffs allege that these representations were made in order to induce them to forego collection efforts, that they in fact relied thereon, and that but for the delay in attempting to collect against the various Shamis companies, they would have been able to recover the amount owed from each of the companies prior to their going out of business. Defendant Shamis presents several arguments in support of dismissal.

First, he argues that the pleading fails to specify who made the complained of representations, and when and where they were made. Plaintiff Kislin provides further detail in his affidavit in opposition to the motion, stating that both defendants made the alleged misrepresentations, in person and over the telephone.

Second, as to questions regarding reasonable reliance, the pleadings concerning misrepresentations and reasonable reliance are adequate to give defendant: notice of the claim, The motion does not demonstrate that reliance is not cognizable or s otherwise unsupportable as a matter of law.

Third, defendant argues the fraud claim is invalid because it is based only on a breach of contractual promises. As to the this point, it is often stated that “a contract action may not be converted into one for fraud by the mere additional allegation that the

contracting party did not intend to meet its contractual obligation,” and that such fraud claims will be dismissed as duplicative of the underlying breach of contract claim (*Bronx Store Equipment Co., Znc. v. Westbury Brooklyn Associates, L.P.*, 280 A.D.2d 352 [1st Dept. 2001]). With respect to defendant Shamis, the fraud claim cannot be dismissed as merely duplicative because there is no viable breach of contract claim against him and the claim against Karabashev is still viable (*Richbell Information Services, Inc. v. 529 Jupiter Partners, L.P.*, 309 A.D.2d 288 [1st Dept. 2003], “a fraud claim may be dismissed as duplicative only as against a defendant against whom the related contract claim is viable,” and once main fraud claim is dismissed as to “direct actor,” it also falls as to remaining “accessorial” defendants).

Fourth, in relation to the pleading of *scienter*, while arguably adequate as to Karabashev, defendant Shamis’s related point is that his fraudulent intent cannot be inferred merely ~~from~~ the fact that his co-defendant breached his promises. This argument is persuasive. When a fraud claim is predicated on breach of a promissory representation or future intentions, the complaint “must allege facts to show that defendant, at the time the promissory representation was made, never intended to honor or act on [his] statement” (*Roney v. Janis*, 77 A.D.2d 555 [1st Dept. 1980]; see also *Abelman v. Shoratlantic Development Co., Inc.*, 153 A.D.2d 821 [2d Dept. 1989], dismissing fraud complaint which was “totally devoid of factual allegations that the defendants knew, at the time the statements were uttered, that they were false, and that at that time the defendants had the then present intent to deceive”; see *Graubard Mollen Dannett & Horowitz v. Moskovitz*, 86 N.Y.2d 112, 122[1995]). Here, there is no allegation that Shamis knew that co-defendant

Karabashev had a present intent not to pay the promissory note a year later, or that Karabashev did not own the copper mill (see *Chun Hye Kang-Kim v. Feldman*, 121 A.D.2d 590 [2d Dept. 1986], fraud claim against accountant defendant dismissed, absent any allegation or evidence that he knew his co-defendant “never intended to pay his proportionate share of taxes **due** ... at the time he allegedly made such representation”).

Nor do the facts set forth in the complaint give rise to an inference that Shamis acted with knowledge that Karabashev had a present intent not to perform his promises with respect to the promissory note and was unable to transfer any interest in a copper mine. According to the bare facts pleaded and Kislin’s affidavit, both defendants engaged in the import/export business and Kislin had known and done business with each of them for a number of years prior to the relevant events. He understood that Shamis lived in California, and Karabashev lived in New Jersey. In mid-1999, Shamis had no personal liability to plaintiff Redi Corp. on any of his companies’ various debts, and was owed \$1.5 million by Karabashev in relation to other transactions. Both defendants offered to have Karabashev pay the \$1.5 million debt directly to plaintiffs Redi Corp. and/or Kislin, in order to satisfy the companies’ obligations. Plaintiffs apparently accepted, provided that Karabashev sign a promissory note, which he did, and also based on Karabashev’s promise to assign shares in a copper mill, which never occurred. At some unspecified time, the companies went out of business and plaintiffs lost any chance to collect directly from them, and Kislin alleges that he “believe[s]” Redi Corp. would have been able to collect from the companies if he had sought to recover directly instead of relying on Karabashev’s promises to pay. Nothing in these facts raises an inference that Shamis knew Karabashev did not

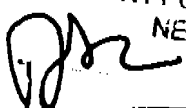
intend to fulfill his obligations under the promissory note and did not own a copper mill, at the time he was negotiating with plaintiffs.

The court observes that fraudulent intent not to perform a promise cannot be inferred merely from the fact of nonperformance (*Lanzi v. Brooks*, 54 A.D.2d 1057, 1058 [1st Dept. 1976], aff'd 43 N.Y.2d 778 [1977]), particularly from the nonperformance of another person (*Wilmoth v. Sandor*, 259 A.D.2d 252 [1st Dept. 1999], "No cause of action for **fraud** arises from allegations of a lack of intent to perform under a proposed contract, nor from expressions of hope for the future performance of entities subject to defendants' control," citations omitted; see *Non-Linear Trading Co. v. Braddis Assocs.*, 243 A.D.2d 107, 118-119 [1st Dept. 1998]).

Accordingly, *the* motion to *dismiss* is granted as to defendant Shamis, with leave to move to amend based on a sufficient showing of facts supporting an inference of *scienter*. The parties are directed to appear for a preliminary conference to be held in ~~Part~~ 8 (Room 540) on April 19, 2004, at 9:45 a.m.

This decision constitutes the order of the court.

Dated: March 18, 2004

FILED
MAR 23 2004
COUNTY CLERK'S OFFICE
NEW YORK


J.S.C.