

M&A Oasis, Inc. v MTM Associates

2004 NY Slip Op 30086(U)

December 16, 2004

Supreme Court, New York County

Docket Number: 0124195/1951

Judge: Paul G. Feinman

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

PRESENT: HON. PAUL G. FEINMAN
Justice

PART 7

0124195/1997

M&A OASIS
VS
MTM ASSOCIATES

SEQ 17
DISMISS

INDEX NO. 124195/97
MOTION DATE 8-5-04
MOTION SEQ. NO. 017
MOTION CAL. NO. _____

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

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits Memo

PAPERS NUMBERED
<u>1, 1A</u>
<u>2, 2A</u>
<u>3A</u>

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion *is decided in accordance with the annexed memorandum decision.*

FILED
DEC 23 2004
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/16/04 Paul G. Feinman
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check If appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : CIVIL TERM: IAS PART 7

-----X
M&A OASIS, INC.,

Plaintiff,

-against-

MTM ASSOCIATES, CAPITAL PROPERTIES, INC.
and SOCIÉTÉ FONCIÈRE POUR LES
INVESTISSEMENTS EXTÉRIEURS, N.V.,

Defendants.

Index No. 124195/97
Oral Arg. Date: 8/5/04
Mot. Seq. Nos. 017 & 018
DECISION & ORDER

-----X
Paul G. Feinman, J.:

Defendants MTM Associates and Capital Properties, Inc., an MTM general partner, move for an order pursuant to CPLR 3211 (a) (1) and (a) (7) dismissing the fifth and sixth causes of action for fraudulent inducement and fraudulent concealment asserted in the fourth amended complaint (motion bearing sequence number 017). Defendant Société Foncière Pour Les Investissements Extérieurs, N.V., (SOFIE) moves for an order pursuant to CPLR 3001, 3016 (b), 3017 (b), 3024 (b), and 3211 dismissing the fourth amended complaint with prejudice (motion bearing sequence number 018). The two motions are consolidated for decision and both are denied for the below-stated reasons.

This action arises out of a July 31, 1986, agreement pursuant to which MTM Associates and non-party Rouhallah Kalimian, the predecessor-in-interest to plaintiff M&A Oasis, Inc., divided four contiguous properties that they had simultaneously purchased through a nominee for \$3.3 million. In relevant part, the 1986 agreement

memorializes the parties agreement that, in exchange for advancing MTM Associates \$100,000 to complete its purchase of two of the properties, Kalimian received a right of first refusal to purchase the properties and, in the event that MTM Associates should obtain a variance or sell or develop the property in accordance with specified criteria, the right to repayment of the \$100,000 advance. Kalimian recorded the right of first refusal on August 21, 1986.

In connection with MTM Associates' purchase of the property, in July 1986, SOFIE loaned MTM Associates the principal amount of \$800,000 and MTM Associates executed a loan agreement and a promissory note. No mortgage was initially recorded, allegedly in order to save the mortgage recording tax that would otherwise have had to been paid. SOFIE did not record the mortgage until April 1991, when the creditors of a former tenant began asserting liens against the property.

On December 30, 1997, Kalimian commenced this action on allegations that the right of first refusal had been triggered by MTM Associates' 1996 negotiations to sell the 150 Wooster Street property to non-party Soho Oasis, Inc., a building tenant, or by the development of the property. Kalimian contended that, therefore, MTM Associates was contractually obligated to repay the advance. Soho Oasis was formerly an intervenor-defendant in this action and is affiliated with plaintiff M&A Oasis, Inc. During the pendency of this action, Kalimian sold his rights under the 1986 agreement to M&A Oasis and M&A Oasis was substituted in the caption as plaintiff.

Subsequently, M&A Oasis moved for leave to amend the complaint to add a variety of claims, including claims for fraudulent inducement and fraudulent concealment arising primarily out of allegations that, prior to entering into the 1986 agreement, MTM Associates orally agreed to an "all-cash" transaction and then obtained a mortgage. By memorandum decision and order dated March 27, 2002, the Honorable Louise Gruner Gans granted the motion in part and denied the motion in part. The Appellate Division, First Department affirmed the order, as modified, and granted leave to add the two proposed fraud claims (see M&A Oasis, Inc. v MTM Assocs., L.P., 307 AD2d 872 [1st Dept 2003]). M&A Oasis subsequently served and filed a fourth amended complaint which includes the fraud claims.

In its motion, MTM Associates seeks to dismiss the fraud claims on grounds that the terms of the 1986 agreement demonstrate that it made no misrepresentations regarding the financing of the purchase and that, to hold otherwise, would be to impermissibly rewrite the agreement. MTM Associates also contends that M&A Oasis cannot demonstrate that it relied on any representations or omissions or sustained any damage as the result of the alleged fraud.

In opposition, M&A Oasis contends that the motion is barred by the doctrine of law of the case and that the fraud claims have been adjudicated legally sufficient. M&A Oasis also contends that the fraud claims are not barred by the documentary evidence because the parol evidence rule does not apply to claims of fraud arising out of facts

extrinsic to the contract.

MTM Associates' motion is denied. On a motion addressed to the sufficiency of the pleadings, the court must accept each and every allegation as true and liberally construe the allegations in the light most favorable to the pleading party (Guggenheimer v Ginzburg, 43 NY2d 268 [1977]; see CPLR 3211 [a] [7]). The court's role is to "determine only whether the facts as alleged fit within any cognizable legal theory" (Leon v Martinez, 84 NY2d 83, 87-88 [1994]). Where the grounds for dismissal are founded upon documentary evidence, "the documents relied upon must resolve all of the factual issues as a matter of law" or dismissal will be denied (Weiss v Cuddy & Feder, 200 AD2d 665, 667 [2d Dept 1994]; see CPLR 3211 [a] [1]).

In the fraudulent inducement claim, M&A Oasis alleges that, in 1986, Kalimian and MTM Associates and Capital Properties orally agreed that the purchase of the Wooster Street properties would be an "all-cash" transaction, i.e., one without any mortgage financing. M&A Oasis contends that Kalimian would not have entered into the 1986 agreement or advanced MTM Associates the \$100,000, had he known that MTM Associates was financing a significant portion of its share of the properties' total purchase price. In a related claim, M&A Oasis alleges that MTM Associates and Capital Properties fraudulently intentionally concealed from Kalimian the existence of the mortgage loan agreement and promissory note, which it had executed three days prior to execution of the 1986 agreement, and its almost immediate default on its mortgage

payment obligation. The arrears now total approximately \$3 million. M&A Oasis alleges that MTM Associates and Capital Properties also concealed from Kalimian the fact that the sole shareholder of the mortgagee (SOFIE) is the mother of one of the principals (Farzad A. Rastegar) of the mortgagor (MTM Associates). M&A Oasis further alleges that it first learned of the mortgage's existence in late 1998 and, in March 2000, first learned of the family relationship between MTM Associates and its lender. In both claims, M&A Associates alleges that MTM Associates' and Capital Properties' fraudulent conduct, and the resulting \$3 million debt on the property, has rendered its right of first refusal impractical to exercise and, therefore, worthless.

Movants' contention that the claims do not set forth sufficient factual allegations in support of the necessary elements of fraud is without merit. To succeed on a claim of fraudulent inducement to contract, the plaintiff must demonstrate the existence of an intentional misrepresentation of present fact, rather than of future intent, collateral to the contract and which induced the plaintiff to enter into the contract (Deerfield Communications Corp. v Chesebrough-Ponds, Inc., 68 NY2d 954 [1986]). A claim of fraudulent concealment is predicated on an act of concealment of a material fact not readily available to the plaintiff, a duty to disclose the fact, scienter, justifiable reliance, and injury (Kaufman v Cohen, 307 AD2d 113 [1st Dept 2003]; P.T. Bank Central Asia v ABN AMRO Bank N.V., 301 AD2d 373 [1st Dept 2003]).

In granting leave to amend the complaint to assert the fraud claims at issue here,

the Appellate Division, First Department held that the proposed claims "are sufficiently specific" in that M&A Oasis has alleged an affirmative misrepresentation and a failure to disclose, and that M&A Oasis "established a prima facie basis" for each claim (M&A Oasis, Inc. v MTM Assocs., L.P., 307 AD2d at 873-74, citing Lanzi v Brooks, 43 NY2d 778 [1977]; see CPLR 3016 [b]). Therefore, pursuant to the doctrine of law of the case, whether the fraud claims are legally sufficient has been judicially determined and may not be reconsidered here, in the same litigation (see Shawangunk Conservancy, Inc. v Fink, 305 AD2d 902 [3d Dept 2003] [where party afforded full and fair opportunity to litigate issue, Appellate Division decision on that issue becomes law of the case precluding further litigation on the issue]; Holloway v Cha Cha Laundry, Inc., 97 AD2d 385 [1st Dept 1983]).

In any event, and assuming the doctrine is not applicable here, in the fourth amended complaint, M&A Oasis has adequately alleged sufficient facts in support of each of the required elements detailed above to satisfy the pleading requirements imposed by the CPLR and has stated viable causes of action for fraudulent inducement and fraudulent concealment.

Also without merit is movants' contention that the fraud claims are barred by the terms of the 1986 agreement. The Appellate Division, First Department has held that, because the 1986 agreement upon which M&A Oasis bases its contractual claims does not require the purchase of the property to be an all-cash transaction, the alleged

misrepresentation that it would be all cash "is not duplicative of [M&A Oasis'] breach of contract claim" (M&A Oasis, Inc. v MTM Assocs., L.P., 307 AD2d at 873, citing Deerfield Communications Corp. v Chesebrough-Ponds, Inc., 68 NY2d 954, supra).

Contrary to movants' reasoning, the fact that the 1986 agreement does not limit the financing of the purchase price and does not require the purchase to be all cash, does not conclusively demonstrate that financing was permitted. Instead, it means simply that the alleged fraudulent representation is extrinsic to the 1986 agreement and does not directly contradict its terms. For this reason, the 1986 agreement upon which MTM Associates relies and the parol evidence rule do not bar assertion of the fraud claims.

The court notes, as did the Appellate Division, that movants' contentions regarding the parties' intent and knowledge at the time of contracting and M&A Oasis' reliance on hearsay evidence raise issues not relevant to a motion addressed to the sufficiency of the pleadings, inasmuch as M&A Oasis has established a prima facie basis for the claims (see M&A Oasis, Inc. v MTM Assocs., L.P., 307 AD2d 872, supra).

For this reason as well, movants' contention, that M&A Oasis cannot demonstrate the element of damage because the right of first refusal was recorded prior to the recording of the mortgage, is premature. M&A Oasis has adequately alleged that its predecessor, Kalimian, would not have contracted, had he known of the existence of the mortgage, and that the right of first refusal has been eviscerated by movants' concealment of the mortgage and MTM Associates' default.

Similarly, the branches of the motion to dismiss the fraudulent inducement and concealment claims asserted against Capital Properties are denied. Contrary to Capital Properties' contention, the fraud claims include sufficient factual allegations that Capital Properties, in conjunction with MTM Associates and as its managing partner, actively participated in the scheme to defraud Kalimian and intentionally misrepresented to Kalimian that the purchase would be all cash and bore a duty to disclose to Kalimian the existence of the mortgage and default, yet concealed these facts from him.

For all these reasons, the motion to dismiss the fraudulent inducement and concealment claims asserted against MTM Associates and Capital Properties is denied.

In SOFIE's motion to dismiss the fourth amended complaint, it and M&A Oasis dispute whether the fifth, sixth, seventh, and eighth causes of action sounding in fraud and contract and requesting declaratory relief are legally viable. Pursuant to court order, M&A Oasis joined SOFIE as a named defendant and asserted four causes of action against it based on theories of fraudulent inducement, fraudulent concealment, and breach of the implied covenant of good faith and fair dealing, and requesting a declaratory judgment piercing SOFIE's corporate veil and finding SOFIE to be MTM Associates' alter ego (see M&A Oasis, Inc. v MTM Assocs., L.P., 307 AD2d 872, supra).

The claims are based on factual allegations by M&A Oasis that, in 1986, MTM Associates, together with Capital Properties and SOFIE, nominally in the name of the mother of Rastegar, Capital Properties' principal, advised Kalimian that it lacked

sufficient funds to fulfill its share of the purchase price and refused to proceed with the closing, unless Kalimian agreed to advance it \$100,000. M&A Oasis also alleges that they advised Kalimian that the purchase would be all cash. Kalimian and MTM Associates, allegedly through Capital Properties and SOFIE, entered into the 1986 agreement providing for the advance in consideration of the right of first refusal. M&A Oasis also alleges that MTM Associates and Capital Properties secretly formed SOFIE and entered into a sham mortgage loan agreement and promissory note for the express purpose of eviscerating and defeating Kalimian's right of first refusal, permitted the interest charges to accrue so that the property could never appear to generate enough profit to trigger MTM Associates' obligation to repay the advance, and planned, in bad faith, a "friendly" foreclosure on the property.

SOFIE now seeks to dismiss the fifth, sixth, and seventh causes of action for fraudulent inducement, fraudulent concealment, and breach of the implied duties of good faith and fair dealing. SOFIE contends that it cannot be held liable for fraud because it was not a signatory to the 1986 agreement and because the fourth amended complaint sets forth no factual allegations of direct communications between SOFIE and M&A Oasis or any relationship from which a duty to disclose may be held to arise. SOFIE also seeks to dismiss the eighth cause of action for a declaratory judgment piercing the corporate veil and finding SOFIE to be the alter ego of MTM Associates and Capital Properties on the ground that M&A Oasis has failed to adequately specify the rights and other legal

relations on which the declaration is requested and whether further or consequential relief is, or could be, claimed (see CPLR 3017 [b]).

In making these arguments, SOFIE overlooks the allegations concerning a close connection between it and its codefendants. M&A Oasis has adequately alleged that SOFIE was intentionally created by MTM Associates and Capital Properties as a tool to give effect to their plan to defraud Kalimian out of the value of the right of first refusal and the right to repayment of the \$100,000 advance. M&A Oasis has also adequately alleged that these defendants dominated SOFIE and that SOFIE did not observe the proper corporate formalities (Matter of Morris v New York State Dept. of Taxation & Fin., 82 NY2d 135 [1993]; Heineman v S & S Mach. Corp., 750 F Supp 1179 [ED NY 1990]; see M&A Oasis, Inc. v MTM Assocs., L.P., 307 AD2d 872, supra). The facts that SOFIE is owned by the mother of one of the principals of the mortgagor and that the original \$800,000 loan has increased to approximately \$3 million because of MTM Associates' default on most of its mortgage payments may be held by the trier of fact to demonstrate that the mortgage was indeed a sham. Therefore, the fraud claims asserted against SOFIE are legally cognizable to the same extent that they are viable against MTM Associates and Capital Associates.

Moreover, M&A Oasis has satisfied the declaratory judgment demand pleading requirements by requesting that SOFIE's corporate structure be set aside and a judgment be entered declaring that SOFIE is its codefendants' alter ego (see CPLR 3017 [b]).

Finally, that branch of SOFIE's motion which seeks to strike certain language from the eighth cause of action as irrelevant, scandalous, and prejudicial is denied as without merit (see CPLR 3024 [b]).

The court has considered defendants' remaining contentions on both motions and finds them to be without merit.

Accordingly, it is

ORDERED that defendants MTM Associates and Capital Properties, Inc.'s motion to dismiss the fifth and sixth causes of action for fraudulent inducement and fraudulent concealment asserted in the fourth amended complaint (motion bearing sequence number 017) is denied; and it is further

ORDERED that defendant Société Foncière Pour Les Investissements Extérieurs, N.V.'s motion to dismiss the fourth amended complaint (motion bearing sequence number 018) is denied.

This constitutes the decision and order of the court.

Dated: December 16, 2004
New York, New York



J.S.C.

FILED

DEC 23 2004

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