

Dweck v Oppenheimer & Co., Inc.

2005 NY Slip Op 30014(U)

July 22, 2005

Supreme Court, New York County

Docket Number: 0_30011/7179

Judge: Karla Moskowitz

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

PRESENT: Hon. KARLA MOSKOWITZ PART 03
Justice

-----x
JACK S. DWECK,

Plaintiff,

-against-

OPPENHEIMER & CO., INC. and MATT
STEINFELD,

Defendants.
-----x

INDEX NO. 117179/2004
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

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

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____


Cross-Motion: Yes No

Upon the foregoing papers, it is

ORDERED that this motion is decided in accordance with the accompanying Decision and Order.

FILED
JUL 29 2005
NEW YORK
COUNTY CLERK'S OFFICE

Dated: July 29 2005



KARLA MOSKOWITZ J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 3

-----X
JACK S. DWECK,

Index No. 117179/2004

-against-

OPPENHEIMER & CO., INC. and MATT
STEINFELD,

Plaintiff

FILED

JUL 29 2005

NEW YORK
COUNTY CLERKS OFFICE

DECISION and ORDER

Defendants

-----X
KARLA MOSKOWITZ, J:

The complaint in this action alleges a bait and switch scheme to which plaintiff did not succumb. By this motion (seq. #1), defendants Oppenheimer & Co. and Matt Steinfeld move to dismiss the complaint. For the foregoing reasons, the court grants the motion.

On either October 7 or 8, 2004, co-defendant Matthew Steinfeld (“Steinfeld”), a broker for defendant Oppenheimer & Co. had three telephone conversations with plaintiff, Jack S. Dweck (“Dweck”) (Affidavit of Jack Dweck Sworn to April 1, 2005 at ¶3). The first phone call was at 11:02 A.M. in which Steinfeld offered to sell to Dweck \$500,000 of New York City Municipal Finance Authority Water and Sewer System Revenue bonds (the “Bonds”) (*id.*). The Bonds had a coupon of 5% and due date of June 15, 2035 (*id.*). Dweck did not purchase the Bonds during this initial phone call with Steinfeld (*id.*).

In a second phone call at 11:26 A.M. the same day, Dweck called Steinfeld and agreed to purchase all \$500,000 of the Bonds (*id.*; May 5, 2005 Transcript of Oral Argument [“Tr.”] pg. 8). Although Dweck had an account with Oppenheimer from years earlier, Steinfeld obtained Dweck’s personal information including Dweck’s social

security number, his approximate net worth and earnings (February 11, 2005 Dweck Amended Complaint at ¶¶ 8, 9; Dweck Affidavit at ¶3). Steinfeld thanked Dweck for purchasing the Bonds and concluded the second phone call (Dweck Affidavit at ¶3).

The third and final phone call was at 11:46 A.M., some twenty four minutes later (*id.*). Steinfeld called to tell Dweck that the Bonds were no longer available (*id.*; Dweck Amended Complaint at ¶¶ 9, 10). Steinfeld explained that someone else purchased the Bonds 15-20 minutes earlier, but offered to sell to Dweck \$45,000 worth of Seattle, WA Port Authority bonds as a substitute (Dweck Amended Complaint at ¶¶ 9, 10, 26, 27; Dweck Affidavit at ¶3). The plaintiff did not purchase the substitute bonds. According to the plaintiff, there were no transactions as large as \$500,000 of the Bonds on either October 7, 2004 or October 8, 2004 (Dweck Amended Complaint at ¶46; Dweck Affidavit at ¶4). Only \$25,000 and \$10,000 trades occurred on those days (Dweck Affidavit at ¶4). Hence, the plaintiff surmises that defendants were trying to scam him into purchasing an inferior product.

Dweck alleges six causes of action in his amended complaint: (1) breach of contract; (2) declaratory judgment; (3) specific performance; (4) fraudulent inducement and bait and switch; (5) violation of GBL § 349; and (6) fraud and deceit. During oral argument on May 5, 2005, the Court dismissed the claims for a declaratory judgment, specific performance and violation of GBL § 349. The Court also denied plaintiff's cross-motion pursuant to CPLR §3211(c) for summary judgment (Tr. pg. 13). This decision addresses the remaining causes of action for breach of contract and fraud.

DISCUSSION

I. Breach of Contract

For breach of contract, the plaintiff must allege facts showing: (1) an agreement; (2) plaintiff's performance; (3) defendant's breach of that agreement; and (4) damages. (*see Furia v. Furia*, 116 AD2d 694, 695 [2d Dept 1986]). First, the Court fails to see how the plaintiff, who did not pay any money to the defendants, meets the second prong – performance of the contract. Second, the allegations in the complaint fail to allege any compensable damages (*see Gordon v. Dino De Laurentiis Corp.*, 141 AD2d 435, 436 [1st Dept 1988]; *Arcidiacono v. Maizes & Maizes, LLP*, 8 AD3d 119, 120 [1st Dept 2004]; *Fowler v. American Lawyer Media, Inc.*, 306 AD2d 113, 113 [1st Dept 2003]).

Plaintiff states that, as a result of the breach of contract, he “suffered incidental, consequential and foreseeable damages, which include all unrealized profits which would have resulted to the plaintiff from the purchase and re-sale of the bonds.” (Amended Complaint of Jack Dweck at ¶14). However, plaintiff has not refuted defendants' showing that he could have purchased the Bonds elsewhere and he fails to identify how he was harmed if the Bonds were available on the open market (*see Gordon*, 141 AD2d at 436).

The plaintiff also argues that defendants induced him to provide personal information to the defendants. Plaintiff alleges no discernable harm from providing that information. Defendants presumably already had plaintiff's personal information because plaintiff was, as he alleges, already a customer (*see id.* [information not confidential or secret because already in defendant's possession]).

Therefore, the Court dismisses plaintiff's breach of contract claim.

II. Fraud

To allege fraud, the plaintiff must show (1) a representation of material fact; (2) falsity; (3) scienter; (4) reliance; and (5) injury or damage (*see Lama Holding Co. v. Smith Barney Inc.*, 88 NY2d 413, 421 [1996]). For the same reasons that the breach of contract claim fails, the fraud claim also fails, namely, for lack of injury or damages (*see id.*). In addition, as defendant never purchased the substitute bonds, it is difficult to see where there is reliance, another requisite element for fraud (*see id.*).

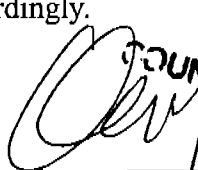
To the extent plaintiff has requested leave to replead, the Court denies permission. Plaintiff neither sustained an injury nor suffered any damages, and no amount of repleading can change that omission.

Accordingly it is

Ordered that defendants Oppenheimer & Co. and Matt Steinfeld's motion to dismiss is granted and the complaint is dismissed in its entirety.

The Clerk is directed to enter judgment accordingly.

Dated: July 22, 2005



J.S.C.

FILED

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