

Kalikow v Hochfelder
2005 NY Slip Op 30607(U)
March 11, 2005
Supreme Court, New York County
Docket Number: 602965/02
Judge: Charles E. Ramos
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Charles Edward Ramos
Justice

PART 53

0602965/2002

KALIKOW, N. RICHARD
VS
HOCHFELDER, ADAM C.

SEQ 6

SUMMARY JUDGMENT

EX NO. _____

FILED DATE _____

FILED SEQ. NO. _____

FILED ON CAL. NO. _____

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

PAPERS NUMBERED

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
accompanying memorandum decision and order.

FILED

MAR 15 2005

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 3/14/05

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

CHARLES E. RAMOS J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:COMMERCIAL DIVISION

-----X
N. RICHARD KALIKOW,

Plaintiff,

Index No. 602965/02

- against-

ADAM C. HOCHFELDER, AMY HOCHFELDER and
MAX NEW YORK, LLC,

Defendants.
-----X

Charles Edward Ramos, J.S.C.:

The defendants Adam C. Hochfelder (Hochfelder), Amy Hochfelder, and Max New York, LLC (Max New York) (collectively, defendants) move, pursuant to CPLR 3212, for an order granting summary judgment dismissing the fourth through seventh causes of action in the second amended complaint.

Max New York is a Delaware limited liability corporation which invests in real estate. Pursuant to an operating agreement, the plaintiff N. Richard Kalikow (Kalikow) was a manager, and 60% owner, of Max New York. Hochfelder was also a manager, and owned the remaining 40% of Max New York. Pursuant to a redemption agreement, Hochfelder and his wife, Amy Hochfelder, acquired Kalikow's interest in Max New York.

The second amended complaint (complaint) alleges that, at a point in time after Kalikow accepted the Hochfelders' offer, but before the redemption agreement was executed, Hochfelder breached section 13.1 of the operating agreement by concealing investment opportunities, including, inter alia, the purchase of the UFT building at 260 Park Avenue South, in Manhattan.

[*3]
Paragraph 28 of the complaint alleges that four days prior to the closing of the redemption agreement, Hochfelder stated to Kalikow that he was "buying the UFT building."

The complaint also alleges that Hochfelder never disclosed a purchase and refinance agreement with Credit Suisse First Boston.

By order dated June 18, 2003, the court granted the defendants' motion to strike the demand for punitive damages and to dismiss Kalikow's fraud and negligent misrepresentation claims (first, second, and third causes of action). The claims for breach of contract and for breach of fiduciary duty were not dismissed (fourth, fifth, sixth, and seventh causes of action).

By order dated November 14, 2003, the court denied, on procedural grounds, a motion to dismiss for mootness, based upon the defendants' offer to Kalikow to rescind the redemption agreement, thereby placing Kalikow back in the position he had prior to selling his interest.

In support of this latest motion to dismiss the complaint, the defendants make the following arguments. As a matter of law, the UFT and Credit Suisse transactions had no value as of the redemption date. Even assuming that the transactions constituted enforceable agreements, any damages attributable thereto necessarily are speculative. Kalikow cannot demonstrate that the redemption consideration was based on reliable valuation of his interests in the company's assets. Neither Adam nor Amy Hochfelder is individually liable for Kalikow's claimed damages.

In opposition to the motion, the plaintiff Kalikow makes the

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following arguments. There are issues of fact as to whether, and to what extent, Kalikow was injured by Hochfelder's concealment of the UFT and Credit Suisse transactions. The damages alleged by Kalikow, and set forth in detail in the report of Kalikow's expert, are ascertainable with reasonable certainty. Kalikow should not be denied a recovery, even if damages are incapable of precise determination. The expert's report properly considers the risks associated with the pending transactions. How the parties calculated the redemption price is an issue of fact.

In reply, the defendants argue that Kalikow seeks a windfall by gaining non-existent purported benefits of the UFT and Credit Suisse transactions, without risking the negative consequences.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact from the case (Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395 [1957]). The failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient for this purpose (Zuckerman v City of New York, 49 NY2d 557 [1980]).

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Here, the defendants have demonstrated that the plaintiff Kalikow is not entitled to recover lost profits, even if the defendants breached the contract. A party may recover damages for lost profits only if it can be shown that: (1) the damages were caused by the breach; (2) the alleged loss is capable of proof with reasonable certainty; and (3) the particular damages were within the contemplation of the parties to the contract at the time it was made (Kenford Co. v County of Erie, 67 NY2d 257 [1986]).

Examining the first requirement, the defendants' breach did not cause Kalikow's alleged damages, as it is undisputed that the UFT transaction was disclosed to the plaintiff. Additionally, one of the subsequently acquired properties was sold by the defendants at a loss.

Applying the second requirement, future profits on new acquisitions are too speculative, and may not be estimated with reasonable certainty. Applying common sense, the parties clearly contemplated that, following the redemption agreement, Max New York would continue to buy and sell real estate. Indeed, Exhibit 2, submitted by the plaintiff Kalikow in opposition to the motion, is a newspaper article describing Mr. Hochfelder's role in the business as concentrating on acquisitions.

In Goodstein Constr. Corp. v City of New York (80 NY2d 366 [1992]), the Court of Appeals found that an award of damages for the expectation of an interest of a party, based on a breach of contract to bargain exclusively, would give the injured party the

[*6]
benefit of a bargain that was not reached. It was held that if no agreement has been reached, it cannot even be known what agreement would have been reached, and there is no way to measure lost expectation. Also, an award of damages for the expectation interest of a party, based on the breach of a contract to bargain exclusively, would give to the injured party the benefit of a bargain that was not reached. Similarly, in the instant case, prior to Kalikow selling his interest, Hochfelder made no agreement to acquire any real estate.

Finally, the particular damages sought by the plaintiff Kalikow clearly were not within the contemplation of the parties. The evidence demonstrates that Kalikow's participation in future profits, and the continuing obligation of the defendants to compensate Kalikow even after the closing, were not within the contemplation of the parties at the time of the contract.

Accordingly, it is

ORDERED that the motion to dismiss is granted, and the complaint is dismissed with costs and disbursements to defendants, as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: March 11, 2005

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J.S.C.

Counsel are hereby directed to obtain an accurate copy of

[* 7]

this Court's opinion from the record room and not to rely on decisions obtained from the internet which have been altered in the scanning process.