

Lehman Brothers, Inc. v Piper Jaffray & Co.
2006 NY Slip Op 30001(U)
September 12, 2006
Supreme Court, New York County
Docket Number: 0600629
Judge: Richard B. Lowe
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. RICHARD B. LOWE, III
Justice

PART 55

[*]

Behman Brothers Inc.

INDEX NO.

600629/06

MOTION DATE

6/29/06

MOTION SEQ. NO.

001

MOTION CAL. NO.

Piper Jaffray & Co

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

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION

FILED

SEP 18 2006

NEW YORK
COUNTY CLERK'S OFFICE


HON. RICHARD B. LOWE, III

J.S.C.

Dated: 9/12/06

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

-----x
LEHMAN BROTHERS, INC.,

Plaintiff,

Index No. 600629/2006

-against-

**DECISION
AND ORDER**

PIPER JAFFRAY & CO.,

Defendant.

-----x
PIPER JAFFRAY & CO.,

Third-Party Plaintiff,

-against-

NATIONWIDE LIFE INSURANCE
COMPANY OF AMERICA

Third-Party Defendant.

-----x
RICHARD B. LOWE, III, J.:

Third-Party Defendant, Nationwide Life Insurance (Nationwide), seeks dismissal of the Third-Party Plaintiff's, Piper Jaffray & Co. (Piper), third party complaint in its entirety pursuant to CPLR 3211 (a) (1) and 3211 (a) (7).

BACKGROUND

The parties to this lawsuit bought and sold interests in an aircraft statutory trust known as the "US Airways Statutory Trust" (US Air Trust). Aircraft statutory trusts borrow money from investors to finance the purchase of airplanes and then use the revenue, earned from leasing these airplanes, to make principal and interest payments to the holders of the debt instruments a.k.a "Certificates of Beneficial Interest" (the "Certificates"). The Certificates also have a market value which fluctuates in accordance with interest rates, the value of the airplanes owned by the

trust and the financial strength of the airlines leasing the airplanes.

Sometime prior to November 2003, Nationwide invested two million dollars in the US Air Trust and received a "Certificate of Beneficial Interest" which indicated this two million dollar investment. As of November 2003, Nationwide had received 57.5% of its investment back, leaving Nationwide with a \$853,487.80 investment remaining in the US Air Trust. In late 2003 the trustee of the US Air Trust (the "Trustee") notified Certificate holders that the US Air Trust would be reorganized and split into eleven new trusts and that the Certificate holders would receive eleven new Certificates, one Certificate in each of the eleven new trusts. The Trustee informed the Certificate holders that their interest would not change due to the reorganization. Around November 13, 2003 Nationwide received eleven new Certificates each having the amount \$853,487.80 featured at the top of the Certificate. The writing immediately below the \$853,487.80 amount, states that the holder's beneficial interest in the US Air Trust is equal to dividing the \$853,487.80 amount by \$160,997,386.00 giving the Certificate holder a 0.53% interest in one of the eleven US Air Trusts.

In August 2004 Nationwide solicited Piper to purchase from Nationwide eleven Certificates in the US Air Trust. Piper alleges that Nationwide represented that the eleven Certificates each had a "face amount" of \$853,487.80 giving all eleven Certificates together a value of \$9,388,366 and that because of the recent US Airways bankruptcy, Nationwide would sell the Certificates to Piper at a discounted rate.

In October 2004, Nationwide sold the eleven Certificates to Piper for \$2.148 million. Piper simultaneously sold the Certificates to a hedge fund for \$2.253 million. In March 2005, Piper purchased the Certificates back from the same hedge fund for \$3.896 million and

simultaneously sold the Certificates to the plaintiff, Lehman Brothers (Lehman) for \$4.06 million. The Certificates never came into the possession of Piper because of the simultaneous resale to the hedge fund and then to Lehman. Lehman and Piper allege that the transactions for the Certificates were completed under the assumption that the Certificates had a “face amount” of \$9,388, 366.

In June 2005, the Trustee sold the airplanes and contacted all the Certificate holders to pay out the holders’ interest in the US Air Trust. Lehman, who had paid \$4.06 million for the Certificates, expected to receive approximately \$4,119,191.35 from the Trustee. The Trustee instead wired to Lehman only \$374, 471.96. Lehman contacted the Trustee, who informed Lehman that all the eleven Certificates had a face value of \$853,487.80 not \$9,388,366.

In February 2006, Lehman sued Piper for breach of contract and mutual mistake seeking damages and/or rescission of the March 2005 sales agreement . In March 2006, Piper filed a third party complaint against Nationwide alleging breach of contract, violation of the Securities Exchange Act, fraud, negligent misrepresentation, unilateral mistake, unjust enrichment, and indemnity in connection with the October agreement. Piper seeks damages and/or rescission. Nationwide has filed the present motion, seeking to dismiss Piper’s complaint in its entirety.

DISCUSSION

As a preliminary matter, federal legislation grants federal courts exclusive jurisdiction over cases arising under the Securities Exchange Act, this court therefore does not have jurisdiction over Piper’s second cause of action under the Securities Exchange Act (15 USC § 78aa; *Matsushita Electric Industrial Co. v Epstein*, 516 US 367, 370 [1996]). Accordingly, Piper’s second cause of action alleging violation of the Securities Exchange Act is dismissed.

Nationwide seeks dismissal of Piper's third party complaint pursuant to CPLR 3211 (a) (1) and CPLR 3211 (a) (7). In determining whether to dismiss a claim pursuant to CPLR 3211 (a) (1) and (a) (7), "the task of the court is to determine whether plaintiff's pleadings state a cause of action. The motion must be denied if from the pleading's four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law," to this end "liberal construction and consideration" are afforded the plaintiff's complaint with regard to defendant's motion to dismiss (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]). Furthermore, dismissal under CPLR 3211(a) (1) is warranted, "only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*id.* at 152, quoting *Leon v Martinez* 84 NY2d 83, 87 [1994]; *see also WFB Telecomms, Inc. v NYNEX Corp.*, 188 AD2d 257, 259 [1st Dept 1992] [Facts as alleged in the plaintiff's complaint are assumed to be true unless contradicted by documentary evidence]).

Breach of Contract

Piper alleges that the "face amount" on the Certificates creates an obligation on Nationwide and that Nationwide breached such an obligation. Such allegations must be accepted as true unless documentary evidence "conclusively establishes a defense to the asserted claims as a matter of law" (*Leon*, 84 NY2d at 87). The only documentary evidence which Nationwide offers to refute Piper's allegations are the Certificates themselves. These Certificates, however, were the same Certificates that three sophisticated investors: Piper, Lehman, and the hedge fund, believed to be worth \$853,487.80. Accordingly, the face amount on the Certificates could reasonably be inferred to have obligated Nationwide to deliver Certificates valued at \$853,487.80. Nationwide's "documentary evidence", the Certificates themselves, does not flatly

contradict Piper's allegation that the Certificates obligated Nationwide to provide Certificates with a true "face amount" of \$853,487.80, and therefore, no defense has been made to Piper's claim as a matter of law.

Furthermore, the eleven "Trade Confirmations" (see Welo Aff, Exs. A-K) between Nationwide and Piper indicate that the parties had an understanding that each Certificate was valued at \$853,487.80 and that each Certificate was being sold at a discounted price of \$193,235.33. Such a confirmation made in writing, by Nationwide, that each Certificate was valued at \$853,487.80, supports Piper's contention that Nationwide breached its contract with Piper by transferring a Certificate which was worth 1/11 of the confirmed value. Based on the foregoing Nationwide's motion to dismiss Piper's breach of contract claim is denied.

Fraud, Negligent Misrepresentation, Unilateral Mistake, Unjust Enrichment and Indemnity

From the outset, this court notes that Nationwide relies primarily on decisions where summary judgment was sought. However, in the present motion, Nationwide makes a pre-answer motion to dismiss.

Fraud

To properly plead a common law fraud claim, the plaintiff must allege a misrepresentation of a material fact, falsity of the misrepresentation, scienter, plaintiff's reasonable reliance on the alleged misrepresentation, and injury resulting from the reliance (*Small v Lorillard Tobacco, Inc.*, 94 NY2d 43 [1999]). In the instant case Piper has pleaded all of the elements of fraud in detail, alleging that Nationwide misrepresented the value of the Certificates, Nationwide knew of these misrepresentations, and Piper was justified in relying upon these misrepresentations. Nationwide, relying primarily on summary judgment cases,

contends that Piper's fraud claim should be dismissed for lack of reasonable reliance.

Nationwide's argument regarding justifiable reliance comes prematurely. "On a motion to dismiss for failure to state a cause of action, a plaintiff...need only plead that he relied on misrepresentations made by the defendant...since the reasonableness of his reliance generally implicates factual issues whose resolution would be inappropriate at this early stage" (*Knight Securities, L.P. v Fiduciary Trust Company*, 5 AD3d 172, 173 [1st Dept 2004]).

Piper's claim for fraud cannot be dismissed as there are considerable issues of fact to resolve, principally whether Piper reasonably relied on Nationwide's misrepresentations and the law of New York strongly supports this conclusion. *Brunetti v Musallam*, 11 AD3d 280 (1st Dept 2004) (record insufficient to conclude as a matter of law that plaintiff could not establish reasonable reliance); *Swersky v Dreyer and Traub*, 219 AD2d 321 (1st Dept 1996) (issue of fact whether plaintiff reasonably relied on alleged statements).

The cases which Nationwide cites in support of its contention that the issue of justifiable reliance can be decided on the present motion to dismiss pertain either to summary judgment rulings, situations where merger clauses or other provisions contained in the parties' contract barred the plaintiff from establishing reasonable reliance, or a combination of the two. *UST Private Equity Investors Fund v Smith Barney*, 288 AD2d 87, 88 (1st Dept 2001) (affirming the dismissal of a fraud claim brought by plaintiff-purchasers where the parties contract contained extensive disclaimers directing the plaintiffs to inspect purchase); *Valassis Communications v William Weimer*, 304 AD2d 448 (1st Dept 2003) (affirming the dismissal of fraud claim where the parties had extensive disclaimers in their contract pertaining to disclosure and reliance on representations). Piper has pleaded a cause of action for fraud and Nationwide, without

justification, asks the court to rule on issues of fact and dismiss Piper's claim. Based on the foregoing, Nationwide's motion to dismiss Piper's fraud claim is denied.

Negligent Misrepresentation

Nationwide's argument in support of its motion to dismiss Piper's negligent misrepresentation again asks the court to rule on issues of fact during a motion to dismiss. Negligent misrepresentation occurs where, there is a special relationship of trust or confidence, the information given was false, and there was reasonable reliance upon the information given (*Hudson River Club v Consolidated Edison*, 275 AD2d 218, 220 [1st Dept 2000]). Piper pleaded all the elements of negligent misrepresentation, yet Nationwide attempts to disqualify Piper's claim by requesting that this court rule against Piper *as a matter of law* on the factual issues of justifiable reliance and special relationship during a motion to dismiss. Justifiable reliance and special relationship are both questions of fact. In addition, and contrary to Nationwide's contentions, a "special relationship" can exist between parties in a general buyer-seller relationship (*Berkshire Fashions v Woolworth*, 256 AD2d 246, 247 [1st Dept 1998] [finding that special relationship can exist between seller-manufacturer of umbrellas and buyer-department store]; *see also Kimmel v Schaefer*, 224 AD2d 217, 218 [1st Dept 1996] [defendant, the director of a company, which the plaintiff purchased was in special relationship for the purposes of negligent misrepresentation]).

The request by Nationwide to rule on the issues of justifiable reliance and special relationship are untenable given the presumptions in favor of the plaintiff's complaint during a motion to dismiss (*511 W. 232nd Owners Corp.*, 98 NY2d 144). Accordingly, Nationwide's motion to dismiss Piper's negligent misrepresentation claim is denied.

Rescission

Piper seeks rescission of the October 2004 sales agreement based on unilateral mistake. “Equity will grant rescission of a contract, upon the basis of a party’s unilateral mistake when there is no prejudice to the other party, and the parties can be put back to the status quo” (*Broadway 111th Street Associates v Selina Schreiber Morris*, 160 AD2d 182, 184 [1st Dept 1990]). Piper’s cause of action for unilateral mistake raises issues of fact, such as whether the parties can be returned to the status quo and who assumed risk of mistake. These cannot be resolved on the present motion to dismiss. Nationwide, however, asks the court to rule against Piper on issues of fact during a motion to dismiss and to find that the parties cannot be returned to the status quo ante or that Piper assumed the risk of mistake. With no record before it and the presumptions in favor of the plaintiff at this stage of the lawsuit Nationwide’s requests cannot be entertained. Accordingly, Nationwide’s motion to dismiss Piper’s cause of action for unilateral mistake is denied.

Unjust Enrichment

Unjust enrichment is a cause of action under quasi-contract, and an express contract generally precludes a plaintiff from bringing a cause of action under quasi-contract (*Apfel v Prudential-Bache Sec.*, 81 NY2d 470, 479 [1993]). Here, however, Piper brings the cause of action for unjust enrichment as an alternative to breach of contract in the event that this court rescinds the October 2004 agreement, “where rescission of a contract is warranted, a party may timely rescind and seek recovery on the theory of quasi-contract” (*Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382, 389 [1987]). Piper’s cause of action for unjust enrichment can be maintained in the event that the October agreement is rescinded, and accordingly Nationwide’s

motion to dismiss the cause of action for unjust enrichment is denied.

Indemnification

Piper's seventh cause of action seeks indemnification from Nationwide for any judgment rendered in favor of Lehman in connection with the Certificates that Nationwide sold to Piper. "The general rule is that a right of implied indemnification will arise in favor of one who is compelled to pay for another's wrong" (*Margolin v New York Life Insurance*, 32 NY2d 149, 152 [1973]). Here, Piper has pleaded that Nationwide committed fraud and/or negligence and that Piper might have to pay Lehman for Nationwide's wrongdoing. While it is true that where the party seeking indemnification was partially at fault courts refuse to imply a right to indemnification (*Rock v Reed-Prentice*, 39 NY2d 34, 39 [1976]), no such fault has been established here. Instead, Nationwide asks the court to determine the fact-intensive question of fault on a motion to dismiss. Such a question of fact cannot be determined on a motion to dismiss. The principal determination, on a motion to dismiss, is whether the plaintiff has pleaded any cognizable cause of action, not whether they have proven or can prove their allegations (*511 W. 232nd Owners Corp.*, 98 NY2d 144). Accordingly, Nationwide's motion to dismiss Piper's cause of action for indemnity is denied.

CONCLUSION

Accordingly, it is hereby

ORDERED that the Defendant's motion is denied

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT

Dated: *September 12, 2006*

ENTER:


HON. RICHARD B. LOWE, III

RICHARD B. LOWE, III, J.S.C.

FILED
SEP 18 2006
NEW YORK
COUNTY CLERK'S OFFICE