

Soundview Plaza, LLC v Duncan
2006 NY Slip Op 30743(U)
November 22, 2006
Supreme Court, New York County
Docket Number: 101077/05
Judge: Herman Cahn
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 49

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SOUNDVIEW PLAZA, LLC, a New York Limited
Liability Company and JOYCE ROAD ASSOCIATES,
LLC, a New York Limited Liability Company,

Index No. 101077/05

Plaintiffs,

- against -

PETER S. DUNCAN, LYNN COMFORT, GEORGE
COMFORT & SONS, INC., COMFORT EMPLOYEES,
PROFIT SHARING PLAN, LOEB PARTNERS
REALTY AND DEVELOPMENT CORP., LOEB
REALTY AND DEVELOPMENT CORP., LOEB
PARTNERS REALTY LLC, and JOHN DOE
NOS. 1-10,

Defendants.
-----X

Herman Cahn, J.

Additional Counterclaim defendant Andrew Lance moves (seq. no. 004) to
dismiss, CPLR 3211(a)(7). The issue on this motion is whether defendants' counterclaim for
fraud was pleaded with sufficient particularity.

Background:

The Complaint and Counterclaim:

Plaintiff Soundview Plaza LLC was formed in 1997 for the purpose of purchasing
and redeveloping a three-acre parcel of land in New Rochelle, NY ("Tuck Tape Property").
November 1997, Soundview purchased said property. Soundview alleges that it subsequently
entered into an agreement with the then owner of adjacent property ("Boston Post Road
Property"), whereby the parties agreed to combine their properties and jointly develop a

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shopping center. Soundview set its sights on Bed Bath & Beyond to be the anchor tenant for Soundview Plaza and commenced negotiations with it.

Soundview sought investors and partners for this venture and ultimately settled on defendants, Peter Duncan, Lynn Comfort, George Comfort & Sons, Inc., Comfort Employees Profit Sharing Plan, Loeb Partners Realty and Development Corp and other related Loeb entities, and John Doe Nos. 1-10. Soundview alleges that the parties entered into an agreement, pursuant to which defendants agreed to reimburse it for monies already advanced in connection with the negotiations with Bed Bath & Beyond, and to provide all other necessary funding and financing for the development of Soundview Plaza. Defendant Comfort Employees Profit Sharing Plan alleges that, as part of this financing, it made a mortgage loan to plaintiffs of \$650,000, to be used to satisfy a purchase money mortgage on the Tuck Tape Property.

Subsequently, Soundview, the owner of the Boston Road Property and defendants formed plaintiff Joyce Road Associates, LLC for the purpose of acquiring another nearby property, which then housed a Costco. Joyce Road Associates then entered into a contract of sale with the then owner of the Costco site, agreeing on a price and a closing date of June 5, 1998, but also providing for adjournments of this date in exchange for the payment of certain extension fees.

Plaintiffs allege that defendants did not comply with their financing obligations, by, for example, not providing the necessary extension fees associated with the Costco site. Plaintiffs allege that defendants' failure to perform their obligations resulted in the loss of Bed Bath & Beyond as the anchor tenant, the loss of another tenant, and prevented the closing of the Costco Contract of Sale. Plaintiffs thereupon brought this action, asserting eight causes of

action: 1) conversion/misappropriation of plaintiff's monies; 2) imposition of a constructive trust; 3) breach of fiduciary duty; 4) unjust enrichment; 5) restitution for the value of service they performed; 6) fraud; 7) breach of contract; and 8) fraudulent business practices.

Defendants answered and asserted a third party claim against third party defendants Arthur Emil, Peter Becker and Andrew Lance, alleged members of Soundview. Defendants allege that third party defendants fraudulently induced them into making a mortgage loan to plaintiffs based on the misrepresentation that plaintiffs had entered into an agreement to purchase the Boston Road Property and had already entered into a lease with Bed Bath & Beyond. Additionally, defendants claim that they were induced into attempting to purchase the Costco site by the misrepresentation that plaintiffs had already secured tenants. Defendants do not allege which third party defendant made which specific statement.

Discussion:

To maintain a cause of action for fraudulent misrepresentation, the pleader must allege that: 1) the defendant made a material false representation, 2) the defendant intended to defraud the plaintiffs thereby, 3) the plaintiffs reasonably relied upon the representation, and 4) the plaintiffs suffered damage as a result of their reliance" (*Swersky v Dreyer and Traub*, 219 AD2d 321, 326 [1st Dept 1996]). Additionally, CPLR 3016 (b) requires that in pleading a cause of action for fraud, "the circumstances constituting the wrong shall be stated in detail." One such detail is the identity of the persons making the allegedly fraudulent misrepresentation (*EBC I, Inc. v Goldman Sachs & Co.*, 7 AD3d 418, 420 [1st Dept 2004]). However, "CPLR 3016(b) should not be interpreted so strictly as to defeat an otherwise valid cause of action where it may be impossible to state in detail the circumstances constituting the fraud" (*Oxford Health Plans, Inc. v Bettercare Health Care Pain Management & Rehab PC*, 305 AD2d 223, 224 [1st Dept

2003)). In an action for fraud, a plaintiff may often not know all the relevant facts before discovery is complete since such facts are often “peculiarly within the knowledge” of the party against whom the claim is asserted (*Berkowitz v Molod*, 261 AD2d 128, 129 [1st Dept 1999]).

Defendants, in their third party claims, allege that three members of Soundview made specific misrepresentations, which they knew to be false, upon which defendants relied and that defendants suffered damages because of that reliance. Defendants provided details regarding the nature of the misrepresentation and the reliance thereon. Additionally, the defendants did assert the identity of the persons making the misrepresentations. They only failed to attribute which third party defendant knowingly made which specific misstatement. As discovery relating to Lance is not yet complete, the details of Lance’s specific contributions to the fraud are “peculiarly within [counter claim defendants’] knowledge” (see *Berkowitz*, 251 AD2d at 129). Therefore, while a CPLR 3212 motion may eventually result in dismissal, it is not warranted at this stage, and the motion to dismiss is denied.

Accordingly, it is

ORDERED the motion to dismiss is denied; and it is further
ORDERED that the clerk shall enter judgment accordingly.

Dated: November 22, 2006

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