

Danna v Malco Realty, Inc.

2007 NY Slip Op 31026(U)

May 1, 2007

Supreme Court, Richmond County

Docket Number: 0103685/2005

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**ANTHONY DANNA, GEORGE DOUGHERTY,
and ROBERT SISTI,**

Plaintiffs,

-against-

**MALCO REALTY, INC., KR MANAGEMENT, LLC.
MICHAEL GRAE, KENNETH I. WILPON, Individually
And KENNETH I. WILPON, as agent, Inc., JOHN DOE,
JANE DOE,**

Defendants.

**Calendar Nos.: 102 - 002
294 - 003
433 - 004
Index No: 103685/05**

**DECISION
HON. JOSEPH J. MALTESE**

_____x

The following papers numbered 1 to 7 were submitted on these motions the 21st of March, 2007:

Notice of Motion to Dismiss Complaint
with Supporting Papers.....1

Plaintiffs’ Affirmation in Opposition to Motion to Dismiss
with Memorandum of Law in Support..... 2

Plaintiffs’ Notice of Motion to Strike Answer and Dismiss
Counterclaims Pursuant to CPLR 3126(3) with Supporting Papers.....3

Defendants’ Notice of Cross Motion Pursuant to 22 NYCRR §130-1.1
with Supporting Papers and Memorandum of Law.....4

Plaintiffs’ Reply Memorandum of Law..... 5

Defendants’ Reply Affirmation with Memorandum of Law6

Plaintiffs’ Answers to Interrogatories.....7

Upon the foregoing papers, defendants’ motion (No. 102) to dismiss the complaint pursuant to CPLR 3211(a)(7) is denied, as is plaintiffs’ motion (No. 294), *inter alia*, to strike defendants’ Answers, and defendants’ cross motion (No. 433) for sanctions pursuant

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to 22 NYCRR 130-1.1.

Insofar as it appears on the papers presently before the court, this action was commenced by plaintiffs to recover the sum of \$85,000.00, which defendants allegedly obtained through fraud and deception. More particularly, it is alleged in the verified complaint that plaintiffs are “businessmen investors” who sought the assistance of defendant Kenneth I. Wilpon (hereinafter “Wilpon”) to procure certain real property located at 1111-1113 Victory Boulevard, Staten Island, New York to house their business operations. In connection with this transaction, plaintiffs claim that Wilpon made frequent representations that the purchase price of \$850,000.00 was non-negotiable, and eventually induced them to pay his company, defendant Kenneth I. Wilpon, as agent, Inc., the sum of \$85,000.00 to be used as a down payment for the contract of sale “as soon as [it]... was available.” According to plaintiffs, although they delivered those funds to Wilpon in his fiduciary capacity and in reliance upon his representations that the purchase price was \$850,000.00, he had already negotiated a lower purchase price for the property. Furthermore, unbeknownst to plaintiffs, a contract of sale was subsequently entered into between defendants Wilpon and Michael Grae (hereinafter “Grae”) as “purchasers”, and defendants Malco Realty, Inc. and KR Management, LLC.¹ as “sellers” for the lesser price of \$725,000.00. Plaintiffs claim that the \$85,000.00 was never used for *their* down payment

¹ Pursuant to a “Stipulation of Voluntary Dismissal” dated April 10, 2006, the action was discontinued as against defendants Malco Realty, Inc. and KR Management, LLC, the owners of the subject property.

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on the proposed contract, and that defendants have retained these funds as their purported “fee for arranging [a] sale” which apparently never took place.

Therefore, it is claimed that defendant Wilpon acted individually and in concert with the remaining defendants to defraud and deceive plaintiffs “by the use of schemes, other devices and artifices” to illegally obtain the sum of \$85,000.00.

In moving to dismiss the complaint as against Grae for failure to state a cause of action, defendants maintain that plaintiffs have failed to plead *in detail*, as required by CPLR 3016(b), the prima facie elements of a cause of action sounding in fraud. According to defendants, the bare allegations of fraud that have been made with regard to defendant Grae are insufficient to sustain that cause of action against him. Defendants also point out that the conclusory allegations against Grae parallel those pleaded against Malco Realty, Inc. and KR Management, LLC., i.e., the former defendants against which plaintiffs have voluntarily discontinued the action.

In considering a motion pursuant to CPLR 3211(a)(7) to dismiss a complaint for failure to state a cause of action, the factual averments in the complaint must be accepted as true, and the plaintiff accorded the benefit of every favorable inference. The question is whether the facts alleged fit within any cognizable theory of law (*see Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414; *Leon v Martinez*, 84 NY2d 83, 87-88; *Morone v Morone*, 50 NY2d 481, 484). However, when evidentiary material is considered “the criterion is whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275).

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As for the specificity required in fraud actions under CPLR 3016(b), it is well established that “[t]his provision requires only that the misconduct complained of be set forth in sufficient detail to clearly inform a defendant with respect to the incidents complained of and is not to be interpreted so strictly as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting a fraud” (Lanzi v Brooks, 43 NY2d 778, 779 citing Jered Constr. Corp. v New York City Tr. Auth., 22 NY2d 187, 194 [internal quotations marks omitted]).

Consonant with these principles, it is the opinion of this court that the factual allegations in the complaint, supplemented by the evidentiary materials submitted in opposition to the motion, adequately state a claim of fraud against defendant Michael Grae (*see* CPC Intl. v McKesson Corp., 70 NY2d 268, 285-286). More specifically, it has been demonstrated (1) that Grae acted in concert with Wilpon in purchasing the subject property on behalf of Mika Realty Holding (hereinafter “MRH”) at a purchase price of \$725,000.00; (2) that the contract was executed sometime in August 2005; (3) that plaintiffs’ checks (totaling \$85,000.00) payable to Kenneth I. Wilpon “as agent” are dated at the end of that month, i.e., August 25, 2005; (4) that a printout from the Department of State indicates that the entity which received the checks was incorporated by Wilpon only 2½ months earlier, on June 10, 2005; and (5) that it was Grae acting on behalf of MRH who authorized the release of \$57,500.00 of its down payment to the sellers prior to closing. Moreover, contrary to defendants’ assertion, while the plaintiffs’ attorney lacked personal knowledge of these transactions, his affirmation in opposition was legally sufficient to bring the

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documents memorializing same to the attention to the court. Given their most favorable intendment (*see* CPC Intl. v McKesson Corp., 70 NY2d at 284-285; Rovello v Orofino Realty Co., 40 NY2d 633, 636), plaintiffs' complaint and the documents annexed to the opposing papers submitted by counsel are sufficient to allege a "scheme" to defraud plaintiffs in which each of the remaining defendants jointly participated. Therefore, notwithstanding the failure of the factual allegations to identify and distinguish between the separate defendants (*see* Board of Mgrs. of 411 E. 53rd St. Condominium v Dylan Carpet, 182 AD2d 551, 552), it is the court's opinion that the motion to dismiss for failure to state a cause of action should be denied.

In any event, where, as here, the roles of the individual co-conspirators are likely to lie peculiarly within their knowledge, dismissal of the fraud claim against any one of them at this early stage of the litigation would be premature (*see* CPLR 3211[d]; Rovello v Orofino Realty Co., 40 NY2d at 634).

Turning to plaintiffs' motion to strike defendants' answer and dismiss their counterclaims pursuant to CPLR 3126(3), it is alleged that defendants have acted improperly in failing to respond to plaintiff's discovery demands, and unilaterally cancelling the court-ordered depositions scheduled in the Preliminary Conference Order dated May 3, 2006 and the so-ordered stipulation dated November 29, 2006. In response, defendants have cross-moved for sanctions against plaintiffs pursuant to 22 NYCRR 130-1.1 on the ground that it was plaintiffs' own failure to timely respond to certain of *defendants'* discovery demands that resulted in the forced cancellation of the depositions in

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January of 2007. Plaintiffs' contrary allegations are claimed to be disingenuous. In addition, defendants point out that pursuant to CPLR 3214(b), disclosure was stayed during the pendency of plaintiffs' motion to dismiss the complaint. According to plaintiffs, Answers to Defendants' Interrogatories and Discovery Demands were mailed to defendants' counsel on December 27, 2006.

Since it is well established that the test for imposing the drastic sanction of striking a pleading is restricted to cases in which there is clear evidence that the failure to comply with discovery was willful, contumacious or in bad-faith (*see Roman v City of New York*, __ AD3d __, 2007 NY Slip Op 02609; *Orlando v Arcade Cleaning Corp.*, 253 AD2d 362, 363). Here, plaintiffs have failed to meet this burden (*see Christian v City of New York*, 269 AD2d 135, 137). Moreover, plaintiffs should not have moved to strike defendants' answers without first making a good faith effort to resolve their discovery dispute, e.g., pursuant to CPLR 3124 (*see also Barber v Ford Motor Co.*, 250 AD2d 552, 552-553).

However, the cross-moving defendants have similarly failed to demonstrate that plaintiffs' conduct was "frivolous" as defined in 22 NYCRR 130-1.1(c).

Accordingly, it is hereby:

ORDERED, that the motions and cross motion are denied in their entirety.

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All parties shall appear for a status conference in DCM 3 at 9:30 a.m. on Monday,
May 14, 2007.

E N T E R,

Dated: May 1, 2007

Hon. Joseph J. Maltese
Justice of the Supreme Court