

Sunshine Group, Ltd. v Rockledge, LLC

2007 NY Slip Op 31938(U)

June 28, 2007

Supreme Court, New York County

Docket Number: 0603762/2006

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
THE SUNSHINE GROUP, LTD.,

Plaintiff,

INDEX NO. 603762/2006

- against -

MOTION DATE _____

ROCKLEDGE, LLC.,

MOTION SEQ. NO. 1

Defendant.
-----x

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED


FILED
JUL 02 2007
NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, it is

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

Dated: June 28, 2007



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
THE SUNSHINE GROUP, LTD.,

Plaintiff,

Index No. 603762/06

-against-

Decision and Order

ROCKLEDGE, LLC.,

FILED
JUL 02 2007

-----x
KARLA MOSKOWITZ, J:

Defendant
NEW YORK
COUNTY CLERK'S OFFICE

This lawsuit arose from an exclusive sales and marketing agreement between the plaintiff, The Sunshine Group, LTD ("Sunshine"), a real estate sales and marketing firm, and the defendant, Rockledge LLC ("Rockledge"), a real estate developer. The agreement was for Sunshine to provide sales and marketing efforts for the individual residential condominiums Rockledge had developed. Sunshine filed a suit for breach of contract against Rockledge alleging that Rockledge failed to make the agreed payments to Sunshine for services it rendered. Rockledge subsequently filed a counterclaim against Sunshine alleging that Sunshine's knowingly fraudulent statements induced Rockledge to enter into the agreement.

By this motion (sequence number 001), Sunshine moves pursuant to CPLR 3211(a)(7) to dismiss Rockledge's counterclaim for failure to allege fraud in the inducement with particularity, as CPLR 3016(b) requires.

FACTS

The court derives the following facts primarily from the complaint and the counterclaim.

In early 2004, Rockledge sought to develop and market real property in Connecticut for the purpose of developing individual residential condominiums. (Defendant's Answer and Counterclaim, ¶ 44) ("Counterclaim"). Rockledge sought the services of Louise Sunshine,

Chairwoman and CEO of Sunshine, for her direct involvement in the marketing and promotion of the property. (Counterclaim, ¶ 45). Louise Sunshine is known in the residential real estate marketing industry for her intricate and specialized knowledge of the business. (Counterclaim, ¶ 9). Rockledge knew that Louise Sunshine was actively involved in Sunshine's day-to-day operations and believed that her active involvement would continue. (Counterclaim, ¶ 47).

On August 19, 2004, Sunshine and Rockledge entered into an exclusive sales and marketing agreement ("Agreement") in which Sunshine was to provide the sales and marketing efforts for the individual residential condominium units Rockledge had developed. (Complaint, ¶ 6). At the time of entering into the Agreement, Rockledge believed that Louise Sunshine would be actively involved in the marketing of the condominium units. (Counterclaim, ¶ 50). Rockledge was to compensate Sunshine for its services according to various payment arrangements depending upon the transaction or circumstance. (Complaint, ¶¶ 7-15). The Agreement provided that either party could terminate the agreement for cause. (Complaint, ¶ 16).

On September 22, 2006, Sunshine notified Rockledge that Rockledge had defaulted on the payments it owed to Sunshine for the services Sunshine had provided and allowed Rockledge ten days to settle the amounts due. (Complaint, ¶ 21). On September 29, 2006, Sunshine notified Rockledge of its intent to terminate the Agreement as of October 2, 2006 because of Rockledge's failure to cure its default within the time allowed. (Complaint, ¶ 22).

Rockledge contends that, at the time of entering into the Agreement with Rockledge, Sunshine knowingly made false representations regarding Louise Sunshine's active involvement in the sales and marketing of the condominium units because Sunshine was aware of its pending merger with the Corcoran Group ("Corcoran"). (Counterclaim, ¶ 51). In June 2005, Corcoran

and Sunshine, both owned by NRT, Inc., announced the merger of Sunshine into Corcoran that created the Corcoran Sunshine Marketing Group ("CSMG"), the group that would provide any future marketing services for Corcoran's developmental properties. (Counterclaim, ¶ 52).

Sunshine contends, in the form of a supporting affidavit, that the merger between Sunshine and the Corcoran Group never actually occurred, although CSMG was formed. (Affidavit of Kelly Kennedy Mack, sworn to April 19, 2007).

Rockledge contends that Sunshine's merger into Corcoran ceased the existence of Sunshine as a separate entity and caused Louise Sunshine to step down as Chairwoman and CEO. As a result, she could not continue her active involvement in the sales and marketing of the Rockledge condominium units. (Counterclaim, ¶¶ 53-54).

Jason Schlesinger, a Managing Member of Rockledge, swore in an affidavit that he had three personal communications with Louise Sunshine in early and mid-2004, the first by phone and the other two in person, in which Louise Sunshine confirmed her active involvement in the sales and marketing of Rockledge's condominium project. (Affidavit of Jason Schlesinger, sworn to March 29, 2007) ("Schlesinger Affidavit").

Rockledge contends that it reasonably relied on these representations on Sunshine's behalf that Louise Sunshine would be actively involved in the sales and marketing of its condominiums and that Rockledge has suffered substantial economic harm because of Louise Sunshine's inactivity on the project. (Counterclaim, ¶¶ 56-59).

DISCUSSION

"In deciding a motion to dismiss directed at the sufficiency of the pleadings (CPLR 3211[a][7]), a court must accept their allegations as true, according them the benefit of every favorable inference to determine whether they come within the ambit of any cognizable legal

theory." (*Merrill Lynch, Pierce, Fenner & Smith, Inc. v Wise Metals Group, LLC*, 19 AD3d 273, 275 [1st Dept 2005]). Also important in a motion to dismiss determination is for the court to consider, along with the complaint, "affidavits submitted by the plaintiff to remedy any defects in the complaint." (*Fresh Direct, LLC v Blue Martini Software, Inc.*, 7 AD3d 387, 488 [2d Dept 2004]).

Counterclaim: Fraud in the Inducement

"To state a cause of action for fraudulent inducement, it is sufficient that the claim alleges a material representation, known to be false, made with the intention of inducing reliance, upon which the victim actually relies, consequentially sustaining a detriment." (*Merrill Lynch, Pierce, Fenner & Smith, Inc.* 19 AD3d at 275). CPLR 3016(b) requires that a claim alleging fraud must state the circumstances surrounding the allegations in detail. (*See Jared Contracting Corp. v New York City Transit Authority*, 22 NY2d 187, 194 [1968]). However, the requirements for a fraudulent inducement claim need not be so stringent as to require the plaintiff to state the details of fraud that are beyond the plaintiff's knowledge. (*See id.*; *see also PT Bank Central Asia v ABN Amro Bank NV*, 301 AD2d 373, 377 [1st Dept 2003] ["CPLR 3016(b) '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 . . ."] *quoting Lanzi v Brooks*, 43 NY2d 778, 780 [1977]).

Sunshine contends that Rockledge's counterclaim fails to state a claim of fraudulent inducement with particularity. (Plaintiff's Notice of Motion to Dismiss Pursuant to CPLR 3211(a)(7)), pp 5-7). However, Rockledge submits an affidavit from Jason Schlesinger that supplements its counterclaim by stating in detail the dates and conversations between himself and Louise Sunshine on the three occasions when she confirmed her active involvement in the

Rockledge condominium project. Rockledge contends that Schlesinger's affidavit remedies any defect in the counterclaim in the particularity of details surrounding the allegations of fraud.

Further, Rockledge contends that the details contained in Schlesinger's affidavit, together with the counterclaim, satisfy the pleading requirements of CPLR 3016(b).

Jason Schlesinger states in his affidavit that, at the time of entering the agreement, Louise Sunshine knew or should have known that her involvement in the development project could not continue after the event of the merger with the Corcoran Group. Sunshine contends that Rockledge has failed to show that Louise Sunshine intentionally made the misleading representations to Jason Schlesinger about her involvement in the condominium project. However, to require Rockledge to show such evidence would be beyond the scope of a fraud in the inducement claim. (*See Jared Contracting Corp.*, 22 NY2d at 194 ["It is almost impossible to state in detail the circumstances constituting a fraud where those circumstances are peculiarly within the knowledge of the party against whom the defense is being asserted."]). Sunshine further contends that Rockledge alleges that Louise Sunshine was "forced out" of her position as Chairwoman and CEO of Sunshine. (*See Transcript*, p 13). Rockledge counters that Sunshine's contention regarding this verbiage is irrelevant because Sunshine has not provided an affidavit that refutes Rockledge's statements to that effect. (*See id.*).

Louise Sunshine controlled Sunshine's operations, as the Chairwoman and CEO. For all intents and purposes, the two were one and the same. Sunshine was to merge into Corcoran and cease as a separate entity; therefore, Louise Sunshine, as Chairwoman and CEO of Sunshine, should have known that her role and activities within the company would change significantly following the merger. Louise Sunshine's knowledge of any change in her involvement in Rockledge's project that the merger with Corcoran caused was peculiarly within her and

Sunshine's knowledge. Rockledge could not have stated the details constituting the alleged fraud with more particularity than Rockledge has stated in its counterclaim and supplemental affidavit and has done so with the sufficiency to satisfy the pleading requirements of CPLR 3016(b).

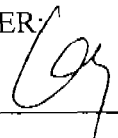
CONCLUSION

Accordingly, it is

ORDERED that the motion of Sunshine to dismiss the counterclaim is denied.

Dated: June 28, 2007

ENTER:



J.S.C.

FILED
JUL 02 2007
NEW YORK
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