

Kehoe v Spizzirro

2007 NY Slip Op 33590(U)

October 29, 2007

Supreme Court, New York County

Docket Number: 0603679/2005

Judge: Rolando T. Acosta

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. ROLANDO T. ACOSTA
Justice

PART 61

Index Number : 603679/2005

INDEX NO. _____

KEHEO, ROBERT J.

MOTION DATE _____

vs

SPIZZIRRO, LOUIS, ESQ.

MOTION SEQ. NO. _____

Sequence Number : 001

MOTION CAL. NO. _____

DISMISS ACTION

this motion to/for _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

422
attached.

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
NOV 05 2007
NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE
WITH THE ATTACHED MEMORANDUM DECISION**

SO ORDERED

Dated: 10/29/07

[Signature]
J.S.C.

ROLANDO T. ACOSTA
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: PART 61

Robert J. Kehoe, Dennis R. Casserly, Jason Himich and
 John R. Scholtz,

Plaintiffs,

– against –

Louis M. Spizzirro, Esq.,

Defendant.

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DECISION/ORDER

Index No. 603679/05

Seq. No. 1

Present:

Rolando T. Acosta
 Supreme Court Justice

The following documents were considered in reviewing defendant's motion for an order pursuant to CPLR 3211(a)(7) & (10) dismissing the complaint, and plaintiffs' cross-motion for an order pursuant to CPLR 3224 compelling disclosure and directing defendant to comply with discovery request:

Papers	Numbered
Notice of Motion & Affidavit	1 (Exhibits A-B)
Affirmation in Opposition	2 (Exhibits A-E)
Notice of Cross-Motion, Affirmation & Affidavit	3 (Exhibits F-G)
Reply Affidavit & Opposition to Cross-Motion	4-5

The facts in this case are relatively straight forward. Plaintiffs agreed to lend Jose Blanco and Metropolis Corp. \$45,000 on a two year loan. They allegedly conditioned the loan on their attorney defendant Louis Spizzirro, Esq. securing a mortgage. Plaintiffs lent Blanco and Metropolis the money on June 25, 2004, and the borrowers have failed to repay the loan. As it turns out, defendant did not secure the loan with a mortgage, but rather he obtained a personal guarantee from Blanco and a corporate guarantee from Metropolis. According to defendant, Blanco and Metropolis are bankrupt.

Plaintiffs commenced this action against Spizzirro alleging fraud. According to the complaint, defendant induced them to loan the money by falsely representing to them that he

would secure the loan with a mortgage, which he never did. They also alleged that defendant's representations regarding the mortgage were known by him to be false, but that he made them to induce plaintiffs to loan Blanco and Metropolis the money. Plaintiffs' relied on the false statements and suffered damages in the amount of \$55,888 (principal plus interest) on the loan.

Defendant now moves to dismiss the complaint pursuant to CPLR 3211(a)(7)&(10). In an action to recover for fraud, the plaintiff must prove a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury. Lama Holding Co. v Smith Barney Inc., 88 N.Y.2d 413 (1996). In addition, CPLR 3016(b) requires that the circumstance constituting the wrong be stated in detail. See Lanzi v. Brooks, 47 N.Y.2d 778, 780 (1977)(CPLR 3016(b) requires only that the misconduct complained of be set forth in sufficient detail to clearly inform defendant with respect to the incidents complained of). Here, plaintiffs clearly plead all elements of fraud and did so in such a way as to inform defendant of the specific wrong, i.e., he allegedly lied to them about securing the loan with a mortgage to induce them to make the loan. And, their reliance on this false representation cost them approximately \$59,000. Accordingly, this portion of the motion is denied.

Defendant's claim that plaintiffs failed to join a necessary party also has no merit. CPLR 1001(a) defines necessary joinder as those who should be made parties if the persons who have already been joined are to be accorded full relief and those absent persons who might be inequitably affected by the judgment. Applying this standard to the instant matter, plaintiff did not have to join Blanco or Metropolis. Full relief for defendant's allegedly fraudulent conduct could be obtained against defendant. If defendant had any claims against Blanco or Metropolis, he certainly could have interposed cross-claims. Moreover, a judgment against defendant would not inequitably affect Blanco or Metropolis. Accordingly, defendant's motion to dismiss is denied.

Plaintiffs' cross-motion for post-note of issue discovery is granted. Plaintiffs deposed defendant on February 20, 2007, and testified as to the existence of a number of files and documents which relate to this action and to related business dealings between the parties. Plaintiff served a notice to produce six days later, but filed the Note of Issue on February 27, 2007, as provided in the Compliance Conference Order, dated December 21, 2006. Based on this Court's records, plaintiffs still had two months on their Standards and Goals date of April 17, 2007, and the Court would have certainly given then an extension. Accordingly, it is

ORDERED that defendant's motion for an order pursuant to CPLR 3211(a)(7) & (10) to dismiss the complaint is denied: and it is further

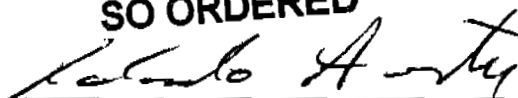
ORDERED that plaintiffs' motion for post-note of issue discovery is granted to the extent that defendant is ordered to respond to plaintiffs discovery request dated February 26, 2007 within 45 days of this order.

This constitutes the Decision and Order of the Court.

Dated: October 29, 2007

ENTER

SO ORDERED



Rolando T. Acosta, J.S.C.
ROLANJO T. ACOSTA
J.S.C.

FILED

NOV 05 2007

NEW YORK
COUNTY CLERKS OFFICE