Underberg v Chromatics Color Sciences Intl. Inc.
2008 NY Slip Op 30162(U)
January 10, 2008
Supreme Court, Nassau County
Docket Number: 1509-03/
Judge: William R. LaMarca
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 17

Scan

Present: HON. WILLIAM R. LaMARCA
Justice

MARC UNDERBERG,

Plaintiff,

-against-

CHROMATICS COLOR SCIENCES INTERNATIONAL INC., JANSEEN PARTNERS, INC., PETER JANSEEN,

Defendants.

Motion Sequence #1
Submitted October 22, 2007

INDEX NO: 11509/03

The following papers were read on this motion:

Notice of Motion...1
Affirmation and Affidavit in Opposition......................................2
Reply Affirmation...3

Requested Relief

Defendants, JANSEEN PARTNERS, INC. (hereinafter referred to as "JP INC.) and PETER JANSEEN (hereinafter collectively referred to as "JANSEEN"), move for an order granting them summary judgment dismissing the actions against them on the ground that no evidence exists to hold said defendants liable or to raise a triable issue of fact. Although it appears that defendant, CHROMATICS COLOR SCIENCES INTERNATIONAL INC., (hereinafter referred to as "CHROMATICS"), was served with the summons and

complaint in this action, by service upon the Secretary of State, no information is provided as to said corporations appearance or default herein, and the Court notes that CHROMATICS was not served with the instant motion. Plaintiff, MARC UNDERBERG, opposes the motion, which is determined as follows:

Background

Plaintiff has commenced this action against defendants for alleged breach of contract and for fraudulent misrepresentation with respect to an investment in CHROMATICS. The verified complaint, dated September 8, 2003, alleges that, on or before February 22, 2003, JP INC. and JANSEEN accepted plaintiff as a client at their investment firm and induced plaintiff to provide a loan to CHROMATICS in the sum of $50,000.00 in exchange for a promissory note with interest payable from February 23, 2003. The first cause of action, against CHROMATICS, alleges breach of the promissory note. The second cause of action alleges that "defendants made materially false representations, knowingly and intentionally, in order to induce plaintiff to provide a loan", and that at all times "defendants knew or should have known that it's (sic) representations of material facts were untrue". The third cause of action alleges that "defendants breached their agreements with plaintiff". Plaintiff seeks damages in the sum of $50,000.00.

In support of the motion to dismiss the counsel for the JANSEEN defendants points out that, throughout the discovery process, plaintiff has failed to uncover any evidence that he had a business relationship with either JANSEEN or JP INC., or that they made any representations to plaintiff about CHROMATICS, let alone knowingly false representations. Counsel urges that there are no triable issues of fact and that summary judgment is appropriate. Counsel points out that, assuming *arguendo* that false statements were

made, plaintiff had the ability to exercise due diligence with respect to CHROMATICS, and discover the truth for himself.

An affidavit of JANSEEN relates that he and plaintiff met in 1997 and shared a mutual interest in motorcycles and investing. JANSEEN states that plaintiff came to his home socially, where plaintiff frequently inquired about JANSEEN's recent investments and indicated his interest in being involved in something JANSEEN felt was a good opportunity. It appears that at some point in time, JANSEEN invested in CHROMATICS and, through conversations with plaintiff, he became aware of said investment and developed an interest in the CHROMATICS company. JANSEEN states that, at the time, he thought it was a good investment, and he gave plaintiff the name of someone at CHROMATICS with whom he could speak concerning investments. JANSEEN asserts that plaintiff was not his client and, at no time did he maintain an account at JP INC., which he claims dealt exclusively with large investors and corporations. Moreover, he contends that he did not serve as an agent in any transaction with CHROMATICS, that he never received any commission or payment from CHROMATICS, and that he was not involved with in the transaction because plaintiff dealt directly with CHROMATICS. JANSEEN contends that he never made any false or misleading statements about CHROMATICS to plaintiff or anyone else and that he, like plaintiff, lost his investment in the company. It is JANSEEN'S position that he and the corporation never had any "agreement" with plaintiff and had no business relationship with him which has been breached.

In opposition to the motion, counsel for plaintiff urges that the transcript of plaintiff's deposition raises questions of fact about the "business relationship of the parties as well as the investment advice offered by defendant Peter Janseen to plaintiff". Moreover, he

states that JANSEEN and his company brokered contracts between other investors with respect to CHROMATICS, and annexes an affidavit of Norman Greif in which he claims that JANSEEN actively solicited him to invest in CHROMATICS in 2001. In his affidavit, plaintiff, MARC UNDERBERG, contends that he and PETER JANSEEN had a social and business relationship and frequently discussed investments. He claims that JANSEEN told him that "he felt comfortable with Chromatics and had invested $200,000 in Chromatics" and that, when he asked for more information, JANSEEN told him that he "didn't need more information and that [he] should trust him". Plaintiff asserts that JANSEEN persistently pushed him to invest in CHROMATICS and told him that "any investment in Chromatics could not lose [and] was a 'lifestyle changing investment'". Plaintiff states that he trusted JANSEEN and decided to invest $50,000 in CHROMATICS because JANSEEN told him it was a "sure thing". Plaintiff claims that although the relationship started as social, he looked to JANSEEN for investment advice as they became more friendly. Counsel for plaintiff urges that defendants have not made a *prima facie* case of entitlement to summary judgment, and that plaintiff has raised triable issues of fact that warrant denial of the motion. The Court disagrees.

The Law

In viewing motions for summary judgment, it is well settled that summary judgment is a drastic remedy which may only be granted where there is no clear triable issue of fact (*see, Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131, 320 NE2d 853 [C.A. 1974]; *Mosheyev v Pilevsky*, 283 AD2d 469, 725 NYS2d 206 [2nd Dept. 2001]. Indeed, "[e]ven the color of a triable issue, forecloses the remedy" *Rudnitsky v Robbins*, 191 AD2d 488,

594 NYS2d 354 [2nd Dept. 1993]). Moreover "[i]t is axiomatic that summary judgment requires issue finding rather than issue-determination and that resolution of issues of credibility is not appropriate" (*Greco v Posillico*, 290 AD2d 532, 736 NYS2d 418 [2nd Dept. 2002]; *Judice v DeAngelo*, 272 AD2d 583, 709 NYS2d 817 [2nd Dept. 2000]; *see also S.J. Capelin Associates, Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [C.A.1974]). Further, on a motion for summary judgment, the submissions of the opposing party's pleadings must be accepted as true (*see Glover v City of New York*, 298 AD2d 428, 748 NYS2d 393 [2nd Dept. 2002]). As is often stated, the facts must be viewed in a light most favorable to the non-moving party. (See, *Mosheyev v Pilevsky*, *supra*). The burden on the moving party for summary judgment is to demonstrate a *prima facie* entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*Ayotte v Gervasio*, 81 NY2d 1062, 601 NYS2d 463, 619 NE2d 400 [C.A.1993]; *Winegrad v New York University Medical Center*, 64 NY2d 851, 487 NYS2d 316, 476 NE2d 642 (C.A. 1985); *Drago v King*, 283 AD2d 603, 725 NYS2d 859 [2nd Dept. 2001]). If the initial burden is met, the burden then shifts to the non-moving to come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. (CPLR§ 3212, subd [b]; see also *GTF Marketing, Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 498 NYS2d 786, 489 NE2d 755 [C.A. 1985]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595, 404 NE2d 718 [C.A. 1980]). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion. (*Mgrditchian v Donato*, 141 AD2d 513, 529 NYS2d 134 [2nd Dept. 1988]).

To establish a cause of action for fraud, plaintiff must establish that 1) defendant made material misrepresentations that were false; 2) that the defendant knew the representations were false and made it with intent to deceive the plaintiff; 3) that plaintiff justifiably relied on defendant's representations and 4) that plaintiff was injured as a result of defendant's representations. *Leno v DePasquale,* 2005 WL 1109438 (2nd Dept. 2005). CPLR Rule 3016(b) requires particularity in the pleadings with respect to fraud or mistake, and directs, as follows:

> Where a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail.

Discussion

After a careful reading of the submissions herein, it is the Court's judgment that defendants have demonstrated a *prima facie* right to summary judgment and that plaintiff has failed to raise a triable issue of fact to require a trial. The Court finds that no reasonable view of the pleaded facts in the second and third causes of action set forth a cause of action upon which relief can be granted. Plaintiff has merely made conclusory allegations lacking factual support and said allegations must fail. *Elsky v KMINS Brokers*, 139 AD2d 691, 527 NYS2d 446 (2nd Dept. 1988). Neither the pleadings nor the deposition transcripts and affidavits of the parties contain specific factual assertions of the defendants fraud (*cf., Jered Contracting Corp. v New York City Transit Authority*, 22 NY2d 187, 292 NYS2d 98, 239 NE2d 197 [C.A. 1968]), and no documentary evidence whatsoever is presented to establish that plaintiff was a client of JANSEEN or JP INC. Instead, it appears that the parties talk of investments was nothing more than "chatter" at social

events, and the Court concludes that plaintiff has failed to raise a triable issue of fact to defeat defendants' motion for summary judgment. The evidence of defendants business dealings with Mr. Greif do not establish that an agreement existed between the parties herein. Rather, the record herein shows that plaintiff dealt directly with CHROMATICS with respect to his investment. Mere conclusions, expressions of hope or unsubstantiated allegations are insufficient to defeat a motion for summary judgment. *Zuckerman v City of New York*, *supra*; *S.J. Capelin Associates Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 (C.A. 1974); *Cheemanlall v Toolsee*, 17 AD3d 392, 792 NYS2d 36 (2nd Dept. 2005); *Abacusleal Estate Finance Co. v P.A.R, Construction & Maiintenance Corp.*, 115 AD2d 576, 496 NYS2d 237 (2nd Dept. 1985). Based on the foregoing, it is hereby

ORDERED, that the motion by JP INC. and JANSEEN to dismiss the second and third causes of action and all claims against them is granted; and it is further

ORDERED, that the caption shall henceforth read as follows;

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

MARC UNDERBERG,

Plaintiff,

-against- **INDEX NO: 11509/03**

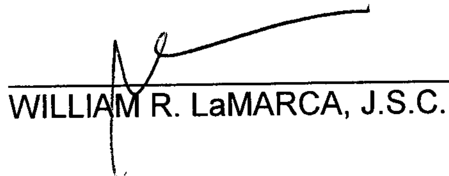
CHROMATICS COLOR SCIENCES INTERNATIONAL INC.,

Defendant.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: January 10, 2008



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