Auto Partners L.L.C. v MacDonell

2008 NY Slip Op 30845(U)

March 18, 2008

Supreme Court, Suffolk County

Docket Number: 0028369/2007

Judge: William B. Rebolini

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AMENDED
MEMORANDUM

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 SUFFOLK COUNTY

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

Auto Partners L.L.C. and Sunrise Automotive L.L.C. d/b/a Sunrise Toyota and William S. Gray, Individually,

Plaintiffs,

- against -

Scott W. MacDonell,

Defendant.

Motion Sequence No.: 001; MotD
Motion Date: 10/31/07
Submitted: 1/30/08

Index No.: 28369/2007

Attorneys for Plaintiffs:

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In an action for damages in which the plaintiffs assert several causes of action, the defendant Scott W. MacDonell moves to dismiss the complaint pursuant to CPLR 3211(a)(5) "in that the cause [sic] of action may not be maintained because of release." (notice of motion dated October 3, 2007). Defendant also requests "a hearing on the issue of indemnification, for attorney's fees" and, in the alternative, that plaintiffs' attorney be ordered to withdraw as attorney for plaintiffs (MacDonell affidavit sworn to October 2, 2007, at "wherefore" clause). Plaintiffs oppose the motion and cross move for an order "setting aside the affirmative defense of release" (Drake affirmation dated December 5, 2007, at p.1). These motions were submitted on January 30, 2008.

For several years prior to December 31, 2002, the defendant MacDonell had been a 50% partner with plaintiff William S. Gray in plaintiff Auto Partners L.L.C. (hereinafter "Auto Partners") which owned the land on which plaintiff Sunrise Automotive L.L.C. d/b/a Sunrise Toyota (hereinafter "Sunrise") operated its auto dealership. Defendant MacDonell had a 5% interest in Sunrise and was manager of the Sunrise dealership; MacDonell also had a 5% interest

in certain affiliated entities, to wit, Oakdale Imports, L.L.C. and Sunrise Rent-a-Car, L.L.C. (hereinafter "the affiliates"). Plaintiff Gray was chiefly engaged in the financial matters of Sunrise and Auto Partners including financing.

On September 12, 2007 the plaintiffs commenced the instant action against MacDonell asserting in their complaint several theories of liability in seven causes of action. The complaint incorporates and refers to a certain agreement dated December 31, 2002 between Auto Partners and MacDonell (hereinafter the "agreement") pursuant to which MacDonell sold all his interest in Auto Partners, Sunrise and the affiliates to Auto Partners for $2,000,000. The $2,000,000 purchase price under the agreement was to be paid to MacDonell by payments of interest only at 5% over eight years with the principal sum being due on December 31, 2010.

The gravamen of plaintiffs' complaint is that defendant MacDonell knowingly misrepresented to plaintiffs that the Town of Islip waived certain requirements which it initially had imposed on Auto Partners and Sunrise in connection with renovations and additions to the auto dealership facility on Sunrise Highway. The requirements in question were certain improvements and alterations (such as curbing, drainage, grading, asphalt, landscaping and installing a cul de sac) to Pond Road which is adjacent to the dealership (Auto Partners) property. The complaint alleges, *inter alia*, that the "building permit was contingent upon AUTO PARTNERS completing construction and improvements on . . . Pond Road" (complaint, p.18) and that MacDonell fraudulently misrepresented over several years, in essence, that the Pond Road requirements would be waived by the Town and that the certificate of occupancy could be obtained without construction or improvements to Pond Road. The complaint additionally alleges that the Pond Road requirements were not waived by the Town and the costs resulting from completion of such requirements exceeded four million dollars. The complaint casts the costs of the Pond Road improvements relating to plaintiffs' renovation project as a liability of Auto Partners not revealed by MacDonell and further alleges that his failure to disclose it inflated the value of Auto Partners and of his interest sold to Auto Partners under the December 31, 2002 agreement.

The agreement entered December 31, 2002 contained the following provision which defendant MacDonell relies upon in moving to dismiss the complaint.

> 9. Mutual Release.
>
> The Companies and William S. Gray and any of their affiliates, on the one hand, and SWM [MacDonell] and any of his affiliates, on the other hand, hereby unconditionally release, acquit, forever discharge and covenant not to sue or otherwise participate in any action against the other and all of their affiliates and related entities, successors, assigns, agents and attorneys (including without limitation John J. Drake, Kelley Drye & Warren, LLP and Jonathan David Brown) from any and all claims, counterclaims, causes of action, liabilities, damages, costs, losses and expenses (including attorney's fees, court costs, and expenses) of whatever nature or kind, in law or in equity, currently known or

> unknown, other than liabilities for breach of this Agreement. Without limiting the foregoing, SWM specifically releases John J. Drake with respect to any and all claims, actions, liabilities and expenses relating to conflict of interests and related matters arising from prior representation of SWM and any affiliated entities. The foregoing release of SWM includes all matters whatsoever relating to SWM involvement with the Companies as a member, manager, employee or otherwise.

The agreement also contained the following provision on which plaintiffs rely (*inter alia*) in opposing defendant's motion:

> 8.1 SWM agrees to cooperate with the Companies with respect to all aspects of the transactions contemplated hereby and the business of the Companies in order to assist the Companies in obtaining any and all consents from third parties required in order to complete the sale of the Interests to Auto Partners and the resignation of SWM from all of his positions as an officer or employee of any of the Companies. SWM agrees to reasonably consult with the Companies with respect to matters regarding the Companies with respect to which he has knowledge and to provide the Companies with any documents or materials within his possession relating to any aspect of the business of the Companies. SWM agrees to cooperate with te Companies in connection with any litigation brought by or against any of the Companies relating to events occurring during the period that SWM was employed by the Companies.

Plaintiffs' first cause of action asserts breach of the agreement, specifically provision 8.1 previously mentioned requiring defendant MacDonell to "consult . . . with respect to matters regarding the companies with respect to which he has knowledge and to provide companies with any documents or materials . . . relating to any aspect of the business of the companies". This claim, insofar as asserted by Auto Partners, the only purchasing entity under the December 31, 2002 agreement, is not barred by the release given to MacDonell under paragraph 9 assuming the allegations of the plaintiffs' first cause of action to be true, as the Court must in this context (see, Leon v. Martinez, 84 NY2d 83 [1994]; Arnav Industries Inc. Retirement Trust v. Brown, Raysman, Millstein, Felder & Steiner, L.L.P. 96 NY2d 300 [2001]; (see, generally, Federici v. Metropolis Night Club, Inc., ____ AD3d ____ 2008 WL 526015 [Second Dept., 2008]). The first cause of action is outside the scope of the release in favor of MacDonell, that is, it is predicated on MacDonell's alleged breach of duties created by the agreement (which plaintiff Gray and plaintiffs' counsel each aver occurred in or about June, 2006) thus falling within the exception provided for in the language of the "Mutual Release" clause (". . . other than liabilities for breach of this [a]greement"). Therefore, the first cause of action is not barred by the release and the portion of MacDonell's motion seeking dismissal of the first cause of action is denied.

The plaintiffs' second cause of action is for damages (compensatory and punitive) based on alleged fraud by MacDonell during 2000 to 2002. Since the alleged actions on MacDonell's part predated entry of the agreement containing the release provision, recovery on a theory of

fraud as asserted in the second cause of action is barred by the release. Likewise, the plaintiffs' third cause of action asserting MacDonell's alleged breach of fiduciary duty (see ad damnum clause of complaint, exhibit "D" to MacDonell's affidavit sworn to October 2, 2007) is barred by the release provision of the agreement as any fiduciary duty could only have existed up to the entry of the agreement and was terminated with the execution thereof. Accordingly, the portion of defendant's motion seeking dismissal of plaintiffs' second and third causes of action is granted.

The fourth cause of action seeking damages based on a theory of fraudulent inducement to enter the agreement must be sustained in this context. The misrepresentations attributed to MacDonell relating to the purported waiver by the Town of the requirements for Pond Road and the value of the plaintiffs' business - including the portion MacDonell sold on December 31, 2002 - are asserted by plaintiffs to be material facts which falsely induced the agreement containing, *inter alia*, the release. Giving the plaintiff every favorable inference as the Court must in this context (see, Leon v. Martinez, 84 NY2d 83 [1994]), the fourth cause of action cannot be dismissed based on the release because its allegations effectively would negate the intent to form the agreement containing the release.

The fifth cause of action is a claim for damages on the theory of MacDonell's alleged mistake concerning the material issue of fact of whether the Town would waive the Pond Road requirements. This claim is barred by the release in the agreement and, therefore, must be dismissed.

Plaintiffs' sixth cause of action is for damages based on the theory of promissory estoppel (see ad damnum clause of complaint) predicated on actions or statements preceding and following entry of the agreement. Clearly, the release in favor of MacDonell would bar any claim on such theory to the extent predicated on actions or statements by MacDonell preceding entry of the agreement. However, the release does not operate prospectively (i.e., after December 31, 2002). Since the bar of the release is the only predicate at this time for defendant's motion to dismiss, the portion of the defendant's motion seeking dismissal of the sixth cause of action is denied at this time.

Plaintiffs' seventh cause of action seeks damages based on a theory of contractual indemnification for breach of warranties contained in paragraph 5.1 of the agreement, which states as follows:

> 5. Indemnities.
>
> 5.1 By SWM. SWM hereby agrees to indemnify, defend, make whole and hold harmless Auto Partners, its successors and assigns ("SWM Indemnities") and to reimburse any of them for any and all losses, costs, damages, or expenses (including without limitation reasonable attorneys' fees) arising out of or resulting from (i) an inaccuracy of any representation or a breach of any warranty or covenant made by SWM in

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> this Agreement, and (ii) any and all third party claims asserted against SWM Indemnitees for expenses, costs or other liabilities relating to the Interests arising prior to the transfer of the Interests to Auto Partners.

The Court concludes that this seventh cause of action is within the ambit of the exception in the release, that is, it is a claim excepted from the scope of the release and therefore not barred by it. Accordingly, the portion of the motion by defendant seeking dismissal of plaintiffs' seventh cause of action is denied.

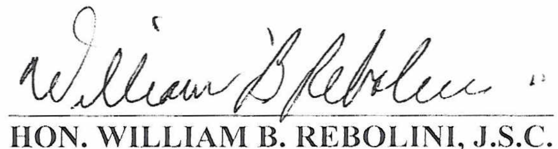
The portion of plaintiffs' cross-motion seeking an order setting aside the release is denied at this time. The release is enforceable according to its terms until invalidated or set aside pursuant to an action for such relief. As plaintiffs have not asserted a claim to rescind or otherwise invalidate the agreement or the release contained in it, there is no predicate for such relief.

Defendant's request for a hearing on indemnification for attorney's fees is denied without prejudice. This request was not properly noticed (see, CPLR §2214). Even if such defect were overlooked the defendant at this point has not asserted a claim for such relief.

Defendant's alternative request denominated as one for an order directing John C. Drake to withdraw as plaintiffs' counsel (in effect, to disqualify said attorney) is granted. It is apparent that the attorney in question represented plaintiffs throughout the period when both defendant and Gray were partners (1995 - 2002) and continued to represent plaintiffs since the cessation of the various interests of MacDonell by virtue of the December 31, 2002 agreement. Defendant has clearly demonstrated his right to such relief (see, Kassis v. Teacher's Insurance and Annuity Association, 93 NY2d 611 [1999]; Brunette v. Gianfelice, 171 AD2d 719 [Second Dept., 1991] cited recently in Lewis v. Goldberg, 6 AD3d 395 [Second Dept. 2004]; Chadrjian v. Purcell, 293 AD2d 699 [Second Dept., 2002]; Dolgoff v. Projectavision, Inc., 235 AD2d 311 [First Dept., 1997]) cf, S&S Ventures Limited Partnership, 69 NY2d 437 [1987]; Zutler v. Drivershield Corp., 15 AD3d 397 [Second Dept., 2005]). In such a case disqualification is warranted and surmounts any perceived or real infringement on plaintiffs' right to counsel of their own selection for this litigation (see, Matter of Abrams, 62 NY2d 183 [1984]). Moreover, permitting Mr. Drake to continue representing plaintiffs in this cause would be unfair and prejudicial to defendant (see, Kassis v. Teacher's Insurance and Annuity Association, 93 NY2d 611 [1999]).

Defendant shall settle an order in accordance with 22 NYCRR §202.48.

Dated: March 18, 2008



HON. WILLIAM B. REBOLINI, J.S.C.