

Meridian Capital Group, LLC v Malta

2008 NY Slip Op 32497(U)

September 11, 2008

Supreme Court, New York County

Docket Number: 0117079/2006

Judge: Martin Shulman

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

PRESENT: HON. MARTIN SHULMAN
Justice

PART 1

Meridian Capital Group

INDEX NO. 117079/06

- v -

MOTION DATE _____

Malta

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

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

Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits ... A-C
Answering Affidavits — Exhibits A-M
Replying Affidavits _____

PAPERS NUMBERED	
1, 2, 3	
4	

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion is decided in accordance with the attached decision and order.

FILED
SEP 15 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: September 11, 2008

Martin Shulman, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 1

-----X
MERIDIAN CAPITAL GROUP, LLC,

Plaintiff,

-against-

ROBERT MALTA, ROBERT N. DeBENEDICTIS,
654 NINTH AVENUE REALTY CORP.,
GMD REALTY LLC, 202 EIGHTH AVENUE, LLC,
JOHN MACROPOULOS t/a DISCOUNT FUNDING
ASSOCIATES and FLEVARIS & ASSOCIATES,

Defendants.
-----X

Hon. Martin Shulman, J.:

In this action, plaintiff Meridian Capital Group, LLC (plaintiff or Meridian) seeks to recover mortgage brokerage commissions purportedly due from defendants Robert Malta (Malta), Robert N. DeBenedictis (DeBenedictis), 654 Ninth Avenue Realty Corp. (654 9th Ave Realty), GMD Realty LLC (GMD Realty), 202 Eighth Avenue, LLC (202 8th Ave LLC), John Macropoulos (Macropoulos) t/a Discount Funding Associates and Flevaris & Associates (collectively, defendants). In this pre-answer motion, defendants move for an order dismissing plaintiff's verified complaint. Plaintiff opposes the instant motion.

Macropoulos, a licensed mortgage broker, was retained to obtain mortgage financing on the properties designated 202 8th Avenue (the 8th Avenue Property) and 654 Ninth Ave (the 9th Avenue Property) (collectively, the Properties) in New York County. The 8th Avenue Property was then, and is now, owned by 202 8th Ave LLC and the 9th Avenue Property was then, and is now, owned by 654 9th Ave Realty

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FILED

SEP 15 2008

COUNTY CLERK'S OFFICE
NEW YORK

(collectively, the corporate owners). The corporate owners were the recipients of the loan proceeds. Malta and DeBenedictis were then, and are now, the sole shareholders and officers of the corporate owners. GMD Realty (202 8th Ave LLC, 654 9th Ave Realty and GMD Realty - collectively, the corporate defendants), whose sole shareholders and officers were then, and are now, Malta and DeBenedictis, paid the application fee for each loan by company check and also made the good faith deposits required by the mortgage commitments.

In support of this motion, defendants, inter alia, submit the Memorandum Agreement, dated February 23, 2006 (the Memorandum, annexed as Exh B to Motion), and the closing documents associated with the underlying loans (annexed as Exh C to Motion). The Memorandum was signed by Macropoulos and by Michael Kesselman on behalf of Meridian. By its terms, the Memorandum provided that Meridian and Macropoulos would share any commissions arising from the procurement of the referenced loans. With the exception of Macropoulos, the Memorandum did not contain a reference to any of the other defendants. Defendants also submit copies of the mortgage notes for the two Properties which were signed by Robert Malta on behalf of the corporate owners.

Defendants contend that plaintiff's entitlement to the brokerage commissions at issue, if any, is based on the Memorandum. Defendants further argue that Macropoulos is the only party, if any, that could be held liable to plaintiff as he was the only defendant to sign the Memorandum and did not sign it on behalf of, or represent that he was acting on behalf of, any of the other defendants. Thus, defendants argue

* 4]
that because plaintiff is not in privity with any of the other defendants, plaintiff lacks standing to make claims against them and that these claims must be dismissed.

In addition, defendants have submitted the affidavits of Malta and of Anastasia Nicole Flevaris (Anastasia Flevaris). Malta, in relevant part, avers that: 1) GMD Realty was not involved in the transactions at issue herein, did not sign any mortgage documents or commitments in connection with the transactions at issue and did not receive any of the proceeds of the loans; 2) Malta and DeBenedictis did not, either on behalf of themselves or on behalf of the corporate defendants, enter into any oral agreements with plaintiff relating to the loans, commissions, or other transactions referenced in plaintiff's complaint; 3) the corporate owners provided the relevant information needed to obtain the loans to Macropoulos and/or Malta's attorney; 4) Malta dealt only with Macropoulos on issues related to the loans; and 5) DeBenedictis is an "elderly man" who has lived in Florida for the last nine years and rarely travels to New York; he was not involved in any of the transactions herein and Malta was the only principal of the corporate defendants involved in any of the relevant transactions.

Anastasia Flevaris avers that: 1) she is the principal of the company Nicolas P. Flevaris & Associates, which was incorporated in Illinois, had an office in Chicago and never maintained a New York office; 2) she is submitting said affidavit to "preclude the possibility that any judgments flowing from the instant claims could be levied against [Nicolas P. Flevaris & Associates]"; 3) Nicolas P. Flevaris & Associates was never a mortgage broker, has not been in business for years, was not involved with the transactions herein, and did not receive any commissions or payments related to the loans; 4) Macropoulos was never a "principal, owner, officer and/or otherwise employed

by Flevaris [he] did not 'trade as' Flevaris in connection with the mortgage transactions set forth in the Complaint"; 5) Nicolas P. Flevaris & Associates maintained no association with Macropoulos; and 6) Macropoulos was acting with neither express nor implied authority of Nicolas P. Flevaris & Associates.

Meridian contends that Malta personally retained Macropoulos and Flevaris to obtain mortgage financing for the Properties pursuant to a written agreement. When said financing was not obtained, Meridian was brought in to procure financing with Malta's knowledge, consent and cooperation. Meridian alleges that it spent a substantial amount of time and incurred expenses to procure a loan of \$1,500,000.00 for each of the Properties with North Fork Bank, entitling it to a commission of \$11,250.00 for each loan.¹

In support of its claims, plaintiff offers the mortgage commitments for the two loans. Each mortgage commitment (annexed as Exhs H and L to Meridian's opposition papers) was signed by Robert Malta, on behalf of the corporate owners, and contains the following provision (¶8):

Broker. The Borrower represents and warrants to the Bank that the Borrower has not dealt with any broker with respect to the transaction[s] contemplated hereby other than Meridian Capital Group. . . .

¹ In its complaint, plaintiff also seeks reimbursement for unspecified out of pocket expenses, attorneys' fees, disbursements, as well as \$2,000,000 in punitive damages for defendants' purported fraudulent conduct, thereby, presumably, bringing this action outside of the \$25,000.00 jurisdictional limit of the Civil Court. Of course, after disclosure is completed, if so warranted, this action may be transferred to Civil Court pursuant to CPLR §325(d).

Plaintiff argues that even though defendants have denominated their motion as a motion to dismiss, in fact, it is a motion for summary judgment since defendants have relied upon allegations and documents that go beyond the scope of the complaint. Therefore, Meridian contends this motion should be decided based on the standard employed for a summary judgment motion and plaintiff's need for discovery warrants denial of this motion.

Plaintiff, inter alia, asserts that: Malta and the corporate owners had a binding contract with plaintiff; the corporate owners, Malta and DeBenedictis all benefitted from the loans and Meridian's efforts to obtain them; and, at a bare minimum, plaintiff has raised questions of fact as to GMD Realty's and Flevaris Associates' presumed liability. Plaintiff further argues that, even assuming the absence of a binding contract with certain defendants, plaintiff still maintains viable claims sounding in quantum meruit, quasi-contract and fraud.

Meridian argues that Flevaris Associates's involvement in the transaction at issue is evidenced by an undated Brokerage Expense Information form signed by Malta and Macropoulos, listing the company name as "Flevaris & Associates" (annexed as Exh E to Plaintiff's Opposition papers). Plaintiff contends that GMD Realty's involvement herein is evidenced by the undisputed fact that it paid the application fees and made the good faith deposits for both loans.

In response, defendants assert the following: 1) GMD Realty did not sign off on the Memorandum, did not apply for the loans and did not receive any of the loan proceeds; 2) while Malta may have submitted "financials," the mortgage commitments and other documents connected to the loans to North Fork Bank, he is not personally

liable to the bank, let alone plaintiff, for so doing, as there are no personal guarantees for the loans, and the extent of Malta and DeBenedictis's involvement, if any, is not relevant vis-a-vis their purported liability to plaintiff; 3) there can be no valid claim based on quantum meruit against either Malta or DeBenedictis, as only the corporate owners received the benefit of the loans; and 4) Malta, DeBenedictis, GMD Realty and Flevaris did not derive any benefit from the loans.

Defendants also argue that plaintiff performed its services in connection with the loans at Macropoulos's request; therefore, even if defendants received a benefit from those services, it was not made at defendants' request and, therefore, defendants cannot be held liable herein. Defendants argue that plaintiff's claim as to Flevaris is frivolous as, in sole support of said claim, plaintiffs rely on the above referenced Brokerage Expense Information document which contains the name Flevaris & Associates. Defendants note that said document refers to the "Maspeth Federal Savings and Loan Association" and not the lender that actually made the loans, viz., North Fork Bank.

Defendants have not identified upon which section of CPLR 3211(a) they rely on in this motion to dismiss. Seemingly, defendants' motion is premised on documentary evidence (CPLR 3211[a][1]), viz., the Memorandum Agreement. In response to plaintiff's argument that the instant motion is in fact a motion for summary judgment, defendants note that CPLR 3211(a)(1) "provides that a party may move to dismiss based upon documentary evidence." However, as defendants also seek dismissal of plaintiff's complaint on additional grounds, it appears that this motion is also being made pursuant to CPLR 3211(a)(7) - failure to state a cause of action.

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It is well settled that upon a court's review of a CPLR 3211 motion, the issue to be determined is whether the proponent of a pleading has a cause of action, not whether he has stated one, and that the motion court must accept the facts alleged in the complaint as true, and draw every possible favorable inference in plaintiff's favor. *Leon v Martinez*, 84 NY2d 83 (1994). "However, '[i]n those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence, they are not presumed to be true or accorded every favorable inference [citation omitted]'..." *Morgenthau & Latham v Bank of New York Co., Inc.*, 305 AD2d 74, 78 (1st Dept), *lv denied* 100 NY2d 512 (2003). And if the court considers extrinsic evidence on a CPLR 3211 motion, such as affidavits and exhibits, the complaint's allegations should not be deemed true. *Biondi v Beekman Hill House Apt Corp*, 257 AD2d 76, 80-81 (1st Dept 1999), *affd* 94 NY2d 659 (2000).

On a motion brought pursuant to CPLR 3211(a)(1), the defendant has the burden of demonstrating that "the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Ladenburg Thalmann & Co., Inc. v Tim's Amusements, Inc.*, 275 AD2d 243, 246 (1st Dept 2000); *Sheridan v Town of Orangetown*, 21 AD3d 365 (2nd Dept 2005).

Defendants contend that plaintiff's entitlement to the mortgage commissions at issue, if any, is derived solely from the Memorandum and therefore, the basis for defendants' liability, if any, must be found within the Memorandum itself. However, plaintiff, in its verified complaint, as well as in its opposition papers, makes clear that it is also asserting causes of action that are not derived from the terms of the

Memorandum, e.g., quantum meruit, unjust enrichment. As noted by Professor David Siegel, in the context of a CPLR 3211 motion, "documentary evidence" is "a paper whose content is essentially undeniable and which, assuming the verity of its contents and validity of its execution, will itself support the ground upon which the motion is based." Practice Commentaries to CPLR 3211, C3211:10. In this instance the Memorandum itself fails to "conclusively establish[] a defense to the asserted claims as a matter of law." *Ladenburg Thalmann & Co., Inc. v Tim's Amusements, Inc.*, 275 AD2d at 246.

Although the instant motion is made on behalf of all the defendants, the defendants have not offered any argument as to why plaintiff's claims against Macropoulos should be dismissed, or how the documentary evidence presented could support such dismissal. While the defendants have seen fit to include the affidavits of certain parties to this action, noticeably absent is an affidavit from Macropoulos himself. Here, the documentary evidence viz., the Memorandum and Macropoulos's undisputed signature thereto points to Macropoulos's liability for the commissions at issue. Accordingly, that branch of defendants' motion which seeks dismissal of plaintiff's claims as to Macropoulos is denied.

Ordinarily, a corporate officer is not personally liable for the obligations of the corporation when he/she enters into a contract unless "there is clear and explicit evidence" of his/her intention to do so. *Worthy v New York City Housing Auth.*, 21 AD3d 284, 286 (1st Dept 2005). Plaintiff relies on bald conclusory allegations that Malta and DeBenedictis personally, as opposed to their corporate egos, benefitted from the loans at issue or took personal responsibility for the obligations arising therefrom.

However, as the parties have seen fit to submit extrinsic evidence, i.e., affidavits and exhibits, the complaint's allegations need not be deemed true. *Morgenthau & Latham v Bank of New York Co., Inc.*, 305 AD2d at 78. Simply put, there is no basis by which Meridian can support its allegations that Malta and/or DeBenedictis assumed liability for any of the purported obligations of the corporate defendants. Accordingly, that branch of defendants' motion that seeks dismissal of plaintiff's complaint as to Malta and DeBenedictis is granted.

Plaintiff has also failed to adequately plead a factual basis on which GMD Realty or Flevaris & Associates can be held liable herein, instead relying on conclusory allegations and boilerplate language. GMD Realty's payment of the application fees and good faith deposits for the underlying loans does not present a basis through which it could be held liable to plaintiff. Nor does the reference to Flevaris & Associates in a single Brokerage Expense Information document, presented in connection with an application for a loan from a different lender, that pre-dated plaintiff's involvement herein, present a basis through which Flevaris & Associates could be held liable to plaintiff. Accordingly, that branch of the defendants' motion that seeks dismissal of plaintiff's complaint as to GMD Realty and Flevaris & Associates is granted.

In the mortgage commitments for the two loans which were signed by Malta on behalf of the corporate owners, the corporate owners acknowledged that they "ha[ve] not dealt with any broker with respect to the transaction[s] contemplated hereby other than Meridian Capital Group . . ." Notwithstanding defendants' protestations to the contrary, the plain language of the mortgage commitments makes it abundantly clear that the corporate defendants were, or should have been aware, of the

role played by Meridian in obtaining the loans. In addition, it is undisputed that the corporate owners received the proceeds of the loans and benefitted therefrom. As such, that branch of defendants' motion that seeks dismissal of plaintiff's entire complaint as to the corporate owners is denied.

Defendants' notice of motion states that defendants seek dismissal of plaintiff's entire complaint, but does not list any specific causes of action that defendants seek to dismiss. However, in the defendants' Memo of Law, Defendants address the following causes of action and seek their dismissal:

Fraud

Plaintiff alleges that Malta, DeBenedictis and the corporate defendants represented to plaintiff that they would pay plaintiff the commissions due at the loan closing and from the closing proceeds, that plaintiff reasonably relied upon said representations and did not attend the closing, instead forwarding its commission bill prior to said closing and that at the time of the closing, defendants refused to have Meridian's commissions paid from the closing proceeds. Plaintiff further alleges that defendants knew that said representations were false when made, made said misrepresentations with the intention of plaintiff relying on the same, and plaintiff relied on same to its detriment, suffering loss, damage and injury as a result thereof. (Complaint, ¶¶ 54-55).

Defendants argue that plaintiff's claims sound in contract and do not present a viable cause of action for fraud. Defendants contend that under New York law, a cause of action for fraud cannot be maintained based solely on defendants' failure to perform as required by contract, i.e., that such claims would be duplicative.

A prima facie claim alleging fraud is made when plaintiff alleges that the defendant made a material misrepresentation which was false and known to be false when it was made, for the purpose of inducing plaintiff's justifiable reliance causing damage. *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413 (1996). As noted in *Gotham Boxing Inc. v Finkel*, 18 Misc 3d 1114[A], 2008 NY Slip Op. 50020[u] (Sup Ct, NY County 2008) (Fried, J.), a fraud claim that arises from a contractual relationship can be maintained when it is "based on some additional representation, omission, or conduct, other than the contract itself, which was fraudulent when performed. ... [I]t does not ... matter that the alleged fraudulent representation is virtually identical to the promise contained in the contract as long as it is made at a different time and place." *Id* at 10.

In the instant action, Meridian alleges that it was advised by defendants that it need not attend the closing since defendants would send Meridian its commissions irrespective of whether plaintiff so attended. Clearly, "the alleged fraudulent misrepresentations are not the same as those representations on which the alleged [written and] oral contract[s] . . . [were] based." *Id.* at 11. Rather, plaintiff's fraud claim "is based on a series of assurances, omissions, and conduct" which occurred both months after the time at which plaintiff alleges defendants had agreed to pay plaintiff its commissions and, at least in part, at a different location. Accordingly, at this juncture, plaintiff's causes of action sounding in fraud, as they relate to the remaining defendants, must survive and that branch of defendants' motion that seeks dismissal of the fraud causes of action as to the remaining defendants is denied.

Quasi-Contract Claims

Defendants seek dismissal of plaintiff's unjust enrichment and implied contract claims, arguing that such claims are unavailable to plaintiff because plaintiff has alleged that it has performed pursuant to a written agreement - the Memorandum.

It is well settled that "a party is not precluded from proceeding on both breach of contract and quasi-contract theories where there is a bona fide dispute as to the existence of a contract or where the contract does not cover the dispute in issue." *Curtis Properties Corp. v Greif Companies*, 236 AD2d 237, 239 (1st Dept 1997). In the instant action, the parties actively dispute whether or not a valid contract exists. And, as noted, despite defendants' characterizations to the contrary, plaintiff's complaint is not based solely on the Memorandum. Accordingly, that branch of defendants' motion that seeks dismissal of plaintiff's causes of action sounding in quasi-contract as against the remaining defendants is denied.

Account Stated

Defendants seek the dismissal of the account stated claims and assert that "there are no allegations of proof that an account existed or was presented and there is certainly ample evidence that the account was and is disputed" (Defendants' Memo of Law, at 8). In a cause of action for an account stated, an agreement to pay may be implied if a party receiving a statement of account keeps it without objecting to it within a reasonable time. because the party receiving the account is bound to examine the statement and object to it, if need be. *Rosenman Colin Freund Lewis & Cohen v Edelman*, 160 AD2d 626 (1st Dept 1990).

Plaintiff has not only adequately plead a cause of action for an account stated in its verified complaint, but in opposition to the instant motion, plaintiff has submitted copies of invoices, dated April 13, 2006 (annexed to Plaintiff's opposition as Exh. F), seeking its commissions. Defendants' purported defenses to this claim are more suited to a motion for summary judgment. If defendants are able to demonstrate that they timely objected to plaintiff's invoices and/or that an account never existed or was never presented, such evidence may be sufficient to warrant a finding of summary judgment in defendants' favor as to this cause of action. Accordingly, that branch of defendants' motion that seeks dismissal of plaintiff's account stated claims as against the remaining defendants is denied.

Accordingly, it is hereby

ORDERED that defendants' motion to dismiss is granted solely to the extent that the branches of defendants' motion that seek dismissal of plaintiff's complaint as to defendants Robert Malta, Robert N. DeBenedictis, GMD Realty LLC and Flevaris & Associates is granted and the complaint is hereby severed and dismissed as against defendants Robert Malta, Robert N. DeBenedictis, GMD Realty LLC and Flevaris & Associates, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the branch of defendants' motion that seeks dismissal of plaintiff's complaint as to defendants 654 Ninth Avenue Realty Corp., 202 Eighth Avenue, LLC and John Macropoulos t/a Discount Funding Associates is denied; and it is further

ORDERED that within 10 days of service of this decision and order together with notice of entry, defendants 654 Ninth Avenue Realty Corp., 202 Eighth Avenue, LLC

and John Macropoulos t/a Discount Funding Associates shall serve an answer to plaintiff's complaint.

Counsel for plaintiff and the remaining defendants are directed to appear for a preliminary conference on October 7, 2008 at 9:30 a.m., I.A.S. Part 1, 111 Centre Street, Room 1127B, New York, New York.

The foregoing constitutes this court's Decision and Order. A courtesy copy of this Decision and Order has been sent to counsel for plaintiff and defendants.

Dated: New York, New York
September 11, 2008



Hon. Martin Shulman, J.S.C.

