

Schwartz v FTB Corp.
2008 NY Slip Op 32673(U)
October 2, 2008
Supreme Court, New York County
Docket Number: 105963/08
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

CAROL EDMEAD
J.S.C.

PART 35

Index Number : 105963/2008

Justice

SCHWARTZ, NORMAN D.

INDEX NO. 105963-08

vs.

MOTION DATE 9/15/08

FTB CORPORATION

MOTION SEQ. NO. #001

SEQUENCE NUMBER : # 001

MOTION CAL. NO. _____

DISMISS COMPLAINT

_____ were read on this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

FILED
OCT 03 2008

COUNTY CLERK'S OFFICE
NEW YORK

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that defendants' motion for an order, pursuant to CPLR 3211(a)(1), (7) and (10), dismissing plaintiff's complaint is denied; and it is further

ORDERED that the parties appear for a preliminary conference on November 5, 2008, 2:15 p.m. and it is further

ORDERED that defendants serve a copy of this order with notice of entry upon all parties within 20 days of entry.

That constitutes the decision and order of the Court.

Dated: 10/2/08



CAROL EDMEAD J.S.C.
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: PART 35

-----x
NORMAN D. SCHWARTZ,

Plaintiff,

Index No. 105963/08

-against-

DECISION/ORDER

FTB CORP. and
HOWARD GOLDSTEIN,

Defendants

-----x
HON. CAROL ROBINSON EDMEAD, J.S.C.

FILED
OCT 03 2008
COUNTY CLERK'S OFFICE
NEW YORK

MEMORANDUM DECISION

In this action, plaintiff Norman D. Schwartz ("plaintiff") seeks damages for fraudulent misrepresentation, unjust enrichment and the fraudulent transfer of funds.¹

FTB Corp. ("FTB") and Howard Goldstein ("defendant") (collectively "defendants") now move to dismiss plaintiff's complaint, pursuant to CPLR 3211(a)(1), (7) and (10) on the grounds that documentary evidence shows that plaintiff's action is premature, and the complaint fails to state a cause of action, fails to plead fraud with particularity, and fails to join a necessary party.

Plaintiff's Complaint

Plaintiff alleges that in April 2006, defendant, the president and owner of FTB, approached plaintiff for a loan of \$201,000 in order for FTB to buy inventory for the business of FTB. Plaintiff alleges that based on the representation that the money was to be utilized by FTB and repaid by FTB, in May 2006, he loaned FTB \$201,000 (paragraphs 14, 20 and 29).² "Based on information and belief," defendant deposited the check into FTB's account and then used his

¹ See plaintiff's affirmation in opposition to defendants' motion to dismiss.

² Exhibit A of the complaint is a copy of plaintiff's check written to FTB.

signatory powers within FTB to convey the loan to himself for defendant's "own personal purposes" (paragraph 13).

Plaintiff alleges that defendant intentionally defrauded plaintiff into loaning the funds to FTB by advising plaintiff that the loan was for FTB, but knew at the time the defendant was going to use the funds for personal purposes and knew that plaintiff relied upon defendant's representation that the funds were going to be used by FTB and repaid by FTB (paragraphs 7, 14, 20, 24 and 29).

In 1997, plaintiff made several requests for defendants to repay the loan. However, defendants have yet to repay the loan.

Plaintiff claims that due to the fraudulent actions of both defendants, defendant was unjustly enriched (paragraph 21), resulting in damages for \$201,000 (paragraphs 15, 21, 30 and 31).

Defendants' Motion

Defendants argue that documentary evidence contradicts plaintiff's allegations.

First, defendants contend that plaintiff's loan was made pursuant to a promissory note, dated May 9, 2006 (the "promissory note"), which was signed by defendant and Barbara Schiano ("Schiano"). According to defendants, the loan was a personal loan made by plaintiff so that defendant and Schiano could jointly purchase property at 5 Indian Run Road (the "property"). Defendants maintain that under the terms of the promissory note, the loan was not to be repaid until after the sale of the property (paragraph 3), which is currently is on the market. The terms of the promissory note call for defendant and Schiano to pay plaintiff at defendant's "discretion" and "without a time limit ... unless one of the three noted events occurs." The promissory note

goes on to list the events:

Termination of Note: One month after the earliest of any of the following 3 events take place or on the closing date if the property is sold:

1. The sale of the property located at 5 Indian Run Road, East [Quogue,] NY.
2. The demise of Howard Goldstein and Barbara Schiano.
3. The demise of Norman D. Schwartz.³

Plaintiff also sent an e-mail admitting that repayment was subject to the sale of the property. Thus, defendants argue, the claim should be dismissed because the documentary evidence shows that a condition precedent to repayment of the promissory note has not yet occurred.

Next, defendants argue that the documentary evidence contradicts each of the elements of plaintiff's fraud claims. The check was made out to FTB "because [plaintiff] insisted that it be written that way" (paragraph 4). But there was no fraud or intent to defraud because as indicated by the promissory note's reference to the property, plaintiff knew at the time he made the loan that the loan was for defendant's personal use (paragraph 3). As further evidence of plaintiff's awareness of the purpose of the loan, defendants refer to two e-mails from plaintiff: one dated February 19, 2006 and the other dated April 30, 2007 (defendants' Exhibit B). Defendants also present a letter dated September 19, 2007 from defendant's attorney to Schiano's attorney as proof that plaintiff was aware that he was to be repaid from the proceeds of the sale of the property (defendants' Exhibit C). Since the promissory note made reference to the property and plaintiff "agreed to the terms of the note" when he executed the loan, plaintiff was aware that the loan was to benefit Goldstein and Schiano (paragraph 4).⁴ Thus, plaintiff made the loan in

³ See defendants' Exhibit A.

⁴ At the time they signed the promissory note, defendant and Schiano were dating and planning to buy the Indian Run property together. They are no longer dating. (See defendants' memorandum of law in support of the motion, p. 2).

reliance on the terms of the promissory note, not on any other representations by defendant. Finally, plaintiff suffered no injury because the time for repayment, triggered by the condition precedent, had not occurred.

Defendants go on to argue that plaintiff failed to plead fraud with particularity as required by CPLR 3016(b). The Complaint fails to allege any statements which were allegedly made, when such statements were allegedly made, whether any were in writing, or the content of any such writing. Similarly, the Complaint fails to allege anything more than bare conclusory allegations in connection with any alleged “intent” to deceive and a misrepresentation without specifics. And, there is nothing in the Complaint which sufficiently alleges justifiable reliance on the part of plaintiff (pp. 8-9).

Plaintiff also fails to state a cause of action for fraud. Not only is justifiable “reliance” missing from the Complaint, plaintiff failed to allege that defendant made any materially false statements, and there is no allegation about anything materially false about defendant using the funds for any purpose. Defendants argue that these shortcomings in plaintiff’s pleadings justify dismissal of plaintiff’s claims.

Finally, defendants argue that plaintiff’s complaint should be dismissed pursuant to CPLR 3211(a)(10) because plaintiff failed to join Schiano as a necessary party, in violation of CPLR 1001. Both defendant and Schiano signed the promissory note. Yet, plaintiff refused to add Schiano, his ex-wife, as a party because he remains on friendly terms with her. Plaintiff’s strategy to “bring this action against [defendant] only,” for Schiano’s benefit, prejudices the defendant, justifying the dismissal of plaintiff’s complaint.

Plaintiff's Opposition

In opposition, plaintiff contends that this action arises out of a loan for inventory purchase from plaintiff to FTB. Defendant then promised to repay the loan *via* a self serving promissory note. At best, the note is further security on the loan to FTB, not a defense to the action for fraud and collection of the loan.

Plaintiff also maintains that he properly pleaded three causes of action in his original complaint: 1) the loan was the product of fraudulent inducement; 2) defendants were unjustly enriched by the misrepresentations leading to the loan; and 3) defendant fraudulently transferred the funds from FTB for his personal use.

The elements of fraud are also pleaded with adequate particularity within the four corners of plaintiff's complaint. "Plaintiff set forth the date of the loan, the purposed [sic] of the loan, the circumstances leading to the loan, how payment was made, what Goldstein did with the money after it was wrongfully taken, and demand for repayment" (p. 4). Plaintiff also argues that he properly pleaded unjust enrichment and fraudulent transfer with sufficient particularity.

Plaintiff asserts that Schiano is not a necessary party to his action. Plaintiff argues that his claims are based on a theory of fraud by defendants, and potential witnesses are not parties. Neither are those against whom there is a potential suit on the note. The potential defense that plaintiff waived FTB's repayment and "took a far-fetched promissory note *in lieu of* the corporate obligation and despite Plaintiff's demands is an affirmative defense" (p. 7). Schiano is a "potential guarantor" of the loan, not a party to the alleged fraud (*id.*).

Plaintiff argues that the e-mails defendants cite are "out of context and misleading as the basis" for defendants' motion (p. 7).

The e-mail from Plaintiff to "Howie" dated February 19, 2006 is nearly three (3) months prior to the loan and does not reference FTB, only potential security for a loan not yet made. The other e-mail from Plaintiff to "Howie" is dated April 30, 2007; about one (1) year post the FTB loan and shows attempts to get repaid. It too fails to reference FTB and does not constitute any waiver wherein Plaintiff states "let's see if we can work this out." (pp. 7-8).

The letter from defendant's attorney to Schiano's attorney (defendants' Exhibit C) "merely argues that funds should be repaid when the property is sold; without or before a date certain," plaintiff argues (p. 8). In sum, none of defendants' documents provides a ground for dismissal of plaintiff's complaint or the joinder of Schiano.

Defendants' Reply

Defendants argue that plaintiff fails to address the issue of the documentary evidence, particularly the promissory note that "was prepared by Plaintiff Schwartz and executed by Defendant Goldstein and Barbara Schiano at the Plaintiff's insistence" (paragraph 2). Plaintiff does not dispute the existence of the promissory note or its terms. The documentary evidence not only establishes that a condition precedent to the repayment of the loan has yet not occurred, rendering plaintiff's action premature; it also contradicts plaintiff's fraud claims. Defendants argue that when factual allegations in the Complaint are inherently incredible or flatly contradicted by documentary evidence, it is incumbent upon the Plaintiff to come forward with some evidence of rebuttal, which plaintiff has clearly failed to do in this matter. The claim that the funds were for FTB's purpose is illogical given that Schiano, who also signed the promissory note, has no connection to FTB. Nor does the promissory note mention FTB.

Analysis

Dismissal Based on Documentary Evidence

Under CPLR 3211(a)(1), dismissal of a complaint is warranted where "the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" based on documentary evidence [*150 Broadway NY Associates, L.P. v Bodner*, 14 AD3d 1, 784 N.Y.S.2d 63 [1st Dept 2004]]. The term "documentary evidence" referred to in CPLR 3211(a)(1) "typically means judicial records such as judgments and orders or out-of-court documents such as contracts, deeds, wills, and/or mortgages and includes '[a] paper whose content is essentially undeniable and which, assuming the verity of its contents and the validity of its execution, will itself support the ground on which the motion is based'" (*Webster Estate of Webster v State of New York*, 2003 WL 728780 (NY Ct Cl), 2003 NY Slip Op. 50590(U) citing Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10, at 20 and 7 Weinstein-Korn-Miller, NY Civil Practice, P 3211.06).

Contrary to defendants' contention, the promissory note does not clearly dispose of plaintiff's claims for fraudulent misrepresentation, unjust enrichment, or fraudulent transfer. Under the promissory note, repayment by defendant is at his "discretion" except that payment becomes due one month after the sale of the property or "demise" of either defendant or Schiano, or on the closing date if the property is sold. Defendants' assertion that a condition precedent to repayment, however, presumes that plaintiff seeks repayment of the loan based on the terms of the promissory note. Yet, plaintiff does not, and no where in plaintiff's Complaint is the promissory note mentioned. Indeed, plaintiff seeks damages resulting from the alleged fraudulent misrepresentations made by defendant and FTB, and the alleged fraudulent transfer

committed by FTB. Therefore, although arguably, the obligation of defendant to satisfy the loan allegedly made by plaintiff to FTB does not trigger until one month after either the “demise” of defendant or Schiano, or upon the closing of the sale of the property, the damages sought herein do not flow from the any breach of the terms of the promissory note. Therefore, defendants’ contention that the documentary evidence demonstrates that plaintiff’s Complaint is premature lacks merit.

Failure to State a Cause of Action

In determining a motion to dismiss, the court’s role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]). The standard on a motion to dismiss a pleading for failure to state a cause of action is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205, 660 NYS2d 726 [1st Dept 1997] [on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see* CPLR §3026). On a motion to dismiss made pursuant to CPLR §3211, the court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory” (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972, 638 NE2d 511 [1994]). However, in those circumstances where the bare legal conclusions and factual

allegations are “flatly contradicted by documentary evidence,” they are not presumed to be true or accorded every favorable inference (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81, 692 NYS2d 304 [1st Dept 1999], *affd* 94 NY2d 659, 709 NYS2d 861, 731 NE2d 577 [2000]; *Kliebert v McKoan*, 228 AD2d 232, 643 NYS2d 114 [1st Dept], *lv denied* 89 NY2d 802, 653 NYS2d 279, 675 NE2d 1232 [1996]), and the criterion becomes “whether the proponent of the pleading has a cause of action, not whether he has stated one” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182, 372 NE2d 17 [1977]; *see also Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 NE2d 511 [1994]; *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150, 730 NYS2d 48 [1st Dept 2001]).

In the Complaint, plaintiff is seeking redress for fraud, a valid cause of action. The elements of fraudulent misrepresentation are: (1) the defendant made a material false representation, (2) the defendant intended to defraud the plaintiffs thereby, (3) the plaintiff reasonably relied upon the representation, and (4) the plaintiff suffered damage as a result of his or her reliance (*Swersky v. Dreyer and Traub*, 219 A.D.2d 321, 326, 643 N.Y.S.2d 33 [1st Dept. 1996]).

Plaintiff alleges defendant made a false material representation that the loan was for FTB to purchase inventory (paragraphs 14, 20 and 29). Plaintiff alleges defendant intended to defraud plaintiff by procuring a loan from plaintiff under the guise of a business purpose and then using the funds for personal purposes (paragraphs 14, 20 and 29). Plaintiff alleges that he wrote the check to FTB as a loan based on said misrepresentation (paragraphs 14, 20, 24 and 29). Finally, plaintiff alleges that he suffered damages in the amount of \$201,000 as a result of his reliance on

defendant's misrepresentations (paragraphs 15, 21, 30 and 31). Thus, plaintiff's Complaint sufficiently states a claim for fraudulent misrepresentation.

Contrary to defendants' argument, the documentary evidence consisting of the promissory note, the e-mails and the letter do not flatly contradict plaintiff's allegations that misrepresentations were made at the time plaintiff made the loan to defendants; that defendant intentionally made misrepresentations; that plaintiff relied on those misrepresentations; or that plaintiff suffered damages as a result of those misrepresentations. The note merely recites the terms for repayment of the loan. It does not indicate under what circumstances the loan was made or for what purpose the loan was to be used. The e-mail of February 19, 2006 was written several months prior to the promissory note and does not even mention the loan to defendants or any specific property. Further, the e-mail of April 30, 2007 merely contains a request from plaintiff that he and defendant discuss "what can be done to take care of the debt" (defendants' Exhibit B). "Basically, I would like to make sure that I get my funds at the closing when the house is sold," plaintiff wrote (*id.*). The letter from defendant's attorney to Schiano's attorney is likely unavailing. The two-page letter contains one sentence referring only to an agreement between defendant and defendant's attorney that plaintiff will be repaid when the property is sold. But like the other documentary evidence, the letter fails to contradict any allegation of fraud that plaintiff makes in his Complaint.

Failure to State Fraud with Particularity

Fraud must be pleaded with sufficient particularity, as required by CPLR 3016(b). The language of 3016(b) merely requires that a claim of misrepresentation be pleaded in sufficient detail to give adequate notice (*see Foley v D'Agostino*, 21 A.D.2d 60, 64, 248 N.Y.S.2d 121 [1st

Dept. 1964]). CPLR 3016(b) does not require a plaintiff to prove his allegations, just plead them with particularity. Indeed, the Court of Appeals has specifically noted that this rule “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 in situations where it may be impossible to state in detail the circumstances constituting a fraud” (*Lanzi v Brooks*, 43 N.Y.2d 778, 780, 402 N.Y.S.2d 384, 373 N.E.2d 278 [1977] [citation omitted]).

Plaintiff has done so in his Complaint. According to the Complaint, in April 2006, defendant misrepresented that the loan he was seeking was for FTB to buy inventory for the business of FTB. Based on defendant’s statement, in May 2006, plaintiff loaned FTB \$201,000. However, defendant transferred the funds from FTB to himself for personal use, resulting in defendant’s unjust enrichment in the amount of 201,000, at plaintiff’s expense. Having provided the alleged date, purpose, and circumstances giving rise to the fraudulent misrepresentation claim are provided in the Complaint, it cannot be said that said claim lacks the required specificity so as to warrant dismissal pursuant to CPLR 3016(b).

Failure to Join a Necessary Party

CPLR 3211(a)(10) provides that a “party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . the court should not proceed in the absence of a person who should be a party.” The court should grant a 3211(a)(10) motion to dismiss only when the unnamed party is not subject to the jurisdiction of the court and will not appear voluntarily, no remedy is available under CPLR 1001(b) and the party which is not named is so essential to the litigation that the action cannot proceed in the absence of the party. (Siegel,

Practice Commentaries C3211:34; (McKinney's 2005); 1 New York Civil Practice: CPLR P 1003.04; and 1 New York Civil Practice: CPLR P 3211.39.) At issue is whether the litigation cannot fairly proceed in the absence of Schiano, or in other words, whether Schiano is an indispensable party under CPLR 1001.

Under CPLR 1001, "[p]ersons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants." Under CPLR 1003, "[n]onjoinder of a party who should be joined under section 1001 is a ground for dismissal of an action without prejudice unless the court allows the action to proceed without that party under the provisions of that section.

CPLR 1001(a) mandates joinder of a party in two situations: (1) where that party is necessary if complete relief is to be accorded between the persons who are parties to the action; or (2) where the unnamed party might be inequitably affected by a judgment in the action (*Castaways Motel v CVR Schuyler*, 24 NY2d 120, 247 N.E.2d 124, 299 N.Y.S.2d 148 [1969] [non-parties are "indispensable" where the determination of the court will adversely affect their rights]). "As to the latter requirement, [t]he possibility that a judgment rendered without [the omitted party] could have an adverse practical effect [on that party] is enough to indicate joinder." "The primary reason for compulsory joinder is to avoid a multiplicity of actions and to protect the non-parties whose rights should not be jeopardized if they have a material interest in the subject matter" (*Joanne S. v Carey*, 115 AD2d 4, 7, 498 N.Y.S.2d 817 [1st Dept 1986]). To determine whether Schiano is an indispensable party, the court must consider whether (1) the plaintiff has another effective remedy if the action is dismissed for nonjoinder, (2) prejudice to

the defendants or the person not joined, (3) whether and by whom prejudice might have been avoided, (4) feasibility of protective orders, and (5) whether an effective judgment may be rendered in the absence of the person not joined (CPLR §1001(b)).

Defendants fail to explain exactly how the nonjoinder of Schiano prejudices them. Plaintiff specifically seeks to recover from defendants under a theory of fraudulent misrepresentation, unjust enrichment and fraudulent transfer. Plaintiff does not contend that Schiano was responsible for or participated in any of the alleged wrongdoing. Schiano bears no relation to FTB or the alleged fraudulent statement or transfer made. That Schiano agreed to repay the loan plaintiff allegedly made to FTB does not make her a necessary party to the claims herein. And, defendants' ability to defend this action is not compromised by the absence of Schiano in this litigation.

Further, an effective judgment may be rendered in Schiano's absence, in that plaintiff may recover damages against defendant, individually, or his company, FTB.

Additionally, any judgment against defendants would not adversely affect Schiano. As plaintiff points out, "Schiano as a potential guarantor would be well-served if the suit rendered her obligation on the note moot" (p. 7). Defendants fail to establish that Schiano is a necessary party to plaintiff's action. Therefore, dismissal of the action for failure to join Schiano is unwarranted.

Based on the foregoing, it is hereby

ORDERED that defendants' motion for an order, pursuant to CPLR 3211(a)(1), (7) and

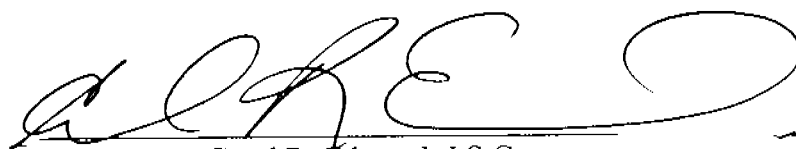
(10), dismissing plaintiff's complaint is denied; and it is further

ORDERED that the parties appear for a preliminary conference on November 5, 2008, 2:15 p.m. and it is further

ORDERED that defendants serve a copy of this order with notice of entry upon all parties within 20 days of entry.

That constitutes the decision and order of the Court.

Dated: October 2, 2008



Hon. Carol R. Edmead, J.S.C.

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