

Schwartz v FTB Corp.

2009 NY Slip Op 30545(U)

March 10, 2009

Supreme Court, New York County

Docket Number: 105963/2008

Judge: Carol R. Edmead

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

PRESENT: Edmead
Justice

PART 35

Norman D. Schwartz

INDEX NO. 105963/08

- v -
FTB Corporation and
Howard Goldstein

MOTION DATE _____

MOTION SEQ. NO. 002

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 ...

Answering Affidavits – Exhibits _____

Replying Affidavits _____

FILED
PAPERS NUMBERED _____
MAR 3 2009
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

Based on the accompanying Memorandum Decision, it is hereby

ORDERED that the branch of the motion by third-party defendant Barbara Schiano for an order, pursuant to CPLR 321 l(a)(7), is granted to the extent that the third-party action is dismissed without prejudice; and it is further

ORDERED that the branch of the motion by third-party defendant Barbara Schiano for an order, pursuant to 22 NYCRR 130-1.1(a), granting third-party defendant attorneys' fees incurred in bringing this application and the costs and disbursements of this action is denied; and it is further

ORDERED that third-party defendant serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that the Clerk may enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: 3/10/09

[Signature]
HON. CAROL EDMEAD
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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,

-against-

FTB CORPORATION and HOWARD GOLDSTEIN,

Defendants.
-----x

HOWARD GOLDSTEIN,

Third-Party Plaintiff,

-against-

BARBARA SCHIANO,

Third-Party Defendant.
-----x

Sequence 002

Index No. 105963/2008

Third-Party Index No.
1066/08

FILED
MAR 13 2009
COUNTY CLERK'S OFFICE
NEW YORK

MEMORANDUM DECISION

In this action to recover damages for fraudulent misrepresentation, unjust enrichment and fraudulent transfer, third-party defendant Barbara Schiano ("Schiano") moves for (1) an order, pursuant to CPLR 321 l(a)(7), dismissing this action with prejudice and (2) an order, pursuant to 22 NYCRR 130-1.1(a), granting third-party defendant attorneys' fees incurred in bringing this application and the costs and disbursements of this action.

Factual Background¹

Plaintiff Norman D. Schwartz ("plaintiff") and defendant Goldstein first became acquainted through a mutual acquaintance, Schiano, Goldstein's then-girlfriend. (Comp. ¶5). In

¹The factual background is taken from the Complaint and Third-Party Complaint as noted.

April, 2006 defendant Goldstein informed plaintiff that Goldstein needed a loan for his company, defendant FTB Corporation ("FTB") to purchase inventory for the business of FTB, said business being the composition of specialized paints for automobiles, pools and high-end coatings (*Id.*, ¶6). Based upon the representations that the money was to be utilized by FTB and repaid to plaintiff by FTB, on or about May 9, 2006 plaintiff provided a loan of \$201,000 to FTB at the request of Defendant Goldstein (*Id.*, ¶7). During 2007, plaintiff made several requests for repayment of the loan by FTB through conversations with defendant Goldstein and through Schiano (*Id.*, ¶8). In 2008, plaintiff received e-mails from defendant Goldstein in which Goldstein individually stated that he was responsible for the repayment of the loan and that he was going to repay the loan that was given to FTB (*Id.*, ¶9). Despite repeated demands by plaintiff for Goldstein and FTB to repay the loan, the loan remains outstanding.

Plaintiff then commenced this action against FTB and Goldstein to recover \$201,000, on theories of fraudulent misrepresentation, unjust enrichment and fraudulent transfer. Defendants filed a pre-answer motion to dismiss the complaint on grounds that documentary evidence established that a condition precedent in the written promissory note for repayment had not occurred, and that the Complaint failed to plead fraud with particularity, state a cause of action, and join a necessary party. The Court denied the motion, stating in relevant part:

. . . . 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 the 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 [] any breach of the terms of the promissory note (Decision, pp. 7-8)

Defendants then filed an answer asserting two (2) counterclaims based on alleged frivolous conduct by plaintiff under 22 NYCRR §130-1.1.

Goldstein filed the third party complaint for an order declaring that Schiano has a duty to defend and indemnify for any sums which may be awarded to plaintiff in this action under the terms of a promissory note, dated May 9, 2006 (the "Promissory Note"). Goldstein alleges that plaintiff's claim for \$201,000.00 is based on the Promissory Note, which was executed by Goldstein and Schiano, in which they promised to pay Schwartz the sum of \$201,000.00 (third-party comp., ¶4). Goldstein alleges that Schiano's joint execution of the promissory note rendered her equally liable as Goldstein to plaintiff for the repayment of the loan (*Id.*, ¶7).

Motion

Goldstein now moves to dismiss the third-party complaint because the Complaint does not seek recovery under the terms of the promissory note, and the promissory note does not require Schiano to indemnify Goldstein or pay his attorneys' fees.

Schiano further argues that Goldstein and his counsel are fully aware that the complaint does not seek recovery under the promissory note. Service of a third-party complaint seeking indemnification for an un-pleaded cause of action is frivolous conduct under Rule 130. Accordingly, Schiano also seeks an order, pursuant to 22 NYCRR 130-1.1 (a), granting her an award of her attorneys' fees incurred in bringing this application, and the costs and disbursements of this action.

Opposition

Goldstein argues that Schiano cannot “bootstrap the Court's decision and contend that the Decision on the motion to dismiss the Complaint was dispositive of the third-party complaint as well.” Goldstein contends that the denial of the previous motion to dismiss is not dispositive of the issues raised in the third-party complaint, since the denial of such a motion is not a substantive bar to Goldstein raising and proving the defense he raised in his motion. Goldstein maintains that Schiano mistakenly urges that the Court's Decision has some sort of *res judicata* effect on the entirety of this litigation. The issues of this case, including all defenses and impleaders have not been fully litigated, nor has the defendant been given a full opportunity to litigate those issues. As such there is no claim of *res judicata* available to Schiano, and her motion must fail.

Further, in the event Goldstein were to ultimately prevail in his assertion of a defense of documentary evidence, Schiano would be liable to indemnify him for any money he may ultimately pay to Schwartz. As such, the third party action is entirely appropriate. Goldstein argues that Schiano's assertion that Goldstein has acted “frivolously” in filing the third-party complaint is groundless, as she signed the Promissory Note and agreed to be jointly liable for the debt to Schwartz. Schiano's assertion smacks of the “pot calling the kettle black”; Schiano is a well seasoned business person, represented by exceedingly competent counsel, and both were well aware, prior to making their motion, that it completely lacks merit. The only purpose Schiano has brought on this motion was to harass Goldstein and run up his bill. Thus, Schiano's conduct is certainly frivolous.²

² Schiano did not submit any reply papers.

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Analysis

Failure to State a Cause of Action CPLR 3211(a)(7)

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 Thorn 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), and 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 [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 [2000]), 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 [1977]; *see also Leon v Martinez*, 84 N Y2d 83, 88, 614 NYS2d 972 [1994]; *Ark Bryant Park Corp. v Bryant*

Park Restoration Corp., 285 AD2d 143, 150, 730 NYS2d 48 [1st Dept 2001]).

Contrary to Goldstein's contention, Schiano's instant application to dismiss the third-party complaint is not based on an assertion that the action is barred by *res judicata* due to the Court's previous determination. Instead, Schiano's application simply rests on the assertion that the main complaint does not seek recovery based on the Promissory Note, upon which Goldstein's indemnification and defense claims stem. Schiano points out that the third-party complaint against her seeks "indemnification from Schiano for any recovery plaintiff obtains against Goldstein in this action under the terms of the promissory note."

Goldstein's third-party complaint specifically asserts, in pertinent part that:

4. Plaintiff . . . alleges that . . . [Goldstein] owes him \$201,000.00. That alleged claim is based on a promissory note dated May 9, 2006, executed by Goldstein and . . . [Schiano] promising to pay [plaintiff] the sum of \$201,000.00.
 5. Said note was executed in consideration of a loan made by the plaintiff to Goldstein and Schiano in the amount of \$201,000.00 for the purpose of buying real property . . .
 6. The \$201,000.00 was to be repaid at a time in Goldstein and Schiano's sole discretion but repayment on said note was not required prior to the sale of the . . . property, Goldstein's death or Plaintiffs death. Said loaned monies were given to FTB Corporation, a corporation owned by Goldstein at Plaintiffs demand.
 7. Schiano's joint execution of the promissory note rendered her equally liable as Goldstein to plaintiff for the repayment of the loan.
 8. On or about April 29, 2008, without any of the events which would trigger a mandatory repayment pursuant to the promissory note having occurred, plaintiff commenced an action against Goldstein seeking a judgment against him for \$201,000.00.
 9. Plaintiff failed to include Schiano as a defendant in this matter, despite her having signed the note.
 10. By reason of the foregoing, in the event Plaintiff obtains a judgment against Goldstein, Schiano is wholly liable over to and will be bound to indemnify Goldstein for the amount of any recovery or verdict recovered against him by the Plaintiff.
- WHEREFORE, Defendant-Third Party Plaintiff demands judgment as follows: (a) declaring that Schiano has a duty to defend and indemnify Defendant Third Party Plaintiff Goldstein for any sums which may be awarded to Plaintiff in this action under the terms of the Promissory Note together with the costs and disbursements of this action plus all

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attorney's fees and other costs incurred herein

Therefore, the third-party claim for defense and indemnification arises solely from Schiano's alleged execution of the Promissory Note in the event Goldstein is found liable to plaintiff under the Promissory Note.

However, the complaint does not seek damages based on Goldstein's alleged promise found in the Promissory Note and breach thereof. Instead, plaintiff's complaint seeks damages based on theories of fraudulent inducement, unjust enrichment and the fraudulent transfer of funds. Plaintiff alleges that defendants made certain false representations concerning the purpose the loan in order to induce plaintiff to loan defendants the amount in question. On the other hand, defendants claim that the loan was a personal loan made by plaintiff so that Goldstein and Schiano could jointly purchase certain real property, and that the loan was not to be repaid until after the sale of the property, which is currently on the market. Yet, the third-party complaint seeks defense and indemnification for "any sums which may be awarded to Plaintiff in this action under the terms of the Promissory Note" and there is no theory under which plaintiff can recover damages based on the terms of Promissory Note in this action.

Given that the third-party complaint only seeks damages against Schiano for her liability under the Promissory Note, and does not allege any claims related to the alleged fraud committed against the plaintiff, the third-party complaint is dismissed.

The Court notes that Schiano bases her dismissal application also on the ground that the Promissory Note does not require her to indemnify Goldstein or pay his attorneys' fees. Since the complaint is not based on the Promissory Note, and consequently, any third-party claim for defense and indemnification based on the Promissory Note is dismissed, the court does not reach

[* 9]
the issue of whether Schiano agreed to be jointly liable to plaintiff under said Note.

Attorneys' Fees

22 NYCRR § 130-1.1 gives the Court, in its discretion, authority to award costs “in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees” and/or the imposition of financial sanctions upon a party or attorney who engages in frivolous conduct.” 22 NYCRR § 130-1.1 (c) states that conduct is frivolous if:

- (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
- (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
- (3) it asserts material factual statements that are false.

Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.

Although the third-party complaint fails to state a cause of action for contractual defense and indemnification based on the Promissory Note, it cannot be said that it is frivolous.

The complaint against Goldstein describes the “Nature of this Action” as a “proceeding to recover a \$201,000 loan provided to FTB Corporation (‘FTB’) which was never repaid despite demand for repayment.” It is uncontested that the \$201,000 loan was memorialized by the parties by the Promissory Note, and that the Promissory Note was executed by Schiano and Goldstein.

The third-party complaint, in turn, alleges that Schiano signed the Promissory Note and agreed to be jointly liable for the debt to plaintiff. Although the complaint does not seek damages based on an alleged breach of the Promissory Note, the complaint does refer to the loan, which is

found in the Promissory Note. Thus, it cannot be said that the third-party complaint premised on the Promissory Note is "completely" without merit, so as to warrant sanctions. Nor is there any showing that the third-party complaint was commenced to delay or prolong the resolution of this litigation, or to harass or maliciously injure Schiano, or asserts material factual statements that are false.

Therefore, third-party defendant Schiano's application for attorneys' fees is denied.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the branch of the motion by third-party defendant Barbara Schiano for an order, pursuant to CPLR 321 l(a)(7), is granted and the third-party action is hereby dismissed; and it is further

ORDERED that the branch of the motion by third-party defendant Barbara Schiano for an order, pursuant to 22 NYCRR 130-1.1(a), granting third-party defendant attorneys' fees incurred in bringing this application and the costs and disbursements of this action is denied; and it is further

ORDERED that third-party defendant serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that the Clerk may enter judgment accordingly.

This constitutes the decision and order of the Court.

FILED
MAR 13 2009
COUNTY CLERK'S OFFICE
NEW YORK

3/10/09
Dated: March 10, 2009
aw

[Signature]
Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD

HON. CAROL EDMEAD