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SCANNED ON 4/9/2009

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

PRESENT: MARCY S. FRIEDMAN PART 57

Justice

Index Number : 601753/2006
LICHTENSTEIN, BEN
VS.
CANNA REAL ESTATE
SEQUENCE NUMBER : 007
SUMMARY JUDGMENT

INDEX NO. 601753/06

MOTION DATE

MOTION SEQ. NO. 007

MOTION CAL. NO.

this motion to/for Summary Judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Supplemental papers - Supp 1

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION/ORDER.

FILED
APR 09 2009
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 4/7/09

MARCY S. FRIEDMAN, J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

BEN LICHTENSTEIN

Plaintiff,

Index No.: 601753/06

- against -

CANNA REAL ESTATE HOLDINGS, LLC.
CANNA REAL ESTATE HOLDINGS, INC.,
KEITH S. BARNETT, DOUGLAS BOLTON, and
CARMINE ALESSANDRO

DECISION/ORDER

Defendants.

In this action, plaintiff alleges that defendants defrauded him in connection with a real estate transaction. The complaint alleges causes of action for an accounting, declaratory relief, partition, quantum meruit, fraud, "breach of duty," fraudulent conveyance and "corporate disregard." Defendants Keith S. Barnett and Douglas Bolton (collectively "defendants") move for summary judgment dismissing the complaint against them.[1]

As alleged in plaintiff's complaint, he and defendants formed Canna Real Estate Holdings, LLC (the "LLC") and, through this corporation, acquired property located at 2320 Adam Clayton Powell Boulevard in Manhattan, on or about November 17, 1999. (Compl., ¶¶13, 21.) Plaintiff claims that each defendant received a 25% interest in the LLC and that, while he

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[1]By order dated September 7, 2006, entered on plaintiff's default, this court dismissed plaintiff's complaint as against defendants Canna Real Estate Holdings, LLC, Canna Real Estate Holdings, Inc., and Carmine Alessandro.

was to receive a 50% interest, he offered to give defendant Barnett an additional 25% if Barnett secured a mortgage on the property. (Id., ¶¶18; 26.)

An agreement dated July 20, 2004 ("2004 agreement") provided for plaintiff's sale of a 25% interest in the LLC to defendants for $80,000. (Ex. E to Defendants' Motion.) Pursuant to the agreement, defendants relieved plaintiff of all tax and loan obligations of the LLC. (Id.) In a separate transaction, on July 21, 2004, plaintiff transferred his ownership interest in a $100,000 insurance policy on his life to defendant Barnett for $50,000. (Id., Ex. G.; P.'s Opp., ¶14.) Plaintiff challenges the validity of both transactions. By agreement dated October 27, 2005, defendants assigned their 100% interest in the LLC to Carmine Alessandro for $1.8 million. (Id., Ex. F.)

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b])." (Zuckerman, 49 NY2d at 562.)

As defendants' motion is primarily addressed to the face of the pleadings, the standards for a motion to dismiss also apply. "[T]he pleading is to be afforded a liberal construction (see CPLR 3026). We 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 within

any cognizable legal theory." (Leon v Martinez, 84 NY2d 83, 87-88 [1994]. See 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144 [2002].) The test "is not whether the plaintiff has artfully drafted the complaint but whether, deeming the complaint to allege whatever can be reasonably implied from its statements, a cause of action can be sustained." (Stendig, Inc. v Thom Rock Realty Co., 163 AD2d 46, 48 [1st Dept 1990].) However, "the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts." (Robinson v Robinson, 303 AD2d 234, 235 [1st Dept 2003]. See also Water St. Leasehold LLC v Deloitte & Touche LLP, 19 AD3d 183 [1st Dept 2005], lv denied 6 NY3d 706 [2006].)

As an initial matter, defendants contend and plaintiff disputes, that plaintiff was never a member of the LLC and merely had an ownership interest in the subject property. However, this contention is contradicted by the 2004 agreement, which explicitly states that it "shall serve to memorialize the terms of sale of Ben Lichtenstein's Twenty-Five (25%) percent interest in Canna Real Estate Holdings LLC." In any event, this dispute is immaterial as the 2004 agreement makes a prima facie showing that even if plaintiff had an interest in the LLC rather than in the property, he sold that interest. To the extent that plaintiff claims that the 2004 agreement was invalid because defendants failed to comply with corporate formalities, he fails to identify the formalities that should have been followed or to submit authority as to the legal impact of the failure to comply. Plaintiff thus fails to raise a triable issue of fact as to the enforceability of the 2004 agreement.

Plaintiff's fifth and sixth causes of action respectively allege that defendants fraudulently induced him into signing the 2004 agreement and transferring his life insurance policy. These

causes of action fail to satisfy the pleading requirements for fraud.

In order to plead a prima facie case for fraud, "a plaintiff must allege misrepresentation of material fact, falsity, scienter, deception and injury, and each element must be pleaded with particularity." (LaSalle Nat. Bank v Ernst & Young L.L.P., 285 AD2d 101, 109 [1st Dept 2001] [internal citation omitted].) Moreover, "the circumstances constituting the wrong shall be stated in detail." (CPLR 3016[b].)

A cause of action for fraud may also be based on an omission of material fact. However, the duty to disclose remains subject to the well-settled doctrine that where a party could have discovered the material facts through the exercise of "ordinary intelligence," but failed to do so, it may not complain that it was induced to enter into the transaction by fraud. (Abrahami v UPC Constr. Co., 224 AD2d 231, 234 [1st Dept 1996], quoting Schumaker v Mather, 133 NY 590, 596 [1892].) "A party will not be relieved of the consequences of his own failure to proceed with diligence or to exercise caution with respect to a business transaction." (Cantor Fitzgerald Inc. v Cantor Fitzgerald Sec., 268 AD2d 324, 326 [1st Dept 2000], affd no op 95 NY2d 919, quoting Hyman, Inc. v Olsen Indus., 227 AD2d 270, 277 [1st Dept 1996].)

In support of plaintiff's fraud claim based on the 2004 agreement, plaintiff alleges that defendant Barnett "misled plaintiff Ben Lichtenstein into signing an unsworn document." (Compl, ¶39.) Plaintiff also alleges that Barnett told him that his share was valued at $80,000 although the actual value of his interest in the LLC was at least $1,000,000. (Id., ¶45.) Plaintiff further alleges that Barnett did not provide him with any disclosure or any opportunity for him to appraise and evaluate the value of the LLC. (Id., ¶40.) In addition, plaintiff pleads that Barnett fraudulently induced plaintiff to transfer ownership to Barnett of plaintiff's whole life insurance

policy. (Id., ¶83.)

The fraud cause of action regarding the 2004 agreement is thus based on plaintiff's allegation that Barnett misrepresented the actual value of plaintiff's interest. However, this allegation is conclusory and lacks the requisite specificity for the pleading of a fraud. Moreover, plaintiff could have learned the value of his interest in the LLC through reasonable investigation on his own. He had the means to conduct due diligence because, as plaintiff concedes, he collected rents from tenants and performed other managerial duties on the property. Plaintiff could also have obtained an independent appraisal of the property. Therefore, plaintiff's pleading deficiency is not ameliorated by his claim that defendants did not provide him with documentation on the value of his interest.

The fraud cause of action regarding the life insurance is predicated on plaintiff's claim that Barnett fraudulently induced him into transferring ownership of the policy. However, plaintiff fails to identify any misrepresentations or omissions that Barnett made which induced him to execute the transaction. This claim is also pleaded with insufficient specificity. Accordingly, plaintiff's fifth and sixth causes of action should be dismissed.

Plaintiff's second cause of action for declaratory relief and eighth cause of action for fraudulent conveyance are duplicative of his fraud claims and therefore should be dismissed. It is well settled that a "cause of action for a declaratory judgment is unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action." (Apple Records Inc. v Capitol Records, Inc., 137 AD2d 50, 54 [1st Dept 1988]; Spitzer v Schussel, 48 AD3d 233 [1st Dept 2008].) Moreover, where fraud and fraudulent conveyance claims are based on the same allegations the duplicative claim should be dismissed. (See e.g. Cahen-Vorburger v

Vorburger, 41 AD3d 281, 282 [1st Dept 2007].)

In support of plaintiff's declaratory judgment cause of action he alleges that "the defendants' misrepresentation and fraud set forth herein fraudulently deprived Plaintiff his equitable interest and share in the income and profits and distributions to the members of CANNA." (Compl., ¶62.) Similarly, plaintiff's fraudulent conveyance claim alleges that defendants' acts and omissions in causing plaintiff to transfer his ownership interest in the LLC were fraudulent. (Id., ¶94.) As these causes of action are based upon the same facts as plaintiff's underlying fraud claims, they should be dismissed.

Plaintiff also alleges a first cause of action for an accounting as against defendant Barnett. It is well settled that "[t]he right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest." (Adam v Cutner & Rathkopf, 238 AD2d 234, 242 [1st Dept 1997] quoting Palazzo v Palazzo, 121 AD2d 261, 265 [1st Dept 1986].) To the extent that plaintiff claims a fiduciary relationship existed between him and the defendants, these allegations are conclusory at best. Moreover, plaintiff contends that he first made a request for an accounting from defendants in October 2005, more than a year after plaintiff sold his ownership interest in the property. Therefore, on the above authority, plaintiff fails to state a cause of action for an accounting.

Plaintiff's seventh cause of action for breach of duty is based on the same facts as his cause of action for an accounting. Thus, this cause of action too must be dismissed as duplicative.

Plaintiff's third cause of action is for partition of the property. It is well settled that a

party bringing an action for partition must have legal title to the real property. (Garland v Raunheim, 29 AD2d 383 [1st Dept 1968]. See also RPAPL §901[1].) Based on the 2004 agreement in which plaintiff sold his 25% interest in the LLC to defendants as well as defendants' subsequent assignment of their 100% interest in the LLC to defendant Alessandro, defendants make a prima facie showing of entitlement to judgment dismissing plaintiffs partition claim. Plaintiff fails to raise a triable issue of fact in opposition. As held above, plaintiff does not raise a triable issue of fact as to the enforceability of the 2004 agreement. Accordingly, the branch of defendants' motion seeking dismissal of plaintiff's partition cause of action should be granted.

Plaintiff's ninth cause of action, entitled "ultra vires - corporate disregard," should be dismissed. Even if plaintiff can adduce evidence to support his claim that defendants failed to comply with corporate formalities, he does not allege, let alone show, how this failure was a proximate cause of his claimed damages. Plaintiff's other allegations of wrongdoing, including filing of false statements on loan applications and self-dealing, are wholly conclusory and therefore insufficient to support this cause of action.

Finally, plaintiff's fourth cause of action for quantum meruit must be dismissed. It is well settled that a claim for quantum meruit requires the plaintiff to show the performance of services in good faith, the acceptance of those services by the persons to whom they were rendered, the existence of an expectation of compensation, and the reasonable value of those services. (Soumayah v Minnelli, 41 AD3d 390, 391 [1st Dept 2007] appeal withdrawn 9 NY3d 989.) In his complaint, plaintiff claims that he brought the opportunity to acquire the property to defendants, as well as provided services for the building, including the collection of rent,

management of the building, and making repairs. (Compl, ¶67.) Plaintiff alleges that he is entitled to the reasonable value of those services.

Although defendants do not dispute that plaintiff performed these services, defendants claim that they were provided solely in connection with plaintiff's acquisition of his 25% interest in the property for which he was compensated through his sale. Defendants further argue that there was never any other agreement or expectation that he would be compensated for them in any other form. Defendants' claim is consistent with the allegations in plaintiff's complaint that in exchange for providing the opportunity to the LLC to acquire the property and the "ongoing [management] services," he was to receive an interest in the LLC. (Id., ¶¶17, 18.) Plaintiff does not plead performance of any services apart from the services that resulted in his acquisition of an interest in the LLC. Thus, plaintiff fails to raise a triable issue of fact as to his entitlement to compensation for services other than the compensation represented by his interest in the LLC which he sold in 2004.

To the extent that plaintiff alleges ethical violations as against Barnett based on his prior representation of plaintiff as his attorney, plaintiff does not make any showing that these matters in which Barnett represented him had anything to do with the instant matter.

Accordingly, it is hereby ORDERED that the motion of defendants Keith S. Barnett and Douglas Bolton for summary judgment is granted to the extent that the complaint is dismissed in its entirety, and the clerk is directed to enter judgment accordingly; and it is further

ORDERED that the counterclaims of defendants Keith S. Barnett and Douglas Bolton are severed and shall continue; and it is further

ORDERED that the parties shall appear in Part 57 of this Court on May 7, 2009 at 2:30

p.m. for a status conference.

This constitutes the decision and order of the court.

Dated: New York, New York
April 7, 2009

MARCY FRIEDMAN, J.S.C.