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

PRESENT: _____ PART 56

Justice

Index Number : 600742/2007

LAROSA, ALFRED

VS.

ARBUSMAN, AVIGAIL

SEQUENCE NUMBER : 005

OTHER RELIEFS

INDEX NO. _____

MOTION DATE 7/20/09

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

...n 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
SEP 28 2009
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 9/24/09

_____ 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

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ALFRED LAROSA, LYNN GROSSMAN and STEPHEN J. SAFT, ESQ., as co-executors of the estate of THOMAS ELMEZZI, individually, and on behalf of Vito, Ltd.,

Plaintiffs,

-against-

AVIGAIL ARBUSMAN, DAN ARBUSMAN, TALI ARBUSMAN, HERZFELD & RUBIN, P.C., and JEWELS BY VIGI, LTD.,

Defendants,

-and-

VITO, LTD.,

Nominal Defendant.

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Index No. 600742/07

DECISION AND ORDER

RICHARD B. LOWE III, J.:

In this Decision and Order, Motion Sequence 005, 006, and 009 are consolidated for disposition. In Motion Sequence 005, defendant Tali Arbusman ("Tali")[1] moves, pursuant to CPLR § 603, for a separate trial plaintiffs Alfred LaRosa, Lynn Grossman, and Stephen J. Saft, Esq.' ("Plaintiffs") claims for fraud in the inducement (second cause of action), fraudulent concealment (fifth cause of action), constructive fraud (sixth cause of action), negligent misrepresentation (seventh cause of action), and material misrepresentation (eighth cause of action) as alleged against her and brought on behalf of the estate of Thomas Elmezzi ("Elmezzi"). In Motion Sequence 006, Tali moves, pursuant to CPLR § 3212, for partial

[1] Due to the similarities in the parties' names, parties are referenced by their first names.

summary judgment dismissing the Plaintiffs' five fraud related claims asserted against her. In Motion Sequence 009, Plaintiffs move, pursuant to 22 NYCRR 130.1-1, for an award of sanctions for fees and costs incurred in connection to defendants Avigail Arbusman ("Avigail"), Dan Arbusman ("Dan"), and Jewels by Viggi Ltd.'s ("JBV") filing of an allegedly frivolous motion for partial summary judgment, which was subsequently withdrawn after receipt of Plaintiffs' opposition papers.

BACKGROUND

Relevant factual and legal background concerning this matter is set forth in this Court's Order and Decision entered on October 24, 2007, dismissing certain claims asserted against Tali and Herzfeld and Rubin, LLP ("Herzfeld & Rubin"), and Order and Decision entered on March 16, 2009, granting plaintiffs partial summary judgment on its conversion claim against defendants Avigail, Dan, and JBV (*LaRosa, et al. v Arbusman, et al.*, Index No 600742/2007, Sup Ct NY County 2007). Further discussion on the factual background is available from this Court's Decision and Order entered on February 8, 2007 in the related action off *Matter of LaRosa, et al.*, (Index No 115651/2006, Sup Ct, NY County 2007). Therefore, familiarity with the background will be presumed and will not be repeated herein.

DISCUSSION

Tali's Motions for Summary Judgment and Severance

"The proponent of a summary judgment motion 'must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact'" (*St. Claire v Empire Gen. Contr. & Painting Corp.*, 33 A.D.3d 611 [2d Dept 2006], *quoting Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

"Once the movant has demonstrated a prima facie showing of entitlement to judgment, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*St. Claire*, 33 AD3d at 611 [citations omitted]). "Mere conclusions, expressions of hope, allegations or assertions are insufficient to raise a triable issue of fact (*Plantamura v Penske Truck Leasing*, 246 AD2d 347, 348 [1st Dept 1998], *citing Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

The parties' competing contentions are viewed in the "light most favorable" to the nonmovant (*Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]). Additionally, the credibility of the parties "is not an appropriate consideration for the court" (*Cochrane v Owens-Corning Fiberglas Corp.*, 219 AD2d 557, 559 [1st Dept 1995]; *see also Glick v Dolleck, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968] ["The court may not weigh the credibility of the affiants on a motion for summary judgment unless it clearly appears that the issues are not genuine, but feigned"]).

The elements for a cause of action for fraud and fraudulent inducement include a "misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421 [1996]; *see also National Union Fire Ins. Co. v Worley*, 257 AD2d 228, 233 [1st Dept 1999], *citing Channel Master Corp. v Aluminium Ltd. Sales*, 4 NY2d 403 [1958]). "[T]he person making the representations must be, or acting on behalf of, the other party to the contract" (*id.*, *citing Federal Ins. Co. v Mallardi*, 696 F Supp 875, 884 [SD NY

1988]). "[A]n omission does not constitute fraud unless there is a fiduciary relationship between the parties" *SNS Bank, N.V. v Citibank, N.A.*, 7 AD3d 352, 356 [1st Dept 2004]).

A cause of action for fraudulent concealment requires all the elements for fraud in addition to proving "that the defendant had a duty to disclose material information and that it failed to do so" (*P.T. Bank Cent. Asia v ABN AMRO Bank N.V.*, 301 AD2d 373, 376 [1st Dept 2003]), *citing Wiscovitch Associates, Ltd. v Philip Morris Companies, Inc.*, 193 AD2d 542 [1st Dept 1993]). Like, fraudulent inducement and fraudulent concealment, to prove negligent misrepresentation and material misrepresentation, a party must establish reliance on the alleged misrepresentation or omission (*Home Mut. Ins. Co. v Broadway Bank & Trust Co.*, 53 NY2d 568, 578 [1981]; *Torrington Indus. v. Southworth-Milton, Inc.*, 17 AD3d 894, 896 [3d Dept 2005]).

The issue of reasonable reliance on an alleged misrepresentations is generally "not subject to summary disposition" (*Brunetti v Musallam*, 11 AD3d 280, 281 [1st Dept 2004), *citing Swersky v Dreyer & Traub*, 219 AD2d 321 [1st Dept 1996] [issue of fact whether plaintiff reasonably relied on alleged statements]). However, a non-moving party must raise at lease an issue of fact as to each element of their claims, including justifiable reliance (*Global Mins. & Metals Corp. v Holme*, 35 AD3d 93 [1st Dept 2006]).

In this case, Plaintiffs are unable to point to any evidence suggesting that Elmezzi would have acted any differently if Tali would have informed him of all the facts of which she was aware. Of course, Plaintiffs are unable to do this because they are without testimony from the deceased which would have been relevant to examination of this issue. Based on the facts before the Court now that discovery in this matter is complete, Plaintiffs are unable to raise an issue of

fact as to the reliance element of fraudulent inducement, fraudulent concealment, negligent misrepresentation, and material misrepresentation. As such, those causes of action are dismissed as pleaded against Tali.

Under the doctrine of constructive fraud, however, "where a fiduciary relationship exists between parties, 'transactions between them are scrutinized with extreme vigilance, and clear evidence is required that the transaction was understood, and that there was no fraud, mistake or undue influence" (*Gordon v Bialystoker Center & Bikur Cholim, Inc.*, 45 NY2d 692, 698 [1978]).[2] "Where those relations exist there must be clear proof of the integrity and fairness of the transaction, or any instrument thus obtained will be set aside or held as invalid between the parties" (*id.*, *citing Ten Eyck v Whitbeck*, 156 NY 341, 353).

Therefore, "[t]he elements of a cause of action for constructive fraud are identical to those for fraud "with the crucial exception that the element of scienter upon the part of the defendant . . . is dropped and is replaced by a requirement that the plaintiff prove the existence of a fiduciary or confidential relationship" (*Brown v Lockwood*, 76 AD2d 721, 731 [2d Dept 1980]). "[W]here a fiduciary relationship exists between parties, 'transactions between them are scrutinized with extreme vigilance'" (*In re Henderson*, 80 NY2d 388, 394 [1992] [citations omitted]).

Plaintiffs' claim for constructive fraud against Tali withstands summary disposition and is ripe for trial. Just like the other claims, the alleged tortious conduct does not concern any

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[2] Nowhere in the *Gordon* decision does that Court of Appeals imply that its holding and discussion on the constructive trust doctrine is limited to incapacitated individuals, as Tali suggests. It is clear from the language of the opinion and the reference to it by the Second Department in *Keating v Weinberger* (160 AD2d 675 [2d Dept 1990]), that the *Gordon* decision is directly applicable to the claims in this matter.

representations Tali made in allegedly perpetuating any fraud on Elmezzi. Rather, the issues relevant for this motion and for the upcoming trial concern: (1) whether Tali maintained a fiduciary relationship with Elmezzi in which she had a duty to inform; (2) whether Tali had information concerning potential fraudulent behavior on the part of her parents; (3) whether Tali failed to disclose material facts to Elmezzi; and (4) whether Tali was interested in the transaction.

At this point, Plaintiffs have raised an issue of fact as to the fiduciary relationship (June 17, 2009 Affidavit of Stuart Summit ["Summit Aff"] Ex 2, Tali Deposition Transcript ["Tali Tr"] at 484:23-485:4 ["did you yourself consider yourself [sic] Mr. Elmezzi's attorney? . . . Somewhat"]).

Plaintiffs have also raised an issue of fact as to whether Tali was on notice of her parents' alleged intent to defraud that she should have disclosed such information to Elmezzi (Summit Aff Ex 2, Dan Deposition Transcript ["Dan Tr"] at 261:23-267:10; 272:10-273:7). Specifically, there is evidence that Dan instructed Tali to incorporate a provision providing that upon the death of a shareholder, a surviving shareholder would take the deceased's shares with a buyout. Tali did not include that provision in previous drafts and Tali warned Dan that plaintiff Stephen Saft ("Saft") would object to the provision (*id.*).[3] Nonetheless, the disputed language appeared in drafts allegedly created by Tali just two days before it was allegedly executed (*id.*).

Furthermore, Dan instructed Tali to stay out of the negotiations and that he didn't want her to say anything about the agreement to Saft (*id.*). These instructions, and her subsequent

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[3] Saft was Elmezzi's personal representative allegedly responsible for negotiating the shareholders' agreement on Elmezzi's behalf.

silence, were arguably in conflict with her fiduciary relationship with Elmezzi, and arguably should have put her on notice to inform Elmezzi and Saft of possible fraudulent conduct or behavior (*see Keating*, 160 AD2d at 675). It is undisputed that Tali never had any direct communications with Elmezzi and that she did not tell Saft (1) that her parents insisted that she include language in the shareholders' agreement that was directly against Elmezzi's interest, and (2) that she was instructed to stay out of the negotiations between her parents and her client, Elmezzi. In fact, there is a factual dispute as to whether she knew the shareholders' agreement was signed and then lied to Saft.

Lastly, Plaintiffs have raised an issue of fact as to Tali's interest in the subsequent transactions among Elmezzi, Avigail, and Dan (Summit Aff Ex 3 [article stating that Tali works in the family business, including a report of an alleged admission by Dan that Tali "decided to join the business"]; and that the fact that Tali admits to being a shareholder in Duffy Greenwich LLC, an entity allegedly formed to purchase real estate in which the alleged "family business" operates). At trial, Plaintiffs bear the burden of establishing Tali benefitted from the contested transactions. At this stage, they have raised an issue of fact as to her involvement with the business and related businesses that may benefit from the business, in addition to her family ties.

Tali's fiduciary obligations to Elmezzi began when she agreed to represent Elmezzi and all the shareholders of Vito, Inc. ("Vito"). The fiduciary relationship therefore began prior to all the allegedly fraudulent transactions involved in this lawsuit -- namely the signing of the shareholders' agreement and, as alleged, the subsequent purchases of jewelry from Avigail and Dan. Plaintiffs' claim for constructive fraud satisfies the requirement that the relationship exist prior to the transaction, as explained in *Emigrant Bank v UBS Real Estate Sec., Inc.* (49 AD3d

382, 384-385 [1st Dept 2008]), because the alleged fraudulent transactions all occurred after Tali was allegedly retained to represent the Vito shareholders. As opposed to the facts of the *Emigrant Bank* case which involved a contract that both allegedly defrauded the party and created the special relationship (*id.*).

If Plaintiffs are able to establish all four of these elements at trial, Tali will then bear the burden "to demonstrate that the agreement entered into by the parties was not the product of fraud or undue influence" (*Keating v Weinberger*, 160 AD2d 675 [2d Dept 1990], *citing Matter of Anrig,* 73 AD2d 947 [2d Dept 1980]). As the Court of Appeals stated:

> Whenever . . . the relations between the contracting parties appear to be of such a character as to render it certain that they do not deal on terms of equality but that either on the one side from superior knowledge of the matter derived from a fiduciary relation, or from an overmastering influence, or on the other from weakness, dependence, or trust justifiably reposed, unfair advantage in a transaction is rendered probable, there the burden is shifted, the transaction is presumed void, and it is incumbent upon the stronger party to show affirmatively that no deception was practiced, no undue influence was used, and that all was fair, open, voluntary and well understood.

(*Gordon*, 45 NY2d at 698-699). Therefore, Tali will bear the burden of proof on the issue whether the transactions were "freely, voluntarily and understandingly made" (*id.*). This includes all the agreements entered into among Elmezzi, Avigail, Dan, and Tali after a fiduciary relationship was established between Elmezzi and Tali.

With respect to the motion for severance, Plaintiffs claim for constructive trust involves Tali's silence in the face of conduct by her parents that she was aware of and allegedly should have been communicated to Elmezzi and Saft. Thus there are common factual and legal issues involved in the claims asserted against Tali and her parents. As the Court of Appeals stated:

> Although it is within a trial court's discretion to grant a severance, this discretion should be exercised sparingly. Where complex issues are intertwined, albeit in

> technically different actions, it would be better not to fragment trials, but to facilitate one complete and comprehensive hearing and determine all the issues involved between the parties at the same time. Fragmentation increases litigation and places an unnecessary burden on court facilities by requiring two separate trials instead of one.

(*Shanley v Callanan Industries, Inc.*, 54 NY2d 52, 57 [1981]).

Tali argues that she will suffer prejudice by a jury potentially associating her with any wrongdoing by her parents. However, any trial concerning the constructive fraud claim against Tali will involve evidence of her parents' conduct. The factual and legal issues are too intertwined to justify severing the claims against Tali (*Eugene J. Busher Co. v Galbreath-Ruffin Realty Co.*, 16 AD2d 750 [1st Dept 1962]).

Plaintiffs' Motion for Sanctions

Plaintiffs argue that Dan, Avigail, and JBV's (collectively the "JBV Defendants") motion for partial summary judgment, served on May 29, 2009, was frivolous and they should be awarded sanctions in the form of costs associated with opposing the motion.

Pursuant to 22 NYCRR § 130-1.1 , "[t]he court, in its discretion, may award to any party or attorney . . . costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct . . . ." Conduct is considered frivolous if:

> (1) it is completely without merit in law and cannot be supported by a reasonable argument . . . ;
>
> (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.

(22 NYCRR § 130-1.1 [c]).

To determine whether conduct is 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 factual basis was apparent or should have been apparent, or was brought to the attention of counsel or the party" (*id.*).

The JBV Defendants motion for partial summary judgment concerned approximately $1.4 million in funds they received from Elmezzi during the last months of his life. In the motion, they explained that the funds were exchanged for certain items of jewelry. The motion papers included invoices for those particular items of jewelry.

Upon receiving the motion papers, Plaintiffs sent the JBV Defendants a letter dated June 2, 2009, explaining that certain assertions made in the motion were refuted by documents the JBV Defendants maintained in their possession. For example, a particular diamond at issue in the motion (allegedly valued at approximately $1 million) was in fact still in the possession of the JBV Defendants, who were still attempting to sell it. Plaintiffs asserted that this issue of fact, among others identified, disposed of the motion and requested that the JBV Defendants withdraw the motion. Plaintiffs also gave the JBV Defendants notice they would file this motion for sanctions if the JBV Defendants did not withdraw the motion.

The JBV Defendants responded with a letter dated June 5, 2009, explaining a mix-up concerning the diamond identified with a separate diamond. The JBV Defendants explained that there was sufficient justification for them to proceed with their motion. Thus Plaintiffs undertook the research and drafting necessary to oppose the motion to preserve their claims. Plaintiffs served their opposition on June 17, 2005. On June 26, 2009, the JBV Defendants

withdrew their motion.

Contrary to the JBV Defendants' position, the June 5, 2009 letter creates a whole host of factual issues that in itself would justify denying summary judgment, or at the very least required JBV Defendants to seek court permission to withdraw and then resubmit the motion after clearing up the identity of the diamonds. Thus the JBV Defendants were on notice that the motion was refuted by their own documents, and was without merit as drafted. Plaintiffs put the JBV Defendants on notice of the same legal and factual arguments that they would submit in opposition and gave the JBV Defendants notice that the motion was frivolous. By failing to withdraw their motion, the JBV Defendants required Plaintiffs to incur unnecessary expense in submitting opposition. The JBV Defendants must assume the unnecessary expenses incurred and sanctions are appropriate.

The JBV Defendants cite to *Matter of Ernestine R. v John R.* (61 AD3d 874, 876 [2d Dept 2009]) in opposition to this motion. Unlike the facts of that case, however, the JBV Defendants did not promptly withdraw the motion upon learning of the facts that made the motion frivolous, but rather kept it open until Plaintiffs undertook the efforts to oppose the motion.

Plaintiffs assert that the costs associated with drafting opposition to the JBV Defendants' motion for partial summary judgment is at least $10,000. However, a factual inquiry into the amount of expense actually incurred is necessary. The Court will give the parties thirty (30) days from the date of entry of this Decision and Order to submit a signed stipulation agreeing to the costs and fees incurred in opposing the motion. If the parties are unable to agree on a amount, the Court will refer this issue to a Special Referee to hear and determine the Plaintiffs'

fees and costs incurred in connection with the JBV Defendants's withdrawn motion for partial summary judgment.

CONCLUSION

Therefore, based on the foregoing, it is hereby

ORDERED that Motion Sequence 005 is denied; and it is further

ORDERED that Motion Sequence 006 is denied in part and granted to the extent of dismissing plaintiffs' claims for fraudulent inducement, fraudulent concealment, negligent misrepresentation, and material misrepresentation (second, fifth, seventh, eighth causes of action) as plead against Tali Arbusman; and it is further

ORDERED that Motion Sequence 009 is granted.

Dated: September 24, 2009

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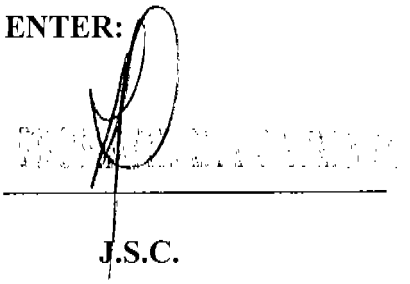

J.S.C.