

Yokuty v 135 W. 14th St., LLC

2009 NY Slip Op 33079(U)

December 9, 2009

Supreme Court, New York County

Docket Number: 601446/2009

Judge: Jane S. Solomon

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

PRESENT: HON. JANE S. SOLOMON
Justice

PART 55

Index Number : 601446/2009
YOKUTY, JEFFERY J.
VS.
135 WEST 14TH STREET LLC
SEQUENCE NUMBER : 001
CORRECT PLEADINGS

INDEX NO. _____
MOTION DATE 9/14/09
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1-3
4-7
8-11

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

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

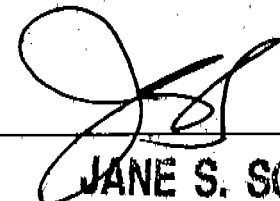
Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is decided by the amended*
Decision and Order.

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

FILED
DEC 28 2009
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/9/09


JANE S. SOLOMON 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: IAS PART 55

-----X

JEFFERY J. YOKUTY,

Index No. 601446/2009

Plaintiff,

DECISION AND ORDER

-against-

135 WEST 14TH STREET, LLC; CORE
GROUP MARKETING LLC; and GUZOV
OFSINK, LLC,

Defendants.

-----X

FILED
DEC 28 2009
NEW YORK
COUNTY CLERK'S OFFICE

Solomon, J;

Plaintiff, Jeffery J. Yokuty (Yokuty), sues Defendants for damages resulting from a failed real estate transaction. Defendants move, pursuant to CPLR 3024(a), for a more definite statement of the first count of the complaint, which alleges fraud and misrepresentation. Plaintiff opposes the motion and cross moves, pursuant to 22 NYCRR 1200.29 and 22 NYCRR 1200.7, to disqualify Guzov Ofsink, LLC (Guzov), a law firm, from representing co-defendants 135 West 14th Street, LLC (135 West) and Core Group Marketing LLC (Core). For the following reasons the motion is granted and the cross motion is denied.

FACTS

135 West is the sponsor of the ten residential and commercial units located at 135 West 14th Street, New York, New York (Building). On February 22, 2008, Yokuty entered into an agreement with 135 West to purchase unit #6 at the Building for

\$2,925,000. Yokuty paid a down payment of \$295,000, which was held in escrow by Guzov. The parties never closed on the deal and, on February 4, 2009, 135 West informed Yokuty that he was in default, and unless closed, his down payment would be forfeit on March 30, 2009. This law suit followed.

In the complaint, Yokuty alleges that Defendants entered into a conspiracy to defraud him by "continuously [making] material misrepresentations to Plaintiff in order to induce Plaintiff to execute the Purchase Agreement" (Complaint, ¶ 37), that these representations "made by 135 WEST, CORE and/or their agents concerning the Executed Contracts, the Prospective Contracts, that the Development and the Unit were available for immediate occupancy and that a closing for the unit would be held in mid April 2008 were false and fraudulent when made" (Complaint, ¶ 46), and "when Plaintiff questioned 135 WEST, CORE and/or their agents about the Development and his Unit being available for immediate occupancy and his closing date, they continuously represented to Plaintiff that the Development and his Unit were available for immediate occupancy" (Complaint, ¶ 64).

A. More Definite Statement

Defendants contend that the first count requires a more definite statement because it appears to be a claim for misrepresentation, fraud and conspiracy, but is not pleaded with

specificity. Yokuty counters that the motion is untimely because, while he agreed to give Guzov an extension of time to file an answer or motion, he did not agree to give one to 135 West or Core, and the motion was filed past the deadline for 135 West and Core. Alternately, Yokuty argues that the first count is not vague or ambiguous.

Initially, the motion is not untimely, as it is undisputed that Guzov (though not 135 West or Core) was given a filing extension until July 24, 2009, the date the motion was filed, and all defendants are entitled to the benefit of any result from the motion.

CPLR 3016 (b) provides: "Where a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust, or undue influence, the circumstances constituting the wrong shall be stated in detail." In other words, a fraud claim must be pleaded with specificity (see *Goldstein v. CIBC World Markets Corp.*, 6 AD3d 295 [1st Dept. 2004]).

The first count of the complaint does not plead in the detail required by CPLR 3016 (b). The complaint merely alleges that numerous representations were made "by 135 WEST, CORE and/or their agents," which constituted fraud. Yokuty does not specifically describe any statements made, nor does he specify which party made the representations. Rather, the count is

replete with generalized assertions, about the defendants collectively. Moreover, Yokuty does not argue that it would be impossible for him to particularize the circumstances surrounding the alleged fraud (see *Kaufman v. Cohen*, 307 A.D.2d 113, 122 [1st Dept, 2003]). Accordingly, the motion for a more definite statement is granted.

B. Disqualification

In his cross motion, Yokuty argues that Guzov's representation of 135 West and Core violates the Rules of Professional Conduct because an attorney in Guzov's employ will be a required witness, and because Guzov's representation of both 135 West and Core creates a concurrent conflict of interest.

Notably, the Rules of Professional Conduct (the Rules) have only recently superceded the Code of Professional Responsibility (the Code) for lawyers in New York, case law dealing with the Code remains applicable to the extent that it is consistent with the language of the Rules (see *DeLorenz v. Moss*, 24 Misc 3d 1218A [Sup. Ct., Nassau Co. 2009]).

1. Concurrent Conflict of Interest

Yokuty argues that all three defendants are adverse, as they have conflicting interests in their obligations under the purchase agreement. Guzov counters, with supporting affidavits, that the defendants consent to Guzov's representation of all parties, and that defendants do not anticipate any cross-claims

[* 6]
(Affidavit of Patrick Thompson; Affidavit of Jack Cayre).

In *Pearl v. 305 East 92nd Street Corp.*, 156 AD2d 122 (1st Dept, 1989), the plaintiff moved to disqualify the attorney/co-defendant from representing itself and another defendant. The defendants denied any conflict of interest. The court held that "plaintiff's alleged solicitude for potential conflict between his adversaries is totally rejected by the defendant-clients themselves, which should have concluded the court's inquiry on this score" (*Id.*, 123). Here, Defendants have denied any conflict, and have affirmed their consent to Guzov's continued representation. Accordingly, the branch of Plaintiff's cross motion seeking disqualification pursuant to 22 NYCRR 1200.7 is denied.

2. Lawyer as Witness

Yokuty argues that the entire Guzov law firm should be disqualified because one of its attorneys, Allison Scollar (Scollar), represented 135 West in the underlying transaction. He contends that Scollar is a necessary witness, and also argues that there is a possibility that further information may be found that would require calling additional Guzov lawyers to testify.

Guzov counters that Scollar is not a necessary witness, that much of her testimony would consist of uncontested facts and privileged information, and that Scollar is not representing the defendants in this litigation.

[* 7]

Disqualification of an attorney-witness may be required only when it is likely that the testimony to be given by the witness is necessary (*S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp*, 69 N.Y.2d 437, 445-446 [1987]). However, even assuming, arguendo, that Scollar's testimony is necessary, the entirety of the Guzov law firm need not be disqualified, as only the attorney-witness who will testify is disqualified (*Talvy v. American Red Cross in Greater New York*, 205 AD2d 143, 152 [1st Dept. 1994], *affd*, 87 NY2d 826 [1995]). Furthermore, even if multiple Guzov attorneys are necessary witnesses, "there is no rule or authority mandating vicarious disqualification if more than one attorney from a law firm is required to testify" (*id.*).

Accordingly, the branch of Plaintiff's cross motion seeking disqualification pursuant to 22 NYCRR 1200.29 is denied.

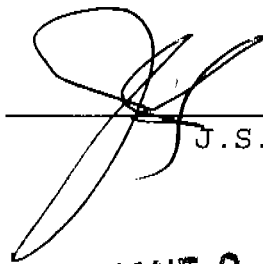
For the foregoing reasons, it hereby is

ORDERED that Defendant's motion is granted and Plaintiff is to provide a more definite statement of his claim pursuant to CPLR § 3024(a) on count one within thirty (30) days of service of a copy of this order with notice of entry; and it further is

ORDERED that Plaintiff's cross motion for disqualification is denied.

Dated: December 9, 2009

ENTER:



J.S.C.
JANE S. SOLOMON

FILED
DEC 28 2009
NEW YORK
COUNTY CLERK'S OFFICE