

Sanford/Kissena Owners Corp. v Daral Props. LLC

2010 NY Slip Op 30602(U)

March 23, 2010

Supreme Court, Queens County

Docket Number: 20719/2009

Judge: Allan B. Weiss

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cooperative ownership and to offer the units for sale to the public. Plaintiff also alleges that pursuant to the plan, the cooperative plan sponsor (the Sponsor), sought to convey the Cooperative Property, which constituted the majority of that which then was known as Tax Lot 22, to plaintiff and to reserve for itself a triangular-shaped portion of the same tax lot known as 42-07 Kissena Boulevard and 140-08 Sanford Avenue, Queens, New York a/k/a Block 5810 (now known as Lot 29, a/k/a Lots 29 and 30 on the City Tax Map) (the Development Property). Pursuant to the offering plan and transfer documents, plaintiff allegedly received ownership of the Cooperative Property, and transferred to the Sponsor, for the benefit of the Development Property, all excess development rights and an easement for the Sponsor as to the Development Property. In addition, plaintiff asserts that it concomitantly accepted restrictions of its rights to any further development of the Cooperative Property. Plaintiff alleges that under the plan and the “Zoning Lot Development Agreement” (Zoning Agreement), dated April 28, 1987, the Cooperative Property and the Development Property were declared a single “zoning lot.” Plaintiff also alleges that on or about April 28, 1987, the offering plan was declared effective and the Cooperative Property was conveyed to it.

The Sponsor allegedly transferred the Development Property to defendant Daral by recorded deed dated August 7, 2000, in exchange for payment of \$700,000.00. Plaintiff alleges that defendant Daral desired to construct a building on the Development Property, but discovered it (Daral) was constrained by certain zoning regulations regarding minimum distances between buildings on the same zoning lot. Defendant Daral allegedly undertook to break apart the zoning lot to eliminate the burden of the zoning regulations, and in furtherance of that goal, offered to pay plaintiff \$75,000.00, in \$5000.00 installments, and release the restrictions on the Cooperative Property, in exchange for an agreement to separate the single zoning lot into two zoning lots. Plaintiff alleges that it entered into the “Release and Cancellation of Zoning Lot and Development Agreement” (Cancellation Agreement) dated August 4, 2003 with defendant Daral, which split the single zoning lot into two zoning lots, each coterminous with the existing tax lots (Lots 22 and 29). According to plaintiff, the Cancellation Agreement terminated the Zoning Agreement, and unbeknownst to it, served to clear the way for defendant Daral to develop the Development Property with a six-story building. Plaintiff allegedly entered into the Cancellation Agreement in ignorance of its import, vis-a-vis the land use and potential development of Lot 29, and in reasonable reliance upon the fraudulent misrepresentation by defendants that \$75,000.00 constituted full and fair consideration for the transaction. Plaintiff alleges that Lot 29 served as a decorative lawn adjacent to its buildings, and by entering into the Cancellation Agreement, it lost the opportunity to acquire Lot 29 for a price consistent with its then severely limited development use.

Plaintiff commenced this action by filing the copy of the summons and complaint on August 3, 2009, alleging that John Di Milia, sued herein as John Dimilia, is a member of its board of directors and a principal of the Sponsor, and that Albert Crecco, a member of defendant Daral, and Mario Tucciarone, are principals of the Sponsor. Plaintiff seeks a judgment rescinding the Cancellation Agreement, declaring it void and be stricken from the record, and awarding compensatory and punitive damages. In its complaint, plaintiff asserts:

- 1) a first cause of action against defendants based upon a claim for breach of fiduciary duty, fraudulent inducement and misrepresentation,
- 2) a second cause of action for rescission based upon unilateral mistake and fraudulent misrepresentation and omission,
- 3) a third cause of action for a declaration that the Cancellation Agreement is void as a product of an ultra vires and unauthorized act of plaintiff's board of directors and former president,
- 4) a fourth cause of action based upon breach of fiduciary duty owing to plaintiff by defendant Di Milia, and upon a claim that defendants Crecco and Tucciarone induced defendant Di Milia to breach such duty and,
- 5) a fifth cause of action asserting a claim for an award of damages in the event rescission is not available.

Defendants Daral and Crecco, in lieu of answering the complaint, move to dismiss the complaint asserted against them. Plaintiff opposes the motion, and seeks leave to replead if necessary. Defendants Di Milia and Tucciarone have not appeared in relation to the motion.

“When determining a motion to dismiss pursuant to CPLR 3211(a)(7), the pleading must be afforded a liberal construction (*see* CPLR 3026; *Leon v Martinez*, 84 NY2d 83, 87 [1994]), the facts as alleged in the complaint are accepted as true, the plaintiff is accorded the benefit of every favorable inference, and the court must determine only whether the facts as alleged fit within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d at 87-88; *Cayuga Partners v 150 Grand*, 305 AD2d 527 [2003]). ‘In assessing a motion under CPLR 3211(a)(7) ... a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint,’ and if the court does so, ‘the criterion is whether the

proponent of the pleading has a cause of action, not whether he has stated one' (*Leon v Martinez*, 84 NY2d at 88 [internal quotations marks omitted]).

'A party seeking dismissal on the ground that its defense is founded on documentary evidence under CPLR 3211(a)(1) has the burden of submitting documentary evidence that "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim"' (*Sullivan v State of New York*, 34 AD3d 443, 445 [2006], quoting *Nevin v Laclede Professional Prods.*, 273 AD2d 453, 453 [2000]; see *Leon v Martinez*, 84 NY2d at 88) (*Uzzle v Nunzie Court Homeowners Assn, Inc.*, 70 AD3d 928 [2010]).

Defendants Daral and Crecco assert that the first cause of action fails to state a claim against them based upon fraud, misrepresentation or breach of fiduciary duty.

To state a cause of action for fraud, a plaintiff must allege that (1) the defendant made material representations that were false or concealed a material existing fact, (2) the defendant knew the representations were false and made them with the intent to deceive the plaintiff or remained silent regarding a concealed material existing fact with the intent to deceive the plaintiff, (3) the plaintiff was deceived, (4) the plaintiff justifiably relied on the defendant's representations or silence, and (5) the plaintiff was injured as a result of the defendant's representations (see *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413 [1996]; *New York Univ. v Continental Ins. Co.*, 87 NY2d 308 [1995]; *Channel Master Corp. v Aluminum Ltd. Sales*, 4 NY2d 403 [1958]; *Watson v Pascal*, 27 AD3d 459 [2006]; *Cerabono v Price*, 7 AD3d 479, 480 [2004]; *New York City Tr. Auth. v Morris J. Eisen, P.C.*, 276 AD2d 78 [2000]; *American Home Assur. Co. v Gemma Const. Co., Inc.*, 275 AD2d 616 [2000]; *Swersky v Dreyer and Traub*, 219 AD2d 321 [1996]). When the cause of action alleging fraud is predicated on acts of concealment, the plaintiff must also allege that the defendant had a duty to disclose the disputed information (see *Spencer v Green*, 42 AD3d 521 [2007]).

In the first cause of action for plaintiff alleges that defendants Daral and Crecco misrepresented the "effect" of the Cancellation Agreement and the value such agreement would confer upon Daral, and breached their fiduciary duty to make disclosure of the true effect and value. Plaintiff, however, has failed to allege any details of the alleged misrepresentations made by defendant Daral or Crecco as required by CPLR 3016 (see *Morales v AMS Mortg. Services, Inc.*, 69 AD3d 691 [2010]).

To the extent plaintiff alleges that defendants Daral and Crecco withheld pertinent information from it during negotiations of the Cancellation Agreement, the relationship between plaintiff and defendant Daral was an “arms-length contractual relationship,” which does not give rise to a fiduciary relationship (*see Cuomo v Mahpac Natl. Bank*, 5 AD3d 621, 622 [2004]; *see also AHA Sales, Inc. v Creative Bath Products, Inc.*, 58 AD3d 6, 21 [2008]). Plaintiff has failed to allege a basis for its claim that defendant Daral or Crecco owed it a fiduciary duty to speak. Plaintiff offers the affidavit of Baosheng Duanmu, its current president, to prove that defendant Di Milia, as a member of plaintiff’s board of directors, owed a duty of loyalty to speak truthfully regarding the benefit, if any, of the Cancellation Agreement to plaintiff, and the adequacy of the proposed consideration supporting the agreement.

The affidavit of Mr. Duanmu is in English and indicates that Mr. Duanmu’s English “is limited” and that he executed it “after interpretation from the English language into the Chinese language.” Plaintiff has failed to offer an affidavit by Mr. Duanmu in Chinese, along with a translation thereof, and an affidavit of any translator or interpreter setting forth the qualifications of the translator or interpreter and the accuracy of his or her translation (*see CPLR 2101[b]*; *Baginski v Queen Grand Realty, LLC*, 21 Misc 3d 1110[A] [2008]).

Even assuming the affidavit of Mr. Duanmu is an accurate version of his statements, it is insufficient evidence upon which to assert a cause of action against defendants Daral and Crecco based upon breach of fiduciary duty. Mr. Duanmu indicates that he suspects defendant Di Milia has “some” relationship with defendants Daral and Crecco, but admittedly does not know its nature, and claims plaintiff needs discovery to explore the issue. However, to permit plaintiff to conduct discovery concerning the purported relationship between defendants Daral and Crecco and Di Milia, based upon such affidavit, would be to sanction a fishing expedition (*see Varveris v Hermitage Ins. Co.*, 24 AD3d 537 [2005]; *see also Devore v Pfizer Inc.*, 58 AD3d 138 [2008]). Moreover, defendant Crecco avers that he is the sole member of defendant Daral, and Di Milia and Tucciarone are not, and never have been, members of Daral, or had any interest in the company. Defendant Crecco also avers that Daral never has been a member of plaintiff’s board of directors.

With respect to the second and third causes of action asserted against defendant Crecco, plaintiff makes no allegation that defendant Crecco is a party to the Cancellation Agreement, and therefore, has failed to state a cause of action against defendant Crecco for rescission of the agreement or to declare it void as the result of an ultra vires or unauthorized act.

To the extent plaintiff claims it is entitled to rescission of the Cancellation Agreement based upon unilateral mistake or to void the agreement as the result of an ultra vires or

unauthorized act, plaintiff makes no allegation that defendant Daral is a member of the board or an officer of plaintiff. Plaintiff, furthermore, has failed to allege facts which sufficiently establish that its purported unilateral mistake was caused by fraudulent conduct on the part of defendants Daral and Crecco and that the mistake occurred despite plaintiff's exercise of due diligence (*see Da Silva v Musso*, 53 NY2d 543 [1981]; *Wachovia Securities, LLC v Joseph*, 56 AD3d 269 [2008]; *Bailey Ford v Bailey*, 55 AD2d 729, 730 [1976]). Plaintiff has failed to demonstrate that the information regarding the impact of splitting of the zoning lot was not available to it with the exercise of reasonable diligence.

Plaintiff additionally has failed to allege facts to support its allegation that a "duly noticed" special meeting of the shareholders was required to approve the Cancellation Agreement. Plaintiff, moreover, has failed to submit any copy of any bylaws to show such requirement, or to cite to anything else which would support such a claim. Even assuming such special meeting was required, plaintiff makes no allegation in the complaint that such meeting did not occur, or if the meeting did occur, the manner in which the meeting was not properly noticed.

With respect to the fourth cause of action, a claim for aiding and abetting a breach of fiduciary duty requires "(1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach (citations omitted)" (*Kaufman v Cohen*, 307 AD2d 113, 125 [2003]). A plaintiff also must allege "substantial assistance" on the part of the alleged aider and abetter to the primary violator (*id.* at 126). "Substantial assistance occurs when a defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur (*see Kolbeck v LIT Am., Inc.*, [939 F Supp 240, 247] [1996])" (*Kaufman v Cohen, id.* at 126).

Plaintiff makes no claim that defendant Daral aided or abetted any breach of fiduciary duty by defendant Di Milia. To the extent plaintiff claims that defendant Crecco aided and abetted defendant Di Milia to breach Di Milia's fiduciary duty owing to plaintiff as a member of the board, plaintiff makes no allegation of substantial assistance on defendant Crecco's part. Plaintiff merely alleges that defendant Crecco urged defendant Di Milia to push for acceptance of Daral's offer, and remain silent about any adverse consequences of accepting the offer.

The fifth cause of action contains no new allegations as against defendants Daral and Crecco, but seeks an alternative remedy, i.e. an award of damages.

To the extent plaintiff seeks leave to replead, it has failed to cross-move for such relief by a proper notice of cross motion and supporting papers (CPLR 2215; *see J.A. Valenti Elec.*

Co. v Power Line Constructors, 123 AD2d 604 [1986]; *Matter of Briger's Estate*, 95 AD2d 887 [1983]). In any event, plaintiff has failed to propose any new allegations against defendants Daral and Crecco.

Under such circumstances, the motion by defendants Daral and Crecco to dismiss the complaint asserted against them is granted.

Dated: 3/23/10

J.S.C.