

Kosovich v Metro Homes, LLC

2010 NY Slip Op 31047(U)

April 23, 2010

Sup Ct, NY County

Docket Number: 601707/09

Judge: Emily Jane Goodman

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

PRESENT **EMILY JANE GOODMAN**

PART 17

Index Number : 601607/2009
KOSOVICH, DUSHAN DR.
VS.
METRO HOMES, LLC
SEQUENCE NUMBER : # 001
DISMISS

Justice

INDEX NO. 601607-09
MOTION DATE
MOTION SEQ. NO. #001
MOTION CAL. NO. _____

_____ were read on 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 be decided per attached

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

FILED
APR 30 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/23/10

[Signature]
EMILY JANE GOODMAN ^{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 17

-----X
DR. DUSHAN KOSOVICH,

Plaintiff,

-against-

Index No.: 601707/09

METRO HOMES, LLC, DEAN S.
GEIBEL, PAUL E. FRIED, UBS
FINANCIAL SERVICES INC., and
KENNETH KAVANAUGH,

Defendants.

FILED
APR 30 2010
NEW YORK
COUNTY CLERK'S OFFICE

EMILY JANE GOODMAN, J.S.C.:

Plaintiff seeks to recover on the principal and interest on what he alleges was a \$200,000 loan that he made to defendants to fund a large New Jersey residential and commercial real estate project, Esperanza at Asbury Park. Defendants Metro Homes, LLC, Dean S. Geibel and Paul E. Fried (together, the Developers) move, pursuant to CPLR 3211, to dismiss the complaint.

Plaintiff cross-moves to amend the caption and complaint to add as additional defendants Metro Homes, AP, LLC and Esperanza Urban Renewal LLC.

Background

In his complaint, plaintiff alleges that upon the advice and recommendation of financial advisor, defendant Kenneth Kavanaugh, then with UBS Financial Services Inc. (UBS), and acting as an agent for the Developers, he advanced monies as a loan from his UBS retirement account to the Developers. Plaintiff alleges that the loan terms were that he would be paid interest at 15% per year for the two-year period of the advance, to be paid each year during the two-year term. Plaintiff contends that on or about June 30, 2005, \$200,000 was transferred from

his account to the Developers, and that UBS and Kavanaugh were paid a commission on the monies. Thereafter, plaintiff alleges, except for a one-time payment of \$12,246.58 in January 2006, no part of the principal balance or interest was paid back to him.

Plaintiff claims that he believes that the construction and development of the Esperanza, LLC project was terminated in December 2007. Plaintiff also claims that the Developers have not accounted for the funds that they received from him, or for other public funds raised for the project, or furnished financial information to anyone regarding advances, or the project.

As against the Developers, the first and second causes of action of the complaint are, respectively, for repayment of a \$200,000.00 loan at 15% per annum, payable yearly, and for money had and received. In the third cause of action, plaintiff alleges that he rendered an account stated, in the sum of \$331,175.72, to the Developers, which is owed to him. In support of this claim, plaintiff has annexed to the complaint a copy of his March 19, 2009 letter, addressed to Metro Homes, LLC, and directed to Geibel, which states that it is a detailed itemized statement of plaintiff's investment in Esperanza, LLC (Def. Mov. Aff., Exh. A).

In the fourth cause of action, plaintiff alleges that he was induced to enter into the agreement to advance monies to the defendants by their false representation that they would have sufficient funds from their operations to pay back the interest and principal. Plaintiff contends that there was no income or cash flow from the operation and construction of Esperanza, LLC during the two-year loan period, and that the project was not built, but abandoned, so that the only way to make the promised interest payments was to obtain new lenders in order to pay the original lenders the promised interest. Plaintiff alleges that the defendants did not raise enough money to do so, and that the statement made by them as to their present or future cash flow, and

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ability to make interest payments was knowingly false, relied upon by plaintiff, and caused him damages of the loss of the money he loaned, and the interest promised thereon.

The sixth cause of action, which is based on the previously discussed factual allegations, is for unjust enrichment. In his seventh cause of action, plaintiff requests punitive damages.

In support of their motion to dismiss, the Developers submit a six-page, sequentially-numbered document (the Fax Submission), which includes a fax cover sheet from plaintiff addressed to Geibel. The Fax Submission contains a fax signature at the top of each page of the document, indicating that it was transmitted from plaintiff's fax on June 28, 2005. Relevant here is that the second page of the Fax Submission includes a copy of the signature page of Esperanza, LLC's operating agreement, signed by plaintiff, which indicates a contribution amount of \$200,000.00. Then the third page of the Fax Submission contains wiring instructions for Esperanza, LLC.

The fourth page of the Fax Submission is a portion of a subscription agreement, which provides that the investor was irrevocably subscribing for \$200,000.00 of limited liability company class B membership interests in Esperanza, LLC, pursuant to the terms and conditions set forth in the Esperanza, LLC's private placement memorandum, dated March 11, 2005 (PPM) and the subscription agreement. The fourth page also states that the general manager of Esperanza, LLC delivered the PPM to the investor simultaneously with the delivery of the offering binder, and that payment for the LLC interest was to accompany the subscription agreement by, among other methods, wire transfer. The sixth page of the Fax Submission is a signature page, apparently relating to the subscription agreement, which contains plaintiff's signature and address, and indicates that his ownership interest in Esperanza, LLC was to be held

individually. In addition, defendants submit what their counsel affirms is a true copy of the PPM, and the subscription and operating agreements for Esperanza Urban Renewal, LLC f/k/a Esperanza, LLC (Esperanza).

In seeking dismissal, defendants argue that there is no basis for liability as against the Developers as they are not contracting parties to the applicable agreement for the transaction and the complaint provides no basis to pierce the veil of Esperanza to reach them. Defendants also argue that the plaintiff's account stated claim fails because, among other reasons, there was no underlying debt. In support of this claim, defendants point to the PPM and other agreements they submit, which, they argue, demonstrate that there was no guaranteed return on investment, and grant to Geibel, as general manager of Esperanza, the discretion to withhold distributions until Esperanza had eliminated debt and had sufficient cash flow.

The Developers contend that the fourth cause of action of the complaint, for misrepresentation, should be dismissed because plaintiff has not pleaded the elements of the claim with particularity, or asserted a specific misrepresentation of fact made by them. Defendants also contend that plaintiff cannot demonstrate the reliance element of the claim in face of the PPM and agreements that they have submitted, which are inconsistent with plaintiff's contention that the investment was a loan with fixed interest payments, and contains disclaimers concerning risks associated with the investment. For example, the PPM states on its cover page "THESE SECURITIES INVOLVE A HIGH DEGREE OF RISK" (Def. Mov. Aff, Exh. B). The Developers also argue that the fraud claim demands the same damages as and is duplicative of the contract claim.

The Developers seek to dismiss the second cause of action, for money had and received,

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on the ground that there is an existing binding contract. They seek to dismiss the sixth cause of action, for unjust enrichment, for the same reason.

In opposition to the dismissal motion, and in support of his motion to amend, plaintiff provides an affidavit in which he states that he never met or discussed the Esperanza project with the Developers prior to lending them \$200,000, but that his discussions about the loan were with his investment advisor, Kavanaugh, then of UBS Financial Services, Inc. Plaintiff avers that the only thing that he received in writing from Metro Homes, LLC and Geibel was a flyer discussing the activities of that entity, which he believes Geibel had written for him. Plaintiff further avers that this flyer also, through handwritten notations, demonstrates the essential terms of the proposed loan, and that he clearly understood that the \$200,000 transferred from his account was made as a loan to Metro Homes, LLC, on the terms and conditions stated by Kavanaugh.

Plaintiff avers that he has never seen the PPM issued by Esperanza, which he describes as "the new entity created by the Promoters" (Pl. Op. Aff., ¶ 11), but that Kavanaugh showed him only the two-page subscription agreement, and the signature pages, representing that they were a mere formality. Plaintiff avers that Kavanaugh gave him some documents to sign that he said were in connection with his loan to Metro Homes, LLC, and that plaintiff sent the pages, and on June 20, 2005, wired money, to Metro Homes, LLC.¹

Plaintiff claims that he would not have understood the PPM, and believes that Kavanaugh also would not have understood it. Plaintiff also argues that what defendants submit is a boilerplate copy of a private placement memorandum, or the form of one, or of the PPM, but not a true

¹While plaintiff claims to have transmitted funds to Metro Homes, LLC, the Fax Submission demonstrates that the wiring instructions were for transmittal of the funds to Esperanza.

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copy of it. Plaintiff also notes that the cover page of the document does not contain the name of the offeree or the memorandum number, despite that the document states that it constitutes an offer only to the offeree named on the cover page, and then only if delivery of the memorandum is properly authorized by Esperanza's general manager, Metro Homes AP, LLC. Plaintiff also points out that the subscription agreement does not have the name of the investor on the front page, that the signature pages are not filled in or signed, and the acceptance page is not signed by the general manager. Plaintiff further argues that the operating agreement submitted by defendants is not signed by the general manager, the Class A, AAA, or B members, and that the investor questionnaire is missing. Plaintiff contends that the defendants essentially submit blank documents, and that these documents are not admissible evidence, or competent to support the dismissal motion.

Plaintiff states that in December of 2006, he received letters from Geibel that the Developers were suspending payments on the project and interest payments to investors, which prompted his March 2009 letter stating his account. Plaintiff maintains that the Developers have shown no accountability for the money they raised, that he would like to know what happened to his money, and that one of the reasons for bringing this suit is to try to find out the details of the promoter's operations, and "the dispersal of public funds raised by them with registering the offering with the SEC" (Kosovich Aff., ¶ 13). Raised for the first time in opposition, plaintiff asserts that, in addition to those claims already discussed, he is alleging securities fraud, based on his contention that the securities were unlawfully unregistered, and that he does not meet the definition of an accredited investor under federal securities regulations.

Discussion

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The complaint is based on plaintiff's contention that he entered into a \$200,000 loan agreement with the Developers concerning the Esperanza project that provided for a fixed return to him, at a fixed point in time, and the return of his principal. Plaintiff does not contend, however, that there is a signed loan document evidencing the debt and terms, or that it is not his signature on the Fax Submission indicating that he authorized transfer by wire of \$200,000 to Esperanza to subscribe for an LLC interest.

Many of the Developers' arguments are predicated on the PPM for Esperanza, referenced in the Fax Submission, as well as the other documents that the Developers have submitted. Therefore, in the event that the copies submitted here of these documents are authentic and correct, plaintiff's contract claim would fail, as the documents contradict his contention that he entered into a loan agreement with the Developers that provides for fixed interest payments and return of his money without investment risk. As plaintiff's claim for an account stated must be predicated on an underlying debt, it too would fail, as would plaintiff's claims against the Developers, for money had and received, and unjust enrichment, as such actions do not lie where there is an express contract between the parties (*Egotovich v Katten Muchin Zavis & Roseman LLP*, 55 AD3d 462, 464 [1st Dept 2008] [addressing money had and received claim]; *Scavenger, Inc. v GT Interactive Software Corp.*, 289 AD2d 58 [1st Dept 2001] [addressing unjust enrichment claim]). Plaintiff's assertion, that he essentially did not read the documents, and thus that his understanding was that he was entering into a loan agreement would not likely save his claims against the Developers (*see Bishop v Maurer*, 33 AD3d 497, 499 [1st Dept 2006] *affd* 9 NY3d 910 [2007]) ["plaintiff is responsible for his signature and is bound to read and know what he signed"].

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Plaintiff, however, has directly challenged the authenticity of the documents submitted by the defendants, other than the Fax Submission, as well as defendants' counsel's assertions that the documents are true copies. The court has carefully reviewed the documents submitted and the Developers' counsel's affirmation submitted in support of the motion. Nowhere in Developers' counsel's affirmation is stated the basis for counsel's contention that the various documents submitted are true and correct copies, or any indication that the statements therein were made upon personal knowledge. The Developers also have not submitted an affidavit from any of the Developers, such as from an authorized custodian for Esperanza, attesting to the authenticity and correctness of the documents. In the event that the Developers demonstrate that the documents that they submit are authentic and correct, it appears that the plaintiff's claims against them would be unlikely to survive dismissal. At this juncture, however, despite plaintiff's challenges, the Developers have not met their burden to demonstrate the authenticity of the documents. Consequently, the record, in its present form, does not support dismissal.²

As to the fourth cause of action of the complaint, for misrepresentation, the Developers make other arguments for dismissal that are not merely predicated on their documentary submissions, and that claim must be dismissed. In the complaint, plaintiff fails to identify anyone who made such a misrepresentation to him, and here he avers that he never had

²It is not that the Developers are precluded from submitting copies of documents on summary judgment, but they must demonstrate the authenticity of whatever they submit and make clear that these are copies of the documents referenced in the Fax Submission. Thus, the Developers might have made this showing with an affidavit in which counsel made clear the basis of his knowledge that the PPM and other agreements are correct and true, and also that they are the documents referred to in the Fax Submission, but did not do so. Developers should have, but failed, to submit the sworn statement of an appropriate custodian or person from Esperanza, or its general manager, with personal knowledge as to these matters.

10] communications with the Developers about the Esperanza project prior to lending them \$200,000, as does his counsel (Walker Aff., ¶ 11). Based on these statements, there is no basis for his claim that he was induced to advance monies to the Developers by their false representation that they would have sufficient funds from their operations to pay plaintiff the interest and principal. As plaintiff's fourth cause of action is dismissed for this reason, it is unnecessary to address the Developers' other arguments concerning this claim.

Raised for the first time in his opposition papers is plaintiff's argument that he is alleging violation of federal securities fraud. Plaintiff's claim, however, is simply for the breach of a loan agreement, and not a federal securities claim. Furthermore, to the extent that such a claim would be viable,³ plaintiff has made no application to amend his complaint to add it. As plaintiff's surviving claims essentially are for loan payments, and his fraud claim has been dismissed, his request for punitive damages is also dismissed.

Plaintiff has moved to change the caption and to add Esperanza Urban Renewal LLC and Metro Homes, AP, LLC as defendants. As defendants contend that Esperanza Urban Renewal LLC is the real party in interest, plaintiff's motion is granted as to that entity. Plaintiff states no persuasive basis to add Metro Homes, AP, LLC as a defendant, however.

Conclusion

Accordingly, it is

ORDERED that the motion to dismiss is granted to the extent that the fourth and sixth causes of action of the complaint against defendants METRO HOMES, LLC, DEAN S.


³In order to amend the complaint to plead such a claim this court would need to have subject matter jurisdiction over the claim which must also be timely.

GEIBEL and PAUL E. FRIED are dismissed, and is otherwise denied without prejudice; and it is further

ORDERED that the plaintiff's cross motion to amend the summons and complaint and caption to add defendant Esperanza Urban Renewal, LLC is granted, and plaintiff's motion to amend is otherwise denied.

Dated: April 23, 2010

ENTER:



J.S.C.

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