

Glenn v SBPartners, LLC

2010 NY Slip Op 32534(U)

September 10, 2010

Supreme Court, Nassau County

Docket Number: 10644/07

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 2
NASSAU COUNTY

BRUCE GLENN,

Plaintiff,

INDEX No. 10644/07

MOTION DATE: July 29, 2010
Motion Sequence # 016

-against-

SBPARTNERS LLC, JAMES BONA,
MARGARETTE SHIM, J. PAUL MUELLER JR.,
DIANE KAERN, MICHAEL KAERN, BUCKLEY &
ASSOCIATES LLP, PORTER & HEDGES LLP,
OTTO WELPER, BURT WILLIAMS, DOUG
MANNER, GREG AVRA, DAN MORRIS, JOSEPH
P. MUELLER, PATTY PUIG MUELLER,
MICHELLE MUELLER MOFFITT, JOSEPH P.
MUELLER LTD., MUELLER-PUIG FAMILY
PROPERTIES LTD., MUELLER EXPLORATION
INC., CLINICAL RESEARCH SERVICES INC.,
MPJ-5 INC., MUELLER ENERGETICS CORP.,
WELPER & ASSOCIATES INC. and VIKING
INTERNATIONAL PETROLEUM LP,

Defendants.

The following papers read on this motion:

Notice of Motion..... X
Affidavit in Opposition..... X
Reply Affirmation..... X
Memorandum of Law..... XX

Motion [Sequence #016] by defendants, J. Paul Mueller, Jr. and Mueller Exploration, Inc. for an order, pursuant to CPLR 3211(a)(7) and GOL §15-108(b), dismissing the cross claims asserted by defendant Margarete Shim is **granted** in part and **denied** in part.

Prior to addressing the merits of the instant motion, the Court, in the interests of clarifying the issues herein will review the factual and procedural history of the case.

This action arises out of plaintiff, Bruce Glenn (“Glenn”)’s investment in an oil reserve company, defendant SBPartners, LLC (“SBP”). Plaintiff alleges that SBP was involved in a fraudulent scheme which was devised to gain money from unsophisticated investors. Glenn claims that this scheme involved the offer and sale of unregistered securities, and was principally engineered by the promoters and managers of SBP, defendants, James Bona (“Bona”) and Margarete Shim (“Shim”). Defendants J. Paul Mueller, Jr., Joseph P. Mueller, Patty Puig Mueller, Michelle Mueller Moffitt, Joseph P. Mueller, Ltd., Mueller-Puig Family Properties, Ltd., Mueller Exploration, Inc., Clinical Research Services, Inc., MPJ-5 Inc. and Mueller Energetics Corp. (collectively referred to as the “Mueller Defendants”), have been in the oil and gas business in Texas and the surrounding Gulf Coast area for 52 years. Plaintiff claims that Shim, Bona, and SBP acted as agents of the Mueller Defendants and through this agency relationship, solicited New York investors, including the plaintiff.

Plaintiff also asserts claims against various other defendants who he alleges played a part in the scheme, including: Otto Welper, Dan Morris Welper & Associates, Inc. and Viking International Petroleum LP (collectively referred to herein as the “Welper Defendants”); Diane Kaern, Michael Kaern, Buckley & Associates LL, Porter & Hedges LLP, Burt Williams, Doug Manner and Greg Avra.

By separate motions, defendants, Burt Williams, Doug Manner, Greg Avra (Mot. Seq. 1); the Welper Defendants (Mot. Seq. 2); Buckley & Associates, LLP (Mot. Seq. 3); the Mueller Defendants (Mot. Seq. 4); and Porter & Hedges, LLP (Mot. Seq. 5), all moved to dismiss for lack of personal jurisdiction pursuant to the long-arm statute, CPLR §302. By a Short Form Order dated January 16, 2008, this Court held that defendants, Buckley & Associates, LLP, Porter & Hedges LLP, Burt Williams, Doug Manner and Greg Avra, were not subject to personal jurisdiction and therefore the plaintiff’s claims against them were dismissed. As to the Mueller Defendants’ motion (Seq. 4) and the Welper Defendants’ motion (Seq. 2), a traverse hearing was ordered.

The traverse hearing took place before Justice Marber from January 30 through February 5, 2009. Justice Marber issued a decision after hearing on April 2, 2009. In her decision, Justice Marber denied defendant J. Paul Mueller, Jr. and defendants Mueller Exploration Inc. ("MEI")'s motion to dismiss the complaint as against them and granted the *remaining* Mueller Defendants' motion to dismiss the complaint. For the sake of clarity, defendants J. Paul Mueller and MEI will collectively be referred to as the "Remaining Mueller Defendants."

In the interim, by an Order dated April 7, 2008, this Court, granted plaintiff's motion (Mot. Seq. 7) for an Order, pursuant to CPLR 3215, granting a default judgment against the defendants SBP, James Bona ("Bona"), Diane Kaern and Michael Kaern.

Thereafter, on or about May 22, 2009, plaintiff and the Remaining Mueller Defendants (i.e., J. Paul Mueller, Jr. and MEI) entered into a confidential Settlement Agreement wherein the plaintiff discontinued his claims against them. Claiming that she was prejudiced by being denied access to the settlement agreement, defendant Shim did not consent to the Stipulation of Discontinuance. This Court, in a Short Form Order dated July 7, 2009, granted plaintiff's motion (Mot. Seq. 13) for an order, pursuant to CPLR 3217(a)(2) discontinuing the action as against the Remaining Mueller Defendants.

By separate order dated July 7, 2009, the court directed defendant Shim to serve a more definite statement with respect to the allegations in paragraph 4 of her cross claim against defendants J. Paul Mueller, Jr. and MEI, and particularly as to the solicitation of \$150,000 alleged to have occurred on June 9, 2004. More specifically, Shim was directed to clarify "whether [Bona] was acting as an agent of [JPM] on the date of June 9, 2004 so that his solicitations are attributable to [JPM]." In a Short Form Order dated October 8, 2009, this Court granted the Remaining Mueller Defendants' motion (Mot. Seq. 14) for an Order pursuant to CPLR 3211(a)(4) and (7) dismissing defendant Shim's amended cross claim on the grounds that she failed to comply with this Court's July 7, 2009 Order, she failed to state a cause of action for fraud, and because of the pendency of another action in Texas between the same parties for the same cause of action. There was no opposition to the motion. Following the issuance of this decision and Order, a telephone conference was held whereupon this Court directed the parties to submit a stipulation for the Court to "So Order" (1) vacating this Court's October 8, 2009 Order dismissing the Cross Claim and (2) allowing Shim to submit opposition to the Remaining Mueller Defendants' motion to dismiss the Cross Claim. The stipulation was never submitted. Instead, more than five months later (after the plaintiff amended his complaint), Shim served the instant cross claims which are principally based on the same operative allegations as contained in the previously dismissed amended cross claims.

Upon the instant motion (Mot. Seq. 16), the Remaining Mueller Defendants seek dismissal of defendant Shim's Amended Cross Claims on the same grounds, to wit: Shim failed to comply with this Court's July 7, 2009 Order and she failed to state a cause of action for fraud, contribution and indemnification. Defendant Shim now advances opposition to the instant motion.

Insofar as it is pertinent to the determination of this motion, the underlying facts are as follows:

The defendant J. Paul Mueller Jr. ("JPM") is the president of MEI, a Texas corporation with its principal place of business in Texas. As the president of MEI, JPM is responsible for obtaining investors that will provide the capital for oil and gas retrieval. MEI needed additional capital to perform oil exploration.

The defendant Margarett Shim is a former attorney for General Electric who had no prior experience in gas and oil retrieval. While working at GE, she met defendant James Bona ("Bona") on match.com in or about April 2004. Bona stated that he was involved in oil and gas exploration and claimed to have a net worth of approximately \$100 million. Shim testified that on June 21, 2004, Bona convinced her to leave her position at GE to form the defendant SBP, a Florida limited liability company, to identify and lease "probable production" properties from oil industry partners and contacts using "cutting edge technology" and a "team of in-house experts." Shim claims that she was led to believe that the oil was already found and all that remained was to obtain the capital to retrieve it.

The next day, on June 22, 2004, Shim and Bona had an hour long teleconference with J. Paul Mueller. Prior to this call, Shim signed a confidentiality agreement that stated that she was not to contact JPM or anyone else directly without the express authorization or permission of Bona. Bona and JPM had a prior business relationship and JPM testified that he was doing a favor for Bona by helping SBPartners. Shim testified that Bona introduced her as a "big-shot Wall Street" attorney from New York, to which JPM responded that he was excited to tap into the New York market. During this conversation, JPM explained the tools utilized to explore terrain. After the teleconference, Shim testified that she compiled the information she received from JPM and made a draft brochure to distribute to potential investors.

Plaintiff Bruce Glenn is a college graduate who drives a truck for his family business. Glenn met Shim at their local gym and knew that she was an attorney with no experience in gas and oil. On July 25, 2004, they met for a business dinner to discuss

SBP; Shim reviewed the brochure with plaintiff and stated that production was already underway. After meeting with prospective investors and discussing the opportunity with them, Shim and Glenn each invested at least \$200,000 in SBP. Plaintiff alleges that he invested a total of \$475,000 in SBP, which ended up in the hands of MEI and was ultimately lost.

On April 22, 2009, Shim cross-claimed against the Remaining Mueller Defendants. In response to the court's order of July 7, 2009 directing her to serve a more definite statement, Shim served an Amended Cross Claim on July 27, 2009. The Remaining Mueller Defendants moved on August 19, 2009 to dismiss Shim's Amended Cross Claim on the grounds that it to state a cause of action for fraud. By order dated October 8, 2009, the court granted the Remaining Mueller Defendants' motion to dismiss the amended counterclaim without opposition. However, in view of the subsequent proceedings discussed below, on the court's own motion the order of October 8, 2009 is vacated.

On February 5, 2010, plaintiff served an amended complaint. In the amended complaint, plaintiff asserts a claim for common law fraud against SBPartners, J. Paul Mueller, Jr., Mueller, Exploration Inc, Mueller Energetics Corp., and Bona. In the second cause of action, plaintiff asserts a claim for aiding and abetting fraud against Shim. In the third cause of action, plaintiff asserts claims for breach of fiduciary duty against SBPartners, J. Paul Mueller, Jr., and Bona. In the fourth cause of action, plaintiff asserts claims for aiding and abetting breach of fiduciary duty against Mueller Exploration and Mueller Energetics. In the fifth cause of action, plaintiff asserts claims for negligent misrepresentation against SB Partners, J. Paul Mueller, Jr., Mueller, Exploration, Mueller Energetics, Bona, and Shim. In the sixth cause of action, plaintiff asserts a claim for negligence against Shim as general counsel to SB Partners. In the seventh cause of action, plaintiff asserts claim for breach of contract against SB Partners based on its failure to repurchase his interest. The eighth and ninth causes of action are against Shim and other defendants for violation of Texas fraud and securities law.

On March 31, 2010, the defendant, Margarete Shim, filed a "Verified Answer to the Amended Complaint dated February 5, 2010 with Cross Claim," in effect providing a more definite statement as to her cross claims against the Remaining Mueller Defendants. The Remaining Mueller Defendants move pursuant to CPLR 3211(a)(7) and GOL § 15-108 to dismiss these cross claims.

38. That between June 9, 2004 and July 20, 2004 the Defendants, [Bona] and the Defendant [JPM], acting through his agent [Bona] and directly, fraudulently,

knowingly, recklessly, wrongfully, negligently and/or carelessly provided the Defendant with false and misleading information solicited and obtained investment funds totaling \$290,000.00 from the Defendant [Shim] as follows; \$150,000.00 on or about June 9, 2004, \$45,000.00 on or about June 15, 2004, \$88,000 on or about July 15, 2004 and \$7,000.00 on or about July 20, 2004, which funds were solicited from, designated and intended by Margarette Shim to be used for legitimate investment purposes only.

The court construes Shim's first cross claim against the Remaining Mueller Defendants as sounding in common law fraud.

The "law of the case" is in essence a doctrine of intra-action res judicata. Pursuant to this doctrine, once an issue is decided, it cannot again be litigated at the trial level (*State of New York Higher Educ. Servs. Corp. v. Starr*, 158 AD2d 771 [3rd Dept. 1990]). On May 12, 2009, the Remaining Mueller Defendants moved to strike Shim's original cross claim because her allegation that they had solicited and obtained her June 9, 2004 investment for \$150,000 was contradictory to her previous sworn testimony from the traverse hearing. At the traverse hearing, Shim "testified that she gave the personal check to [Bona] on or about June 9, 2004 and the first time she spoke to [JPM] was by telephone on June 22, 2004." In the July 7th Order, this Court found that "Shim's contention that [JPM] clearly solicited all the funds directly and indirectly from her appears to be confusing since Shim has not established that giving money to [Bona] is equivalent to giving money to [JPM]. Shim entered into a confidentiality agreement with [Bona] and gave the personal check to him. [Shim] does not offer any evidentiary support that [JPM] was acting through an operative or representative, [Bona]."

To establish an agency relationship under New York law, the plaintiff must allege that the purported agent acted upon the request, under the direction, and for the benefit of the purported principal (*Maurillo v. Park Slope U-Haul*, 194 AD2d 142, 147 [2nd Dept. 1993]).

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. The court must accept the allegations of the complaint as true and provide plaintiff the benefit of every possible favorable inference (*AG Capital Funding Partners v. State Street Bank and Trust Co.*, 5 NY3d 582, 591 [2005]). Giving the cross claim the benefit of every possible favorable inference, the Court concludes that Shim sufficiently alleges that Bona acted upon the request, under the direction, and for the benefit of JPM in soliciting her June 9, 2004 and June 15, 2004 investments.

A motion made pursuant to CPLR 3211(a)(7) requires this Court to determine whether the plaintiff has a legally cognizable cause of action and not whether the action has been properly plead (*Guggenheimer v. Ginzburg*, 43 NY2d 268 [1977]; *Rovello v. Orofino Realty Co.*, 40 NY2d 633 [1976]). In determining this motion, the claim must be liberally construed, and the defendant asserting the cross claim must be given the benefit of every favorable inference (*Sitar v. Sitar*, 50 AD3d 667 [2nd Dept. 2008]; *Mitchell v. TAM Equities, Inc.*, 27 AD3d 703 [2nd Dept. 2006]). The court must also accept as true all of the facts alleged in the cross claim and any factual submissions made in opposition to the motion (*511 West 232rd Street Owners Corp. v. Jennifer Realty Co.*, 98 NY2d 144 [2002]; *Sokoloff v. Harriman Estates Development Corp.*, 96 NY2d 409 [2001]). If, from the facts alleged in the cross claim and the inferences which can be drawn from those facts, the court determines that the pleader has a cognizable cause of action, the motion must be denied (*Sokoloff v. Harriman Estates Development Corp.*, *supra*; *Stucklen v. Kabro Assocs.*, 18 AD3d 461 [2nd Dept. 2005]). While factual allegations contained in the claim are deemed true, legal conclusions and facts contradicted on the record are not entitled to a presumption of truth (*In re Loukoumi, Inc.*, 285 AD2d 595 [2nd Dept. 2001]; *Doria v. Masucci*, 230 AD2d 764 [2nd Dept. 1996]).

In order to establish a cause of action for fraud, a plaintiff must plead the following elements: (1) a false representation; (2) of material fact; (3) with intent to defraud; (4) reasonable reliance on the representation; (5) causing damages to the plaintiff (*Lama Holding Co. v. Smith Barney*, 88 NY2d 413 [1996]). CPLR 3016(b) provides that an action for fraud must be pled “with particularity, including specific dates and items, if necessary and insofar as practicable.” Conclusory allegations of fraud will not be sufficient (*Dumas v. Fiorito*, 13 AD3d 332 [2nd Dept. 2004]; *Sargiss v. Magarelli*, 50 AD3d 1117 [2nd Dept. 2008]; *see also*, CPLR 3016[b]). However, it is sufficient to plead facts that would allow a reasonable inference of the alleged fraud (*Pludeman v. Northern Leasing Systems, Inc.*, 10 NY3d 486 [2008]).

Shim alleges that she invested money in SB Partners based upon fraudulent representations by Bona that the funds would be used to develop “proven reserves of oil under leases owned by J. Paul Mueller, Jr.” (Answer ¶ 39). Shim further alleges that this representation was false and she relied upon it by making her investment. “If the [purported defrauded party] has the means of knowing, by the exercise of ordinary intelligence, the truth, or the real quality of the subject of the representation, [she] must make use of those means, or [she] will not be heard to complain that [she] was induced to enter into the transaction by misrepresentations” (*Crigger v. Fahnestock and Co., Inc.*, 443 F. 3d 230, 234 [2nd Cir. 2006]). Defendants argue that, as an attorney, Shim could not reasonably rely upon Bona’s representations. However, whether reliance is reasonable is

generally a question of fact (*Talansky v Schulman*, 2 AD3d55, 361 [1st Dept 2003]). From the evidence of the three-way telephone conference, the court must assume that Bona made these false representations as J. Paul Mueller, Jr.'s agent. The Remaining Mueller Defendants' motion to dismiss defendant Shim's first cross claim for failure to state a cause of action is **denied**.

Shim's second cross claim sounds in "indemnification or contribution." The essence of Shim's second cross claim is that as plaintiff contends that he lost his investments due to an alleged fraud orchestrated by the named defendants in this action including Shim, JPM, MEI and Bona, if and to the extent that plaintiff's loss was caused by fraudulent and negligent acts, his loss was the result of the acts of JPM, MEI and Bona.

The Remaining Mueller Defendants argue that because they have settled all of plaintiff's claims, Shim's cross claim for contribution is barred by New York's General Obligation Law (GOL)§15-108(b).

GOL §15-108(b) provides:

(b) Release of tortfeasor. A release given in good faith by the injured person to one tortfeasor as provided in subdivision (a) relieves him from liability to any other person for contribution as provided in article fourteen of the civil practice law and rules.

Under Article 14, cross claims for contribution are not limited to personal injury and include claims for "economic loss," provided the loss did not result exclusively from a breach of contract (*Abetta Boiler & Welding Service v American Intn'l Specialty Lines*, 2010 N.Y. App. Div. LEXIS 6451 [1st Dept 2010]). Nevertheless, GOL § 15-108 will bar a claim for contribution where the underlying tort results in economic injury, as in a negligence or fraud claim (*BDO Seidman v Strategic Resources Corp.*, 70 AD3d 556 [1st Dept 2010]).

Shim argues that because the the Remaining Mueller Defendants' Settlement Agreement has been kept confidential, it cannot be determined whether the Agreement qualifies for GOL §15-108's protection.

GOL §15-108(d) provides:

(d) Releases and covenants within the scope of this section. A release or a covenant not to sue between a plaintiff or claimant and a person who is liable or

claimed to be liable in tort shall be deemed a release or covenant for the purposes of this section only if:

- (1) the plaintiff or claimant receives, as part of the agreement, monetary consideration greater than one dollar;
- (2) the release or covenant completely or substantially terminates the dispute between the plaintiff or claimant and the person who was claimed to be liable; and
- (3) such release or covenant is provided prior to entry of judgment.

Because the settlement agreement terminates the dispute between the Remaining Mueller Defendants and the plaintiff, was entered prior to judgment, and provides for monetary consideration greater than \$ 1 dollar, it satisfies all of the requirements of GOL §15-108(d) (*Kagan v. Jacobs*, 260 AD2d 442, 443 [2nd Dept. 1999]). Thus, Shim is precluded from asserting a contribution claim.

Inasmuch as her second cross claim is one for implied indemnification, said claim is also deficient.

“[W]here one is held liable solely on account of the negligence of another, indemnification, not contribution, principles apply to shift the entire liability to the one who was negligent” (*Glaser v. M. Fortunoff of Westbury Corp.*, 71 NY2d 643, 646 [1988], quoting, *D'Ambrosio v. City of New York*, 55 NY2d 454, 462 [1982]). The predicate of common law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee. Thus, it follows that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine (*Trustees of Columbia University in City of N.Y. v. Mitchell/Giurgola Associates*, 109 AD2d 449, 453 [1st Dept. 1985]; see also, *Arlington Cent. School Dist. v. Horizon Roofing*, 27 AD3d 676 [2nd Dept. 2006]).

Shim's cross claim against the Remaining Mueller Defendants effectively derives from and is based upon plaintiff's allegation of fraud inasmuch as he (the plaintiff) claims “he was enticed to invest in Proven Reserves of oil due to false information and numerous misrepresentations made to him by the Defendant” (*Cross Claim*, ¶44).

Accordingly, even assuming that there were “false information or misrepresentations concerning the Proven Reserves” submitted by the Remaining Mueller

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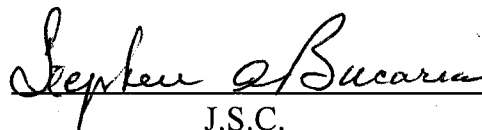
Defendants and Bona (*Id.* at ¶45), the ensuing injury sustained by the plaintiff, would still be attributable in part, to Shim's own, alleged errors or active negligence, thereby foreclosing the ability to succeed with a claim for implied indemnification (*See, e.g., Edge Mgt. Consulting, Inc. v. Blank*, 25 AD3d 364 [1st Dept. 2006]; *Davis v. Isaacson, Robustelli, Fox, Fine, Greco & Fogelgaren, P.C.*, 283 AD2d 349, 350 [1st Dept. 2001]). Specifically, by Shim's own admission in paragraph 44 of her indemnification claim, plaintiff alleged in his complaint that Shim is not an innocent party; rather, plaintiff alleges that Shim had a duty to SBP's investors which she breached, and that she engaged in other acts which caused plaintiff's harm. Therefore, because her liability to the plaintiff, if any, would be due to her own wrongful conduct, this Court finds that Shim has failed to adequately plead indemnification.

Plaintiff's attempt to exculpate herself from involvement in plaintiff's solicitation by alleging in her cross claim that "any alleged false information or misrepresentation concerning the Proven Resources originated with and were provided to Plaintiff by [JPM, MEI and Bona]" is unavailing. On the traverse hearing, Justice Marber found that Shim provided the plaintiff with investment materials. In any event, it is clear that plaintiff is seeking to hold Shim liable for the harm she directly caused him by soliciting and taking his money; plaintiff is not attempting to hold her liable for acts she engaged in vicariously through JPM.

The Remaining Mueller Defendants' motion to dismiss defendant Shim's second cross claim for failure to state a cause of action is **granted**.

So ordered.

Dated 10 September 2010


J.S.C.

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