

Three Hands Holdings, LLC v Lipman

2011 NY Slip Op 30688(U)

March 7, 2011

Sup Ct, NY County

Docket Number: 104011/10

Judge: Eileen A. Rakower

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

PRESENT: RAKOWEN
Justice

PART 15

THOSE HANDS HOLDINGS
- v -
BRIAN LIPMAN

INDEX NO. 104011/10
MOTION DATE _____
MOTION SEQ. NO. 2
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1, 2
3, 4
5

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

MAR 09 2011

NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

Dated: 3/7/11


HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

MAR 09 2011

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

NEW YORK
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-----X
THREE HANDS HOLDINGS, LLC,

Index No.
104011/10

Plaintiff,

-against-

DECISION
and ORDER

BRIAN LIPMAN, RICARDO GOLDSCHMIDT,
ALAN PEYSER, DAVID SELTZER, MANUEL
GOLDSCHMIDT, BACHRACH INVESTORS, LLC,
and BACHRACH CAPITAL, LLC,

Mot. Seq.
001

Defendants.

-----X
HON. EILEEN A. RAKOWER:

Three Hands Holdings LLC ("Plaintiff") brings this action against Defendants for contractual indemnification, breach of the covenant of good faith and fair dealing, and causes of action sounding in fraud in relation to to a Membership Interest Purchase Agreement dated May 29, 2008 ("Purchase Agreement"). Presently before the court is Plaintiff's motion pursuant to CPLR §§2221(a) and 5015(a) to vacate this court's order dated November 20, 2010 ("the prior order"), which dismissed the action against all Defendants.

As stated in the prior order, Plaintiff is a limited liability company that is engaged in the business of selling men's apparel. Defendants are partial owners of Bachrach Aquisition, LLC ("the Company"), a limited liability company that owned and operated approximately 50 men's clothing stores throughout the United States. According to the Complaint, Plaintiff and Defendants entered into discussions for the sale and purchase of the Company in early 2008. On May 29, 2008, Plaintiff entered into the Purchase Agreement with Defendants and the Company. Pursuant to this Agreement, Plaintiff purchased a 50% ownership interest in the Company for the sum of \$11,000,000.00. Of the total purchase price, \$9,000,000.00 was paid to the Company for the purchase of newly issued membership interests representing 40% of the total ownership interest in the Company; and \$2,000,000.00 was paid to Defendants for the purchase of portions of their membership interests, amounting to

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10% of the total ownership interest in the Company.

Plaintiff alleges that the Company and Defendants misrepresented its financial condition to Plaintiff and that, but for this misrepresentation, Plaintiff would not have entered into the Purchase Agreement. Specifically, Plaintiff alleges that the Company and Defendants falsely represented that it was not in material breach of any of its commercial leases. According to the Complaint, however, the Company defaulted on its rental obligations on many of its commercial leases for the months of April 2008 and May 2008 (for a total deficiency of \$1,600,000.00).

On or around May 6, 2009, the Company filed for bankruptcy. Plaintiff commenced this action by filing its summons and complaint on March 26, 2010, claiming that Defendants' and the Company's misrepresentations "proximately caused substantial loss to the Plaintiff in an amount approaching \$1,600,000.00;" and seeking indemnification from Defendants pursuant to Sections 3.15(b) & 10.3 of the Purchase Agreement. Section 3.15(b) of the Purchase Agreement is contained in Article III (titled "Representations and Warranties of the Company") and provides, in pertinent part,

Schedule 3.15(b) contains a true and correct list of all leases, subleases, concessions, licenses and other agreements (whether written or oral) of the Company (including all amendments, modifications, extensions, renewals, guaranties and other agreements with respect thereto) for each Leased Rental Property (each, a "Lease," and collectively, the "Leases"). Except as set forth on schedule 3.15(b) with respect to each of the Leases:... (iv) neither the Company nor, to the Knowledge of the Company, any other party to the Lease is in material breach or default under such Lease and no event has occurred or circumstance exists which, with delivery of notice, passage of time or both, would constitute such a material breach or default or permit the termination, modification or acceleration of rent under such Lease...

Section 10.3 of the Purchase Agreement provides, in pertinent part,

10.3 Indemnification by the Selling Members.

- (a) From and after the Closing Date, each of the Selling Members [Defendants] severally and not jointly, hereby indemnifies and holds the Buyer Indemnified Parties harmless from and against, and agrees to defend promptly the Buyer Indemnified Parties from and reimburse the Buyer Indemnified Parties for, any and all Loss that the Buyer Indemnified Parties may at any time suffer or incur, or become subject to, as a result of or in connection with any breach or inaccuracy of any of the representations and warranties made by such Selling Member in this Article IV of this Agreement or any other agreement or instrument delivered by such Selling Member, or by the Company on behalf of such Selling Member, pursuant hereto...

Defendants moved to dismiss the action on the grounds that Section 10.3 pertained only to breaches or inaccuracies of any of the representations and warranties made by Selling Members (*i.e.*, Defendants), and the alleged misrepresentation was made by the Company pursuant to the Purchase Agreement. The court granted the motion in its prior order.

Plaintiff now submits a copy of an amended complaint that Plaintiff states was served upon Defendants during the pendency of the motion to dismiss but was not brought to the attention of the court. The amended complaint is virtually identical to the original complaint in terms of the factual allegations and causes of action, except that Plaintiff adds additional causes of action sounding in fraud, and breach of the covenant of good faith and fair dealing against Defendants.

Defendants oppose Plaintiff's motion to vacate the prior order, arguing that the additional causes of action are without merit.

CPLR §2221 permits the court to grant leave to reargue a prior order "based upon matters of fact or law allegedly overlooked or misapprehended by the court on the prior motion" Here, leave to renew the prior motion to dismiss is granted, as

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the court's prior order did not address Plaintiff's fraud claims and claim for breach of the covenant of good faith and fair dealing.

CPLR §3211 provides, in relevant part:

- (a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
 - (1) a defense is founded upon documentary evidence; [and]
 - (7) the pleading fails to state a cause of action.

In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory." (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91 [1st Dept. 2003]) (internal citations omitted) (*see* CPLR §3211[a][7]). On a motion to dismiss pursuant to CPLR §3211(a)(1) "the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007]) (internal citations omitted) "When evidentiary material is considered, the criterion is whether the proponent of the pleading *has* a cause of action, not whether he has stated one" (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]) (emphasis added). A movant is entitled to dismissal under CPLR §3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dept. 2007]) (citation omitted).

First, Plaintiff's first through seventh causes of action for contractual indemnification against Defendants are dismissed for the reasons set forth in the prior order.

With respect to Plaintiff's eighth cause of action, "[i]t is axiomatic that all contracts imply a covenant of good faith and fair dealing in the course of performance. This covenant embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to

receive the fruits of the contract” (*Forman v. Guardian Life Ins. Co. of America*, 2010 6606, *2 [1st Dept. 2010]) (citations and internal quotations omitted). Here, Plaintiff does not claim that it was deprived of the benefits of Purchase Agreements by Defendants in the course of Defendants’ performance on the Agreement. Rather, Plaintiff’s damages are the result of alleged misrepresentations which induced him to enter into the Agreement in the first place. Accordingly, Plaintiff fails to state of cause of action for breach of the implied warranty of good faith and fair dealing.

Plaintiff’s ninth through thirteenth causes of action sound in fraud. The elements of fraud are material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff, and damages (*see Pramer S.C.A. v. Abaplus, Intl. Corp.*, 2010 NY Slip Op 4936, *7 [1st Dept. 2010]). The Purchase Agreement expressly provides that the alleged misrepresentation at issue in this lawsuit (*i.e.*, that the Company was not in default on any of its commercial leases) was being made solely by the Company, and not by any of the Defendants. In addition to specifically setting forth the representations being made by the Company versus those being made by the Defendants, the Purchase Agreement contains a merger clause which provides as follows:

This Agreement and the documents referred to herein and to be delivered pursuant hereto constitute the entire agreement between the parties pertaining to the subject matter hereof, and supersede all prior and contemporaneous agreements, understandings, negotiations and discussions of the parties, whether oral or written, and there are no warranties, representations or other agreements between the parties in connection with the subject matter hereof, except as specifically set forth herein or therein....

Generally, a plaintiff is barred from asserting a fraud claim based upon an extra-contractual representation where the contract specifically disclaims any representations other than those contained in the contract (*see Plaza PH2001 LLC v. Plaza Residential Owners, LP*, 2010 NY Slip Op 9385 [1st Dept. 2010]) (*citing Danann Realty Corp. v. Harris*, 5 N.Y.2d 317, 320-21 [1959]). However, “a purchaser may not be precluded from claiming reliance on misrepresentations of facts peculiarly within the seller’s knowledge, notwithstanding the execution of a specific disclaimer” (*Steinhardt Group, Inc. v. Citicorp*, 272 A.D.2d 255, 257 [1st Dept.

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2000)).

Plaintiff states in its complaint that it requested that Defendants obtain the consent of the landlords of the subject commercial leases, and that Defendants instead delivered an "a purported list of automatic payments dated May 7, 2008 of the Company." Although the list shows payments of the Company's commercial leases for April 2008 rent, Plaintiff alleges in its complaint that April 2008 rent was not paid for 25 of the commercial leases listed therein. In addition, Plaintiff attaches a list of unpaid rent for April and May 2008, which it alleges was maintained by Defendants prior to and after the closing, but did not become available to Plaintiff until July 2008. Based upon the foregoing, the court finds that Plaintiff has stated viable causes of action for fraud.

Wherefore it is hereby

ORDERED that Plaintiff's motion for leave to renew the prior motion to dismiss is granted; and it is further

ORDERED that, upon renewal, Defendants' motion to dismiss is granted with respect to Plaintiff's first, second, third, fourth, fifth, sixth, seventh and eighth causes of action; and it is further

ORDERED that Defendants' motion to dismiss is otherwise denied; and it is further

ORDERED that Defendants are directed to serve their answer to Plaintiff's amended complaint within ten days of receipt of a copy of this order with notice of entry thereof.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: March 7, 2011



EILEEN A. RAKOWER, J.S.C.

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