

Kosovich v Metro Homes, LLC
2011 NY Slip Op 30857(U)
April 4, 2011
Supreme Court, New York County
Docket Number: 601607/09
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 : 002

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is ordered per*

attached

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

FILED
APR 08 2011
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/4/11

EJG
EMILY JANE GOODMAN

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.: 601607/09

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

Defendants.

-----X
EMILY JANE GOODMAN, J.:

In this case, plaintiff, a man in his late seventies at the time, claims that he was induced to invest \$200,000 from a retirement account, based upon false information provided to him by defendant Kenneth Kavanagh, then an employee of defendant UBS Financial Services Inc. (UBS). UBS moves, pursuant to CPLR 3211 (a) (7) and CPLR 3016, to dismiss the complaint.

Background and the Complaint

Plaintiff alleges that UBS was engaged by defendants Metro Homes, LLC (Metro), Dean S. Geibel and Paul E. Fried (together, the Developers), for a fee, to raise funds for a condominium project to be built by the Developers in New Jersey. Plaintiff claims that UBS, acting as the Developers' agent, recommended that plaintiff advance monies from his UBS account to the Developers. Plaintiff further claims, upon information and belief, that UBS advised him that the funds he advanced to the Developers would be for a period of two years, with interest paid annually, at the rate of 15%. Plaintiff states that, on or about June 30, 2005, he transferred

\$200,000 to Metro, and believes that UBS was paid \$20,000 in commissions on the transaction.¹

Plaintiff alleges that the Developers failed to pay interest and principal on the loan, except for a \$12,246.58 payment made to him in January 2006. Plaintiff states that he believes that the project was terminated in December 2007, and that the Developers have not accounted for the funds that they received from plaintiff and others, or furnished financial information concerning these funds.

The first and second causes of action of the complaint are not directed at UBS. In the third cause of action, plaintiff alleges that he stated an account which remains unpaid. The complaint does not make clear that this claim is alleged against UBS.

In his fourth cause of action, plaintiff alleges that the “defendants” induced him to enter into the agreement to advance money to them by falsely representing to him that they would have sufficient funds, from their operations, to pay plaintiff the interest on the money he transferred, and would have funds to repay plaintiff the \$200,000 loan at the end of the two-year loan term. Plaintiff alleges that these statements, as to present and future cash flow and the ability to make interest payments as promised, were false, known to be so by the defendants, and fraudulent. Plaintiff states, on information and belief, that the developers had no income or cash flow from operations or construction of the project during the two-year period, and that the only way that the Developers could make the promised interest payments was to obtain new lenders to pay the original lenders. Plaintiff further alleges that the Developers did not raise enough money to

¹While the court will use the word “Developers” for convenience, defendants submit a document signed by plaintiff that shows wiring instructions for Esperanza, LLC and a “Signature Page of Operating Agreement of Esperanza, LLC” indicating a \$200,000 contribution. Thus, it appears that plaintiff transferred funds to Esperanza, LLC.

follow this path, and that the project was not built, but abandoned. Plaintiff also claims that he relied on defendants' statements about their ability to make payments as promised, and as a result sustained the loss of the \$200,000 that he loaned to the defendants, plus the promised interest payments.

In the complaint's fifth cause of action, plaintiff alleges that UBS and its employee, defendant Kavanagh, a financial advisor, were fiduciaries to him, as he had a 401(k) account and other financial accounts with UBS. Plaintiff claims that UBS violated its fiduciary duty by inducing him to lend money to the Developers, by failing to conduct due diligence as to the Developers' resources, and by failing to advise plaintiff as to the involved risks. Plaintiff also claims that UBS concealed that it was paid commissions for producing customers to lend money to the Developers.

In his sixth cause of action, plaintiff claims that UBS was unjustly enriched at his expense in the amount of \$200,000. In his seventh cause of action, plaintiff seeks punitive damages.

In moving to dismiss, UBS argues that the complaint does not state the elements of an account stated claim. UBS further argues that plaintiff fails to sufficiently allege fraud and that his breach of fiduciary duty and unjust enrichment claims are barred by the Martin Act. UBS also argues that the unjust enrichment claim fails because plaintiff has not alleged that UBS received any funds from him.

In opposition to the motion, plaintiff submits an affidavit in which he states that Kavanagh told him that he was making a three-year loan² to the Developers to fund the project, with interest to be paid semi-annually, at a rate of 15% per year. Plaintiff avers that Kavanagh stated many

²The complaint alleges that the loan term was two years with annual interest payments.

times that the transaction was a loan, and not an investment, and that it was plaintiff's understanding that the \$200,000 was loaned to Metro on the terms and conditions stated to him by Kavanagh. Plaintiff also submits a letter, dated August 2007, from the Developer's then president, defendant Dean Geibel, in which Geibel stated "my priority is to get your interest payments out to each of you as soon as possible" (Pl. Op Aff., ¶ 9). Plaintiff states that the condominium project is a hole in the ground, and that he relied on UBS, and the other defendants, to place his funds in a safe, income-producing situation, but that his advisors instead put him in a precarious real estate development investment.³

Discussion

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). However, "bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not presumed to be true and accorded every favorable inference" (*M & B Joint Venture, Inc. v Laurus Master Fund, Ltd.*, 49 AD3d 258, 260 [1st Dept 2008], *aff'd as mod* 12 NY3d 798 [2009] [internal quotation marks and citation omitted]). Where extrinsic evidence is submitted in connection with the motion, the appropriate standard of review "is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*IIG Capital LLC v Archipelago, L.L.C.*, 36 AD3d 401, 402 [1st Dept 2007] [internal quotation marks and citation omitted]).

³In opposition papers, plaintiff discusses his desire to obtain information about how the Developers used funds obtained by other investors, and to find out how the Developers spent his money.

Plaintiff's third cause of action, for account stated, is dismissed because plaintiff claims only to have stated an account to Metro, and not to UBS. As there is no factual basis in the complaint to support an account stated claim against UBS, and plaintiff submits only a statement of account addressed to Metro in opposition, the claim is not stated.⁴

UBS argues that plaintiff's fourth cause of action, sounding in misrepresentation, fails because: (1) plaintiff has not alleged a misrepresentation, as he has not alleged that UBS's statement that "the investment would be for a period of two years and would pay 15% interest per year" was false when made, or that UBS then knew it to be so (UBS Memo. of Law, at 9);⁵ (2) plaintiff's claim of reasonable reliance on Kavanagh's alleged statements is defeated by the offering materials, which demonstrate that the transaction was an investment that was subject to significant risk and without guaranteed return; and (3) plaintiff has not adequately alleged proximate causation.

"The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages. A claim rooted in fraud must be pleaded with the requisite particularity under CPLR 3016(b)" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009] [citation omitted]).

The court will address UBS' argument regarding causation first. In a common fraud law

⁴It does not appear that plaintiff intended to state a claim for account stated in the complaint against UBS.

⁵UBS cites to paragraph 13 of the Complaint which states "the monies advanced to the developers would be for a period of two years." Plaintiff does not claim that he was told that the "investment" would be for a two-year period, but speaks of a loan transaction.

claim, the plaintiff must allege a direct causal link between the wrongdoing complained of and an injury for which a plaintiff seeks damages alleged (*see Laub v Faessel*, 297 AD2d 28, 31 [1st Dept 2002] [broker’s representations about his own work experience were not the cause of plaintiff’s investment loss where broker make no misrepresentation about the investments, or companies, he recommended]). Thus, the complaint must state facts, with particularity, from which the court may at least infer “a reasonable connection between the act or omission of the defendant and the damages which the plaintiff has suffered” (*Laub*, 297 AD2d at 31; *see Small v Lorillard Tobacco Co.*, 94 NY2d 43, 57 [1999]).⁶ As UBS points out, regarding the interest payments, plaintiff did not receive any payments beyond the initial payment, because the project’s operations did not generate cash to make payments.⁷ This does not demonstrate a nexus between the alleged misrepresentation that the transaction was a loan, and plaintiff’s alleged injury or damages. To the extent that plaintiff alleges that he received a different type of interest which, due to its increased risk, was of less value than he was led to believe, that does not demonstrate a causal link between plaintiff’s alleged misrepresentation and the loss (*see e.g. Allegheny Energy, Inc.*, 50 F3d 171, *supra* [involving claim that based on seller’s misrepresentation, buyer bought

⁶In a federal securities fraud case, loss causation generally is not demonstrated by the allegation of a buyer’s stock purchase at an inflated price due to the buyer’s reliance on a misrepresentation (*Dura Pharmaceuticals, Inc. v Broudo*, 544 US 336, 342 [2005]); *Lentell v Merrill Lynch & Co., Inc.*, 396 F3d 161, 174 [2d Cir 2005] [“It is not enough to allege that a defendant’s misrepresentations and omissions induced a ‘purchase-time value disparity’ between the price paid for a security and its ‘true investment quality’ (citation omitted)”]). In a common law fraud case, however, a plaintiff is not required to demonstrate loss causation in the same manner (*Merrill Lynch & Co. Inc. v Allegheny Energy, Inc.*, 50 F3d 171, 183 [2007]).

⁷UBS mischaracterizes plaintiff’s argument regarding repayment of his principal. The complaint does not state that the return of his principal was tied to the project’s operations’ generation of cash.

business for more than it was worth])).

As to the return of principle, plaintiff fails to state a fraud claim. The complaint and affidavit indicate that plaintiff claims that in reliance on UBS' misrepresentation that the transaction was in the nature of loan, he transferred \$200,000 to the Developers, only later to find out that the transaction was not a loan, but a speculative equity investment. The only misrepresentation of material fact allegedly made by Kavanagh, on behalf of UBS, was that he repeatedly stated that the transaction was in the nature of a loan, and plaintiff avers that had he been informed that transaction was an investment, he would not have entered into it. However, the statement must have been false when made, and must have concerned present facts, not promises about future actions or performance. Statements of prediction or expectation about future events cannot give rise to a negligent misrepresentation or fraud claim (*see e.g., ESBE Holdings, Inc. v. Vanquish Acquisition Partners*, 50 AD3d 397, 398 [1st Dept 2008]; *Dragon Inv. Co. II LLC v. Shanahan*, 49 AD3d 403 [1st Dept 2008]; *Naturopathic Labs. Intl., Inc. v. SSL Americas, Inc.*, 18 AD3d 404, 404-405 [1st Dept 2005]; *Thomas v. McLaughlin*, 276 AD2d 440, 440-41, [1st Dept 2000]; *Sheth v. New York Life Ins. Co.*, 273 AD2d 72, 73-74 [1st Dept 2000]; *Albert Apt. Corp. v. Corbo Co.*, 182 AD2d 500, 500-01 [1st Dept 1992]). Here, as to the return of principal, no present facts are alleged to support a fraud claim based on the statement that, two years in the future, plaintiff's principal would be returned. Accordingly, plaintiff does not adequately state a fraud claim.

UBS also argues that the fraud claim should be dismissed because plaintiff was not justified in relying on Kavanagh's alleged representation, as plaintiff was advised of the investment's nature and significant risk through a subscription agreement (SA) and a private

placement memorandum (PPM). UBS argues that this documentary evidence establishes that plaintiff received the SA and PPM in advance of making his investment. UBS further contends that, even if plaintiff did not receive the documents, his claim should be dismissed because he had the means to obtain the truth through the use of ordinary intelligence. Plaintiff avers that he never saw the PPM prior to this lawsuit, and that UBS never spoke with him about it. He also challenges the admissibility of the documents UBS submits.

In order to prevail on a motion to dismiss where the basis for dismissal is submitted evidence, the admissible documents must conclusively resolve factual issues raised in the pleadings in favor of the moving party (*see AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, 5 NY3d 582 [2005]; *New York Schools Ins. Reciprocal v Gagliotti Assocs.*, 305 AD2d 563 [2d Dept 2003]; CPLR 3211 [c]). There are instances in which courts have stated that documents submitted on a motion to dismiss need not be accompanied by an affidavit from a person with knowledge (*see e.g. Empire One Telecommunications, Inc. v Verizon New York, Inc.*, 26 Misc 3d 541, 548 [Sup Ct, Kings County] [determining that affidavit from person with knowledge of authenticity of documents was not required where the documents were referred to and formed the basis of the complaint and were the subject of CPLR 4540]). However, UBS has not demonstrated that this should be one of those cases.

The documents UBS submits contain a blank line where the document indicates that the name of the investor and the subscription number should be. In addition, the signature pages of the SA submitted, which plaintiff does not deny that he signed, do not conform to the pages of the SA submitted by UBS, and UBS has provided no explanation as to why. Furthermore, UBS has not provided an affidavit from a person, with knowledge, stating that documents are true and

correct copies of the documents as they existed at the time that plaintiff entered into the transaction with the Developers. There is no evidence in the record to demonstrate this. While the documents may be authentic, accurate copies, it was incumbent on UBS to demonstrate this.⁸ As it has not adequately done so, even in response to plaintiff's challenge, its reliance argument is unsupported here.⁹

Despite this, the fourth cause of action must be dismissed because, as discussed above, plaintiff's allegations do not sufficiently demonstrate proximate cause. In addition, plaintiff's allegations lack particularity, as plaintiff does not distinguish between the defendants in many instances, where he undoubtedly has knowledge sufficient to do so, such as where he indicates that statements were made to him. On this motion, and in the event that plaintiff decides to seek leave to amend the complaint or to replead, he is not excused from meeting the requirements of CPLR 3016. As the claim is dismissed, the court need not address UBS' argument that plaintiff has failed to allege a misrepresentation.

⁸UBS would be required to meet certain burdens in order to be permitted to introduce evidence at trial and provides nothing to demonstrate that such burdens are relaxed on a pre-trial, CPLR 3211 (a) (7), motion.

⁹UBS' reliance argument is based on information included in the PPM and SA which were also previously submitted by the Developers on their dismissal motion in 2009. The court denied that motion, in part, because the PPM and SA were submitted through the affidavit of an attorney who did not state that he had personal knowledge of the underlying matter, or a basis for his assertion that the documents were true and correct. Here, UBS submits a copy of that same attorney affidavit to present the PPM and SA. UBS also submits a copy of plaintiff's federal case, concerning other investments. In that case, the Court relied on a copy of a brochure that the *plaintiff* attached to the complaint, and also cited to the certification of defendant "Giebel," whom plaintiff alleges was a member of Metro, as the vehicle for the submission of the private placement memoranda, and not the affidavit of an attorney without personal knowledge of the underlying matter (*see Kosovich v Metro Homes, LLC*, 2009 WL 5171737, 2009 US Dist LEXIS 121390 [SD NY 2009], *affd* 2010 WL 5113128, 2010 US App LEXIS 25681 [2d Cir 2010]).

UBS' sole argument to dismiss the fifth cause of action of the complaint is that it is preempted by the Martin Act. The First Department has recently opined that a motion to dismiss is properly denied where it is predicated on an argument that a claim is preempted by the Martin Act if the complaint states a common law claim and "does not rely entirely on alleged omissions from filings required by the Martin Act and the Attorney General's implementing regulations" (*Board of Mgrs. of Marke Gardens Condominiums v 240/242 Franklin Ave., LLC*, 71 AD3d 935, 936 [1st Dept 2010] [citation and quotation marks omitted]). Plaintiff does not rely on alleged omissions from filings required by the Martin Act or the Attorney General's implementing regulations, and UBS does not argue that plaintiff has otherwise failed to state a claim for breach of fiduciary duty. Therefore, UBS' motion must be denied.

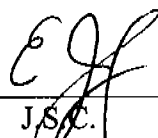
Plaintiff does not state a cause of action for unjust enrichment because he does not claim that UBS was enriched by the \$200,000 he lost due to the Developer's failure to pay back the loan. If plaintiff has opposed dismissal of this claim, it is not evident from his submissions. Therefore, the sixth cause of action is dismissed. Accordingly, it is

ORDERED that the motion to dismiss is granted to the extent that the third, fourth and sixth causes of action of the complaint are dismissed as to defendant UBS, and is otherwise denied; it is further

ORDERED that the parties are to appear for a discovery conference on April 7, 2011.

This constitutes the Decision and Order of the Court.

Dated: April 4, 2011

FILED
 APR 08 2011
 ENTER: 
 NEW YORK COUNTY CLERK'S OFFICE
 J.S.C.
EMILY JANE GOODMAN