

Stein v Doukas

2011 NY Slip Op 31792(U)

June 20, 2011

Supreme Court, Suffolk County

Docket Number: 21627-10

Judge: Daniel Martin

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**SUPREME COURT OF THE STATE OF NEW YORK
I.A.S. PART 9 SUFFOLK COUNTY**

PRESENT:**HON. DANIEL MARTIN**

_____ x

**DOUGLAS STEIN, Individually, and as
Administrator of the Estate of his father,
BENJAMIN STEIN, deceased, ESTATE
OF BENJAMIN STEIN, ESTATE OF
BENJAMIN STEIN as member of M.D.
STAT LLC., DOUGLAS CLAIRE
STEIN, deceased, and ESTATE OF
CLAIRE STEIN,**

Plaintiff,

-against-

TED DOUKAS, M.D. *Et al.*,

Defendants.

_____ x

INDEX NO.: 21627-10

Motion Date: 10/20/10; 1/4/11

Submitted: 1/4/11

Motion Sequence Nos.: 01 - MG/CaseDisp
02 - MD/CaseDisp

PLAINTIFFS' ATTY:**Kevin T. Grennan, PLLC.****1000 Franklin Avenue, Ste. 302****Garden City, NY 11530****DEFENDANTS' ATTY:****Robert J. Delcol, Esq.****1038 West Jericho Turnpike****Smithtown, NY 11787****The following named papers have been read on this motion:**

Order to Show Cause/Notice of Motion	X
Cross-Motion	X
Answering Affidavits	X
Replying Affidavits	

ORDERED that the motion by defendants for an order pursuant to CPLR 3211 dismissing the complaint against them is granted; and it is further

ORDERED that the cross motion by plaintiffs for an order pursuant to CPLR 2201 staying the determination and hearing of the instant motion by defendants is denied.

On September 21, 2001, Benjamin Stein entered into an agreement ("Agreement") with

defendant MD Stat LLC, a corporate entity solely owned by defendant Ted Doukas. In the Agreement, MD Stat agreed to assume certain mortgage and property tax obligations relating to certain real property located in Amityville, New York, in the area around Brunswick Hospital, upon transfer of those properties from Stein to MD Stat. As consideration, Stein was to receive a 10% interest in MD Stat. Shortly thereafter, an action was commenced by Amar Jit Singh and Harry Fruhman against Stein and Doukas alleging, among other things, that the Agreement constituted a breach of a prior contract between Stein, Singh and Fruhman. The subject properties were put in receivership until a stipulation of settlement was entered into by the parties on July 12, 2004.

The complaint in this action alleges a closing was held on November 6 and November 9, 2004 in connection with the stipulation of settlement, and that the receiver deeded certain real property to MD Stat. According to the complaint, on March 15, 2005, Doukas and MD Stat fraudulently transferred certain real property to defendant Nosal Realty, LLC, thereby divesting plaintiffs of the property and their interest in MD Stat and WKYA Holding Corp. The complaint further alleges that certain properties were conveyed from Nosal Realty to Loudon Realty, LLC, and then from Loudon Realty to Efastos Corp.

Plaintiff Douglas Stein is the son of Benjamin Stein and Claire Stein, who died on August 21, 2005 and on February 4, 2008, respectively. Douglas Stein allegedly is the administrator of Benjamin Stein's estate and the executor of Claire Stein's estate, and the sole beneficiary of their estates. The complaint alleges that Doukas controlled the following corporate defendants: WKYA Holding Corp., 4 Loudon Ave. Corp., 60 Loudon Corp. a/k/a 60 Loudon Corp., Nosal Realty, LLC, and Efastos Corp. The complaint asserts causes of actions sounding in fraud, breach of contract, and breach of fiduciary duty, as well as a derivative shareholder action.

Defendants now move for an order pursuant to CPLR 3211(a)(1),(3),(5),(7),(8) and (10) dismissing the complaint against them, arguing, among other things, that it fails to state a cause of action, that certain claims are barred by the statute of limitations and collateral estoppel, and that a defense founded on documentary evidence exists. In support of their motion, defendants submit, among other things, a copy of the summons and complaint, an affidavit of Doukas, the Agreement, the certificate book of MD Stat, a copy of the Stipulation of Settlement and pleadings from the action entitled *Singh v Brunswick Hospital*, assigned index no. 01-23503, and copies of various deeds and mortgage notes.

Plaintiff cross-moves pursuant to CPLR 2201 for an order staying the determination of the instant motion to dismiss by defendants. Plaintiff argues that the instant motion by defendants should be stayed pending a decision in the action entitled *Douglas Stein v Ted Doukas*, assigned index number 07-05623 action, on a motion to consolidate the instant action with the action assigned index number 07-05623. Plaintiff further argues that the order issued by this Court (Cohalan, J) on September 3, 2009 in the action assigned index number 07-05623 is the law of this case. Plaintiff also opposes defendants' motion to dismiss, arguing that the instant action has been timely commenced, as the continuous representation doctrine applies, and that as the Agreement was executory the statute of limitations did not begin to run until 2004 when the closing of the subject

properties took place. In opposition, plaintiffs submit, among other things, a copy of the summons and complaint; a copy of the order to show cause, pleadings, notice of motion, and appellate briefs from *Douglas Stein v Ted Doukas*, index no. 07-5623; and affidavits of Douglas Stein, Mary Hauptman, Antoinette Webster, and Ted Doukas.

A stay of an action pending the outcome of another is appropriate only where the decision in one will determine all the questions in the other, and where the judgment in one trial will dispose of the controversy in both actions. This requires a complete identity of parties, cause of action, and judgment sought (*see Map Mar. Ltd. v China Constr. Bank Corp.*, 70 AD3d 404, 895 NYS2d 352 [1st Dept 2010]; *Somoza v Pechnik*, 3 AD3d 394, 772 NYS2d 2 [1st Dept 2004]). Here, there is not a complete identity of parties and causes of action. Thus, the cross motion by plaintiff for an order staying the determination of defendants' motion is denied.

Under CPLR 3211 (a)(1), a dismissal may be granted only if the documentary evidence submitted by the movant "conclusively establishes a defense to the asserted claims as a matter of law" (*Held v Kaufman*, 91 NY2d 425, 671 NYS2d 429 [1998]). On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the Court must afford the complaint a liberal construction, accept all facts as alleged in the complaint to be true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83, 614 NYS2d 972 [1994]; *Melnicke v Brecher*, 65 AD3d 1020, 886 NYS2d 406 [2d Dept 2009]; *Fishberger v Voss*, 51 AD3d 627, 858 NYS2d 257 [2d Dept 2008]). If from the four corners of the complaint factual allegations are discerned which taken together manifest any cause of action cognizable at law, the motion will fail, regardless of whether the plaintiff will ultimately prevail on the merits (*see Danna v Malco Realty, Inc.*, 51 AD3d 621, 857 NYS2d 688 [2d Dept 2008]; *Bovino v Village of Wappingers Falls*, 215 AD2d 619, 628 NYS2d 508 [2d Dept 1995]). Further, a defendant seeking to dismiss the complaint insofar as asserted against it as time-barred pursuant to CPLR 3211(a)(5) has the initial burden of proving through documentary evidence that the action was untimely commenced after its accrual date (*see Lessoff v 26 Court Street Assoc., LLC*, 58 AD3d 610, 872 NYS2d 144 [2d Dept 2009]; *Savarese v Shatz*, 273 AD2d 219, 220, 708 NYS2d 642 [2d Dept 2000]). Thereafter, the burden shifts to the plaintiff to aver evidentiary facts establishing that the action was timely commenced or to raise an issue of fact as to whether it was timely (*see Lessoff v 26 Court Street Assoc., LLC, supra*).

CPLR 3016 (b) requires that in an action based upon fraud, "the circumstances constituting the wrong shall be stated in detail" in the pleading. Bare allegations of fraud without any allegation of the details constituting the wrong are not sufficient to sustain such a cause of action (CPLR 3016[b]; *see Kline v Taukpoint Realty Corp.*, 302 AD2d 433, 754 NYS2d 899 [2d Dept 2003]; *Gill v Caribbean Home Remodeling*, 73 AD2d 609, 422 NYS2d 448 [2d Dept 1979]; *Biggar v Buteau*, 51 AD2d 601, 377 NYS2d 788 [3d Dept 1976]). Here, the causes of action alleging fraud are not pleaded with particularity, as there are no allegations concerning specific misrepresentations and when they were made (*see Nicosia v Board of Mgrs. of the Weber House Condominium*, 77 AD3d 455, 909 NYS2d 412 [1st Dept 2010]; *Daly v Kochanowicz*, 67 AD3d 78, 884 NYS2d 144 [2d Dept 2009]). The bare allegations that Doukas never intended to transfer a 10% share of MD Stat to Benjamin Stein when the contract was entered into is insufficient to state a cause of action for fraud, constructive or actual (*see Rocchio v Biondi*, 40 AD3d 615, 835 NYS2d 401 [2007]; *Lapis Enters. v International Blimpie Corp.*, 84 AD2d 286, 445 NYS2d 574 [2d Dept 1981]). Moreover, a cause

of action to recover damages for fraud does not lie where, as here, the only fraud claimed relates to an alleged breach of contract (*see Hylan Elec. Contr., Inc v MasTec N. Am., Inc.*, 74 AD3d 1148, 903 NYS2d 528 [2d Dept 2010]). Similarly, a cause of action alleging breach of fiduciary duty which is merely duplicative of a breach of contract claim, as in the instant case, cannot stand (*see Hylan Elec. Contr., Inc v MasTec N. Am., Inc.*, *supra*; *Brooks v Key Trust Co. Natl. Assn.*, 26 AD3d 628, 809 NYS2d 270 [3d Dept 2006]). Thus, the branch of defendants' motion to dismiss each of the fraud-based causes of action is granted, including not only plaintiff's first and second causes of action, but also the third cause of action for breach of fiduciary duty, fifth cause of action for fraudulent inducement, and eighteenth cause of action for fraudulent concealment.

Dismissal of the cause of action for breach of contract also is granted. Plaintiffs' fourth cause of action for breach of contract alleges that Doukas breached the 2001 Agreement with plaintiffs as he failed to convey a 10% membership and capital share interest in MD Stat to Benjamin Stein and entered into prohibited transactions with Singh and Fruhman in 2004. More specifically, the Agreement states under the caption "Prohibited Transactions" that Doukas, MD Stat and the Steins will not be a "party to any contract, agreement, instrument, understanding or transaction with Singh or Fruhman." The complaint alleges that the stipulation of settlement in July 2004 and the closing pursuant to the stipulation in November 2004 entered into by Doukas constitute prohibited transactions. A breach of contract cause of action accrues, and the relevant six-year statute of limitations begins to run, at the time of the breach (*see CPLR 213[2]*; *6D Farm Corp. v Carr*, 63 AD3d 903, 882 NYS2d 198 [2d Dept 2009]). However, the Agreement was entered into by the parties in 2001. Thus, plaintiffs' cause of action for breach of contract is time-barred. The Court notes that plaintiffs also signed the stipulation of settlement in July 2004.

Dismissal of plaintiffs' sixth cause of action for conversion of plaintiffs' real property is granted. An action sounding in conversion does not lie where the property involved is real property (*see Dickinson v Igoni*, 76 AD3d 943, 908 NYS2d 85 [2d Dept 2010]; *Garelick v Carmel*, 141 AD2d 501, 529 NYS2d 126 [2d Dept 1988]). Moreover, a claim to recover damages for conversion cannot be predicated on a mere breach of contract (*see Priolo Communications. v MCI Telecom. Corp.*, 248 AD2d 453, 669 NYS2d 376 [2d Dept 1998]). Plaintiffs' cause of action alleging conversion merely restates the cause of action to recover damages for breach of contract and does not allege a separate taking.

With respect to the seventh and sixteenth causes of action, which seek to recover under the theories of unjust enrichment and quantum meruit, "the existence of a valid and enforceable written contract governing a particular subject matter precludes recovery in quasi-contract on theories of quantum meruit and unjust enrichment for events arising out of the same subject matter" (*Yenrab, Inc. v 794 Linden Realty, LLC*, 68 AD3d 755, 758, 892 NYS2d 105 [2009]; *see Marc Contr., Inc. v 39 Winfield Assoc., LLC*, 63 AD3d 693, 880 NYS2d 346 [2009]). Here, the existence of the Agreement precludes plaintiffs' claims alleging unjust enrichment and quantum meruit. Moreover, the complaint fails to state a cause of action to recover in quantum meruit, as there is no allegation that plaintiffs performed services or that defendants accepted any services from plaintiffs (*see AHA Sales, Inc. v Creative Bath Prods., Inc.*, 58 AD3d 6, 867 NYS2d 169 [2d Dept 2008]; *Tesser v Allboro Equip. Co.*, 302 AD2d 589, 756 NYS2d 253 [2d Dept 2003]). The seventh and sixteenth causes of action, therefore, are dismissed.

In the eighth, ninth and tenth causes of action of the complaint, plaintiffs allege derivative

claims against defendants based on their alleged interest as a shareholder of MD Stat. Under Business Corporation Law §626, only complainants who are shareholders at the time of the action and the challenged transaction have standing to bring a derivative action. Here, plaintiffs assert in their complaint that defendants failed to convey the 10% interest of MD Stat to Benjamin Stein pursuant to the Agreement. As there was no conveyance of the 10% interest, Benjamin Stein is not a shareholder and lacks standing to bring a derivative action.

In the eleventh cause of action, the complaint asserts a claim pursuant to Article 15 of the Real Property Actions and Proceedings Law to compel determinations of claims to real property adverse to plaintiffs. It alleges that a deed recorded on March 15, 2005, shows defendants fraudulently transferred real property located at 60, 80-100 and 120 Louden Avenue to defendant Nosal Realty, which then fraudulently conveyed title to such properties to defendant Louden Realty. A claim pursuant to Article 15 of the Real Property Actions and Proceedings Law to compel determinations of claims to real property adverse to plaintiffs, however, is inappropriate in the instant case. The eleventh cause of action is no more than a claim for fraud and breach of contract. To maintain an action under Article 15 of the RPAPL, a person must claim an estate or interest in real property or claim such estate or interest as executor or administrator of a deceased person (*see* RPAPL §1501). Here, plaintiffs allege that the transfers made by Doukas divested plaintiffs of the property and of their interest in MD Stat and WKYA Holding. However, the Court has already determined that plaintiffs had no interest in MD Stat and there is no allegation in the complaint that they had an interest in WKYA Holding. Furthermore, contrary to the allegations in the complaint that the properties reverted back to plaintiffs after the stipulation of settlement, the record shows that said properties were held in receivership during the litigation and then transferred to MD Stat after the settlement. Accordingly, plaintiffs' eleventh cause of action is dismissed.

Plaintiffs' twelfth and thirteenth causes of action for attachment are dismissed, as an attachment is a provisional remedy and not an independent cause of action (*see* CPLR 6201).

Defendants' application under CPLR 3211(a)(7) to dismiss plaintiffs' fourteenth cause of action for the imposition of a constructive trust and the fifteenth cause of action for an accounting is granted. Here, the allegations in the complaint were insufficient to allege the existence of a fiduciary relationship between defendants and plaintiffs (*see East End Lab., Inc. v Sawaya*, 79 AD3d 1095, 914 NYS2d 250 [2d Dept 2010]). In the absence of a fiduciary relationship, the complaint fails to state a cause of action for the imposition of a constructive trust (*see First Keystone Consultants, Inc. v DDR Constr. Servs.*, 74 AD3d 1135, 904 NYS2d 113 [2d Dept 2010]) and for an accounting (*see Akkaya v Prime Time Transp., Inc.*, 45 AD3d 616, 845 NYS2d 827; *Town of New Windsor v New Windsor Volunteer Ambulance Corps., Inc.*, 16 AD3d 403, 791 NYS2d 159 [2d Dept 2005]).


As to plaintiffs' seventeenth cause of action, pursuant to Section 349(a) of the General Business Law, a plaintiff claiming the benefit of the statute must allege conduct by the defendant that is consumer-oriented (*see New York Univ. v Continental Ins. Co.*, *supra*; *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, N.A.*, 85 NY2d 20, 623 NYS2d 529 [1995]). Private contract disputes, unique to the parties, for example, do not fall within the ambit of the statute (*see Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, N.A.*, *supra*). Here, the Agreement between the parties was not a typical consumer transaction and, therefore, is not covered by General Business Law §349. Thus, this cause of action against defendants is

dismissed.

Finally, plaintiffs' nineteenth cause of action for exemplary damages is dismissed, as there is no independent cause of action for punitive damages (*see, Probst v Cacoulidis*, 295 AD2d 331, 743 NYS2d 509 [2d Dept 2002]; *Oakfield Group, LLC v Bell Atl. Corp.*, 277 AD2d 365, 716 NYS2d 336 [2d Dept 2000]; *Glatter v Chase Manhattan Bank*, 239 AD2d 68, 669 NYS2d 651 [2d Dept 1998]).

So Ordered.

Dated: June 20, 2011
Riverhead, NY



HON. DANIEL MARTIN, A.J.S.C.