

Fulton v Kelly

2011 NY Slip Op 33284(U)

September 12, 2011

Supreme Court, Queens County

Docket Number: 20501/10

Judge: Orin R. Kitzes

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. ORIN R. KITZES
Justice

PART 17

-----X
TIMOTHY FULTON,

Plaintiff,

-against-

JOHN KELLY, MICHAEL CHOLOWSKY,
MATTHEW CRESCIMANNI, and EMJAY
ENVIRONMENTAL RECYCLING, LTD.,

Index No: 20501/10
Motion Date: 5/25/11
Mot. Cal. No.: 16
Mot. Seq. 3

Defendants.

-----X
The following papers numbered 1 to 3 read on this motion by defendant John Kelly for an order pursuant to CPLR 3211(a)(7) dismissing all of the cross claims asserted against him.

	<u>Papers Numbered</u>
Notice of Motion – Affidavits – Exhibits	1
Answering Affidavits - Exhibits.....	2
Reply Affidavits.....	3

Upon the foregoing papers it is ordered that: That branch of the motion by defendant Kelly which is for an order pursuant to CPLR 3211(a)(7) dismissing the first cross claim asserted against him is denied. Those branches of the motion by defendant Kelly which are for an order dismissing the second, third, fourth, fifth, sixth, and seventh cross claims asserted against him are granted. (See the accompanying memorandum.)

DATED: September 12, 2011

ORIN R. KITZES, J.S.C.

MEMORANDUM

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS**

**PART 17
HON. ORIN R. KITZES**

-----X
TIMOTHY FULTON,

Plaintiff,

-against-

**JOHN KELLY, MICHAEL CHOLOWSKY,
MATTHEW CRESCIMANNI, and EMJAY
ENVIRONMENTAL RECYCLING, LTD.,**

Defendants.

**Index No: 20501/10
Motion Date: 5/25/11
Mot. Cal. No.: 16
Mot. Seq. 3**

Dated: September 12, 2011

-----X
Defendant John Kelly has moved for an order pursuant to CPLR 3211(a)(7) dismissing all of the cross claims asserted against him.

Plaintiff Fulton's complaint alleges the following: In or about June 2003, defendant Cholowsky and defendant Kelly became the sole shareholders of Emjay Environmental Recycling Ltd. (Emjay), and pursuant to a shareholder's agreement neither could sell his stock without first tendering it to the corporation and to the other shareholder in that order. On or about February 3, 2010, defendant Kelly agreed to sell his stock to defendant Cholowsky, who promised to pay the sum of \$1,300,000 and to assume the payment of a loan that had been made by Capital One Bank. The agreement required Cholowsky to pay \$450,000 upon the execution of the agreement and subsequently the sum of \$850,000 by certified check or wire transfer. Kelly and Cholowsky warranted, inter alia, (1) that no government approval was needed for the consummation of the transaction and (2) that there were no judgments against them or the corporation. On February 4, 2010, plaintiff Fulton, who had signed the agreement as a "guarantor," wired the amount of \$200,000 to Kelly's attorney which represented part of the down payment. On February 4, 2010, defendant Matthew Crescimanni, who had also signed the agreement as a guarantor, wired the sum of \$250,000 to Kelly's attorney which represented the remainder of the required down payment. On March 8, 2010 and March 10, 2010, plaintiff Fulton paid the balance of the purchase price to defendant Kelly's attorney. On May 4, 2010,

defendant Crescimanni paid the sum of \$500,000 to defendant Kelly pursuant to paragraph 5 of the agreement of sale.

Plaintiff Fulton further alleges: In or about October 2009, defendant Cholowsky talked to him, the owner of an iron and metal recycling plant in Williamsburg, Brooklyn, about purchasing a 50% interest in a garbage transfer station located in Brentwood, New York which defendant Kelly, the co-owner wanted to sell. (Emjay owned the solid waste transfer station in Brentwood, New York.) Fulton and Cholowsky orally agreed between themselves that they would jointly pay the sums required by the agreement of sale and give security required to obtain the release of a mortgage placed on Emjay's property by Kelly. On February 3, 2010, Kelly, as seller, and Cholowsky, as buyer, entered into an agreement for the sale of stock, and plaintiff Fulton and defendant Crescimanni signed a guarantee which read: "As to paragraph 2(c) of this agreement, the undersigned agree to personally guaranty payment and performance of the requirements set forth therein." Paragraph 2(c), *inter alia*, required Cholowsky to satisfy and/or assume a loan made by Capital One Bank and a mortgage given to the lender then secured by the assets of Kelly and companies he apparently controlled. Fulton was not represented by an attorney when he signed the contract as a "guarantor." Cholowsky refused plaintiff Fulton's demands that their oral agreement be put in writing, but Fulton wired \$900,000 to Kelly because he had been told that he would lose his down payment if he failed to do so. When Kelly obstructed Fulton's efforts to inspect corporate documents, Fulton hired his own bookkeeper to work at Emjay's premises. Despite previously selling Emjay, Kelly subsequently entered into a contract with Salvatore Trovato for the sale of the corporation.

Plaintiff Fulton began this action on or about August 12, 2010. The first cause of action alleges that the defendants misrepresented the amount of funds deposited pursuant to paragraph 5 of the agreement of sale. The second cause of action, which is for breach of warranty, alleges that while defendant Kelly and Cholowsky warranted that no governmental approval was needed to consummate the transaction, the consent of the Department of Environmental Conservation was required for the conveyance of a recycling station operated by Emjay. The third cause of action alleges that while the defendants warranted that there were no actions pending against them, there were two actions pending in federal court. The fourth cause of action alleges that the defendants tortiously interfered with the agreement for the sale of stock by denying plaintiff Fulton access to the books and records of the corporation. The fifth cause of action alleges that the sale of stock and assets of Emjay to another party and the loss of a lease will cause irreparable harm to the plaintiff.

Defendant Kelly alleges the following: The warranties in the sale of stock agreement were made to defendant Cholowsky, not plaintiff Fulton. On July 26, 2010, Kelly received all of the consideration due under the agreement for the sale of stock that he had entered into with Cholowsky, and he transferred the appropriate shares in Emjay to Cholowsky. Kelly was not a party to the agreement that Cholowsky allegedly had with plaintiff Fulton whereby the former promised to transfer shares in Emjay to the latter.

On December 8, 2010, plaintiff Timothy Fulton moved for a preliminary injunction prohibiting the defendants from selling, transferring, or conveying any assets or stock of defendant Emjay. Defendant Cholowsky and defendant Emjay cross-moved for an order pursuant to CPLR 3211(a)(7) dismissing the complaint against them. Defendant Kelly cross-moved for, *inter alia*, an order pursuant to CPLR 3211(a)(1) dismissing the complaint against him.

Pursuant to a decision and order dated January 31, 2011, this Court granted the cross motion brought by defendant Kelly for an order pursuant to CPLR 3211(a)(7) dismissing the complaint asserted against him. The Court stated: “In the case at bar, defendant Kelly did not contract with plaintiff Fulton for the sale of shares in Emjay. The claims of breach of contract and breach of warranty made by plaintiff Fulton against defendant Kelly pertain to a contract made between only the latter and defendant Cholowsky. *** Not being a party to the principal obligation, plaintiff Fulton lacks standing to assert claims of breach of contract belonging to defendant Cholowsky. (*See, Gelmin v Sequa Capital Corp.*, 269 AD2d 492; *European American Bank v Lofrese*, 182 AD2d 67.) *** Second, although plaintiff Fulton allegedly paid part of the consideration on the primary contract owed by defendant Cholowsky, he did not thereby become a party to the primary contract. *** Third, plaintiff Fulton did not sufficiently allege that he was a third-party beneficiary of the contract between Kelly and Cholowsky. *** Fulton would not directly benefit from the contract between Kelly and Cholowsky, but rather from the alleged separate contract Fulton had with Cholowsky for the eventual acquisition of the corporate shares.” This Court also granted the cross-motion by defendant Cholowsky and defendant Emjay for an order pursuant to CPLR 3211(a)(7) dismissing the complaint against them, but with leave to plead causes of action for, *inter alia*, fraud, breach of contract, and unjust enrichment against Cholowsky. This Court also denied without prejudice to renewal plaintiff Fulton’s motion for a preliminary injunction prohibiting the defendants from selling, transferring, or conveying any assets or stock of defendant Emjay.

Defendant Crescimanni alleges in his verified answer that he entered into an agreement with Cholowsky whereby the latter promised to transfer shares in Emjay to Crescimanni and Fulton. Crescimanni further alleges in his verified answer that because of the personal guaranty he made of Cholowsky's obligations under paragraph 2(c) of the contract and because of the need to avoid a default under the contract, he paid \$750,000 to Kelly. On the other hand, in an affidavit submitted in opposition to the instant motion, Crescimanni alleges that he made payments to Kelly in reliance upon the latter's representations that he would become the owner of shares of Emjay.

Crescimanni's first cross claim asserts that he made payments because of fraudulent misrepresentations made by Kelly and Cholowsky. The second cross claim asserts unjust enrichment against Kelly and Cholowsky. The third cross claim alleges that Kelly and Cholowsky have breached fiduciary obligations owed to Crescimanni. The fourth cross claim seeks an accounting from Kelly and Cholowsky. The fifth cross claim seeks in the imposition of a constructive trust upon the assets of Kelly and Cholowsky. The sixth cross claim is for money had and received. The seventh cross claim again alleges unjust enrichment.

That branch of the motion by defendant Kelly which is for an order pursuant to CPLR 3211(a)(7) dismissing the first cross claim asserted against him is denied. A party may submit affidavits and evidentiary material on a CPLR 3211(a)(7) motion for the limited purpose of correcting defects in a pleading. (*See, Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633; *Kenneth R. v Roman Catholic Diocese of Brooklyn*, 229 AD2d 159.) In the case at bar, Crescimanni submitted an affidavit in opposition to the instant motion in which he alleges that at a meeting held on February 3, 2010, attended by Kelly, Cholowsky, Fulton, himself, and Timothy Hankin (Kelly's attorney), Kelly informed him that for various purposes the deal had to be structured so that Kelly would first transfer his stock to Cholowsky and then Cholowsky would issue shares to Crescimanni. The cross claimant alleges, *inter alia*: "At the 2/3/10 meeting, I delivered a check to Kelly in the sum of \$250,000. I delivered a check to Kelly in reliance upon statements of Kelly that I *received* 10% of Emjay stock to be held by Hankin in escrow on my behalf." (Italics added.) (Crescimanni apparently makes the allegation that Kelly represented to him that as part of the transaction, Cholowsky had already issued new shares of Emjay to be held in escrow.) A party asserting a cause of action for fraud must allege (1) that the defendant made material representations that were false or concealed a material existing fact, (2) that the defendant knew the representations were false and made them with the intent to deceive the plaintiff, (3) that the plaintiff was deceived, (4) that the plaintiff justifiably relied on the

defendant's representations, and (5) that the plaintiff was injured as a result of the defendant's representations. (See, Lama Holding Co. v Smith Barney, 88 NY2d 413; New York Univ. v Continental Ins. Co., 87 NY2d 308; Watson v Pascal, 27 AD3d 459; Cerabono v Price, 7 AD3d 479; New York City Transit Authority v Morris J. Eisen, P.C., 276 AD2d 78; American Home Assur. Co. v. Gemma Const. Co., Inc., 275 AD2d 616; Swersky v Dreyer & Traub, 219 AD2d 321.) Crescimanni's allegation that Kelly falsely represented to him that he was receiving a 10% interest in Emjay at the time he made the \$250,000 payment at the February 3, 2010 meeting concerns an alleged misrepresentation of a material existing fact, and not a mere statement of prediction or expectation of what Cholowsky would do in the future. (See, Pacnet Network Ltd. v KDDI Corp., 78 AD3d 478; Naturopathic Labs. Intl., Inc. v SSL Ams., Inc., 18 AD3d 404.) Crescimanni alleges further: "After the 2/3/10 meeting, having understood I was a 10% shareholder in Emjay, subject to release by Hankin, I went to work at Emjay." If, as the court interprets the cross claim, Kelly falsely represented that Cholowsky had already executed new stock certificates to Crescimanni to be held in escrow until Kelly transferred entire ownership of the corporation to Cholowsky, then Crescimanni has an actionable claim. The Court is mindful that Crescimanni's allegations and admissions are apparently contradictory concerning the purposes for which he allegedly made payments to Kelly and concerning whether Kelly made statements of mere expectation or prediction, but in view of the liberal standards applied on a CPLR 3211(a)(7) motion, the first cross claim will not be dismissed at this stage of the litigation. The Court need not determine here whether the cross claim can survive a motion for summary judgment.

Those branches of the motion by defendant Kelly which are for an order pursuant to CPLR 3211(a)(7) dismissing the second cross claim, which is for unjust enrichment, and the seventh cross claim, which is also for unjust enrichment, are granted. The second and seventh cross claims are duplicative of the first. (See, American Mayflower Life Ins. Co. of New York v Moskowitz, 17 AD3d 289.)

Those branches of the motion by defendant Kelly which are for an order pursuant to CPLR 3211(a)(7) dismissing the third cross claim, which is for breach of fiduciary duty, and the fourth cross claim, which is for an accounting, are granted. The cross claimant did not state a cause of action based on breach of fiduciary duty against Kelly as a principal of Emjay.

That branch of the motion by defendant Kelly which is for an order pursuant to CPLR 3211(a)(7) dismissing the fifth cross claim, which is for the imposition of a constructive trust, is granted. The elements of a cause of action to impose a constructive trust include (1) a

confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance upon the promise, and (4) unjust enrichment. (Bodden v Kean, 86 AD3d 524.) There was no confidential relationship in this ordinary business transaction.

That branch of the motion by defendant Kelly which is for an order pursuant to CPLR 3211(a)(7) dismissing the sixth cross claim, which is for money had and received, is granted. The sixth cross claim is duplicative of the first. (*See, American Mayflower Life Ins. Co. of New York v Moskowitz*, supra.)

Short Form Order signed herewith.

ORIN R. KITZES, J.S.C.