Fulton v Kelly
2011 NY Slip Op 34322(U)
September 14, 2011
Supreme Court, Queens County
Docket Number: 20501/10
Judge: Orin R. Kitzes

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. ORIN R. KITZES **PART 17**
Justice

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TIMOTHY FULTON,

Plaintiff,

-against-

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

Defendants.

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Index No: 20501/10
Motion Date: 8/3/11
Mot. Cal. No.: 27
Mot. Seq. 5

The following papers numbered 1 to 4 read on this motion by plaintiff Timothy Fulton for, *inter alia*, leave to reargue his opposition to a previous cross motion by defendant John Kelly for, *inter alia*, an order dismissing the complaint against him pursuant to CPLR 3211(a)(7)

	PAPERS NUMBERED
Notice of Motion - Affidavits - Exhibits	1
Answering Affidavits - Exhibits	2-3
Reply Affidavits	4

Upon the foregoing papers it is ordered that the motion is determined as follows:

The facts and allegations as originally stated by the parties are given in this court's decision dated January 31, 2011 which granted defendant Kelly's cross motion for an order dismissing the complaint against him pursuant to CPLR 3211(a)(7). The allegations made by Fulton on this motion differ somewhat. Fulton alleges that in or about June 2003, defendant Michael 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, Fulton, Kelly, Cholowsky, and Crescimanni attended a meeting at the offices of Hankin & Manzel (the law firm representing Kelly) at which the parties discussed the transfer of Emjay. On February 3,2010, Kelly and Cholowsky entered into a written contract pursuant to

which the former agreed to sell his sixty shares of stock in Emjay to the latter. Fulton, Cholowsky, and defendant Matthew Crescimanni allegedly orally agreed among 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. Fulton allegedly agreed with Cholowsky that Kelly's 60% ownership interest in Emjay would be purchased with Fulton providing the bulk of the necessary funds. Cholowsky allegedly orally promised to transfer an interest in Emjay to Fulton (45 shares or a 45% ownership interest) and to Crescimanni after Kelly transferred his stock to him. Fulton and Crescimanni signed the February 3, 2010 agreement only as "guarantors" of paragraph 2(c) of the lease, but Fulton alleges that he was a full party to the contract. 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. Plaintiff Fulton alleges that he sent by three wire transfers the sum of $1,100, 000 to defendant Kelly's attorneys as payments due under the February 3, 2010 agreement for the sale of stock. Crescimanni also alleges that he made payments due under that contract. On July 26, 2010, Kelly, having received all of the payments due under the contract, transferred his shares in Emjay to Cholowsky. Fulton and Crescimanni allegedly did not receive the stock allegedly promised to them by Cholowsky.

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.

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, inter alia : "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. 'Consideration may be given to the promisor or to some other person, or by the promisee or by some other person.' (22 NY Jur 2d, Contracts § 64; *see*, Markson v Markson's Furniture Stores, 267 NY 137.) "

That branch of the motion by plaintiff Fulton which is for leave to reargue his opposition to the previous cross motion by defendant Kelly is granted. That branch of the motion by plaintiff Fulton which is for leave to renew his opposition to the previous cross motion by defendant Kelly is granted. Plaintiff Fulton has attempted to demonstrate that the "the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision." (Schneider v Solowey, 141 AD2d 813; *see*, CPLR 2221[d]; Grassel v Albany Med. Ctr. Hosp., 223 AD2d 803; William P. Pahl Equipment Corp. v Kassis, 182 AD2d 22.) Plaintiff Fulton asserts that the court misapprehended the facts and the law on the previous cross motion by defendant Kelly because of the "disorganized fashion in which the material was submitted to the Court."

Initially, the court notes that defendant Kelly, defendant Cholowsky, and defendant Emjay brought their previous cross motions pursuant to CPLR 3211(a). The previous cross motions were not brought for summary judgment and thus the court's previous order was not defective because of the absence of "affidavits or verified statements."

Moreover, Kelly, Fulton, Crescimanni and Cholowsky did not enter into one contract, and there were not three purchasers under the contract dated February 3, 2010. The agreement of that date plainly identifies John Kelly as "Seller" and only Michael Cholowsky as "Purchaser." The agreement recites that "Purchaser and Seller are the sole shareholders of the Corporation" and that "Purchaser desires to purchase all of Seller's shares of common stock in the Corporation." The contract states: "Agreement to Sell. Seller agrees to sell, transfer and deliver to Purchaser, and Purchaser agrees to purchase upon the terms and conditions hereinafter set forth, sixty (60) shares of the common stock of the Corporation ***." Fulton's claim that "Pursuant to the Agreement of Sale, Kelly agreed to sell his sixty (60%) per cent ownership interest in Emjay to Cholowsky

AND HIS INVESTOR PURCHASERS" is contradicted by the plain terms of the agreement of sale. References in the agreement to " Purchaser and his investors" do not make Fulton and Crescimanni parties to the agreement which they signed only as guarantors of paragraph 2(c). In any event, the agreement of sale creates no obligation on the part of Kelly to transfer any of his shares to Fulton and Crescismanni. The plain terms of the agreement required Kelly to transfer his shares to Cholowsky alone. Kelly did so.

The court stated in its previous decision: "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. "Consideration may be given to the promisor or to some other person, or by the promisee or by some other person." (22 NY Jur 2d, Contracts § 64; *see*, Markson v Markson's Furniture Stores, 267 NY 137.) Nothing presented suggests the court misapplied or misunderstood this principle of law.

The agreement of sale required Kelly to transfer his shares only to Cholowsky. Upon receiving the consideration specified in the contract, he did so, and Fulton did not show that Kelly breached any obligation under the contract owed to him.

In regard to fraud, a party asserting a cause of action for fraud must allege, inter alia, that the defendant made material representations that were false or concealed a material existing fact.(*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.) A mere statement of prediction or expectation of what Cholowsky would do in the future is not actionable (*see*, Pacnet Network Ltd. v KDDI Corp., 78 AD3d 478; Naturopathic Labs. Intl., Inc. v SSL Ams., Inc., 18 AD3d 404.), and the plaintiff did not adequately allege that Kelly made an intentional misrepresentation of any material existing facts. (*See*, Pacnet Network Ltd. v KDDI Corp., supra.)

Upon reargument, the court adheres to its previous decision, and upon renewal, the court adheres to its previous decision.

That branch of the motion which is for an order permitting the plaintiff to serve a third amended complaint is granted to the extent that the plaintiff may serve an amended complaint that does not assert causes of action against Kelly. In determining whether to permit a party to amend a complaint to add a cause of action, the court must examine the merits of the proposed cause of action. (*See*, Morgan v Prospect Park Associates Holdings, LP, 251 AD2d 306; McKiernan v

McKiernan, 207 AD2d 825.) The amendment will not be permitted where the proposed cause of action is patently lacking in merit.(*See*, McKiernan v McKiernan, supra.) This court has already determined that Fulton cannot state meritorious causes of action against Kelly.

That branch of the motion which is for an order disqualifying the law firm of Sullivan Gardner P.C. from representing defendant Cholowsky and defendant Emjay is denied. In regard to the advocate-witness rule (Rule 3.7), Fulton failed to meet the heavy burden of establishing that testimony from the attorneys now representing Cholowsky is necessary. (*See*, S& S Hotel Ventures Ltd. Partnership v 777 S.H. Corp., 69 NY2d 437; Campbell v McKeon, 75 AD3d 479.) The law firm of Lindenbaum & Young, not the law firm of Sullivan Gardner P.C., represented Cholowsky during the negotiation of the February 3, 2010 contract. In regard to the conflict of interest rule (Rule 1.7), Fulton did not adequately demonstrate that the interests of Cholowsky and Trovato, who apparently purchased stock in Emjay from Cholowsky, are adverse.

The remaining branches of the motion are denied.

DATED: September 14, 2011

ORIN R. KITZES, J.S.C.

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