

Konan 11, LLC v GGP Staten Is. Mall, LLC
2012 NY Slip Op 31393(U)
May 23, 2012
Supreme Court, Richmond County
Docket Number: 102164/10
Judge: Joseph J. Maltese
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No.: 102164/10
Motion No.:006**

KONAN 11, LLC,

Plaintiff

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

**GGP STATEN ISLAND MALL, LLC,
GENERAL GROWTH PROPERTIES, INC., and
WETZEL'S PRETZELS, LLC,**

Defendants

The following items were considered in the review of the following motion to dismiss.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Memorandum of Law In Support	2
Answering Affidavits	3
Replying Affidavits	4
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The defendant, Wetzel's Pretzels, LLC, ("Wetzel") moves to dismiss the plaintiff's sixteenth cause of action for fraud in the inducement and claims for punitive damages against it. The defendant's motion is granted.

Wetzel's is a franchisor of Wetzel's Pretzel locations. The plaintiff contracted with Wetzel to open a franchise location at the Staten Island Mall. Allegedly, due to a dispute with the Staten Island Mall's owners, GGP Staten Island Mall, LLC and General Growth Properties, the plaintiff was unable to open a location at the Staten Island Mall. Plaintiff commenced this action against Wetzel for among other things, fraud in the inducement. The plaintiff's complaint beginning at paragraph 135 sets forth its cause of action against Wetzel which states:

135. Plaintiff repeats and re-alleges each and every allegation set forth above with the same force and effect as if more fully set forth herein at length.

136. Upon information and belief, Defendant Wetzel's, its agents, employees, servants and/or representatives made promises and statements that induced plaintiff, its agents, employees, servants and/or representative into executing the Early-Entry Agreement and the "Franchise Agreement."

137. That as a result of said promises and statements, the plaintiff executed said Early-Entry Agreement and the "Franchise Agreement."

138. That as a result of defendant Wetzel's promises and statements, plaintiff Konan entered into the "Early-Entry Agreement" and the "Franchise Agreement" with a false impression of the risks, duties, and/or obligations involved.

139. As a result of the defendant's aforesaid conduct, the Plaintiff has and will continue to suffer irreparable harm.

140. By reason of the foregoing, the Plaintiff has been injured and damaged and is entitled to compensation as well as punitive damages in an amount which exceeds the jurisdictional limits of all lower Courts which would otherwise have jurisdiction.

Wetzel argues that the sixteenth cause of action fails to state a cause of action, and is not plead with particularity as required by CPLR § 3016(b). In addition Wetzel asserts that none of its alleged conduct supports a claim for punitive damages.

Discussion

When determining a motion to dismiss pursuant to CPLR § 3211(a)(7), a court must accept the facts as alleged in the complaint as true, according the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any

cognizable legal theory.¹ The plaintiff's sixteenth cause of action and claims for punitive damages must be dismissed.

The Appellate Division, Second Department affirmed the trial court's dismissal of a claim for fraud in the inducement in *Orchid Construction Corp. v. Gonzalez*.² The court stated that, "[t]he elements of a cause of action sounding in fraud are a material misrepresentation of an existing fact, made with knowledge of the falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation, and damages."³ In affirming the trial court's decision in *Orchid Construction Corp.* the Appellate Division, Second Department found that "[t]he plaintiff did not set forth the time or place of [defendant's] alleged misrepresentation . . . , and failed to properly plead the elements of misrepresentation of a material fact and justifiable reliance with specificity . . ."⁴ In addition, the court reiterated CPLR § 3016(b) requirement that states:

Where a cause of action . . . is based upon misrepresentation, fraud, mistake, wilful default, breach of trust, or undue influence, the circumstances constituting the wrong shall be stated in detail.

Here, the excerpted text from the plaintiff's complaint fails to meet the requirements for a cause of action for fraud in the inducement. Consequently, the plaintiff's sixteenth cause of action is dismissed.

The Court of Appeals has held:

Punitive or exemplary damages have been allowed in cases where the wrong complained of is morally culpable, or is actuated by evil and reprehensible motives, not only to punish the defendant but to

¹ *Goldman v. Metropolitan Life Ins. Co.*, 5 NY3d 561 [2005].

² 89 AD3d 705 [2d Dept, 2011].

³ *Id.*

⁴ *Id.* (Citations omitted).

deter him, as well as others who might otherwise be so prompted, from indulging in similar conduct in the future.⁵

The plaintiff alleges that Wetzel's should be liable for punitive damages. The Appellate Division, Second Department in *Reads Co., LLC v. Katz* stated that:

[P]unitive damages are not recoverable in an ordinary breach of contract case, as their purpose is not to remedy private wrongs but to vindicate public rights . . . Punitive damages are only recoverable where the breach of contract also involves a fraud evincing a high degree of moral turpitude, and demonstrating such wanton dishonesty as to imply a criminal indifference to civil obligations, and where the conduct was aimed at the public generally". . . Moreover, punitive damages are available where the conduct associated with the breach of contract is first actionable as an independent tort for which compensatory damages are ordinarily available, and is sufficiently egregious to warrant the additional imposition of exemplary damages. . .⁶

Here, the plaintiff has failed to demonstrate: 1) a tort separate from the breach of contract; and 2) any egregious conduct on the part of Wetzel. Consequently, the claims for punitive damages are dismissed as against Wetzel.

Accordingly, it is hereby:

ORDERED, that the motion to dismiss made by Wetzel's Pretzels, LLC is granted and the sixteenth cause of action for fraud in the inducement along with plaintiff's claims for punitive damages are dismissed; and it is further

⁵ *Walker v. Sheldon*, 10 NY2d 401, 404 [1961].

⁶ 72 AD3d 1054, 1056-1057 [2d Dept, 2010].

ORDERED, that the parties shall return to DCM Part 3,130 Stuyvesant Place, 3rd Floor, on **Friday, June 8, 2012 at 11:00 a.m.** for a compliance conference.

ENTER,

DATED: May 23, 2012

Joseph J. Maltese
Justice of the Supreme Court