

Levine v Manolios

2013 NY Slip Op 31292(U)

June 6, 2013

Supreme Court, Suffolk County

Docket Number: 26221-2012

Judge: Emily Pines

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.

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

COPY

Present:

HON. EMILY PINES
J. S. C.

Motion Date: 10-23-2012
Submit Date: 03-12-2013
Motion No.: 001 MOTD

[] Final
[x] Non Final

_____ X

JOSHUAH LEVINE,

Plaintiff,

- against -

CHRISTOPHER MANOLIOS,

Defendant.

_____ X

Attorney for Plaintiff
Law Offices of Andrew Crabtree PC
225 Broadhollow Road - Suite 303
Melville, New York 11747

Attorney for the Defendant
George J. Razis, Esq.
Razis & Ross PC
23-09 31st Street
Astoria, New York 11105

ORDERED that the defendant's motion (Mot. Seq. 001) pursuant to CPLR 3211 to dismiss the Amended Verified Complaint is granted to the extent that the third, fourth, fifth, sixth, seventh, eighth, and ninth causes of action are dismissed, and the motion is otherwise denied.

Factual and Procedural Background

On or about August 26, 2010, the plaintiff, Joshuah Levine ("Plaintiff") and the defendant, Christopher Manolios ("Defendant") formed C & L Management of NY Corp. ("C & L"), and subsequently entered into a Shareholders Agreement pursuant to which each owned 50% of the corporation's stock.

On April 23, 2012, the Plaintiff resigned as an officer and director of C & L, and entered into a Stock Purchase Agreement with Defendant, pursuant to which Defendant agreed to purchase Plaintiff's stock in the corporation for \$10,000 in the

form of a Promissory Note (“Note”) given by Defendant to Plaintiff at the closing. The Note, also dated April 23, 2012, calls for payment of the full amount on or before 30 days of the date of the Note, i.e. May 23, 2012. The Stock Purchase Agreement also provides, in relevant part:

12. REPRESENTATION OF THE PARTIES TO EACH OTHER. The provisions hereof as well as all questions pertinent hereto have been fully and satisfactorily explained to them . . . Each party is entering into this Agreement with a full understanding of its provisions and with full financial disclosure by the other party. Neither party requires any further information from the other in order to knowingly and intelligently execute this Agreement. Each party acknowledges that this Agreement has been achieved after full financial disclosure and good-faith negotiations and each party is entering into this Agreement because he or she fully believes that the terms and provisions of this Agreement are in his or her best interest.

* * *

15. EXECUTION OF WAIVER AND RELEASE. Subject to the provisions of this Agreement, each party has remised, released and forever discharged, and by their execution of this agreement does for himself or herself, and his or her heirs, legal representatives, executors, administrators, and assigns, remise, release and forever discharge the other of and from any and all causes of action, suits, debts, claims, rights, obligations or demands whatsoever, in law or in equity, which either of the parties hereto ever had, now has, or in the future may have against the other, upon or by reason of any matter, cause or thing with regards to any all [sic]

matters with the Corporation.

The Verified Amended Complaint dated November 14, 2012, asserts causes of action for breach of contract and attorneys' fees based upon Defendant's alleged default on the Note. Additionally, Plaintiff asserts causes of action for conversion, fraud, breach of fiduciary duty, breach of the covenant of good faith and fair dealing, unjust enrichment, and an accounting, based on a the allegation that Defendant engaged in a series of thefts from C & L by making unauthorized cash payments to himself and paying personal bills from corporate accounts. Plaintiff also asserts that Defendant fraudulently induced Plaintiff to enter into the Stock Purchase Agreement by falsely representing that he used corporate assets for legitimate corporate purposes. Finally, Plaintiff seeks a judgment declaring that he is entitled to the shares of stock in C & L held in escrow due to Defendant's default under the Note.

The Defendant now moves to dismiss the Verified Amended Complaint pursuant to CPLR 3211(a)(1), (3), (5), and (7). Plaintiff opposes the motion.

Discussion

“A motion to dismiss a complaint pursuant to CPLR 3211(a)(1) may be granted only where the documentary evidence submitted by the movant utterly refutes the plaintiff's allegations against it and conclusively establishes a defense as a matter of law” (*Cog-Net Bldg. Corp. v. Travelers Indem. Co.*, 86 AD3d 585 [2d Dept 2011]).

In considering a motion to dismiss a complaint pursuant to CPLR 3211(a)(7):

[t]he complaint must be liberally construed and the plaintiff given the benefit of every favorable inference (citations omitted). The court must also accept as true all of the facts alleged in the complaint and any factual submissions made

in opposition to the motion (citations omitted). If the court can determine that the plaintiff is entitled to relief on any view of the facts stated, its inquiry is complete and the complaint must be declared legally sufficient (citations omitted). While factual allegations contained in the complaint are deemed true, bare legal conclusions and facts flatly contradicted on the record are not entitled to a presumption of truth (citations omitted).

(*Symbol Tech., Inc. v. Deloitte & Touche, LLP*, 69 AD3d 191, 193-195 [2d Dept 2009]).

Contrary to the Defendant's contention, the fact that he tendered payment of the full amount of the note, \$10,000, to Plaintiff on September 11, 2012, does not negate Defendant's liability for default under the terms of the note. Payment on the note was due on or before May 23, 2012. It is undisputed that payment was not tendered until September 11, 2012. Accordingly, those branches of Defendant's motion seeking dismissal of the first, second, and tenth causes of action, which are all based on Defendant's default on the Note, are denied.

However, those branches of Defendant's motion seeking dismissal of the third (conversion), fourth (fraud), fifth (breach of fiduciary duty), sixth (breach of duty of good faith and fair dealing), seventh (unjust enrichment), eighth (accounting) and ninth (fraud in the inducement), are granted. As recently set forth by the Court of Appeals:

Generally, "a valid release constitutes a complete bar to an action on a claim which is the subject of the release" (*Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 98 [1st Dept. 2006]). If "the language of a release is clear and unambiguous, the signing of a release is a 'jural act' binding on the parties" (*Booth v 3669 Delaware*, 92 NY2d 934, 935 [1998], quoting *Mangini v McClurg*, 24 NY2d 556, 563 [1969]). A release "should never be converted into a starting point for . . . litigation except under

circumstances and under rules which would render any other result a grave injustice” (*Mangini*, 24 NY2d at 563). A release may be invalidated, however, for any of “the traditional bases for setting aside written agreements, namely, duress illegality, fraud, or mutual mistake” (*id.*).

Although a defendant has the initial burden of establishing that it has been released from any claims, a signed release “shifts the burden of going forward . . . to the [plaintiff] to show that there has been fraud, duress or some other fact which will be sufficient to void the release” (*Fleming v Ponziani*, 24 NY2d 105, 111 [1969]). A plaintiff seeking to invalidate a release due to fraudulent inducement must “establish the basic elements of fraud, namely a representation of material fact, the falsity of that representation, knowledge by the party who made the representation that it was false when made, justifiable reliance by the plaintiff, and resulting injury” (*Global Mins.*, 35 AD3d at 98).

Notably, a release may encompass unknown claims, including unknown fraud claims, if the parties so intend and the agreement is “fairly and knowingly made” (*Mangini*, 24 NY2d at 566-567; *Alleghany Corp. v Kirby*, 333 F2d 327, 333 [2d Cir 1964]). As the Appellate Division majority explained below (*Cebtro*, 76 AD3d at 318), a party that release a fraud claim may later challenge that release as fraudulently induced only if it can identify a separate fraud from the subject of the release (*see Bellefonte Re Inc. Co. v Argo naut Ins. Co.*, 757 F2d 523, 527-528 [2d Cir 1985]). Were this not the case, no party could ever settle a fraud claim with any finality.

(*Centro Empresarial Cempresa S.A. v America Movil, S.A.B. De C.V.*, 17 NY3d 269, 276 [2011]).

Here, Defendant has met his initial burden of establishing that pursuant to the

broad language of paragraph 15 of the Stock Purchase Agreement, he has been released from the causes of action for conversion, fraud, breach of fiduciary duty, breach of the covenant of good faith and fair dealing, unjust enrichment, an accounting, and fraud in the inducement. Thus, the burden shifts to Plaintiff to establish the basic elements of fraud. The Plaintiff has not identified a separate fraud from the subject of the release (*see Pappas v Tzolis*, 20 NY3d 228 [2012]). Rather, the Amended Verified Complaint only alleges that the Defendant represented that he used corporate assets for legitimate corporate purposes. This is not a separate fraud but is the same fraud as the subject of the release (*see Kafa Investments, LLC v 2170-2178 Broadway, LLC*, 39 Misc3d 385 [Sup Ct NY County 2013]). Moreover, Plaintiff's allegation that Defendant actively concealed the corporate books and records is flatly contradicted by the representations contained in paragraph 12 of the Stock Purchase Agreement. Specifically, Plaintiff represented therein that there had been full financial disclosure by Defendant before the Stock Purchase Agreement was entered into and that he did not require any further information from Defendant in order to knowingly and intelligently execute the agreement. Accordingly, the third, fourth, fifth, sixth, seventh, eighth and ninth causes of action in the Verified Amended Complaint are dismissed.

Although Plaintiff requests leave to re-plead any dismissed causes of action, he has not made a cross-motion for such relief nor has he articulated any factual or legal basis supporting leave to re-plead. Therefore, Plaintiff's request is denied at this time.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: June 6, 2013
Riverhead, New York



EMILY PINES
J. S. C.

Final
 Non Final