

**Darby Group Cos., Inc. v Wulforst Acquisition, LLC**

2013 NY Slip Op 31570(U)

July 11, 2013

Supreme Court, Suffolk County

Docket Number: 32913-12

Judge: Thomas F. Whelan

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. COMMERCIAL PART 45 - SUFFOLK COUNTY

**COPY**

**PRESENT:**

Hon. THOMAS F. WHELAN  
Justice of the Supreme Court

MOTION DATE 5/23/13  
ADJ. DATES 6/21/13  
Mot. Seq. # 001 - MG  
Mot. Seq. # 002 - XMD  
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DARBY GROUP COMPANIES, INC.,	:		:	SALON, MARROW, DYKMAN ET AL
	:		:	Attys. For Plaintiff
Plaintiff,	:		:	292 Madison Ave.
	:		:	New York, NY 10017
-against-	:		:	
	:		:	JASPAN, SCHLESINGER, LLP
WULFORST ACQUISITION, LLC, NEIL REGO,	:		:	Attys. For Def. People's United Bank
GEORGE HEINLEIN, PEOPLE'S UNITED BANK:	:		:	300 Garden City Plaza
as successor by merger to the Bank of Smithtown,	:		:	Garden City, NY 11530
OWEN CONSTRUCTION CORP., NEW YORK	:		:	
STATE DEPARTMENT OF TAXATION AND	:		:	EDWARD G. McCABE, ESQ.
FINANCE and "JOHN DOE No. 1" TO "JOHN	:		:	Atty. For Def. Wulforst, Rego & Heinlein
	:		:	21 Greene Ave.
DOE No. XXX", inclusive the last names being	:		:	Amityville, NY 11701
fictitious and unknown to plaintiff, the persons or	:		:	
parties intended being the tenants, occupants,	:		:	FRANCIS YAKABOSKI, ESQ.
persons or corporations, if any, having or claiming	:		:	Atty. For Def. Owen Constr.
an interest in or lien upon the premises which is	:		:	456 Griffing Ave.
the subject of this action,	:		:	Riverhead, NY 11901
	:		:	
Defendants.	:		:	OFFICE OF COUNSEL
	:		:	Atty. For NYS Dept. of Tax. & Fin.
	:		:	Bldg. 9, WA Harriman Campus
	:		:	Albany, NY 12227
-----X	:		:	

Upon the following papers numbered 1 to 13 read on this motion to dismiss and cross motion to amend pleadings; Notice of Motion/Order to Show Cause and supporting papers 1 - 3; Notice of Cross Motion and supporting papers 4-6; Answering papers     ; Replying papers 7-8; Other 9 (memorandum); 10-11 (memorandum); 12-13 (memorandum); (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that this motion (#001) by defendant People's United Bank to dismiss the two cross claims sounding in fraud asserted against it by defendants, Neil Rego and George Heinlein, is considered under CPLR 3211(a)(1) and (a)(7) and is granted; and it is further

*ds*

**ORDERED** that the cross motion (#002) by defendants, Neil Rego and George Heinlein, for leave to amend their answer to assert a third cross claim against the moving defendant is denied.

This action was commenced by the plaintiff to foreclose an October 24, 2011 commercial mortgage given to the plaintiff by defendant, Wulforst Acquisition, LLC [hereinafter "Acquisition"] to the plaintiff in connection with its acquisition of title to the mortgaged premises on which the development of a 30 lot subdivision was planned. The mortgage secured a consolidated, amended and restated mortgage note of October 24, 2011 in the amount of \$2,800,000.00 which the plaintiff advanced to defendant Acquisition. The monies advanced were used, in part, to fund the purchase by Acquisition's principals of three separate prior mortgages owing to a predecessor-in-interest of defendant, People's United Bank [hereinafter "PUB"] that were the subject of a foreclosure action pending in Commercial Part 44 of this court. This purchase, together with the purchase of a mortgage debt on an adjacent property housing a golf course that was also in foreclosure, was the subject of a September 9, 2011 Loan Purchase Agreement between Wulforst Farms LLC, their members and principals, including defendants Rego and Heinlein, on behalf of existing and companies to be formed and a subsidiary of Wulforst, Rugby Recreational Group [Rugby]. The agreement contemplated the purchase of all mortgage debts on both properties, together with guarantees, and the subsequent execution of deeds in lieu of foreclosure. These deeds would transfer title to the subject premises out of Wulforst Farms, LLC to defendant Acquisition while title to the adjacent golf course property would be transferred by Rugby to a newly formed entity known as Fox Hill Acquisitions, LLC. The agreement also contemplated that the plaintiff would, if required, replace certain Letters of Credit issued by PUB's predecessor-in-interest in favor of municipal agencies in the aggregate amount of \$681,560.00 that were required for development of the subject premises as planned.

Also executed on September 9, 2011 by defendants Rego and Heinlein, was a Loan Purchase and Sale Agreement [hereinafter "LPSA"] with defendant PUB by which PUB would sell to Rego and Heinlein assets owned by PUB including the three mortgages that encumbered the subject premises. Prior thereto, PUB, by its predecessor-in-interest, issued three Letters of Credit in favor of the Town of Riverhead, its Planning Board and Water District in connection with the development of the land, each of which, by their terms, expired in 2010. As a condition of PUB'S obligation to sell the assets, including the mortgages, proof of cancellation of the Letters of Credit from each beneficiary, together with delivery of such letters, had to have been received by PUB (*see* ¶ 4.2 of LPSA, attached as Exhibit F to the moving papers). Alternatively, the deposit of the sum of \$681,560.00, the aggregate face amount of the Letters of Credit, into an account with the PUB, together with a fully executed cash collateral pledge agreement for such account by the purchasers would suffice to insure PUB against payment liability under the terms of the issued Letters of Credit which were negotiable paper (*id.* at ¶ 4.2[f]). The LPSA also included a release and discharge of PUB by defendants Rego and Heinlein as buyers, from any and all causes of action, claims, demands and remedies of whatsoever kind and nature that the buyers have or may have in the future arising against PUB out of or related to the assets or sale of assets under the Agreement (*see* ¶ 8.2 of the LPSA). It was further provided that neither party to the LPSA would be liable to the other for any consequential, special or punitive damages for any claims arising out of the agreement (*see id.*). The LPSA also included a disclaimer on the part of the cross moving defendants of reliance on any representations by PUB concerning the credit, affairs, financial condition, business or any other matter concerning the defendants or PUB (*see* ¶ 6.6 of the LPSA).

The closing of the LPSA occurred on October 24, 2011. Since neither proof of cancellation nor delivery of the original Letters of Credit were tendered by Rego and Heinlein, the alternative provisions set forth in ¶ 4.2(f) were employed by the parties by their execution of a Cash Collateral Account and Reimbursement Agreement. Pursuant thereto, defendants Rego and Heinlein were required to deposit the sum of \$681,560.00 in an account with the PUB over which PUB was granted a first priority lien and a security interest as collateral for the security for the Letters of Credit obligations. The account was funded by the plaintiff and the funds so deposited were ultimately released by PUB in September of 2012, after the plaintiff posted replacement letters of credit or other security acceptable to Town officials. Since the Letters of Credit were negotiable in nature, PUB required proof of cancellation upon the written consent of the beneficiaries and the return of the Letters of Credit to PUB which the defendants agreed to provide within 90 days of the execution of the Cash Collateral Agreement. The Cash Collateral Agreement thus imposed these obligations upon the cross moving defendants (*see* ¶ 6[c] of the Cash Collateral Account and Reimbursement Agreement attached as Exhibit H to the moving papers). Failure to comply constituted a default which the Bank could remedy by withdrawal of the amounts on deposit in the reimbursement account established with PUB under the terms of the Cash Collateral Agreement.

The answer served and filed herein by defendants Rego and Heinlein contains two cross claims against PUB to recover money damages under theories of fraudulent and/or negligent misrepresentation regarding the existence and continuing viability of the Letters of Credit. These claims rest upon the purported inaccuracy of certain factual recitals set forth in the Cash Collateral Agreement regarding the Letters of Credit, including that the Letters of Credit, as of the October 24, 2011 date of the Cash Collateral Agreement, “are still outstanding and have not expired”; that “the Letters of Credit may continue to remain outstanding until they are replaced” by the buyers; and that “as consideration of PUB’s agreement to continue the Letters of Credit until they are replaced and as a condition of the Bank’s promise to transfer and sell the Loan, the Bank required that the Buyer execute this Agreement in favor of the Bank”. These recitals are alleged to have induced the cross moving defendants into executing the Cash Collateral Agreement even though the Letters of Credit were expired and as such left the property without development as the Town and other municipal agencies would not allow construction to proceed under the expired Letters of Credit.

By the instant motion, defendant PUB moves for dismissal of the above described cross claims advanced by defendants Rego and Heinlein in their answer. These defendants oppose the plaintiff’s motion and cross move for leave to amend their answer so as to include a third cross claim against PUB sounding in breach of the Cash Collateral Agreement. For the reasons stated below, the plaintiff’s motion is granted while the cross motion is in all respect denied.

First considered is the cross motion (#002) by the defendants for leave to amend their answer so as to assert a third cross claim against PUB sounding in breach of the Cash Collateral Agreement. The standard for determining a party's right for leave of the court to amend its pleading is simply whether the amendment is palpably improper or patently insufficient as a matter of law (*see Koenig v Action Target, Inc.*, 76 AD3d 997, 907 NYS2d 692 [2d Dept 2010]; *Lucido v Mancuso*, 49 AD3d 220, 851 NYS2d 238 [2d Dept 2008]). If it is neither, leave to amend should be granted unless an adverse party demonstrates that surprise or prejudice will directly result from the amendment (*see Maldonado v Newport Gardens, Inc.*, 91AD3d 731, 937 NYS2d 260 [2d Dept 2012]; *Koenig v Action Target, Inc.*, 76 AD3d 997, *supra*; *Yemini v Goldberg*, 46 AD3d 806, 848 NYS2d 676 [2d Dept 2007]).

It is well established that the elements of a cause of action to recover damages for breach of contract are as follows: the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages (*see Elisa Dreier Reporting Corp. v Global NAPs Networks*, 84 AD3d 122, 921 NYS2d 329 [2d Dept 2011]; *JP Morgan Chase v J.H. Elec. of N.Y., Inc.*, 69 AD3d 802, 893 NYS2d 237 [2d Dept 2010]; *Palmetto Partners, L.P. v AJW Qualified Partners*, 83 AD3d 804, 921 NYS2d 260 [2d Dept 2011]). Since a contract is not breached until the time set for performance has expired (*see Palmetto Partners, L.P. v AJW Qualified Partners.*, 83 AD3d at 806, *supra*), the pleader must identify the provisions of the contract that were allegedly breached in order to state a claim for damages for breach (*see Barker v Time Warner Cable, Inc.*, 83 AD3d 750, 923 NYS2d 118 [2d Dept 2011]; *Peters v Accurate Bldg. Inspectors Div. of Ubell*, 29 AD3d 972, 815 NYS2d 484 [2d Dept 2006]). Allegations that are vague, conclusory, and indefinite as to the alleged breach of one or more provisions of the agreement are insufficient as a matter of law (*see Island Surgical Supply Co. v Allstate Ins. Co.*, 32 AD3d 824, 820 NYS2d 854 [2d Dept 2006]).

A review of the proposed amendment reveals that the same is patently insufficient as a matter of law, as prosecution of the proposed new claim is barred by the general release provisions of the LPSA and those wherein the parties agreed that neither would be liable for any damages claims arising out of the LPSA. All of these provisions were ratified in ¶ 12(d) of the Cash Collateral Agreement and thus survived its execution. In addition, the proposed amendment fails to identify the provisions of the Cash Collateral Agreement that were allegedly breached by defendant PUB. The cross moving defendants' reliance upon the preamble "Whereas" recitals of the Cash Collateral Agreement is unavailing as those recitals were merely descriptive and imposed no performance obligations upon PUB nor any representations or warranties upon which a viable claim for breach thereof might be premised (*see Hampton Hall Pty Ltd. v Global Funding Serv.*, 82 AD3d 523, 918 NYS2d 455 [1st Dept 2011]; *Grand Manor Health Related Fac., Inc. v Hamilton Equities Inc.*, 65 AD3d 445, 447, 885 NYS2d 255 [1st Dept 2009]). For these reasons, the cross motion (#002) by the defendants for leave to amend their answer to assert a cross claim against PUB for breach of contract is denied.

The motion-in-chief (#001) by defendant PUB for dismissal of the existing two cross claims in the answer of defendants Rego and Heinlein wherein they seek recovery of damages by reasons of the PUB's purported fraudulent and negligent misrepresentations is granted. As in the case of the proposed breach of contract claim, these tort claims are premised upon the alleged misstatement of fact regarding the continuing existence, viability and non-expired nature of the Letters of Credit, the non-cancellation of which, was the impetus for the parties' resort to the alternate remedy the Cash Collateral Agreement provided as contemplated by the LPSA. These claims are likewise barred by the general release provisions of the LPSA and those wherein the parties agreed that neither would be liable for any damages claims arising out of the LPSA, each of which, survived and were ratified in ¶ 12(d) of the Cash Collateral Agreement. In any event, defendants' Rego and Heinlein cross claims sounding in fraudulent and negligent misrepresentations are insufficient as a matter of law.

The 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" (*Fromowitz v W. Park Assoc., Inc.*, 106 AD3d 950, 965 NYS2d 597 [2d Dept 2013]; *quoting, Introna v Huntington Learning Ctrs., Inc.*, 78 AD3d 896, 898, 911 NYS2d 442 [2d Dept 2010]; *see Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559, 883 NYS2d 147 [2009]; *County of Suffolk v Long Is. Power Auth.*, 100 AD3d 944, 954 NYS2d 619 [2d Dept 2012]). Where the facts allegedly misrepresented are not matters peculiarly

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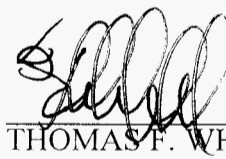
within the knowledge of the presenter of such facts and the claimant has the means to discover the true nature of the transaction by the exercise of ordinary intelligence and fails to make use of those means, he or she cannot claim justifiable reliance on misrepresentations of his adversary (*see Danann Realty Corp. v Harris*, 5 NY2d 317, 320–321, 184 NYS2d 599 [1959]; *DiBuono v Abbey, LLC*, 95 AD3d 1062, 944 NYS2d 280 [2d Dept 2012]; *Urstadt Biddle Prop., Inc. v Excelsior*, 65 AD3d 1135, 885 NYS2d 510 [2d Dept 2009]).

Claims of constructive fraud or negligent misrepresentation require the establishment of the same elements as actual fraud “except that the element of scienter is replaced by a fiduciary or confidential relationship between the parties” (*Brown v Lockwood*, 76 AD2d 721, 731, 432 NYS2d 186 [2d Dept 1980]; *Refreshment Mgt. Serv. Corp. v Complete Office Supply Warehouse Corp.*, 89 AD3d 913, 933 NYS2d 312 [2d Dept 2011]). Such a relationship requires demonstrating a high degree of dominance and reliance and where parties have an arm's length business relationship, a plaintiff's subjective claims of reliance on defendant[s] expertise are insufficient (*see SNS Bank, N.V. v Citibank, N.A.*, 7 AD3d 352, 777 NYS2d 62 [1st Dept 2004]). The relationship of bank and a depositor or even a borrower is not one that is fiduciary or confidential in nature (*see Greenberg, Trager & Herbst, LLP v HSBC Bank USA*, 17 NY3d 565, 934 NYS2d 43 [2011]; *Baumann v Hanover Community Bank*, 100 AD3d 814, 957 NYS2d 111 [2d Dept 2012]; *Call v Ellenville Natl. Bank*, 5 AD3d 521, 774 NYS2d 76 [2d Dept 2004]).

Here, the cross moving defendants have no viable claim of reliance, let alone justifiable reliance, since the expiration date of the Letters of Credit were stated on the face thereof and the moving defendants were well aware of the need to replace those Letters of Credit with some other form of security with the Town and its interested agencies prior to the execution of the Cash Collateral Agreement. Since the expiration dates of the Letters of Credit were not matters peculiarly within the knowledge of PUB and the cross moving defendants had the means to ascertain the truth regarding the continued existence or viability of the Letters of Credit by simply reviewing the expiration dates set forth on the face thereof and other pages, they may not be heard to complain that they were wrongfully induced into entering into the Cash Collateral Agreement or any of the other loan documents. Nor are there any allegations that the defendants suffered any harm as a result of any misstatements regarding the continued existence and viability of the Letters of Credit. The plaintiff posted the monies deposited into the Cash Collateral Account which were later returned to it upon proof that PUB had no liability under the Letters of Credit it issued due to the substitution of new security with the Town and its agencies. Moreover, the absence of a fiduciary relationship between defendants Rego, Heinlein and PUB precludes the prosecution of any cross claims sounding in negligent misrepresentation against PUB. The court thus finds that PUB is entitled to a dismissal of the two cross claims asserted in the answer of defendants Rego and Heinlein pursuant to CPLR 3211(a)(1) and (a)(7).

In view of the foregoing, the motion (#001) by defendant PUB for dismissal of the cross claims of defendants Rego and Heinlein is granted while the cross motion (#002) by such defendants for leave to amend their answer is denied.

DATED: 7/11/13



THOMAS F. WHELAN, J.S.C.