

Gregor v Rossi

2013 NY Slip Op 32921(U)

November 13, 2013

Sup Ct, New York County

Docket Number: 651432/2013

Judge: Eileen A. Rakower

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**SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY
PRESENT: Hon. EILEEN A. RAKOWER PART 15**

Justice

DEBORAH A. GREGOR AND CARL GERARDI,
Plaintiffs,

INDEX NO. 651432/2013

- v -

MOTION DATE _____
MOTION SEQ. NO. 004

JOSEPH J. ROSSI, ANJI ROSSI, VTL DIAGNOSTICS
LLC, VETAURA, INC., BRUCE BERNSTEIN, NANCY
ZIMMERMAN TUNKEL, LUIGI CRESCITELLI, BARBARA
ALESI, ROBERT GROMAN, THOMAS GLASCOCK,
GREGORY TEMBECK, FREDERICK BLUMER, AND JAMES
O'DAY,

MOTION CAL. NO. _____

Defendants.

The following papers, numbered 1 to _____ were read on this motion for/to

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...	<u>1, 2</u>
Answer – Affidavits – Exhibits _____	<u>3</u>
Replying Affidavits _____	<u>4</u>

Plaintiffs Deborah A. Gregor and Carl Gerardi (collectively, “Plaintiffs”) bring the instant action for fraud, constructive fraud, fraudulent inducement, negligent representation, violation of North Carolina’s RICO statute and civil conspiracy. In this action, Plaintiffs allege that they are were fraudulently induced by defendant Joseph J. Rossi (“Rossi”), who was assisted by co-defendants, to invest substantial sums of money through Rossi into defendant companies VTL Diagnostics, LLC (“VTL”) and Vetaura, Inc. (“Vetaura”).

Plaintiffs alleges sixteen causes of action in their Amended Complaint, of which nine are asserted against defendant Gregory Tembeck (“Tembeck”). The causes of action asserted against Tembeck are as follows: fraud; fraudulent inducement; constructive fraud; negligent misrepresentation; violation of North Carolina RICO statute NCGSA 75D-4(a)(1); violation of North Carolina RICO statute NCGSA 75D-4(a)(2); violation of North Carolina RICO statute NCGSA 75D-4(a)(3); civil conspiracy; and inspection of corporate records of VTL and Vetaura.

Tembeck now moves pursuant to CPLR §3211(a)(7) and §3016(b) for an

Order dismissing all causes of action brought against him in the Amended Complaint.

CPLR §3211 provides, in relevant part:

(a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(7) the pleading fails to state a cause of action.

In determining whether dismissal is warranted for failure to state a cause of action, the court must “accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory.” (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91[1st Dept. 2003]) (internal citations omitted) (*see* CPLR §3211[a][7]).

The following consist of the only paragraphs in the Amended Complaint which reference Tembeck:

13. Defendant Gregory J. Tembeck is an attorney-at-law of the State of New York, practicing law with The Law Offices of Gregory J. Tembeck, P.C., located at 2500 West Chester Avenue, Suite 109, Purchase, New York, 10577, and was retained by Rossi to represent both Rossi and VTL.

46. Rossi offered to “guaranty” the investment, and on August 7, 2009, Rossi sent the Gregors a promissory note dated July 30, 2009, drafted by Rossi’s attorney, Defendant Gregory Tembeck, to give Mrs. Gregor further assistance that her investment was safe.

187. The professional services Defendants, Vetaura lawyers Barbara Alesi, Robert Groman, Thomas Glascock, and Gregory Tembeck, and Vetaura accountants Federick Blumer and James O’Day, made or caused to be made material misrepresentations, omissions, false promises as previously detailed in the foregoing paragraphs of the Complaint.

240. Defendants Joseph J. Rossi, Anji Rossi, VTL Diagnostics, LLC, Vetaura, Inc., Nancy Zimmerman Tunkel, Luigi Crescitelli, Barbara Alesi,

Robert Groman, Thomas Glaseock, Gregory Tembeck, Frederick Blurner, and James O' Day have committed the torts of fraud, fraudulent inducement, constructive fraud, and negligent misrepresentation.

245. Defendants Joseph J. Rossi, Anji Rossi, VTL Diagnostics, LLC, Vetaura, Inc., Nancy Zimmerman Tunkel, Luigi Crescitelli, Barbara Alesi, Robert Groman, Thomas Glaseock, Gregory Tembeck, Frederick Blurner, and James O' Day have committed violations of the North Carolina RICO statute, NCGSA 75D-4(a), in the pursuit of their fraudulent scheme.

The first cause of action alleges fraud against Tembeck. In an action to recover for fraud, a plaintiff must prove (1) a misrepresentation or a material omission of fact; (2) which was false and known to be false by defendant; (3) made for the purpose of inducing the other party to rely upon it; (4) justifiable reliance of the other party on the misrepresentation or material omission; and (5) injury. (*Mandarin Trading Ltd. v. Wildenstein*, 16 NY3d 173, 919 NYS2d 465, 944 NE2d 1104 [2011]).

The second cause of action alleges fraudulent inducement against Tembeck. The elements of fraudulent inducement are: (1) a false representation of material fact; (2) known by the utterer to be untrue; (3) made with the intention of inducing reliance and forbearance from further inquiry; (4) that is justifiably relied upon; and (5) results in damages. (*See, MBIA Ins. Corp. v. Credit Suisse Securities USA LLC*, 32 Misc. 3d 758, 927 NYS2d 517 [Sup Ct NY Cty 2011]).

The third cause of action alleges constructive fraud against Tembeck. The elements of constructive fraud and actual fraud are identical, except that actual fraud requires an intentional deception, while constructive fraud generally requires "a confidential fiduciary relationship between the parties, or one having superior knowledge over the other" (*see, 60A N.Y. Jur 2d, Fraud and Deceit 2*), and in constructive fraud it is not necessary to demonstrate knowledge of the falsity of a representation (*see, Eden Rock Fin. Fund, L.P., v. Gerova Fin. Gruop, Ltd.*, 34 Misc. 3d 1205[A][Sup Ct NY Cnty 2011]). "Bare allegations of fraud without any allegation of the details constituting the wrong are clearly insufficient to sustain a cause of action. [*Gill v. Carribbean Home Remodeling Co.*, 73 AD2d 609 [2nd Dept 1979]).

The fourth cause of action alleges negligent misrepresentation against Tembeck. For such an action, Plaintiffs must establish: (1) Defendant had a duty; (2) based upon some special relationship with Plaintiff; (3) to impart correct information; (4) that the information given was false or incorrect; and (5) that the Plaintiff justifiably relied upon that information provided. (*See, Berger-Vespa v. Rondack Building Inspectors*, 293 AD3d 838, 740 NYS2d 504 [2002]).

CPLR §3016(b) provides, “Where a cause of action or a defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances surrounding the wrong shall be stated in detail.”

Here, the first, second, third, and fourth causes of action listed above (fraud, fraudulent inducement, constructive fraud, and negligent misrepresentation) require a false representation. Here, aside from conclusory language that Tembeck, along with various other defendants, “made material misrepresentations” and “committed the torts of fraud, fraudulent inducement, constructive fraud, and negligent misrepresentation,” Plaintiffs fail to detail the alleged misrepresentations made by Tembeck to Plaintiffs. As for the third cause of action for constructive fraud and the fourth cause of action for negligent misrepresentation, there are allegations that Tembeck represented VTL and VTL’s shareholders and there was a fiduciary or special relationship with Plaintiffs, as other alleged shareholders of VTL. However, Plaintiffs’ third and fourth causes of action fail to set forth in detail the alleged misrepresentation or false information that the claims are based upon and therefore fail to satisfy the heightened pleading standard set forth in CPLR §3016(b).

The eighth, ninth and tenth causes of action allege violations by Tembeck of the North Carolina RICO statute NCGSA §75D-4(a)(1)(Defendants engaged in a pattern of racketeering activity), NCGSA §75D-4(a)(2)(“Defendants have conducted and participated in an enterprise”), and NCGSA §75D-4(a)(3)(Defendants have conspired with one another to violate sections 4(a)(a) and 4(a)(2)).

The alleged sections of the North Carolina RICO statute provide:

§75D-4. Prohibited activities.

(a) No person shall:

- (1) Engage in a pattern of racketeering activity or, through a pattern of racketeering activities or through proceeds derived therefrom, acquire or maintain, directly or indirectly, any interest in or control of any enterprise, real property, or personal property of any nature, including money; or
- (2) Conduct or participate in, directly or indirectly, any enterprise through a pattern of racketeering activity whether indirectly, or employed by or associated with such enterprise; or
- (3) Conspire with another or attempt to violate any of the provisions of subdivision (1) or (2) of this subsection.

Racketeering activity is defined as “to commit, to attempt to commit, or to solicit, coerce, or intimidate another person to commit an act or acts which would be chargeable by indictment if such act or acts were accompanied by the necessary mens rea or criminal intent under the following laws of this State...” “‘Enterprise’ means any person, sole proprietorship, partnership, corporation, business trust, union chartered under the laws of this state, or other legal entity; or any unchartered union, association or group of individuals associated in fact although not a legal entity; and it includes illicit as well as licit enterprises and governmental as well as other entities.”

However, as with the other causes of action, the Amended Complaint fails to allege a single act by Tembeck that would support a cause of action under the North Carolina RICO statute.

As no claims based on fraud or negligent representation have been stated as against Tembeck, a claim for civil conspiracy has not been plead. (*see Romano v. Romano*, 2 A.D. 3d 430, 432 [2nd Dept 2003] (“a cause of action sounding in civil conspiracy cannot stand alone, but stands or falls with the underlying tort”).

The fourteenth cause of action, which demands books and records of Vetaura and VTL, fails to state a claim as against Tembeck based on the allegations fo the Complaint.

Wherefore, it is hereby,

ORDERED that defendant Gregory Tembeck's motion to dismiss the Complaint is granted and the Complaint is dismissed as against Gregory Tembeck in its entirety and the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: NOVEMBER ¹³ 2013



J.S.C.
HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE