

**Selechnik v Sultzer**

2013 NY Slip Op 34253(U)

June 27, 2013

Supreme Court, Bronx County

Docket Number: Index No.: 21193/12E

Judge: Alexander W. Hunter, Jr.

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: PART 23A**

-----X

Jacob Selechnik and Churchill Homes,

Index No.: 21193/12E

Plaintiffs,

Decision and Order

-against-

Neil Sultzer and Ackerman Raphan and Sultzer LLP,

Defendants.

-----X

**HON. ALEXANDER W. HUNTER, JR.**

Defendants’ motion for an order pursuant to CPLR 3211(a)(5) and (a)(7), dismissing plaintiffs’ complaint in its entirety, is granted. Plaintiffs’ cross-motion for leave to amend the complaint pursuant to CPLR 3025(b) is denied.

Plaintiff Jacob Selechnik (“Selechnik”) is a former business partner of Eric Fessler (“Fessler”), a non-party to this action. Selechnik and Fessler were equal owners of plaintiff Churchill Homes (“Churchill”), which was in the business of buying, rehabilitating, and selling property located in the Bronx, New York. A formal agreement dated March 5, 2005 (the “Agreement”) existed between Selechnik and Fessler defining rights and obligations of the parties, restricting the transfer and encumbrance of Churchill property, and detailing the distribution of sales proceeds. Neil Sultzer (“Sultzer”) was a partner at the law firm of Ackerman Raphan and Sultzer LLP (“ARS”) who undertook work on behalf of Churchill.

Plaintiffs allege that Fessler, with the help of Sultzer and without plaintiffs’ knowledge or consent, sold several Churchill properties, failed to remit requisite proceeds, encumbered certain Churchill properties, and wrongfully transferred certain Churchill properties to Fessler’s personal company. On August 15, 2012, plaintiffs filed a complaint alleging five causes of action: 1) breach of contract; 2) legal malpractice; 3) fraudulent misrepresentation; 4) fraud; and 5) vicarious liability.

Defendants move for an order of dismissal pursuant to CPLR 3211, or in the alternative, an order granting summary judgment pursuant to CPLR 3212. Defendants aver that 1) plaintiffs’ legal malpractice and vicarious liability claims are time-barred by the three year statute of limitations; 2) privity does not exist between plaintiff Selechnik and defendants; 3) plaintiffs insufficiently pleaded their breach of contract, fraudulent misrepresentation, and fraud claims; 4) plaintiff Selechnik does not have standing; and 5) plaintiffs failed to join an essential or indispensable party.

In opposition, plaintiffs aver that 1) the statute of limitations has not run, as its claims are rooted in fraud, which has a six year statute of limitations; 2) Selechnik has standing to bring suit on behalf of Churchill; 3) plaintiffs have sufficiently pleaded causes of action for fraud and

breach of contract; and 4) Fessler is not an indispensable party. Plaintiffs cross-move for leave to amend the complaint to eliminate the legal malpractice claim and substitute causes of action for breach of fiduciary duty and legal fraud. Plaintiffs submit a proposed amended complaint asserting six causes of action: 1) breach of fiduciary duty; 2) breach of contract; 3) legal fraud; 4) fraudulent misrepresentation; 5) fraud; and 6) vicarious liability.

In reply, defendants oppose plaintiffs' cross-motion for leave to amend the complaint. Defendants aver that the causes of action for fraud, fraudulent misrepresentation, and breach of fiduciary duty are duplicative of the legal malpractice claim, which is time-barred by the three year statute of limitations. Defendants maintain that they owed no special or contractual duty to plaintiffs to oversee or regulate the conduct of Fessler, as no contract ever existed between plaintiffs and defendants stating such terms. Defendants also reiterate that plaintiffs failed to state viable causes of action for fraud, fraudulent misrepresentation, and breach of fiduciary duty.

On a motion to dismiss under CPLR 3211(a)(7), "a complaint should not be dismissed on a pleading motion so long as, when the plaintiff is given the benefit of every favorable inference, a cause of action exists." **Rovello v. Orofino Realty, Co.**, 40 N.Y.2d 633, 634 (1976); **see also, Leon v. Martinez**, 84 N.Y.2d 83 (1994). Affidavits submitted by plaintiff can remedy any defects in the complaint. **Id.** at 635. "The test is whether the pleadings give adequate notice to the court and the adverse party of the transactions or occurrences intended to be proved." **Stern v. Consumer Equities Assocs.**, 160 A.D.2d 993, 994 (2nd Dept. 1990). Moreover, "it is not the function of the court to evaluate the merits of the case," nor to "express an opinion as to plaintiff's ability to ultimately establish the truth of the averments." **Khan v. Newsweek, Inc.**, 160 A.D.2d 425, 426 (1st Dept. 1990).

The elements of a cause of action for breach of contract are: 1) the existence of a contract; 2) plaintiff's performance under the contract; 3) defendant's breach of the contract; and 4) resulting damages. **American-European Art Assocs. v. Trend Galleries**, 227 A.D.2d 170 (1st Dept. 1996). Plaintiffs' complaint does not allege any facts establishing the existence of an enforceable contract between plaintiffs and defendants. In plaintiffs' cross-motion for leave to amend the complaint, ¶¶41 and 42, plaintiffs concede that they failed to allege the specific terms of the contract. Accordingly, plaintiffs' first cause of action for breach of contract is dismissed pursuant to CPLR 3211(a)(7).

"[A]n action to recover damages for malpractice, other than medical, dental or podiatric malpractice, regardless of whether the underlying theory is based in contract or tort..." must be commenced within three years. **CPLR 214(6)**. Plaintiffs' second and fifth causes of action for legal malpractice and vicarious liability are dismissed as the statute of limitations has run prior to plaintiffs' commencement of the instant action. **CPLR 3211(a)(5)**.

CPLR 3016(b) requires a cause of action for fraud, mistake, willful default, or breach of trust or undue influence to be pled with particularity. **See CPLR 3016(b); EBC I, Inc. v. Goldman Sachs & Co.**, 7 A.D.3d 418 (1st Dept. 2004). "This provision requires only that the misconduct complained of be set forth in sufficient detail to clearly inform a defendant with respect to the incidents complained of and is not to be interpreted so strictly as to prevent an otherwise valid cause of action in situations where it may be 'impossible to state in detail the

circumstances constituting a fraud.” Lanzi v. Brooks, 43 N.Y.2d 778, 780 (1977), quoting Jered Contr. Corp. v. New York City Trans. Auth., 22 N.Y.2d 187, 194 (1968). To make out a claim for fraud, “the plaintiff must prove a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury.” Lama Holding Co. v. Smith Barney Inc., 88 N.Y.2d 413, 421 (1996); see also Nicosia v. Bd. of Mgrs. of the Weber House Condominium, 77 A.D.3d 455 (1st Dept. 2010); Braddock v. Braddock, 60 A.D.3d 84 (1st Dept. 2009). Plaintiffs’ complaint fails to assert with particularity any false statements and/or misrepresentations knowingly made by defendants that plaintiffs detrimentally relied upon. CPLR 3016(b). Plaintiff Selechnik admits that the “evidence of this collusion for fraud is not in [his] possession.” (Plaintiffs’ exhibit 5, ¶19). Accordingly, plaintiffs’ fourth, and fifth causes of action for fraudulent misrepresentation and fraud are dismissed pursuant to CPLR 3211(a)(7).

Leave to amend pleadings under CPLR 3025(b) should be freely given, and denied only if there is “prejudice or surprise resulting directly from the delay” or if the proposed amendment “is palpably improper or insufficient as a matter of law.” McCaskey, Davies & Assoc. v. New York City Health & Hosp. Corp., 59 N.Y.2d 755, 757 (1983); Shepherd v. New York City Transit Auth., 129 A.D.2d 574 (2nd Dept. 1987). Prejudice to warrant denial of leave to amend requires “some indication that the defendant[s] ha[ve] been hindered in the preparation of [their] case or ha[ve] been prevented from taking some measure in support of [their] position.” McGhee v. Odell, 96 A.D.3d 449 (1st Dept. 2012), quoting Kocourek v. Booz Allen Hamilton Inc., 85 A.D.3d 502, 504 (1st Dept. 2011) (internal citation omitted).

To state a cause of action for breach of fiduciary duty, a plaintiff must allege “the existence of a fiduciary relationship, misconduct by the defendant, and damages that were directly caused by the defendant’s misconduct.” AmBase Corp. v. Davis Polk & Wardwell, 30 A.D.3d 171, 172 (1st Dept. 2006), *aff’d*, 8 N.Y.3d 428 (2007); Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc., 10 A.D.3d 267 (1st Dept. 2004). The Agreement provided that Fessler, as managing partner, could sell properties to bona fide purchasers in the ordinary course of business. (Defendants’ exhibit F, ¶¶ 2 and 7). Defendants were not parties to the Agreement, and therefore could not have violated it. American-European Art Assocs. v. Trend Galleries, 227 A.D.2d 170 (1st Dept. 1996). Accordingly, plaintiffs’ proposed cause of action for breach of fiduciary duty is insufficient as a matter of law.

Plaintiffs seek to abandon the legal malpractice cause of action, as it is time-barred pursuant to CPLR 214(6). Plaintiffs seek leave to amend the complaint to substitute a cause of action for legal fraud, whereby plaintiffs assert that defendants owed plaintiffs a special duty; that defendants breached this special duty when they assisted Fessler in closing on certain properties; and that defendants’ fraudulent conduct was the proximate cause of losses sustained by plaintiffs. The legal fraud claim is rooted in malpractice, and thus has a statute of limitations of three years from the date of the last real estate transaction, which occurred on or about March 28, 2008. As such, the proposed legal fraud claim is time-barred by the three year statute of limitations. CPLR 214(6). Additionally, plaintiffs’ proposed legal fraud claim does not satisfy the pleading requirements of CPLR 3016(b), and is duplicative of the legal malpractice cause of

action. Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc., 10 A.D.3d 267 (1st Dept. 2004); Turk v. Angel, 293 A.D.2d 284 (1st Dept. 2002).

Accordingly, defendants' motion for an order of dismissal pursuant to CPLR 3211(a)(7), dismissing plaintiffs' complaint, is granted as plaintiffs have failed to state cognizable claims for recovery as to its first, third, and fourth causes of action for breach of contract, fraudulent misrepresentation, and fraud claims. Plaintiffs' second and fifth causes of action for legal malpractice and vicarious liability are dismissed pursuant to CPLR 3211(a)(5).

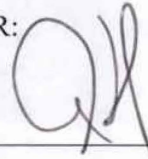
Plaintiffs' cross-motion for leave to amend its complaint pursuant to CPLR 3025(b) is denied.

Defendants are directed to serve a copy of this order by regular and certified mail (return receipt not required) upon plaintiffs and file proof thereof with the clerk's office.

This constitutes the decision and order of this court.

Dated: June 27, 2013

ENTER:



\_\_\_\_\_  
J.S.C.