

Gregor v Rossi

2014 NY Slip Op 30001(U)

January 3, 2014

Supreme Court, 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

HON. EILEEN A. RAKOWER

PRESENT:

PART 15

Justice

Index Number : 651432/2013
GREGOR, DEBORAH A
vs.
ROSSI, JOSEPH
SEQUENCE NUMBER : 006
DISMISS

INDEX NO.

MOTION DATE

MOTION SEQ. NO.

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s) 1, 2

Answering Affidavits — Exhibits No(s) 3

Replying Affidavits No(s) 4

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 1/3/2014

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

- 1. CHECK ONE: CASE DISPOSED, NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED, DENIED, GRANTED IN PART, OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER, SUBMIT ORDER, DO NOT POST, FIDUCIARY APPOINTMENT, REFERENCE

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. 006

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 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 allege sixteen causes of action in their Amended Complaint, of which the following causes of action are asserted against defendants Barbara Alesi, Robert Groman, and Thomas Glascock ("Moving Defendants"): 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.

Moving Defendants now move pursuant to CPLR §3211(a)(1) and (7) and

§3016(b) to dismiss the Amended Complaint and pursuant to CPLR §3211(a)(7) to dismiss co-defendant Bruce Bernstein's cross claims for failure to state a claim. Plaintiffs oppose. Defendant Bruce Bernstein does not oppose.

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:

- (1) a defense is founded upon documentary evidence;
- (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]).

On a motion to dismiss pursuant to CPLR §3211(a)(1), "the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007]) (internal citations omitted). "When evidentiary material is considered, the criterion is whether the proponent of the pleading *has* a cause of action, not whether he has stated one." (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]) (emphasis added). A movant is entitled to dismissal under CPLR §3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint. (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dept. 2007]) (citation omitted).

Moving Defendants Alesi, Groman, and Glascock are alleged to be attorneys with the law firm of Forchelli, Curto, Schwartz, Mineo & Terra, "retained by Rossi as corporate counsel for Vetaura."

The following paragraphs of the Amended Complaint relate to the claims as asserted against Moving Defendants:

12. Defendants Barbara Alesi, Robert Groman, and Thomas Glascock are attorneys-at-law of the State of New York, practicing law with the law firm of Forchelli, Curto, Deegan, Schwartz, Mineo & Terrana, LLP, located at 333 Earle Ovington Boulevard, Suite 1010, Uniondale, New York 11553, and were retained by Rossi as corporate counsel for Vetaura.

106. In or around June 2011, the Plaintiffs began demanding that Rossi provide them with documentation and information detailing how their investments in Vetaura were being utilized, and accounting for the investments, the company's cash flow and business operations, and its financial situation.

107. At various times, the Plaintiffs demanded this information and documentation directly from the Vetaura lawyers, Defendants Barbara Alesi, Robert Groman, and Thomas Glascock of the Defendant Forchelli law firm, but were rebuffed each time.

109. In further perpetration of the scheme to defraud the Plaintiffs, in August 2011, the Vetaura lawyers drafted a "Shareholder Agreement" tailored to the small number of "investors" and "principals" in the company, for the presentation to the Plaintiffs as evidence of their ownership interests in Vetaura.

110. The Vetaura lawyers also drafted the following additional documents for presentation to the Plaintiffs:

- (a) Merger documents for a proposed merger to a Delaware entity created by the Vetaura lawyers;
- (b) a Cooperative Marketing Agreement;
- (c) Shareholder/Director Consents;
- (d) Stock Transfer Records; and

(e) a Common Stock Purchase Agreement.

111. The Vetaura lawyers charged substantial fees to the company for the preparation of these documents.

112. The Vetaura lawyers frequently presented drafts of the documents to the Plaintiffs, engaging them in active review and revision of the Shareholder Agreement.

113. The Vetaura lawyers met personally with the Plaintiffs, offering them legal counsel and reassurances as to the operation and organization of Vetaura.

121. During the course of their representation of Vetaura during 2011, the Vetaura lawyers became intimately familiar with the company's structure and the history of the Plaintiffs' investments, many of which were made directly to Rossi.

122. Apparently, the Vetaura lawyers had become aware of Rossi's scheme to defraud the Plaintiffs out of their money, and became complicit in the scheme for substantial payments for supposed "legal services" rendered to the company.

123. The Vetaura lawyers assisted Rossi in creating and implementing a diversionary scheme to merge Vetaura into a newly created Delaware entity in an effort to further distance Rossi from liability to the Plaintiffs for his fraudulent activity.

124. The Vetaura lawyers represented to the Plaintiffs that the formation of a Delaware entity was a necessity for the company, but gave no basis for those statements.

125. In December 2011, the merger plan was finalized, with the surviving Vetaura, Inc. based in Delaware.

126. After the merger was complete, and despite the significant amounts of time and money spent on the drafting of the Shareholder

Agreement and specifically tailoring it to Delaware law, Defendant Barbara Alesi represented to the Plaintiffs that the Shareholder Agreement was “no longer necessary” and recommended that the Plaintiffs not execute the document.

127. By virtue of the preparation, presentation, review and discussion of the substance and form of the Shareholder Agreement and other corporate documents with the Plaintiffs, the Vetaura lawyers represented to the Plaintiffs that Vetaura was a viable company and was being run as a legitimate corporation.

128. The Vetaura lawyers, through personal meetings, correspondence, and telephone conversations with the Plaintiffs, exceeded the scope of their representation as corporate counsel and offered direct legal counsel to the Plaintiffs, which the Plaintiffs justifiably relied on in their decision making regarding Vetaura and their further investment in the company.

129. By virtue of their legal advice and counsel with respect to the Shareholder Agreement, other corporate documents, and the formation, organization, and implementation of Vetaura, the Vetaura lawyers represented to the Plaintiffs that Vetaura was a viable company and was being run as a legitimate corporation.

130. The Vetaura lawyers knew, or should have known, of Rossi’s scheme to defraud the Plaintiffs.

131. The Vetaura lawyers were complicit in the scheme to defraud the Plaintiffs of their investment monies.

132. As corporate counsel, the Vetaura lawyers owed certain duties to the company and to the Plaintiffs, as purported shareholders.

133. The Plaintiffs reasonably relied on the representations and material omissions of the Vetaura lawyers.

134. In reliance of the representations and material omissions of the Vetaura lawyers, the Plaintiffs invested well over \$100,000 into Vetaura.

157. In July 2012, the Vetaura lawyers, at Rossi's instruction, issued stock to several new investors without notice to the Plaintiffs, also purported shareholders of Vetaura.

158. The issuance of new stock further diluted the value of the holdings of the current shareholders in Vetaura.

159. There is no documentation of the actual amounts purportedly paid for the new stock by the new investors.

160. The Plaintiffs sent correspondence to Rossi objecting to the issuance of new stock without notice to existing shareholders.

161. Rossi, upon the advice and counsel of the Vetaura lawyers, responded that there was no requirement to notify the shareholders of such actions.

174. Rossi further advised the Plaintiffs that he had confirmed his position- that their investment money now belonged to him and he could do what he wanted with it, and not have to account to the Plaintiffs for it - with both Vetaura Accountant O'Day and Vetaura counsel Defendant Roberta Groman.

176. Defendants Accountant O'Day and Vetaura lawyers Barbara Alesi, Robert Groman, and Thomas Glascock were complicit Rossi's scheme to defraud the Plaintiffs of their investment monies, as evidence by said Defendants' failure and refusal to provide requested documentation and information to the Plaintiffs, in violation of their legal and ethical duties to the Plaintiffs as shareholders of the corporate client they represented and serviced.

177. Defendants Accountant O'Day, and Vetaura lawyers Alesi, Groman and Glascock prepared misleading documents and made false representations to the Plaintiffs upon which the Plaintiffs relied, as a result of which the Plaintiffs suffered great financial and emotional harm.

178. All of the Defendants committed overt acts in furtherance of the scheme.

179. Further, each of the Defendants had fiduciary and special relationships with the Plaintiffs, who were investor [sic] and shareholders of the company, as follows: Rossi as President and Chief Executive Officer of Vetaura; Crescitelli and Tunkel as shareholders, and O'Day and the Vetaura lawyers as providers of professional services to a closely held corporation and, therefore, to its shareholders.

The first cause of action alleges fraud against Moving Defendants. 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 [2011]).

The second cause of action alleges fraudulent inducement against Moving Defendants. 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 [Sup Ct NY Cty 2011]).

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."

The third cause of action alleges constructive fraud against Moving Defendants. 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]).

The fourth cause of action alleges negligent misrepresentation against Moving Defendants. The elements of negligent misrepresentation are as follows: (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]).

Accepting all allegations as true, the four corners of the Amended Complaint state claims for fraud and fraudulent inducement against Moving Defendants. Additionally, accepting all allegations as true, the four corners of the Amended Complaint state claims for constructive fraud and negligent misrepresentation against the Moving Defendants based on the allegations that the Moving Defendants “through personal meetings, correspondence, and telephone conversations with the Plaintiffs, exceeded the scope of their representation as corporate counsel and offered direct legal counsel to the Plaintiffs, which the Plaintiffs justifiably relied on in their decision making regarding Vetaura and their further investment in the company.”

The eighth, ninth and tenth causes of action allege violations 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)) against Moving Defendants.

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.”

Here, accepting all allegations as true, Plaintiffs have set forth a cause of action under North Carolina RICO Statute NCGSA 75D-4(a)(1), NCGSA 75D-4(a)(2), and NCGSA 75D-4(a)(3) against Moving Defendants.

As claims based on fraud and negligent representation have been stated as against the Moving Defendants, a claim for civil conspiracy has 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”).

Punitive damages are recoverable in “cases involving intentional torts on the theory that the conduct charged portends significant harm to the public interest.” *Laurie Marie M. v. Jeffrey T.M.*, 159 A.D. 2d 52, 58 [2d Dept 1990].

Accepting all allegations as true, the four corners of the Complaint state a claim for punitive damages against Moving Defendants.

The fourteenth cause of action, which demands books and records of Vetaura and VTL, states a claim against the Moving Defendants. The fourteenth cause of action alleges that Plaintiffs "have repeatedly demanded production" of the records of Vetaura and VTL from the Moving Defendants, as Vetaura's lawyers, to no avail, and that they have a right to inspect the corporate books and records.

Moving Defendants also seek to dismiss Bruce Bernstein's cross claims for indemnification and contribution. Bernstein has not opposed Moving Defendants' motion.


Wherefore, it is hereby,

ORDERED that defendants Barbara Alesi, Robert Groman, and Thomas Glascock's motion to dismiss the Amended Complaint is denied; and it is further

ORDERED that defendants Barbara Alesi, Robert Groman, and Thomas Glascock's motion to dismiss defendant Bruce Bernstein's cross claim is granted without opposition and said cross claim is dismissed as against Barbara Alesi, Robert Groman, and Thomas Glascock.

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

Dated: JANUARY 3, 2014


HON. EILEEN A. RAKOWER
U.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE