

Zorse v Stewart Title E. Carribean Ltd.

2014 NY Slip Op 30312(U)

January 31, 2014

Sup Ct, New York County

Docket Number: 154416/2013

Judge: Shirley Werner Kornreich

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH
Justice

PART 54

Index Number : 154416/2013
ZORSE, BRETT
vs
STEWART TITLE EASTERN
Sequence Number : 002
DISMISS ACTION

INDEX NO.
MOTION DATE 1/9/14
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) 9-13
Answering Affidavits — Exhibits No(s) 26
Replying Affidavits No(s) 29

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

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

Dated: 1/31/14

SHIRLEY WERNER KORNREICH J.S.C.

- 1. CHECK ONE: CASE DISPOSED (checked), NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED (checked), 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
COUNTY OF NEW YORK: PART 54

-----X
BRETT ZORSE,

Index No.: 154416/2013

Plaintiff,

DECISION & ORDER

-against-

STEWART TITLE EASTERN CARRIBEAN LTD.,
a wholly owned subsidiary of and associate of;
STEWART TITLE GUARANTY CO.,
STEWART INFORMATION SERVICES CORP.,

Defendants.

-----X

SHIRLEY WERNER KORNREICH, J.:

Motion Sequence Numbers 002, 003, and 004 are consolidated for disposition.

Defendants Stewart Title Eastern Caribbean Ltd. (STEC), Stewart Title Guaranty Co. (STGC), and Stewart Information Services Corp. (SISCO) move to dismiss the Complaint pursuant to CPLR 3211 and 3016(b). Defendants' motions are granted for the reasons that follow.

I. Factual Background & Procedural History

As this is a motion to dismiss, the facts recited are taken from the Complaint and the documentary evidence.

SISCO is a holding company that has an ownership interest in STEC and STGC, which provide escrow services. Complaint ¶¶ 2-5. In May 2005, Richard P. Savitt (the attorney for

plaintiff Brett Zorse) and non-party Gary Luciani¹ entered into Purchase and Sale Agreements (the 2005 Contracts) with Barnes Bay Development Ltd. (BBD)² for two condominium units in Anguilla (the Property). ¶¶ 7, 10. In connection with those sales, Savitt wired a total of \$445,500 to STEC in May 2005 as a non-refundable deposit; STEC served as the escrow agent. ¶¶ 8-14. Pursuant to the 2005 Contracts, STEC was obligated to immediately release this money to BBD. *See* Dkt. 38, Ex. A., p. 1. The money was, in fact, released to BBD in 2005.

Despite making a non-refundable deposit, Savitt never paid the balance of the purchase price to BBD. Instead, years later, Savitt and BBD agreed that Savitt would find a new purchaser to pay BBD the amount owed for the Property. In 2011, Savitt convinced Zorse to be the new buyer. The new agreement with BBD, memorialized in a contract dated September 12, 2011 (the 2011 Contract),³ sets forth that Zorse assumes the obligation to pay the full purchase price (\$1,225,185), but that he gets credit for the 2005 down payment (\$445,500), so he only owes the unpaid balance (\$779,685). The 2011 Contract further provides that STEC is supposed to transfer the \$445,500 directly to BBD. STEC, however, does not have this money because, as mentioned earlier, STEC wired the money to BBD in 2005 as soon as it received it (in accordance with the express terms of the 2005 Contract). In fact, STEC⁴ had nothing to do with

¹ Since Luciani played no meaningful role in the underlying events apart from making a down payment, the court only discusses Savitt's role in the subject real estate transactions.

² BBD is a now-bankrupt company.

³ Though the 2011 Contract calls for the application of Anguilla law, the parties only made arguments under New York law. The court, therefore, applies New York law.

⁴ The Complaint does not differentiate between the three defendants, two of which (SISCO and STGC), have nothing to do with the subject transactions. Zorse seeks to involve them based on a veil piercing theory. The Complaint's lack of merit makes it unnecessary to explain why Zorse' veil piercing allegations, or lack thereof, are inadequate.

the 2011 Contract and never signed the contract. Moreover, Zorse did not even contact STEC regarding the down payment funds until February 2013, two years after the 2011 Contract's execution. Complaint ¶ 21. That is, 8 years after STEC wired down payment funds on behalf of Savitt, Zorse, a stranger to the transaction with STEC, requested that STEC refund the \$445,500 that it had wired to BBD in 2005. Unsurprisingly, STEC rebuffed Zorse's request.

Zorse commenced this action on May 14, 2013. The Complaint lists ten causes of action: (1) conversion; (2) unjust enrichment; (3) negligent misrepresentation; (4) fraud; (5) fraudulent inducement; (6) breach of the duty of good faith and fair dealing; (7) breach of fiduciary duty; (8) violation of GBL § 349; (9) breach of contract; and (10) a demand for an accounting.

Defendants move to dismiss on four grounds: (1) lack of personal jurisdiction; (2) that the statutes of limitation have run; (3) failure to plead the fraud claims with particularity; and (4) failure to state a claim. With respect to the personal jurisdiction issue, there appear to be questions of fact that might warrant jurisdictional discovery. However, there is no need to burden defendants with that expense because the Complaint's allegations are ripe for dismissal with prejudice. To be sure, the fraud claims are not pled with particularity since the Complaint does not identify which allegedly fraudulent statements are attributable to which defendants. But, the court will not address this since, for the reasons discussed at oral argument, the Complaint fails to allege the elements of each claim. *See* Dkt. 46 (Transcript). Furthermore, for the reasons discussed below, this action is precluded by the statute of limitations and, even more basically, for failure to identify a wrongful act committed by defendants.

II. Discussion

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1992); see also *Cron v Harago Fabrics*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action. *Skillgames, id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. “However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration.” *Skillgames*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed if “the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.” *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

In the documentary evidence itself, all of the parties admit that STEC released the down payment to BBD in 2005. This was the extent of STEC’s responsibilities under the 2005 Contracts. The Complaint does not identify another form of misconduct aside from failure to perform STEC’s escrow obligations. Hence, Zorse’s breach of contract claim fails. Moreover, as the scope of STEC’s duties are governed by the 2005 Contracts, the fraud and quasi-contract

claims are duplicative. See *Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561 (2005); *Stuart Lipsky, P.C. v Price*, 215 AD2d 102 (1st Dept 1995).

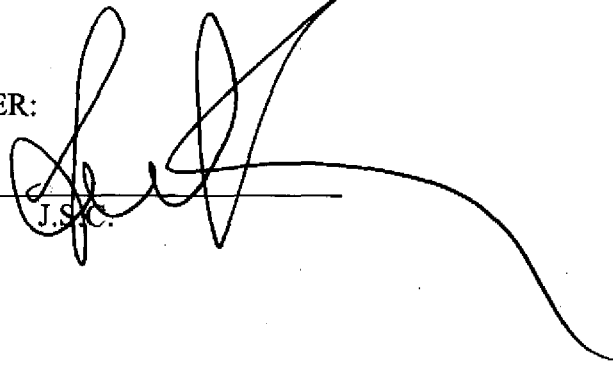
In any event, there is no question of fact that STEC's involvement in this matter ended in 2005. Zorse, who was not a party to the 2005 transactions and whose allegations are far from clear, has no evidence that defendants committed any misconduct, nor does he plead facts explaining the basis for his allegations. Yet, even if misconduct occurred, Zorse's claims are time barred because this action was brought well after the relevant statutes of limitation expired. The longest of the applicable statutes of limitations is 6 years (for fraud or breach of contract) and expired in 2011. See CPLR 213(2) & (8). Zorse's only possible avenue to recovery is the 2-year notice rule, which only applies to fraud.⁵ See *Ghandour v Shearson Lehman Bros. Inc.*, 213 AD2d 304, 305-06 (1st Dept 1995) (the 2-year-from-discovery period begins to run when "a person of ordinary intelligence possessed knowledge of facts from which the fraud could be reasonably inferred"). However, Zorse cannot reasonably contend that he (or his attorney Savitt, the original buyer) could not have learned that the funds were not received in 2005, since, as anyone who has ever bought property knows, if the seller does not receive his money (especially the down payment), the transaction will not close. A buyer's claim that he could not have known about problems with a down payment until 8 years after the sale is an "inherently incredible" contention that cannot defeat a motion to dismiss. Accordingly, it is

⁵To be sure, there are a litany of substantive problems with Zorse suing defendants for fraud, including the fact that Zorse could not have been defrauded by STEC because he was not involved with it until well after the down payment had been released. Regardless, even if he was, his claims would still be time barred.

ORDERED that the motion to dismiss the Complaint by defendants Stewart Title Eastern Caribbean Ltd., Stewart Title Guaranty Co., and Stewart Information Services Corp. is granted, and the Clerk is directed to enter judgment dismissing the Complaint with prejudice.

Dated: January 31, 2014

ENTER:



J.S.C.