Marcum, LLP v Rosenfarb
2014 NY Slip Op 31216(U)
April 3, 2014
Supreme Court, Suffolk County
Docket Number: 27407-13
Judge: Thomas F. Whelan

MEMO DECISION & ORDER

INDEX No. 27407-13

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 12/20/13
SUBMIT DATE: 2/7/14
Mot. Seq. # 001 - MotD
CDISP: Yes

MARCUM, LLP,	:	ANDREW PRESBERG, PC
	:	Attys. For Plaintiff
Plaintiff,	:	100 Corporate Plaza
	:	Islandia, NY 11749
-against-	:	
	:	WALLISON & WALLISON, LLP
SAM ROSENFARB,	:	Attys. For Defendant.
	:	60 E. 42nd St.
Defendant.	:	New York, NY 10165

Upon the following papers numbered 1 to 8 read on this motion for an order dismissing the amended complaint; Order To Show Cause/Notice of Motion and supporting papers: 1 - 3; Notice of Cross Motion and supporting papers ____; Answering papers 4-6; Reply papers ____; Other 7 (memorandum in support); 8 (reply memorandum); (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the defendant's request for oral argument on this motion (#001) to dismiss the plaintiff's amended complaint and for sanctions and costs is considered under 22 NYCRR 202.8 and is denied; and it is further

ORDERED that those portions of this motion (#001) by the defendant for dismissal of the amended complaint served and filed herein by the plaintiff is considered under CPLR 3211(a)(5) and 3211(a)(7) and is granted; and it is further

ORDERED that the remaining portions of the defendant's motion wherein he seeks the imposition of sanctions against the plaintiff and/or an award of costs to the defendant is considered under 22 NYCRR Part 130-1 and are denied.

This action arises out of the merger of two financial and business consulting firms under the terms of a May 22, 2008 Transaction Agreement executed by principals of a New Jersey limited liability company known as RosenfarbWinters, LLC and a New York limited liability partnership known as Marcum & Kliegman, LLP. The defendant was a principal and managing member of

RosenfarbWinters, LLC and of its successor firm, known as M&K Rosenfarb, LLC, (hereinafter "MKR") and he negotiated the merger of MKR under the terms of the Transaction Agreement dated May 22, 2008. Ownership interests in the two firms were exchanged and defendant Rosenfarb became a partner in the plaintiff on June 1, 2008 by execution of a Partners' Counterpart Signature Page to the Marcum & Kleigman, LLP Amended and Restated Partnership Agreement dated January 1, 2002. In such capacity, the defendant was the managing partner of the New Jersey office which serviced the RosenfarbWinters clients and he was responsible for the assignment of clients and the collection of accounts receivable during and after the close the 18 month transition period set forth in the Transaction Agreement that closed on June 1, 2008. This transition period allowed both sides the option to continue with the merger or to avoid it by unwinding therefrom. In December of 2009, the merger was accomplished by the filing of a Certificate of Merger/Consolidation.

In August of 2011, the defendant and the plaintiff entered into a letter agreement in which the terms of the defendant's withdrawal from the partnership of the plaintiff were defined, including the effective date of such withdrawal which was fixed at June 30, 2011. In paragraph 15 thereof, the parties issued mutual releases of claims against each other. At issue here is the plaintiff's release of claims against the defendant that is set forth in subparagraph (b) of paragraph 15, which reads as follows:

> Marcum releases any and all claims, demands, causes of action, losses, liabilities, damages, costs and expenses against you and against any of your affiliates, heirs executors, representatives, agents, successors or assignees (collectively, the "Rosenfarb Released Parties"), based on anything, including any act or omission by you or any of the other Rosenfarb Released Parties, that has happened at any time up to and including the Effective Date. Marcum understands that this is a general release and that it is releasing claims not specifically mentioned above and claims of which it may not even be aware. However, this general release does not apply to or include any claims arising out of or relating to this Agreement, and all rights are preserved with respect to such claims; such rights being expressly excluded from this general release. This general release is intended to be legally binding on Marcum, Marcum's Partners, Principals and Principal Shareholders, and their respective affiliates, heirs, executors, personal representatives, successors and assignees, and is made for the benefit of you and the other Rosenfarb Released parties.

The plaintiff commenced this action by the filing of a summons and complaint on October 10, 2013. The following three causes of action were therein asserted against the plaintiff: 1) recovery of money damages due to the fraudulent and false misrepresentations as to the nature and collectability of the accounts receivable of the Rosenberg Winters and the MKR firm before and after the merger and overstatement of the reserves therefor; 2) money damages by reasons of the defendant's purported breach of his fiduciary duties while a partner of the plaintiff due to his failure to truthfully and accurately report, manage and control those accounts receivable; and 3) breach of certain terms of the plaintiff's Partnership Agreement by post-withdrawal conduct on the part of the defendant.

On October 29, 2013, the plaintiff filed an amended complaint. Therein, the plaintiff added a new second cause of action for a judgment declaring "inapplicable to the causes of action herein", the plaintiff's release of all claims against the defendant contained in the letter agreement dated August 11, 2011 providing for the terms of the defendant's withdrawal from the plaintiff's partnership. Specifically, the defendant claims that the release bars the First, Second and Third causes of action and alternatively claims that all causes of action are not "viable" due to legal insufficiency. The defendant also seeks the imposition of monetary sanctions and an award of costs and fees due to the plaintiff's engagement in allegedly frivolous conduct. For the reasons stated, the dismissal requested is granted but the remainder of the relief demanded is denied.

By the instant motion, the defendant seeks dismissal of the complaint pursuant to CPLR 3211(a)(5) and 3211(a)(7). Although a defendant has the initial burden of establishing that it has been released from any claims, a signed release "'shifts the burden of going forward ... to the [plaintiff] to show that there has been fraud, duress or some other fact which will be sufficient to void the release'" (***Centro Empresarial Cempresa S.A. v America Movil, S.A.B. de C.V.***, 17 NY3d 269, 929 NYS2d 3 [2011], *quoting* ***Fleming v Ponziani***, 24 NY2d 105, 111, 299 NYS2d 134 [1969]). A plaintiff seeking to invalidate a release due to fraudulent inducement must "'establish the basic elements of fraud, namely a representation of material fact, the falsity of that representation, knowledge by the party who made the representation that it was false when made, justifiable reliance by the plaintiff, and resulting injury'" (***Centro Empresarial Cempresa S.A. v America Movil, S.A.B. de C.V.***, 17 NY3d 269, *quoting* ***Global Minerals and Metals Corp. v Holme***, 35 AD3d at 98, 824 NYS2d 210 [1st Dept 2006]).

In ***Rivera v Wyckoff Hgts. Med. Ctr.*** (113 AD3d 667, 978 NYS2d 337 [2d Dept 2014]), the Appellate Division, Second Department pronounced the law governing releases to be as follows:

> "A release is a contract, and its construction is governed by contract law" (Schiller v. Guthrie, 102 A.D.3d 852, 853, 958 N.Y.S.2d 736 [internal quotation marks omitted]; see Lee v. Boro Realty, LLC, 39 A.D.3d 715, 716, 832 N.Y.S.2d 453). "A release will not be treated lightly, and will be set aside by a court only for duress, illegality, fraud, or mutual mistake" (Seff v. Meltzer, Lippe, Goldstein & Schlissel, P.C., 55 A.D.3d 592, 593, 865 N.Y.S.2d 323 [internal quotation marks omitted]; see Centro Empresarial Cempresa S.A. v. America Movil, S.A.B. de C.V., 17 N.Y.3d 269, 276, 929 N.Y.S.2d 3, 952 N.E.2d 995; Cahill v. Regan, 5 N.Y.2d 292, 299, 184 N.Y.S.2d 348, 157 N.E.2d 505; Bodisher v. Hofmann, 50 A.D.3d 720, 854 N.Y.S.2d 316; Lee v. Boro Realty, LLC, 39 A.D.3d at 716, 832 N.Y.S.2d 453). As with contracts generally (see Greenfield v. Philles Records, 98 N.Y.2d 562, 569, 750 N.Y.S.2d 565, 780 N.E.2d 166), "[w]here a release is unambiguous, the intent of the parties must be ascertained from the plain language of the agreement" (Schiller v. Guthrie, 102 A.D.3d at 853–854, 958 N.Y.S.2d 736 [internal quotation marks omitted]; see Alvarez v. Amicucci, 82 A.D.3d 687, 688, 918 N.Y.S.2d 144; A.A. Truck Renting Corp. v. Navistar, Inc., 81 A.D.3d 674, 675, 916 N.Y.S.2d 194). Accordingly, "courts should be extremely reluctant to interpret an agreement as impliedly stating

> something which the parties have neglected to specifically include" (Centro Empresarial Cempresa S.A. v. America Movil, S.A.B. de C.V., 17 N.Y.3d at 277, 929 N.Y.S.2d 3, 952 N.E.2d 995 [internal quotation marks omitted]; see Aivaliotis v. Continental Broker–Dealer Corp., 30 A.D.3d 446, 447, 817 N.Y.S.2d 365) or " 'impos[e the court's] own conception of what the parties should or might have undertaken, rather than confining itself to the implementation of a bargain to which' the parties have committed themselves" (CNR Healthcare Network, Inc. v. 86 Lefferts Corp., 59 A.D.3d 486, 489, 874 N.Y.S.2d 174, quoting Joseph Martin, Jr., Delicatessen v. Schumacher, 52 N.Y.2d 105, 109, 436 N.Y.S.2d 247, 417 N.E.2d 541; see Stathakis v. Poon, 295 A.D.2d 496, 497, 744 N.Y.S.2d 473).
>
> In general, "a valid release constitutes a complete bar to an action on a claim which is the subject of the release" (Centro Empresarial Cempresa S.A. v. America Movil, S.A.B. de C.V., 17 N.Y.3d at 276, 929 N.Y.S.2d 3, 952 N.E.2d 995 [internal quotation marks omitted]). "If 'the language of a release is clear and unambiguous, the signing of a release is a "jural act" binding on the parties' " (id., quoting Booth v. 3669 Delaware, 92 N.Y.2d 934, 935, 680 N.Y.S.2d 899, 703 N.E.2d 757, quoting Mangini v. McClurg, 24 N.Y.2d 556, 563, 301 N.Y.S.2d 508, 249 N.E.2d 386). A valid general release will apply not only to known claims, but "may encompass unknown claims, including unknown fraud claims, if the parties so intend and the agreement is 'fairly and knowingly made'" (Centro Empresarial Cempresa S.A. v. America Movil, S.A.B. de C.V., 17 N.Y.3d at 276, 929 N.Y.S.2d 3, 952 N.E.2d 995, quoting Mangini v. McClurg, 24 N.Y.2d at 566, 301 N.Y.S.2d 508, 249 N.E.2d 386; see Alvarez v. Amicucci, 82 A.D.3d at 688, 918 N.Y.S.2d 144; A.A. Truck Renting Corp. v. Navistar, Inc., 81 A.D.3d at 675, 916 N.Y.S.2d 194). Nevertheless, "[t]he meaning and coverage of a general release depends on the controversy being settled and upon the purpose for which the release was actually given, and a general release may not be read to cover matters which the parties did not desire or intend to dispose of" (Huma v. Patel, 68 A.D.3d 821, 822, 890 N.Y.S.2d 639 [internal quotation marks and citations omitted]; see Cahill v. Regan, 5 N.Y.2d at 299, 184 N.Y.S.2d 348, 157 N.E.2d 505; Kaprall v. WE: Women's Entertainment, LLC, 74 A.D.3d 1151, 1152, 904 N.Y.S.2d 721).

Where a defendant moving to dismiss pursuant to CPLR 3211(a)(5) on the basis of a release meets its initial burden of proof, the plaintiff is required to demonstrate that a triable issue of fact exists concerning the validity and/or scope of the release (*see* ***Moskowitz v General Acc. Ins. Co.***, 179 AD2d 722, 579 NYS2d 596 [2d Dept. 1992]). If the plaintiff fails to raise a triable issue concerning the validity or scope of the release, it shall be enforced according to its terms and the plaintiff's claim dismissed (*see* ***Booth v 3669 Delaware***, 92 NY2d 934, 680 NYS2d 899 [1998]; ***Rocanova v Equitable Life Assur. Socy.***, 83 NY2d 603, 616, 612 NYS2d 339 [1994]).

Here, the moving papers of the defendant demonstrated that the release issued by the plaintiff was fairly and knowingly made and constituted a jural act which finalized the business relationship between the plaintiff and the defendant which arose out of the merger of the previously separate accounting and consulting firms in 2008. The broad and unambiguous language of the release precludes all claims of any kind known or unknown arising prior to the June 30, 2011 effective date of the August 16, 2011 partnership withdrawal letter agreement. The moving papers thus established that the claims advanced in the First, Second and Third causes of action are within the scope of the broad, general release provisions of the August 16, 2011 letter agreement governing the defendant's withdrawal from the plaintiff's partnership (*see* ***Gale v Citicorp***, 78 AD2d 197, 716 NYS2d 905 [2d Dept 2000]).

Rejected as unmeritorious is the plaintiff's claim that the release is inapplicable to plaintiff's First cause as it is premised upon purported fraudulent misrepresentations that occurred prior to the execution of the Transaction Agreement in June 2008 that allegedly induced the plaintiff in to executing said agreement of action. According to the plaintiff, the scope of the general release is limited to "potential partnership issues between them from June 1, 2008 through the June 30, 2011 'effective date' of the August 16, 2011 letter agreement of withdrawal and not to any arising prior thereto (*see* p. 9 of the affirmation in opposition by plaintiff's counsel). However, the plaintiff's characterization of the scope of the release is unsupported by the broad language of the general release provisions set forth in ¶ 15 (b) of the partnership withdrawal letter agreement. In addition, the general release provisions preclude the breach of fiduciary claim advanced in the Third cause of action in the amended complaint as all of the purported breaches occurred prior to the effective date of the partnership withdrawal letter agreement. The plain meaning of the unambiguous language of the release thus interdicts the plaintiff's prosecution of the First and Third causes of action set forth in its complaint.

However, the record supports the plaintiff's contention that the general release provisions relied upon by the defendant as a complete defense to the action were not intended to cover the claim that the August 16, 2011 partnership withdrawal letter agreement, the execution of which, was allegedly induced by fraudulent misrepresentations of the defendant regarding the collectability of the accounts receivable and reserves because the release itself states that "this general release does not apply to or include any claims arising out of or relating to this Agreement and all rights are preserved with respect thereto". Since the Second cause of action in which a declaration of the invalidity of the release due to fraudulent inducement is advanced is premised upon conduct that relates to the withdrawal agreement itself, such conduct appears to be within the ambit of the exclusion and a question of fact exists with respect to the scope of the release when viewed in light of the controversy being settled, the purpose for which the release was actually given and the language employed by the parties (*see* ***Rivera v Wyckoff Hgts. Med. Ctr.***, 113 AD3d 667, *supra, quoting* ***Huma v Patel***, 68 AD3d 821, *supra*). The plaintiff's claim that the Second cause of action is not within the scope of the release,is discernible from the allegations advanced in the complaint and it renders such cause of action plausible (*see* ***Wechsler v Diamond Sugar Co., Inc.***, 29 AD3d 681, 815 NYS2d 639, 640 [2d Dept 2006]).

Although the continued viability of the Second cause of action in which the validity of the release is assailed would defeat the defendant's prima facie showing of his entitlement to dismissal

of the First and Third causes of action pursuant to CPLR 3211(a)(5) on the grounds that the release bars prosecution such causes of action, the court finds that the defendant is entitled to a dismissal of the plaintiff's Second cause of action pursuant to CPLR 3211(a)(7) due to legal insufficiency. The standard applied in evaluating a motion to dismiss pursuant to CPLR 3211(a)(7) is whether "the pleading states a cause of action, not whether the proponent of the pleading has a cause of action" (***Marist Coll. v Chazen Envtl. Serv.***, 84 AD3d 1181, 923 NYS2d 695 [2d Dept 2011], *quoting* ***Sokol v Leader***, 74 AD3d 1180, 1180–1181, 904 NYS2d 153 [2d Dept 2010]). On such a motion to dismiss, the court must accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see* ***Goshen v Mutual Life Ins. Co. of N.Y.,*** 98 NY2d at 314, 326, 746 NYS2d 858 [2002]; ***Leon v Martinez***, 84 NY2d 83, 87, 614 NYS2d 972 [1994]). However, bare legal conclusions and factual averments flatly contradicted by the record are not presumed to be true (*see* ***Simkin v Blank***, 19 NY3d 46, 945 NYS2d 222 [2012]); ***Khan v MMCA Lease, Ltd.***, 100 AD3d 833, 954 NYS2d 595 [2d Dept 2012]; ***U.S. Fire Ins. Co. v Raia***, 94 AD3d 749, 942 NYS2d 543 [2d Dept 2012]).

The test distills into "whether the complaint gives sufficient notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from its averments" (***Treeline 990 Stewart Partners, LLC v RAIT Atria, LLC***, 107 AD3d 788, 967 NYS2d 119 [2d Dept 2013]; ***JP Morgan Chase v J.H. Elec. of N.Y., Inc.***, 69 AD3d 802, 803, 893 NYS2d 237 [2d Dept 2010]). In making such determination, the court must consider whether the complaint contains factual allegations as to each of the material elements of any cognizable claim and whether such allegations satisfy any express, specificity requirements imposed upon the pleading of that particular claim by applicable statutes or rules (*see* ***East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.***, 66 AD3d 122, 884 NYS2d 94 [2d Dept 2009], *aff'd* 16 NY3D 775, 919 NYS2d 496 [2011]).

It is well settled that 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 (*see* ***Eurycleia Partners, LP v Seward & Kissel, LLP***, 12 NY3d 553, 559, 883 NYS2d 147 [2009]; ***Orchid Constr. Corp. v Gottbetter***, 89 AD3d 708, 932 NYS2d 100 [2d Dept 2011], 910 NE2d 976). CPLR 3016(b) requires that "the circumstances of the fraud must be stated in detail, including specific dates and items (***Stein v. Doukas***, 98 AD3d 1024, 1025, 951 NYS2d 173 [2d Dept 2012]; ***Moore v Liberty Power Corp., LLC***, 72 AD3d 660, 661, 897 NYS2d 723 [internal quotation marks omitted]).

A review of the allegations set forth in the complaint reveal that the plaintiff failed to plead with the requisite particularity any claim that it was fraudulently induced by the defendant to execute the August 16, 2011 partnership withdrawal agreement and the general release contained therein. The plaintiff's conclusory claims did not set forth the time or place of the defendant's alleged misrepresentations and failed to properly plead with the requisite specificity the elements of a claim for misrepresentation of a material fact including justifiable reliance (*see* ***Nanomedicon, LLC v Research Found. of State Univ. of New York*** , 112 AD3d 594, 976 NYS.2d 191 [2d Dept 2013]; ***Orchid Constr. Corp. v Gottbetter***, 89 AD3d 708, *supra*; ***Stein v Doukas***, 98 AD3d 1024, *supra*). The plaintiff's Second cause of action is thus dismissed pursuant to CPLR 3211(a)(7).

Since the plaintiff's Second cause of action, in which the validity of the release set forth in the August 16, 2011 partnership withdrawal agreement is assailed, is no longer viable due to legal insufficiency, the defendant is entitled to a dismissal of the First and Third Causes of action on the grounds that the general release language contained in such agreement precludes the prosecution of those causes of action. As found above, the moving papers of the defendant established that the release signed by the plaintiff was fairly and knowingly made and constituted a jural act which finalized the business relationship between the plaintiff and the defendant which arose out of the merger of the previously separate accounting and consulting firms in 2008 and that the conduct complained of falls within the scope of the release. The plaintiff's prosecution of the claims advanced in the First and Third causes of action are thus barred by the general release provisions set forth in the August 16, 2011 partnership withdrawal agreement (*see* ***Gale v Citicorp***, 78 AD2d 197, *supra*). The First and Third causes of action are thus dismissed pursuant to CPLR 3211(a)(5).

Also granted are those portions of the defendant's motion wherein he seeks dismissal of the plaintiff's Fourth cause of action sounding in breach of the partnership agreement by the defendant due to alleged post-withdrawal defalcations. It is well established that the essential 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]). Here, by its express terms, the August 16, 2011 withdrawal agreement replaced and terminated all prior agreements including the Partnership Agreement thereby rendering post-withdrawal wrongdoing non-actionable. The claims advanced in the Fourth cause of action are thus legally insufficient since no partnership agreement was in existence at the time of the alleged breach by the defendant. The plaintiff's fourth cause of action is thus dismissed pursuant to CPLR 3211(a)(7).

Denied are the remaining portions of the defendant's motion wherein it seeks sanction, costs and fees pursuant to 22 NYCRR Part 130-1. The court finds that the complained of action, namely, the commencement of this action, did not constitute frivolous conduct within the contemplation of that rule.

DATED: 4/3/14

THOMAS F. WHELAN, J.S.C.