

Lumen at White Plains v Stern
2014 NY Slip Op 31434(U)
May 30, 2014
Sup Ct, New York County
Docket Number: 653052/2013
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDWARDS
Justice

PART 35

Lumen at White Plains

-v-

Stern, Moses

INDEX NO. 653052/2013

MOTION DATE 4/29/14

MOTION SEQ. NO. 001

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s).

Answering Affidavits — Exhibits No(s).

Replying Affidavits No(s).

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

In this action arising out of a real estate transaction, defendants Buchanan Ingersoll & Rooney, P.C. ("BIR") (motion seq. #001) and Stephen Friedman ("Friedman") (motion seq. #002) (collectively referred to as "defendants") move to dismiss the complaint of the plaintiffs Lumen at White Plains, LLC ("LWP"), Salvatore DiPiazza ("DiPiazza"), and DiPiazza as Member of LWP (collectively, "plaintiffs") on the grounds that the complaint fails to state a claim against them and fails to plead fraud with particularity. Motion seq. 001 and 002 are consolidated for joint disposition herein.

Factual Background

In the complaint, plaintiffs allege that in January 2007, DiPiazza, on behalf his limited liability company LWP, entered into an agreement to purchase property from Pulte Homes New York for condominium development in White Plains, New York. DiPiazza later entered into agreements in which defendant Moses Stern a/k/a Mark Stern (who was represented by defendants Howard Reiss and Sherri Eisenpress of defendant Reiss Eisenpress LLP) agreed to provide financing for the project in exchange for a portion of DiPiazza's interests in LWP. In August 2007, DiPiazza executed various operating agreements for entities set up for the purchase and development of the condominium project, as well as transfer tax documents. The documents DiPiazza executed were then provided to Reiss Eisenpress LLP in escrow pending Stern's contribution into LWP of the purchase and development financing. The closing of Stern's purchase of DiPiazza's interest and of the property were to occur simultaneously.

Dated: , J.S.C.

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

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
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However, Stern and the various defendants moved forward with the transaction (“as if Stern now owned a majority or all of LWP”) and Reiss Eisenpress LLP, as counsel for LWP, consummated the purchase transaction of the property by LWP from Pulte. A contract for sale for the purchase of the property by defendant Rome Partners and Associates, LLC (“Rome Partners”) (also represented by Howard Reiss and Sherri Eisenpress) from a non-existent company, defendant Kesef Properties, LLC (of which defendant Joseph Niederman was the alleged President) was presented to the bank which financed the transaction. At this loan closing, the bank was presented with a deed through which LWP transferred the property to Rome Partners. Plaintiffs assert that Kesef Properties LLC has never owned the property or even been in contract with LWP to purchase the property. As a result of the fraudulent transactions, DiPiazza was defrauded out of his ownership interest in LWP without consideration.

Thus, plaintiffs plead causes of action for fraud (first cause of action) and unjust enrichment (second cause of action) against all defendants, and indemnification (third cause of action) against First American, Fidelity and/or First American Title Insurance Company of New York.

Plaintiffs allege fraud perpetrated by Stern, Niederman, and Ephraim Frenkel (title agent) regarding their execution of fraudulent documents to consummate the above transactions and misrepresentations to plaintiffs of the purpose of the execution of the various documents. Plaintiffs allege that “At the time the Stern Defendants executed the purchase agreement with the Niederman Defendants, the Stern Defendants had been negotiating the purchase of the same Property from the Plaintiffs. They knew that their agreement with the Niederman Defendants was false and a sham.” The “Niederman Defendants misrepresented the existence of any entity, misrepresented their ownership of the Property, and entered into fraudulent transactions with the Stern Defendants.” Plaintiffs then allege that “The lawyers involved, Howard Reiss and Sherri Eisenpress of Reiss Eisenpress and Stephen Freidman of BIR, knew of each other’s involvement in the transactions and assisted the fraud by failing to take and/or intentionally omitting reasonable steps in the transactions, including but not limited to, title review, corporate review, and follow-ups with respect to transactions in escrow.” (§43).

In support of dismissal of the fraud and unjust enrichment claims, defendants argue that plaintiffs have not alleged any direct communications with BIR or Friedman, or that BIR or Friedman was in any way enriched at plaintiffs’ expense. Nor have plaintiffs alleged that the moving defendants represented them in any capacity. The claim that Friedman knew that LWP did not have a contract to sell the property to Rome Partners is insufficient. Plaintiffs alleged that the moving defendants were counsel for the other defendants who they claim defrauded them. The absence of any alleged duty to disclose is fatal to plaintiffs’ claim against the moving defendants.

In opposition, plaintiffs argue that the Complaint alleges sufficient basic facts that the defendants aided and abetted the fraud of the various other defendants. The existence of the underlying fraud, detailed allegations of the underlying fraud, and actual knowledge of the defendants are alleged within paragraphs 54 - 56 of the Complaint. Further, the substantial assistance of the defendants is alleged within the same paragraphs. Proof of same is not required at the pleading stage, and fraud can be established with circumstantial evidence, which can be obtained through much needed discovery.

In reply, defendants argue that the complaint does not allege that BIR or Friedman made any misrepresentation of fact to anyone so as to state a cause of action for fraud. And, there is no support for an aided and abetting claim since they have not alleged facts indicating that BIR or Friedman had a duty to disclose. Plaintiffs do not allege that BIR and Friedman did anything other than act as counsel to the opposing party in the transaction. Further, no relationship between plaintiffs and the BIR defendants, or enrichment at plaintiffs' expenses was alleged. And, plaintiffs have abandoned their unjust enrichment claims by failing to mention it in their opposing papers.

Discussion

In determining a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the Court's role is deciding "whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (*African Diaspora Maritime Corp. v Golden Gate Yacht Club*, 109 AD3d 204, 968 NYS2d 459 [1st Dept 2013]; *Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, 960 NYS2d 404 [1st Dept 2013]). On a motion to dismiss made pursuant to CPLR § 3211, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs "the benefit of every possible favorable inference," and "determine only whether the facts as alleged fit into any cognizable legal theory" (*Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, *supra*; *Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972, 638 NE2d 511 [1994]). However, "allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not" presumed to be true or accorded every favorable inference (*David v Hack*, 97 AD3d 437, 948 NYS2d 583 [1st Dept 2012]; *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81, 692 NYS2d 304 [1st Dept 1999], *aff'd* 94 NY2d 659, 709 NYS2d 861, 731 NE2d 577 [2000]; *Kliebert v McKoan*, 228 AD2d 232, 643 NYS2d 114 [1st Dept], *lv denied* 89 NY2d 802, 653 NYS2d 279, 675 NE2d 1232 [1996], and the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182, 372 NE2d 17 [1977]; *see also Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 NE2d 511 [1994]; *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150, 730 NYS2d 48 [1st Dept 2001]; *WFB Telecom., Inc. v NYNEX Corp.*, 188 AD2d 257, 259, 590 NYS2d 460 [1st Dept], *lv denied* 81 NY2d 709, 599 NYS2d 804, 616 NE2d 159 [1993]).

"A plaintiff alleging an aiding-and-abetting fraud claim must allege the existence of the underlying fraud, actual knowledge, and substantial assistance" (*Oster v Kirschner*, 77 AD3d 51, 905 NYS2d 69 [1st Dept 2010]). To state a cause of action for fraud, plaintiff must allege a misrepresentation or omission of a material fact, falsity, knowledge by the wrongdoer, justifiable reliance on the deception, and the resulting injury (*Rather v CBS Corporation*, 886 NYS2d 121 [1st Dept 2009]; *Waggoner v Caruso*, 886 NYS2d 368 [1st Dept 2009]). "[A]ctual knowledge need only be pleaded generally . . . particularly at the pre-discovery stage," as "a plaintiff lacks access to the very discovery materials which would illuminate a defendant's state of mind" (*id.*). And, "[s]ubstantial assistance exists 'where (1) a defendant affirmatively assists, helps conceal, or by virtue of failing to act when required to do so enables the fraud to proceed, and (2) the

actions of the aider/abettor proximately caused the harm on which the primary liability is predicated” (Stanfield Offshore Leveraged Assets, Ltd. v Metropolitan Life Ins. Co., 64 AD3d 472, 883 NYS2d 486 [1st Dept 2009]).

Moreover, a claim rooted in fraud must be pleaded with the requisite particularity under CPLR 3016 (b), sufficient to permit a “reasonable inference” of the alleged misconduct (Eurycleia v Seward & Kissel, 12 NY3d 553, 883 NYS2d 147 [2009]).

Here, there are no allegations to support a direct fraud claim against the moving defendants. Further, the bald, conclusory claim of aiding and abetting the alleged fraud are insufficient. The complaint fails to allege any factual allegations indicating any level of assistance either BIR or Friedman gave toward the alleged fraudulent transactions. That the moving defendants may have failed to disclose the underlying scheme to plaintiffs is insufficient in the absence of any facts establishing that the moving defendants owed any fiduciary or other duty to disclose same to plaintiffs (see Stanfield Offshore Leveraged Assets, Ltd. v Metropolitan Life Ins. Co., 64 A.D.3d 472, 883 N.Y.S.2d 486 [1st Dept 2009] (finding that where plaintiffs' claim that Credit Suisse assisted in the alleged fraud by failing to disclose Meridian's insolvency, such allegation was insufficient to support an aiding and abetting fraud claim absent a fiduciary duty or some other independent duty owed by Credit Suisse to the plaintiffs)).

In the absence of any pleaded facts to support the essential element of the claim of “substantial assistance” by the moving defendants, no claim for aiding and abetting the alleged fraud lies against the moving defendants herein.

And, plaintiffs’ failure to address the moving defendants’ contentions regarding the unjust enrichment claim merits dismissal of such claim.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by defendants Buchanan Ingersoll & Rooney, P.C. (motion seq. #001) and Stephen Friedman (“Friedman”) (motion seq. #002) to dismiss the complaint of the plaintiffs on the grounds that the complaint fails to state a claim against them and fails to plead fraud with particularity is granted, and the first and second causes of action are hereby severed and dismissed as against the moving defendants; and it is further

ORDERED that the remaining parties shall appear for a Preliminary Conference on July 22, 2014, 2:15 p.m.; and it is further

ORDERED that defendants shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

DATED: 5/30/14

HON. CAROL EDMEO J.S.C.

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