Remediation Capital Funding LLC v Noto
2014 NY Slip Op 32157(U)
August 6, 2014
Supreme Court, New York County
Docket Number: 652491/2011
Judge: O. Peter Sherwood

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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REMEDIATION CAPITAL FUNDING LLC,

Plaintiff,

- against -

PAUL J. NOTO, MICHAL ATTIA, JAMES BILOTTA, RE-NEW PROPERTIES, LLC, MAMARONECK DEVELOPMENT LLC and SHELDRAKE ESTATE CONDOMINIUMS LLC,

Defendants.

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DECISION AND ORDER
Motion Sequence No.: 005

Index No.: 652491/2011

O. PETER SHERWOOD , J.:

Defendant Paul J. Noto moves, pursuant to CPLR 3211 (a) (7), for dismissal of the complaint claiming failure to state a cause of action.[1] Plaintiff Remediation Capital Funding LLC (RCF) cross-moves, pursuant to CPLR 3025, for leave to amend the complaint. The background facts below are taken from the complaint and assumed true for purposes of this motion.

In 2006, plaintiff RCF, a New York limited liability company, was formed for the purpose of making high risk bridge loans (complaint, ¶¶ 12, 26). RCF hired Steven Parnes to solicit business for it (*id.*, ¶ 26). In February, 2007, Noto, as counsel for nonparty Ofer Attia, approached Parnes regarding potential short-term bridge loan financing on several properties in Mamaroneck, New York that Ofer Attia was seeking to purchase and develop (*id.*, ¶ 27).

Noto represented to RCF through Parnes and Erik Ekstein, a member of RCF, that the "Properties" (four separate properties that were a mixture of single-family residences and commercial properties) had recently been rezoned for residential use, and that site plan approval for Ofer Attia's proposed condominium project (Sheldrake Project) was imminent (*id.*, ¶ 28). Noto further represented that Ofer Attia had an option to purchase all of the Properties with a very small window to close (*id.*, ¶ 29).

Ofer and his wife, defendant Michal Attia, provided RCF with a workbook created by the Attias and, upon information and belief, Noto, showing the total cost to purchase the Properties as

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[1]Noto is the only remaining defendant. The defendants case has been discontinued as to others (*see* Stipulation of Discontinuance, dated June 27, 2013).

approximately $9.6 million. The Properties consisted of three parcels for $2.7 million, and the main parcel, 270 Waverly, for $6.9 million (*id.*, ¶ 33). The main parcel was owned by Waverly Land Management, Inc., a corporation owned by Doriano Totis and John Esposito, known as the "Blood Brothers" (*id.*, ¶ 27). Ofer Attia and Noto also represented that, although Ofer Attia had a contract with the Blood Brothers to purchase 270 Waverly for $6,595,000, Ofer Attia had convinced them to instead accept $1.9 million in cash and a membership interest in the entity that would own the properties, Sheldrake Lofts LLC (Lofts), which would entitle the Blood Brothers to a preferred distribution of $5 million, in addition to a participating interest in the Sheldrake Project (*id.*, ¶ 36). The acquisition of 270 Waverly was provided for in a Letter Agreement, dated June 6, 2005 (*id.*, ¶118) and a contract of sale made on November 15, 2006 (*see* Ekstein aff, exhibit C).

At an in-person meeting attended by Ofer Attia, Jay Furman, Ekstein, and Parnes, on behalf of RCF, Ofer Attia reaffirmed Noto's representations concerning the Properties and the small window that he had to close on the Properties (complaint, ¶ 34). At that meeting, Ofer Attia produced a detailed "Acquisition Summary" spreadsheet, created by himself, Michal Attia, and, upon information and belief, Noto, specifically detailing the arrangement for the sale of 270 Waverly. It listed the Blood Brothers as the sellers, a contract price of $6,595,000 for which the actual payoff at closing would be $1.9 million, and the balance as an equity participation. Ofer Attia also produced an appraisal by "The Leitner Group," valuing the Properties at $18 million. The appraisal was premised on multiple "Extraordinary Assumptions" that all approvals for development of the residential condominium project described in the appraisal would be obtained. These Extraordinary Assumptions, as well as the total purchase price, upon information and belief, were solely based on representations made by the Attias and Noto concerning the Properties (*id.*, ¶¶ 42-45).

RCF did not have sufficient time to obtain its own appraisal. Instead, RCF relied primarily on the represented land cost because, in the event that the Sheldrake Project was not completed, the property was zoned residential and, based on the land acquisition cost representations, RCF would be lending 50% of the $9.6 million market value of the security (i.e., the Properties). RCF agreed to loan Lofts $6,635,000 (the Loan) (*id.*, ¶ 49). The Loan closed within two weeks of the meeting between Ofer Attia, Noto, and RCF. The collateral for the Loan was a first priority lien on the Properties and a personal guarantee from Ofer Attia (*id.*, ¶ 52).

Although the Loan had an 18-month term, Ofer Attia and Noto represented that RCF would be repaid within six months. Based on Ofer Attia's representations, RCF believed it was lending less than 50% of the land cost and less than 50% of the land market value based on the $18 million appraisal, after accounting for the Extraordinary Assumptions of approvals that had not yet been attained, and that could not be validated in the extremely short window that defendants and Ofer Attia had to obtain financing (*id.*, ¶¶ 56-57).

The Loan closed on March 2, 2007, at the offices of counsel for RCF. Ofer Attia, the "Attia Defendants,"[2] and Noto intentionally arranged for the Blood Brothers' absence at the closing, for, had they attended, Noto would have had to disclose that he was simultaneously representing Ofer Attia, the Attia Defendants, and the Blood Brothers, a fact of which neither RCF nor the Blood Brothers were aware (*id.*, ¶¶ 59, 65-66).

The closing documents fraudulently represented the ownership structure of the initial purchasing entity, Sheldrake Estate Condominiums LLC (Sheldrake Estate), 50% of which had been transferred from Ofer Attia to Michal Attia on January 1, 2007. Also included with the closing documents was an opinion letter from Noto, addressed to RCF, dated March 2, 2007 (Opinion Letter). The Opinion Letter states that, to Noto's knowledge, and after due inquiry, the execution and delivery of the Loan documents "will not violate, conflict with, result in the breach of or constitute a default under any contract, agreement, instrument . . . to which [Lofts] or [Ofer Attia], as may be applicable, is subject." Noto knew this statement was false, because the Loan amount that Lofts and the Attias secured with Noto's assistance violated the terms of a prior letter agreement between Ofer Attia and the Blood Brothers (Letter Agreement), which Noto purportedly negotiated as counsel for the Blood Brothers. Noto also knowingly and untruthfully represented in the Opinion Letter that he had no interest in Lofts, or in any party involved in the subject transactions. In fact, he was acting as the undisclosed counsel to the Blood Brothers. Noto also represented that he had no financial interest in the Properties, other than his fees, but he was permitted to retain $300,000 of the $1.9 million that was to be paid to the Blood Brothers prior to transferring the $1.6 million balance to Re-New Properties, LLC (*id.*, ¶¶ 74, 85-92).

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[2]The Attia Defendants include Michal Attia, Mamaroneck Development LLC, Sheldrake Estate Condominiums LLC, and Re-New Properties, LLC (complaint, ¶ 2).

RCF first learned of the fraud in December, 2010, approximately three years after the closing, when an attorney for the Blood Brothers contacted RCF about a malpractice suit that the Blood Brothers brought against Noto, then pending in New York State Supreme Court, County of Westchester, entitled *Esposito & Totis v Noto* (index No. 26299-09) (Blood Brothers Action). The papers in the Blood Brothers Action alleged that the Blood Brothers never received any of the $1.9 million from Noto, and that the numerous oral and written representations that defendants and Ofer Attia made about the acquisition cost of the Properties, and the structure of the purchase of 270 Waverly from the Blood Brothers, were false. Moreover, for the first time, RCF learned that Noto was the Blood Brothers' original attorney, having been hired in 2003, and had negotiated a series of increasingly complex set of deals with Ofer Attia and his entities before becoming counsel to Ofer Attia and his entities regarding financing for the Sheldrake Project and obtaining municipal approvals (*id.*, ¶¶ 95, 97-98).

After Ofer Attia retained Noto, Noto, unbeknownst to the Blood Brothers, engaged in an undisclosed joint representation of Ofer Attia, the Attia Defendants, and the Blood Brothers. In exchange for their valuable property, the Blood Brothers were offered few legal protections (*id.*, ¶ 122). Pursuant to a Letter Agreement, the Blood Brothers did not participate in any potential upside of the Sheldrake Project. The contract at closing provided for a $6,595,000 purchase price for 270 Waverly that Ofer Attia and Noto represented was being paid to the Blood Brothers as a $1.9 million cash payment plus a $5 million preferred interest in the borrowing entity (*id.*, ¶ 144). These representations were false, made with the intention of inflating the land acquisition costs to induce RCF to loan significantly more money than it would have had it known the truth (*id.*, ¶ 145). As counsel to the Blood Brothers, Noto knew of defendants' and Ofer Attia's breaches of these agreements by obtaining the Loan and, therefore, his statement in the Opinion Letter to the contrary was false, made to induce RCF into entering into the Loan transaction (*id.*, ¶ 151).

The Blood Brothers never received any proceeds of the sale of 270 Waverly other than a few small consulting payments and the payoff of their small existing mortgage, all of which were funded by RCF (*id.*, ¶ 155). The defendants and Ofer Attia used the entire $1.9 million funded by RCF for the acquisition of 270 Waverly for other purposes, including the purchase of another piece of property for a different project in Mamaroneck (Harbor Village), and to pay Noto $300,000 for his role in facilitating the fraudulent scheme. No part of the $1.9 million was used for the Sheldrake

Project (*id.*, ¶ 156). Subsequently, Lofts defaulted on its obligations under the Loan Agreement with RCF (*id.*, ¶ 158).

On December 28, 2007, Ofer Attia requested that RCF advance Lofts (already in default) an additional $240,000 to cover a recreation fund contribution that Ofer Attia represented was required pursuant to a "Village" law. Attached to this request was a "Financial Overview" spreadsheet for the Sheldrake Project created by Ofer Attia and Michal Attia, and, upon information and belief, with assistance from Noto, that fraudulently misrepresented the cost of the Properties as $11,855,000, which included a $5 million note to be paid at closing, plus other costs that had been attributed to the Properties subsequent to the Loan closing (*id.*, ¶¶ 166-170).

On October 12, 2009, Ofer Attia filed a Chapter 7 bankruptcy petition in the United States Bankruptcy Court for Southern District of New York (Chapter 7 Proceeding). On August 10, 2010, on the eve of RCF's noticed foreclosure sale of the Properties, Lofts filed a Chapter 11 bankruptcy petition in the United States Bankruptcy Court for Southern District of New York (Chapter 11 Proceeding) (*id.*, ¶¶ 173, 176).

Unbeknownst to RCF, on January 1, 2007, Ofer Attia had transferred 50% of his then 100% interest in Sheldrake Estate to Michal Attia, for no listed consideration. Subsequently, RCF obtained copies of other purported transfers of interests for no consideration. As a result of these purported transfers, Ofer Attia had no interest in any of the entities preceding his personal bankruptcy filing in October, 2009. These purported assignments were drafted on the eve of Ofer Attia's personal bankruptcy filing and back-dated in an attempt to protect the assignments from reversal. The bankruptcy court reversed those transfers (*id.*, ¶¶ 190-201). Ofer Attia's Chapter 7 Proceeding was concluded when the bankruptcy court entered a Final Decree on July 30, 2010. On July 29, 2010, Michal Attia retransferred her 51% in Sheldrake Estate to Ofer Attia (*id.*, ¶¶ 223-224).[3]

The Sheldrake Project is now mired in litigation. In the Chapter 11 Proceeding, the Attias represented that the current value of the Properties is $3 million. RCF is currently owed $14 million on the Loan, plus attorneys' fees, costs, and eventual foreclosure sale costs (*id.*, ¶¶ 253-255).

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[3]¶207 of the complaint describes a transfer of 50% from Ofer to Michal. ¶224 describes a transfer of 51% from Michal to Ofer. The origin of the additional 1% is unclear.

The complaint contains two causes of action. The First Cause of Action (Fraud) alleges that, in funding the Loan, RCF justifiably relied on defendants' misrepresentations of facts. RCF was injured by the amount of the Loan, less the value of the collateral in the approximate amount of $10 million, plus interest.

The Second Cause of Action (Debtor and Creditor Law § 273) alleges that conveyances were made while defendants were insolvent or which rendered defendants insolvent and were made without fair consideration. Any such transactions should be reversed, and any corporate veil that would otherwise exist should be pierced as to the individual defendants.

In support of the motion for dismissal of the complaint for failure to state a cause of action, Noto argues that RCF acknowledges that Attia produced the documents on which it relied on to its detriment (the workbook/acquisition summary and The Leitner Group Appraisal), but that RCF only vaguely alleges "upon information and belief these documents were prepared by Noto." The complaint does not set forth how Noto would have known that these purported documents were false. RCF, a sophisticated lender, also fails to allege reasonable reliance, because it did not perform any due diligence. RCF has not identified which purported misrepresentations it relied on in issuing the subject Loan.

Noto also argues that RCF failed to plead a cognizable cause of action against him under Debtor and Creditor Law § 273, because Noto was not a "transferor" of the RCF Loan or the conveyances that gave rise to the RCF Loan. Even if Noto were deemed a "transferor" of the RCF Loan, RCF failed to plead that Noto was insolvent at the time of the RCF Loan, or was rendered insolvent by virtue of the RCF Loan.

RCF argues that both the original complaint and the proposed amended complaint allege that Noto made numerous material misrepresentations of facts, specifically that: (1) the purchase price of 270 Waverly was $6,595,000; (2) the issuance of the Loan would not violate any prior agreement between Attia and the Blood Brothers; and (3) Noto did not have any undisclosed interest. Noto had knowledge of the falsity of those facts because of his undisclosed representation of the Blood Brothers and negotiation of the Letter Agreement providing for the sale of 270 Waverly for $1.9 million.

RCF argues further that, because time was of the essence, it relied on the purported arm's length negotiated purchase prices of the Properties in deciding to loan up to a maximum of 50% loan-to-value against that amount. Both the original complaint and the proposed amended complaint specifically allege Noto's participation in the inflated purchase price scheme. Noto allegedly drafted the Opinion Letter addressed to RCF containing false statements, knowing that RCF would rely on its contents to fund the Loan.

DISCUSSION

Fraud Claims

"To make a prima facie claim of fraud, the complaint must allege misrepresentation or concealment of a material fact, falsity, scienter on the part of the wrongdoer, justifiable reliance and resulting injury" (*Dembeck v 220 Cent. Park S., LLC*, 33 AD3d 491, 492 [1st Dept 2006]). "'[R]eliance must be found to be justifiable under all the circumstances before a complaint can be found to state a cause of action in fraud'" (*VisionChina Media Inc. v Shareholder Representative Servs., LLC*, 109 AD3d 49, 57 [1st Dept 2013], quoting *Danann Realty Corp. v Harris*, 5 NY2d 317, 322 [1959]).

The essence of the fraud claim is based on the assertion that defendants misrepresented the value of the Properties upon which RCF had made the Loan. RCF emphasizes that it did not perform any due diligence of its own in assessing the Properties' value, because RCF lacked sufficient time to obtain its own appraisal. This assertion is unavailing as a basis for a finding of justifiable reliance for a "sophisticated party" that characterizes itself as one "formed for the purpose of making short term bridge loans for projects with environmental liabilities up to a maximum of 50% loan-to-value for land only properties" (Memorandum in Opposition at 1; complaint, ¶¶ 12, 26; *see VisionChina Media Inc.*, 109 AD3d at 57["Sophisticated investors must show they used due diligence and took affirmative steps to protect themselves from misrepresentations by employing what means of verification were available at the time"]; *see also Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 100 [1st Dept 2006] ["New York law imposes an affirmative duty on sophisticated investors to protect themselves from misrepresentations made during business acquisitions by investigating the details of the transactions and the business they are acquiring"]).

RCF does not dispute the assertion that it had the means to discover the actual value of the Properties by conducting its own appraisal. That it chose not to so because it wanted to participate in a rushed transaction indicates that it "willingly assumed the business risk that the facts may not be as represented" (*DDJ Mgt., LLC v Rhone Group L.L.C.*, 15 NY3d 147, 154 [2010] [internal quotation marks and citation omitted]). RCF has not shown, or even alleged, that it was unable to obtain its own appraisal of the value of the Property so as to adhere to its strategy of maintaining a 50% loan-to-value to ensure an equity cushion that would protect it from market downturns. As stated by the Court of Appeals:

> [I]f the facts represented are not matters peculiarly within the party's knowledge, and the other party has the means available to him of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations

(*id.* at 154 [quotation marks and citation omitted]). On the face of the complaint, RCF's reliance on the alleged misrepresentations by Noto was unreasonable as a matter of law. As such, RCF has failed to establish reasonable reliance (*see Miller v Icon Group LLC*, 77 AD3d 586, 587 [1st Dept 2010] ["the fraudulent inducement defense was properly rejected. Defendant, a sophisticated real estate entity represented by counsel, could not establish justifiable reliance since it did not undertake due diligence concerning a matter it regarded as essential to the transaction and was not peculiarly within its knowledge"]).

In *DDJ Mgt., LLC*, the Court of Appeals found that the plaintiffs had taken reasonable steps to protect themselves by insisting that the borrower (American Remanufacturers Holdings, Inc. [ARI]) represent and warrant that:

> the 2004 financial statements present fairly in all material respects the financial position of ARI as at December 31, 2004 and the results of ARI's operations and cash flows for the period then ended'; that the statements were prepared in accordance with generally accepted accounting principles; that 'between December 31, 2003 and March 22, 2005 [the closing date], no event has occurred, which alone or together with other events, could reasonably be expected to have a Material Adverse Effect' on ARI's business, assets, operations or prospects or its ability to repay the loans; and that 'no information contained in the loan agreement, the other loan documents or the financial statements being furnished to the Plaintiffs contains any untrue statement of a material fact or omits to state a material fact necessary to

> make the statements contained therein not misleading in light of the circumstances under which they were made"

id. at 153). The plaintiffs there alleged that the "defendants presented them with ARI financial statements that were designed to inflate the number with which the plaintiffs were most concerned - ARI's earnings before interest, taxes, depreciation and amortization" (*id.* at 151). Hence, the misrepresentations pertained to ARI's own financial condition, which were peculiarly within that party's knowledge, and thus susceptible to manipulation and fraud. Here, however, the valuation of the Property was not something that was within the particular knowledge of Noto and the other defendants. Nevertheless, RCF chose to rely on defendant's rendition of the value of the Property. As stated by RCF in the complaint, Ofer Attia produced an appraisal valuing the Properties at $18 million, but premised upon "extraordinary assumptions" that all approvals for the development of the residential condominium project described in the appraisal would be obtained, assumptions that were based solely on representations made by the Attias and Noto concerning future events regarding the Properties (complaint, ¶¶ 42-45). Thus, *DDJ Mgt., LLC* does not warrant a different result (*see HSH Nordbank AG v UBS AG*, 95 AD3d 185, 198 n 9 [1st Dept 2012] [distinguishing *DDJ Mgt., LLC* on the ground, among others, that "the matters misrepresented therein [concerning a borrower's financial condition] were matters of existing fact peculiarly within the knowledge of the defendants"]).

RCF states that, in deciding to close on and fund the Loan, it sought to protect itself by relying on an arm's-length negotiated purchase price for 270 Waverly of $6,595,000. According to RCF, a legitimate arm's-length purchase price is a good indicator of market value, and a 50% loan-to-value creates an equity cushion that protects the lender (Memorandum in Opposition at 2). However, that transaction was not intended to be consummated according to that contract. According to the complaint, the Blood Brothers had, instead, agreed to accept $1.9 million at closing and a greatly flawed equity participation in Lofts (complaint ¶¶ 119-22, 153). Thus, viewed in a light most favorable to plaintiff, RCF was not relying on a "legitimate arm's-length purchase price".

Under some circumstances, allegations that a law firm knowingly prepared an opinion letter containing material misrepresentations of fact can be sufficient to state a cause of action for fraud (*see e.g. North Fork Bank v Cohen & Krassner*, 44 AD3d 375, 375 [1st Dept 2007]). RCF argues

that, in the Opinion Letter, Noto made numerous material misrepresentations of facts, specifically that: (1) the purchase price of 270 Waverly was $6,595,000; (2) the issuance of the Loan would not violate any prior agreement between Ofer Attia and the Blood Brothers; and (3) Noto did not have any undisclosed interest. Assuming that these are "matters peculiarly within the party's knowledge" (*DDJ Mgt., LLC*, 15 NY3d at 154), as stated above, the source of the alleged harm to RCF was the alleged false appraisal of the Properties, facts that were not exclusively within Noto's knowledge. Hence, as discussed above, the cause of action for fraud fails to adequately allege justifiable reliance.

"[W]hen the party to whom a misrepresentation is made has hints of its falsity, a heightened degree of diligence is required of it" (*Global Mins. & Metals Corp. v Holme*, 35 AD3d at 100). Although the allegations of the complaint do not indicate that RCF had hints of falsity, the facts that (1) $5 million of the purchase price consisted of a preferred interest in the borrower, (2) the appraisal was based on extraordinary assumptions and (3) the transaction was presented as one that had to close in a very short time, should have made RCF wary of the borrowers' claims about the value of the Properties and the underlying transactions with the Blood Brothers. RCF was asked to make a loan to support a complex transaction that was to close within two weeks from the first time it was presented with the proposal. Indeed, it took RCF a 43-page complaint, containing only two causes of action, to describe the parties' transactions. As a matter of law, and based on the particular circumstances presented here, it was unreasonable for RCF to base the Loan on defendants' representations.

Additionally, the allegations against Noto fail to support a fraud claim because they are directed primarily at the Attias, while seeking to establish Noto's participation through allegations based merely on "information and belief" (*see 501 Fifth Ave. Co. LLC v Alvona LLC.*, 110 AD3d 494, 494 [1st Dept 2013]).

As for the Second Cause of Action (Fraudulent Conveyance), RCF has abandoned this claim. It has not argued against its dismissal in its opposition papers, and it has removed it from its proposed amended complaint.

Cross motion

In its cross-motion, RCF seeks leave to amend the complaint, wherein the sole defendant is Noto, to replace the cause of action for fraudulent conveyance with one for negligent

misrepresentation, and to retain the cause of action for fraud. RCF argues that granting leave will not result in surprise or prejudice to Noto. The proposed amended complaint also eliminates allegations unrelated to Noto.

"A motion for leave to amend the complaint pursuant to CPLR 3025(b) should be freely granted unless the proposed amendment is palpably insufficient to state a cause of action or is patently devoid of merit" (*Smith-Hoy v AMC Prop. Evaluations, Inc.*, 52 AD3d 809, 811 [2d Dept 2008] [internal quotation marks and citation omitted]). Here, leave must be denied as to the fraud cause of action, because, although the "upon information and belief" qualification has been removed, the proposed amended complaint still fails to adequately allege justifiable reliance (*see Bishop v Maurer*, 83 AD3d 483, 485 [1st Dept 2011]).

As for the proposed negligent misrepresentation cause of action, RCF alleges that Noto had a duty to use reasonable care to impart correct information to RCF in the Opinion Letter, which was a requirement for closing on the Loan. Allegedly, Noto violated his duty to use reasonable care in imparting the information to RCF by knowingly including false information. Allegedly, Noto knew that the information was to be used for particular purposes; specifically to enable RCF to decide whether to issue the Loan. As a result, RCF issued the Loan and subsequently incurred damages because the Loan was not repaid and was undersecured.

"It has long been the law in New York that a plaintiff in an action for negligent misrepresentation must show either privity of contract between the plaintiff and the defendant or a relationship 'so close as to approach that of privity'" (*Sykes v RFD Third Ave. 1 Assoc., LLC*, 15 NY3d 370, 372 [2010], citing *Ultramares Corp. v Touche*, 255 NY 170, 182-183 [1931]; *Glanzer v Shepard*, 233 NY 236 [1922]; *Credit Alliance Corp. v Arthur Andersen & Co.*, 65 NY2d 536, 551 [1985]). As is the case with other professionals, attorneys may be held liable for economic loss injury caused by negligent misrepresentation (*see Prudential Ins. Co. of Am. v Dewey, Ballantine, Bushby, Palmer & Wood*, 80 NY2d 377, 381 [1992], *rearg denied* 81 NY2d 955 [1993]). This is especially true here, where the Opinion Letter was expressly addressed to RCF, allegedly with the understanding that RCF would be relying upon the representations contained therein (as well as other representations not contained in the Opinion Letter), in deciding to consummate the transaction at issue. Thus, the Opinion Letter satisfied the three requirements set forth in *Securities Inv. Protection*

Corp. v BDO Seidman (95 NY2d 702, 711 [2001]) (a decision rendered in the context of a report issued by an accountant): (1) whether the defendant was aware that the information imparted was to be used for a particular purpose; (2) whether in furtherance of such purpose, a known party intended to rely; and (3) whether there was some linking conduct that evinced the defendant's understanding of that party's reliance (citing *Credit Alliance Corp. v Arthur Andersen & Co.*, 65 NY2d at 551). Thus, whether there was a relationship "so close as to approach that of privity" is not at issue here.

However, besides demonstrating "the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff," the plaintiff must demonstrate that the information was incorrect and that it reasonably relied on the information (*see J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148, *rearg denied* 8 NY3d 939 [2007]). The problem with the proposed cause of action is that "reliance is an element of a negligent misrepresentation claim against a professional" (*Ackerman v Price Waterhouse*, 252 AD2d 179, 197 [1st Dept 1998]). As previously stated, according to RCF, in the Opinion Letter, Noto made material misrepresentations of facts that: (1) the purchase price of 270 Waverly was $6,595,000; (2) the issuance of the Loan would not violate any prior agreement between Ofer Attia and the Blood Brothers; and (3) Noto did not have any undisclosed interest. These alleged misrepresentations in the Opinion Letter do not pertain to the appraisal of the Properties, and, as discussed above, it was the alleged false appraisal that caused the harm to RCF.

The proposed amended complaint does not adequately allege that Noto breached a duty owed to RCF that was created by the issuance of the Opinion Letter (*Prudential Insur. Co. v Dewey, Ballantine, Bushby, Palmer & Wood*, 80 NY2d at 386-387). In negligent misrepresentation cases, "[r]eliance provides the requisite causal connection between the defendant's misrepresentation and the plaintiff's injury" (*Ackerman v Price Waterhouse*, 252 AD2d at 197). Such reliance is not alleged here.

Moreover, the complaint does not allege facts showing misrepresentations made in the Opinion Letter. The complaint and the documentary evidence presented in connection with the cross-motion confirms the allegation that there was a contract of sale for 270 Waverly for a purchase price of $6,595,000.00 (*see* Ekstein aff, exhibit C, NYSCEF Doc. No. 113). Plaintiff was aware that

the contractual sale price was to be paid as $1.9 million in cash and a preferred equity interest valued at $5 million in the Sheldrake Project (*see* compl. ¶¶ 7, 43). The complaint does not allege any facts tending to show falsity of the statement in the Opinion Letter dated March 3, 2007, that "execution and delivery of the Loan Documents... will not violate... any contract... to which [Sheldrake Lofts LLC and/or Offer Attia]; as applicable, is subject" (Ekstein aff, exhibit D, NYSCEF Doc. No. 114). Also, the complaint does not allege facts to show that Noto made misrepresentations when he stated that "I have no financial interest in the Property other than fees for legal services performed." The fact that Noto represented the Blood Brothers almost two years earlier and was paid for his legal services does not raise an inference that Noto had a financial interest in the Properties.

Accordingly it is

ORDERED that the motion by Paul J. Noto to dismiss the complaint is granted and the complaint is dismissed with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the cross motion by Remediation Capital Funding LLC for leave to amend its complaint is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

DATED: August 6, 2014

E N T E R,

O. PETER SHERWOOD
J.S.C.