

Sapra v Patel

2014 NY Slip Op 32998(U)

January 6, 2014

Supremem Court, Westchester County

Docket Number: 57426/2013

Judge: William J. Giacomo

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.**

-----X
PRATAP SAPRA and SOMA DISTRIBUTORS, LLC,
Plaintiffs,

-against-

Index No. 57426/2013
Decision & Order

HIMESH PATEL, SUNRISE WHOLESALERS, INC.,
BHAVESH PATEL and JOHN DOES 1-10,
Defendant.

-----X
The following papers numbered 1 to 10 were read on defendants' motion to dismiss the complaint:

	<u>PAPERS NUMBERED</u>
Notice of Motion/Affirmation/Exhibits A- D	1-6
Memorandum of Law	7
Affirmation in Opposition	8
Memorandum of Law in Opposition	9
Memorandum of Law in Reply	10

Factual and Procedural Background

This action arises out of the sale of defendant Sunrise Wholesalers, Inc. ("Sunrise") which is operated by defendant Himesh Patel and Bhavesh Patel. Plaintiffs intended on purchasing the assets of Sunrise. In the spring of 2010, plaintiffs paid \$600,000 to defendants as a good faith deposit towards the purchase of Sunrise. Apparently the sale was never consummated, however, plaintiffs did receive a refund of the \$600,000 in May 2011.

Plaintiffs commenced this action against defendants asserting causes of action sounding in fraud, fraud in contract, conversion, negligent misrepresentation, conspiracy to defraud, aiding and abetting tortious conduct, promissory estoppel, unjust enrichment and breach of contract.

Defendants make this pre-answer motion to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action. In opposition, plaintiffs argue that given that their factual allegations are entitled every favorable inference, they have sufficiently stated all causes of action.

Discussion

On a motion to dismiss a complaint pursuant to CPLR §3211(a)(7) for failure to state a cause of action, “the court must liberally construe the complaint, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Minovici v Belkin BV*, 109 AD3d 520 [2nd Dept 2013]; see *Leon v Martinez*, 84 NY2d 83, 87–88; *Treeline 990 Stewart Partners, LLC v RAIT Atria, LLC*, 107 AD3d 788, 791 [2nd Dept 2013]). Moreover, “[w]here evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one” (*Rabos v R & R Bagels & Bakery, Inc.*, 100 AD3d 849, 851–852 [2nd Dept 2012]; see *Guggenheimer v Ginzburg*, 43 NY2d 268, 274–275; *Minovici v Belkin BV*, 109 AD3d 520 [2nd Dept 2013]). However, “unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, again

dismissal should not eventuate" (*Guggenheimer v Ginzburg*, 43 NY2d at 275; see *Rabos v R&R Bagels & Bakery, Inc.*, 100 AD3d 849, 851-852 [2nd Dept 2012]).

Pursuant to CPLR 3016(b), "where a cause of action or defense is based upon misrepresentation [or] fraud..., the circumstances constituting the wrong shall be stated in detail." The Court notes that in their complaint plaintiffs make specific allegations regarding the alleged fraud. The complaint alleges how each defendant made false representations and omissions with the knowledge that they were false with the intent to have plaintiffs rely on those representations, upon which plaintiffs did rely and thereafter suffered damages. For example, plaintiffs make very specific allegations regarding how defendants improperly represented to him that Sunrise was worth much more than what was reflected on the business's tax return or its books.

Accordingly, defendants' motion to dismiss plaintiffs' first cause of action sounding in fraud is DENIED.

With respect to plaintiffs' second cause of action seeking damages for constructive fraud, defendants argue that such a claim is not valid since there was no fiduciary or confidential relationship between plaintiffs and defendants. In this seemingly arms-length business transaction, plaintiffs have not sufficiently alleged the existence of a fiduciary relationship between the parties (see *Brown v. Lockwood*, 76 AD2d 721, 731 [2nd Dept 1980]). Accordingly, plaintiffs' second cause of action is DISMISSED.

Defendants do not seek dismissal plaintiffs' third cause of action sounding in conversion.

With respect to plaintiffs' fourth cause of action sounding in negligent misrepresentation, a claim for negligent misrepresentation requires the plaintiff to

demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information (*see Parrott v Coopers & Lybrand*, 95 NY2d 479, 484 [2000]; *Murphy v Kuhn*, 90 NY2d 266, 270 [1997]). In view of the fact that there is no allegation of a special or privity-like relationship between the parties, this cause of action is DISMISSED.

Plaintiffs' fifth cause of action sounding in conspiracy to commit a fraud must be DISMISSED since New York does not recognize a cause of action for civil conspiracy (*see Pappas v. Passias*, 271 AD2d 420 [2nd Dept 2000]).

Plaintiffs' sixth, seventh and eighth causes of actions sound in aiding and abetting a fraud. To plead a cause of action to recover damages for aiding and abetting fraud, the complaint must allege the existence of an underlying fraud, knowledge of the fraud by the aider and abettor, and substantial assistance by the aider and abettor in the achievement of the fraud (*see Stanfield Offshore Leveraged Assets, Ltd. v Metropolitan Life Ins. Co.*, 64 AD3d 472, 476 [1st Dept 2009]). Here, since plaintiffs have sufficiently alleged a fraud cause of action, defendants' motion to dismiss the sixth, seventh, and eighth causes of action is DENIED.

Plaintiffs' ninth cause of action is for promissory estoppel. To state a viable cause of action for promissory estoppel, the following elements must be established: (1) an oral promise that is sufficiently clear and unambiguous; (2) reasonable reliance on the promise by a party; and (3) injury caused by the reliance (*see Knight Sec. v Fiduciary Trust Co.*, 5 AD3d 172 [1st Dept 2004]). Here, plaintiff made sufficient factual allegations to support a

claim for promissory estoppel. Defendants' motion to dismiss the ninth cause of action is DENIED.

Defendants do not seek to dismiss the tenth cause of action sounding in unjust enrichment.

Plaintiffs' eleventh cause of action seeks damages for breach of contract. Contrary to defendants' arguments plaintiff has sufficiently alleged all the elements of a breach of contract cause of action. Accordingly, defendants' motion to dismiss the tenth cause of action is DENIED.

Defendants also seek to dismiss plaintiffs' request for an award of treble damages, punitive damages and attorneys fees. Plaintiff does not dispute that treble damages are only available when expressly provided by statute. Nor do they dispute that no such statute is applicable herein. With respect to punitive damages and attorneys fees, plaintiff argues that such awards would be appropriate if they prove bad faith and actual malice.

In view of the fact that plaintiffs have alleged that defendants intentionally kept two sets of books, submitted improper tax returns and doctored other documents as part of this business transaction, they have alleged sufficient facts to support a claim for punitive damages (*see Walker v. Sheldon*, 10 NY2d 401 [1961]). However, plaintiff has not alleged sufficient facts to support their claim for attorneys fees (*see Brook Shopping Ctrs. v Bass*, 107 A.D.2d 615, 483 N.Y.S.2d 1021 [1st Dept 1985])[the allegations of the complaint fall far short of demonstrating actual malice and that defendants acted with disinterested malevolence, intentionally seeking to inflict economic injury on plaintiffs by forcing them to engage legal counsel]).

Accordingly, defendants' motion seeking to dismiss plaintiffs' claims for treble damages and attorneys fees is GRANTED, however, their motion seeking to dismiss plaintiffs' punitive damages claim is DENIED.

Summary

Defendants' motion to dismiss is GRANTED only to the extent of dismissing plaintiffs' second, fourth and fifth causes of action and plaintiffs' claims for treble damages and attorneys fees. The motion is DENIED in all other respects.

The parties are to appear in the Preliminary Conference Part on February 24, 2014, room 800 at 9:30 a.m. for further proceedings.

Dated: White Plains, New York
January 6, 2014



HON. WILLIAM J. GIACOMO, J.S.C.