DeBenedictis v Malta
2014 NY Slip Op 33476(U)
March 6, 2014
Supreme Court, New York County
Docket Number: 602537/2008
Judge: Marcy S. Friedman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: Hon. Marcy Friedman, J.S.C.

ROBERT N. DEBENEDICTIS,

Plaintiff,

- against –

ROBERT MALTA and SALVATORE GAUDIO.

Defendants.

ROBERT MALTA,

Third-Party Plaintiff,

- against –

DANIEL PERLA ASSOCIATES, LP,

Defendant.

Index No.: 602537/2008

Motion Seq. No. 003

DECISION/ORDER

This action, brought by plaintiff Robert DeBenedictis against defendant/third-party plaintiff Robert Malta, arises out of an agreement between the parties to exchange their interests in jointly owned real properties. The complaint alleges causes of action for fraud, fraudulent misrepresentation, fraudulent concealment, breach of fiduciary duty, and breach of the covenant of good faith and fair dealing, based on Malta's alleged concealment of a pending sale of one of the properties and of air rights to others. Malta now moves for summary judgment dismissing all claims against him.[1]

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[1] In a decision dated October 16, 2009, this Court (Fried, J.) denied defendant Salvatore Gaudio's motion to dismiss the complaint and Malta's cross-motion to dismiss the complaint. Subsequently, on September 11, 2012, DeBenedictis dismissed with prejudice all claims against Gaudio. (Joint Statement of Undisputed Facts ¶ 12.)

Facts

The following facts are undisputed. DeBenedictis and Malta exchanged their respective interests in four separate parcels of Manhattan real estate. The parcels involved in the exchange were 1431 Second Avenue, 1435 Second Avenue, 1439 Second Avenue (collectively, the Second Avenue Properties), and 81 Greenwich Street. (Joint Statement of Undisputed Facts [JS] ¶ 5.) As of December 27, 2004, LMS Realty LLC (LMS) owned 1439 Second Avenue; and GMD Realty LLC (GMD) owned 1431 Second Avenue and 1435 Second Avenue. (Id. ¶ 2.) DeBenedictis and Malta each held a 25% interest in LMS and GMD. (Id.) Gaudio held a 50% interest in each of these companies. (Id.) Greenwich Partners LLC (Greenwich), in which DeBenedictis and Malta each held a 50% ownership interest, owned 81 Greenwich Street. (Id.)

On December 27, 2004, DeBenedictis and Malta entered into an agreement (the Exchange Agreement) to separate their property interests. (JS ¶¶ 5, 10; Agreement [Kapin Aff. In Supp., Ex. E].) Prior to the exchange, a list was prepared by Malta and DeBenedictis setting forth the value of each property to be exchanged (the List).[2] (JS ¶ 15; Kapin Aff. In Supp., Ex. E.) The Exchange Agreement provided for the transfer to Malta of 100% of DeBenidictis' interest in GMD and LMS in exchange for the transfer to DeBenedictis of 100% of Malta's interest in Greenwich. (JS ¶ 5.) As a result, DeBenedictis became the 100% owner of 81 Greenwich Street, and Malta became the 50% owner of the Second Avenue Properties with Gaudio. The List provided the following values for the properties: $3,132,000 for 1431 Second Avenue; $2,788,416 for 1435 Second Avenue; $3,128,544 for 1439 Second Avenue; and $4,125,000 for 81 Greenwich Street.[3] (P.'s Memo. In Opp. at 1-2.)

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[2] The List is annexed to the Exchange Agreement.

[3] This value represented one half of the option to purchase price included in a January 2003 lease for *81* Greenwich. (P.'s Memo. In Opp. at 2.)

On February 14, 2005, 1431 Second Avenue was sold to a developer for $8,750,000 ($5,618,000 over the value stated in the List). (Aff. In Opp. Of James H. Rowland [Attorney for DeBenedictis], ¶ 13; Ex. F.) In addition, as of February 14, 2005, LMS entered into a contract for the sale of air rights to 1435 and 1439 Second Avenue. (Id., Ex. D.)

DeBenedictis claims that the consummation of these transactions a mere one and one-half months after the Exchange Agreement indicates that Malta knew of the pending sales prior to executing the Exchange Agreement and failed to disclose this fact to DeBenedictis. Malta denies such knowledge.

Discussion

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212 [b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b])." (Zuckerman, 49 NY2d at 562.) "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (Vega v Restani Constr. Corp., 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted].) "[I]ssue-finding, rather than issue-determination, is key. Issues of credibility in particular are to be resolved at trial, not by summary judgment." (Shapiro v Boulevard Hous. Corp., 70 AD3d 474, 475 [1st Dept 2010], citing S.J. Capelin Assoc., Inc. v Globe Mfg. Corp., 34 NY2d 338, 341 [1974] [other internal citations omitted].)

Fraud, Fraudulent Misrepresentation, and Breach of the Covenant of Good Faith and Fair Dealing

The first cause of action for fraud and the second for fraudulent misrepresentation are based on the allegations that Malta intentionally undervalued the Second Avenue Properties on the List. The third cause of action for fraudulent concealment and the fourth for breach of fiduciary duty are based on the allegations that Malta had a duty to disclose to DeBenedictis, prior to the Exchange Agreement, that sales of 1431 Second Avenue and of the air rights to 1435 and 1439 Second Avenue were pending, and that Malta intentionally failed to make such disclosure. The breach of fiduciary duty cause of action is also based on the allegation that Malta intentionally undervalued the Second Avenue Properties. The fifth cause of action for breach of the covenant of good faith and fair dealing is based on the allegations that Malta intentionally undervalued the Second Avenue Properties and intentionally failed to disclose the pending sales. The causes of action for fraud, fraudulent misrepresentation, and breach of the covenant of good faith and fair dealing are dismissed as duplicative of the causes of action for fraudulent concealment and breach of fiduciary duty.

Breach of Fiduciary Duty

As a threshold matter, the court holds that the breach of fiduciary duty claims here sound in fraud, and are therefore subject to the six-year limitations period. (See Kaufman v Cohen, 307 AD2d 113, 119 [1st Dept 2003] ["[A] cause of action for breach of fiduciary duty based on allegations of actual fraud is subject to a six-year limitations period"].)

In order to plead breach of fiduciary duty, a plaintiff "must allege that (1) defendant owed [it] a fiduciary duty, (2) defendant committed misconduct, and (3) [it] suffered damages caused

by that misconduct." (Burry v Madison Park Owner LLC, 84 AD3d 699, 699-700 [1st Dept 2011]; Rut v Young Adult Inst., Inc., 74 AD3d 776, 777 [2d Dept 2010].)

In moving for summary judgment, Malta does not dispute that he owed fiduciary duties to DeBenedictis. However, Malta does argue that his fiduciary obligations to DeBenedictis were limited or modified by sections 11, 15, and 17 of the in the Exchange Agreement, which provide that neither party is relying on prior representations or representations not made in the agreement. Section 11 of the Exchange Agreement provides:

> "It is understood and agreed that this agreement constitutes the entire contract between the parties hereto, all understandings and agreements heretofore had are merged in this agreement and same is entered into after full investigation, neither party relying upon any statement or representation not embodied in this agreement, and any [sic] not be modified except by an instrument in writing signed by the parties hereto."

Section 17 is virtually identical to section 11. Section 15 similarly provides:

> "The Purchaser [DeBenedictis] acknowledges that the Seller [Malta], Seller's agents, employees and servants have not made any representations other than those which are specifically stated and contained herein and that the Purchaser is not relying upon any statements and/or representations other than those expressly stated herein. . ."

The court finds Malta's argument untenable given the lack of any language in these provisions that expressly and unambiguously modifies or eliminates Malta's fiduciary duties. It is settled that "[a] sophisticated principal is able to release its fiduciary from claims – at least where . . . the fiduciary relationship is no longer one of unquestioning trust – so long as the principal understands that the fiduciary is acting in its own interest and the release is knowingly entered into." (Centro Empresarial Cempresa S.A. v America Movil, S.A.B. de C.V., 17 NY3d 269, 278 [2011]; accord Pappas v Tzolis, 20 NY3d 228, 232 [2012], rearg denied 20 NY3d 1075 [2013]; cf. Limited Liability Company Law § 417[a] [with certain exceptions,"[t]he operating agreement may set forth a provision eliminating or limiting the personal liability of managers to

the limited liability company or its members for damages for any breach of duty in such capacity"].) However, Malta fails to cite any case law supporting the proposition that fiduciary duties can be modified or eliminated absent explicit language to that effect or a broad general release of claims, including fiduciary claims. (See Pappas, 20 NY3d 228 at 231-233 [in connection with a sale by members of their interest in a limited liability company to a co-member, holding that release of co-member from fiduciary duties was valid, where release provided not only that the sellers were not relying on any representations by the co-member, but also that "Steve Tzolis [the co-member] has no fiduciary duty to the undersigned Sellers in connection with [the] assignments"]; Centro Empresarial, 17 NY3d at 274, 278 [holding that release of "all manner of actions . . . whatsoever, in law or equity, whether past, present or future, actual or contingent . . . based upon, attributable to or resulting from the ownership of membership interests in [TWE] or having taken or failed to take any action in any capacity on behalf of [TWE] or in connection with the business of [TWE]" was "extraordinarily broad" and sufficient to release a fiduciary from claims].)[4]

The court holds that Malta's fiduciary obligations were not modified or limited by the Exchange Agreement. Malta was therefore obligated to make full disclosure of all material facts with respect to the transaction. (Centro Empresarial, 17 NY3d at 278 [fiduciary was "required to disclose any information that could reasonably bear on plaintiffs' consideration of [its purchase] offer"] [internal quotation marks and citation omitted, brackets in original]; Salm v Feldstein, 20 AD3d 469, 470 [2d Dept 2005] [holding that defendant, a co-member with plaintiff of a limited

[4] On the reply at the oral argument, Malta appeared to argue for the first time that the merger clause in the Exchange Agreement eliminated fiduciary duties that arose under prior agreements between the parties – i.e., operating agreements for the limited liability companies of which Malta and DeBenedictis were members. (Oral Argument Tr. at 17.) This argument appears to conflict with the above authority. In any event, it was not raised at a time when plaintiff had an opportunity to respond, and therefore will not be considered by the court.

liability company, "owed the plaintiff a fiduciary duty to make full disclosure of all material facts" in connection with defendant's purchase of plaintiff's membership interest in the company].)

Malta fails to eliminate triable issues of fact as to whether he satisfied this disclosure obligation prior to the execution of the Exchange Agreement. In support of his motion, Malta relies primarily on an affidavit in which he asserts that he was not part of discussions with developers regarding sale of the Second Avenue property and air rights, and was unaware of any "advanced negotiations" by Gaudio with developers, prior to his entry into the Agreement. (Malta Aff., ¶¶ 41, 63-66.) Malta's conclusory affidavit is plainly insufficient to eliminate the material issue of fact of whether Malta was aware of the pending sale, particularly given the "alacrity" with which the sale occurred after DeBenedictis conveyed his interest in the companies to Malta. (See Salm, 20 AD3d at 470; see also Rowland Aff., Ex. E at 3 [Non-Party Law Firm Response to Subpoena, confirming that it was drafting a term sheet for the Second Avenue Properties as early as December 5, 2004].)

Malta further fails to eliminate triable issues of fact as to whether DeBenedictis could justifiably rely on Malta's representations or duty to disclose. As the Court of Appeals has held, "[w]here a principal and fiduciary are sophisticated entities and their relationship is not one of trust, the principal cannot reasonably rely on the fiduciary without making additional inquiry." (Pappas, 20 NY3d at 232.) The Court further explained that in Centro Empresarial, where the parties were negotiating the termination of their relationship and the plaintiffs knew that the defendants had not supplied them with the requisite financial information, the plaintiffs were required to exercise "'a heightened degree of diligence.' In this context, 'the principal cannot blindly trust the fiduciary's assertions.'" (Id. at 232-233, quoting and explaining Centro

Empresarial, 17 NY3d at 279.) As the Centro Empresarial Court noted, "[i]n certain circumstances, a fiduciary's disclosure obligations might effectively operate like a written representation that no material facts are undisclosed, and this might satisfy a principal's obligation to investigate further." (17 NY3d at 279.) As held by the Pappas Court, however, there is no per se test, even in the case of a transaction between fiduciaries terminating their business relationship. Rather, "[t]he test, in essence, is whether, given the nature of the parties' relationship at the time of the release, the principal is aware of information about the fiduciary that would make reliance on the fiduciary unreasonable." (20 NY3d at 233.)

In claiming that the relationship between DeBenedictis and Malta was no longer one of trust as of their entry into the Exchange Agreement, Malta points to the following deposition testimony of DeBenedictis: "Before we even decided to do this exchange, I called Bobby and I wanted to simplify my life and we were going to just cut – you know, I didn't like certain things that he was doing. I didn't agree with them, and I figured maybe it's time to cut bait . . . ." (DeBenedictis Dep. at 322.) DeBenedictis goes on, however, to explain that his concern was that Malta and Gaudio were not going to develop the Second Avenue Properties themselves, as opposed to selling them to a third-party, and that Malta assured him that they would not sell. (Id. at 322-323.)[5] In other portions of his testimony, DeBenedictis' states that he did not include

[5] DeBenedictis testified about his discussion with Malta regarding the development of the Second Avenue Properties, as follows:

> "Before we even decided to do this exchange, I called Bobby and I wanted to simply my life and we were going to just cut – you know, I didn't like certain things that he was doing. I didn't agree with them, and I figured maybe it's time to cut bait, so a starting point would have been the properties, and I mentioned to him, I think this was the starting point, there was no reason for me to hold onto my partnership in the Second Avenue properties if they were not going to develop because they thought that they were going to develop them. That's what I was led to believe, and I had already done that in my lifetime and I didn't want to go through it again so I said, okay, fine. He said, 'oh, no, no, no, we're going to develop it ourselves. We're not going to sell it to anybody. We're going to develop it ourselves and we don't know when we're going to that.'"

(DeBenedictis Dep. at 321-322.)

protective provisions in the Exchange Agreement "[b]ecause I trusted Bobby Malta implicitly . . . and, as I said before, I trusted Malta, Bobby implicitly, so – that's it." (Id. at 334-335.) He also testified that Malta "was like a son. I trusted him. I never thought that [Malta] would ever, ever, you know, do anything that wasn't right." (Id. at 350.) This testimony, considered as a whole, raises an issue of fact as to whether the relationship of trust continued up to the time the Exchange Agreement was made.

Malta also argues that DeBenedictis' reliance was unreasonable because he received hints of the falsity of Malta's representations. As this Department has explained, "when the party to whom a misrepresentation is made has hints of its falsity, a heightened degree of diligence is required of it. It cannot reasonably rely on such representations without making additional inquiry to determine their accuracy." (Global Minerals and Metals Corp. v Holme, 35 AD3d 93, 100 [1st Dept 2006] [internal citation omitted], lv denied 8 NY3d 804 [2007].) In arguing that DeBenedictis had a heightened duty of inquiry, Malta again relies on DeBenedictis' deposition testimony that he had concerns about whether Malta and Gaudio were going to develop the Second Avenue Properties themselves. (DeBenedictis Dep. at 322-323, quoted supra at n 5.) DeBenedictis' testimony merely shows that DeBenedictis was aware of potential development of the Second Avenue Properties. It is insufficient to eliminate issues of fact as to whether he had any hints or knowledge that the Second Avenue Properties were actively being shopped prior to the date of the Exchange Agreement.

In concluding that triable issues of fact exist as to whether DeBenedictis justifiably relied on Malta's disclosure obligations as a fiduciary, the court notes that the Exchange Agreement included disclaimers of reliance but did not contain a general release. (Compare Centro Empresarial, 17 NY3d at 278 [holding that general release released fiduciary from disclosure

obligations]; Kafa Invs., LLC v 2170-2178 Broadway, LLC, 39 Misc 3d 385, 394 [Sup Ct, NY County 2013], affd 114 AD3d 433 [1st Dept 2014], lv denied 2014 NY Lexis 2418.)

The Court of Appeals has noted that "[t]he question of what constitutes reasonable reliance is always nettlesome because it is so fact-intensive." (DDJ Mgt., LLC v Rhone Group L.L.C., 15 NY3d 147, 155 [2010] [internal quotation marks and citation omitted].) Although a justifiable reliance issue may be determined on a motion upon an appropriate record, the record here presents triable issues as to whether DeBenedictis justifiably relied on Malta's fiduciary obligation to make disclosure of any information that could reasonably bear on DeBenedictis' consideration of his sale of his membership interests. The court accordingly rejects Malta's further contention that DeBenedictis' breach of fiduciary duty claim is barred as a matter of law by his own failure to undertake an investigation into the potential sale of the Second Avenue Properties.

The court holds that Malta fails to submit evidence that conclusively demonstrates as a matter of law that he did not breach his fiduciary duty. The branch of Malta's summary judgment motion for dismissal of the breach of fiduciary duty claim will therefore be denied.[6]

Fraudulent Concealment

To plead a claim for fraudulent misrepresentation, the plaintiff must allege the following elements: "a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages." (Eurycleia Partners, LP v Seward & Kissel, LLP, 12 NY3d 553, 559 [2009].) A cause of action for fraudulent concealment requires

[6] In reaching this result, the court does not rely on the Gaudio affidavit, submitted by DeBenedictis, in which Gaudio asserts that he advised Malta of negotiations regarding the sale of the Second Avenue property and air rights, before Malta entered into the Exchange Agreement with DeBenedictis. Malta objects to this affidavit because it was not produced prior to Gaudio's deposition. The affidavit is, in any event, wholly conclusory, and raises credibility issues that should not be resolved on a motion for summary judgment.

proof of the elements of fraudulent misrepresentation, as well as "an allegation that the defendant had a duty to disclose material information and that it failed to do so." (P.T. Bank Cent. Asia, New York Branch v ABN AMRO Bank N.V., 301 AD2d 373, 376 [1st Dept 2003].) A fraudulent concealment claim must be based on a "special relationship or fiduciary obligation." (Gomez-Jimenez v New York Law School, 103 AD3d 13, 18 [1st Dept 2012], lv denied 20 NY3d 1093 [2013].) Put another way, the duty to disclose may arise from a fiduciary relationship. (Dembeck v 220 Cent. Park S., LLC, 33 AD3d 491, 492 [1st Dept 2006].)

As held above, Malta had a fiduciary duty to disclose material information with respect to the exchange transaction. For the reasons also stated above, triable issues of fact exist as to whether he had material information about the sale of the Second Avenue property and air rights that he intentionally failed to disclose, and whether DeBenedictis' reliance on Malta as a fiduciary was justifiable.

It is accordingly hereby

ORDERED that defendant Malta's motion for summary judgment is granted to the extent of dismissing plaintiff's first, second, and fifth causes of action, and is otherwise denied.

This constitutes the decision and order of the court.

Dated: New York, New York
March 6, 2014

MARCY FRIEDMAN, J.S.C.