

Silverstein v Imperium Partners Group, LLC
2014 NY Slip Op 33806(U)
January 28, 2014
Supreme Court, New York County
Docket Number: 651375/13
Judge: Melvin L. Schweitzer
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then sought to undervalue the assets in the Fund and to siphon assets from the Fund to prevent Mr. Silverstein from receiving the full value of his investment. Mr. Silverstein admits in paragraph 16 of the complaint that he resolved his claims by entering into an agreement with Imperium on February 25, 2011 (Agreement).

In the Agreement, Mr. Silverstein agreed to accept “as full, complete and final redemption of all of [his] interests in the Fund” the sum of \$2,992,918.20 plus any additional value of his interest determined by the audit of the Fund’s certified public accountants for the year 2010. The Agreement contemplated that the audit might determine that Mr. Silverstein’s interest was not worth more than the amount of his distributions to date, because it states that “if the Audit reveals that I was not underdistributed and no further payments were due to me, . . . the final redemption of all of my interests in the Fund . . . shall be effective upon receipt by the Fund of the Audit.”

Mr. Silverstein released all of the Imperium Defendants effective upon receipt of any additional payment due, or if no additional payment was due, upon receipt by the Fund of the 2010 audit. The full text of the release is as follows:

Upon the full, complete and final redemption of all of my interest in the Fund in accordance with Section 3 above, I hereby release, discharge and acquit the Fund, their respective officers, managers, directors, agents and employees and its and their respective successors and assigns, from all obligations to me (and my respective heirs, administrators, executors, successors and assigns) and from any and all claims, demands, debts, accounts, contracts, liabilities, actions and causes of actions, whether in law or in equity, that I at any time had or has, or that my successors and assigns hereafter can or may have against the Fund, their respective officers, directors, agents or employees and its and their respective successors and assigns.

The 2010 audit was delayed because the Fund's accountants resigned. The Fund hired WeizerMazars LLP as its new certified public accountant. On November 25, 2011, WeizerMazars released the findings of its audit for the Fund. Its audit determined that Mr. Silverstein's 2010 investment in the Fund was worth \$3,292,918, that Mr. Silverstein had received redemptions of \$300,000 in April 2010 and \$2,992,918 in February 2011, and that Mr. Silverstein had been overpaid by \$46,110 with respect to his interest in the Fund. WeiserMazars released its full audit report for 2010 in December.

Mr. Silverstein filed this action on April 16, 2013. The complaint alleges that the Imperium Defendants engaged in misconduct to depress the value of his interest in the Fund and that WeizerMazars committed professional malpractice in failing to detect or correct the misconduct. Count One alleges that the Imperium Defendants breached their fiduciary duty to plaintiff in understating the value of his interest. Count Two alleges that the Imperium Defendants breached the Agreement by failing to pay Mr. Silverstein the "full value" of his investment. Count Three alleges that the Imperium Defendants made false statements about the value of Mr. Silverstein's account. Count Four alleges that the Imperium Defendants negligently misrepresented the value of Mr. Silverstein's account. Count Five alleges that the Imperium Defendants committed professional malpractice and negligence in falsely valuing Mr. Silverstein's account. Count Six alleges that Mr. Michaelson assisted the other Imperium Defendants in perpetrating fraud upon Mr. Silverstein. Count Seven alleges that Mr. Michaelson aided and abetted the Imperium Defendants' breach of fiduciary duty. Count Eight alleges that Mr. Michaelson tortiously interfered with the Agreement.

Discussion

On a motion to dismiss for failure to state a cause of action, the court accepts all factual allegations pleaded in plaintiff's complaint as true, and gives plaintiff the benefit of every favorable inference. CPLR 3211 (a) (7); *Sheila C. v Povich*, 11 AD3d 120 (1st Dept 2004). The court must determine whether "from the [complaint's] four corners[,] 'factual allegations are discerned which taken together manifest any cause of action cognizable at law.'" *Gorelik v Mount Sinai Hosp. Ctr.*, 19 AD3d 319 (1st Dept 2005) (quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977)). Vague and conclusory allegations are not sufficient to sustain a cause of action. *Fowler v American Lawyer Media, Inc.*, 306 AD2d 113 (1st Dept 2003).

On a motion to dismiss on the ground that defenses are founded upon documentary evidence, the evidence must be unambiguous, authentic and undeniable. CPLR 3211 (a) (1); *Fontanetta v Doe*, 73 AD3d 78 (2d Dept 2010). "To succeed on a [CPLR 3211 (a) (1)] motion . . . a defendant must show that the documentary evidence upon which the motion is predicated resolves all factual issues as a matter of law and definitively disposes of the plaintiff's claim." *Ozdemir v Caithness Corp.*, 285 AD2d 961, 963 (3d Dept 2001), *leave to appeal denied* 97 NY2d 605. In other words, "documentary evidence [must] utterly refute plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 (2002).

Plaintiff acknowledges that there was a dispute about the value of his account which was resolved by the February 25, 2011 Agreement. As part of that Agreement, Mr. Silverstein released the Fund and its agents and employees from all liability. There was only one condition precedent to the release becoming effective – that the Fund's auditors deliver to the Fund the

2010 audit and, if the audit determined that Mr. Silverstein's interest was worth more than he had been paid, that he be paid the additional monies due. This condition precedent was met. The Fund's accountants gave Mr. Silverstein the results of their audit of his account value on November 25, 2011, finding that no additional monies were due, and released the final audit to the Fund shortly thereafter. Mr. Silverstein is bound by the release that he gave as part of the Agreement.

A valid release which is clear and unambiguous on its face and which is knowingly and voluntarily entered into will be enforced as a private agreement between parties. *Fleming v Ponziani*, 24 NY2d 105 (1969); *Frost v Budget Car & Truck Rental*, 15 AD3d 963 (4th Dept 2005); *Appel v Ford Motor Co.*, 111 AD2d 731 (2d Dept 1985). There are strong policy considerations which favor the enforcement of settlement agreement, *Rocanova v Equitable Life Assurance Society of the United States*, 83 NY2d 603 (1994), and "a release may not be treated lightly since it is a jural act of high significance without which the settlement of disputes would be rendered all but impossible. It should never be converted into a starting point for renewed litigation except under circumstances and under rules which would render any other result a grave injustice." *Calvano v New York City Health & Hosp. Corp.*, 246 AD2d 317 (1st Dept 1998).

A release is valid even though it does not become effective until a condition precedent occurs. *IDT Corp v Tyco Group, S.A.R.L.*, 13 NY3d 209 (2009). A condition precedent is "an act or event, other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the agreement arises." *Id.*, citing *Calamari and Perillo, Contracts* § 11-2, at 438 (3d ed.). Here, the parties agreed on a single condition precedent to the release

becoming effective – the Fund would obtain a 2010 audit from its certified public accountants and, if that audit showed that Mr. Silverstein’s interest was worth more than he was paid, Mr. Silverstein would be paid the additional funds. Mr. Silverstein’s release became valid and enforceable when the Fund’s certified accountants determined as part of its 2010 audit that Mr. Silverstein’s interest was worth less than he had already been paid. The release bars Mr. Silverstein’s claims that he was paid less for his interest than it was worth do to wrongdoing by defendants (Counts 1, 3-7). In addition, the release applies to all of the Imperium Defendants. Mr. Silverstein admits in his complaint that the Fund was managed by the other Imperium entities sued, and that Mr. Michaelson was a limited partner and/or officer of all the Imperium entities. These defendants are covered by the portion of the release which applies to “officers, managers, directors, agents and employees.”

Mr. Silverstein’s second cause of action alleges that the Imperium Defendants breached the Agreement by (a) failing to tender to plaintiff a true up payment; (b) failing to perform an accurate valuation of the Fund as of year-end 2010; (c) failing to tender to plaintiff an amount equal to the full value of plaintiff’s fund account; and (d) failing to comply with the implied covenant of good faith and fair dealing. These breach of contract claims are barred by the plain terms of the Agreement.

The Agreement provided that the Fund would only pay additional funds to Mr. Silverstein if the Fund’s certified public accountants determined as part of their 2010 audit that Mr. Silverstein had been underpaid. Since the Fund’s certified public accountants determined that Mr. Silverstein was overpaid, his breach of contract claim for additional money (subparts (a) and (c)) fails. The Agreement did not provide that the Fund was going to conduct a valuation;

rather, it provided that the Fund's certified public accountants were going to conduct a valuation. Therefore, subpart (b) fails to allege that defendants breached the Agreement. Finally, plaintiff has not pled any facts to support the contention that the Imperium Defendants breached an implied covenant of good faith and fair dealing. The Agreement obligated the Fund to obtain an audit from its certified public accounting firm and pay any additional monies found due by the audit. It did that. There is no basis to allege that the Fund breached any implied terms of the Agreement.

Mr. Silverstein's tortious interference with contract claim against Mr. Michaelson (Count 8) fails for two reasons. The elements of a tortious interference with contract claim are "the existence of a valid contract, the tortfeasor's knowledge of the contract and intentional interference with it, the resulting breach and damages." *Hoag v Chancellor, Inc.*, 246 AD2d 224, 228, 677 NYS2d 531 (1st Dept 1998). First, as already shown, Mr. Silverstein's claim that the Fund breached the Agreement is meritless. There can be no tortious interference with contract claim if the contract was in fact not breached. *Jagarnauth v Massey Knakal Realty Services, Inc.*, 104 AD3d 564 (1st Dept 2013); *OTG Management, LLC v Konstantinidis*, 2013 WL 2631731 (NY Sup Ct 2013).

Second, where a third party alleges that a corporate officer has tortuously interfered with his corporation's contract with that third party, the corporate agent cannot be found liable unless he does not act in good faith and commits independent torts or predatory acts directed at another for personal pecuniary gain. *First Am. Commercial Bancorp., Inc. v Saatchi & Saatchi Rowland, Inc.*, 55 AD3d 1264, 1266-67 (4th Dept 2008), *lv. dismissed and denied*, 12 NY3d 829 (2009); *Bradbury v Cope-Schwarz*, 20 AD3d 657, 659 (3d Dept 2005). Plaintiff's complaint does not

allege that Mr. Micháelson committed independent torts or predatory acts for personal pecuniary gain and therefore fails to allege a tortious interference claim against him.

Mr. Silverstein acknowledges that he settled and released his claim that the Imperium Defendants had tried to defraud him by undervaluing his account. He claims that he is entitled to rescind the release based on the very fraud claims that he compromised and settled.

Mr. Silverstein's argument that the allegations of fraud which are compromised in a settlement and release can be later used to rescind the settlement and release itself, if accepted by this court, would render every agreement settling a case which had alleged fraud unenforceable. That is not the law in New York. In order to rescind a settlement agreement based on fraud, the complaint has to allege that the settlement agreement itself was procured by fraud. Mr. Silverstein's complaint does not do so, and therefore Mr. Silverstein's fraud claim fails because it was released. Accordingly, it is

ORDERED that defendants' motion to dismiss is granted.

Dated: January 28, 2014

ENTER:

J.S.C.

MELVIN L. SCHWEITZER