

Wagner v Azulay

2015 NY Slip Op 30230(U)

February 3, 2015

Supreme Court, New York County

Docket Number: 151552/2012

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

THEODORE WAGNER and THEODORE WAGNER
PLUMBING & HEATING CORP.,

Index No. 151552/2012

Plaintiffs

- against -

DECISION AND ORDER

ZIV AZULAY a/k/a MAIMONE ZIV AZULAY,

Defendant

LUCY BILLINGS, J.S.C.:

Defendant moves to dismiss the amended complaint, which he has not yet answered, and for summary judgment dismissing the original complaint claiming a breach of contract, which he has answered. C.P.L.R. § 3211(a), 3212(b). Defendant claims plaintiffs' service of their amended complaint after plaintiffs served a note of issue April 8, 2013, and he filed an amended answer July 2, 2013, is untimely. After service of the note of issue, he moved to vacate it, 22 N.Y.C.R.R. § 202.21(e), and then withdrew his motion pursuant to a court ordered stipulation dated June 28, 2013. The parties stipulated that (1) the parties' depositions continue immediately, (2) defendant was to serve an amended answer by July 3, 2013, (3) plaintiffs reserved their right to move to dismiss the amended answer's affirmative defenses or counterclaims, and (4) defendant reserved his right to move to dismiss the complaint.

Since defendant's amended answer was a pleading responsive to the original complaint, C.P.L.R. § 3025(a) permitted

plaintiffs to serve an amended complaint without the court's permission within 20 days after service of that responsive pleading. Defendant protests that the amended complaint is nonetheless untimely because it will necessitate further disclosure after the note of issue. The court need not address that issue, however, because, for the reasons explained below, the court grants defendant's motion to dismiss the claims that the amended complaint added to the original complaint. C.P.L.R. §§ 213(8), 3211(a)(5).

I. PLAINTIFFS' BREACH OF CONTRACT CLAIM IN THE ORIGINAL AND AMENDED COMPLAINTS

In both the original and the amended complaint plaintiffs claim defendant breached a written agreement in the form of an affidavit to which he swore February 15, 2005, "in connection with outstanding notice of violations issued by the City of New York to Theodore Wagner Plumbing and Heating Corp. and/or Theodore Wagner, Individually." Aff. of Jeffrey H. Miller Ex. A, V. Compl., Ex. 1 ¶ 4, and Ex. I, Am. V. Compl., Ex. 1 ¶ 4. Defendant's affidavit promised that:

I am personally responsible for these notice of violations and/or fines in the event that Wagner-Ziv Plumbing and Heating Corp. cannot defend Theodore Wagner or Theodore Wagner Plumbing and Heating Corp. in the appropriate Tribunal and/or pay the fines when levied by the appropriate Tribunal of the City of New York.

Id. ¶ 5.

Measuring the applicable statute of limitations of six years, C.P.L.R. § 213(2), from the date defendant executed his agreement February 15, 2005, he maintains that plaintiffs'

commencement of this action April 4, 2012, exceeded the limitations period. Plaintiffs' claim accrued not when defendant executed the agreement, however, but, at the earliest, when he breached the agreement, Hahn Automotive Warehouse, Inc. v. American Zurich Ins. Co., 18 N.Y.3d 765, 770 (2012); Ely-Cruikshank Co. v. Bank of Montreal, 81 N.Y.2d 399, 402 (1993); Sanchez de Hernandez v. Bank of Nova Scotia, 76 A.D.3d 929, 930 (1st Dep't 2010); Nordberg v. South St. Seaport Corp., 43 A.D.3d 774, 775 (1st Dep't 2007), or when plaintiffs became entitled to demand the payment owed under the agreement. Hahn Automotive Warehouse, Inc. v. American Zurich Ins. Co., 18 N.Y.3d at 770-71; Verizon New York, Inc. v. Sprint PCS, 43 A.D.3d 686, 686-87 (1st Dep't 2007); Bombardier Transp. (Holdings) USA, Inc. v. Telephonics Corp., 14 A.D.3d 358, 359 (1st Dep't 2005); Kuo v. Wall Street Mortg. Bankers, Ltd., 65 A.D.3d 1089, 1090 (2d Dep't 2009). According to the agreement, defendant breached it when he failed to be responsible for the violations cited by the City after the parties' joint business, Wagner-Ziv Plumbing and Heating Corp., could not defend plaintiffs against the violations, at which point plaintiffs were entitled to demand defendant's payment of the amount of fines levied by the City.

Although the complaint and amended complaint allege that the outstanding violations resulted in judgments for the fines assessed against plaintiffs, and thus the violations and fines were not successfully defended, neither plaintiffs nor defendant specifies when those judgments and the failure of any defense

occurred. Plaintiffs do claim that the City attempted to collect the judgments for the fines in 2009, and on "December 10, 2009, Plaintiffs were compelled to advance the sum of fifty-two thousand eight hundred dollars (\$52,800.) to the City of New York to reduce the amount of judgments against Plaintiffs." Miller Aff. Ex. A ¶ 17 and Ex. I ¶ 17.

Since defendant does not claim, let alone show conclusively, that through these occurrences plaintiffs' breach of contract claim accrued more than six years before April 4, 2012, the court denies defendant's motion to dismiss and for summary judgment dismissing that claim on the grounds that the statute of limitations has expired. C.P.L.R. §§ 213(2), 3211(a)(5), 3212(b). Moreover, insofar as defendant's February 2005 agreement was to indemnify plaintiffs for the fines or judgments resulting from the cited violations, the statute of limitations runs six years from plaintiffs' first payment, in December 2009, toward the liability for which defendant was to indemnify plaintiffs. C.P.L.R. § 213(2); State of New York v. Speonk Fuel, Inc., 3 N.Y.3d 720, 724 (2004); State of New York v. Stewart's Ice Cream Co., 64 N.Y.2d 83, 88 (1984); Matter of American Druggists' Ins. Co., 15 A.D.3d 268, 268 (1st Dep't 2005); Union Turnpike Assoc., LLC v. Getty Realty Corp., 27 A.D.3d 725, 726-27 (2d Dep't 2006).

II. PLAINTIFFS' CLAIMS FOR DECEIT AND FRAUDULENT INDUCEMENT IN THE AMENDED COMPLAINT

In the amended complaint plaintiffs claim defendant defrauded them when he performed plumbing using the plumber's

license issued to Wagner without plaintiffs' permission and for defendant's personal gain or his businesses' gain, causing Wagner to lose his license and plaintiffs to lose business. The amended complaint also claims that defendant fraudulently induced plaintiffs to forego their own defense against the violations and fines resulting from defendant's misuse of Wagner's license and to advance payment for the judgments, in reliance on defendant's sworn agreement to defend against the fines or pay them, when defendant had no intention of fulfilling his promise.

The statute of limitations for fraud is also six years, measured from when defendant committed the fraud, or two years from when plaintiffs discovered his fraud or with reasonable diligence could have discovered the fraud, whichever is later. C.P.L.R. § 213(8). According to the amended complaint, defendant defrauded plaintiffs when he misused Wagner's license without plaintiffs' permission for defendant's own gain or his businesses' gain, before defendant executed his agreement February 15, 2005, to indemnify plaintiffs, who at least as of then had discovered that fraud. Serradilla v. Lords Corp., 117 A.D.3d 648, 648 (1st Dep't 2014); AXA Equit. Life Ins. Co. v. Malen, 117 A.D.3d 645, 645 (1st Dep't 2014); Apt v. Morgan Stanley DW, Inc., 115 A.D.3d 466, 467 (1st Dep't 2014); Bohn v. 176 W. 87th St. Owners Corp., 106 A.D.3d 598, 599 (1st Dep't 2013).

That agreement was also when defendant fraudulently induced plaintiffs' reliance on his false promise of indemnification, as

obviously an agreement may not be induced after the fact. Plaintiffs discovered that fraud when he failed to pay the fines levied. Since the amended complaint admits that plaintiffs were aware of the City's efforts to collect the judgments for the fines in 2009 and in December 2009 actually paid part of the judgments, at that point plaintiffs had discovered that defendant had not defended against or paid the fines. Thus plaintiffs discovered the fraudulent inducement more than two years before April 4, 2012. C.P.L.R. § 213(8); Prichard v. 164 Ludlow Corp., 49 A.D.3d 408, 408 (1st Dep't 2008); St. Clement v. Londa, 8 A.D.3d 89, 90 (1st Dep't 2004); Suero v. Fort I Group, 305 A.D.2d 180, 181 (1st Dep't 2003).

III. EQUITABLE ESTOPPEL

Plaintiffs further allege that they delayed legal action based on defendant's "representations," Miller Aff. Ex. Ex. I ¶ 33, but these "representations" refer back to "Defendant's promise to indemnify Plaintiffs" in "an Affidavit on February 15, 2005." Id. ¶ 29. Since these representations are the same acts on which plaintiffs' underlying fraudulent inducement claim is based, they may not form the basis for equitable estoppel against defendant's reliance on the statute of limitations. Ross v. Louise Wise Servs., Inc., 8 N.Y.3d 478, 491 (2007); Pautienis v. Legacy Capital Corp., 36 A.D.3d 462, 463 (1st Dep't 2007); Lucas-Plaza Hous. Dev. Corp. v. Corey, 23 A.D.3d 217, 218 (1st Dep't 2005); Kaufman v. Cohen, 307 A.D.2d 113, 122 (1st Dep't 2003). The fraud on which equitable estoppel may be based must be a

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later act to conceal defendant's prior alleged fraud. Ross v. Louise Wise Servs., Inc., 8 N.Y.3d at 491; Zumpano v. Quinn, 6 N.Y.3d 666, 674 (2006). Defendant's representations in connection with his February 2005 affidavit were well before plaintiffs discovered that defendant had not defended against or paid the fines, at the latest in December 2009, which in turn was before the statute of limitations expired. See Simculski v. Saeli, 44 N.Y.2d 442, 449-50 (1978); Rite Aid Corp. v. Grass, 48 A.D.3d 363, 364-65 (1st Dep't 2008).

In opposition to defendant's motion, plaintiffs also refer to a written indemnity and repayment agreement in 2009, again before the statute of limitations expired, but do not allege this agreement in their amended complaint and admit in their opposition that only defendant's attorney executed this agreement. Even if defendant's attorney's signature bound defendant, moreover, this agreement only promises to transfer defendant's shares in a nonparty corporation to his attorney as security for defendant's repayment to Wagner. Finally, plaintiffs point further to the amended complaint's allegations that defendant made a partial repayment to plaintiffs January 6, 2010, and a partial payment toward the judgments July 7, 2011.

Most importantly, nowhere do plaintiffs allege, in a pleading, an affidavit, or testimony, see Simculski v. Saeli, 44 N.Y.2d at 446-47; Lessoff v. 26 Ct. St. Assoc., LLC, 58 A.D.3d 610 (2d Dep't 2009); Pate v. Pate, 17 A.D.3d 334 (2d Dep't 2005); Stamp v. Schenk, 267 A.D.2d 1017 (4th Dep't 1999), that

defendant's 2009 agreement or his 2010 or 2011 payment induced them, through "fraud, misrepresentations or deception to refrain from filing a timely action" against defendant until after the statute of limitations expired, at the latest, in December 2011. Ross v. Louise Wise Servs., Inc., 8 N.Y.3d at 491; Zumpano v. Quinn, 6 N.Y.3d at 674; Simculski v. Saeli, 44 N.Y.2d at 449; Kaufman v. Cohen, 307 A.D.2d at 122. See Gordon v. Curtis, 68 A.D.3d 549, 550 (1st Dep't 2009); Prichard v. 164 Ludlow Corp., 49 A.D.3d at 409; Kenny v. RBC Royal Bank, 22 A.D.3d 385, 386 (1st Dep't 2005); Dailey v. Mazel Stores, 309 A.D.2d 661, 663 (1st Dep't 2003). Nor do plaintiffs allege in their amended complaint or other admissible evidence that in negotiating the 2009 agreement or 2010 or 2011 payment defendant indicated an intent to relinquish a future statute of limitations defense. JCH Delta Contr., Inc. v. City of New York, 44 A.D.3d 403, 404 (1st Dep't 2007); Dailey v. Mazel Stores, 309 A.D.2d at 663-64.

IV. CONCLUSION

Thus, even if the amended complaint's additional claims relate back to the filing of the original complaint, C.P.L.R. § 213(8) bars the amended complaint's second claim, for deceit in the misuse of Wagner's license, and third claim, for fraudulent inducement through defendant's agreement executed February 15, 2005. C.P.L.R. § 203(f); Koch v. Acker, Merrall & Condit Co., 114 A.D.3d 596, 597 (1st Dep't 2014); Jennings-Purnell v. Jennings, 107 A.D.3d 513, 514 (1st Dep't 2013). See Serradilla v. Lords Corp., 117 A.D.3d at 648-649; Wright v. Emigrant Sav.

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Bank, 112 A.D.3d 401, 402 (1st Dep't 2013); Matter of Estate of Greenspan, 78 A.D.3d 555, 556 (1st Dep't 2010); B.B.C.F.D., S.A. v. Bank Julius Baer & Co., Ltd., 62 A.D.3d 425, 426 (1st Dep't 2009). The court therefore grants defendant's motion to dismiss the amended complaint's second and third claims on the grounds that the statute of limitations has expired. C.P.L.R. §§ 213(8), 3211(a)(5); Serradilla v. Lords Corp., 117 A.D.3d at 648; Apt v. Morgan Stanley DW, Inc., 115 A.D.3d at 466; Gutkin v. Siegal, 85 A.D.3d 687, 687-88 (1st Dep't 2011); Prichard v. 164 Ludlow Corp., 49 A.D.3d at 408. While plaintiffs' fraudulent inducement claim is simply that defendant misrepresented he would perform his February 2005 agreement when he did not intend to, rather than anything collateral to the agreement, Fairway Prime Estate Mgt., LLC v. First Am. Intl. Bank, 99 A.D.3d 554, 557 (1st Dep't 2012); Empire 33rd LLC v. Forward Assn. Inc., 87 A.D.3d 447, 449 (1st Dep't 2011); International Plaza Assoc., L.P. v. Lacher, 63 A.D.3d 527 (1st Dep't 2009); ESBE Holdings, Inc. v. Vanquish Acquisition Partners, LLC, 50 A.D.3d 397, 398 (1st Dep't 2008), and the damages for this fraud are not separately delineated from the damages for his breach of that agreement, Mañas v. VMS Assoc., LLC, 53 A.D.3d 451, 454 (1st Dep't 2008); Teachers Ins. Annuity Assn. of Am. v. Cohen's Fashion Opt. of 485 Lexington Ave., Inc., 45 A.D.3d 317, 319 (1st Dep't 2007), dismissal of the fraudulent inducement claim on this ground is academic. C.P.L.R. § 3211(a)(7). See O'Connell v. Corcoran, 1 N.Y.3d 179, 186 (2003); Carol v. Madison Plaza Assoc., LLC, 95 A.D.3d 735, 736

(1st Dep't 2012); Gottlieb Contr., Inc. v. City of New York, 49 A.D.3d 409, 410 (1st Dep't 2008).

As set forth above, the court denies defendant's motion to dismiss and for summary judgment dismissing the original and amended complaints' first claim for breach of contract claim on the grounds that the statute of limitations has expired.

C.P.L.R. §§ 213(8), 3211(a)(5). A trial shall proceed on the original complaint for breach of contract. The parties shall appear for a pretrial conference March 4, 2015, at 9:30 a.m., in Part 46. 22 N.Y.C.R.R. § 202.26.

DATED: February 3, 2015.

Lucy Billings

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.