

Weiner v Kraus

2015 NY Slip Op 31155(U)

June 25, 2015

Supreme Court, Queens County

Docket Number: 706494/14

Judge: Timothy J. Dufficy

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ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY

PART 35

Justice

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**BROCK WEINER and B C W MANAGEMENT
& CONSULTING CORP.,**

Plaintiffs,

Index No.: 706494/14

Mot. Date: 1/23/15

-against-

Mot. Cal. No. 99

Mot. Seq. 2

**THOMAS M. KRAUS, JOHN M. SHANNON,
FRANK A. VOLPICELLO, JR., F&N
MANAGEMENT INC., F&N MANAGEMENT
& CONSTRUCTION CORP., F&N
MANAGEMENT & CONSULTING CORP.,
JMS MANAGEMENT & DEVELOPMENT
CORP., TMK-REAL ESTATE NY, INC. and
LEONESSA DEVELOPMENT CORP.,**

Defendants.

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The following papers numbered EF 7 to EF 14, EF 20, EF 22 to 31, and EF 33 read on this motion by defendants **THOMAS M. KRAUS, FRANK A. VOLPICELLO, JR., F&N MANAGEMENT INC., F&N MANAGEMENT & CONSTRUCTION CORP., F&N MANAGEMENT & CONSULTING CORP., AND TMK-REAL ESTATE NY, INC.** (collectively referred to as defendants for purposes of this motion) to dismiss the plaintiffs' complaint pursuant to CPLR 3211 (a)(1) and (7).

FILED
JUN 26 2015
COUNTY CLERK
QUEENS COUNTY

**PAPERS
NUMBERED**

Notice of Motion - Affidavits - Exhibits	EF 7 - 14
Memorandum of Law.....	---
Answering Affidavits - Exhibits	EF 20, EF 22-31
Reply Affidavits	EF 33
Memorandum of Law	---

Upon the foregoing papers it is ordered that the motion is determined as follows:

In 2010, defendants Leonessa Development Corp. (Leonessa), and TMK-Real Estate NY, Inc. (TMK), were engaged in a joint venture for the purpose of Leonessa developing and completing the construction of homes on property owned by TMK. Defendant Thomas M. Kraus (Kraus) is the sole owner of TMK, while defendants John M. Shannon (Shannon) and Frank A. Volpicello, Jr. (Volpicello), were the two shareholders of Leonessa. The plaintiffs have alleged that they loaned and invested various sums of money to the partnership created by Kraus, Shannon and Volpicello, amounting to approximately \$1.2 million, by issuing checks to Leonessa, one of the entities that the partnership used to conduct its business. During construction, various issues allegedly arose which caused the costs of completion to increase, and when the sale of the homes was completed, the profits were not as high as predicted and Leonessa allegedly repaid the loans to plaintiff Brock Weiner (Weiner) out of the proceeds of the sale, but at a substantial shortfall.

Leonessa was then dissolved, on or about January 22, 2014. The plaintiffs have alleged that the partnership formed by Kraus, Shannon and Volpicello operated, controlled and marketed through a network of different businesses, including Leonessa and defendants F&N Management Inc., F&N Management & Consulting Corp., and JMS Management & Development Corp., entities which were allegedly operated by Shannon and Volpicello. The plaintiffs have commenced the instant action for money damages, alleging causes of action sounding in fraudulent inducement, intentional misrepresentation, fraud, breach of fiduciary duty, negligent misrepresentation, conversion and equitable rescission.

Defendants have moved to dismiss the complaint pursuant to CPLR 3211 (a)(7) and have argued that the complaint has failed to state a cause of action and that the plaintiffs' causes of action constitute breach of contract and do not constitute fraud. "In determining a motion to dismiss pursuant to CPLR 3211 (a)(7), the court must afford the pleading a liberal construction ... accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Feldman v Finkelstein & Partners, LLP*, 76 AD3d 703, 704 [2010] [internal citation omitted]; see *Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Nationwide Insulation & Sales, Inc. v Nova Cas. Co.*, 74 AD3d

1297, 1298 [2010]). Defendants have also moved to dismiss the complaint pursuant to CPLR 3211 (a)(1) and have argued that documentary evidence in the record has demonstrated that there was no fraud. A motion to dismiss pursuant to CPLR 3211 (a) (1) may only be granted where the documentary evidence presented resolves all factual issues as a matter of law and conclusively disposes of the claim (*see Reid v Gateway Sherman, Inc.*, 60 AD3d 836, 837 [2009]).

The record contains, among other things, a copy of the amended summons and complaint, two copies of Joint Venture Agreements between TMK and Leonessa, dated April 3 and August 19, 2010, a copy of a promissory note from Weiner, as president of plaintiff BCW Management & Consulting, Corp., and Leonessa, dated April 14, 2010, the affidavit of Volipcello, the affirmation of Weiner, the affidavit of Kraus, and copies of emails between Kraus and Weiner.

The complaint has alleged claims sounding in intentional misrepresentation, negligent misrepresentation, conversion and rescission. However, defendants have failed to adequately address these causes of action in their motion papers. Therefore, they are not entitled to the dismissal of these causes of action and the court will limit its discussion on this motion to the causes of action that were addressed by defendants, namely those of fraud, fraudulent inducement, and breach of fiduciary duty.

Defendants contend that while the plaintiff's allegations sound in breach of contract against Leonessa, plaintiffs cannot have both a breach of contract and a fraud claim simultaneously and that the allegations are insufficient to constitute a cause of action for fraud against them. "A fraud claim may coexist with a breach of contract cause of action only where the alleged fraud constitutes the breach of a duty separate and apart from the duty to abide by the terms of the contract" (*Verizon N.Y., Inc. v Optical Communications Group, Inc.*, 91 AD3d 176, 179-180 [2011]). Plaintiffs' complaint does not contain a breach of contract claim.

"The elements of a cause of action sounding in fraud are a material misrepresentation of an existing fact, made with knowledge of the falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation, and damages" (*McMorrow v Angelopoulos*, 113 AD3d 736, 739-740 [2014] quoting *Fromowitz v W. Park Assoc., Inc.*, 106 AD3d 950, 951 [2013]). Similarly, the elements of a cause of

action sounding in fraudulent inducement are “representation of a material existing fact, falsity, scienter, deception and injury” (*Dalessio v Kressler*, 6 AD3d 57, 61 [2004], quoting *Channel Master Corp. v Aluminium Ltd. Sales*, 4 NY2d 403, 407 [1958]). Any cause of action for fraud must be pled with particularity (CPLR 3016 [b]; see *Greentech Research LLC v Wissman*, 104 AD3d 540 [2013]). The purpose of such a requirement is to inform a defendant of the alleged wrongful conduct and give notice of the allegations a plaintiff intends to prove, and the heightened pleading requirement “should not be confused with unassailable proof of fraud,’ and ‘may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct” (*McDonnell v Bradley*, 109 AD3d 592, 593 [2013], quoting *Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 492 [2008]; see *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]).

The Court has conducted a careful examination of the allegations contained in the complaint. After drawing reasonable inferences therefrom, accepting the facts alleged as true, and according the plaintiffs the benefit of every favorable inference, this court has determined that the plaintiffs have adequately pleaded causes of action for fraud and fraudulent inducement (see *McDonnell v Bradley*, 109 AD3d at 593-594). The allegations in the complaint specified that the defendants, in conjunction with non-moving defendants, made material misrepresentations as to investing and lending money to the partnership formed by Kraus, Shannon and Volpicello, as to inflated costs to operate the projects, the sale prices of the real property, and how the funds were to be allocated and used, all with the knowledge that these representations were false. The complaint has further sufficiently alleged that the defendants made the misrepresentations for the purpose of inducing plaintiffs to invest money and lend funds to the partnership and that the plaintiffs relied upon the representations of the defendants in investing in the partnership and that he was, thus, damaged by his reliance on the misrepresentations when the funds were not repaid. The documentary evidence submitted, does not definitively establish that no fraud occurred in this matter, as has been alleged in the complaint, and that evidence has failed to resolve all factual issues as a matter of law (CPLR 3211 [a][1]; see *Palmieri v Biggiani*, 108 AD3d 604, 607 [2013]).

Therefore, the defendants have failed to demonstrate that they are entitled to the dismissal of these causes of action.

As to the plaintiff's cause of action for breach of fiduciary duty, "[t]he elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct" (*Rut v Young Adult Inst., Inc.*, 74 AD3d 776, 777 [2010]; see *Faith Assembly v Titledge of N.Y. Abstract, LLC*, 106 AD3d 47, 61 [2013]; *Armentano v Paraco Gas Corp.*, 90 AD3d 683, 684 [2011]). "A fiduciary relationship exists between two persons when one of them is under a duty to act for ... the benefit of another upon matters within the scope of the relation" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005] [internal quotation marks omitted]). The complaint has sufficiently alleged that the nature of the partnership between Kraus, Shannon and Volpicello, and their agreement with Weiner that the project the plaintiffs funded would be executed through various business entities, created a fiduciary relationship, that the defendants' misconduct in re-allocating and mis-using funds breached that duty, which resulted in his damages when his investments were not repaid by the partnership or the entities which were used to conduct the business of completing the project. These allegations read in a light most favorable to the plaintiffs, along with the documentary evidence in this matter have failed to demonstrate that the defendants are entitled to summary dismissal of this claim pursuant to CPLR 3211 (a)(1) or (7) (see *Feldman v Finkelstein & Partners, LLP*, 76 AD3d at 704; see *Palmieri v Biggiani*, 108 AD3d at 607).

Accordingly, it is

ORDERED, that the defendants' motion to dismiss the complaint pursuant to CPLR3211 (a)(1) and (7) is denied in its entirety.

The forgoing constitutes the decision and order of this Court.

Dated: June 25, 2015



 TIMOTHY J. BUFFICY, J.S.C.

FILED
 JUN 26 2015
 COUNTY CLERK
 QUEENS COUNTY