

Solimano v McClellan Sotheby's Intl.

2015 NY Slip Op 32983(U)

October 9, 2015

Supreme Court, Bronx County

Docket Number: Index No. 21059/2015E

Judge: Mary Ann Brigantti

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**SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15**

PRESENT: Honorable Mary Ann Brigantti

-----X
LOUIS G. SOLIMANO,

Plaintiff,

-against-

DECISION / ORDER
Index No. 21059/2015E

MCCLELLAN SOTHEBY'S INTERNATIONAL, et als.,

Defendants

-----X

The following papers numbered 1 to 7 read on the below motion noticed on June 5, 2015 and duly submitted on the Part IA15 Motion calendar of **July 3, 2015**:

<u>Papers Submitted</u>	<u>Numbered</u>
Def. Notice of Motion, Memo of Law, Exhibits	1,2,3
Pl.'s Aff. in Opp., Exhibits	4,5
Def.'s Aff. In Reply, Memo of Law, Exhibits	6,7

Upon the foregoing papers, defendants McClellan Sotheby's International, CS McClellan Realty, and Holly Mellestrom ("McClellan"), moves pre-answer, to dismiss the complaint of the plaintiff Louis G. Solimano ("Plaintiff"), pursuant to CPLR 3211(a)(1) and (7). Plaintiff opposes the motion.

I. Background

According to the complaint, co-defendants Nickolas and Debra Kouroupas ("the Kouroupas") leased a house owned by Plaintiff in early 2012. The term of the lease was two years, commencing March 1, 2012. Under the terms of the lease, the Kouroupas agreed to pay \$6,000 per month. Prior to the execution of the lease, the complaint alleges that McClellan represented that the Kouroupas were qualified tenants, and were able to pay rent at the property in accordance with the lease. The complaint alleges that, in fact, the Kouroupas were not qualified, as they allegedly paid rent for approximately six months before falling behind, and ultimately stopping payment altogether in May 2013. The Kouroupas were ultimately evicted in August 2013 for nonpayment of rent. Plaintiff thereafter brought this action against, among other parties, the McClellan defendants. With respect to McClellan, the complaint contends, *inter*

alia, that they represented that the Kouroupas were qualified tenants, and collected a commission on that basis, when in fact the Kouroupas were not qualified. McClellan now moves, pre-answer, to dismiss Plaintiff's complaint pursuant to CPLR 3211(a)(1) and (7).

II. Applicable Law and Analysis

In a pre-answer motion to dismiss under CPLR 3211(a)(1) and (7), this Court must "accept the complaint's factual allegations as true, according to plaintiff the benefit of every possible favorable inference, and determining only whether the facts as alleged fit within any cognizable legal theory" (*see Lezama v. Cedano*, 119 A.D.3d 479 [1st Dept. 2014], citing *Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc.*, 10 A.D.3d 267, 270 [1st Dept.2004] [internal quotation marks omitted]). Dismissal may be granted only if the documentary evidence submitted "utterly refutes plaintiff's factual allegations," and "conclusively establishes a defense to the asserted claims as a matter of law" (*Id.*, citing *Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326 [2002]; *Greenapple v. Capital One, N.A.*, 92 A.D.3d 548, 550, 939 N.Y.S.2d 351 [1st Dept.2012]; *Weil, Gotshal*, 10 A.D.3d at 270-271 [internal quotation marks omitted]).

As argued by McClellan, the allegations in the complaint may be construed as a cause of action for negligent misrepresentation. The essential elements of a claim for negligent misrepresentation are: "(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 J.A.O. Acquisition Corp. v. Stavitsky*, 8 N.Y.3d 144, 148, *rearg. den.*, 8 N.Y.3d 939 [2007]). McClellan initially argues that this claim must fail because Plaintiff has not alleged the existence of a special or privity-like relationship between himself and McClellan so as to impose a duty on McClellan to impart correct information. McClellan alleges that it was only in privity with the Kouroupas, and had no special relationship with Plaintiff, who had his own real estate agent. However, liability for negligent misrepresentation may be found where there is an "awareness that the information provided is to be relied upon for a particular purpose, and some conduct by the declarant linking it to the relying party and evincing the declarant's understanding of their reliance" (*see*

Houlihan/Lawrence v. Duval, 228 A.D.2d 560 [2nd Dept. 1996], citing *Ossining Union Free School Dist. v. Anderson Larocca Anderson*, 73 N.Y.2d 417, 425 [1989]). Here, again affording Plaintiff all favorable inferences, it may be determined that McClellan had a sufficient awareness that any representations or omissions would be relied upon by Plaintiff, owner of property seeking to rent to McClellan's prospective tenants.

Nevertheless, the complaint fails to allege what "representation" was made, or the "circumstances of the wrong," in sufficient detail (CPLR 3016[b]), *see Colasacco v. Robert E. Lawrence Real Estate*, 68 A.D.3d 706 [2nd Dept. 2009]). Furthermore, even assuming that McClellan's alleged "representations" regarding the prospective tenants' financial abilities were "incorrect," Plaintiff has not alleged circumstances under which his reliance on those representations could be considered reasonable or justifiable (*Colasacco, supra*, at 708). The complaint itself does not specifically allege any reliance on representations from McClellan concerning the Kourourpas' financial condition at the time the lease was executed. Even accepting Plaintiff's allegations in opposition that he did in fact rely on McClellan to perform certain investigations on prospective tenants, Plaintiff does not allege that this information was within the exclusive knowledge of McClellan, or that Plaintiff did not have the means available to determine, by the exercise of ordinary intelligence, the true or real quality of the alleged representations from McClellan (*see Orlando v. Kukielka*, 40 A.D.3d 829 [2nd Dept. 2007]; *see also Daly v. Kochanowicz*, 67 A.D.3d 78, 91 [2nd Dept. 2009]). Indeed, in opposition to the motion, Plaintiff submits an affidavit from an investigator he retained to perform a background check on the Kourourpas defendants. That branch of the motion seeking dismissal of Plaintiff's alleged "negligent misrepresentation" claim is therefore granted, pursuant to CPLR 3211(a)(7), and the claim is dismissed.

Plaintiff contends in opposition that the thrust of his case is that McClellan failed to competently perform obligations it owed to him, including its obligation to investigate the financial background of tenants by obtaining a complete financial history of the prospective tenants, including bank statements, tax returns, and pay stubs. None of this was done by McClellan. Plaintiff notes that McClellan's moving papers include a disclosure form signed by the tenants, where McClellan checked a box indicating that they were acting as a "dual agent"

and had the landlord's permission to so act. Plaintiff alleges that from their own documentation, McClellan owed a duty to the landlord of performing an adequate investigation on the financial background of the tenant.

The elements of common law negligence are (1) a duty owed by the defendant to the plaintiff, (2) a breach of the duty, and (3) an injury proximately caused by the breach (*see Akins v. Glens Falls City School Dist.*, 53 N.Y.2d 325 [1981]). Absent a duty of care to the injured party, a defendant cannot be held liable in negligence (*see Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339 [1928]). The question of whether a duty of care exists is for the court to decide (*Stankowski v. Kim*, 286 A.D.2d 282 [1st Dept 2001], *lv dismissed* 97 N.Y.2d 677 [2001]).

A real estate broker is a fiduciary with a duty of loyalty and an obligation to act in the best interests of the principal (*see Cornwell v. NRT New York, LLC.*, 95 A.D.3d 637 [1st Dept. 2012], citing *Dubbs v. Stribling & Assoc.*, 96 N.Y.2d 337 [2001]). To state a claim for breach of fiduciary duty, a plaintiff must allege that (1) defendant owed them a fiduciary duty, and (2) defendant committed misconduct, and (3) they suffered damages by that misconduct (*see Burry v. Madison Park Owner LLC.*, 84 A.D.3d 699 [1st Dept. 2011]). In this case, upon a liberal reading of the complaint, when considered along with the facts alleged by Plaintiff in response to the motion (*see Rovello v. Orofino Realty, Inc.*, 40 N.Y.2d 633, 635-36 [1976]), and accepting all allegations as true, Plaintiff has sufficiently alleged the existence of a fiduciary duty on the part of McClellan, and a breach of that duty by failing to investigate the financial background of prospective tenants (*see Salles v. Chase Manhattan Bank*, 300 A.D.2d 226, 239 [1st Dept. 2002][Court's role on a pre-answer motion to dismiss is simply to determine whether the facts, as alleged, fit into any valid legal theory]). Further, the documents submitted in support of McClellan's motion - including the lease agreement, landlord-tenant disclosure form, and a copy of the listing for the premises, do not conclusively establish a defense to the asserted claims as a matter of law. The landlord-tenant disclosure form, while certainly not dispositive of the issue, does not utterly refute any contention that McClellan and Plaintiff had a fiduciary relationship. The exclusive right to rent agreement was submitted for the first time in reply papers and thus cannot be considered (*see Ritt by Ritt v. Lenox Hill Hosp.*, 182 A.D.2d 560 [1st Dept. 1992]), and an affidavit such as the one supplied in reply, further, does not "establish conclusively that

plaintiff has no cause of action” (*Rovello v. Orofino Realty, Co., supra*).

III. Conclusion

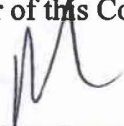
Accordingly, it is hereby

ORDERED, that McClellan’s motion to dismiss is granted only to the extent of dismissing any cause of action for negligent misrepresentation against McClellan, and it is further,

ORDERED, that McClellan’s motion to dismiss Plaintiff’s cause of action sounding in negligence, is denied.

This constitutes the Decision and Order of this Court.

Dated: 10/9, 2015



Hon. Mary Ann Briganti, J.S.C.