Scola v Boivin
2016 NY Slip Op 30116(U)
January 21, 2016
Supreme Court, New York County
Docket Number: 653458/2011
Judge: O. Peter Sherwood

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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KATARINA SCOLA,

Plaintiff,

-against-

STEPHANE BOIVIN, STEPHANE BIBEAU, NORDICA CAPITAL, and JOHN AND JANE DOE PERSONS or ENTITIES 1 to 10,

Defendants.

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DECISION AND ORDER

Index No.: 653458/2011
Motion Sequence Number: 006

O. PETER SHERWOOD. J.

This motion of defendant, Stephane Bibeau, for a summary judgment (motion sequence number 006) is granted for the reasons discussed here. The facts are taken from the undisputed facts in the parties' 19-a statements, except as noted. Citations are to Bibeau's Reply Statement of Material Undisputed Facts (RSMUF, NYSCEF Doc. No. 126).

I. FACTS

In February 2010, plaintiff Katarina Scola loaned $400,000 to defendant Nordica Capital (Nordica) in return for a private placement note (the Note). Defendant Stephane Boivin is the owner of Nordica. Boivin personally guaranteed the note. Defendant Stephane Bibeau witnessed execution of the Note. His relationship with Nordica is disputed. Under the terms of the Note, Nordica was to repay the $400,000 to Scola within a year, along with 16% interest, to be paid quarterly. Nordica made the first two quarterly interest payments. Scola received no further payments.

Scola filed this action on December 14, 2011 (the Original Action). The parties entered into a settlement agreement on July 20, 2012. Because Nordica and Boivin defaulted under the settlement agreement, this action was re-opened. Thereafter, Nordica and Boivin signed a confession of judgment and the re-opened case as to defendant Bibeau was severed by order of this court (NYSCEF Doc. No. 88).

Scola and Bibeau met in approximately 1997-98, when Scola and her mother moved from Brazil to the United States and stayed with Bibeau for a month (¶ 1). Scola was thirteen at the time (*id.*). Scola and Bibeau became very close (*id.*).

Bibeau is now "a real estate professional with over 20 years of experience in the field" (¶ 10 p. 22). He "seeks out investment opportunities and sourcing of new deals for [his] company and its equity partners" (*id.*). In 2009, Bibeau told Scola he was excited about a Bermudan real estate project called Nine Beaches, which was being developed by Nordica (¶ 2). Scola claims Bibeau presented himself as a participant in Nine Beaches, and that the project was a joint venture (¶ 3). Scola says Bibeau told her that he and Boivin were partners (¶ 4). Bibeau claims he never told Scola he and Boivin were business partners, and that Nine Beaches was not a joint venture (¶¶ 3-4). The parties agree that Scola and Bibeau discussed the investment opportunity and that Scola made a loan to Nordica. Scola claims Bibeau reassured her the investment was foolproof and verbally guaranteed she would be paid back, even if he had to sell his own assets (¶ 5). The parties dispute what Bibeau said to Scola and when he said it. Bibeau claims he did not know the details of the Note until after it was signed, and that he did not offer to repay Scola until after Nordica had already defaulted (*id.*).

In addition to her claims against Boivin and Nordica, Scola alleges breach of contract (referring to the Note); fraud, fraudulent inducement and fraudulent misrepresentation; unjust enrichment; and deceptive practices against Bibeau (Complaint at 9-12). Bibeau moves for summary judgment as to all causes of action.

II. DISCUSSION

A. Summary Judgment Standard

The standards for summary judgment are well settled. Summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*see* CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 329 [1986]; *Sillman v Twentieth Century-Fox Film Corporation,* 3 NY2d 395 [1957]). To prevail, the party seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law tendering evidentiary proof in admissible form, which may include deposition transcripts and other proof annexed to an attorney's affirmation (*see, Alvarez v Prospect Hosp., supra*; *Olan v Farrell Lines,* 64 NY2d 1092 [1985]; *Zuckerman v City of New York,* 49 NY2d 557

[1980]). Absent a sufficient showing, the court should deny the motion without regard to the strength of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

Once the initial showing has been made, the burden shifts to the party opposing the motion for summary judgment to rebut the prima facie showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*see Kaufman v Silver*, 90 NY2d 204, 208 [1997]). Although the court must carefully scrutinize the motion papers in a light most favorable to the party opposing the motion and must give that party the benefit of every favorable inference (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625 [1985]), and summary judgment should be denied where there is any doubt as to the existence of a triable issue of fact (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]), bald, conclusory assertions or speculation and "a shadowy semblance of an issue" are insufficient to defeat a summary judgment motion (*S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338 [1974]; *see Zuckerman v City of New York, supra; Ehrlich v American Moninga Greenhouse Manufacturing Corp.*, 26 NY2d 255, 259 [1970]).

Lastly, "'[a] motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility'" (*Ruiz v Griffin*, 71 AD3d 1112 [2d Dept 2010], quoting *Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]).

B. Breach of Contract based on the Note

1. Whether Bibeau was a Partner in Nordica

Bibeau claims, and Scola no longer disputes, that he did not sign the Note as a party. He signed as a witness only. Bibeau also claims that, as far as Scola argues he was a "partner, owner, operator[,] or authorized employee of Nordica, or involved in a joint venture with Boivin [and so] should be liable for the debt," the assertions are unsupported (Memo at 7).

The parties do not dispute that Nordica is not a registered business entity, and so is treated like a partnership or joint venture. Scola concedes that no written partnership agreement exists for Nordica, but claims that Bibeau is liable as a partner in Nordica because he (1) held himself out as a partner, including Scola's statement that he handed her a Nordica business card; (2) conducted himself as a partner; and (3) believed he would eventually be taken on as a partner in the Nine Beaches project (Opp at 12-13). Scola contends that Bibeau's actions in inviting and urging her to

invest indicated he had control over the Nine Beaches project. Scola also states Bibeau told her he was going to make a lot of money off the project, thereby suggesting to her that Bibeau was going to share in the profits (*id.*). Bibeau denies giving Scola a Nordica business card. The purported business card was never produced and Scola could not recall whether the card had Bibeau's name on it (NYSCEF Doc. No. 122, p. 50). Bibeau admits that he traveled to Bermuda to investigate the investment opportunity at his own expense, but never discussed the distribution of profits or losses from Nine Beaches with Boivin, and had no control over Nine Beaches or Nordica (Reply at 9; Bibeau dep, attached as Exhibit M to Mannarino Aff, at 38:20- 39:7).

The admissions, interrogatory answers, and affidavits filed by Bibeau and Nordica state that Bibeau was not a partner in Nordica. Bibeau asserts that there is virtually no documentary evidence supporting Scola's claim (Memo at 8). As to the business card, Scola has testified that Bibeau gave her a business card from Nordica. She does not claim the card had Bibeau's name on it. Bibeau asserts that that mere fact that he may have handed Scola a Nordica business card does not create an issue of fact as to Bibeau's status at Nordica. Scola claims Bibeau held himself out as a partner in Nordica, and expected that he would become a partner in the Nine Beaches Project at some point (Opp at 12-13). However, the deposition testimony cited by Scola does not indicate Boivin was or anticipated becoming a partner, but only that he believed he would make money from the Nine Beaches Project. Bibleau notes that a mere expectation does not make him a partner. Scola's vague, unsupported, and self-serving statements about Bibeau's holding himself out as a partner merely represent "a shadowy semblance of an issue" (*S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]).

2. Whether Nine Beaches was a Joint Venture

Scola argues that Bibeau should be liable under the Note since Nine Beaches was a joint venture between Nordica and Bibeau (Opp at 14-16). Scola points out that "partners and joint venturers are jointly and severally liable to third parties for 'any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership'" (*id.* at 15, quoting *Gramercy Equities Corp. v Dumont*, 72 NY2d 560, 565 [1998] and citing NY Partnership Law §§ 24, 26 [McKinney]).

> "The indicia of the existence of a joint venture are: acts manifesting the intent of the parties to be associated as joint venturers, mutual contribution to the joint undertaking through a combination of property, financial resources, effort, skill or knowledge, a measure of joint proprietorship and control over the enterprise, and a provision for the sharing of profits and losses"

(*Richbell Info. Services, Inc. v Jupiter Partners, L.P.*, 309 AD2d 288, 298 [1st Dept 2003]). Scola points to evidence that Bibeau and Nordica's principal did work together, that Bibeau presented Boivin as his partner, that they traveled together to Bermuda to review the Nine Beaches plans, and that Bibeau told Scola he was going to make a lot of money off the Nine Beaches project (Opp at 15). Scola argues that Bibeau's actions in seeking investments for the project and promising repayment within a year support the conclusion that he had control over the Nine Beaches project (*id.*).

It is undisputed that Bibeau signed the Note as a witness only. More than perception is required to show a joint venture. Bibeau must have actually had some control over the project, and no evidence in the record supports that conclusion. Scola provided no direct evidence of any of the elements of a joint venture.[1] At best, her evidence creates no more than "a shadowy semblance of an issue" (*S.J. Capelin Assoc.*, 34 NY2d at 341). Because the evidence presented by Scola is insufficient to create an issue of fact as to whether Bibeau was a joint venturer with Nordica, her claim against him based on the Note must be dismissed.

C. Breach of Contract based on an Oral Guaranty

Scola claims that she had an oral contract with Bibeau in which he promised to repay the loan if Nordica defaulted (Opp at 10, citing SMF ¶¶ 5, 24, 32). She claims Bibeau made the promise before she made the loan (*id.*). The claim is not supported by the portions of the record cited by Scola (*see* NYSCEF Docs. Nos. 120, ¶24; 122, pp. 36-37; and 123, pp. 96-98). In fact, Scola's own testimony suggests that no such assurance was made before the Note was signed (NYSCEF Doc. No. 122, pp. 52:11-53:3 and 24:3 -7). Bibeau concedes that he told Scola he would make sure she was repaid, even to the extent of selling his personal assets. He denies having guaranteed the Note. He

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[1]The court has reviewed two documents submitted by plaintiff after oral argument which she characterized as newly discovered e-mails showing Bibeau misrepresented his involvement with the transaction. The documents are not inconsistent with Bibeau's prior statements.

adds that his assurance was made after Nordica defaulted (NYSCEF Doc. No. 110, pp. 92:6-98:15), thereby making it an unenforceable gratuitous promise (Reply at 4-5, citing *Presbyt. Church v Cooper*, 112 NY 517, 520-21 [1889] ["It is, of course, unquestionable that no action can be maintained to enforce a gratuitous promise, however worthy the object intended to be promoted. The performance of such a promise rests wholly on the will of the person making it. He can refuse to perform, and his legal right to do so cannot be disputed, although his refusal may disappoint reasonable expectations, or may not be justified in the forum of conscience"]).

Bibeau also argues that such a promise would be barred by the statute of frauds, as that statute requires a "promise to answer for the debt, default, or miscarriage of another" to be in writing (Reply at 6, quoting *Martin Roofing, Inc. v Goldstein*, 60 NY2d 262, 264 [1983] and NY Gen. Oblig. Law § 5-701[a][2] ["Every agreement . . . is void, unless it . . . be in writing . . . if such agreement . . . [i]s a special promise to answer for the debt, default, miscarriage of another person]). Bibeau also claims any such oral promise is unenforceable due to the statute of frauds (NY Gen. Oblig. Law § 5-701[a][1]), as the Note provides that it shall be paid off "one year after effective date of this instrument" (Note, as Exhibit D attached to Mannarino Aff). Accordingly, Bibeau claims, the agreement described in the Note cannot be fully performed within one year, and requires a writing (Reply at 7-8).

Scola argues that, to the contrary, her oral contract could be completed within a year, and so the statute of frauds in NY Gen. Oblig. Law § 5-701(a)(1) does not bar the enforcement of the agreement. Scola claims that Bibeau promised her she would receive four quarterly interest payments and full payment within a year (Opp at 10), allowing this agreement to fall within the exception.[2] Scola claims Boivin's guaranty could have, by its terms, been completed within one year, had Nordica quickly defaulted and Boivin timely paid her. However, NY Gen. Oblig. Law § 5-701(a)(1), requires a writing where "by its terms [the agreement] is not to be performed within one year from the making thereof". Further, NY Gen. Oblig. Law § 5-701 (a)(2) provides that the writing requirement applies to "a special promise to answer for the debt, default, or miscarriage of another

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[2]At the point of the record cited by plaintiff's counsel, Scola testified that she understood that she would be paid "every quarter and then at the end of the year and [Nordica] would just pay [Scola] everything back" (NYSCEF Doc. No. 122, p. 15:8-24).

person." As the nature of the alleged contract is just such a promise, the writing requirement applies even if section 5-701(a)(1) does not.

Scola also claims the oral guaranty also falls within another exception to the statute of frauds as a "qualified financial contract" (Opp at 11, NY Gen. Oblig. Law § 5-701[b][1]). However, the statute specifies what constitutes a "qualified financial contract," and the alleged agreement does not fit the specification. New York General Obligations Law defines a qualified financial contract as being an agreement for certain types of transactions "as to which each party thereto is other than a natural person" (NY Gen. Oblig. Law § 5-701[b][2]). Scola is claiming the existence of a contract between herself and Boivin, both natural persons. Therefore, the alleged oral agreement does not qualify for this exception to the writing requirement.

Accordingly, even if there was an oral agreement for Bibeau to guaranty the loan, it is not enforceable.

D. Fraud, Fraudulent Inducement, Fraudulent Misrepresentation Claims

The complaint alleges that Boivin and Bibeau made a variety of false statements to get her to make the loan. Those statements include "that the Note was a 'fool proof' investment; that repayment was fully guaranteed; that they guaranteed that Plaintiff would be fully repaid with 16% interest in no longer than a year" (Complaint, ¶ 17). Scola also points to Bibeau's (disputed) statement that he would sell his own property to ensure she was paid back (Opp at 16, RSMUF, ¶ 5). However, this alleged statement is an unenforceable promise, and is barred by the statute of frauds (*see* NY Gen. Oblig. Law § 5-701[a][2]).

Bibeau points out that, "in a claim for fraudulent misrepresentation, a plaintiff must allege 'a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury'" (Memo at 9, quoting *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011]). Bibeau argues that his statements were not false, or that, at least, he did not know that any of his statements were false when he made them. Scola argues that (1) summary judgment cannot be granted on the basis of Bibeau's personal belief what he said was true; and (2) his statements to Scola that the loan was "foolproof" were

reckless, and so can support a fraud claim (Opp 16-17, citing *Owens v Waterhouse*, 225 AD 582, 584 [4th Dept 1929] ["a representation made without knowing whether it was true or false, and where the party making it was indifferent whether it was true or false, will sustain an action"]; *Cohen v Koenig*, 25 F3d 1168, 1172 [2nd Cir 1994]; *Shields v Citytrust Bancorp, Inc.*, 25 F3d 1124, 1128 [2d Cir 1994] [a "strong inference" of fraud may be established . . . by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness"]). A statement can be fraudulent if the speaker "knew that it was false, or, not knowing whether it was true or false, and not caring what the fact might be, made it recklessly, paying no heed to the injury which might ensue" (*Kountze v Kennedy*, 147 NY 124, 129 [1895]; *State St. Trust Co. v Ernst*, 278 NY 104, 112 [1938]["heedlessness and reckless disregard of consequence" "may furnish evidence leading to an inference of fraud so as to impose liability"]). Bibeau argues that the cases cited by Scola are distinguishable because they involve securities fraud, rather than common law fraud (Reply at 11). However, recklessness has provided the basis for a fraud claim in other contexts as well (*Tony Shafrazi Gallery, Inc. v Christie's Inc.*, 101 AD3d 654, 655 [1st Dept 2012] [fraud claim as to whether defendant acted recklessly in accepting a painting for consignment]). Additionally, "[i]t is well settled that false and fraudulent representations made to one contemplating a business transaction or negotiations with a third person, concerning the financial status, solvency, or credit standing of such third person, constitute misrepresentations that may furnish the basis of a cause of action for fraud" (60A NY Jur 2d Fraud and Deceit § 87; *State Street Trust Co. v Ernst*, 278 N.Y. 104 [1938]; *Ultramares Corporation v Touche*, 255 N.Y. 170 [1931]).

Defendant Bibeau also claims that the statements which Scola attributes to Bibeau cannot support a fraud claim, as they are mere opinion or puffery (Memo at 10; *see Sheth v New York Life Ins. Co.*, 273 AD2d 72, 74 [1st Dept 2000]["The purported misrepresentations relied upon by plaintiffs may not form the basis of a claim for fraudulent and/or negligent misrepresentation since they are conclusory and/or constitute mere puffery, opinions of value or future expectations"]). In *Longo v Butler Equities II, L.P.*, for example, the First Department determined that the "alleged misrepresentations that the target company was seriously undervalued and could be profitably broken up, and that partnership investors would be 'in and out' in not more than one year, can only be understood as nonactionable expressions of opinion, mere puffing" (278 AD2d 97, 97 [1st Dept

2000]).

Scola relies on allegations that Bibeau told Scola the Note was a 'fool proof' investment; that repayment was fully guaranteed; that they guaranteed that Plaintiff would be fully repaid with 16% interest in no longer than a year" Complaint, ¶ 17). The characterization as "fool proof" is classic puffery. The description of the loan as "guaranteed" was accurate- Boivin guaranteed the Note. The statement about full repayment was a representation of the terms of the Note. Additionally, allegations that Bibeau said Nine Rivers was "a great investment opportunity" and that Scola "had nothing to worry about" (SMF ¶ 5) are also pure puffery. None of the statements which Scola claims Bibeau made can provide the basis for a fraud, fraudulent inducement, or fraudulent misrepresentation claim. Bibeau's motion for summary judgment on these claims will be granted.

E. Unjust Enrichment

"Unjust enrichment is a quasi contract theory of recovery, and 'is an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned'" (*Georgia Malone & Co., Inc. v Rieder*, 86 AD3d 406, 408 [1st Dept 2011], *affd.* 19 NY3d 511 [2012], quoting *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]). In order to plead a claim for unjust enrichment, the plaintiff must allege "that the other party was enriched, at plaintiff's expense and that 'it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered'" (*Georgia Malone & Co.*, 86 AD3d at 408, quoting *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]).

Bibeau argues that summary judgment should be granted, dismissing this claim, as he did not receive any benefit from the loan (Memo at 11). Scola loaned money to Nordica and was not paid back. There is no dispute that Bibeau did not receive the funds. Additionally, he did not have any control over the recipient's finances and therefore cannot be directly liable for Nordica's actions (*see Land Man Realty, Inc. v Weichert, Inc.*, 94 AD3d 1221, 1222 [3d Dept 2012]). First, Scola argues that Bibeau would be liable as a partner or joint venturer. As discussed above, no issue of material fact exists to support Scola's argument that Bibeau was either a partner or joint venturer.

Alternatively, Scola claims Bibeau benefitted indirectly from the loan, because it gave Bibeau the opportunity to pursue the Nine Beaches project (Opp at 18-19). Scola cites no law in support of her argument that a defendant can be unjustly enriched by indirectly receiving an opportunity,

especially one which is unsuccessful. "The essence of such a cause of action is that one party is in possession of money or property that rightly belongs to another" (*Clifford R. Gray, Inc. v LeChase Const. Services, LLC*, 31 AD3d 983, 988 [3d Dept 2006] citing *Paramount Film Distrib. Corp. v State*, 30 NY2d 415, 421 [1972] *cert. denied* 414 US 829 [1973]). Here, Bibeau is not alleged to be "in possession of money or property belonging to plaintiff. Thus, there is no issue of fact" which would support the claim for unjust enrichment (*Clifford R. Gray, Inc.*, 31 AD3d at 988 [3d Dept 2006]).

F. Deceptive Practices

"Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state" are prohibited by General Business Law section 349. Section 349(h) creates a private right of action. A plaintiff "must prove three elements: first, that the challenged act or practice was consumer-oriented; second, that it was misleading in a material way; and third, that the plaintiff suffered injury as a result of the deceptive act" (*Stutman v Chem. Bank*, 95 NY2d 24, 29 [2000]).

"A deceptive practice . . . need not reach the level of common-law fraud to be actionable under section 349" (*Stutman v Chem. Bank*, 95 NY2d 24, 29 [2000]). Puffery or opinion, however, is not actionable under General Business Law § 349 (*Lacoff v Buena Vista Pub., Inc.*, 183 Misc 2d 600, 610 [Sup Ct 2000] citing *Bader v Siegel*, 238 AD2d 272 [1st Dept 1997]). Additionally, "the deceptive practice must be 'likely to mislead a reasonable consumer acting reasonably under the circumstances'" (*Stutman*, 95 NY2d at 29, quoting *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, N.A.*, 85 NY2d 20 [1995]). The "reasonable consumer test" may be decided as a matter of law, if appropriate (*Oswego Laborers' Local 214 Pension Fund*, 85 NY2d at 26).

Here, Scola claims that Bibeau was acting a promoter in convincing Scola to make the loan, and that the Note was a security, pursuant to New York General Business Law section 352 (Opp at 20). Scola points to the statements Bibeau made about Boivin, Nordica, and the Nine Beaches project, and to the documents about the Nine Beaches project he gave to Scola's brother (*id.* at 20-21 citing RSMUF ¶ 2, 5, 24, 35). As discussed above, the statements Bibeau made that the loan investment was fool proof, and that Nine Beaches was a great investment, were puffery. A reasonable consumer acting reasonably would not rely on those representations in making a $400,000

investment. Accordingly, this claim also fails as a matter of law.

Accordingly, it is hereby

ORDERED that the motion of defendant, Stephane Bibeau, for summary judgment is granted and the complaint is dismissed with costs and disbursements to said defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

DATED: January 21, 2016

E N T E R,

O. PETER SHERWOOD
J.S.C.