SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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MICHAEL BEYS and PETER BEYS,

Plaintiffs,

-against-

MMM GROUP, LLC, BRETT MARKS, PETER MORRIS, RYANN MCCARTHY,

Defendants.

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Index No. 650625-2012

DECISION/ORDER

Motion Sequence 006

HON. GEORGE J. SILVER, J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion, Affirmations & Collective Exhibits Annexed	1, 2, 3
Affirmation in Opposition	4

In this action for fraud stemming from a real estate transaction in the Hudson Valley area of New York, Plaintiffs Michael Beys and Peter Beys ("Plaintiffs") commenced this action on March 2, 2012, naming MMM Group ("MMM"), Brett Marks ("Marks"), Peter Morris ("Morris"), and Ryann McCarthy as defendants ("McCarthy," collectively "Defendants"). Plaintiffs allege Defendants fraudulently induced them to enter into a purchase agreement for a piece of property (Beys Compl. at 9), and made numerous misrepresentations in relation to a buyout agreement (*Id.* at 7). Marks denies the allegations and filed a motion to dismiss on October 1, 2014. On June 3, 2015 the Court denied the motion without prejudice because Marks failed to have his affidavit duly notarized. Prior to the Court's June 3rd Decision and Order, on May 19, 2015, Marks submitted the present motion to dismiss, and in the alternative for summary judgment. Finally, Marks submitted a third motion to dismiss on July 18, 2015.

CPLR § 3211(e) bars litigants from filing multiple motions to dismiss, with a few exceptions (CPLR § 3211[e]). The single-motion rule serves to prevent delay before answer (*see Held v Kaufman*, 91 NY2d 425, 430 [1998]), protect the pleader from being harassed by repeated CPLR 3211(a) motions *(Nassau Roofing & Sheet Metal Co. v Celotex Corp.*, 74 AD2d 679, 680 [3d Dept 1980]), and to conserve judicial resources (*Oakley v Cty. of Nassau*, 127 AD3d 946, 947 [2d Dept 2015]). Here however, the Court denied, without prejudice, Marks' original motion

to dismiss because he failed to have his supporting affidavit duly notarized. As such, the renewal of the motion upon a duly notarized affidavit, does not violate the single motion rule set forth in CPLR 3211(e) (*see 767 Third Ave. LLC v Greble & Finger, LLP*, 8 AD3d 75, 75 [1st Dept 2004] [holding CPLR 3211[e] did not apply where defendants promptly refiled their dismissal motion after initial denial on procedural grounds for failure to attach a copy of the amended complaint]; *Merrill Lynch Credit Corp v Smith*, 87 AD3d 1391, 1392 [4th Dept 2011]). However, this exception to 3211(e) does not extend to Marks' third attempt at a motion to dismiss. Therefore, motion sequence 007 must be dismissed under CPLR 3211(e).

As a further preliminary matter, Plaintiffs do not submit opposition to the present motion to dismiss, but rely on their opposition papers to the previous motion to dismiss under motion sequence 004, with permission of the Court (see *Studio A Showroom, LLC v Yoon*, 99 AD3d 632 [1st Dept 2012] [permitting a failure to include motion pleadings where "the pleadings were filed electronically and thus were available to the parties and the court"]).

Marks first seeks to dismiss the action as time-barred. In the alternative, Marks seeks to dismiss the action pursuant to CPLR § 3211(a)(1) and (7), and lastly, moves for an order granting summary judgment pursuant to CPLR § 3212 under 3211(a)(1) and (7) grounds. Recognizing that Marks is a pro se litigant, the Court has interpreted his papers pursuant to this Courts long-held practice that the papers of pro se litigants be granted some latitude given the lack of formal legal training and general unfamiliarity with court procedures (*Protective Ins. Co. v Little*, 2014 WL 4913861 (Sup Ct, NY County 2014). However, "[a] pro se litigant acquires no greater rights than those of any other litigant and cannot use such status to deprive [plaintiffs] of the same rights as other [plaintiffs]" (*Goldmark v Keystone & Grading Corp.*, 226 AD2d 143, 144 [1st Dept 1996]; *Jiggetts v MTA Metro-N. R.R.*, 121 AD3d 414, 415 [1st Dept 2014]).

Turning to the substance of the motion, Marks first raises the affirmative defense, under CPLR § 3018(b), that Plaintiffs did not timely file the complaint. Plaintiffs filed a summons and complaint on March 2, 2012 alleging multiple acts of fraud arising from actions occurring on March 2, 2006. The statute of limitations for fraud is six years (CPLR § 213[8]). Further, in computing the statute of limitations period, "the day of accrual is excluded and the count begins the next day" (Siegel, N.Y. Prac. § 34 [5th ed] citing Gen. Constr. L § 20). Thus, "[w]ith a limitation period measured in years, this makes the event's anniversary date in the last year the last day for the bringing of the action" (Siegel, N.Y. Prac. § 34 [5th ed] *citing Evans v Hawker-Siddeley Aviation, Ltd.*, 482 F Supp 547 [SDNY 1979]). Indeed, this Court previously noted, in its Decision and Order dated April 3, 2013 that "[t]he statue of limitations for the sole cause of action asserted in the complaint, fraud, expired on March 2, 2012, the date Plaintiffs filed their complaint." Thus, the complaint was timely filed and Defendant's motion to dismiss based on statute of limitations is denied.

Second, Marks moved to dismiss the complaint against him pursuant to CPLR § 3211(a)(1) as barred by documentary evidence. Specifically, Marks claims that documentary evidence demonstrates that Plaintiffs do not have a legitimate claim of fraud (Marks Aff. Supp.).

"A motion to dismiss pursuant to CPLR 3211(a)(1) will be granted only if the documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Cives Corp. v George A. Fuller Co.*, 97 AD3d 713, 714 [2d Dept 2012] quoting *Fontanetta v John Doe 1*, 73 AD3d 78, 83 [2d Dept 2010]). A motion to dismiss under CPLR 3211(a)(1) obliges the court "to 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" (*Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 270 [1st Dept 2004]). Dismissal is appropriate only where the documentary evidence submitted "utterly refutes plaintiff's factual allegations," and conclusively establishes a defense to the asserted claims as a matter of law (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Amsterdam Hosp. Grp., LLC v Marshall-Alan Associates, Inc.*, 120 AD3d 431, 433 [1st Dept 2014]).

Here, Marks documentary evidence uses, as necessary support, an affidavit from Marks, in addition to emails to and from Marks (Marks Aff; Marks Aff. at Ex. B; Marks Aff at Ex. C). Crucially though, CPLR § 3211(a)(1) must be established by the documentary evidence alone, and affidavits cannot be used as the basis, or as necessary support under the statute; nor can emails (CPLR § 3211[a][1]; *Amsterdam Hosp. Grp., LLC v Marshall-Alan Associates, Inc.*, 120 AD3d 431, 433 [1st Dept 2014]). Therefore, Marks' motion to dismiss under CPLR § 3211(a)(1) is denied.

Marks next moved for an order dismissing the claim under CPLR § 3211(a)(7) for failure to state a cause of action. CPLR 3211(a)(7) limits [the court] to an examination of the pleadings to determine whether they state a cause of action (*Lee v Dow Jones & Co.*, 121 AD3d 548, 549 [1st Dept 2014] citing *Miglino v Bally Total Fitness of Greater N.Y., Inc.*, 20 NY3d 342, 351 [2013]; *Rovello v Orofino Realty Co.*, 40 NY2d 633 [1976]). "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" (*High Tides, LLC v DeMichele*, 88 AD3d 954, 957 [2d Dept 2011] quoting *Introna v Huntington Learning Ctrs., Inc.*, 78 AD3d 896, 898 [2d Dept 2010). CPLR 3016(b) requires that the circumstances of the fraud must be stated in detail, including specific dates and items (*Cremosa Food Co., LLC v Amella*, 130 AD3d 559, 559 [2d Dept 2015] citing *Moore v Liberty Power Corp.*, LLC, 72 AD3d 660, 661 [2d Dept 2010]).

Here, Plaintiffs allege that Defendants made a material misrepresentation about a buyout of Plaintiffs' interest, on March 2, 2006, among other alleged misrepresentations (Beys Compl. at 7). Plaintiffs further allege that Defendants knew this to be a falsity (*Id.* at 7-9), and intended it to induce Plaintiffs to enter into the $500,000.00 Purchase Agreement dated November 7, 2006 (*Id.* at 2). Thus, Plaintiffs have successfully pled a cause of action for fraud, and Marks' motion to dismiss pursuant to CPLR § 3211(a)(7) is denied.

Finally, in the alternative, Marks moved for an order, pursuant to CPLR § 3212, granting summary judgment against Plaintiffs on CPLR § 3211(a)(1) and (7) grounds. It is well-settled

that on a motion for summary judgment, the moving party has the initial burden of demonstrating, by admissible evidence, its right to judgment (*Bendik v Dybowski*, 227 AD2d 228 [1st Dept 1996]). The burden then shifts to the opposing party, who must proffer evidence in admissible form establishing that an issue of fact exists warranting a trial (*Id.*). Summary judgment is a drastic remedy that should only be employed where no doubt exists as to the absence of triable issues (*Leighton v Leighton*, 46 AD3d 264 [1st Dept 2007]). The key to such procedure is issue-finding, rather than issue-determination (*Id.*). Further, summary judgment may be denied with leave to renew where outstanding discovery issues prevent a litigant from effectively opposing a motion (*Weinstein v WB/Stellar IP Owner, LLC,* 125 AD3d 526, 527 [1st Dept 2015]; *Wilson v Yemen Realty Corp.*, 74 AD3d 544, 545 [1st Dept 2010) citing *Groves v Land's End Hous. Co.*, 80 NY2d 978, 980 [1992]).

Here, the Court need not consider the merits of the motion because the motion would be premature. Plaintiffs have not had a chance to depose any of the Defendants, and have outstanding third party discovery with direct knowledge concerning the use of Plaintiffs' money in the underlying transaction (Plaintiffs' Mem. Opp. at 6) which would constitute "facts essential to [plaintiffs'] opposition" (*Weinstein*, 125 AD3d at 527). Thus, the motion for summary judgment is denied with leave to renew upon the completion of discovery. The Court has reviewed Marks' other arguments and found them unpersuasive. As such, it is hereby

ORDERED that Defendant's motion for an order pursuant to CPLR § 3211 is denied; and it is further

ORDERED that Defendant's motion for an order pursuant to CPLR § 3212 is denied with leave to renew upon the completion of discovery; and it is further

ORDERED that the parties are to appear for a status conference on June 22, 2016 at 2:30pm in Part 32, 80 Centre St., Room 308, New York, NY 10007; and it is further

ORDERED that Plaintiffs shall serve a copy of this order, with notice of entry, upon defendants within 20 days of entry.

George J. Silver

George J. Silver, J.S.C.

Dated: April 11, 2016
New York County