

Miller v Fusion Analytics Holdings, LLC

2016 NY Slip Op 31086(U)

June 10, 2016

Supreme Court, New York County

Docket Number: 151023/2015

Judge: Barry R. Ostrager

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: IAS PART 61

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SUE MILLER and MATTHEW MILLER a/k/a
 MATTHEW ANDERSEN-MILLER,

Plaintiffs,

INDEX NO. 151023/2015

-against-

Motion Seq. No. 001

FUSION ANALYTICS HOLDINGS, LLC
 FUSION ANALYTICS INVESTMENT PARTNERS LLC,
 MICHAEL J. CONTE; KEVIN P. LANE;
 JOSEPH D. FITZGERALD; JOSEPH P. CONTE;
 and CRAIG W. DOUGHERTY,

Defendants.

_____ X

OSTRAGER, J:

The plaintiff's motion for summary judgment is granted as to the first, second, and third causes of action in the complaint, and denied as to the fourth, fifth, and sixth causes of action in the complaint. The defendants' cross motion for summary judgment as to the fourth and fifth causes of action is denied. The defendants' cross-motion for summary judgment as to the sixth cause of action is granted.

The plaintiffs are Sue Miller ("Mrs. Miller") and her son, Matthew Andersen-Miller ("Mr. Miller"). The defendants are two related corporate entities, Fusion Analytics Holdings LLC ("Fusion") and Fusion Analytics Investment Partners LLC, and five individuals who have held either a managerial position and/or an equity interest in these entities (Miller complaint, ¶ 3-9). Fusion Analytics Holdings LLC is the maker of three Promissory Notes ("Notes") that were issued to plaintiffs, two of which were issued in consideration for the transfer of funds from Sue

Miller's discretionary account with Ameritrade to Fusion Analytics Investment Partners.

Another Promissory Note was issued to plaintiff Matthew Miller in consideration for a loan.

Briefly, in late 2010, Mrs. Miller entered into an agreement with Fusion whereby Mrs. Miller lent \$200,000 to Fusion for 36 months at 10% interest, in exchange for monthly payments of \$1,666.67 (the "First Miller Note") (plaintiff's moving papers, Exh. 1). Fusion was obligated to pay back the principal amount of \$200,000 at the end of the 36-month term under the Note (*id.*). About a week later, Mr. Miller entered into a similar loan arrangement with Fusion whereby Mr. Miller lent Fusion \$50,000 for 36 months at 10% interest, in exchange for monthly payments of \$416.67, with principal payable in full at the end of the 36-month term (the "Second Miller Note") (Andersen-Miller aff, Exh. A). Approximately one year later, Mrs. Miller entered into a third Note agreement with Fusion for \$200,000, but this time for 54 months and at 8% interest, yielding \$1,333.33 per month for the first 30 months and \$8,333.33 per month for the remaining 24 months (the "Third Miller Note") (plaintiff's Exh. 2). Fusion was obligated to pay back the principal amount of \$200,000 at the end of that term (*id.*).

It is undisputed that Fusion has defaulted on most of the principal and interest payments due on the Notes. In the first, second, and third causes of action the plaintiffs allege breach of contract based upon Fusion's default under the three Notes (Miller complaint, ¶ 34-61). The defendants do not contest these allegations and, therefore, plaintiffs are entitled to summary judgment on the first, second, and third causes of action. The parties are directed to agree on the sums due based upon the dates of default, the sums repaid, and the unpaid interest as of the date of this order.

The fourth cause of action asserts that defendants violated California's Elder Financial Abuse law with respect to Mrs. Miller, a California resident who was approximately 75 years old when the First and Third Miller Notes with Fusion were executed (Miller complaint, ¶ 1, 10).

California's Welfare and Institutions Code (WIC) Section 15610.30 provides that "financial abuse" occurs when a person or an entity appropriates, takes, or assists in taking an elder's property for wrongful use or with intent to defraud, or both. *See* WIC § 15610.30(a). Additionally, an alleged wrongdoer must know or should have known that its conduct is "likely to be harmful to the elder." *See* § 15610.30(b). Allegations of fraud raise triable issues of fact which cannot be resolved on a motion for summary judgment (*see Epstein v Scally*, 99 AD2d 713, 714 [1st Dept 1984]). On the other hand, email communications between Mrs. Miller and the defendants show that Mrs. Miller understood the terms of the Note agreements and consulted with her sons about the transactions with Fusion (defendants' Exhs. A, B); (*see Epstein* at 714; *see also Rotuba Extruders v Ceppos*, 46 N.Y.2d 223, 231 [1978]). Accordingly, neither party is entitled to summary judgment on the fourth cause of action in the complaint.

The fifth cause of action alleges breach of fiduciary duty by all individually-named defendants who allegedly persuaded Mrs. Miller and Mr. Miller to make risky loans for the benefit of Fusion, a thinly-capitalized holding company, thereby putting Fusion's interest before the plaintiffs' interests (plaintiffs' Memorandum of Law In Support of Motion for Summary Judgment at 19-21). It is undisputed that the defendants had a long-term relationship with the Millers and the Millers' finances. The defendants move to dismiss the fifth cause of action, alleging, *inter alia*, that Michael Conte and Fusion Partners were perhaps Mrs. Miller's fiduciaries in connection with her investment brokerage account, but claim that this action involves a voluntary, arms-length agreements between private parties which lacks proof of undue

influence (defendants' Memorandum of Law at 14). There are disputed issues of fact with respect to the fifth cause of action and neither party is entitled to summary judgment on the fifth cause of action in the complaint.

As for the sixth cause of action, the plaintiffs assert that the defendants engaged in deceptive trade practices in violation of New York General Business Law Section 349 (GBL § 349) by failing to provide appropriate investment management advice or services to the plaintiffs (Miller complaint, ¶ 99-105). The defendants argue that GBL § 349 is inapplicable in a private dispute involving promissory notes which were not offered to the general public.

GBL § 349 requires the plaintiffs to demonstrate that the defendants engaged in acts or practices that are deceptive or misleading in a material way, that plaintiff was injured by reason thereof, and that such acts or practices were "consumer-oriented" (*see Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20 [1995]) ("Private contract disputes, unique to the parties, for example, would not fall within the ambit of the statute"). This action involves a transaction between private parties, and while there are unsubstantiated allegations¹ that defendants' conduct was directed against other members of the "consuming public," these conclusory allegations, without more, are insufficient to defeat summary judgment.

For all the foregoing reasons, it is hereby

ORDERED that plaintiff's motion for summary judgment is granted to the extent of awarding plaintiff a judgment on liability in favor of plaintiff Sue Miller against defendant Fusion Analytics Holdings, LLC on the first Miller Note based on the First Cause of Action, as well as a judgment on liability in favor of plaintiff Matthew Miller a/k/a Matthew Andersen-

¹ The extent of the plaintiff's allegations of solicitation are contained in Joseph D. Fitzgerald's deposition where Mr. Fitzgerald discusses loans made by two family members related to Fusion's principals (Fitzgerald deposition at 33-34).

Miller on the Andersen-Miller Note based on the Second Cause of Action, as well as a judgment on liability in favor of plaintiff Sue Miller against Fusion Analytics Holdings, LLC on the Second Sue Miller Note based on the Third Cause of Action; and it is further

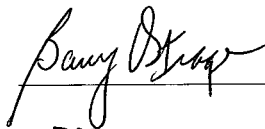
ORDERED that plaintiff's motion for summary judgment on the Fourth, Fifth and Sixth Causes of Action is denied; and it is further

ORDERED that defendants' cross-motion for summary judgment is granted in part and the Clerk is directed to sever and dismiss the Sixth Cause of Action; and it is further

ORDERED that defendants' cross-motion is otherwise denied; and it is further

ORDERED that counsel for all parties shall appear in Room 341 for a pre-trial conference on June 22, 2016 at 2:45 p.m. prepared to discuss all aspects of the case, including settlement and a trial date.

Dated: June 10, 2016



J.S.C.

BARRY R. OSTRAGER
JSC