

Fuller v 79 Hamilton Place Hous. Dev. Fund Corp.

2016 NY Slip Op 31435(U)

July 27, 2016

Supreme Court, New York County

Docket Number: 150028/2016

Judge: Cynthia S. Kern

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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 : PART 55

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 EMMA FULLER and MICHAEL OVERBY,

Plaintiffs,

DECISION/ORDER
Index No. 150028/2016

-against-

79 HAMILTON PLACE HOUSING DEVELOPMENT FUND
 CORPORATION, WILLIE SUGGS, KIMBERLY RICHTER
 and ROLAND BREWSTER,

Defendants.

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 HON. CYNTHIA KERN, J.:

Plaintiffs commenced the instant action seeking recovery for the failure of defendant 79 Hamilton Place Housing Development Fund Corporation (“79 Hamilton Place”), a cooperative corporation, to sell plaintiffs a unit in 79 Hamilton Place’s building at an allegedly agreed-upon price. 79 Hamilton Place and Roland Brewster (“Brewster”) (the “Moving Defendants”) now separately move for an Order (1) pursuant to CPLR §§ 3025 and 1003 rejecting plaintiffs’ Verified Amended Complaint as untimely and (2) for an Order pursuant to CPLR § 3211(a)(5) and (7) dismissing plaintiffs’ Verified Amended Complaint. These motions are consolidated for the purpose of disposition and resolved as set forth below.

The Verified Amended Complaint alleges as follows. 79 Hamilton Place owns a building located at 79 Hamilton Place, New York, New York (the “building”). Plaintiffs applied to purchase shares allocated to Unit 23 (the “unit”) in the building, and 79 Hamilton Place approved their application. The parties agreed that the closing was contingent on 79 Hamilton Place repairing the roof of the building and renovating the unit, which 79 Hamilton Place claimed it would do after receiving the necessary funds from the sale of Unit 7, another unit in the building. Although Brewster, 79 Hamilton Place’s attorney, sent plaintiffs a copy of a contract of sale incorporating the terms of the parties’ agreement to purchase the unit, including a \$250,000.00 purchase price for the unit, plaintiffs did not sign the contract. Despite repeated

assurances from 79 Hamilton Place and its agents or representatives, including defendants Willie Suggs (“Suggs”), Kimberly Richter (“Richter”) and Brewster, that 79 Hamilton Place would repair the roof, renovate the unit and close the sale of the unit within a few months, 79 Hamilton Place did not intend to repair the roof and renovate the unit using the funds from the sale of Unit 7. 79 Hamilton Place failed to repair the roof until late 2014. Thereafter, 79 Hamilton Place claimed that the roof had started leaking again. Further, 79 Hamilton Place failed to renovate the unit, even as it received funds from the sale of various other units. Plaintiffs learned that Suggs intended to hold an open house for the unit on November 21, 2015, at a significantly higher listing price.

Plaintiffs commenced the instant action, asserting causes of action for breach of contract, promissory estoppel, unjust enrichment, a declaratory judgment and a permanent injunction against 79 Hamilton Place, on or about January 4, 2016. On or about April 5, 2016, after 79 Hamilton Place made a motion to dismiss the complaint, plaintiffs amended their complaint to assert causes of action for fraud, aiding and abetting fraud and negligent misrepresentation and to add as defendants Suggs, Richter and Brewster. By a decision and order of this court dated May 16, 2016, the court dismissed plaintiffs’ original complaint in its entirety.

The court first considers Moving Defendants’ motion for an Order pursuant to CPLR §§ 3025 and 1003 rejecting plaintiffs’ Verified Amended Complaint as untimely because it was served more than twenty days after 79 Hamilton Place moved to dismiss the original complaint. Pursuant to CPLR § 3025(a), a party may amend its pleading without leave once “within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it.” Similarly, pursuant to CPLR § 1003, a party may be added without leave within twenty days after service of the original summons, or at any time before the period for responding to the summons expires, or within twenty days after service of a pleading responding to the summons. When a defendant moves to dismiss a complaint, its time to respond to the complaint is extended until ten days after service of the notice of entry of the order determining the motion to dismiss. CPLR § 3211(f). Thus, a plaintiff may amend its complaint without leave while a motion to dismiss is pending. *Perez v. Wegman Cos.*, 162 A.D.2d 959, 959 (4th Dept 1990).

In the present case, plaintiffs' service of the Verified Amended Complaint on April 5, 2016 was not untimely as the period for responding to the original complaint had not yet expired. As 79 Hamilton Place filed a motion to dismiss the original complaint on March 13, 2016, its time to respond to the original complaint was extended until ten days after service of notice of entry of the order on May 18, 2016. Thus, plaintiffs correctly contend that they were permitted to serve an amended complaint without leave while 79 Hamilton Place's motion was pending.

The court next considers Moving Defendants' motion for an Order pursuant to CPLR § 3211(a)(5) and (7) dismissing plaintiffs' Verified Amended Complaint on the merits. As an initial matter, plaintiffs' argument that Moving Defendants' motion for an Order pursuant to CPLR § 3211(a)(5) and (7) dismissing plaintiffs' Verified Amended Complaint must be denied on the ground that it violates the single motion rule is without merit. Pursuant to CPLR § 3211(e), a party may only make one motion on one or more of the grounds set forth in CPLR § 3211(a). In the present case, Moving Defendants have not violated the single motion rule as the court considers their motions to be one consolidated motion to reject the Verified Amended Complaint as untimely or, in the alternative, to dismiss the Verified Amended Complaint pursuant to CPLR § 3211(a).

The portion of Moving Defendants' motion to dismiss plaintiffs' causes of action for breach of contract, promissory estoppel, unjust enrichment, a declaratory judgment and a permanent injunction is granted without opposition on the ground that the court dismissed identical causes of action in the original complaint by its decision and order dated May 16, 2016. Moving Defendants do not move to dismiss plaintiffs' causes of action for negligent misrepresentation and aiding and abetting fraud against Suggs and Richter.

The portion of Moving Defendants' motion for an Order pursuant to CPLR § 3211(7) dismissing plaintiffs' cause of action for fraud against 79 Hamilton Place is granted. On a motion addressed to the sufficiency of the complaint, the facts pleaded are assumed to be true and accorded every favorable inference. *Morone v. Morone*, 50 N.Y.2d 481 (1980). Moreover, "a complaint should not be dismissed on a pleading motion so long as, when plaintiff's allegations are given the benefit of every possible inference, a

cause of action exists.” *Rosen v. Raum*, 164 A.D.2d 809 (1st Dept. 1990). “Where a pleading is attacked for alleged inadequacy in its statements, [the] inquiry should be limited to ‘whether it states in some recognizable form any cause of action known to our law.’” *Foley v. D’Agostino*, 21 A.D.2d 60, 64-65 (1st Dept 1977) (quoting *Dulberg v. Mock*, 1 N.Y.2d 54, 56 (1956)). However, “conclusory allegations – claims consisting of bare legal conclusions with no factual specificity – are insufficient to survive a motion to dismiss.” *Godfrey v. Spano*, 13 N.Y.3d 358, 373 (2009).

The elements of fraud are as follows: “a representation of a material fact, the falsity of that representation, knowledge by the party who made the representation that it was false when made, justifiable reliance by the plaintiff, and resulting injury.” *Pope v. Saget*, 29 A.D.3d 437, 441 (1st Dept 2006). A claim for fraud must be pleaded with particularity pursuant to CPLR § 3016(b).

In the present case, plaintiffs’ cause of action for fraud against 79 Hamilton Place must be dismissed on the ground that plaintiffs have failed to allege justifiable reliance on the representations by 79 Hamilton Place and its agents that 79 Hamilton Place would move forward with the renovation work and thereafter close the sale of shares as it is undisputed that plaintiffs did not sign the contract of sale, which is the same reason the court dismissed plaintiffs’ cause of action for promissory estoppel in the original complaint. In a decision and order of this court dated May 16, 2016, the court dismissed plaintiffs’ cause of action for promissory estoppel because “plaintiffs have failed to adequately allege reasonable reliance on any promise to sell them the unit based on the documentary evidence establishing that the contract of sale sent by defendant to plaintiffs was never signed by plaintiffs.” As the court stated in a decision and order denying plaintiffs’ motion for a preliminary injunction dated February 26, 2016, the “reason that there was not an enforceable agreement to sell the property to plaintiffs was not because of the actions taken by defendant—it was because plaintiffs never executed the contract of sale and made the down payment required of them even though defendant’s attorney sent a letter to plaintiffs’ attorney which requested that plaintiffs sign the contract of sale and return it with the agreed upon down payment on August 9, 2013.” Just as the court previously dismissed plaintiffs’ cause of action for promissory estoppel on the ground that plaintiffs did not sign the contract of sale and therefore had failed to allege reasonable reliance on any promise to sell them

the unit, the court here must dismiss plaintiffs' cause of action for fraud on the ground that plaintiffs did not sign the contract of sale and therefore fail to allege justifiable reliance on any representations that 79 Hamilton Place would move forward with the renovation work and thereafter sell them the unit.

The portion of Moving Defendants' motion for an Order pursuant to CPLR § 3211(7) dismissing plaintiffs' cause of action for aiding and abetting fraud against Brewster is also granted. To state a claim for aiding and abetting fraud, a plaintiff must allege: (1) the existence of underlying fraud, (2) actual knowledge and (3) substantial assistance. *Chambers v. Weinstein*, 135 A.D.3d 450, 450 (1st Dept 2016). In the present case, as plaintiffs have failed to state an underlying cause of action for fraud against 79 Hamilton Place, they cannot state a cause of action for aiding and abetting fraud against Brewster.

Accordingly, Moving Defendants' motion for an Order rejecting plaintiffs' Verified Amended Complaint is denied and Moving Defendants' motion for an Order dismissing plaintiffs' Verified Amended Complaint is granted except as to plaintiffs' causes of action for negligent misrepresentation and aiding and abetting fraud against defendants Willie Suggs and Kimberly Richter. This constitutes the decision and order of the court.

DATE :

7/27/16CK
KERN, CYNTHIA S., JSC**HON. CYNTHIA S. KERN**