

Moyal v Sullo

2016 NY Slip Op 31559(U)

August 16, 2016

Supreme Court, New York County

Docket Number: 157850/2014

Judge: Jeffrey K. Oing

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 48

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DAVID MOYAL, Suing Individually and on
Behalf of Circle Press, Inc.,

Plaintiffs,

-against-

JOSEPH SULLO, ROBERT MALTA and
GMD 444 LLC,

Defendants,

CIRCLE PRESS, INC.,

As Nominal Defendant.

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DECISION AND ORDER

JEFFREY K. OING, J.:

Mtn Seq. No. 009

Defendant/cross-claim defendant Joseph Sullo ("Sullo") moves for an order: pursuant to CPLR 7501 and 7503(a), compelling defendants Robert Malta ("Malta") and GMD 444 LLC ("GMD") (together, the "Malta defendants") to arbitrate the cross claims asserted against Sullo and staying this action pending the conclusion of the arbitration; or, in the alternative, dismissing the cross claims, pursuant to CPLR 3211.

Mtn Seq. No. 010

Plaintiff David Moyal ("Moyal") moves: pursuant to CPLR 3211, to dismiss the third and seventh counterclaims asserted by the Malta defendants, or, in the alternative, to stay this action until the conclusion of the arbitration, and, pursuant to CPLR

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3204, to require the Malta defendants to provide a more definite statement of claims devoid of allegations related to arbitrable matter.

Mtn seq. nos. 009 and 010 are consolidated for disposition.

FACTS

This action arises out of a business venture in which the parties invested in a Manhattan building located at 121 Varick Street (the "Building"). The Building is a 12-story commercial building owned by nonparty 121 Varick Street Corp. (the "Co-op"). The Co-op owns the ground floor of the Building, and floors 2-12 are owned by the proprietary lessees of those floors, with each floor's lessee owning 9.09% of the outstanding stock of the Co-op.

In early 2008, Moyal's company, One2One, owned the third and sixth floors. Another of his companies, 1-800-Postcards, was the tenant occupying the ground floor of the Building. A third company of his, Next Printing, leased the fourth floor from its owner, nominal defendant Circle Press, Inc. ("Circle Press"). Moyal agreed with the owners of Circle Press to buy their shares in Circle Press, which owned the fourth, seventh and eighth floors of the Building. At the same time, Moyal reached an agreement to buy 100% of the stock of the company that owned the twelfth floor of the Building. These transactions would result

in Moyal securing control of six of the Building's eleven floors that the Co-op did not own and also obtaining control of the Co-op.

According to Sullo, Moyal approached Sullo and proposed a joint venture (the "Joint Venture") to finance the transactions. Specifically, Moyal sought the acquisition and exploitation of floors 4, 7, 8 and 12 (the "JV floors"). Moyal and Sullo each contributed an equal amount of cash to close the Joint Venture's purchase of the four floors. The assets were held in two single-purpose entities -- Circle Press and 121 Varick Street Twelfth Floor, LLC ("V12 LLC") (together V12 LLC and Circle Press are referred to as the "JV Companies").

V12 LLC became the owner of the 4th and 12th floor assets, and Circle Press became the owner of the 7th and 8th floor assets (the assets consisted of the Co-op shares and the proprietary leases). At the same time, Moyal and Sullo executed governance documents for V12 LLC and Circle Press.

The original operating agreement governing V12 LLC designated Sullo as its sole "Manager"; however, according to Sullo, his authority was wholly delegated to Moyal, and Moyal was solely responsible for managing the assets of the Joint Venture. Circle Press was governed by a shareholder sales agreement and by its bylaws.

In October 2011, GMD invested in the JV Companies, thereby joining the Joint Venture. GMD allegedly paid \$2.5 million for its one-third share in the Joint Venture, \$800,000 of which was to be used by the JV Companies for future operating needs. The operating agreement for V12 LLC and the shareholder agreement for Circle Press were both updated at the time that GMD purportedly made its investment. Under the updated operating agreement, Moyal was formally designated as manager of V12 LLC, the position that, according to Sullo, he held since 2008. Moyal continued to be designated as president of Circle Press. Thus, under these circumstances, his exclusive management authority over the Joint Venture continued when GMD became a co-venturer.

In September 2012, Malta, GMD's managing member, entered into a promissory note agreement with Sullo, pursuant to which Malta received a \$500,000 loan. Malta contends that in executing the note he relied on representations that Sullo and Moyal made in October 2011 in which they stated that Malta would be receiving \$10,000 a month as dividends on the investment, and that the Building would be sold within 18 months. Malta never received any dividend, and no effort was made to sell the Building. Rather, according to Malta, in February 2014, Sullo and Moyal entered into a secret agreement providing that any monetary shortfalls for the JV Companies would not be Sullo's

responsibility. This purported agreement resulted in requiring Malta to shoulder substantially more than his proportionate share of the costs, and provided a pretext to dilute Malta's ownership interest.

In early 2014, Malta asked to inspect the books and records of the JV Companies in response to a capital call. Given there was no significant change in the tenant structure, and no capital call had been contemplated when Malta invested in the Joint Venture, Malta believed that a negative cash flow requiring a capital call did not make sense. Moyal allegedly responded by diluting GMD's interest in the JV Companies.

In July 2014, believing that Moyal was guilty of misconduct, GMD and Sullo executed resolutions and certificates removing Moyal as manager of V12 LLC, installing Sullo as manager, declaring that GMD and Sullo would take over Circle Press's management, and designating Sullo as agent of the majority for that purpose, thereby making Sullo de facto manager of Circle Press. Moyal commenced two actions seeking to be restored to power. The instant action is the second of those actions. Moyal seeks: (1) injunctive relief against Sullo, Malta and GMD (a) restraining them from alleged continued violation of the bylaws of Circle Press, (b) restraining them from alleged continued violation of the terms of the second amended shareholders

agreement of Circle Press, (c) restraining them from acting in the capacity of a manager of Circle Press, (d) restraining them from removing Moyal from corporate bank accounts or otherwise taking over Moyal's responsibilities, and (e) declaring Moyal president of Circle Press (first cause of action); (2) declaratory judgment declaring that Sullo and GMD do not have the ability to remove Moyal from the responsibilities and authority vested in him as president of Circle Press (second cause of action); (3) declaratory judgment on behalf of Circle Press declaring that Sullo and GMD cannot eliminate Moyal as a signatory on any of the corporate accounts of Circle Press (third cause of action); (4) declaratory judgment declaring that Sullo and GMD do not have the ability to designate Sullo as the exclusive manager of the company (fourth cause of action); (5) declaratory judgment declaring that Moyal shall continue to serve as president of Circle Press (fifth cause of action); (6) removal of Sullo and Malta as directors of Circle Press (sixth cause of action); and (7) relief for breach of the shareholder agreement (seventh cause of action).

GMD, Malta and Sullo served an answer and counterclaims to those actions. They interposed counterclaims for: (1) breach of fiduciary duties, seeking damages for (a) funds that were allegedly converted by Moyal, (b) Moyal allegedly failing to

ensure compliance with Small Business Association loans, and (c) Moyal concluding a sweetheart extension of an agreement that caused the Joint Venture to lose money (first counterclaim); (2) breach of fiduciary, seeking an accounting (second counterclaim); (3) breach of contract, seeking damages (third counterclaim); and (4) cancellation of the sweetheart extension (fourth counterclaim).

During the pendency of this action, Sullo's relationship with Malta soured to the point where they were now adverse to each other's interest (NYSCEF Doc. No. 181). After Moyal and Sullo jointly moved to discontinue the action as between them, in July 2015, the Malta defendants cross-moved for leave to amend their answer, and brought cross claims against Sullo for breach of fiduciary duty (first cross claim); breach of contract (second cross claim); and fraudulent inducement to contract (fourth cross claim against Sullo and seventh counterclaim against Moyal). This Court denied leave to assert the third cross claim against Sullo and the sixth counterclaim against Moyal for usurious loan (NYSCEF Doc. No. 181 at pp. 26-47).

On October 8, 2015, this Court granted plaintiff's motion to compel arbitration of the counterclaims as they relate to V12 LLC, based, in part, upon an earlier decision in the related case that determined that all V12 LLC claims must go to arbitration,

and imposed a stay of all V12 LLC claims (Moyal v Sullo, Index No. 156790 [Hagler, J.]). Any claims of Circle Press would remain in this Court. This Court also dismissed the fifth counterclaim for injunctive relief finding that defendants did not adequately plead irreparable harm.

The Malta defendants filed a statement of claim with the American Arbitration Association following this Court's decision in October 2015.

DISCUSSION

Motion to Dismiss the Cross Claims and Counterclaim

First Cross Claim

Sullo seeks to dismiss the breach of fiduciary duty cross claim based on the Malta defendants' lack of standing. He points out that Malta is not a shareholder in Circle Press, or a member of V12 LLC. In addition, while acknowledging that GMD is a shareholder in Circle Press and a member of V12 LLC, Sullo contends that GMD, too, lacks standing because any alleged wrong was committed against the JV Companies, not against GMD. As such, Sullo argues that the claim does not belong to GMD. Sullo further argues that he did not owe any fiduciary duty to GMD prior to July 2014 because he was a non-managing member until that time.

Given that all the issues related to V12 LLC are subject to arbitration, the question of whether Malta has standing to bring those claims should be determined by the arbitrator. Sullo is correct in stating that Malta does not have standing to assert this cross claim -- Malta was not a shareholder in Circle Press. Rather, his company, GMD, held this position. Therefore, the first cross claim insofar as it is brought by Malta and concerns Circle Press is dismissed for lack of standing.

With respect to GMD, there are allegations that some of the alleged wrongs were against GMD, not only against the Joint Venture. In particular, the allegations that Sullo conspired with Moyal to dilute GMD's interest in Circle Press, and their failure to pay GMD its share of profits, are direct claims rather than derivative claims. As such, to the extent this cross claim is asserted on behalf of GMD, it will continue.

Accordingly, that branch of Sullo's motion to dismiss the first cross claim is granted to the extent of dismissing that portion of the cross claim asserted by Malta as it concerns Circle Press for lack of standing, and is otherwise denied.

Second Cross Claim and Third Counterclaim

The second cross claim and the third counterclaim allege the breach of two contracts -- the shareholder agreement for Circle

Press, and the V12 LLC operating agreement. To the extent that they involve V12 LLC, these claims are subject to arbitration.

Sullo maintains that the Malta defendants fail to set forth any facts, and in particular, fail to include the specific provisions of the contract upon which they base liability. Sullo further asserts that a review of the contracts shows that there were no obligations in those agreements that could be said to have been breached by the conduct alleged by the Malta defendants. Moyal also seeks dismissal based on virtually the same arguments.

The Malta defendants counter that the breach of contract cross claim and counterclaim are premised on the breach of section 4.0 of the shareholder sales agreement, and on Sullo's breach of Circle Press's operating agreement by allegedly improperly diluting Malta's shares and withholding his share of profits proportionate to his shares.

Although the amended answer does not "set forth the terms of the agreement upon which liability is predicated" with respect to Sullo (Chrysler Capital Corp. v Hilltop Egg Farms, Inc., 129 AD2d 927, 928 [3d Dept 1987]), the Malta defendants refer to Circle Press's shareholder sales agreement, section 4.0, and the letter signed by Sullo advising the participants in the JV Companies of a capital call and its warning of dilution if the funds were not

forthcoming signed by Sullo. Under these circumstances, the second cross claim and the third counterclaim sufficiently sets forth facts to support the contention that Sullo was involved in the dilution of GMD's shares. Thus, at this juncture, dismissal of these claims is not warranted.

Accordingly, that branch of Sullo's motion to dismiss the second cross claim, and that branch of Moyal's motion to dismiss the third counterclaim are denied.

Fourth Cross Claim and Seventh Counterclaim

The Malta defendants contend that Malta was fraudulently induced to sign a note and security agreement in September 2012 in reliance on two misrepresentations and a concealment. The specific misrepresentations and omissions alleged are that in October 2011, a year earlier, Sullo told Malta that Malta would receive \$10,000 in monthly dividends from his investment in the JV Companies; that in October 2011 Sullo told Malta that the Building would be sold in 18 months; and that in September 2012 Sullo concealed the fact that Moyal funded one half of Sullo's \$500,000 loan to Malta. This claim does not implicate the JV Companies, except to the extent that Malta alleges that the loan included proceeds that he invested in the JV Companies.

In order to state a claim for fraudulent inducement, a plaintiff must plead facts demonstrating that the representation

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or omission 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" (Lama Holding Co. v Smith Barney, 88 NY2d 413, 421 [1996]). Where the claim is based on fraudulent concealment, the plaintiff must also allege facts to support the conclusion "that the defendant had a duty to disclose material information and that it failed to do so" (P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V., 301 AD2d 373, 376 [1st Dept 2003]).

Here, Sullo's alleged misrepresentation that Malta would receive \$10,000 a month was not a representation upon which Malta could reasonably rely. Initially, a projection of that sort is in the nature of future expectation, which cannot support a claim for fraud (International Fin. Corp. v Carrera Holdings Inc., 82 AD3d 641, 641-642 [1st Dept 2011]). Furthermore, where a party has the ability to determine the truth or falsity of a representation, that party must make use of such ability, or the reliance is not justifiable. Here, the representation was made nearly a year prior to Malta's alleged reliance. During that time, Malta did not receive any monthly payments of \$10,000. Therefore, Malta's reliance on such a projection was unreasonable as a matter of law (ACA Fin. Guar. Corp. v Goldman, Sachs & Co.,

25 NY3d 1043, 1044 [2015]). Additionally, there was no indication that there was any attempt to sell the Building. Malta could not have reasonably relied on these representations without making additional inquiry, and there are no allegations that such additional inquiry was made. Further, Malta does not provide any basis to conclude that the representations made in October 2011 were intended to induce a year later Malta to enter into a loan agreement in September 2012.

With respect to the alleged concealment, Malta fails to allege loss causation. In order to plead fraud, Malta must show that Sullo's misrepresentation or concealment not only induced him to borrow the money, but that it directly caused the loss (Water St. Leasehold LLC v Deloitte & Touche LLP, 19 AD3d 183, 185 [1st Dept 2005]). Malta does not allege how the concealment of Moyal's participation in lending the money caused any damage to him.

Lastly, Malta fails to plead actual damages. The absence of pleading out-of-pocket damages is fatal to the claim (Connaughton v Chipotle Mexican Grill, Inc., 135 AD3d 535, 540 [1st Dept 2016]).

Accordingly, that branch of Sullo's motion to dismiss the fourth cross claim, and that branch of Moyal's motion to dismiss the seventh counterclaim are granted and they are dismissed.

Motion to Compel Arbitration

What remains for arbitration consideration are the first and second cross claims. Sullo seeks to compel the Malta defendants to arbitrate the cross claims asserted against him. The parties signed V12 LLC's operating agreement, which sets forth the following arbitration clause:

Any controversy arising out of or relating to this Agreement shall be resolved by arbitration in New York pursuant to the Rules of the American Arbitration Association and laws of the State of New York.

(Sullo Aff., Ex. 4, § 12.12(a)). Based on this arbitration clause, this Court granted Moyal's motion to compel arbitration of the Malta defendants' counterclaims against him to the extent the counterclaims concern V12 LLC.

In the first and second cross claims, the Malta defendants assert that Sullo issued bogus capital calls to GMD in his capacity as the manager of V12 LLC. The capital call letters are written on V12 LLC stationery, and are written by Sullo in his capacity as managing member of V12 LLC. The fact that the cross claims assert that Sullo failed to pay sums due on SBA loans does not alter this conclusion. The borrower on the loans is V12 LLC (Sullo Aff., Ex. 2, Exs. B, O), and Sullo signed as manager of V12 LLC. Therefore, the alleged failure to pay sums due on the loans is also related to V12 LLC's operating agreement.

The Malta defendants also assert that Sullo entered into and concealed from them an agreement with Moyal pursuant to which Moyal promised that "any monetary shortfalls for Circle and [V12 LLC] would not be the responsibility of Sullo" (Moyal Aff., Ex. B, Cross Claim, ¶¶ 67-71). This alleged secret agreement concerns V12 LLC's members' responsibility for monetary shortfalls, which, again, implicates subject matter that is related V12 LLC's operating agreement. As such, the first and second cross claims concern a subject matter that is related to V12 LLC's operating agreement, and are, thus, subject to arbitration.

Sullo also seeks to have this Court compel arbitration of all aspects of the cross claims, including those that allege a breach of duties related to Circle Press. As noted in the October 8, 2015 transcript, in which Moyal sought to compel arbitration of the counterclaims, there is no arbitration agreement regarding Circle Press. Therefore, there is no basis upon which arbitration can be compelled with respect to those aspects of the cross claims.

Accordingly, that branch of Sullo's motion to compel arbitration of the first and second cross claim is granted, and those cross claims are subject to the underlying arbitration

proceeding. That branch seeking arbitration of all aspects of the cross claims is denied.

That branch of Sullo's and Moyal's motion seeking an order from this Court staying litigation of the Circle Press-related cross claims and counterclaims pending arbitration of the V12 LLC claims is appropriate. The determination in the arbitration proceeding could have a significant effect on the outcome of the related claims, and the specter of inconsistent findings in the absence of a stay is very real (Fedele v Ackerman, 20 AD3d 350 [1st Dept 2005]; see also County Glass & Metal Installers, Inc. v Pavarini McGovern, LLC, 65 AD3d 940 [1st Dept 2009]). Under these circumstances, those cross claims and counterclaims that are not subject to arbitration are stayed pending final resolution of the underlying arbitration.

That branch of Moyal's motion for a more definite statement is denied without prejudice to renew after final resolution of the underlying arbitration proceeding.

CONCLUSION

Accordingly, it is hereby

ORDERED that branch of the motion of defendant Sullo (mtn seq. no. 009) to dismiss the cross claims is granted to the extent of dismissing the fourth cross claim and that portion of

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the first cross claim asserted by Malta as it concerns Circle Press for lack of standing; and it is further

ORDERED that branch of the motion of defendant Sullo to compel arbitration is granted to the extent of directing that the first and second cross claims shall be arbitrated, and is otherwise denied; and it is further

ORDERED that branch of defendant Moyal's motion (mtn seq. no. 010) to dismiss the third and seventh counterclaims is granted to the extent of dismissing the seventh counterclaim, and is otherwise denied; and it is further

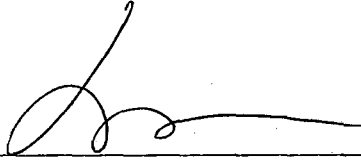
ORDERED that branch of defendant Moyal's motion for a more definite statement is denied without prejudice; and it is further

ORDERED that branch of defendants Sullo's and Moyal's motion to stay this action pending arbitration of the claims is granted, and this action is stayed pending final resolution of the underlying arbitration.

This memorandum opinion constitutes the decision and order of the Court.

Dated:

8/16/16


HON. JEFFREY K. OING, J.S.C.
JEFFREY K. OING
J.S.C.