Malta v Gaudio
2016 NY Slip Op 31633(U)
August 26, 2016
Supreme Court, New York County
Docket Number: 653647/2015
Judge: Anil C. Singh
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

---X

Robert Malta, LMS Realty LLC, Diego Enrico
Malta and Dem 444 LLC,

Plaintiffs

-against-

Salvatore Gaudio, 444 Park Avenue South
Associates LLC, A&L 444 LLC,
David Moinian and Moin Development Corp.,

Defendants

---X

Index No.: 653647/2015

DECISION AND ORDER
Motion Seq. 001, 002

HON. ANIL SINGH:

Plaintiffs Robert Malta ("Malta"), LMS Realty LLC ("LMS Realty"), Diego Enrico Malta ("Diego Malta") and DEM 444 LLC ("DEM 44") (together, plaintiffs) bring this action for, *inter alia*, breach of contract and breach of fiduciary duty against defendants Salvatore Gaudio ("Gaudio"), 444 Park Avenue South Associates LLC ("444 Associates"), A&L 444 LLC ("A&L"), David Moinian and Moin Development Corp (the "Moinian defendants") (together, "defendants"). Defendants have moved to dismiss the amended complaint pursuant to CPLR (a)(1), (5) and (7). Plaintiffs oppose.

The agreements

[* 2]

For several years, Malta and Gaudio have been business partners who owned properties together for the purpose of owning real estate in Manhattan.

In 2011, Malta sued Gaudio over a dispute about, *inter alia*, the disposition of proceeds from the sale of a building they owned together at 444 Park Avenue South. After negotiations, in January 26, 2012, Malta and Gaudio entered into a Settlement Agreement and Mutual Global Release (the "January Agreement"). The January Agreement unwound all their numerous joint ventures, disposed of multiple pending lawsuits, and divided all of their properties between them. As part of the January Agreement, Malta and Guido entered into two redemption agreements. The LMS Redemption Agreement (the "LMS Agreement") divided the parties' interests in LMS Realty LLC, which owned three buildings, one of which is, 1420 Second Avenue. The second redemption agreement divided the proceeds of the sale of 444 Park Avenue South, another building at issue, owned through another company, GMD Realty LLC (the "GMD Agreement").

Based on the LMS Agreement, LMS Realty would redeem or purchase all of Gaudio's ownership interest in LMS Realty. In return, LMS Realty would transfer to Gaudio its subsidiary companies that owned the real properties located at 1420 Second Avenue.

Plaintiffs' claim regarding 1420 Second Ave

Plaintiffs claim that contravening his lack of authority to do so under an operating agreement (not at issue in this action), Gaudio had signed a lease on November 1, 2011 with Kids in Sports LLC (the "Lease") for the retail space at 1420 Second Avenue for a lengthy terms and a significant rent. Malta claims that when he signed the January Agreement in 2012, he did not know that Gaudio had entered into the lease.

In March 2013, LMS 1420 LLC, which at time, was owned and controlled by Gaudio, sold the real property located at 1420 Second Avenue at a significant profit.

Section 19 of the January Agreement state that the parties to the agreement were signing it "without fraud". Malta claims that Gaudio violated this by holding out of no fraud by signing the LMS Agreement containing representations regarding the Kids in Sports lease. In particular, plaintiffs claim that under the LMS Agreement, Gaudio represented in Section 2.2 that, to his knowledge the real property located at 1420 Second Avenue was "free and clear of any Encumbrance".

Plaintiffs' claim regarding 444 Park Avenue South

The complaint alleges that A&L 444 LLC (owned by Gaudio and his family members) had a 70% ownership interest in the building located at 444 Park Avenue

South; GMD Realty LLC (which Malta and Gaudio owned 50-50)[1] had a 26% interest, and DEM Realty LLC (owned by plaintiff Diego Malta) had a 4% interest, as tenants in common.

On March 1, 2011, A&L, GMD Realty and DEM Realty entered into an agreement pursuant to which 444 Associates would purchase all of GMD Realty and DEM Realty's interests and 20% of A&L LLC interest (the "444 Park Agreement"). This would leave A&L and 444 Associates as 50-50 owners as tenants in common.

On August 3, 2011, A&L became a member of 444 Associates with a 19.5% interest. In July 2012, 444 Associates sold the property at 444 Park Avenue to Moin Development and a hotel developer for $45 million.

Plaintiffs now claim that when they sold their interests to 444 Associates, Gaudio failed to inform Malta and Diego Malta concerning any partnership with a hotel developer. As a result, Malta had sold his interest and lost the opportunity for profit resulting from the purchase by Moin Development and the hotel developer.

They also claim that the Moinian defendants were complicit in this alleged scheme and that they should have known that Gaudio owed Malta a fiduciary duty.

Analysis

---

[1] The Complaint refers to GMD 444 Realty LLC. From the Complaint, it appears that GMD Realty LLC owned GMD 444 LLC.

Standard on motion to dismiss

On a motion to dismiss based on the ground that the defenses are founded upon documentary evidence pursuant to CPLR 3211(a)(1), the evidence must be unambiguous, authentic, and undeniable. See, Fountanetta v. Doe, 73 A.D.3d 78 (2d Dept 2010). "To succeed on a [CPLR 3211(a)(1)] motion ... a defendant must show that the documentary evidence upon which the motion is predicated resolves all factual issues as a matter of law and definitively disposes of the plaintiff's claim." Ozdemir v. Caithness Corp., 285 A.D.2d 961, 963 (2d Dept 2001), leave to appeal denied 97 N.Y.2d 605. Alternatively, "documentary evidence [must] utterly refute plaintiff's factual allegations, conclusively establishing a defense as a matter of law." See, Goshen v. Mutual Life Ins. Co. of New York, 98 N.Y.2d 314, 326 (2002).

On a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), all factual allegations must be accepted as true, the complaint must be construed in the light most favorable to plaintiffs, and plaintiffs must be given the benefit of all reasonable inferences. Allianz Underwriters Ins. Co. v. Landmark Ins. Co., 13 A.D.3d 172, 174 (1st Dept 2004). The court determines only whether the facts as alleged fit within any cognizable legal theory. Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994). The court must deny a motion to dismiss, "if, from the pleading's four corners, factual allegations are discerned which, taken

[* 6]

together, manifest any cause of action cognizable at law." 511 West 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 152 (2002).

"[N]evertheless, allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or contradicted by documentary evidence, are not entitled to such consideration." Quatrochi v. Citibank, N.A., 210 A.D.2d 53, 53 (1st Dept 1994) (internal citation omitted).

First and Second Causes of Action

Plaintiffs' claim for breach of the January Agreement and the LMS Agreement must be dismissed because the Kid in Sports lease is not an Encumbrance. Pursuant to the LMS Agreement, an Encumbrance is a defined term and it does not include leases.[2] Section 2.1 of the agreement states:

> The Selling Member [Gaudio] is the sole owner of the Interests; such Interests are owned free, and clear of any setoff, claim, restriction, pledge, hypothecation, mortgage, security interest, lien, encumbrance or any other charges; the Selling Member has not entered into any agreements for the sale and/or transfer of the Interests other than this Agreement; and the Selling Member has not created any claim(s), restriction(s), pledge(s), hypothecation(s), security interest(s), lien(s), encumbrance(s) or any other charges upon the Interests (collectively, "Encumbrances").

[2] Defendants argue that the definition of "Encumbrance" from Black's Law Dictionary further support their argument. Since an Encumbrance is a defined term under the LMS Agreement, the court looks to the intention of the parties in the contract.

Dismissal under CPLR 3211(a)(1) is warranted when a contract "unambiguously contradicts the allegations supporting a litigant's cause of action..., regardless of any extrinsic evidence or self-serving allegations offered by the proponent of the claim. 150 Broadway NY Assc. v. Bodner, 14 A.D. 3d 1, 5 (1st Dept 2004).

Plaintiffs' claim that Gaudio made false representations as to section 2.2 of the LMS Agreement is unavailing.[3] The encumbrances described in sections 2.1 and 2.2 are in relation to the title of the properties and not to leases[4]. Notably, the "Encumbrances" in section 2.2 as "particularly described" in Item 3 of Schedule 1 only list mortgages, security interests and liens associated with the properties and not leases. The other properties were leased as well but the leases were not recorded as Encumbrances in Schedule 1. Although under the previous operating agreements not at issue in this case, Gaudio may not have the authority to enter into the Lease, plaintiffs have inadequately pleaded breach of the January Agreement or the LMS Agreement as there are no false representations made to plaintiffs regarding 1420 Second Ave.

Apart from the agreements discussed above, defendants claim that the properties were transferred pursuant to the August 2011 Agreement and was ratified

[3] Section 2.2 states, "To the knowledge of the Selling Member, the Company is the sole owner of the 167 Property, the 1420 Property, and the 297 Property, free and clear of any Encumbrance, other than as more particularly described in Item 3 on Schedule 1 attached hereto."
[4] Black's Law Dictionary (10th ed. 2014) defines a lease as, "[a] contract by which a rightful possessor of real property conveys the right to use and occupy the property in exchange for consideration, usu. rent." This is decidedly different than title to a property.

by the parties' conduct. The language of the 2011 Agreement does not conclusively provide that the title to the 1420 Second Ave property (or the 167 Ninth Avenue property) was transferred[5]. However, the course of conduct by Malta after the August 2011 Agreement lends weight to Gaudio's contention that plaintiffs' claims based on the Kids in Sports LLC Lease is seller's remorse.[6]

Accordingly, based on the LMS Agreement, plaintiffs' first and second causes of action are dismissed.

Third Cause of Action

Plaintiffs' third cause of action for breach of fiduciary duty is dismissed as it is duplicative of the contract claims alleged in the first two causes of action.

A breach of fiduciary duty claim is duplicative of contract claim if it alleges the same facts. LaSalle Hotel Lessee, Inc. v Marriott Hotel Services, Inc., 29 A.D. 3d 464, 465 (1st Dept 2006) (the cause of action for breach of fiduciary duty, based

[5] The August 2011 Agreement states "Robert Malta **shall** transfer to Salvatore Gaudio, the fifty percent interest in LMS 1420 LLC owned by Robert Malta. For tax purposes, the property located at 1420 Second Avenue shall be valued at $2,400,000." (emphasis added). The Agreement also provided for the 167 Ninth Avenue building to be transferred.
[6] In particular, Malta received a $500,000 payment regarding the 444 Park Avenue building and asked for transfers to be as provided for in the August Agreement. There is also no dispute among the parties that Gaudio started paying the mortgage, utilities and all other expenses for 1420 Second Ave after an August 2011 agreement with Malta. Similarly, Malta does not contend that he started paying all expenses for the 167 Ninth Avenue building. In fact, both Gaudio and Malta took control of the respective buildings that was to be transferred, immediately after the signing of the agreement. Defendants have also provided the General Ledger for 167 Ninth Avenue which shows that Malta drew funds from the building's bank account to pay for various other personal properties that he owns.

on the same allegations as for breach of contract, was properly dismissed); Chowaiki & Co. Fine Art Ltd. v Lacher, 115 A.D.3d 600 (1st Dept 2014) (breach of fiduciary duty dismissed as duplicative of the breach of contract claim, since the claims are premised upon the same facts and seek identical damages).

Here, plaintiffs' breach of contract and breach of fiduciary duty claim with regard to the 1420 Second Ave property are premised on the same facts. The damages sought by plaintiffs are also identical. Accordingly, the third cause of action is dismissed.

Fourth Cause of Action

Plaintiffs are also seeking a declaratory judgment that the releases under the agreements be voided. The January Agreement (section 18), LMS Agreement (section 6.2) and GMD Agreement (section 5.2) all contained releases.

In Allen v Riese Org., Inc., 106 AD3d 514, 516 (1st Dept 2013), the court held that "[w]here the language is clear and unambiguous, the release is binding on the parties unless it is shown that it was procured by fraud, duress, overreaching, illegality or mutual mistake". In Allen, the court upheld the releases despite plaintiffs claim that their supervisor threatened that if they did not sign the releases, he would withhold their last paycheck and block their unemployment benefits. The court held that plaintiffs were barred from challenging the releases on the grounds that they

ratified the release. "Ratification occurs when a party accepts the benefits of a contract and fails to act promptly to repudiate it." Id. at 517. "Although a defendant has the initial burden of establishing that it has been released from any claims, a signed release "shifts the burden of going forward ... to the [plaintiff] to show that there has been fraud, duress or some other fact which will be sufficient to void the release." Centro Empresarial Cempresa S.A. v Am. Movil, S.A.B. de C.V., 17 N.Y. 3d 269, 276 (2011).

Here, plaintiffs allege that defendants concealed the Lease and fraudulently misrepresented that there was no Encumbrance. As discussed, *supra*, the definition of an Encumbrance in the LMS Agreement does not support plaintiffs' allegations that there was a misrepresentation in failing to disclose the Lease. As such, the releases will not be voided.

Fifth and Sixth Causes of Action

Plaintiffs' causes of action for breach of fiduciary duty and fraud as against Gaudio and A&L regarding the hotel development of 444 Park Ave South must be dismissed.

The breach of fiduciary duty cause of action against Malta as Operating Manager of GMD Realty fails. First, there is a contract that governs the relationship of the parties, namely, 444 Park Agreement. To state a cognizable breach of

fiduciary claim against Gaudio as to the 444 Park Avenue South, Malta has to allege that he "breached a duty other than, and independent of, those contractually imposed upon" him. See e.g., Brasseur v Speranza, 21 AD3d 297, 298 (1st Dept 2005); Celle v Barclays Bank P.L.C., 48 A.D. 3d 301, 302 (1st Dept 2008).

The 444 Park Agreement specifically state that the property could be utilized for the "development and conversion of the Property as a hotel, or as a residential or office building."

Section 26 of the Purchase Agreement states,

> Purchaser and Seller agree that at Closing they shall execute a Tenancy-in-Common Agreement and a memorandum thereof (the latter to be recorded promptly following the Closing), substantially in the form and substance of Exhibit 26 attached hereto **(the "TIC Agreement")**. Purchaser and Seller further agree that at the Closing they will execute any additional documents, not described herein, as shall be reasonably necessary to carry out the intended purpose of this Agreement.

(emphasis in original).

The TIC Agreement that is attached to the Purchase Agreement states in section 4.1 that,

> "The Co-Owners hereby agree to the utilization, development and conversion of the Property **as a hotel, or as a residential or office building**, upon the terms and conditions set forth in this Tenancy in Common Agreement (the "Project")"

(emphasis added).

The 444 Park Agreement explicitly states that the building could be converted into a hotel. Plaintiffs' claims that Gaudio falsely represented that he was not

interested in a hotel deal and that they were pressed to enter into the GMD Agreement are of no moment because Malta could not have reasonably relied on the alleged misrepresentation in light of the contract.

Malta does not state a cause of action for breach of fiduciary duty based upon claims that the purchasing partner surreptitiously negotiated undisclosed transactions that increased the value. Pappas v. Tzolis, 20 N.Y. 3d 228 (2012). The facts of Pappas are analogous to the case at hand. In Pappas, the court held that, "[w]here a principal and fiduciary are sophisticated entities and their relationship is not one of trust, the principal cannot reasonably rely on the fiduciary without making additional inquiry." Id. at 232. There is no dispute that both Malta and Gaudio were represented by attorneys when negotiating the 444 Park Agreement. Moreover, in a separate action that was brought by Malta against his attorney, Steven Louros, Malta alleges that in the complaint that during the negotiations for the 444 Park Ave property, "Malta no longer trusted Gaudio."[7] Therefore, Malta cannot assert that he reasonably relied on Gaudio's representations when he explicitly stated that he did not trust him.

Moreover, plaintiffs claim for fraud against Gaudio and A&L fails because they have not pleaded fraud with particularity. The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent

[7] NYSECF #39, Exh. S to O'Brien Aff, para 16-17.

to induce reliance, justifiable reliance by the plaintiff and damages. Eurycleia Partners, LP v Seward & Kissel, LLP, 12 NY3d 553, 559 (1st Dept 2009); see also, CPLR 3016(b).

Here, the fraudulent misrepresentations alleged by plaintiffs are that Gaudio expressed that he had no interest in a hotel deal before the signing of the agreements and that he made no representation concerning the partnership with a hotel developer. These allegations are not particularized and in any event, are not "material misrepresentations".

Seventh, Eighth and Ninth Causes of Action

Plaintiffs causes of action against A&L, 444 Associates and the Moinian defendants for aiding and abetting Gaudio's breach of fiduciary duty and fraud as to the hotel development at 444 Park Avenue South are dismissed.

As a threshold matter, plaintiffs cannot establish that there was a breach of fiduciary duty and fraud by Gaudio and/or A&L. Second, plaintiffs are unable to state a claim for aiding and abetting by the other defendants.

To state a claim for aiding and abetting a breach of fiduciary duty, a person must provide "substantial assistance" to the primary violator. Kaufman v. Cohen, 307 A.D. 113, 126 (1st Dept 2003). Substantial assistance occurs when a defendant affirmatively assists, helps conceal or fails to act when required to do so. Similarly,

to state a claim for aiding and abetting a fraud, the complaint must allege: (1) the existence of the underlying fraud; (2) knowledge of this fraud on the part of the aider and abettor; and (3) substantial assistance by the aider and abettor in achievement of the fraud. Stanfield Offshore Leveraged Assets, Ltd v. Metro Life Ins. Co., 64 A.D. 3d 472, 476 (1st Dept 2009).

In this case, alleged inaction on the part of the Moinian defendants constitutes substantial assistance only if Gaudio and/or A&L owe a fiduciary duty directly to the plaintiffs. Kaufman, 307 A.D. at 126 (1st Dept 2003). Plaintiffs have not and cannot allege that Gaudio and/or A&L owed them a fiduciary duty.

Plaintiffs have also not pleaded existence of the underlying fraud. Therefore, plaintiffs claim for aiding and abetting of fraud fails.

Finally, plaintiffs Malta's and Diego Malta's claim for a constructive trust against A&L and 444 Associates is dismissed. Plaintiffs have failed to properly allege the elements for a constructive trust, namely, (1) a confidential or fiduciary relationship (with A&L and/or 444 Associates); (2) a promise, (3) transfer in reliance upon the promise, and (4) unjust enrichment. Simonds v. Simonds, 45 N.Y.2d 233, 241 (1978); Wachovia Sec., LLC v. Joseph, 56 A.D. 3d 269, 271 (1st Dept 2008).

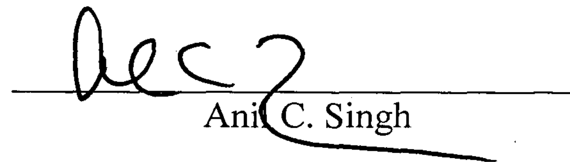
Plaintiffs have not adequately pleaded that there was a fiduciary or confidential relationship between them and A&L and/or 444 Associates. Moreover,

unjust enrichment sounds in quasi contract and here, there is a contract that governs the relationship of the parties.

Accordingly, it is hereby,

ORDERED that defendants' motion to dismiss plaintiffs' complaint is granted without leave to replead.

Date: August 26, 2016
New York, New York



Anil C. Singh