SCS Strategic Capital, LLC v Mosaic Real Estate Credit, LLC
2016 NY Slip Op 31926(U)
October 14, 2016
Supreme Court, New York County
Docket Number: 650540/2016
Judge: Eileen A. Rakower

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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SCS STRATEGIC CAPITAL, LLC,

Plaintiff,

- v -

MOSAIC REAL ESTATE CREDIT, LLC, ASSETAVENUE 106, LLC, OMEK CAPITAL LLC, AVI FELDMAN, and CHARLES HARTMAN

Defendants.

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Index No. 650540/2016

DECISION and ORDER

Mot. Seq. 001

HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff SCS Strategic Capital, LLC ("SCS" or "plaintiff") brings this breach of contract action against defendants Mosaic Real Estate Credit, LLC ("Mosaic"), AssetAvenue 106, LLC ("AssetAvenue"), Omek Capital LLC ("Omek"), Avi Feldman, and Charles Hartman (collectively, "defendants") seeking the recovery of fees allegedly owed pursuant to a letter agreement concerning an acquisition and development loan for property located at 18 West 75th Street, New York, NY (the "Property"). Plaintiff alleges that defendants are liable to plaintiff, jointly and severally, for an origination fee due and owing to plaintiff at closing in the amount of $435,000 (3% of the maximum total loan amount), along with 9% statutory interest from the closing date of May 18, 2015.

Defendant AssetAvenue now moves for an order, pursuant to CPLR 3211(a)(1), (3), (7), dismissing plaintiff's verified complaint in its entirety as against AssetAvenue.[1] In support, AssetAvenue submits the attorney affirmation of Jeffrey A. Mitchell, Esq., annexing copies of the verified complaint and the results of its public license search conducted within New York's Occupational Licensing Management System, eAccessNY, to determine whether plaintiff was a licensed real estate broker in New York.

[1] AssetAvenue is named as a defendant in the Second (Breach of Fiduciary Duties), Third (Breach of a Duty of Loyalty), Fourth (Tortious Interference with Contracts), and Eighth Causes of Action (Account Stated), and moves to dismiss those claims.

In opposition, plaintiff submits the attorney affirmation of Jonathan M. Stein, Esq., annexing copies of a signed Letter of Interest, dated March 31, 2015, and an undated Amendment to the Letter of Interest.

The following facts are recited from the verified complaint. In March 2015, plaintiff negotiated an agreement between plaintiff and defendants Hartman, Feldman, and their company Omek, to fund the acquisition of the Property, a single family townhouse located in the Central Park West area of Manhattan. Brokers Berko & Associates ("Berko") brought the deal to the attention of plaintiff in the ordinary course of business.

The terms of the deal, structured by plaintiff (the "Lender") as one loan, were set forth in the Letter of Interest signed by defendants Hartman and Feldman (the "Principals"), personally and on behalf of Omek (collectively, the "Borrowers" or "Sponsors").[2] The Borrowers executed the Letter of Interest on March 31, 2015 and due diligence commenced.

Plaintiff discovered that the Borrowers had misstated the square footage of the Property and the approval process for the rehabilitation of the Property, making the project less feasible than initially represented by the Borrowers. Plaintiff then sought to engage defendant AssetAvenue, a peer-to-peer lending group. The Letter of Interest permitted plaintiff to introduce additional investors or other loan participants into the deal or syndicate the deal through third parties. AssetAvenue represented to plaintiff that its participation could make the deal feasible. Plaintiff engaged AssetAvenue and wired AssetAvenue $20,000 of plaintiff's expense deposit.

AssetAvenue's business practices include the introduction of blind investors to deals, i.e., third parties whom the originators do not know exist. Initially, defendant Mosaic was introduced to the deal by AssetAvenue without plaintiff's knowledge.

On May 5, 2015, plaintiff, the Borrowers, AssetAvenue, Mosaic, and Berko attended a site visit of the Property.[3] During the site visit, Mosaic's representative learned that an old friend was a principal at Berko. Shortly after the site visit, plaintiff was cut out of the deal. The transaction closed on May 18, 2015, and the Borrowers received a $14,500,000 acquisition loan from Mosaic in the form of a

[2] While the agreement is identified as a "Letter of Intent" in the Verified Complaint, it is identified as a "Letter of Interest" in a copy of the agreement submitted in opposition.
[3] AssetAvenue claims that the Verified Complaint mistakenly alleges that AssetAvenue was present at the site visit. AssetAvenue states that it was not present at the visit.

single mortgage, on the same material terms negotiated by plaintiff. The Borrowers never paid plaintiff a 3% origination fee.

Defendant AssetAvenue argues that plaintiff is barred by Real Property Law ("RPL") section 442-d from maintaining an action to recover a commission or fee for the performance of services rendered in "negotiating a loan" upon the Property.[4] AssetAvenue further argues that, even if plaintiff's affiliates or principals held real estate broker licenses, the action cannot be maintained because a broker cannot recover a commission without establishing that he was the procuring cause of the sale.

In opposition, plaintiff asserts that it was acting as a real estate financing company while non-party Berko was acting as the real estate broker. Plaintiff argues that RPL section 442-d does not apply because plaintiff was a real estate investor and lender in the transaction. Plaintiff further argues that, because plaintiff was not the broker, it did not need to be the procuring cause of the transaction.

In reply, AssetAvenue argues that the claims against it must be dismissed because they are predicated on the non-binding Letter of Interest. AssetAvenue contends that it has no contractual duties under the Letter of Interest because it was not a signatory to the Letter. AssetAvenue points out that plaintiff never made the loan to the Borrowers and assumed no binding obligations to make the loan. AssetAvenue suggests that, to the extent plaintiff is claiming fees for services rendered under the Letter of Interest, plaintiff's sole remedy is to seek a "break-up fee" of $145,000 from the Principals, defendants Hartman and Feldman.

Under CPLR 3211(a), "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 1. a defense is founded upon documentary evidence; or ... 3. the party asserting the cause of action has not legal capacity to sue; or ... 7. the pleading fails to state a cause of action[.]"

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[4] Section 442-d provides:

> No person, copartnership, limited liability company or corporation shall bring or maintain an action in any court of this state for the recovery of compensation for services rendered, in any place in which this article is applicable, in the buying, selling, exchanging, leasing, renting or *negotiating a loan upon any real estate* without alleging and proving that such person was a duly licensed real estate broker or real estate salesman on the date when the alleged cause of action arose.
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> N.Y. Real Prop. Law § 442-d (emphasis added).

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. *Leon v. Martinez*, 84 N.Y.2d 83, 87–88 (1994); *see* CPLR § 3026. The court will "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Id.* at 87–88. "[T]he criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." *Id.* at 88 (internal quotation marks omitted). Dismissal is warranted pursuant to CPLR 3211(a)(1) "only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 152 (2002) (internal citations omitted). Lack of legal capacity is a ground for dismissal if timely raised as a defense. *See* CPLR §§ 3211(a)(3), 3211(e); *Sec. Pac. Nat. Bank v. Evans*, 31 A.D.3d 278, 280 (1st Dept. 2006) ("The statute is clear that the defense of lack of capacity must be raised in a pre-answer motion to dismiss or the answer, or else it will be waived.").

Real Property Law section 442-d bars an entity from maintaining an action for the recovery of compensation for services rendered in facilitating the sale of real estate, if it was not a "duly licensed real estate broker or real estate salesman" on the date the cause of action arose. RPL § 442-d; *Kopelowitz & Co. v. Mann*, 83 A.D.3d 793, 799 (2d Dept. 2011). The purpose of the real estate broker's licensing regulations is "to protect dealers in real estate from unlicensed persons acting as brokers, and to protect the public from inept, inexperienced or dishonest persons who might perpetrate or aid in the perpetration of frauds upon it, and to establish protective or qualifying standards to that end." *Small v. Marchese*, 98 Misc. 2d 295, 296 (1st Dept. 1978). Since the failure to procure a license is a crime, *see* RPL § 442-e, Article 12-A of the RPL should be "strictly construed so as not to encompass every situation in which an interest in real estate may be part of the transaction." *Eaton Associates v. Highland Broad. Corp.*, 81 A.D.2d 603, 604 (2d Dept. 1981) (citing *Reiter v. Greenberg*, 21 N.Y.2d 388, 391–92 (1968)).

Plaintiff alleges that it was acting as a "lender" or "investor" in the transaction and Berko was acting as the real estate broker. Accepting plaintiff's contention as true, as the court must, the real estate licensing requirement is inapplicable here. *See Mann*, 83 A.D.3d at 799 (plaintiff was not subject to RLP § 442-d where plaintiff's principal alleged that he was not acting as a broker, but rather as a potential principal in the acquisition or, alternatively, as a "finder"); *Eaton Assoc.*, 81 A.D.2d at 603–4 (real estate licensing requirement inapplicable where services of a "financial consultant" fell outside the scope of real estate brokerage services); *Gutman v. Savas*, 17 A.D.3d 278, 279 (1st Dept. 2005) (where transaction giving

rise to action was an oral agreement by plaintiff to advance money to defendants for the renovation of certain property, plaintiffs were not required to prove that they possessed duly issued real estate licenses under RPL § 442-d because "real estate was not the dominant feature of the transaction sued upon, but rather the advancement of money by [plaintiff] to defendants").

Turning to plaintiff's second and third causes of action for breach of fiduciary duty and breach of the fiduciary duty of loyalty, "[a] fiduciary duty exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relationship. *Roni LLC v. Arfa*, 18 N.Y.3d 846, 848 (2011). A fiduciary duty may be one "imposed on individuals as a matter of social policy, as opposed to those imposed consensually as a matter of contract agreement." *Apple Records, Inc. v. Capitol Records, Inc.*, 137 A.D.2d 50, 55 (1st Dept. 1988). Additionally, a fiduciary relationship may exist where one party reposes confidence in another and reasonably relies on the other's superior expertise or knowledge. *See AG Capital Funding Partners, LP. v State St. Bank & Trust Co.*, 11 N.Y.3d 146, 158 (2008) ("A fiduciary relation exists when confidence is reposed on one side and there is resulting superiority and influence on the other.").

To state a claim for breach of fiduciary duty, the plaintiff must allege that (1) defendant owed the plaintiff a fiduciary duty; (2) defendant committed misconduct; and (3) plaintiff suffered damages caused by that misconduct. *Burry v. Madison Park Owner LLC*, 84 A.D.3d 699, 699–700 (1st Dept. 2011). A cause of action for breach of fiduciary duty must also be pled with the requisite particularity of CPLR 3016(b). *Id.*; *Berardi v. Berardi*, 108 A.D.3d 406, 406–7 (1st Dept. 2013). "New York courts have not hesitated to find fiduciary duty claims deficient when a plaintiff has not pled or proved facts demonstrating a fiduciary duty or 'any relationship approaching privity.'" *Suthers v. Amgen Inc.*, 441 F. Supp. 2d 478, 487 (S.D.N.Y. 2006) (quoting *Columbia Mem'l Hosp. v. Barley*, 16 A.D.3d 748, 749 (3d Dept. 2005)).

In the verified complaint, plaintiff claims that the "Defendants' status as stakeholders in a joint venture with Plaintiff gives rise to a fiduciary relationship amongst the parties." Plaintiff alleges that defendants acted with "wonton and willful misconduct" by eliminating plaintiff from the transaction to enhance their own pecuniary gain. Defendants allegedly "started demanding that Plaintiff accept less and less for its efforts" as soon as defendant Mosaic "stepped … onto the scene at the site inspection[.]"

Plaintiff further alleges that defendants, as fiduciaries, owed plaintiff a duty of loyalty, which proscribed any defendant "from using its relative bargaining position or industry influence to enhance its benefit of the bargain." Plaintiff suggests that "[t]he disparity in bargaining power and influence between Defendants Mosaic and AssetAvenue and Plaintiff is undeniable" and argues that defendants breached their duty of loyalty "by immediately demanding, upon Mosaic's direct involvement in the transaction, that Plaintiff accept less and less for its Loan Origination, culminating in a threat on May 12, 2015, that Plaintiff accept 1/3rd of a point for its services, or nothing."

The above allegations fall short of stating a cause of action for breach of fiduciary duty or breach of the duty of loyalty. Even assuming the truth of plaintiff's allegations that defendant AssetAvenue "did absolutely nothing to stop Defendant Mosaic and the Defendant Sponsors, Feldman, Hartman, and Omek, from stripping Plaintiff of its fees" and "took no action to protect Plaintiff" in the deal, plaintiff has not shown that AssetAvenue had any such obligation. The allegation that all of the defendants were "stakeholders in a joint venture" with plaintiff is vague and conclusory. Plaintiff has not cited any authority for imposing a fiduciary duty upon defendant AssetAvenue. Moreover, plaintiff's allegations of "misconduct" on the part of AssetAvenue have not been pleaded with sufficient particularity. *See* CPLR 3016(b); *Peacock v. Herald Sq. Loft Corp.*, 67 A.D.3d 442, 443 (1st Dept. 2009) (allegation that the director defendants rejected plaintiffs' proposal due to the self-interest of one or more of the directors lacked the specificity required to adequately state a claim for breach of fiduciary duty).

As for the fourth cause of action, tortious interference with contract requires "the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom." *Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413, 424 (1996).

Plaintiff alleges (i) that it had an "express contract" with Omek, Feldman, and Hartman, entitling plaintiff to a 3% origination fee for procuring financing for the transaction; (ii) that "Mosaic and AssetAvenue had actual knowledge of this Contract"; and (iii) that Mosaic and AssetAvenue "intentionally procured Defendants Omek, Feldman, and Hartmans' breach of this contract, without justification," causing damage to plaintiff in the "sum-certain" of $435,000. Even assuming the existence of a valid contract and AssetAvenue's knowledge thereof, plaintiff fails to provide sufficient detail as to AssetAvenue's actions in "intentionally procur[ing]" the breach of such contract. Plaintiff merely alleges that

AssetAvenue "took no action to protect Plaintiff" and "did absolutely nothing to stop [the other defendants] from stripping Plaintiff of its fees." Because the complaint and moving papers do not plead any factual details supporting plaintiff's conclusory allegation that AssetAvenue "intentionally procured" defendants Omek, Feldman, and Hartman to breach the alleged contract, plaintiff has failed to state a claim against AssetAvenue for tortious interference with contract. *See Godfrey v Spano*, 13 N.Y.3d 358, 373 (2009) ("[C]onclusory allegations—claims consisting of bare legal conclusions with no factual specificity—are insufficient to survive a motion to dismiss.").

As for the eighth cause of action, an account stated is "an agreement between parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance due." *Ryan Graphics, Inc. v. Bailin*, 39 A.D.3d 249, 250–51 (1st Dept. 2007) (internal citations omitted). An essential element of an account stated is that the parties came to an agreement with respect to the amount due. *Raytone Plumbing Specialities, Inc. v. Sano Constr. Corp.*, 92 A.D.3d 855 (2d Dept. 2012); *Episcopal Health Servs., Inc. v. Pom Recoveries, Inc.*, 138 A.D.3d 917, 919 (2d Dept. 2016); *see also Digital Ctr., S.L. v. Apple Indus., Inc.*, 94 A.D.3d 571, 572–73 (1st Dept. 2012) (granting defendant's motion to dismiss the cause of action for account stated where plaintiff failed to allege agreement with respect to balance due, as required to state a claim for account stated).

Plaintiff alleges in the complaint that it mailed all defendants a "statement of account" in the sum of $435,000 and that "[t]he statements were retained without objection, thereby creating accounts stated in the sum-certain of $435,000." However, plaintiff fails to allege an agreement between plaintiff and defendant AssetAvenue pursuant to which the statement of account in the sum of $435,000 was issued. An account stated "assumes the existence of some indebtedness between the parties, or an express agreement to treat the statement as an account stated" and "cannot be used to create liability where none otherwise exists." *M. Paladino, Inc. v. J. Lucchese & Son Contracting Corp.*, 247 A.D.2d 515, 516 (2d Dept. 1998)).

Accordingly, this court finds that plaintiff has failed to sufficiently allege causes of action against defendant AssetAvenue for breach of fiduciary duty, breach of the fiduciary duty of loyalty, tortious interference with contract, and account stated.

Based upon the foregoing, it is hereby

ORDERED that defendant AssetAvenue 106 LLC's motion to dismiss plaintiff SCS Strategic Capital LLC's verified complaint as against AssetAvenue 106 LLC is granted.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: OCTOBER 14, 2016

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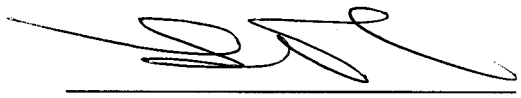

Eileen A. Rakower, J.S.C.