Gargano v Morey
2016 NY Slip Op 32963(U)
May 18, 2016
Supreme Court, Nassau County
Docket Number: 608026/15
Judge: Robert A. Bruno

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT: HON. ROBERT A. BRUNO, J.S.C.

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SALVATORE GARGANO and COMPASS CONSTRUCTION OF N.Y. CO., INC.,

Plaintiffs,

-against-

MICHAEL MOREY, CHAMPLAIN STONE LTD., EAGLES NEST LLC, GREGORY GRANDE, SEAN CARROLL, GRANDE AGGREGATES, GRANDE AGGREGATES LLC, NORTHEAST AGGREGATES DOCK OPERATOR LLC, NORTHEAST AGGREGATES DOCK OWNERS LLC, NORTHEAST AGGREGATES EQUIPMENT LEASING LLC, NORTHEAST AGGREGATES, LLC, NORTHEAST AGGREGATES QUARRY OWNERS LLC, STONY CREEK SERVICES, LLC, WHITEHALL AGGREGATES, LLC, MONROE TRACTOR & IMPLEMENT CO., INC., CHRISTOPHER BAUM AND BAUM & BAILEY, P.C.,

Defendants,

-and-

MAGNOLIA ASSOCIATES, LLC,

Proposed Intervenor-Defendant.

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TRIAL/IAS PART 15
Index No.: 608026/15
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DECISION & ORDER

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Upon the foregoing papers, motion by defendant Monroe Tractor & Implement Co., Inc. ("Monroe") for judgment dismissing all but one of plaintiffs' claims against it pursuant to CPLR §3211(a)(1) and (a)(7) is granted in part, and denied in part, pursuant to CPLR §3211(a)(7) as set forth below.

Plaintiffs' claims arise out of an alleged investment in a mining business in upstate New York. The business is located at a quarry west of Route 4 in Whitehall, New York, identified as Section 86, Block 1, Lot 19.2 ("the real property"). Two very large pieces of mining equipment, namely a jaw crusher and a cone crusher ("the equipment"), are located on the property.

Plaintiffs Salvatore Gargano, and his company, Compass Construction of N.Y. Co., Inc., are investors located in Nassau County (complaint, ¶ 64). They allege that defendants Morey, Grande, and Carroll, together with defendants Grande Aggregates, Grande Aggregates LLC and Monroe, engaged in a scheme to induce them to invest in a sham purchase of both the real property and the equipment (complaint, ¶¶ 35-89).

Beginning in November, 2014, plaintiffs did invest in what they thought would be a profitable mining business in the total amount of $3,006,000.00 (complaint, ¶¶ 90-91). According to plaintiff, the aforementioned six defendants represented to plaintiffs that the monies paid would be held "in trust" while the size and type of mining equipment was negotiated (complaint, ¶¶ 99-107). Defendants used plaintiffs' money to pay for the equipment, but plaintiffs received nothing (complaint, ¶ 126).

Plaintiffs allege that defendants are using the equipment to mine the Morey property and are keeping all the profits for themselves (complaint, ¶¶ 127-130). They insist that many of the defendants are shell entities with no assets, and the equipment is diminishing in value.

Plaintiff commenced this action by filing on December 14, 2015. The complaint contains a total of thirty causes of action against various defendants. At this time Monroe moves for judgment dismissing eight of the claims against it pursuant to CPLR §3211(a)(1) and (a)(7).

3211 Dismissal Standard

On a motion to dismiss pursuant to CLR §3211, the facts as alleged must be accepted as true, the pleader must be accorded the benefit of every favorable inference, and the court must determine only whether the facts as alleged fit within any cognizable theory (*ABN AMRO Bank, N.V. v. MBIA, Inc,* 17 N.Y.3d 208, 227 [2011], citing *Leon v. Martinez*, 84 N.Y.2d 83, 87 [1994]; *Samiento v. World Yacht Inc.*, 10 N.Y.3d 70, 79 [2008]). "Bare legal conclusions, as well as factual claims flatly contradicted by the record are not entitled to any such consideration" (*Everett v. Eastchester Police Dept.,* 127 A.D.3d 1131, 1132 [2d Dept. 2015], lv. app. den. 26 N.Y.3d 911 [2015], quoting *Riback v. Margulis*, 43 A.D.3d 1023 [2d Dept. 2007]; *Goel v.*

Ramachandran, 111 A.D.3d 783, 791-792 [2d Dept. 2013]).

A motion to dismiss pursuant to CPLR §3211(a)(1) "may be appropriately granted only where documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326 [2002]). Neither affidavits, nor letters are considered documentary evidence for the purposes of CPLR §3211(a)(1) (*Shofel v. DaGrossa*, 133 A.D.3d 649, 650 [2d Dept. 2015]; *JBGR, LLC v. Chicago Tit. Ins. Co.*, 128 A.D.3d 900, 903 [2d Dept. 2015]).

Where a party offers evidentiary proof on a motion pursuant to CPLR §3211(a)(7), the criterion is whether the proponent of the pleading has a cause of action (*Leon, supra* at 88; *Randazzo v. Nelson*, 128 A.D.3d 935, 936 [2d Dept. 2015]). Affidavits submitted almost never warrant dismissal under CPLR §3211(a)(7) unless they establish conclusively that the plaintiff has no cause of action (*Dolphin Holdings, Ltd. v. Gander & White Shipping, Inc.*, 122 A.D.3d 901, 902 [2d Dept. 2014]; *Bokhour v. GTI Retail Holdings, Inc.*, 94 A.D.3d 682, 683 [2d Dept. 2012]).

Whether a claim will later survive a summary judgment motion, or whether the plaintiff will ultimately be able to prove his or her claims, is not part of the calculus in determining a motion to dismiss (*see EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19 [2005]; *Vasomedical, Inc. v. Barron*, 137 A.D.3d 778 [2d Dept. 2016]; *Zellner v. Odyl, LLC*, 117 A.D.3d 1040, 1041 [2d Dept. 2014]).

Discussion

In support of its motion pursuant to CPLR §3211 Monroe submits an affidavit of Scott Erb, Wirtgen Division Manager of Monroe, a copy of a Purchase Agreement dated June 8, 2015[1], for the equipment plus a "triple deck screen," and copies of bank records showing transfers of cash by plaintiff Gargano to it on May 4, 2015, and June 11, 2015. Monroe argues that this documentation shows that it never agreed to hold monies wired by Gargano "in trust" for the future negotiation of equipment.

In opposition, Gargano states that he negotiated directly with Monroe for the right equipment. Gargano attaches several "proposed purchase orders," none of which were ever signed (Gargano affidavit dated December 21, 2015, ¶ 53 and Exhibit F), and Gargano insists that an agreement as to the right equipment for the mining business was never reached with Monroe.

[1]For the record, the signature on the Purchase Agreement is illegible.

Overall, the Court finds Monroe's documentation does not "utterly refute" plaintiffs' claims for the purposes of CPLR §3211(a)(1). The Court now turns to the alternative basis for dismissal, CPLR §3211(a)(7).

The second cause of action is for imposition of a constructive trust. The elements of a cause of action to impose a constructive trust are (1) a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance thereon, and (4) resulting unjust enrichment (see *Sharp v. Kosmalski*, 40 N.Y.2d 119, 121 [1976]; *Loeuis v. Grushin*, 126 A.D.3d 761, 765 [2d Dept. 2015]). A conventional business relationship, without more, is insufficient to create a fiduciary relationship (*Chi Lo Liu v. Radmin*, 106 A.D.3d 1042, 1043 [2d Dept. 2013], quoting *Legend Autorama, Ltd. v. Audi of Am., Inc.*, 100 A.D.3d 714, 717 [2d Dept. 2012]; *Friedman v. Anderson*, 23 A.D.3d 163, 166 [1st Dept. 2005]). In the absence of a confidential or fiduciary relationship with the defendants, plaintiffs have no cause of action for imposition of a constructive trust (*County of Nassau v. Expedia, Inc.*, 120 A.D.3d 1178, 1181 [2d Dept. 2014]; *Evans v. Rosen*, 111 A.D.3d 459 [1st Dept. 2013]).

A fiduciary relationship may exist when one party reposes confidence in another and reasonably relies on the other's superior expertise or knowledge, but not in an arm's-length business transaction involving sophisticated business people (*Faith Assembly v. Titledge of N.Y. Abstract, LLC*, 106 A.D.3d 47, 62 [2d Dept. 2013]; *Guarino v. North Country Mtge. Banking Corp.*, 79 A.D.3d 805, 807 [2d Dept. 2010]). The core of a fiduciary relationship is "a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions" (*EBC I, Inc*, *supra* at 19; *Faith Assembly*, *supra*). Dismissal of a cause of action for the imposition of a constructive trust pursuant to CPLR §3211 is warranted where the plaintiff fails to plead facts demonstrating the existence of a fiduciary or confidential relationship (*Refreshment Mgt. Servs., Corp. v. Complete Off. Supply Warehouse Corp.*, 89 A.D.3d 913, 915 [2d Dept. 2011]; *Baer v. Complete Off. Supply Warehouse Corp.*, 89 A.D.3d 877, 878 [2d Dept. 2011]; *Pfeiffer v. Jacobowitz*, 29 A.D.3d 661, 662 [2d Dept. 2006]). Conclusory allegations of a fiduciary relationship also fail to satisfy the requirements of CPLR §3016(b) (*Faith Assembly*, *supra*).

In this case plaintiffs attempt to create the requisite fiduciary or confidential relationship by pleading that Monroe agreed to hold all monies "in trust" for them (complaint, ¶ 107). This conclusory and self-serving assertion does not suffice to establish a factual basis for the existence of a fiduciary relationship in an arms-length transaction for the purchase of mining equipment (see generally *Manti's Transp., Inc. v. C.T. Lines, Inc.*, 68 A.D.3d 937 [2d Dept. 2009](no fiduciary relationship between seller and purchaser of two buses)). Consequently the second cause of action must be dismissed against defendant Monroe.

In the tenth cause of action plaintiffs allege a claim against Monroe for money had and received. Such a claim is recognized as one in quasi-contract, and is available "in the absence of

an agreement, when one party possesses money that in equity and good conscience [it] ought not to retain and that belongs to another" (*Board of Educ. of Cold Spring Harbor Cent. School Dist. v. Rettaliata*, 78 N.Y.2d 128, 138 [1991]).

The money at issue in this action was paid to Monroe for purchase of the equipment. Plaintiffs' allegation the money rightfully belongs to them (complaint, ¶ 195), is flatly contradicted by the record and therefore, not entitled to the presumption of truth. Under these circumstances plaintiff have no cause of action against Monroe for money had and received, and the tenth cause of action is hereby dismissed.

In the eleventh cause of action plaintiffs allege a claim for unjust enrichment against Monroe. The elements of a cause of action for unjust enrichment are that (1) the other party was enriched, (2) at the pleader's expense, and (3) that "it is against equity and good conscience to permit the other party to retain what is sought to be recovered" (see *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 182 [2011]). "Without sufficient facts, conclusory allegations that fail to establish that a defendant was unjustly enriched at the expense of a plaintiff warrant dismissal"*(Mandarin Trading Ltd*, *supra* at 183).

Here, again, the allegation that Monroe has been unjustly "enriched in the sum of the $2,191,000.00 paid by plaintiffs" (complaint, ¶ 199), is wholly conclusory, as well as flatly contradicted by record which demonstrates that the money was paid for the purchase of the equipment. Accordingly, plaintiffs have no cause of action against Monroe for unjust enrichment, and the eleventh cause of action must be dismissed.

The fifteenth cause of action is one for promissory estoppel. The elements of a cause of action based upon promissory estoppel are: (1) a clear and unambiguous promise, (2) reasonable and foreseeable reliance by the party to whom the promise is made, and (3) an injury sustained in reliance on that promise (*AHA Sales, Inc. v. Creative Bath Prods., Inc.*, 58 A.D.3d 6, 21-22 [2d Dept. 2008]; *NGR, LLC v. General Elec. Co.*, 24 A.D.3d 425 [2d Dept. 2005]). Recovery based upon promissory estoppel is limited to cases where the promisee suffered an unconscionable injury (*Halliwell v. Gordon*, 61 A.D.3d 932, 934 [2d Dept. 2009]; *AHA Sales, Inc.*, *supra*, at 22).

Plaintiffs herein state the bare elements of a cause of action for promissory estoppel, based upon prior allegations in the complaint. Monroe argues that plaintiffs' claim of an oral agreement to hold all money paid by Gargano "in trust," is conclusory and wholly unsupported. No facts have been alleged as to any such promise, including who made the promise and when.

This Court agrees with Monroe that there is no clear and unambiguous promise by Monroe upon which plaintiffs could have reasonably relied to sustain a cause of action for promissory estoppel (*Rogowsky v. McGarry*, 55 A.D.3d 815, 817 [2d Dept. 2008]). In addition,

the plaintiffs have failed to allege an unconscionable injury caused by Monroe (*Halliwell, supra*). Based on the foregoing, plaintiffs have no cause of action against Monroe for promissory estoppel, and consequently, the fifteenth cause of action against Monroe is dismissed.

In the seventeenth cause of action plaintiffs allege a cause of action for quasi contract against Monroe. A quasi contract claim is viable "in the absence of an express agreement, and is not really a contract at all, but rather a legal obligation imposed in order to prevent a party's unjust enrichment" (*Scott v. Fields*, 92 A.D.3d 666, 669 [2d Dept. 2012], quoting *Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 N.Y.2d 382, 388 [1987]). As plaintiffs have no cause of action for unjust enrichment, they also have no cause of action for quasi contract. Accordingly, the seventeenth cause of action against Monroe is dismissed.

In the twenty-third cause of action, plaintiffs seek an accounting from Monroe. "The right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest" (*Center for Rehabilitation & Nursing at Birchwood, LLC v. S&L Birchwood, LLC*, 92 A.D.3d 711, 713 [2d Dept. 2012]; *Weinstein v. Natalie Weinstein Design Assoc., Inc.*, 86 A.D.3d 641, 643[2d Dept. 2011]). As set forth above, plaintiffs have no confidential or fiduciary relationship with Monroe, and accordingly, they have no cause of action for an accounting. Under these circumstances, the twenty-third cause of action against Monroe is dismissed.

In the twenty-fifth cause of action plaintiffs allege a cause of action against Monroe for aiding and abetting the commission of a tort. The factual and legal basis of this cause of action is unclear from the complaint. In their opposition papers, plaintiffs argue that Monroe aided and abetted the fraudulent scheme by Morey, Carroll and Grande.

The elements of a cause of action for aiding and abetting fraud are: (1) the existence of an underlying fraud, (2) knowledge of the fraud by the aider and abettor, and (3) substantial assistance by the aider and abettor in the achievement of the fraud (see, *Nabatkhorian v. Nabatkhorian*, 127 A.D.3d 1043 [2d Dept. 2015). Aiding and abetting fraud must be plead with specificity pursuant to CPLR §3016(b), and this heightened pleading requirement is met when the material facts alleged in the complaint "are sufficient to permit a reasonable inference of the alleged conduct," including the adverse party's knowledge of, or participation in, the fraudulent scheme (see *Goel, supra* at 793, citing *Pludeman v. Northern Leasing Sys., Inc.*, 10 N.Y.3d 486, 492 [2008]).

On the 3211 motions by Stony Creek, and Morey, Eagles and Champlain, this Court has found that plaintiffs have pleaded a cause of action alleging fraud against these defendants. Plaintiffs allege that Monroe benefitted by being paid in full for the equipment and bills it could

not otherwise get paid by the mining defendants (complaint, ¶ 126). Monroe did not transfer title to the equipment to plaintiffs, although the payments came from plaintiffs. On this record, plaintiffs have alleged facts in the complaint, that permit a reasonable inference of Monroe's knowledge of, or participation in, the alleged fraudulent scheme with respect to the equipment. Viewing the allegations in the light most favorable to plaintiffs, they have alleged that Monroe provided substantial assistance to the mining defendants with respect to the equipment. Under these circumstances, the motion to dismiss the twenty-fifth cause of action against Monroe is hereby denied.

The twenty-eighth cause of action is labeled "Respondent (sic) Superior." This cause of action contains no allegations against Monroe, who is only identified in the title of the cause of action. This purported cause of action against Monroe is summarily dismissed.

For the record, Monroe's moving papers address neither the sixth cause of action for Deceit that is expressly alleged against Monroe, nor the twenty-sixth cause of action alleged against "defendants" for conspiracy to commit fraud and conversion. For this reason, the Court has not considered dismissal of these causes of action against Monroe.

All matters not decided herein are denied.

This constitutes the Decision and Order of this Court.

Dated: May 18, 2016
Mineola, New York

ENTER:

Hon. Robert A. Bruno, J.S.C.

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