

**Ullian v Margarella**

2017 NY Slip Op 31352(U)

May 9, 2017

Supreme Court, Richmond County

Docket Number: 750027/2016

Judge: Kim Dollard

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND

-----X  
MICHAEL ULLIAN and PONQUOGUE MANOR  
CONSTRUCTION, LLC,

Plaintiff,

-against-

MICHAEL MARGARELLA, ATRIUM 680 LLC,  
GREGG SCAROLA and MENICUCCI VILLA  
CILMI, PLLC,

Defendants,  
-----X

DCM Part 4

Present:  
HON. KIM DOLLARD

DECISION AND ORDER

750027/2016

Index No. ~~100462/2014~~

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This action stems from a loan agreement occurring on October 23, 2009, wherein the defendants, Michael Margarella and Atrium 680 LLC lent the sum of \$1,500,000.00 to Ponquogue Manor Construction, LLC, a domestic limited liability company. The loan was accompanied by a written promissory note pursuant to which the plaintiff, Ponquogue Manor Construction, LLC promised to repay the principal amount of the loan (\$1,500,000.00) together with monthly interest payments. The note was also signed by plaintiff, Michael Ullian, who personally guaranteed the loan and executed “Guaranty of the Note”. The money was to be used for a construction project at 68 Foster Avenue, Hampton Bays, New York. In addition to the note, Ponquogue Manor Construction, LLC also granted the defendant, Atrium 680 LLC and Margarella a mortgage against the Hampton Bays property. This mortgage was subordinate to the first mortgage held by People’s United Bank in the amount of \$1,500,000.

On or about October 23, 2009, the plaintiff, Ponquogue Manor Construction, LLC also entered into a construction management agreement with the defendants, Atrium 680, LLC and Margarella to oversee the first phase of the construction project.

The note executed required that plaintiffs, Ponquogue and Ullian, pay the loan and interest in full by November 1, 2010. Ponquogue and Ullian defaulted on the note, and on September 3, 2015 Atrium 68- LLC and Margarella brought action against Ullian under index number 150811/2015 in Richmond County Supreme Court for judgment in lieu of a complaint. On or about February 5, 2016, this Court granted the motion of Atrium 680, LLC and Margarella and awarded judgment in their favor against Ullian in the sum of \$3,400,000. Ponquogue Manor Construction, LLC and Ullian also defaulted on their first mortgage with People’s United Bank resulting in a foreclosure proceeding. Documents produced showed that the property was actually foreclosed upon and Margarella then purchased the first mortgage from People’s United Bank to protect his subordinate mortgage lien.

On or about March 25, 2016, Ponquogue and Ullian instituted the current action against Michael Margarella, Atrium 680 LLC, Gregg Scarola and Menicucci Villa Cilmi, PLLC. The plaintiffs in the current action, Ponquogue and Ullian assert seven causes of action. The first cause of action is against Margarella and Atrium 680 LLC for breach of contract with respect to the loan agreement; the second cause of action is against Margarella for breach of contract with respect to the Construction Management Agreement; the third cause of action is against Margarella, Atrium and Scarola for fraudulent inducement; the fourth cause of action is against Margarella and Atrium for

breach of the covenant of good faith and fair dealing; the fifth cause of action is against Margarella for breach of the covenant of good faith and fair dealing; the sixth cause of action is against Menicucci Villa Cilmi, PLLC for aiding and abetting a breach of fiduciary duty; and a seventh cause of action is asserted against Margarella for breach of fiduciary duty.

The defendant, Menicucci Villa Cilmi, PLLP, move to dismiss the complaint pursuant to CPLR §3211(a)(1) and CPLR §3211(a)(7) based upon documentary evidence and that the complaint fails to state a cause of action as against their law firm.

The defendants, Michael Margarella, Atrium 680 LLC and Gregg Scarola move to dismiss the complaint pursuant to CPLR §3211(a)(1), CPLR §3211(a)(7) and CPLR §3211(a)(5) based upon documentary evidence, that the complaint fails to state a cause of action and that the statute of limitations has expired.

With respect to the defendant, Menicucci Villa Cilmi, PLLC, the plaintiff alleges in the complaint that Margarella negotiated with People’s United Bank to purchase the first mortgage in competition with Ponquogue Manor Construction, LLC, thereby constituting a breach of fiduciary duty and which resulted in the cost to purchase the first mortgage to increase from \$1,700,000 to \$2,300,000. This sixth cause of action alleges that Margarella owed a fiduciary duty to Ponquogue as the owner’s representative relating to the real property and that Menicucci Villi Cilmi, PLLC, knew of this fiduciary duty since they drafted the Construction Management Agreement. It is further alleged that Menicucci Villa Cilmi, PLLC, were Margarella’s agent that communicated with People’s United Bank on his behalf with respect to the purchase of the first mortgage and therefore this law firm aided and abetted the breach of fiduciary duty.

The defendant, Menicucci Villa Cilmi, PLLP, claim that there is no fiduciary relationship between defendant, Margarella and plaintiff, Ponquogue Manor Construction, LLC, and therefore their law firm cannot have aided and abetted the breach of fiduciary duty. This defendant further asserts that Margarella’s negotiations with People’s United Bank to purchase the first mortgage in an effort to protect the subordinate second mortgage does not breach any fiduciary duty. It is also argued that even if a fiduciary duty existed, that duty would have related solely to the Construction Management Agreement and further that the law firm did not provide “substantial assistance” to any breach of fiduciary duty, but were merely acting as attorneys.

The defendants, Margarella, Atrium 680 LLC and Gregg Scarola claim also that there was no fiduciary relationship created between Margarella and Ponquogue Manor Construction, LLC by virtue of the Construction Management Agreement. It is claimed that any negotiation by Margarella to purchase the first mortgage so as to protect his subordinate mortgage does not constituted a breach of fiduciary duty. Defendant, Scarola, named in the third cause of action for fraudulent inducement, claims that any actions which he took were as a member of Atrium 680, LLC and that there was no privity of contract between himself personally and Ponquogue Manor Construction, LLC. It is further claimed that the third cause of action for fraudulent inducement was not plead with particularity and

does not state a cause of action. Defendants Margarella, Atrium and Scarola also contend that all claims should be dismissed based upon the expiration of the statute of limitations.

The plaintiff opposed both motions. In opposition, plaintiff Ullian claimed that as a construction manager, Margarella had a special relationship with the owner, Ponquogue Manor Construction, LLC and acted as the owner's representative, thereby resulting in a fiduciary relationship. Plaintiff Ullian claimed that from November of 2009 to January of 2010, he was negotiating with People's United Bank and had a deal "in principle" to purchase the first mortgage for \$1,700,000. Ullian claims that he had conversations with Margarella and disclosed his negotiations. Sometime in 2010, the price to purchase the first mortgage increased to \$2,300,000 allegedly due to negotiations between Margarella and People's United Bank. Plaintiff, Ullian claims that Margarella's negotiations constituted a breach of fiduciary duty resulting in damages in the sum of \$600,000 when the price to purchase the first mortgage allegedly increased from \$1,700,000 to \$2,300,000.

Plaintiff Ullian further states that Menicucci Villa Cilmi, PLLC, knew of the fiduciary relationship since this law firm drafted the Construction Management Agreement, and represented and assisted Margarella in his efforts to purchase the first mortgage. Such actions were claimed to have aided and abetted Margarella in breaching his fiduciary duty.

Plaintiff states that they properly plead a cause of action for fraudulent inducement since Margarella, Scarola and Atrium 680, LLC, misrepresented that they had the ability to complete the first phase of the construction project, and that such facts were relied upon by Ponquogue Manor Construction, LLC. Lastly, plaintiff claims that any defense based upon expiration of the statute of limitations or based upon documentary evidence are waived, since they were not asserted in the defendants' answer.

The motion of defendant, Menicucci Villa Cilmi, PLLC to dismiss for failure to state a cause of action is granted and the complaint is dismissed as to this defendant.

In determining whether a complaint is sufficient to withstand a motion to dismiss pursuant to CPLR 3211(a)(7), "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail" (Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 372 N.E.2d 17; see 1414 Realty Corp. v. G & G Realty Co., 272 A.D.2d 309, 707 N.Y.S.2d 885). "The complaint must be construed liberally, the factual allegations deemed to be true, and the nonmoving party granted the benefit of every possible favorable inference" (Hense v. Baxter, 79 A.D.3d 814, 815, 914 N.Y.S.2d 200; see Leon v. Martinez, 84 N.Y.2d 83, 87, 614 N.Y.S.2d 972, 638 N.E.2d 511; Kopelowitz & Co., Inc. v. Mann, 83 A.D.3d 793, 796-797, 921 N.Y.S.2d 108). In addition, a court may consider any factual submissions made in opposition to a motion to dismiss in order to remedy pleading defects (see CPLR 3211[c]; Ryan v. Cover, 75 A.D.3d 502, 503, 904 N.Y.S.2d 750; Tarzia v. Brookhaven Natl. Lab., 247 A.D.2d 605, 669 N.Y.S.2d 230).

A motion pursuant to CPLR 3211(a)(1) to dismiss the complaint on the ground that the action is barred by documentary evidence may be granted only where the documentary evidence utterly refutes the plaintiff's factual allegations, thereby conclusively establishing a defense as a matter of

law (*see Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326 [746 N.Y.S.2d 858, 774 N.E.2d 1190]; *Williams v. Williams*, 36 A.D.3d 693 [828 N.Y.S.2d 189]; *Martin v. New York Hosp. Med. Ctr. of Queens*, 34 A.D.3d 650 [826 N.Y.S.2d 85] )” (*Mendelovitz v. Cohen*, 37 A.D.3d 670, 830 N.Y.S.2d 577).

In the current action, the only cause of action alleged as against Menicucci Villa Cilmi, PLLP, is that of aiding and abetting breach of fiduciary duty. A claim for aiding and abetting breach of fiduciary duty requires 1) breach of fiduciary obligations to another; 2) that the party being sued knowingly induced or participated through the provision of substantial assistance in procuring the breach; and 3) that the party bringing such action suffered damage as a result of the breach of the fiduciary duty (*Bullmore v. Ernst & Young Cayman Islands*, 45 A.D.3d 461, 1<sup>st</sup> Dept., 2007). In order to sustain a claim, there must exist a fiduciary relationship between the claimant and the party allegedly induced to harm the claimant. As a general rule, an arms length business relationship, between a property owner and contractor on a construction project does not give rise to a fiduciary relationship (*Board of Managers of Highpoint Condominium v. East/West Venture, Haseko (40<sup>th</sup>), Inc.*, 278 A.D.2d 55, 1<sup>st</sup> Dept., 2000).

The fact that an attorney prepares legal documents which arise out of an alleged breach of fiduciary duty does not constitute the “substantial assistance” required by law (*Roni, LLC v. Arfa*, 72 A.D.3d 413, 1<sup>st</sup> Dept., 2010, *aff’d* 15 N.Y.3d 826 (2010)).

In the case at bar, there are two agreements, the loan agreement and the construction management agreement. They are both arms length transactions which do not create a fiduciary relationship, but only a contractual one.

A fiduciary relationship 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 relation (*EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d at 20, 799 N.Y.S.2d 170, 832 N.E.2d 26, quoting *Restatement [Second] of Torts § 874, comment a*; *see Roni LLC v. Arfa*, 18 N.Y.3d 846, 848, 939 N.Y.S.2d 746, 963 N.E.2d 123). Such a relationship may exist where one party reposes confidence in another and reasonably relies on the other's superior expertise or knowledge, but an arms-length business relationship does not give rise to a fiduciary obligation (*WIT Holding Corp. v. Klein*, 282 A.D.2d 527, 529, 724 N.Y.S.2d 66 [citations omitted]; *see EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d at 19, 799 N.Y.S.2d 170, 832 N.E.2d 26; *Carbon Capital Mgt., LLC v. American Express Co.*, 88 A.D.3d 933, 938, 932 N.Y.S.2d 488).

A conventional business relationship, without more, does not become a fiduciary relationship by mere allegation (*Oursler v. Women's Interart Ctr.*, 170 A.D.2d 407, 566 N.Y.S.2d 295, 1991). Rather a plaintiff must make a showing of special circumstances that could have transformed the parties business relationship to a fiduciary one, such as control of one party of the other party for the good of the other (*DiTolla v. Doral Dental IPA of New York, LLC*, 100 A.D.3d 586, 953 N.Y.S.2d 155, 2<sup>nd</sup> Dept., 2012).

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. v. Goldman, Sachs & Co.*, 5 N.Y.3d at 20, 799 N.Y.S.2d 170, 832 N.E.2d 26). To state a claim for breach of a

fiduciary duty, a plaintiff must first establish the existence of a fiduciary relationship between the parties (Compania Sud-Americana de Vapores, S.A. v. IBJSchroder Bank & Trust Co., 785 F.Supp. 411, DNY, 1992).

Under the facts presented, it is this Court’s opinion that the Construction Management Agreement did not create a fiduciary relationship as plaintiff contends. The agreement was a typical arms length business transaction. Further, any negotiation to purchase the first mortgage by Margarella was clearly outside the scope of the Construction Management Agreement and unrelated to same. Therefore even had a fiduciary relationship existed, it would not have encompassed or been violated by Margarella’s actions pertaining to the first mortgage which was unrelated to the Construction management Agreement.

There being no fiduciary relationship, the firm of Menicucci Villa Cilmi, PLLC could not have aided and abetted a breach of fiduciary agreement and therefore the sixth cause of action and the complaint as against this defendant is dismissed. Additionally, the actions of the Menicucci law firm in preparing legal documents with respect to the purchase of the first mortgage did not constitute the “substantial assistance” required by law to support a cause of action for aiding and abetting (Roni, LLC v. Arfa, 72 A.D.3d 413, 1<sup>st</sup> Dept., 2010, aff’d 15 N.Y.3d 826 (2010)).

This Court having found that no fiduciary relationship exists between Ponquogue Manor Construction LLC and Margarella, the seventh cause of action for breach of fiduciary duty against Margarella is dismissed.

The plaintiffs’ third cause of action for fraudulent inducement against defendants, Margarella, Scarola and Atrium 680, LLC is also dismissed.

The elements of a cause of action sounding in fraudulent inducement are “ ‘representation of a material existing fact, falsity, scienter, deception and injury’ “ (Dalessio v. Kressler, 6 A.D.3d 57, 61, 773 N.Y.S.2d 434 [2d Dept.2004] quoting Channel Master Corp. v. Aluminum Ltd. Sales, 4 N.Y.2d 403, 407 [1958] ). In a fraudulent inducement claim, the alleged misrepresentation should be one of then-present fact, which would be extraneous to the contract and involve a duty separate from or in addition to that imposed by the contract (see Deerfield Communications Corp. v. Chesebrough-Ponds, Inc., 68 N.Y.2d 954 [1986] ), and not merely a misrepresented intent to perform (see Hawthorne Group, LLC v. RRE Ventures, 7 A.D.3d 320, 323–324, 776 N.Y.S.2d 273 [1st Dept.2004] ). A cause of action to recover damages for fraud will not lie where the only fraud claimed arises from the breach of a contract (see Gorman v. Fowkes, 9l AD3d 726,727 [2d Dept.2012] citing Selinger Enters., Inc. v. Cassuto, 50 AD3d 766,768 [2d Dept.2008]; Tiffiny at Westbury Condominium v. Marelli Dev. Corp., 40 A.D.3d 1073, 1077, 840 N.Y.S.2d 74 [2d Dept.2007] ). A mere misrepresentation of an intent to perform under the contract is insufficient to sustain a cause of action to recover damages for fraud (see Gorman v. Fowkes, supra ). Here, the fraud cause of action concerns performance under the contract and hence is duplicative of the breach of contract claim (see Hawthorne Group v. RRE Ventures, 7 A.D.3d at 324, 776 N.Y.S.2d 273), and the third cause of action must be dismissed.

Further, there is an additional ground for dismissal of the third cause of action since plaintiffs failed to plead the requisite elements of fraudulent inducement with particularity as required by CPLR §3016(b). Their claim is not supported with specific and detailed allegations of fact; instead, plaintiffs have merely recited in conclusory language the elements of fraudulent inducement, which is clearly insufficient (see CYG-Knit Mills v. Denton Sleeping Garment Mills, 26 A.D.2d 800, 273 N.Y.S.2d 831). Plaintiff has failed to satisfy the requirement of CPLR §3016(b).

With respect to the remaining causes of action, the defendants, Margarella, Scarola and Atrium 680, LC claim that the statute of limitations has expired. However, these defendants failed to assert a statute of limitations affirmative defense.

The statute of limitations is an affirmative defense that must be plead and proved [see, CPLR §3018(b); CPLR §3211 (a)(5)]. The statute of limitations must be raised by either a motion to dismiss prior to service of a responsive pleading or as a defense in an answer; a defendant who does neither waives it [CPLR §3018(b); CPLR §3211(a)(5) and CPLR §3211 (e)]. Because Margarella, Scarola and Atrium 680, LLC neither plead the affirmative defense of statute of limitations in their answer nor moved to dismiss prior to service of a responsive pleading on the ground that the statute of limitations expired, they waived this defense.

Accordingly, based upon the foregoing, it is,

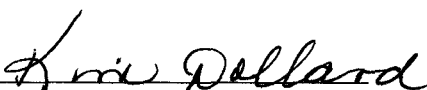
ORDERED, that the sixth cause of action alleging aiding and abetting a breach of fiduciary duty and the complaint against the defendant, Menicucci Villa Cilmi, PLLC is dismissed; and it is further,

ORDERED, that the seventh cause of action alleging breach of fiduciary duty against defendant, Margarella, is dismissed; and it further,

ORDERED, that the third cause of action alleging fraudulent inducement against Margarella, Scarola and Atrium 680, LLC, is dismissed. Since this is the only cause of action asserted against the defendant, Scarola, the complaint is dismissed as to this defendant.

Dated: 5/9/17

ENTER

  
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J.S.C.

Hon. Kim Dollard  
Acting Supreme Court Justice