

Cohen v Saks Inc.

2017 NY Slip Op 31638(U)

July 27, 2017

Supreme Court, New York County

Docket Number: 652724/2013

Judge: Charles E. Ramos

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

-----x
SAMUEL T. COHEN, individually and on
behalf of all others similarly situated,

Plaintiff,

Index No. 652724/2013

- against -

SAKS INCORPORATED, FABIOLA ARREDONDO,
ROBERT B. CARTER, MICHAEL S. GROSS, DONALD
E. HESS, MARGUERITE W. KONDRACKE, JERRY W.
LEVIN, NORA MCANIFF, STEPHEN I. SADOVE,
JACK L. STAHL, HUDSON'S BAY COMPANY, and
HARRY ACQUISITION INC.,

Defendants.

-----x
THOMAS H. JENNINGS, individually and on
behalf of all others similarly situated,

Plaintiff,

Index No. 652725/2013

- against -

SAKS INCORPORATED, FABIOLA ARREDONDO,
ROBERT B. CARTER, MICHAEL S. GROSS, DONALD
E. HESS, MARGUERITE W. KONDRACKE, JERRY W.
LEVIN, NORA MCANIFF, STEPHEN I. SADOVE,
JACK L. STAHL, HUDSON'S BAY COMPANY, and
HARRY ACQUISITION INC.,

Defendants.

-----x
ROBERT OLIVER, on behalf of himself and
those similarly situated,

Plaintiff,

Index No. 652758/2013

- against -

SAKS INCORPORATED, FABIOLA ARREDONDO,
ROBERT B. CARTER, MICHAEL S. GROSS, DONALD
E. HESS, MARGUERITE W. KONDRACKE, JERRY W.
LEVIN, NORA MCANIFF, STEPHEN I. SADOVE,
JACK L. STAHL, HUDSON'S BAY COMPANY, and
HARRY ACQUISITION INC.,

Defendants.

-----x
JOSHUA TEITELBAUM,

Plaintiff,

Index No. 652793/2013

- against -

SAKS INCORPORATED, FABIOLA ARREDONDO,
ROBERT B. CARTER, MICHAEL S. GROSS, DONALD
E. HESS, MARGUERITE W. KONDRACKE, JERRY W.
LEVIN, NORA MCANIFF, STEPHEN I. SADOVE,
JACK L. STAHL, HUDSON'S BAY COMPANY, and
HARRY ACQUISITION INC.,

Defendants.

-----x
JACK and WANDA OLIVER, individually and on
behalf of all others similarly situated,

Plaintiffs,

Index No. 652854/2013

- against -

SAKS INCORPORATED, FABIOLA ARREDONDO,
ROBERT B. CARTER, MICHAEL S. GROSS, DONALD
E. HESS, MARGUERITE W. KONDRACKE, JERRY W.
LEVIN, NORA MCANIFF, STEPHEN I. SADOVE,
JACK L. STAHL, HUDSON'S BAY COMPANY, and
HARRY ACQUISITION INC.,

Defendants.

-----x
SHARON GOLDING, on behalf of herself and
others similarly situated,

Plaintiff,

Index No. 653036/2013

- against -

SAKS INCORPORATED, FABIOLA ARREDONDO,
ROBERT B. CARTER, MICHAEL S. GROSS, DONALD
E. HESS, MARGUERITE W. KONDRACKE, JERRY W.
LEVIN, NORA MCANIFF, STEPHEN I. SADOVE,
JACK L. STAHL, HUDSON'S BAY COMPANY, and
HARRY ACQUISITION INC.,

Defendants.

-----x
MICHELLE SABATTINI, on behalf of herself
and all others similarly situated,

Plaintiff,

Index No. 652817/2013

- against -

SAKS INCORPORATED, FABIOLA ARREDONDO,
ROBERT B. CARTER, MICHAEL S. GROSS, DONALD
E. HESS, MARGUERITE W. KONDRACKE, JERRY W.
LEVIN, NORA MCANIFF, STEPHEN I. SADOVE,
JACK L. STAHL, HUDSON'S BAY COMPANY, and
HARRY ACQUISITION INC.,

Defendants.

-----x

Hon. C. E. Ramos, J.S.C.:

In motion sequence 005¹, plaintiffs Samuel T. Cohen, Thomas H. Jennings, Robert Oliver, Joshua Teitelbaum, Jack and Wanda Oliver, Sharon Golding and Michelle Sabattini, on behalf of themselves and all others similarly situated (collectively, the "Shareholders"), move pursuant to CPLR 302(b) for leave to amend the complaint.

Defendants Saks Incorporated ("Saks"), Fabiola Arredondo, Robert B. Carter, Michael S. Gross, Donald Levin, Nora Mcaniff, Stephen I. Sadove, Jack L. Stahl, Hudson' Bay Company ("Hudson's Bay"), and Harry Acquisition Inc. (collectively, the "Saks

¹ The above cases with Index No. 652724/2013, 652725/2013, 652758/2013, 652793/2013, 652854/2013, 653036/2013 are consolidated for disposition.

Parties") cross-move pursuant to CPLR 2104 to enforce the written stipulation of settlement signed by the Shareholders and the Saks Parties, dated October 22, 2014 (the "Settlement Stipulation").

For the reasons set forth below, the Court denies the Shareholders' motion to amend the complaint, and denies the Saks Parties' motion to enforce the Settlement Stipulation.

Background

On July 29, 2013, Hudson's Bay and Saks announced that they executed a definitive merger agreement where by Hudson's Bay would acquire all outstanding shares of Saks for \$16 per share (the "Transaction") (Affirmation of Monteverde ["Monteverde Aff."], Ex. 1 ["Proposed Complaint"], ¶ 1). Goldman Sachs & Co. ("Goldman") was the Saks Parties' financial advisor in the Transaction, and authorized the Transaction team to issue a fairness opinion dated July 28, 2013 (Proposed Complaint, ¶¶ 7, 49).

In August 2013, the Shareholders commenced this action against Saks' individual directors for breach of fiduciary duty and against Hudson's Bay and Harry Acquisition, Inc. for aiding and abetting breach of fiduciary duty, alleging that they received grossly inadequate consideration in connection with the Transaction (Complaint, ¶¶ 135-145).

The Transaction was consummated in November 2013 (Proposed Complaint, ¶1). At that time, Saks operated 41 Saks Fifth Avenue

stores, including its flagship store at 611 Fifth Avenue (the "Flagship Store"), which was appraised most recently in 2006 (*id.* at ¶¶ 5, 35). The Shareholders knew that Saks' board of directors (the "Board") did not obtain an appraisal of its real estate prior to consummation of the Transaction (Monteverde Aff., ¶ 8).²

On October 22, 2013, the Shareholders and the Saks Parties executed the Settlement Stipulation in this action (Monteverde Aff., ¶ 5). In the Settlement Stipulation, the Shareholders and the Saks Parties stipulated and agreed to mutually release any claims against "Released Persons," including unknown claims (Affirmation of Korn ["Korn Aff."], Ex. 10 ["Settlement Stipulation"]). Specifically, "Unknown" is defined as

"any one or more of Plaintiffs, Defendants, members of the Class, or any of their Related Persons does not know or suspect to exist, but that, if known by him, her or it, might affect his, her or its agreement to release the Settled claims or might affect his, her or its decision to object or not to object to the Settlement..." (Settlement Stipulation, ¶ 14).

"Released Persons" include the Shareholders and their counsel, the Saks Parties, and "Related Persons," which is defined as:

"each of [the Saks Parties]..., and each and all of their

² In February 2013, prior to announcement of the Transaction, Catterton, a private equity firm, expressed an interest in a potential acquisition of Saks in an unsolicited phone call (Proposed Complaint, ¶ 81). On April 18, 2013, Catterton met with Saks to discuss a proposal to take Saks private, which would likely separate its real estate assets for financing purposes (*id.* at ¶ 82). On April 24, 2013, Hudson's Bay sent a due diligence request to Goldman, asking for the appraised value of Saks' real estate assets (*id.* at ¶ 85).

respective past...financial or investment advisors, consultant accountants, investment bankers (including specifically...[Goldman]...)” (*id.* at ¶ 11).

In addition, the Settlement Stipulation states that “[the Shareholders] acknowledge...that the foregoing waiver was separately bargained for and is a key element of the Settlement of which this release is a part” (*id.* at ¶ 14).

In his deposition, Goldman’s managing director testified that the fairness material utilized in the Transaction does not contain any valuation of Saks’ real estate (Proposed Complaint, ¶ 57).

On February 3, 2014, approximately three months after the settlement, Goldman presented a real estate portfolio overview to Hudson’s Bay, which stated that “[m]anagement preliminary portfolio valuation of [approximately] \$7.7bn with heavy concentration in Saks Fifth Avenue, New York ([approximately] \$4bn)” (*id.* at ¶ 70).

On November 22, 2014, more than one year after the Transaction, news releases stated that Hudson’s Bay purchased Saks for a low price (Monteverde Aff., ¶ 6). Subsequently, the Shareholders moved to compel the Saks Parties to produce additional discovery to examine the substance of the news, which was withdrawn (NYCSEF Doc. 126). The Shareholders allege that they were not aware of the fact that Saks’ real property in New York City exceeded the total price of Saks by approximately \$1

billion until the publication of the newspaper article, and the newly disclosed information is inconsistent with the testimony given during the discovery prior to the execution of the Settlement Stipulation (Proposed Complaint, ¶ 75).

Goldman, which is also one of the banks providing refinancing to Hudson's Bay immediately after the Transaction, produced documents and witnesses for examination, during the course of discovery in this action (Monteverde Aff., ¶¶ 7, 8). The Shareholders now allege that Goldman misled the Board to believe that Saks' real estate was worth only between \$1 and \$1.2 billion because Goldman intended Hudson's Bay to be a future client, while an appraisal revealed that the Flagship Store itself was worth \$4 billion (*id.* at ¶ 8).

The Shareholders now seek to amend the complaint to pursue additional claims against the Saks Parties and Goldman (Monteverde Aff., ¶ 9).

Discussion

The Shareholders seek to amend the complaint and rescind the Settlement Stipulation. They argue that the Settlement Stipulation should be rescinded because the Saks Parties and Goldman procured the Settlement Stipulation by imparting information to the shareholders they knew or should have known to be false at the time of execution, and allege that Goldman misrepresented the true value of the Flagship Store and misled

the Board in the Transaction.

"Stipulations of settlement are favored by the courts and not lightly cast aside" (*Hallock v State*, 64 NY2d 224, 230 [1984]). A party can rescind a stipulation during litigation "[o]nly where there is cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident" (*id.*).

Here, the Shareholders fail to sufficiently establish that the Saks Parties and Goldman fraudulently induced them to enter into the Settlement Stipulation. Prior to consummation of the Transaction, Goldman's fairness opinion does not contain any valuation of Saks' real property, and the Shareholders knew that the Board did not obtain an appraisal of its real estate since 2006. Goldman's determination of the value of Saks' real property only came after the Transaction was consummated and the Settlement Stipulation was executed.

The Shareholders have failed to meet the specificity requirement in the allegation that the Saks Parties or Goldman knowingly misrepresented a material fact to induce the Shareholders to enter into the Settlement Stipulation (See *Eurycleiz Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). In the original complaint, the Shareholders alleged receiving inadequate consideration. The additional discovery has not revealed any evidence that either the Saks Parties or Goldman knowingly misrepresenting a material fact, nor does it

demonstrate that the Shareholders were induced by the alleged misrepresentation to settle the claim of inadequate consideration. Mere speculation that Goldman may have known the value of Saks' real property before the Transaction was consummated is insufficient to establish fraudulent inducement. Thus, because the Shareholders fail to demonstrate sufficient cause to rescind the Settlement Stipulation, their proposed amended complaint fails.

CPLR 3025(b) provides that a party may amend the pleading at any time by leave of court. "Absent prejudice or unfair surprise, requests for leave to amend should be granted" (*Mallory Factor, Inc. v Schwartz*, 146 AD2d 465, 467 [1st Dept 1989]). On a motion for leave to amend a pleading, the movant "must simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit" (*Perotti v Becker, Glynn, Melamed & Muffy LLP*, 82 AD3d 495, 498 [1st Dept 2011]).

In the proposed amended complaint, the Shareholders seek to assert a cause of action for breach of fiduciary duty against the Board, and a new cause of action for aiding and abetting breach of fiduciary duty against Goldman. The Shareholders argue that Goldman aided and abetted the Board's breach of their fiduciary duty by misleading the Board to believe that Saks' real estate was worth only between \$1 and \$1.2 billion so that Goldman could gain favor with Hudson's Bay.

The proposed pleading is completely devoid of merit not only because it is based on speculation, but because these claims have been released under the Settlement Stipulation. The Shareholders in the Settlement Stipulation stipulated and agreed to release any claims against the Saks Parties and Goldman related to the Transaction, including unknown claims that might have affected their decision to release if known at the time of execution. The claims in the proposed amended complaint are clearly within the scope of the release.

Lastly, this Court's Practice Rule 17 requires a hearing on the fairness of the settlement prior to approval of any class action settlement. The parties are directed to schedule a fairness hearing as required by the rule. Accordingly, the cross-motion to enforce the Settlement Stipulation is denied without prejudice as premature.

Accordingly, it is

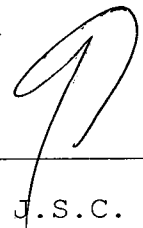
ORDERED that the motion for leave to amend the complaint is denied; and it is further

ORDERED that the cross-motion to enforce the written stipulation of settlement is denied without prejudice; and it is further

ORDERED that the parties shall contact the clerk of Part 53 to schedule a fairness hearing within 30 days from service of a copy of this order with notice of entry.

Dated: July 27, 2017

ENTER:



J.S.C.

CHARLES E. RAMOS