

**Landa v McGuire**

2017 NY Slip Op 32545(U)

December 4, 2017

Supreme Court, Kings County

Docket Number: 513122/2016

Judge: Sylvia G. Ash

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Comm-11 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 4th day of December, 2017.

PRESENT:

HON. SYLVIA G. ASH,

Justice.

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BENJAMIN LANDA,

Plaintiff(s),

DECISION AND ORDER

- against -

Index # 513122/2016

F. JAMES MCGUIRE and THE MCGUIRE GROUP, INC.,

Mot. Seq. 2

Defendant(s).

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The following e-filed papers numbered 17 to 28 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	_____
Opposing Affidavits (Affirmations) _____	_____
Reply Affidavits (Affirmations) _____	_____

_____	17 - 25
_____	26, 27
_____	28

After oral argument and upon the foregoing papers, Defendants' motion to dismiss is granted as to Plaintiff's first cause of action for fraud but denied as to Plaintiff's second cause of action for unjust enrichment.

**Background**

Plaintiff, BENJAMIN LANDA ("Landa" or "Plaintiff"), is the principal of a group of investors that sought to purchase seven nursing homes owned by Defendant, THE MCGUIRE GROUP, INC. ("McGuire Group"), of which Defendant, F. JAMES MCGUIRE ("McGuire"), is the Chief Executive Officer. The parties entered into a six-page Memorandum of Understanding ("MOU") dated May 14, 2015, relating to the sale of the nursing homes and substantially all of their assets. In addition to the nursing homes, the McGuire Group owned a pharmacy business that it

wanted to sell but which Plaintiff was not interested in purchasing. The MOU provided for a 90-day exclusivity period during which Plaintiff had the exclusive opportunity to negotiate the purchase of the nursing homes and which the McGuire Group and its affiliates were prohibited from marketing the nursing homes to other potential buyers.

According to Plaintiff's complaint, "from May 2015 through May 2016, defendants, and particularly defendant, McGuire, repeatedly requested that Landa locate or otherwise assist in locating a potential purchaser for [the pharmacy]" and that "defendants, and particularly defendant, McGuire, represented to Landa, that if Landa were to locate or assist in locating a potential buyer for the pharmacy, that defendants would complete the transaction(s) set forth in the MOU" (Complaint, Paragraphs 9, 10). Plaintiff further alleges that, in reliance upon Defendants' representations, he "secured a purchaser for defendants' pharmacy" and that thereafter, he "invested substantial time and expense in connection with the transaction(s) set forth in the MOU..." (*Id.* at Paragraphs 13, 14), but that Defendants thereafter terminated the transaction. Plaintiff alleges that Defendants never intended to complete the transactions set forth in the MOU but fraudulently led him to believe that Defendants would do so in order to induce Plaintiff to obtain a purchaser for Defendants' pharmacy. Plaintiff further alleges that McGuire engaged in such conduct due to "a bias or discriminatory animus against Landa, by virtue of his religious beliefs and background, to wit: an orthodox Jew from New York" (*Id.* at Paragraph 17).

On July 29, 2016, Plaintiff commenced this action against Defendants alleging two causes of action: (1) fraud and (2) unjust enrichment.

With the instant motion to dismiss, Defendants argue that Plaintiff's fraudulent inducement claim must be dismissed because Plaintiff fails to plead fraud with particularity. Secondly, Defendants argue that Plaintiff cannot show justifiable reliance supporting a fraudulent inducement claim because the MOU expired on August 12, 2015, as did Plaintiff's exclusive right to purchase the nursing homes. That accordingly, if Defendants made any representations that it would only sell

the nursing homes to Plaintiff, which Defendants deny, that Plaintiff was on notice that those representations were false and thus could not have justifiably relied upon them. Third, Defendants contend that the MOU governs the instant dispute and, therefore, Plaintiff cannot recover under an unjust enrichment theory.

In the event the Court does not dismiss Plaintiff's claims, Defendants seek to strike paragraph 17 of Plaintiff's complaint pursuant to CPLR §3024[b]. Defendants argue that the allegations contained in Paragraph 17 have no bearing on Plaintiff's claims and the only purpose for its inclusion is to damage the business of the McGuire Group, to insult McGuire or to do both.

In opposition to Defendants' motion, Plaintiff argues that he has sufficiently stated a cause of action for fraud as it is based upon the fact that he was induced to locate a buyer for the pharmacy by Defendants' promise that they would sell the nursing homes to Plaintiff but that Defendants had no intention of fulfilling that promise due to Defendants' anti-Semitism. Plaintiff also argues that the MOU does not govern Plaintiff's claims because the MOU encompasses the parties' agreement to agree as it relates to the terms of the sale of the nursing homes and does not mention the pharmacy other than to state that the pharmacy's sale must be consummated before, or contemporaneous with, the sale of the nursing homes. Because the MOU does not govern Plaintiff's claims, Plaintiff additionally contends that his unjust enrichment claim cannot be duplicative of a breach of contract claim.

With regards to Paragraph 17 of his complaint, Plaintiff contends that his allegation of discrimination against Defendants bears on his fraud claim because a claim of fraud requires scienter.

#### *Discussion*

On a motion to dismiss a plaintiff's claim pursuant to CPLR §3211[a][7] for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see Campaign for Fiscal Equity v State*, 86 NY2d 307, 317 [1995]). Rather, the court is required to afford the

pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference (*Kamchi v Weissman*, 125 AD3d 142, 150 [2d Dept 2014]).

“The essential elements of a cause of action sounding in fraud are a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury” (*Orlando v Kukielka*, 40 AD3d 829, 831 [2d Dept 2007]). Where the alleged misrepresentations conflict with express provisions contained in a written agreement, the element of justifiable reliance needed to establish fraud is negated as a matter of law (*see Manchester Equipment Co. v Panasonic Industrial Co., Div. of Matsushita Electric Corp.*, 141 AD2d 616, 617 [2d Dept 1988]; *see also Bango v Naughton*, 184 AD2d 961, 963 [3d Dept 1992]; *Marine Midland Bank, N.A. v Cafferty*, 174 AD2d 932, 933 [3d Dept 1991]).

Here, with the foregoing principles in mind, the Court finds that the terms of the MOU effectively destroy Plaintiff’s claim that he was induced to procure a buyer for Defendants’ pharmacy on the false promise that Defendants would sell the nursing homes to Plaintiff. It is undisputed that the MOU governs the sale of the nursing homes. By the MOU’s terms, the exclusivity period under which Defendants could not consider any other buyers for the nursing homes expired 90 days from the MOU’s execution. There is no allegation that the exclusivity period was extended. Thus, upon the expiration of the exclusivity period, it was permissible for Defendants to seek other buyers for the nursing homes. Such a provision negates any claim of reasonable reliance upon an alleged promise that Defendants would sell these nursing homes to Plaintiff so long as Plaintiff procured a buyer for the pharmacy.

Turning then to the next cause of action for unjust enrichment, “[t]o state a cause of action to recover damages for unjust enrichment, a plaintiff must allege that (1) the other party was enriched, (2) at [the plaintiff’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” (*AHA Sales, Inc. v Creative Bath Prods., Inc.*, 58 AD3d 6, 19 [2d Dept 2008] [internal quotation marks omitted]). “The essence of

unjust enrichment is that one party has received money or a benefit at the expense of another” (*Goldman v Simon Prop. Group, Inc.*, 58 AD3d 208, 220 [2d Dept 2008]).

Here, Plaintiff has properly plead a cause of action for unjust enrichment. Further, Defendants fail to establish as a matter of law that the MOU governs the instant issue thereby precluding a claim for unjust enrichment. The MOU does not state that Plaintiff had to procure a buyer for the pharmacy as a condition precedent to consummate the transaction. The MOU merely states that the sale of the pharmacy must have been consummated.

Having dismissed Plaintiff’s claim for fraud, the Court finds that Paragraph 17 of Plaintiff’s complaint must be struck. Under CPLR §3024[b], “[a] party may move to strike any scandalous or prejudicial matter unnecessarily inserted in a pleading.” “In reviewing a motion pursuant to CPLR 3024[b], the inquiry is whether the purportedly scandalous or prejudicial allegations are relevant to a cause of action” (*Soumayah v Minnelli*, 41 AD3d 390, 392 [1st Dept 2007]). Having dismissed Plaintiff’s claim for fraud, the allegation that Defendants never intended to consummate the transaction with Plaintiff because Defendants are anti-Semitic is not relevant. Moreover, even if the cause of action for fraud remained, the Court finds that the allegation must be struck as it is highly prejudicial to Defendants, inflammatory, and does little, if anything, to establish scienter.

In conclusion, Defendants’ motion to dismiss is granted as to fraud and denied as to unjust enrichment. Further, Defendants’ motion to strike Paragraph 17 of the complaint is granted.

This constitutes the Decision and Order of the Court.

E N T E R,

  
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Sylvia G. Ash, J.S.C.