

Gross v Chambre

2017 NY Slip Op 32827(U)

April 6, 2017

Supreme Court, Rockland County

Docket Number: 031761/2015

Judge: Thomas E. Walsh II

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

-----X
LESSER GROSS, individually and on behalf of LASK
DEVELOPERS, INC.,

Plaintiff,

-against-

DECISION & ORDER

Index No. 031761/2015

Motion #10

ROBERT J. CHAMBRE, 141 RT 59 LLC, YOEL Y. WEISS,
GIBRALTAR ABSTRACT COMPANY, SHAUL KOPELWITZ,
VICTOR WEISS, ISAAC SHEINER and LASK
DEVELOPERS, LLC

Defendant.
-----X

Hon. Thomas E. Walsh II, J.S.C.

The following papers numbered 1 were considered in connection with Defendants 141 RT 59 LLC AND YOEL Y. WEISS'S Notice of Motion for an Order (1) granting summary judgment in the instant action, pursuant to Civil Practice Law and Rules § 3212 and dismissing the complaint against 141 RT 59 LLC and YOEL L. WEISS for failure to state a cause of action, (2) discharging the mortgage dated March 18, 2014 made by LASK DEVELOPERS, LLC to 141 RT 59 LLC, and recorded in the Rockland County Clerk's Office under instrument #2014-0000810, upon payment of the \$450,000 into the Clerk of the Court pursuant to Real Property Actions and Proceedings Law § 1921, (3) cancelling the Notice of Pendency filed on the 29th day of April 2015 and awarding Defendants costs and attorneys fees pursuant to Civil Practice Law and Rules §§ 6512 and 6514 and (4) such other and further relief as the Court deem just and proper:

PAPERS

NUMBER

NOTICE OF MOTION/AFFIRMATION OF MICHAEL P. O'CONNOR, ESQ./	
EXHIBIT A/PROPOSED ORDER CANCELLING NOTICE OF PENDENCY	1

Plaintiff brought this action in his individual capacity and as a member of Lask Developers, LLC (hereinafter LASK). The instant action relates to a contract to sell the subject property to Defendant 141 Route 59 LLC, of which Defendant YOEL Y. WEISS is the

sole member.¹ There is also a companion case (Index # Kopelwitz v. Weiss, et al 032450/2014) which also pertains to the sale of property located at 141 Rt 59 Monsey, New York from Lask Developers, LLC to Defendant 141 RT 59 LLC on March 18, 2014. As part of the transaction LASK took a money mortgage for 141 Rt 59 LLC in the sum of \$450,000. After the closing in the real estate transaction a dispute arose between the members of LASK, Plaintiff GROSS and Defendant SHAUL KOPELWITZ regarding the actual sale price and the possible existence of a "secret deal" between Plaintiff and Defendant YOEL WEISS and 141 Rt 59 LLC. Defendant KOPELWITZ then commenced the companion action based on the allegation of the "secret deal" and other related arguments.

In response, Plaintiff GROSS filed the instant action against Defendant KOPELWITZ alleging that KOPELWITZ fraudulently assigned the mortgage that was for LASK to himself personally through an Assignment of Mortgage which he completed on behalf of LASK. Additionally, it is alleged that Defendant KOPELWITZ further assigned the mortgage to a third party, Defendant CHAMBRE. Defendants YOEL WEISS and 141 Rt 59 LLC are named as to the first two causes of action in the instant action. The first cause of action seeks a temporary restraining order "prohibiting any defendants from taking any action to enforce the purchase money mortgage and requiring any such sum to be paid into Court. Defendant WEISS is also named in the third cause of action, in which it is alleged that he aided and abetted Defendant KOPELWITZ along with Defendant GIBRALTAR in transferring the mortgage into Defendant KOPELWITZ's name.

Defendants YOEL Y. WEISS and 141 RT 59 LLC have filed the instant motion seeking to pay the principal sum of \$450,000 into Court pursuant to Real Property Actions and Proceedings Law § 1921. Further, Defendants WEISS and 141 RT 59 LLC are seeking a dismissal of the Complaint on a failure to state a cause of action.

Third Cause of Action - Fraud and Aiding and Abetting Fraud

In the Complaint Plaintiff asserts in the Third cause of action that Defendant KOPELWITZ transferred the mortgage into his own name and that the fraud has been abetted by Defendants GIRBALTAR and CHAMBRE who are seeking to enforce the note.

¹ Per stipulation, Defendant WEISS is no longer a Defendant in the companion action, Index # 032450/2014.

To state a claim for aiding and abetting a fraud, a plaintiff must show allege the existence of an underlying fraud, actual knowledge and substantial assistance. [*Oster v. Kirschner*, 77 AD3d 51, 55-56 (1st Dept 2010); *Houbigant, Inc. v. Deloitte & Touche, LLP*, 303 AD2d 92, 100-101 (1st Dept 2003); *High Tides, LLC v. DeMichele*, 88 AD3d 954, 960 (2d Dept 2011)]. It is insufficient to merely raise allegations sufficient to state a claim against the principal participants for fraud and combine conclusory allegations that the aider and abettor had actual knowledge of the fraud. [*National Westminster Bank v. Wechsel*, 124 AD2d 144, 149 (1st Dept 1987).] To satisfy the element of an underlying fraud the plaintiff must establish that there is "misrepresentation or a material omission of fact which was false and known to be false by the 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); *Lama Holding Co., v. Smith Barney*, 88 NY2d 413, 421 (1996)]. Further, as in the aiding and abetting of a breach of fiduciary duty, in the circumstance in which it is alleged that a party aided and abetted a fraud the "defendant substantially assists the commission of a fraud when it "affirmatively assists, helps conceal, or by virtue of failing to act when required to do so enables the fraud to proceed." [*Cromer Finance Ltd. v. Berger*, 137 FSupp2d 452, 470 (S.D.N.Y. 2001)]. In demonstrating substantial assistance the plaintiff must allege that the actions of the aider and abettor proximately caused the harm on which the "primary liability is predicated" and the "injury to be a direct or reasonably foreseeable result of the conduct." [*Cromer Finance Ltd.*, 137 FSupp2d at 470]. As stated with aiding and abetting a breach of fiduciary duty, inaction by a defendant is only considered "participation" when the defendant owes a fiduciary duty to the plaintiff." [*Kolbeck*, 939 FSupp at 247].

In support of Defendant WEISS and 141 RT 59 LLC's motion they assert that the Complaint fails to plead any facts that indicate or suggest that Defendant WEISS knew that Defendant KOPELWITZ was defrauding Plaintiff through the assignment of mortgage or that Defendant KOPELWITZ did not have authority to assign the mortgage. Additionally, Defendants argue that to sustain a cause of action for fraud the movant must allege damages. Therefore, Defendants argue that since the mortgage is not being enforced pending a determination of the merits by the Court, plaintiff cannot demonstrate that he will suffer any damage. Defendants aver that absent any factual allegations the third cause of action against YOEL WEISS and 141 RT 59 LLC must be dismissed as a matter of law.

The proponent of a summary judgment motion must establish his or her claim or

defense sufficient to warrant a court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. [*Giuffrida v. Citibank Corp., et al.*, 100 NY2d 72 (2003), citing *Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986)]. The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. [*Lacagnino v. Gonzalez*, 306 AD2d 250 (2d Dept 2003)]. However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. [*Gonzalez v. 98 Mag Leasing Corp.*, 95 NY2d 124 (2000), citing *Alvarez, supra*, and *Winegrad v. New York Univ. Med. Center*, 64 NY2d 851 (1985)]. Mere conclusions or unsubstantiated allegations unsupported by competent evidence are insufficient to raise a triable issue. [(*Gilbert Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966 (1988); *Zuckerman v. City of New York*, 49 NY2d 557 (1980)].

Upon considering Defendant WEISS and 141 Rt 59 LLC's unopposed motion for summary judgment, the Defendants have made a prima facie showing of entitlement to judgment as a matter of law as to third cause of action, fraud and aiding and abetting the fraud. The evidence provided by Defendants WEISS and 141 RT 59 LLC demonstrates that the Plaintiff has failed to demonstrate existence of an underlying fraud committed.

Upon Defendants WEISS and 141 RT 59 LLC meeting their burden on the summary judgment motion, the burden shifted to Plaintiff to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. The Plaintiff has failed to oppose the instant motion. As such, Defendants WEISS and 141 RT 59 LLC's motion is granted.

The Court in its discretion is denying the instant request for an award of costs and attorneys fees to the Defendants pursuant to *Civil Practice Law and Rules* § 6512 and 6514.

Accordingly, it is

ORDERED that Defendants WEISS and 141 RT 59 LLC's motion for Summary Judgment (Motion #10) is granted in part and denied in part; and it is further

ORDERED that as to Defendants WEISS and 141 RT 59 LLC the instant action is dismissed; and it is further

ORDERED that Defendants WEISS and 141 RT 59 LLC are directed to pay \$450,000 into the Clerk of the Court pursuant to Real Property Actions and Proceedings Law § 1921 within thirty (30) days of the date hereof; and it is further

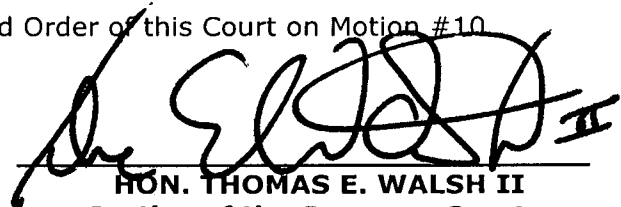
ORDERED that Defendants WEISS and 141 RT 59 LLC are to submit proof of

payment of the \$450,000 into the Clerk of the Court along with a proposed Order Discharging the mortgage dated March 18, 2014 made by LASK DEVELOPERS to 141 RT 59, LLC and recorded in Rockland County Clerk's Office under instrument #2014-0000810; and it is further

ORDERED that Defendants WEISS and 141 RT 59 LLC are to submit proof of payment of the \$450,000 into the Clerk of the Court along with a proposed Order cancelling the Notice of Pendency filed on April 29, 2015.

The foregoing constitutes the Decision and Order of this Court on Motion #10

Dated: New City, New York
April 6, 2017


HON. THOMAS E. WALSH II
Justice of the Supreme Court

TO:

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(via e-file)

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