Phoenix Life Ins. Co. v Town of Oyster Bay
2017 NY Slip Op 33247(U)
April 20, 2017
Supreme Court, Nassau County
Docket Number: 605451/2016
Judge: Linda S. Jamieson
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Disp ___ Dec __x__ Seq. No. __1___ Type _dismiss_

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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PHOENIX LIFE INSURANCE COMPANY,

Index No. 605451/2016

Plaintiff,

DECISION AND ORDER

-against-

TOWN OF OYSTER BAY,

Defendant.

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The following papers numbered 1 to 4 were read on this motion:

Paper	Number
Notice of Motion, Affirmation and Exhibits	1
Memorandum of Law	2
Memorandum of Law and Exhibits in Opposition	3
Reply Memorandum of Law	4

Defendant the Town of Oyster Bay (the "Town") brings this motion seeking to dismiss the action in its entirety. This Court has been assigned to hear and determine this matter pursuant to Administrative Order AO/041/2017.

As set forth in the Second Amended Complaint (the "complaint"), the facts are as follows. Plaintiff is a lender which, through its relationship with a non-party, NDH Capital Corporation ("NDH"), loaned substantial money to a non-party, SRB Concession, Inc. ("SRB"). SRB operated several recreational facilities in the Town, pursuant to a Concession Agreement dated

May 1, 2005. The Concession Agreement required SRB to pay the Town for the privilege of operating these facilities. The Town, however, retained substantial control over all of the facilities. The Concession Agreement had a 20-year term, with two ten-year renewals.

Among other things, the Concession Agreement required SRB to make certain improvements to the facilities. These improvements were valued at $1 million. The Town retained ownership of the facilities and the improvements thereto. In September 2008, SRB and the Town amended the Concession Agreement. One of the amendments required SRB to make additional improvements to the facilities totaling another $2.5 million. (At that time, SRB had already done work totaling over $750,000.)

In 2010, SRB sought financing from plaintiff via NDH. As set forth in the complaint, "One of the issues that made it difficult for SRB to obtain financing was the simple fact that it had no collateral to support any potential loan. In particular, . . . the improvements that SRB intended to make to the Facilities would, once completed and accepted by [the Town], become [the Town's] property. In the absence of any such collateral, Phoenix was unwilling to commit to loan money to SRB."

As a result, and in light of the fact that any loan to SRB would benefit the Town, the complaint alleges that the Town

agreed "to structure a transaction that would assure that Phoenix would receive significant monies from [the Town] in the event that SRB defaulted in its repayment obligations. These monies would, of course, then be utilized to satisfy the loan made to SRB." The parties - plaintiff, defendant, NDH and SRB - "collaboratively created a vehicle" that provided that if SRB defaulted, the Town would make a "termination payment" to plaintiff. The payment would also be due if the Town terminated the Concession Agreement for any other reason. The amount of the payment was to equal whatever amount SRB then owed to plaintiff.

In connection with this transaction, according to the complaint, plaintiff required an opinion letter from outside counsel for the Town, Harris Beach PLLC ("Harris Beach"). In June 2012, Harris Beach supplied plaintiff with a letter which stated, in relevant part, that the Town "had 'the power and authority to conduct the business described in the Concession Agreement (as amended);'" that the Concession Agreement has been "'duly authorized by all necessary action of [the Town] and has been duly executed and delivered by'" the Town; and that the Concession Agreement is valid, binding and enforceable. The Deputy Town Attorney, Frederick Mei, also issued a similar letter to plaintiff in June 2012.

Plaintiff eventually loaned SRB $12,273,748.80. SRB and the Town amended the Concession Agreement again, to provide for the

above termination provisions (the "second amendment"). The Town Attorney, Leonard Genova, executed the second amendment. The second amendment also provided that the Town's obligation to make the payment to plaintiff would not be subject to any defenses.

Not surprisingly, SRB eventually defaulted on its obligations to plaintiff. In June 2015, the very same Town Attorney, Leonard Genova, sent plaintiff a letter (via NDH) that the Town had no obligations to plaintiff because the transaction violated the State Constitution, and was also not authorized by a Town Board resolution.

In November 2015, plaintiff provided notice of its intention to accelerate the note, and to require the loan to be paid in full ($9,975,120.74 is the amount set forth in the complaint). Also not surprisingly, the Town refused to make the payment. This litigation followed.

The complaint sets forth twelve causes of action. They are: (1) breach of contract for the Town's failure to remit the payment; (2) breach of contract for the Town's failure to remit the payment under a different provision of the Concession Agreement; (3) unjust enrichment; (4) innocent misrepresentation based on the actions of Harris Beach in issuing its opinion letter; (5) innocent misrepresentation based on the actions of Mei in issuing his opinion letter; (6) negligent misrepresentation based on the actions of Harris Beach in issuing

its opinion letter; (7) negligent misrepresentation based on the actions of Mei in issuing his opinion letter; (8) fraud based on the actions of Harris Beach in issuing the opinion letter; (9) fraud based on Mei's issuing his opinion letter; (10) innocent misrepresentation based on Genova's actions in entering into the second amendment; (11) negligent misrepresentation based on Genova's actions in entering into the second amendment; and (12) fraud based on Genova's actions in entering into the second amendment.

Analysis

It has long been settled that "on a motion to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Clarke v. Laidlaw Transit, Inc.*, 125 A.D.3d 920, 921-22, 5 N.Y.S.3d 138, 141 (2d Dept. 2015). As the *Clarke* Court elaborated, "a motion to dismiss made pursuant to CPLR 3211(a)(7) will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law." *Id.*

A review of the complaint shows that on its face, plaintiff has properly alleged all of the requisite elements for each of its causes of action. Defendant, however, argues that these elements are irrelevant, essentially, because (1) the second amendment to the Concession Agreement was never authorized by the Town Board, as required by New York Town Law § 64(6); and (2) the transaction is prohibited by the New York State Constitution.

The Court begins with the Town Law argument. Town Law § 64(6), "Award and execution of town contracts," provides that a Town Board: "May award contracts for any of the purposes authorized by law and the same shall be executed by the supervisor in the name of the town after approval by the town board." Defendant is correct that this "statute requires that a formal resolution be passed by the Town Board and executed by the Town Supervisor in the name of the Town before a Town can be bound by any contract." *Town of Angelica v. Smith*, 89 A.D.3d 1547, 1550-51, 933 N.Y.S.2d 480, 484 (4th Dept. 2011) (denying a motion for summary judgment because there were "triable issues of fact whether the Town Board ratified the latter two agreements."). Defendant is also correct that plaintiff has not appended to its papers any proof of such a formal resolution.

Plaintiff, of course, argues that such a resolution may be uncovered during discovery. The Town counters in its Memorandum of Law that no such resolution exists. However, this statement

is not evidentiary. *See, e.g., Brown v. Smith*, 85 A.D.3d 1648, 1649, 924 N.Y.S.2d 867 (4th Dept. 2011) ("a memorandum of law also has no evidentiary value."). The Town has thus failed to demonstrate that no such resolution does exist.

Moreover, under the unique circumstances present here, the Town may well be liable even if it turns out that there was no resolution. This is because "where a governmental subdivision acts or comports itself wrongfully or negligently, inducing reliance by a party who is entitled to rely and who changes his position to his detriment or prejudice,[1] that subdivision should be estopped from asserting a right or defense which it otherwise could have raised." *Bender v. N.Y. City Health & Hosps. Corp.*, 38 N.Y.2d 662, 668 (1976). *See also JRP Old Riverhead Ltd. v. Town of Southampton*, 44 A.D.3d 905, 909, 844 N.Y.S.2d 132, 135 (2d Dept. 2007) (in a parallel situation, "a settlement which is not approved by the relevant municipal body may be ratified by the municipality by subsequent conduct, such as making payments pursuant to a settlement agreement, or adopting a subsequent resolution that refers to the settlement agreement. In addition,

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[1]The Town argues that plaintiff had no basis for relying on any alleged misrepresentations or malfeasance by any Town employees or counsel because plaintiff "is a sophisticated party that was represented by counsel," and that all of the statements "concerned easily verifiable, publicly available information" easily uncovered by "minimal due diligence." That minimal due diligence applies equally to the Town Board, however; if the Town Board had exercised the same due diligence, perhaps it would have uncovered what was happening much sooner.

the doctrine of estoppel may be applied against a municipality in the case of extraordinary circumstances where the municipality acts wrongfully or negligently."); *Town of Babylon v. Tully Const. Co.*, 242 A.D.2d 703, 704, 662 N.Y.S.2d 590, 591 (2d Dept. 1997).

While the Court is not making any finding at this very preliminary stage of the case that this is a case in which "a governmental subdivision act[ed] . . . wrongfully or negligently," it is also not obvious that the Town is the sole victim here (an assertion made by the Town). The Town's very own attorneys made blatant representations, in writing, which proclaimed that the Town had complied in full with all of its legal obligations. Whether it had or not, and whether plaintiff's reliance thereon was reasonable, is a matter that cannot be determined on this motion to dismiss. *See ACA Fin. Guar. Corp. v. Goldman, Sachs & Co.*, 25 N.Y.3d 1043, 1045 (2015) ("Accepting the allegations of the complaint as true and providing plaintiff the benefit of every possible favorable inference as we must do on a motion to dismiss, plaintiff has sufficiently pleaded justifiable reliance. . . ."). The Court thus denies the motion to dismiss to the extent that defendant argues that no enforceable obligation was ever established because of the absence of the requisite resolution.

Turning to the Constitutional argument, the Town asserts

that "*any* agreement by a municipality to guarantee the debt of a private entity is unconstitutional and cannot stand." It argues that this is because the Town's "obligations are tied entirely to amounts owed by another, **without any required connection to a public purpose or benefit to the Town.**" (Emphasis added). The Court disagrees with defendant's cursory assertion that there was absolutely no public purpose or benefit to the Town in the present transaction. Again, while it may well be, at the end of the day, that there was no public purpose to this transaction besides, as defendant characterizes it, an "indirect potential benefit to the public," the Court is not prepared to make such a finding at this stage of the litigation. *See, e.g., Hamptons Resort & Tourism Ass'n, Inc. v. Cty. of Suffolk*, 224 A.D.2d 662, 662, 639 N.Y.S.2d 422, 422 (2d Dept. 1996) (movant failed to demonstrate unconstitutionality because it failed to show that the primary object was a private benefit); *Lavin v. Klein*, 12 A.D.3d 244, 245, 783 N.Y.S.2d 815 (1st Dept. 2004) (private and public benefit); *Develop Don't Destroy (Brooklyn) v. Urban Dev. Corp.*, 59 A.D.3d 312, 325, 874 N.Y.S.2d 414, 424 (1st Dept. 2009) (even when there is a financial benefit to private parties, project may still have a civic purpose within the Constitution).

Indeed, the Supreme Court, Nassau County, in another case

involving many of the same players,[2] held in an October 4, 2016 Decision and Order on a similar motion to dismiss (the "Motion to Dismiss Decision") filed by the Town (represented by the same counsel), that "the Town continues to retain the use and benefit of the improvements made with the loaned funds," such that "it would be unfair, inequitable, and unreasonable for the Town to retain these benefits which they obtained by inducing plaintiff to enter into the loan agreement. . . ." This statement in the Motion to Dismiss Decision indicates that it is not at all obvious that there was no benefit whatever to the Town. The Court thus declines to dismiss the action on the basis that it violates the New York State Constitution. The Court notes that the Judge in the Motion to Dismiss Decision declined to dismiss any of the claims brought by that plaintiff against the Town.

Next, the Court finds that the unjust enrichment claim is alleged properly. It is well-settled that "to establish unjust enrichment it is not necessary that the party enriched have been in complete privity with the plaintiff; rather, the relationship between the parties must not be too attenuated and the plaintiff must show that it is against equity and good conscience to permit the other party to retain what is sought to be recovered." *Murphy v. 317-319 Second Realty LLC*, 95 A.D.3d 443, 445, 944

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[2]This other litigation is entitled *Atalaya Asset Income Fund II LP v. HVS Tappan Beach Inc., et al.*, Index No. 600517-2016.

N.Y.S.2d 42, 44-45 (1st Dept. 2012). Again, given the apparent dealings that occurred here - with the Town Attorney who signed the second amendment to the Concession Agreement being the same Town Attorney who three years later sent the letter stating that the transaction was void - the Court disagrees with defendant's assertion that "there is nothing unjust about any alleged enrichment to the Town." To the contrary, the Court finds that plaintiff has alleged that there may have been a "direct benefit to the Town *at Phoenix's expense*" - an expense totaling over $9 million and counting. The unjust enrichment claim thus stands.

As for plaintiff's tort claims, the Court finds that they are neither duplicative of the breach of contract claims; nor an end run around the State Constitution; nor time-barred, as will be discussed below. Although the Town argues that plaintiff relied on the statements of Mei, Genova and Harris Beach at its own peril because "municipal corporations are not liable for unauthorized statements or representations by individuals," the Court finds that on its face, it appeared that Harris Beach, Mei and Genova all had authority. Indeed, the opinion letters issued by Mei and Harris Beach **expressly** stated that they **did** have such authority (Town had "the power and authority to conduct the business described in the Concession Agreement (as amended)," which had been "'duly authorized by all necessary action of [the Town] and has been duly executed and delivered by'" the Town.).

Plaintiff has thus alleged that it had a reasonable basis for relying on the representations made by Mei, Genova and Harris Beach. *See Nager Elec. Co. v. E.J. Elec. Installation Co.*, 128 A.D.2d 846, 846, 513 N.Y.S.2d 766, 767 (2d Dept. 1987) ("plaintiff's first cause of action sounding in fraud as set forth in the amended complaint was sufficiently pleaded to withstand a motion to dismiss."). Whether relying on those representations was reasonable or not is a question that cannot be answered on this motion to dismiss. To the extent that defendant argues that the complaint "does not allege that either Harris Beach or Mei was duly authorized to make any representations on the Town's behalf," the Court disagrees. The very letters issued by both Harris Beach and Mei, which the complaint quotes, indicate exactly such authorization. Further, the complaint alleges that in making such representations, Mei, and Harris Beach, "acted for the benefit, and on behalf of," the Town.

Similarly, the claims for negligent misrepresentation also survive this motion to dismiss. Negligent misrepresentation requires "the plaintiff to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information." *Mandarin Trading Ltd. v. Wildenstein*, 16

N.Y.3d 173, 180 (2011) ("A special relationship may be established by persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified."). Defendants argue vociferously that as an arms' length business transaction, where each side was represented by counsel, there can be no special relationship. This is inaccurate, under the circumstances here. As the First Department just stated in a February 2017 opinion, although

> a sophisticated party is generally required to exercise due diligence to verify the facts represented to it before entering into a business transaction[,] [t]he Court of Appeals has recognized, however, that, where a plaintiff has gone to the trouble to insist on a written representation that certain facts are true, it will often be justified in accepting that representation rather than making its own inquiry.

Remediation Capital Funding LLC v. Noto, 147 A.D.3d 469, 46 N.Y.S.3d 606, 607-08 (1st Dept. 2017). The *Remediation* Court further stated that "on a motion addressed to the sufficiency of the pleadings, it cannot be held as a matter of law that plaintiff was required to do more, and whether plaintiff was justified in relying on Noto's opinion letter is a question for the trier of fact." *Id.*, 46 N.Y.S.3d at 608. The Court concluded by stating that the allegations that counsel for defendant "prepared the opinion letter at its request, provided the letter to plaintiff, and did so understanding that plaintiff would rely upon it in making the loan at issue, were sufficient

to plead a privity-like relationship for purposes of its claim in the proposed amended complaint for negligent misrepresentation." *Id.* *See also RBS Citizens, N.A. v. Thorsen*, 71 A.D.3d 1108, 1109, 898 N.Y.S.2d 219, 220 (2d Dept. 2010) (denying motion to dismiss the complaint where "plaintiff also alleged the existence of certain facts which, if true, would establish that certain information the defendant imparted to the plaintiff in an opinion letter was false, and that the plaintiff reasonably relied on that information.").

With respect to the claims for innocent misrepresentation, which requires the same elements as a fraud claim except for scienter, *see Jack Kelly Partners LLC v. Zegelstein*, 140 A.D.3d 79, 85, 33 N.Y.S.3d 7, 10 (1st Dept. 2016) ("fraud sufficient to support the rescission requires only a misrepresentation that induces a party to enter into a contract resulting in some detriment; proof of scienter is not necessary and even an innocent misrepresentation is sufficient for rescission."), defendant claims that because the only remedy is recission - which would undo the second amendment, rather than disgorge plaintiff's money to it - the claims must be dismissed. While it does indeed appear that damages are not appropriate for a claim of innocent misrepresentation, restitution or other equitable remedies may be available. *See Glob. Crossing Bandwidth, Inc. v. PNG Telecommunications, Inc.*, 2007 WL 174094, at *2 (WDNY Jan.

22, 2007) ("Although a cause of action for innocent misrepresentation is distinct from a cause of action for intentional or negligent misrepresentation, the remedy available for innocent misrepresentation is recision of the contract, or restitution, but the plaintiff may not recover damages."); *Canadian Agency v. Assets Realization Co.*, 165 A.D. 96, 102, 150 N.Y.S. 758, 762 (1st Dept. 1914) ("Though an innocent misrepresentation, even if relied upon, will give no right to damages in a court of law, relief may be given in equity."). *See also* "Rescission and restitution: For innocent misrepresentation," 27 Williston on Contracts § 69:49 (4th ed.) ("Innocent misrepresentation is sufficient, for though the representation may have been made innocently, it would be unjust and inequitable to permit a person who has made false representations, even innocently, to retain the fruits of a bargain induced by such representations."). As this action unfolds, it may become clear that the only equitable remedy appropriate in this situation is recission (which does not assist plaintiff). If that is the case, the Court can address the continued viability of the innocent misrepresentation claims on a subsequent motion.

Finally, the claims are not time-barred, as defendant suggests. "On a motion to dismiss a cause of action pursuant to CPLR 3211(a)(5) on the ground that it is barred by the statute of

limitations, a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired. In considering the motion, a court must take the allegations in the complaint as true and resolve all inferences in favor of the plaintiff." *Island ADC, Inc. v. Baldassano Architectural Grp., P.C.*, 49 A.D.3d 815, 816, 854 N.Y.S.2d 230, 231 (2d Dept. 2008).

Defendant admits that the statute of limitations (one year and 90 days, pursuant to General Municipal Law § 50-I) begins to run from the time that plaintiff could have discovered the fraud "with reasonable diligence." *Coleman v. Wells Fargo & Co.*, 125 A.D.3d 716, 716, 4 N.Y.S.3d 93, 94 (2d Dept. 2015). As stated above, given the opinion letters that plaintiff received, there is no basis at this time for the Court to find that the claims accrued before Genova issued his June 2015 letter. *Girozentrale v. Tilton*, 48 N.Y.S.3d 98 (1st Dept. 2017) ("Knowledge of the fraudulent act is required and mere suspicion will not constitute a sufficient substitute.").

Nor is there any basis for dismissing the negligent misrepresentation claims either. As the Court of Appeals has held, "a tort cause of action cannot accrue until an injury is sustained. That, rather than the wrongful act of defendant or discovery of the injury by plaintiff, is the relevant date for marking accrual. The Statute of Limitations does not run until

there is a legal right to relief. Stated another way, accrual occurs when the claim becomes enforceable, i.e., when all elements of the tort can be truthfully alleged in a complaint."). *Kronos, Inc. v. AVX Corp.*, 81 N.Y.2d 90, 94 (1993). *See also Bonded Waterproofing Servs., Inc. v. Anderson-Bernard Agency, Inc.*, 86 A.D.3d 527, 530, 927 N.Y.S.2d 133, 136 (2d Dept. 2011); *U.S. Fire Ins. Co. v. N. Shore Risk Mgmt.*, 114 A.D.3d 408, 410, 980 N.Y.S.2d 35, 37 (1st Dept. 2014) (declining to dismiss negligent misrepresentation claims prior to discovery, where fact issues, and where "third-party negligent misrepresentation claims, to which a three-year statute of limitations applied, were timely, as there was no injury to North Shore until U.S. Fire commenced its action against North Shore"). Once discovery has occurred, defendant may revisit this issue. *See Lasher v. Albion Cent. Sch. Dist.*, 38 A.D.3d 1197, 1198, 833 N.Y.S.2d 791, 792 (4th Dept. 2007) (date of reliance "has not yet been established at this preanswer stage of the proceedings.").

Accordingly, the motion is denied in its entirety. The parties are directed to appear for a Preliminary Conference in Courtroom 103, Supreme Court, Westchester County, on May 1, 2017 at 9:30 a.m. This Court's Part Rules and Preliminary Conference Order are available on the Westchester Commercial Division website,

https://www.nycourts.gov/courts/comdiv/westchester_judges_links.s html. The parties should fill out the Preliminary Conference Order before appearing in Court.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
April 20, 2017

HON. LINDA S. JAMIESON
Justice of the Supreme Court

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