2125-27 Williamsbridge LLC v 2125 Williamsbridge Realty LLC
2017 NY Slip Op 33345(U)
November 9, 2017
Supreme Court, Bronx County
Docket Number: Index No: 21187/2015E
Judge: Ben R. Barbato
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX : PART 27

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2125-27 WILLIAMSBRIDGE LLC and AM TURDO REALTY LLC, as Contract Assignee of 2125-27 WILLIAMSBRIDGE LLC,

Index No: 21187/2015E

Plaintiffs,

DECISION/ORDER

-against-

2125 WILLIAMSBRIDGE REALTY LLC, JOSEPH RIZZOTTO, GRACE RIZZOTO, LAWRENCE S. RABINE, and MARK SIEGEL,

Defendants.

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HON. BEN R. BARBATO:

This action is for breach of contract, specific performance, breach of fiduciary duty and attorney malpractice in connection with the proposed sale of certain premises commonly known as 2125 Williamsbridge Road, located in Bronx County, New York. Defendants 2125 Williamsbridge Realty LLC ("Seller"), and Joseph Rizzotto and Grace Rizzotto (collectively "the Rizzotto defendants") seek pre-answer dismissal of the first and fourth causes of action with prejudice and further, dismissal of the complaint as to plaintiff AM Turdo Realty ("AM"). Defendant Lawrence S. Rabine ("Rabine") seeks dismissal of the second and fourth causes of action and Part 131 sanctions. Defendant Mark Siegel ("Siegel") seeks dismissal of the third and fourth causes of action.

The motions are determined as follows:

Plaintiff 2125-27 Williamsbridge LLC ("Purchaser") and Seller entered into a Contract of Sale for the subject premises on or about January 9, 2014. It is undisputed that AM was not a named party to the Contract, although Purchaser contends that Seller understood AM was the intended

beneficiary of the sale, pursuant to an IRS § 1031 transfer at closing. Rabine was Seller's counsel and Siegel represented Purchaser. As noted in the Contract, Rabine and Siegel share office space.

Pursuant to the terms of the Contract, the purchase price of the premises was $1,450,000.00, payable as follows: "On the signing of this contract, [$50,000.00] by check subject to collection to be held in escrow by the attorney for Seller in an IOLA account . . .; By Executing a Note and First Mortgage [for $1,365,000.00] at the closing of title in favor of Seller, pursuant to the terms set forth herein, Balance [$35,000.00] at Closing, checks to be drawn on a New York City Clearing House bank."

According to the Contract, closing of title was to occur on January 17, 2014; however, Purchaser was entitled to adjournment provided closing took place on or before February 16, 2014. Purchaser could request a further adjournment so long as closing occurred on or before March 10, 2014. In any event, Purchaser would be obligated to pay to Seller additional fees of $1,000.00 per day, up to and including the day of the closing; and to Seller's attorney, $2,500.00 for each adjourn date as the cost of re-drafting closing documents, including but not limited to, the Deed, Transfer Documents, Closing Statement, Note and Mortgage.

Vivian Pecoraro ("Pecoraro") executed the Contract on behalf of Purchaser and defendant Joseph Rizzotto ("Joseph") executed on behalf of Seller. The Rider itself is executed solely by Pecoraro. Although it appears that both Joseph and Pecoraro initialed each page of the Contract and Rider, Joseph submits a sworn affidavit denying initialing the pages, and further, asserts that the initials attributed to him were done by someone else.

According to the complaint, Purchaser tendered a check in the amount of $50,000.00 to be deposited by Rabine as escrow agent, into his IOLA escrow account. On July 8, 2014, four months

after all potential closing dates in the Contract had passed, Purchaser wire-transferred $150,000.00 into the IOLA escrow account of Seller's attorney, Rabine.[1] It is undisputed that Purchaser never requested an adjourn date as set forth in the Contract. However, Purchaser states that it sent a time of the essence letter designating a closing date on February 23, 2015, more than one year after the Contract was originally signed, and that Purchaser appeared for closing ready, willing and able to complete the transaction. Rabine, Siegel and a representative for the title insurance company were present. However, neither the Seller nor the Rizzotto defendants appeared.[2] Purchaser alleges that the defendants were aware of Purchaser's intention to transfer title to AM, an entity of which Pecoraro's sister is a managing member, at the time of closing; and that Seller's refusal to close defeated AM's ability to defer capital gains from an unrelated sales transaction, pursuant to IRS § 1031.[3]

The complaint contains four causes of action. The first seeks recovery for breach of contract; the second seeks to hold Rabine liable for Seller's breach of contract; the third seeks to hold Siegel

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[1]In opposition to Rabine's motion, Purchaser submits a copy of the email from Rabine to Siegel directing the wire transfer to Rabine's IOLA Attorney Escrow Account.

[2]In opposition to Rabine's motion, Purchaser submits a copy of a closing statement and insurance binder with a proposed effective date of July 10, 2014, as proof that Purchaser was ready, willing and able to close on February 23, 2015. Neither are in admissible form; however, for the limited purpose of confirming Purchaser's claim that a closing was held, the Court notes that the closing statement indicates that a closing for the subject premises was held on July 25, 2014, and that all parties, including Purchaser appeared. Since all parties admit no closing has occurred, the Court will not consider these documents in determining the motions currently before it.

[3]Purchaser submits what appears to be a single page closing statement for an unrelated sale of certain realty as proof of its argument that AM was a known assignee of the Contract and that this transaction was necessary to the completion of the IRS § 1031; however, the statement fails to identify AM as seller, nor does it contain any other evidence linking AM to the subject premises in this action.

liable for breach of fiduciary duty, negligence and malpractice; and the fourth cause of action is against all defendants, alleging that they acted in concert with Rabine, aiding and abetting a fraudulent scheme to extort funds as a condition to the transfer title. Purchaser seeks specific performance in the transfer of title and monetary damages from the respective defendants.

"It is settled that a motion for dismissal pursuant to CPLR 3211(a)(7) must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144 [2002][internal quotation marks omitted]). The pleading is to be liberally construed (*Id*). The court must accept the facts alleged in the pleading as true and accord the opponent of the motion, here plaintiffs, the benefit of every possible favorable inference [to] determine only whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83 [1994]). [T]he criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one (*Id* [internal quotation marks omitted])" (*Siegmund Strauss, Inc. v E. 149th Realty Corp.*, 104 AD3d 401 [2013]).

As a threshold issue, Purchaser has not alleged sufficiently a cause of action as against the Rizzotto defendants. "Veil-piercing is a narrowly construed doctrine limiting the accepted principles that a corporation exists independently of its owners . . . and that it is perfectly legal to incorporate for the express purpose of limiting the liability of the corporate owners" (*54 Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135 [1993]; *see Bartle v Home Owners Coop.*, 309 NY 103 [1955]; *Goldman v Chapman*, 44 AD3d 938 [2nd Dept 2007]). The party seeking to pierce the corporate veil bears the heavy burden of showing that: "(1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination

was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" (*54 Matter of Morris v New York State Dept. of Taxation & Fin.*, supra; *see Sheridan Broadcasting Corp. v Small*, 19 AD3d 33 [1st Dept 2005])" (*Skanska USA Bldg. Inc. v Atl. Yards B2 Owner, LLC*, 146 AD3d 1 [1st Dept 2016]).

Here, the complaint merely sets forth conclusory allegations that as majority shareholders of Seller, the Rizzotto defendants acted in concert with Seller and the other co-defendants, in breach of contract and in an attempt to commit fraud (*see e.g. Brainstorms Internet Mktg. v USA Networks*, 6 AD3d 318 [1st Dept 2004]). The law is clear that "a simple breach of contract, without more, [fails to] constitute a fraud or wrong warranting the piercing of the corporate veil" (*Skanska USA Bldg. Inc. v Atl. Yards B2 Owner, LLC*, 146 AD3d 1 [1st Dept 2016]; *see Bonacasa Realty Co., LLC v Salvatore*, 109 AD3d 946 [2nd Dept 2013]). The mere claim that the corporation was completely dominated by the owners, or conclusory assertions that the corporation acted as their "alter ego," without more, will not suffice to support the equitable relief of piercing the corporate veil (*see Matter of Morris v New York State Dept. of Taxation & Fin.*, supra; *Skanska USA Bldg. Inc. v Atl. Yards B2 Owner, LLC*, supra; *Damianos Realty Group, LLC v Fracchia*, 35 AD3d 344 [2nd Dept 2006]). "The decision whether to pierce the corporate veil in a given instance depends on the particular facts and circumstances" (*Damianos Realty Group, LLC v Fracchia*, supra [internal quotation marks omitted]; *see Skanska USA Bldg. Inc. v Atl. Yards B2 Owner, LLC*, supra). Absent any facts or details to support Purchaser's overly broad and vague assertions, the complaint does not support any cause of action as against the Rizzotto defendants.

With regard to AM's claims, the Seller and the Rizzotto defendants argue that AM lacks standing to commence the action since AM was neither a party nor a beneficiary to the Contract.

There is no evidence to support AM's claim that it was an intended third-party beneficiary of the Contract nor does AM oppose any of the motions herein. Moreover, there is no proof evincing Purchaser's authority to act on behalf of AM. Notwithstanding the foregoing, Purchaser argues that defendants were aware of the relationship between Pecoraro and AM and the potential assignment at closing of title. Absent from the Contract is any mention of this proposed assignment, nor is there any proof that the Contract was assignable and further, that the parties agreed to the assignment (*see Langel v Betz*, 250 NY 159 [1928]). Moreover, "[i]t is well settled in this State that the assignee of rights under a bilateral contract does not become bound to perform the duties under that contract unless [it] expressly assumes to do so" (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]).

Seller contends that Purchaser failed to satisfy the first element of the Contract requiring the escrow deposit of $50,000.00. According to the Seller, Purchaser issued a post-dated check from an account belonging to an entity not a party to the Contract. Despite Seller's contention that the issuance of a check from a non-party stranger was a breach of the parties' agreement, the Contract itself is silent as to any requirement that payments be issued solely from Purchaser's direct accounts. Paragraph 3 of the Contract states that Acceptable Funds includes "[g]ood certified check of Purchaser, or official check of any bank, trust company, or savings and loan association . . . payable directly to the order of the Seller . . . or by wire transfer." Although the check was issued on behalf of Purchaser by a non-party, it was made payable directly to the order of the Seller, satisfying the "Acceptable Funds" provision.

Seller further contends that Purchaser issued a post-dated check and advised Seller to hold it for later deposit. In breach of the Contract requirement that Purchaser tender a deposit to be held

in escrow, Purchaser never notified Rabine that the escrow check was viable for deposit.

Seller submits a copy of Joseph's letter to Seller's counsel dated February 18, 2015, wherein Rabine is instructed to inform Purchaser that the Contract had expired; that there would be no transfer of the subject property; and, further, instructed Rabine to refund any funds currently held in escrow. It is undisputed that Seller did not directly notify the Purchaser of its' determination that the Contract was cancelled. Nor is there any proof that the dates set in the Contract made the agreement time of the essence (*see ADC Orange, Inc. v Coyote Acres, Inc.*, 7 NY3d 484 [2006]; *Ballen v Potter*, 251 NY 224 [1929]; 2-25 Warren's Weed New York Real Property § 25.14 [2017]).

"In the absence of a time of the essence provision, the passage of the designated closing date does not amount to an incurable contractual default (*see Tarlo v Robinson*, 118 AD2d 561[2nd Dept 1986]). The parties may, by their conduct, reflect an intent to waive the set closing date (*see, Tarlo v Robinson*, supra) or otherwise indicate that they continue to view the contract as remaining in full force and effect (*see Levine v Sarbello*, 112 AD2d 197 [2nd Dept 1985] affd. 67 NY2d 780 [1986])" (*Dwyer v Villanova*, 129 AD2d 763 [2nd Dept 1987]).

In this instance, the Court finds that by accepting the wire transfer of funds four months after the last date set for closing in the Contract, Seller waived its right to deem the agreement terminated. Moreover, Seller's notice to terminate given to its own attorney cannot be deemed to have been given to Purchaser. The Court cannot determine, as a matter of law, that the Contract had expired and that there was no agreement between the parties for the sale of the subject premises.

In considering Purchaser's fourth cause of action alleging that Seller colluded with its co-defendants for the purpose of extorting excessive fees and penalties in the transfer of title, CPLR 3016(b) states "[w]here a cause of action or defense is based upon misrepresentation, fraud, mistake,

wilful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail" (*Id*). Here, Purchaser's fourth cause of action alleging fraud contains only bare and conclusory statements, devoid of any supporting detail (*see IndyMac Bank, F.S.B. v Vincoli*, 105 AD3d 704 [2nd Dept 2013]; *Barclay Arms v Barclay Arms Assoc.*, 144 AD2d 287 [1st Dept 1988], aff'd 74 NY2d 644 [1989]["no cause of action for fraud is made out, nor can one be effectively answered and defended, when the subjective element is summarily alleged without supporting factual detail"]; *see also National Westminster Bank v Weksel*, 124 AD2d 144 [1st Dept 1987]).

Moreover, Purchaser failed to properly plead the elements of misrepresentation of a material fact or scienter in the complaint with specificity. The complaint did not contain factual allegations suggesting that any of the defendants made representations concerning a material fact that was false and known by them to be false at the time they were made and further, that the defendants made the representations with the purpose of inducing Purchaser to execute the Contract and purchase the subject premises (*see Nationscredit Fin. Servs. Corp. v Turcios*, 55 AD3d 806 [2nd Dept 2008]; *Maisano v Beckoff*, 2 AD3d 412 [2nd Dept 2003]). Notably, "[a] cause of action for fraud does not arise when the only fraud charged relates to a breach of contract *(see Wegman v Dairylea Coop.*, 50 AD2d 108, 113, lv dismissed 38 NY2d 918; *Miller v Volk & Huxley*, 44 AD2d 810)." (*Tesoro Petroleum Corp. v Holborn Oil Co.*, 108 AD2d 607, appeal dismissed 65 NY2d 637.) To plead a viable cause of action for fraud arising out of a contractual relationship, 'plaintiff must allege a breach of duty which is collateral or extraneous to the contract between the parties (*see Mastropieri v Solmar Constr. Co.*, 159 AD2d 698; *see also Spellman v Columbia Manicure Mfg. Co.*, 111 AD2d 320)' (*Americana Petroleum Corp. v Northville Indus. Corp.*, 200 AD2d 646, 647)" (*Krantz v Chateau Stores of Can., Ltd.*, 256 AD2d 186 [1st Dept 1998]).

Rabine seeks dismissal of the complaint as against him on the ground that the second and fourth causes of action fail to state a cause of action (*see* CPLR 3211[a][7]). The second and fourth causes of action, even read in a light most favorable to Purchaser, fail to satisfy the specificity and particularity requirements of CPLR § 3013 and 3016(b).

Rabine contends that the second cause of action fails to allege a legal malpractice claim in connection with his representation of Seller. Even if such a claim were alleged, it would fail to state a cause of action in the absence of an attorney-client relationship (*see Federal Ins. Co. v North Am. Specialty Ins. Co.*, 47 AD3d 52 [1st Dept 2007]; *Linden v Moskowitz*, 294 AD2d 114 [1st Dept 2002], lv denied 99 NY2d 505 [2003]), or a relationship approaching privity or other special circumstance (*see Good Old Days Tavern v Zwirn*, 259 AD2d 300 [1st Dept 1999]). Purchaser argues that it was not aware that Rabine and Siegel shared the same office suite, and that the two attorneys colluded together to extort fees from Purchaser. However, it is evident from the face of the Contract that the addresses provided for Purchaser and Seller for purposes of notice is the same office suite and building for both Rabine and Siegel.

Despite the contentions of Purchaser to the contrary, sharing office space is not in and of itself a conflict of interest between counsel (*see e.g. People v Contreras*, 28 AD3d 393 [1st Dept 2006][co-defendants represented by attorneys who were mother and son and shared office space and other services but maintained separate practices held not a conflict of interest]). "There is no conflict of interest merely because attorneys share office space and resources. *(see United States v Badalamente*, 507 F.2d 12, 20-21 [2d Cir. 1974], cert. denied, 421 US 911[1975][finding no conflict where record showed that attorneys shared office space and secretary, but interests did not overlap in acceptance of clients or sharing of fees]; *United States v Bell*, 506 F.2d 207, 224-25 [D.C.

Cir.1974][finding no conflict where evidence disclosed that attorneys shared office space but practiced independently]). Shared space and resources is relatively common among solo practitioners (*Rivas v United States*, No. 96 CV 2954(SJ), 1997 WL 391464 [E.D.N.Y. Jul. 8, 1997][finding no conflict where attorneys shared office space and a secretary])" (*Ventry v United States*, No. 01-CR-028A, 2011 WL 2471390, at *7 [W.D.N.Y. June 22, 2011]).

As to Purchaser's fourth cause of action, the complaint is devoid of any specific allegation to support Purchaser's claims that Rabine engaged in fraudulent conduct. The mere claim of a party's involvement in a purported fraudulent transaction cannot satisfy the pleading requirements of a cause of action for fraud (*see* CPLR 3016[b]; *Old Republic National Title Insurance Co. v Cardinal Abstract Corp.*, 14 AD3d 678 [2nd Dept 2005]).

As for the allegation that Rabine acted in concert in a civil conspiracy, the complaint fails to set forth a distinct cause of action for such relief and further, the allegation sounds as a repetitive claim for fraud. Since Purchaser has not set forth a substantive claim for fraud, the cause of action predicated upon the same parties' alleged conspiracy to commit that fraud must also be dismissed (*see Linden v Moskowitz*, 294 AD2d 114 [1st Dept 2002], lv denied, 99 NY2d 505 [2003]; *see also Salvatore v Kumar*, 45 AD3d 560 [2nd Dept 2007] [no independent cause of action recognizing civil conspiracy to commit a tort]).

As to Rabine's claim for sanctions, the imposition of sanctions is not appropriate where there is no indication that the action is completely frivolous and without merit (*see Grossman v Pendant* Realty Corp., 221 AD2d 240 [1st Dept 1995], lv dismissed 88 NY2d 919 [1996]; *North American Van Lines, Inc. v American Intl. Cos.*, 11 Misc.3d 1076[A][2006], aff'd 38 AD3d 450 [1st Dept 2007] .

With regard to Siegel's motion seeking dismissal of the third cause of action, the complaint fails to adequately set forth a claim for breach of fiduciary duty, negligence or professional malpractice. "To prove malpractice, a client must establish, among other things, that the attorney failed to exercise that degree of care, skill and diligence commonly possessed by a member of the legal profession (*Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner*, 96 NY2d 300, 303-304 [2001]). A conflict of interest, even if a violation of the Code of Professional Responsibility, does not by itself support a legal malpractice cause of action (*see Sumo Container Sta. v Evans, Orr, Pacelli, Norton & Laffan*, 278 AD2d 169, 170 [1st Dept 2000])" (*Schafrann v N.V. Famka, Inc.*, 14 AD3d 363, 364 [1st Dept 2005]). Purchaser has failed to properly allege that "but for [Siegel's] alleged omissions in [his] representation in the underlying action, [it] would have prevailed in those actions (*Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 272 [1st Dept 2004]; *Golden v Cascione, Chechanover & Purcigliotti*, 286 AD2d 281 [1st Dept 2001])" (*Cohen v Kachroo*, 115 AD3d 512, 513 [1st Dept 2014]).

Moreover, to the extent the third cause of action alleges breach of Siegel's fiduciary duty and negligence, it must be dismissed as repetitive of Purchaser's claim for legal malpractice. Contrary to Purchaser's assertions, neither the breach of fiduciary duty claim nor the negligence claim set forth additional facts and, in fact, seek the identical relief as Purchaser's claim alleging legal malpractice (*see Cohen v Kachroo*, supra; *Cobble Cr. Consulting, Inc. v Sichenzia Ross Friedman Ference LLP*, 110 AD3d 550, 551 [1st Dept 2013]; *Garnett v Fox, Horan & Camerini, LLP*, 82 AD3d 435, 436 [1st Dept 2011]).

With regard to the fourth cause of action as against Siegel alleging conspiracy and fraud, "it is well settled that New York does not recognize an independent civil tort of conspiracy" (*Jebran v LaSalle Bus. Credit, LLC*, 33 AD3d 424, 425 [1st Dept 2006]; *see Algomod Tech. Corp. v Price*,

65 AD3d 974 [1st Dept 2009], lv. denied 14 NY3d 707 [2010]). While a plaintiff may allege, in a claim of fraud or other tort, that parties conspired, the conspiracy to commit a fraud or tort is not, of itself, a cause of action (*see MBF Clearing Corp. v Shine*, 212 AD2d 478, 479 [1st Dept 1995], citing *Brackett v Griswold*, 112 NY 454 [1889])" (*Hoeffner v Orrick, Herrington & Sutcliffe LLP*, 85 AD3d 457, 458 [1st Dept 2011]).

As to Purchaser's conflict of interest claim, this court has already determined that the mere fact counsel shared space with Rabine is insufficient to raise a triable issue of fact *(see United States v Badalamente,* supra; *Ventry v United States,* supra). Moreover, this Court has already determined that the fourth cause of action alleging fraud must be dismissed as against Siegel's co-defendants inasmuch as Purchaser has not set forth a substantive claim, and further, the assertion is predicated upon the identical conspiracy claim that has also been dismissed (*see Linden v Moskowitz*, supra; *see also Salvatore v Kumar*, supra).

For the foregoing reasons it is hereby

ORDERED that the motion of the Purchaser and the Rizzotto defendants is granted to the extent of dismissal of the action in its entirety as against the Rizzotto defendants; dismissal of the complaint in its' entirety as to AM; and dismissal of the fourth cause of action as against Purchaser, and it is otherwise denied; and it is further,

ORDERED that the Rabine motion is granted solely to the extent of dismissing the action as against Rabine and it is otherwise denied; and it is further,

ORDERED that the Siegel motion is granted and the action is dismissed as against Siegel.

This constitutes the decision and order of the court.

Dated: November 9, 2017

Ben R. Barbato, J.S.C.