

Gershkovich v Shchukin Gallery Inc.

2018 NY Slip Op 32212(U)

September 5, 2018

Supreme Court, New York County

Docket Number: 655982/2017

Judge: Paul A. Goetz

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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

Vladislav Gershkovich,

Index No.: 655982/2017

Plaintiff,

DECISION/ORDER

-against-

Mot. Seq. 001

Shchukin Gallery Inc., Nikolay Shchukin, Marina
Preobrazhenskaya a/k/a Marina Shchukin,Defendants.

PAULA A. GOETZ, J.S.C.:

Plaintiff Vladislav Gershkovich commenced this action pursuant to CPLR 3213 seeking to recover on a loan agreement and guarantees with defendants. The court denied plaintiff's motion and directed him to file a complaint. In his complaint, plaintiff asserts causes of action for breach of the loan agreement and guarantees which were executed October 18, 2015. In their answer, defendants assert seven counterclaims against plaintiff for breach of contract, unjust enrichment, conversion, fraud, fraudulent inducement, negligent misrepresentation and prima facie tort. Plaintiff now moves pursuant to CPLR 3212 for summary judgment on his claims and seeks dismissal of the counterclaims pursuant to CPLR 3211.

In support of his motion for summary judgment, plaintiff has submitted the signed loan agreement and guarantees with defendants as well as proof of the wire transfers to defendants and proof of default. This is sufficient to meet his prima facie burden on the breach of contract claims (*Atul Bhatara v. Futterman*, 122 A.D.3d 509, 510 [1st Dep't 2014]). In opposition, defendants contend that they signed the loan agreement and guarantees under duress. Defendants argue that their relationship with Gershkovich was as a silent investor and they never intended to borrow money from him. Defendants contend that they only signed the loan agreement because Rustam Iseev, an alleged co-conspirator of plaintiff Gershkovich herein, stole five of their paintings, valued at approximately \$60,000,000, and Iseev refused to return these painting unless defendants signed the loan agreement with Gershkovich. These

five paintings are the subject of a related action also pending in this court captioned *Shchukin House OU v. Iseev*, Index No. 155936/2016.

Defendants' defense of duress is directly contradicted by the documentary evidence. First, the emails submitted by plaintiff and defendants themselves show that the parties spent months negotiating the loan agreement and that defendants proposed changes and participated in drafting the loan agreement (Affirmation of Stephen Weingard dated April 9, 2018, Exh. 2; Affidavit of Vladislav Gershkovich sworn to on February 27, 2018, Exh. G; see *C.B.S. Rubbish Removal Co. v. Winters Waste Services*, 18 A.D.3d 790 [2d Dep't 2005] [holding that duress claim was properly dismissed where plaintiffs' negotiations with defendant occurred over a period of months and thus plaintiffs had ample opportunity to exercise free will or seek relief in court]). Second, defendants' allegations regarding an alleged conspiracy between Iseev and Gershkovich are wholly conclusory (*Diederich v. Nyack Hosp.*, 49 A.D.3d 491, 494 [2d Dep't 2008]). There is simply no evidence that Gershokovich was involved in Iseev's alleged theft of the paintings (*Citibank, N.A. v. Graphic Scanning Corp.*, 459 F.Supp. 337, 341 n.3 [S.D.N.Y. 1978] [stating that "[t]he alleged threats of a stranger to a contract . . . [are] insufficient to support a claim of duress between contracting parties."]). Indeed, although defendants allege that Iseev stole the five paintings on August 26, 2015, the subsequent email correspondence from defendants to Gershokovich just a few days later concerning the loan agreement makes no mention of these paintings or of defendants' alleged demand for the return of these paintings (Affirmation of Stephen Weingard dated April 9, 2018, Exh. 2; Affidavit of Vladislav Gershkovich sworn to on February 27, 2018, Exh. G).

To the extent that defendants are claiming duress based on Gershokovich's threat to commence legal proceedings against defendants, this argument fails as a matter of law as there is no actionable duress where, as here, "the alleged menace was to exercise a legal right" (*Madey v. Carman*, 51 A.D.3d 985, 987 [2d Dep't 2008]; see also *Fred Ehrlich, P.C. v. Tullo*, 274 A.D.2d 303 [1st Dep't 2000] [the threatened exercise of a legal right is not economic duress]). Finally, the loan agreement was executed in October 2015 and defendants, by accepting the benefits of the loan and failing to repudiate the agreement, waived any claim of economic duress (*Wujin Nanxiashu Secant Factory v. TI-Well Int'l Corp.*, 14 A.D.3d

352 [1st Dep't 2005] [borrower waived any claim of economic duress by its failure to promptly repudiate the agreement]). As defendants failed to raise a material issue of fact to defeat the breach of contract claims, plaintiff's motion for summary judgment must be granted.

Plaintiff's motion to dismiss defendants' counterclaims, which are based on essentially the same allegations as their defense to the loan agreement, should be granted. With respect to the first counterclaim, defendants fail to allege how, even if true, the alleged theft of the artwork constitutes a breach of the loan agreement, particularly where the loan agreement was executed after the alleged theft by Iseev, plaintiff's alleged co-conspirator. Defendant's second and third causes of action for unjust enrichment and conversion, which also appear to be based on Iseev's alleged theft of the artwork, also fail. As discussed above, defendants have not alleged any actions undertaken by Gershkovich to steal the artwork and defendants' vague and conclusory allegations concerning a conspiracy between plaintiff and Iseev are insufficient to establish any common scheme or plan (*Agostini v. Sobol*, 304 A.D.2d 395 [1st Dep't 2003] [affirming trial court's order granting motion to dismiss cause of action for conspiracy to commit fraud]). Defendants' fourth and fifth counterclaims for fraud and fraudulent inducement based on plaintiff's alleged misrepresentation that he was a skilled and honorable investor also must be dismissed as they fail to satisfy the particularity requirements of CPLR 3016(a). Moreover, on a fundamental level, these claims fail as defendants cannot show that they were damaged by any such alleged misrepresentation as they admittedly received the investment funds from plaintiff. Likewise, the sixth cause of action for negligent misrepresentation must be dismissed because defendants have failed to allege the existence of a special relationship with Gershkovich which may give rise to this claim (*Basis Pac-Rim Opportunity Fund v. TCW Asset Mgmt. Co.*, 124 A.D.3d 538 [1st Dep't 2015]). Finally, defendants' claim for prima facie tort must be dismissed as defendants' own allegations show that plaintiff's actions were motivated by economic self-interest, not malice (*Entertainment Partners Group, Inc. v. Davis*, 198 A.D.2d 63, 64 [1st Dep't 1993] [a cause of action for prima facie tort does not lie absent an allegation that the action complained of was motivated solely by malice rather than by self-interest]). Thus, the motion to dismiss the counterclaims must be granted.

Accordingly, it is

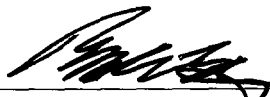
ORDERED that the plaintiff's motion for summary judgment is granted and the Clerk is directed to enter judgment in favor of plaintiff and against defendants jointly and severally in the amount of \$1,516,922.38, together with interest at the rate of 15% per annum from January 25, 2018 until the date of this decision and order, and thereafter at the statutory rate until entry of judgment, as calculated by the Clerk; and it is further

ORDERED that plaintiff's claim for attorneys' fees and costs is hereby severed and referred to a special referee to hear and report; and it is further

ORDERED that within twenty days of entry of this order, plaintiff must submit a copy of this order with notice of entry to the Special Referee Clerk by fax (212-401-9186) or email (spref@nycourts.gov) along with a fully completed Information Sheet; and it is further

ORDERED that the motion to dismiss the counterclaims is granted, the counterclaims are dismissed and the Clerk is directed to entry judgment accordingly.

Dated: September 5, 2018


HON. PAUL A. GOETZ, JSC