

Tarkan v Safdieh

2018 NY Slip Op 32925(U)

November 2, 2018

Supreme Court, New York County

Docket Number: 656734/2016

Judge: Gerald Lebovits

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. GERALD LBOVITS PART IAS MOTION 7EFM

Justice

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INDEX NO. 656734/2016

SHIRLEY TARKAN, Individually and as the Personal Representative of DR. STREVEN TARKAN, Deceased,

MOTION DATE 08/22/2018

Plaintiffs,

MOTION SEQ. NO. 003

- v -

RONALD SAFDIEH, R N JOSEPH FINE ARTS LTD, RNJA COMPANY, LLC, RN JOSEPH FINE ART, & JOHN DOE

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 54, 55, 56, 58, 59, 60, 61, 62, 66, 67, 68, 69, 70

were read on this motion to/for

DISMISSAL

Plaintiffs commenced this action on December 27, 2016, to recover the purchase price of Russian antiques and artifacts they bought from defendants. Plaintiffs filed an amended complaint on December 4, 2017, asserting four causes of action against defendants: (1) fraudulent inducement, (2) breach of contract, (3) unjust enrichment, and (4) violation of General Business Law § 349. Defendant, Ronald Safdieh, now moves to dismiss plaintiffs' amended complaint under CPLR 3211 (a) (1), (5), and (7).

I. Background

According to the amended complaint, plaintiffs purchased Russian antiques from defendants at the Essex House Gallery at 160 Central Park South, New York, New York, four times: July 2003, November 2004, March 2005, and May 2005. (NYSCEF Doc #52, ¶¶ 1-100.) Plaintiffs allege that defendants, during each transaction, represented that the antiques were authentic and crafted by well-known Russian artisans; promised to repurchase the antiques from plaintiffs at any point in the future; and gave plaintiffs certificates of appraisal for the purchased antiques. (*Id.*)

Plaintiffs assert that they had no reason to doubt the authenticity of the antiques until January 2016, when they discovered two lawsuits filed against defendants regarding the sale of alleged inauthentic Russian antiques. (*Id.*, ¶¶ 101-104.) In March 2016, plaintiffs commissioned a report from Dr. Geza von Habsburg of the Winston Art Group to verify the authenticity of three pieces purchased from defendants. Dr. von Habsburg concluded that the selected pieces were modern reproductions. (*Id.*, ¶¶ 106-109.) In July and August 2016, plaintiffs requested that

defendants repurchase all antiques, but defendants refused. (*Id.*, ¶¶ 110-112.) Plaintiffs then commenced this action against defendants on December 27, 2016.

Dr. Steven Tarken, one of the plaintiffs, passed away on April 28, 2017. Plaintiffs' motion for substitution was granted in an order dated August 30, 2017, and an amended complaint was filed on December 4, 2017, bringing the four causes of action against defendants.

Plaintiffs' first cause of action for fraudulent inducement is based on defendants' alleged misrepresentation of material facts regarding the authenticity, origin, and age of items plaintiffs purchased from defendants. (*Id.*, ¶¶ 113-123.) Plaintiffs' second cause of action for breach of contract is based on defendants' refusal to live up to their "express promises, representations, and agreements to repurchase any of the ITEMS for the same price as Plaintiffs paid to Defendants." (*Id.*, ¶¶ 124-131 [capitals in original].) Plaintiffs' third cause of action for unjust enrichment arises out of allegations that defendants have been unjustly enriched by their retention of \$379,350 for the purchase price of antiques paid by plaintiffs. (*Id.*, ¶¶ 132-136.) Plaintiffs' fourth cause of action for violating GBL § 349 alleges that defendants' conduct was consumer oriented and materially misleading. (*Id.*, ¶¶ 137-142.)

One defendant, Ronald Safdieh, now moves to dismiss plaintiffs' amended complaint under CPLR 3211 (a) (1), (5), and (7). This court will address Safdieh's pre-answer motion as it applies to each cause of action.

II. Motion to Dismiss

Under CPLR 3211 (a) (1), a party may move to dismiss a cause of action on the basis that a defense is founded upon documentary evidence. A court must accept the complaint's factual allegations as true and determine whether the facts as alleged fit within any cognizable legal theory. Dismissal under CPLR 3211 (a) (1) is warranted only if the documentary evidence "utterly refutes [plaintiffs'] factual allegations" and "conclusively establishes a defense to the asserted claims as a matter of law. (*Kolchins v Evolution Mkts., Inc.*, 128 AD3d 47, 58 [1st Dept 2015].)

Under CPLR 3211 (a) (5), a party may move to dismiss a cause of action on the basis that the cause of action may not be maintained because of a relevant statute of limitations.

Under CPLR 3211 (a) (7), a party may move to dismiss a cause of action on the basis that the pleading fails to state a cause of action.

A. Fraudulent Inducement

Safdieh's motion to dismiss plaintiffs' claim for fraudulent inducement under CPLR 3211 (a) (1), (5), and (7) is denied.

Safdieh argues that plaintiffs did not attach actual invoices for the sale of antiques by defendants to support a claim for fraudulent inducement. (NYSCEF Doc #55, ¶ 10.) Plaintiffs'

failure to attach invoices to her complaint or amended complaint is immaterial. Plaintiffs detailed in the pleadings the facts of each transaction. This court must accept these alleged facts as true.

Safdieh also argues that the certificates of appraisal, invoices, and credit-card receipts contradict defendants' alleged promise to repurchase the items sold. (NYSCEF Doc #55, ¶ 11-13; NYSCEF Doc #66, ¶¶ 6-8.) The certificates of appraisal do not contain any statements that refute defendants' alleged promise. The credit-card receipts state that there are "NO RETURNS," but Safdieh fails to supply receipts to account for all transactions that plaintiffs raise in the lawsuit. (NYSCEF Docs #2, #67 [capitals in original].) The invoices account for all items plaintiffs purchased from defendants and contain language providing that "MERCHANDISE MAY BE RETURNED WITHIN 14 DAYS FOR EXCHANGE OR STORE CREDIT ONLY. NO REFUNDS." (NYSCEF Docs #2, #56 [capitals in original].) Therefore, Safdieh's documentary evidence establishes a defense to plaintiffs' claim of fraudulent inducement regarding defendants' alleged promise to repurchase the antiques. The documentary evidence does not provide a defense to plaintiffs' claims of fraud concerning the age, authenticity, and origin of the antiques. Safdieh's motion to dismiss plaintiffs' cause of action for fraudulent inducement under CPLR 3211 (a) (1) is granted in part insofar as the claims of fraudulent inducement relate to defendant's alleged promise to repurchase the antiques, and the remainder of Safdieh's motion is denied.

Safdieh also argues that plaintiffs' action for fraudulent inducement is time-barred under CPLR 3211 (a) (5). An action for fraud must be commenced "the greater of six years from the date the cause of action accrued or two years from the time the plaintiff or the person under whom the plaintiff claims discovered the fraud, or could with reasonable diligence have discovered it." (CPLR 213 [8].) A plaintiff discovers the fraud "when the plaintiff has knowledge of facts from which the fraud could be reasonably inferred." (*Cusimano v Schurr*, 137 AD3d 527, 531 [1st Dept 2016].)

Safdieh asserts that plaintiffs' fraudulent inducement claim is time-barred because the last transaction of May 2005 took place more than six years before this action begun. Further, Safdieh asserts that the certificates of appraisal, invoices, and credit-card receipts should have prompted plaintiffs to exercise reasonable diligence. (NYSCEF Doc #55, ¶¶ 11, 13; NYSCEF Doc #66, ¶ 9.) Safdieh's argument is not persuasive. The cited documents do not provide a basis to uncover any fraud concerning the age, authenticity, or origin of the antiques. Plaintiffs did not learn until 2016 of two key facts from which the alleged fraud could be reasonably inferred: (1) discovery of two separate lawsuits filed against defendants, and (2) Dr. von Habsburg's report. (NYSCEF Doc #52, ¶¶ 101-109.) Plaintiffs exercised due diligence in discovering the inauthentic antiques and timely filed their complaint on December 27, 2017, within the two-year CPLR 213 (8) deadline. Plaintiffs' action for fraudulent inducement is not time-barred. Safdieh's motion to dismiss plaintiffs' cause of action for fraudulent inducement under CPLR 3211 (a) (5) is denied.

Safdieh argues that statements from plaintiffs' pleadings made on information and belief are insufficient to sustain allegations of fraudulent inducement. (NYSCEF Doc #55, ¶ 16; *Facebook, Inc. v DLA Piper LLP (US)*, 134 AD3d 610, 615 [1st Dept 2015] ["Statements made in pleadings upon information and belief are not sufficient to establish the necessary quantum of

proof to sustain allegations of fraud.”) A cause of action for fraud requires a “material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, [and] justifiable reliance by the plaintiff and damages.” (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009].) Failure to allege a necessary element of the cause of action should not be confused with CPLR 3016 (b): “the circumstances constituting the [fraud] shall be stated in detail.” CPLR 3016 (b) requires only

“that the misconduct complained of be set forth in sufficient detail to clearly inform a defendant with respect to the incidents complained of and is not to be interpreted so strictly as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting a fraud.” (*Lanzi v Brooks*, 43 NY2d 778, 780 [1977].)

The amended complaint contains statements based on personal knowledge in addition to statements on information and belief. Plaintiffs use personal knowledge to support allegations based on information and belief regarding defendant’s knowledge and intent of the alleged fraud. (NYSCEF Doc #52, ¶¶ 12-121.) Plaintiffs’ description of conversations with defendants are sufficiently detailed to support each element of fraud pleaded and clearly informs Safdieh of each alleged incident of fraud according to CPLR 3016 (b). (*Id.*) Plaintiffs are not expected to state Safdieh’s actual knowledge of the alleged fraud at this pre-discovery stage. (*Pludeman v N. Leasing Sys., Inc.*, 40 AD3d 366, 368 [1st Dept 2007].) Plaintiffs’ amended complaint properly states a cause of action for fraudulent inducement. Safdieh’s motion to dismiss plaintiffs’ cause of action for fraudulent inducement under CPLR 3211 (a) (7) is denied.

B. Breach of Contract

Safdieh’s motion to dismiss plaintiffs’ claim for breach of contract under CPLR 3211 (a) (1) is granted.

Safdieh asserts that the invoices, certificates of appraisal, and credit-card receipts directly contradict plaintiffs’ claim for breach of contract. (NYSCEF Doc #55, ¶ 11-13; NYSCEF Doc #66, ¶¶ 6-8.) The invoices are sufficient utterly to refute plaintiffs’ allegations that defendants promised to repurchase the antiques. (NYSCEF Doc #52, ¶¶ 125-126; NYSCEF Doc #56.) The invoices clearly state that there were no refunds, and plaintiffs had two options after purchasing the antiques: exchange the items or obtain a store credit within 14 days. (NYSCEF Doc #56.) Plaintiffs’ argument that the notations on the invoice constitute an additional term is not persuasive. Plaintiffs agreed to notations on the invoice by signing the first invoice dated July 8, 2003, and receiving five additional invoices on the same form without objection. (*Id.*; See *Kay-Bee Toys Corp. v Winston Sports Corp.*, 214 AD2d 457, 459 [1st Dept 1995] [holding that prior dealings between the parties established that defendant was aware of and assented to terms of indemnity provisions in a purchase order].) Safdieh establishes a defense to plaintiffs’ claim for breach of contract because the invoices establish that defendants did not breach any contractual obligation by failing to repurchase the antiques upon plaintiffs’ request. Therefore, Safdieh’s motion to dismiss plaintiffs’ cause of action for breach of contract under CPLR 3211 (a) (1) is granted.

This court need not consider Safdieh's argument that plaintiffs' cause of action is time-barred under CPLR 3211 (a) (5).

C. Unjust Enrichment

Safdieh's motion to dismiss plaintiffs' claim for unjust enrichment under CPLR 3211 (a) (5) is granted.

A six-year statute of limitations applies where breach of contract and unjust enrichment claims are made on the same facts and pleaded in the alternative. (*Maya NY, LLC v Hagler*, 106 AD3d 583, 585 [1st Dept 2013].) The limitation period for unjust enrichment runs from "the occurrence of the alleged wrongful act giving rise to restitution." (*Swain v Brown*, 135 AD3d 629, 632 [1st Dept 2016].) Plaintiffs argue that defendants' refusal to honor their promise to repurchase antiques in 2016 constitutes the wrongful act giving rise to unjust enrichment. (See NYSCEF Doc #60, at 18.) Plaintiffs rely on *Maya NY* to support its argument. In that case, defendants failed to fully repay a loan pursuant to an oral contract. The First Department held that a wrongful act giving rise to restitution occurs when the money should have been repaid to plaintiff, not when plaintiff first advanced the funds. (*Maya NY*, 106 AD3d at 585.)

The case of *Maya NY* is distinguishable from the present case, which involves a contract for the sale of antiques rather than a loan agreement. There was no repayment date in the contract between plaintiffs and defendants. Defendants' wrongful act giving rise to unjust enrichment occurred when plaintiffs purchased and paid for the allegedly inauthentic antiques between 2003 to 2005, over six years before plaintiffs commenced this action. Safdieh's motion to dismiss plaintiffs' cause of action in unjust enrichment under CPLR 3211 (a) (5) is granted.

This court need not consider Safdieh's argument that plaintiffs' unjust enrichment claim is precluded by their breach-of-contract claim.

D. Violation of General Business Law § 349

Safdieh's motion to dismiss plaintiffs' claim under CPLR 3211 (a) (5) for violating GBL § 349 is granted.

GBL § 349 prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service" and allows a person injured by a violation to recover damages. A claim for violation of GBL § 349 has a three-year limitation period imposed by CPLR 214 (2). (*Corsello v Verizon NY, Inc.*, 18 NY3d 777, 789 [2012].) The limitation period runs from the date a plaintiff is injured. (*Id.* at 790.)

Plaintiffs rely on *Gaidon v Guardian Life Ins. Co. of Am.* (96 NY2d 201 [2001]) to argue that plaintiffs suffered no measurable damage until 2016, when their expectations about the authenticity and repurchase of the antiques were not met. (NYSCEF Doc #60, at 19-21.) In *Gaidon*, plaintiffs alleged that defendants lured them into purchasing insurance policies by using materials that created unrealistic expectations about the elimination of premiums at a future date.

Thus, plaintiffs in *Gaidon* were not injured until the unrealistic predictions defendants raised were not met. (See 96 NY2d at 211-212.)

In the present case, defendants did not make unrealistic predictions about the likelihood of a future event. Instead, defendants made alleged representations regarding the authenticity and sale of Russian antiques. Plaintiffs were allegedly injured when they relied on defendants' representations made between 2003 to 2005 and refrained from raising any complaints during the three-year limitation period after purchasing the antiques. Accepting plaintiffs' argument based on expectations would effectively postpone the start of the limitation period to the date they discovered the alleged fraud. However, the statute of limitations on a GBL § 349 action runs from the date of injury and not from the date when plaintiffs learn, or reasonably should learn, that they have been deceived. (*Corsello*, 18 NY3d at 789-790.) Safdieh's motion to dismiss plaintiffs' cause of action for violating GBL § 349 is granted.

This court need not consider Safdieh's argument that plaintiffs' claim for violating GBL § 349 should be dismissed under CPLR 3211 (a) (7).

Finally, Safdieh argues that improper references to his faith and use of the term "Plaintiffs" should be prohibited in the amended complaint. This court denies Safdieh's request because he did not move for that relief.


Accordingly, it is hereby

ORDERED that defendant Ronald Safdieh's motion to dismiss plaintiffs' amended complaint is granted in part and denied in part: plaintiffs' second, third, and fourth causes of action are dismissed; that aspect of the first cause of action at paragraph 121 for fraudulent inducement concerning defendants' oral promise to repurchase the antiques is dismissed; and the remainder of this motion is denied; and it is further

ORDERED that defendant file its answer within 20 days from service of this decision and order; and it is further .

ORDERED that the parties appear for a preliminary conference on February 13, 2019, at 11:00 a.m., in Part 7, room 345, at 60 Centre Street.

11/2/2018
DATE


GERALD LÉBOVITS, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART	
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE