

McKissack Group, Inc. v MacFarland

2019 NY Slip Op 30694(U)

March 18, 2019

Supreme Court, New York County

Docket Number: 160650/2017

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

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INDEX NO. 160650/2017

THE MCKISSACK GROUP, INC.,

Plaintiff,

MOTION SEQ. NO. 001

- v -

RANCE MACFARLAND, MSK BUSINESS SOLUTIONS, LLC, and
MELISSA KEARNS, jointly and severally,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 13, 14

were read on this motion to/for DISMISSAL

Upon the foregoing documents, it is ordered that the motion is decided as follows.

In this action by plaintiff The McKissack Group, Inc. (“plaintiff” or “McKissack”) seeking damages for fraud in the inducement as against Rance MacFarland (“MacFarland”), MSK Business Solutions, LLC (“MSK”), and Melissa Kearns (“Kearns”) (collectively “defendants”), defendants move, pre-answer pursuant to CPLR 3211(a)(7), to dismiss the complaint for failure to state a cause of action. After oral argument, and after a review of the motion papers and the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiff is a construction management corporation which, in March of 2017, conducted an executive search for an experienced business leader to become its President. Defendant MacFarland was referred to plaintiff as a candidate for that office. His interview for that position was conducted by plaintiff’s Chief Executive Officer (“CEO”), Cheryl McKissack Daniel. Doc.

No. 2. According to plaintiff, its CEO made it very clear that a condition of MacFarland's hiring was that his "past employment engagements and other business-related activities and engagements must be free from actions, events, or circumstances that would jeopardize the CEO's confidence in the candidate's ability to perform his duties in compliance with the standard of integrity and fiscal responsibility expected of and inherent in the position of President." Id. ¶ 15. Plaintiff alleges that MacFarland, in order to fraudulently induce plaintiff to hire him, "purposefully and intentionally concealed the substantial judgments pending against him....by giving ...false and fraudulent assurances that his past business activities reflected a proven record of integrity and fiscal responsibility and were fully consistent with the professional and ethical standards required by the CEO..." Id. ¶ 16. Plaintiff argues that the corporate entity, MSK, was created to cover up MacFarland's previous financial judgments, awarded against a different corporate entity named IBC Business Groups, LLC.¹

On or about March 8, 2017, plaintiff entered into a Consultant Agreement with MSK pursuant to which MacFarland was hired as President. The Agreement was executed by MacFarland as a member of MSK. Plaintiff alleges that MacFarland and Kearns were members of MSK and that they were parties to, and helped facilitate, the fraudulent misrepresentations of MacFarland in order to induce McKissack to hire MacFarland as President. Id. ¶¶ 17, 18, 19, 21.

During the fall of 2017, McKissack became aware of defendants' alleged misrepresentations when it received Marshal's Notices, Garnishments and Levies against MacFarland's salary. Id. ¶20.

¹ See *Dimitris Christodoulous, et al v Rance MacFarland*, Supreme Court, New York County Index No. 159441/16 and *Construction Force Services, Inc. v Rance MacFarland and IBC Business Groups, LLC.*, Supreme Court, Queens County Index No. 707475/2015.

On December 1, 2017, plaintiff commenced the captioned action against defendants by filing a summons and verified complaint. Docs. 1-2. The three causes of action in the complaint alleged fraud in the inducement as against MacFarland, Kearns, and MSK, respectively. Doc. 2. Specifically, plaintiff claimed that it never would have hired MacFarland had it been aware of the judgments against him. Id. ¶ 25. Plaintiff further alleged that, based on defendants' "purposeful, intentional and malicious acts, omissions, lies and transgressions" it was damaged in an amount of at least \$220,000.00. Id. ¶¶ 30, 39, 40.

On February 15, 2018, defendants filed the instant pre-answer motion, pursuant to CPLR 3211(a)(7), seeking to dismiss the complaint for failure to state a cause of action. Docs. 6-8. In support of the motion, defendants maintain that plaintiff has failed to properly plead a claim for fraud in the inducement. Specifically, defendants claim that, since plaintiff did not have a relationship of confidence or trust with them, plaintiff's reliance on any representations they made was not justified. Further, defendants maintain that plaintiff failed to plead its claim with the requisite particularity.

In opposition to the motion, plaintiff argues that it has pleaded a valid claim for fraud in the inducement as against all defendants. Specifically, plaintiff claims that it has pleaded that MacFarland made a false representation of fact designed to induce plaintiff into entering a contract with MSK, the entity created by MacFarland and Kearns, as a means to defraud plaintiff.

LEGAL CONCLUSIONS:

On a CPLR 3211 motion to dismiss a complaint, "the pleading is to be afforded a liberal construction. [The court is to] accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged

fit within any cognizable legal theory.” *Leon v Martinez*, 84 NY2d 83, 87–88 (1994). A motion to dismiss a cause of action for failure to state a claim pursuant to CPLR 3211(a)(7) “test[s] the facial sufficiency of the pleading in two different ways.” *Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 134 (1st Dept 2014). First, “the motion may be used to dispose of an action in which the plaintiff has not stated a claim cognizable at law.” *Id.* Second, the court may dismiss a claim where the plaintiff has identified a cognizable cause of action but has nevertheless failed to plead a material allegation necessary to establish it. *Id.*

“To state a legally cognizable claim of fraudulent inducement based on a misrepresentation or omission, the complaint must allege that the defendant intentionally made a material misrepresentation of fact in order to defraud or mislead the plaintiff, and that the plaintiff reasonably relied on the misrepresentation and suffered damages as a result.” *Connaughton v Chipotle Mexican Grill, Inc.*, 135 AD3d 535, 537 (1st Dept 2016), *aff’d* 29 NY3d 137 (2017). “A claim rooted in fraud must be pleaded with the requisite particularity under CPLR 3016(b).” *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 (2009).

The Court of Appeals addressed the pleading requirements of CPLR 3016(b) in *Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486 (2008), stating, inter alia, that:

the purpose underlying the statute is to inform a defendant of the complained-of incidents. We cautioned that the statute “should not be so strictly interpreted 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” (*id.* at 491 [internal quotation marks and citation omitted]). Although there is certainly no requirement of “unassailable proof” at the pleading stage, the complaint must “allege the basic facts to establish the elements of the cause of action” (*id.* at 492). We therefore held that CPLR 3016 (b) is satisfied when the facts suffice to permit a “reasonable inference” of the alleged misconduct (*id.*). And, “in certain cases, less than plainly observable facts may be supplemented by the circumstances surrounding the alleged fraud” (*id.* at 493).

Eurycleia Partners, LP, 12 NY3d at 559.

Applying the foregoing factors to the complaint herein, this Court denies defendants' motion insofar as it seeks dismissal as against MacFarland. Plaintiff alleges with sufficient particularity that MacFarland met with plaintiff's CEO and intentionally failed to disclose to her material information regarding his background and finances; that his actions were calculated to defraud or mislead plaintiff; that plaintiff reasonably relied on MacFarland's omission; and that plaintiff sustained damages as a result. Thus, "the allegations present in [the] complaint allege conduct which is clearly beyond the scope of [McFarland's] authority as [a] corporate officer[]." *Two Clinton Square Corp. v Friedler*, 91 AD2d 1193, 1194 (4th Dept 1983).

However, this Court dismisses the claims against MSK and Kearns. Plaintiff merely alleges that "Kearns and MSK were parties to and facilitated the fraudulent misrepresentations made by McFarland in an effort to fraudulently induce [plaintiff] to hire MacFarland . . ." Doc. 2 ¶ 21. Such claims are conclusory and do not give rise to a reasonable inference that MSK and Kearns committed fraud, or aided and abetted MacFarland in committing a fraud. *See Eurycleia Partners, LP*, 12 NY3d at 560-561.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion to dismiss is granted to the extent that the second and third causes of action are dismissed; and it is further

ORDERED that the complaint is dismissed in its entirety as against defendants MSK Business Solutions, LLC and Melissa Kearns with costs and disbursements to said defendants as

taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the action is severed and continued against remaining defendant, Rance MacFarland; and it is further

ORDERED that remaining defendant Rance MacFarland is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption as follows:

THE MCKISSACK GROUP, INC. d/b/a
MCKISSACK AND MCKISSACK,

Plaintiff,

-against-

RANCE MACFARLAND,

Defendant.

and it is further,

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that the parties are directed to appear for a preliminary conference on June 18, 2019 at 80 Centre Street, Room 280, at 2:15 p.m.; and it is further

ORDERED that this constitutes the decision and order of the court.

3/18/2019

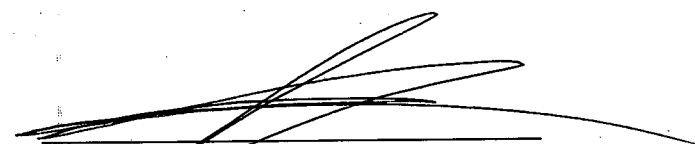
DATE

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION

APPLICATION: GRANTED SUBMIT ORDER GRANTED IN PART OTHER

CHECK IF APPROPRIATE: SETTLE ORDER FIDUCIARY APPOINTMENT REFERENCE

INCLUDES TRANSFER/REASSIGN


KATHRYN E. FREED, J.S.C.