

Tremont Invs., LLC. v Danialian
2019 NY Slip Op 31845(U)
June 26, 2019
Supreme Court, New York County
Docket Number: 655638/2017
Judge: Anthony Cannataro
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. ANTHONY CANNATARO **PART** **IAS MOTION 41EFM**

Justice

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TREMONT INVESTORS, LLC.,

Plaintiff,

- v -

BIJAN DANIALIAN, WEA TREMONT FUNDING ASSOCIATES
A/K/A WRA TREMONT FUNDING ASSOCIATES, SIMINOU &
ASSOCIATES, COASTAL LAND SERVICES, OHEB LAW
PLLC, CAPIN & ASSOCATES, 3700 TREMONT ASSOCIATES,
INC, LAW OFFICE OF JOSE A. RODRIGUEZ, SUSANA
VANEGAS,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 008) 186, 187, 188, 204, 205, 206, 207, 208

were read on this motion to/for

DISMISSAL

DECISION AND ORDER

In this action involving a real estate transaction, plaintiff Tremont Investors, LLC (“Tremont”) alleges a multitude of claims including breach of contract, fraud, and breach of fiduciary duty against the sole remaining defendant Bijan Danialian (“Danialian”), a 10% interest holder in the corporate plaintiff. Defendant now moves to dismiss all claims for failure to state a cause of action.

The underlying real estate transaction began when Zaida and Hilario Villavicencio (“the Villavicencios”), owners of an apartment at 788 West End Avenue (“the Manhattan property”), were approached by Danialian, a real estate investor, about purchasing property located at 3713 East Tremont Avenue (“the Bronx property”) for \$2,650,000. The proposed deal required a down payment of \$200,000 and about \$200,000 in improvements. To facilitate the transaction, the Villavicencios formed the corporate plaintiff, Tremont Investors, LLC. The Villavicencios

also made Danialian a 10% interest holder and a managing member of the corporate plaintiff. The Villavicencios mortgaged both the Manhattan and Bronx properties to finance the deal. Plaintiff, Tremont, defaulted on its mortgage obligations shortly after closing on the Bronx property.

The Villavicencios commenced this action on behalf of the corporate plaintiff on August 31, 2017. On April 16, 2018 the Villavicencios submitted an amended complaint via the New York State Courts Electronic Filing system asserting causes of action against Danialian individually, but that pleading was never marked “filed”. On May 7, 2018 Danialian moved to dismiss for failure to state a cause of action and lack of standing. The Villavicencios responded by cross-moving for leave to amend the complaint. This Court, in an Order dated September 12, 2018, granted a motion to dismiss by Danialian, to the extent of dismissing claims pleaded by the Villavicencios in their individual capacities for lack of standing, and granted the Villavicencios’ cross-motion to amend their complaint to allege essentially identical claims on behalf of the corporate plaintiff, Tremont.

On November 15, 2018 Danialian presented an order to show cause seeking to enjoin the Villavicencios from selling or otherwise encumbering the Manhattan and Bronx properties. On November 15, 2018, the corporate plaintiff, Tremont, also filed its third amended complaint, which is the complaint at issue in the instant motion. The Court declined to sign the order to show cause without prejudice to re-presenting it after correcting the papers to reflect the true parties to the action. On December 4, 2018, Danialian brought the motion now before the court to dismiss the third amended complaint.

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). 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” (*id.*).

First, the Court addresses defendant’s claim that Tremont’s first cause of action should be dismissed pursuant to CPLR 3016(b) for failure to plead fraud with sufficient particularity. “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]). “For such a cause of action to be viable, it must be demonstrated that there was a false representation, made for the purpose of inducing another to act on it, and that the party to whom the representation was made justifiably relied on it and was damaged” (*Perrotti v Becker, Glynn, Melamed & Muffly LLP*, 82 AD3d 495, 498 [1st Dept 2011]). The claim must allege the time, place, manner, and content of the alleged misrepresentations (*see Eastman Kodak Co. v Roopak Enterprises, Ltd.*, 202 AD2d 220, 222 [1st Dept 1994]; *see also Murphy v Sheldon*, 13 Misc 3d 1223[A] [Sup Ct 2006]). The claim for fraud must also allege “actual pecuniary loss sustained at the direct result of the wrong” (*Electron Trading, LLC v Morgan Stanley & Co. LLC*, 157 AD3d 579, 582 [1st Dept 2018] [internal citations omitted]). “[T]he loss is computed by ascertaining the difference between the value of the bargain which a plaintiff was induced by fraud to make and the and the amount or value of the consideration exacted as the price of the bargain” (*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421 [1996] [internal citations omitted]).

Danialian argues that Tremont’s cause of action for fraud has not been sufficiently pleaded in that it lacks the required specificity as to the time, place, and manner of the alleged misrepresentations and any resulting pecuniary loss. Danialian further asserts that Tremont cannot be the party that was fraudulently induced to act by the defendant and that the complaint

continues to confuse the corporate plaintiff and the Villavicencios. It is important to note that this Court permitted plaintiff to file a third amended complaint only on behalf of the corporate plaintiff and not on behalf of the individual members of the corporation. In its third amended complaint, however, plaintiff changed the name in the caption of the action but failed to amend the substance of its pleadings consistent with the change.

Despite the deficiencies in the complaint, and even taking into account the heightened pleading requirements for a cause of action for fraud, fraudulent misrepresentation has been pleaded with sufficient particularity to survive this motion to dismiss. Specifically, Tremont alleges that Danialian held himself out as a professional real estate investor and property manager, thereby inducing Tremont to justifiably rely on his representations regarding the real estate transaction at issue. Tremont alleges that based on plaintiff's (mis)representation, it was induced to amend its operating agreement to make Danialian a 10% interest holder and a managing member. Further, Tremont alleges that it was induced to purchase a contract of sale for the Bronx property on June 14, 2017 for the price of \$2,650,000 in the belief that it was purchasing the property for a fair price directly from the owner. Plaintiff also alleges pecuniary loss based on the allegedly inflated purchase price for the property. Tremont also alleges that it was induced to mortgage the Bronx and Manhattan properties in reliance on Danialian's representation that Tremont would be able to make the monthly mortgage payments from income generated by the properties. Finally, Tremont alleges that it sustained actual pecuniary loss when it immediately defaulted on its mortgage and a foreclosure action was commenced. Therefore, while the disordered complaint confuses and sometimes conflates the identities of Tremont, the corporate plaintiff, and the now-dismissed individually named plaintiffs, there still remains a viable cause of action for fraud as to Tremont.

Defendant next argues that Tremont's second, fourth, fifth, and eighth causes of action should be dismissed for failure to state a cause of action. In support of this branch of his motion, Danialian argues that Tremont failed to adequately assert any fraudulent acts or malfeasance. As discussed above, Tremont has adequately alleged that Danialian committed fraud or malfeasance, and as such the motion is denied as to these related causes of action.

Similarly, the court finds unpersuasive Danialian's argument that Tremont's seventh cause of action alleging breach of reporting and records obligations under the corporation's operating agreement should also be dismissed for failure to state a cause of action. Danialian argues that he did not breach an obligation because the operating agreement provides that books and records will be made available to the members of the company, not to the corporate entity itself. However, in stark contrast, Danialian in his prior motion to dismiss against the individually named plaintiffs argued that this cause of action belonged solely to the company. Defendant cannot make diametrically opposed arguments merely to meet the needs of the relief he hopes to obtain. Even if defendant could do so, there is basis to dismiss this cause of action at this juncture based on a such a restrictive reading of the operating agreement. Tremont has sufficiently pleaded its seventh cause of action for breach of reporting and recording obligations and the motion to dismiss should be denied.

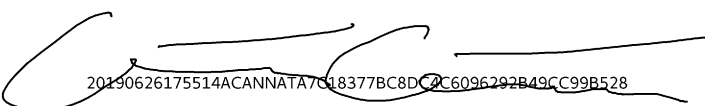
Plaintiff's tenth cause of action for conversion was added only in the third amended complaint. To establish a cause of action for conversion "plaintiff must show legal ownership or an immediate superior right of possession to a specific identifiable thing and must show that the defendant exercised an unauthorized dominion over the thing in question ... to the exclusion of the plaintiff's rights" (*Scott v Fields*, 85 AD3d 756, 757 [2d Dept 2011] [internal citations omitted]). "[C]onversion occurs when funds designated for a particular purpose are used for an

unauthorized purpose” (*Lemle v Lemle*, 92 AD3d 494, 497 [1st Dept 2012]). Here, Tremont alleges that it maintained a bank account containing its funds, that Danialian was the sole signatory to Tremont’s account, that Danialian withdrew money from this account for his personal use, and that, upon request, Danialian refused to return said funds to Tremont’s account. Giving these allegations the benefit of every favorable inference, Tremont has sufficiently pleaded a cause of action for conversion.

Finally, the motion to dismiss plaintiff’s third and sixth causes of action seeking equitable relief for unjust enrichment and rescission, respectively, is also denied. In the third amended complaint, plaintiff alleges that Danialian unjustly enriched himself by fraudulently inducing Tremont to make him a 10% interest holder in the LLC and then receiving compensation from a third party for the real estate transaction at issue here. Accepting the facts as alleged in the complaint as true, Tremont has pleaded causes of action for unjust enrichment and for the equitable relief of rescission insofar as these claims do not duplicate any of plaintiff’s contract or tort claims. Accordingly, it is

ORDERED that defendant’s motion to dismiss is denied in its entirety; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 490, 111 Centre Street, New York, New York on July 17, 2019, at 2:15PM.

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DATE		ANTHONY CANNATARO, J.S.C.	
CHECK ONE:	☐ CASE DISPOSED ☐ GRANTED ☐ SETTLE ORDER ☐ INCLUDES TRANSFER/REASSIGN	☒ DENIED ☐ NON-FINAL DISPOSITION ☐ GRANTED IN PART ☐ SUBMIT ORDER ☐ FIDUCIARY APPOINTMENT	☐ OTHER ☐ REFERENCE
APPLICATION:			
CHECK IF APPROPRIATE:			