Gluck v Rosania
2019 NY Slip Op 32085(U)
July 8, 2019
Supreme Court, New York County
Docket Number: 655183/2016
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 39EFM

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LAURENCE GLUCK,

Plaintiff,

- v -

ROBERT ROSANIA, JOHN DOE 1

Defendant.

INDEX NO. 655183/2016

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

----------X

HON. SALIANN SCARPULLA:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 42, 43, 44 were read on this motion to/for DISMISSAL.

Upon the foregoing documents, it is

In this dispute between former real estate partners, Defendant Robert Rosania ("Rosania") moves to dismiss Plaintiff Lawrence Gluck's ("Gluck") amended verified complaint pursuant to CPLR 3211 (a)(1) & (7) and CPLR 3016(b). Rosania also seeks sanctions pursuant to 22 NYCRR § 130-1.1.

Background[1]

Gluck alleges that he is the founder of Stellar Management ("Stellar"), which owns and operates residential and commercial real estate in New York and across the country. Rosania allegedly worked at Stellar from around 1998 until 2013.

[1] Unless otherwise specified, all facts are taken from the amended verified complaint and are accepted as true only for purposes of this motion to dismiss. *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994).

While employed at Stellar, Rosania assisted Gluck in real estate acquisitions and investment. In or around 2005, Rosania was promoted to chief executive officer ("CEO") of Stellar. While Rosania was CEO, Gluck allegedly granted Rosania more than $30 million in loans and advances to enable Rosania to invest in the lucrative real estate deals that Rosania worked on and to enable him to participate in those transactions. Gluck maintains that these loans and advances are documented in a series of promissory notes which reflect the amounts Rosania owed to Gluck for each deal in which he participated; these loans and advances are also allegedly documented in pledge and security agreements, through which Rosania pledged his interests in the investment properties to Gluck.

In 2006, Gluck alleges that at Rosania's urging, he invested in and acquired an apartment complex in San Francisco, California known as the Villas at Parkmerced ("Parkmerced").[2] Gluck invested about $21 million in Parkmerced in his own name and loaned $8 million to Rosania for him to invest in Parkmerced; Rosania purportedly executed promissory notes to memorialize this and several other loans.

Thereafter, the Parkmerced deal allegedly ran into financial difficulties during a market downturn in 2008. In 2010, an investment company, Fortress Investment Group LLC ("Fortress"), offered to invest capital necessary to stop foreclosure and avert the loss

[2] Gluck alleges that defendant "John Doe" 1 is the limited liability company through which Rosania directly or indirectly holds his Parkmerced ownership interest. Gluck asserts that he used a fictitious name because Rosania refused to provide him with the limited liability agreements evidencing Rosania's interest in Parkmerced and that he intends to amend the complaint to include this information when he ascertains it.

of Parkmerced. Gluck alleges that Rosania negotiated an infusion of "rescue" capital from Fortress while still employed at Stellar.

Gluck alleges that Rosania blatantly breached the fiduciary duties he owed to Gluck as his partner by negotiating a term sheet with Fortress whereby Rosania and Gluck would transfer their respective equity interests in Parkmerced, and once Parkmerced was recapitalized by Fortress, a company owned solely by Rosania would retain a 15-25% carried interest. Rosania allegedly failed to inform Gluck about Fortress's capital infusion until after Rosania had already agreed to terms that enabled Rosania to retain the carried interest in Parkmerced but eliminated Gluck's interest without providing him with any compensation.

Rather than contest Rosania's actions, Gluck allegedly chose to allow Rosania to go forward with the Fortress agreement on the condition that Rosania repay Gluck the entire $29 million invested in Parkmerced before Rosania received any money from the funds attributable to Rosania's carried interest in Parkmerced; this was memorialized in a written agreement dated September 29, 2010 ("Agreement").

In 2014, a new investor allegedly offered to buy Parkmerced for more than $1.4 billion, which Gluck maintains would have resulted in Rosania receiving more than $100 million in carried interest, thus enabling him to repay Gluck under the Agreement. Because Rosania allegedly wanted to remain in the deal to avoid repaying Gluck, the new investor purchased Fortress's interest in Parkmerced. Upon the closing of this transaction, Gluck alleges that Rosania received a substantial amount of money, but

instead of repaying Gluck, Rosania used the money he received from the transaction to purchase a $30 million apartment. Rosania allegedly concealed this transaction from Gluck. Gluck also alleges that, since this transaction, Rosania has received additional management fees from Parkmerced, which are attributable to Rosania's carried interest and thus required to be paid to Gluck under the Agreement.

Several disputes later arose between Gluck and Rosania involving, *inter alia*, the Parkmerced transaction and the parties' entry into the Agreement. These disputes have led to several lawsuits filed in this court.

Gluck commenced this action in 2016 and filed an amended verified complaint on January 12, 2018. The amended verified complaint alleges three causes of action for: (1) fraudulent inducement, seeking rescission of the Agreement, damages, and for the Parkmerced promissory notes to be reinstated; (2) a permanent injunction barring the sale, transfer, or distribution of any Parkmerced assets until this litigation is resolved; and (3) a constructive trust to prevent Rosania and his codefendant from misusing the economic interests they obtained in Parkmerced at Gluck's expense. Rosania now moves to dismiss Gluck's complaint pursuant to CPLR 3211(a)(1) & (7) and CPLR 3016 (b), and for sanctions pursuant to 22 NYCRR § 130-1.1.

Discussion

On a motion to dismiss, "the pleading is to be afforded a liberal construction" – the Court must "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*, 84 NY2d at 87–88 (citations omitted). "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003) (citation omitted).

To state a claim for fraudulent inducement, "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), *affd*, 29 NY3d 137 (2017) (citations omitted). "To fulfill the element of misrepresentation of material fact, the party advancing the claim must allege a misrepresentation of present fact rather than of future intent." *Perella Weinberg Partners LLC v Kramer*, 153 AD3d 443, 449 (1st Dept 2017), citing *Deerfield Communications Corp. v Chesebrough–Ponds, Inc.,* 68 NY2d 954, 956 (1986). "General allegations of lack of intent to perform are insufficient; rather, facts must be alleged establishing that the adverse party, at the time of making the promissory representation, never intended to honor the promise." *Perella Weinberg Partners LLC,* 153 AD3d at 449 (citation omitted).

Here, Gluck alleges that, to induce him to cooperate with the transfer of his Parkmerced interest and to sign the Agreement, Rosania promised that "if and when market conditions improved, he would either sell of recapitalize Parkmerced . . . so that Rosania could use those . . . proceeds to honor his obligations to repay Gluck."

Complaint ¶35. Rosania allegedly never intended to perform the Agreement or this promise, "as subsequent events have proved." *Id.* at ¶36.

These allegations are insufficient to allege a misrepresentation of present fact made by Rosania that induced Gluck's detrimental reliance. *See Manas v VMS Assoc., LLC*, 53 AD3d 451, 454 (1st Dept 2008) (general allegations that "at the time defendants made the alleged representations . . . defendants did not intend to compensate plaintiff in conformity with their promises" insufficient to state fraudulent inducement case of action); *see also 627 Acquisition Co., LLC v 627 Greenwich, LLC*, 85 AD3d 645, 647 (1st Dept 2011) (no fraud cause of action based on allegations that breaching party "'had the undisclosed and preconceived intention not to perform under the Loan Agreements,' without alleging facts to show that [breaching party] never intended to perform").

Gluck's argument that Rosania's promise is collateral to the Agreement, and is therefore sufficient to preserve his claim, is unavailing. Regardless of whether the promise was a collateral representation or made pursuant to the Agreement, Gluck alleges that Rosania lacked the intent to perform, which is clearly a statement of future intent and is thus not actionable. *See Orix Credit All., Inc. v R.E. Hable Co.*, 256 AD2d 114, 115 (1st Dept 1998) ("a viable claim of fraud concerning a contract must allege misrepresentations of present facts (rather than merely of future intent) that were collateral to the contract and which induced the allegedly defrauded party to enter into the contract" (citation omitted)). Accordingly, Gluck has failed to state a cause of action for fraudulent inducement.

Fraudulent inducement also forms the bases for Gluck's remaining causes of action. In his second cause of action, Gluck asserts he is entitled to permanent injunctive relief because of his success on the merits of his fraudulent inducement claim. Similarly, in his third cause of action, Gluck asserts he is entitled to the imposition of a constructive trust because Rosania promised to repay Gluck the money that he invested in Parkmerced, which Gluck claims is how Rosania fraudulently induced him to execute the Agreement. Accordingly, because Gluck has failed adequately to plead a cause of action for fraudulent inducement, Gluck's second and third causes of action fail as well.

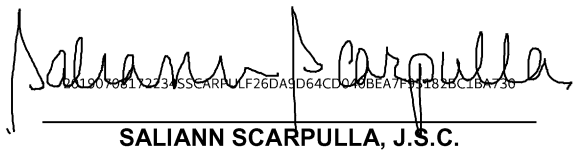
Finally, considering the parties' history, including the related actions they each have brought, I deny Rosania's application for an award of sanctions for frivolous conduct, pursuant to 22 NYCRR §130-1.1 (c).

In accordance with the foregoing, it is hereby

ORDERED that the portion of defendant Robert Rosania's motion seeking sanctions is denied; and it is further

ORDERED that the remainder of defendant Robert Rosania's motion seeking dismissal of the amended verified complaint is granted, the amended verified complaint is dismissed in its entirety, and the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.



7/8/2019
DATE

SALIANN SCARPULLA, J.S.C.

CHECK ONE:	X	CASE DISPOSED				NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE