

Streit v Bombart

2019 NY Slip Op 35108(U)

May 14, 2019

Supreme Court, Bronx County

Docket Number: Index No. 20465/2018E

Judge: Rubén Franco

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX - IAS PART 26

CLIFFORD STREIT, individually and on behalf
of TINY FIESTA REALTY ASSOCIATES, LLC.

Plaintiff,

Index No. 20465/2018E

-against-

**MEMORANDUM
DECISION/ORDER**

JONATHAN BOMBART, individually and
MADISON REALTY CAPITAL ADVISORS, LLC,
d/b/a MADISON REALTY CAPITAL GP, LLC, d/b/a
MADISON REALTY CAPITAL PARTNERS LLC,
d/b/a MADISON REALTY CAPITAL, L.P.

Defendants.

Rubén Franco, J.:

This is an action for a declaratory judgment regarding the ownership of 75% of Tiny Fiesta Realty Associates, LLC (“Tiny Fiesta”), for breach of fiduciary duty on behalf of Tiny Fiesta against defendant Jonathan Bombart (“JB”); against defendants Madison Realty Capital Advisors, LLC, d/b/a Madison Realty Capital GP, LLC, d/b/a Madison Realty Capital Partners LLC, d/b/a Madison Realty Capital, L.P. (“Madison”), for aiding and abetting JB’s breach of fiduciary duty; against Madison and JB for fraud; against Madison for tortious interference with prospective economic advantage; against JB for aiding and abetting Madison’s tortious interference with prospective economic advantage; and, for an accounting of Tiny Fiesta. Madison moves to dismiss the Complaint pursuant to CPLR 3211 (a) (1), (3), and (7), and JB moves separately to dismiss the Complaint pursuant to CPLR 3211 (a) (3), (7), and (10).

The court has gleaned the following facts from the pleadings and the documents submitted by the parties in connection with the instant motions: This litigation is essentially involves an alleged oral agreement between plaintiff and Louis Bombart (“LB”) for the purchase by plaintiff

of 888 Grand Concourse, Bronx County ("property"), which was owned by Tiny Fiesta. Tiny Fiesta was owned 75% by LB and 25% by defendant JB, LB's son. The property had been in various stages of foreclosure proceedings since December 2013. Plaintiff claims to have been informed that JB owed LB approximately \$3 million dollars from other, unrelated, real estate transactions in Brooklyn. LB allegedly orally agreed to sell his 75% interest in Tiny Fiesta to plaintiff, together with an assignment of the proceeds from the sale of Brooklyn properties in the sum of \$3 million dollars owed to LB from JB. Plaintiff was also to create a trust for LB's granddaughter.

The consideration for the sale and assignment was that plaintiff would pay off or refinance the mortgage on the property and any liens, and litigate against JB for any outstanding monies due and owing to LB. Plaintiff deposited monies in escrow to pay all attorneys fees related to the transfer of stock and the real estate transaction regarding the property. Plaintiff claims that based on the oral agreement, he became 75% owner of Tiny Fiesta.

Mistakenly believing that Madison was the mortgage holder of the property, plaintiff informed Mark Simon ("Simon") at Madison that he was creating a partnership with Tiny Fiesta and wanted to discuss mortgage terms. Simon responded that he would like to discuss a loan for purchase of the property. Plaintiff met with Josh Zegen ("Zegen"), the President of Madison, regarding the property. Plaintiff and Simon engaged in negotiations from May to October 2015. In September 2015, at LB's suggestion, plaintiff offered a payoff of \$10.5 million dollars to satisfy the mortgage on the property. Simon responded that there was no interest in selling the loan but would consider a new loan. With plaintiff holding himself out to be the majority interest holder in Tiny Fiesta, the negotiations continued. Toward the end of the negotiations, plaintiff became aware that Madison had established a relationship with Mark Tress ("Tress"), another investor.

Madison was allegedly working with Tress and JB, while considering plaintiff's proposals. Eventually, Zegen advised plaintiff that there was no interest in making or selling a loan.

Plaintiff's belief was that the mortgage was for \$11 million dollars, and the property was worth between \$30-40 million dollars. Plaintiff believes that Madison did not make a deal with him because Madison was also negotiating with JB and Tress. The property remained in foreclosure.

Between October and December 2015, plaintiff attempted to memorialize his oral agreement with LB. On December 22, 2015, plaintiff executed a written agreement for LB to sign, however, LB died on May 17, 2016 in Florida, and never signed or returned the purported agreement with plaintiff.

On November 23, 2016, a justice of this court Ordered the Judgment of Foreclosure and Sale of the property. Plaintiff notes that Madison continued the foreclosure proceeding despite plaintiff's offer to pay off the mortgage, believing that there was already a deal with JB and Tress. Madison advised plaintiff's attorney that there was nothing resembling a deal between plaintiff and LB. Plaintiff asserts that it was not until January 2017, that Madison challenged plaintiff's position in relation to the property.

A proceeding to probate LB's estate was commenced in Florida, where the court appointed a Curator. LB's 75% share in Tiny Fiesta was part of his estate. A Notice to Creditors was sent to plaintiff's attorney, and plaintiff never filed a claim against LB's estate, contending that it was not necessary since he already considered himself the owner of LB's 75% interest in Tiny Fiesta. The Curator filed a petition to sell the interests in Tiny Fiesta, which was granted on January 26, 2017, by the Florida Circuit Court. The Court authorized the Curator to sell LB's 75% interest in Tiny Fiesta, the owner of the property, to JB, the minority shareholder, who then would own 100%

of the interest in Tiny Fiesta. The property was sold to JB by LB's estate despite the foreclosure proceedings and auction.

A receiver was appointed for 888 Grand Concourse, which had many violations. In June 2017, JB sold the property for \$28 million. Plaintiff accuses Madison of colluding with JB, by engaging plaintiff in negotiations, so that plaintiff would not acquire the property.

Brian Shatz ("Shatz"), the manager of non-party SDF63 Cap NY 2 LLC ("SDF63"), submits an affidavit wherein he explains that Madison, which is not a subsidiary or parent company of SDF63, had no connection to Tiny Fiesta or the property. Further, the d/b/a's referenced in the caption do not exist. In January 2013, SDF63, as assignee from Capital One, N.A., the original mortgagee, commenced an action to foreclose on the mortgage in the amount of \$7 million dollars, executed by Tiny Fiesta in March 2011, due to Tiny Fiesta's failure to make its monthly payments. The assignment and mortgage were recorded in the Office of the City Register, Bronx County. Plaintiff insists that during negotiations Madison held itself out to be the owner of the mortgage note on the property.

JB asserts that he was not properly served with the Summons and Complaint and only learned about plaintiff's lawsuit when he received a letter from plaintiff's counsel, which resulted in JB filing a motion to dismiss. JB notes that plaintiff never filed a claim against LB's estate, and never signed a contract for the purchase of Tiny Fiesta. JB avers that he is one of three children, and when his father became ill in the year before his death, JB was the son who took care of him. JB was named executor of LB's will, and, contrary to plaintiff's assertions, he denies that he and his father were estranged. JB explains that his father enjoyed negotiating and haggling back and forth with prospective purchasers, he insists, however, that notwithstanding any negotiations, plaintiff never had a deal with LB.

The proponent for dismissal under CPLR 3211 (a) (1) must submit documents that will definitively defeat the action (see CPLR 3211 (a) (1); *AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 590-591 [2005]; *Amsterdam Hospitality Group, LLC v Marshall Alan Assoc., Inc.*, 120 AD3d 431, 433 [1st Dept 2014]). The primary documentary evidence submitted by JB is the Florida Order permitting the sale of LB's 75% share in Tiny Fiesta to JB. Other documents include the recorded mortgage and note showing that SDF63 is the mortgage holder by assignment from Capital One, N.A., the Judgment of Foreclosure and Sale, and the Department of State documents related to Madison, SDF63, and Tiny Fiesta.

CPLR 3211 (a) (3) provides for dismissal for lack of capacity or standing. Capacity concerns a plaintiff's power to appear before and bring an action in court. While capacity and standing are conceptually different (see *Silver v. Pataki*, 96 NY2d 532, 537 [2001]), they are treated as synonyms for the purposes of applying CPLR (a) (3) (see *Wells Fargo Bank Minn., N.A. v Mastropaolo*, 42 AD3d 239, 242 [2nd Dept 2007]). A plaintiff lacks standing if it does not have a sufficiently cognizable stake in the outcome of the litigation (see *Matter of Graziano v County of Albany*, 3 NY3d 475, 479 [2004]). "'Standing' is an element of the larger question of 'justiciability' (see, *Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 769 [1991]; *Matter of Dairylea Coop. v Walkley*, 38 NY2d 6, 9 [1975])." (*Community Bd. 7 of Borough of Manhattan v Schaffer*, 84 NY2d 148, 154 [1996].) Therefore, a defendant can challenge a plaintiff's standing by moving to dismiss the action pre-Answer, or raising lack of standing in the Answer. If, as defendants argue, plaintiff is not the owner of 75% of LB's shares in Tiny Fiesta, plaintiff lacks standing to advocate on its behalf.

On a motion pursuant to CPLR 3211 (a) (7), a Complaint must be liberally construed, the factual allegations set forth must be accepted as true, the plaintiff must be given the benefit of all

favorable inferences therefrom, and the court must decide only whether the facts alleged fall under any recognized legal theory (*Miglino v Bally Total Fitness of Greater N.Y., Inc.*, 20 NY3d 342 [2013]; *Lee v. Dow Jones & Co., Inc.*, 121 AD3d 548 [1st Dept 2014]). Affidavits may be considered freely “to preserve inartfully pleaded, but potentially meritorious, claims” in a Complaint (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [1976]; *Finkelstein Newman Ferrara LLP v Manning*, 67 AD3d 538, 540 [1st Dept 2009]).

CPLR 3211 (a) (10) allows for dismissal of an action when the court determines that it “should not proceed in the absence of a person who should be a party.” CPLR 1001 (a) provides that “[p]ersons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants.” In *Swezey v Merrill Lynch, Pierce, Fenner & Smith, Inc.* (19 NY3d 543, 551 [2012]), the Court reviewed the factors to be considered as set forth in CPLR 1001 (b) and stated: “The overall statutory design is intended to (1) ‘guarantee[] that absent parties at risk of prejudice will not be ‘embarrassed by judgments purporting to bind their rights or interests where they have had no opportunity to be heard’ ’ and (2) ‘protect against multiple lawsuits and inconsistent judgments’ ([*Matter of Red Hook/Gowanus Chamber of Commerce v New York City Bd. of Stds. & Appeals*, 5 NY3d 452, 459 [2005]]) *id.* at 458-459, quoting *First Natl. Bank of Amsterdam v Shuler*, 153 NY 163, 170 [1897]).” JB contends that since plaintiff alleges that he is the owner of a part of LB’s estate, the estate is a necessary party to any litigation involving estate assets. Plaintiff argues that despite the Florida court’s position and subsequent decision, the 75% share of Tiny Fiesta was not part of LB’s estate.

Preliminarily, to determine if plaintiff has cognizable claims, accepting as true plaintiff's factual allegations, the court must determine whether there could have been an enforceable oral agreement between plaintiff and LB. General Obligations Law § 5-703 provides in part:

1. An estate or interest in real property, ... or any trust or power, over or concerning real property, or in any manner relating thereto, cannot be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the person creating, granting, assigning, surrendering or declaring the same, or by his lawful agent, thereunto authorized by writing....
2. A contract ... for the sale, of any real property, or an interest therein, is void unless the contract or some note or memorandum thereof, expressing the consideration, is in writing, subscribed by the party to be charged, or by his lawful agent thereunto authorized by writing.
3. A contract to devise real property or establish a trust of real property, or any interest therein or right with reference thereto, is void unless the contract or some note or memorandum thereof is in writing and subscribed by the party to be charged therewith, or by his lawfully authorized agent.

In *Pollak v Moore* (85 AD3d 578, 579 [1st Dept 2011]), the Court dismissed the plaintiff's breach of contract claim and all related claims as duplicative, finding that the "documentary evidence established that the purported agreement was not signed by all the parties to be charged." The Court explained that "the sale terms were modified by plaintiff, and the parties had an opportunity to execute plaintiff's marked-up contract of sale, but did not elect to execute such agreement. To the extent plaintiff relies on other writings to argue that they demonstrate the parties to be charged agreed to the sale of a portion of a lot to plaintiff (*see generally WPP Group USA v Interpublic Group of Cos.*, 228 AD2d 296 [(1st Dept) 1996]), we find that the writings do no more than reflect interest of the parties to be charged in effecting a sale of the portion of the property to plaintiff upon appropriate terms." Similarly, here, when LB was given the opportunity to formalize, in writing, the purported transaction of the parties, he did not do so.

Plaintiff refers to emails in his Complaint. In *Leist v Tugendhaft* (64 AD3d 687, 688 [2nd Dept 2009]), the Court determined that an email is inadequate, if it is not subscribed by the parties to be charged, or by anyone purporting to act in their behalf. Even when a listing agent is identified as the sender in the e-mail the subscription requirement is not satisfied, at best, such an e-mail is the equivalent of a cover letter to a proposed contract. Plaintiff does not allege that there is any conclusive email that would satisfy the subscription requirement.

Plaintiff attempts to argue that the nature of his transaction with LB does not fall within the requirements of any statute or case law that require a writing. This argument lacks merit. Even when the sale of the real property is accomplished by the sale of shares of stock, the Statute of Frauds is applicable to any transfer of the stock (*Pritsker v Kazan* (132 AD2d 507 [1st Dept 1987]; see also *Bergman v Krausz*, 19 AD3d 186 [1st Dept 2005]). Plaintiff alleges that what he purchased was membership shares of Tiny Fiesta. However, it is inescapable that Tiny Fiesta's only asset was the real property, which plaintiff sought to own.

The doctrine of part performance is not applicable. The doctrine is "based on principles of equity and recognizes that 'it would be a fraud to allow one party to a real estate transaction to escape performance after permitting the other party to perform in reliance on the agreement' (*Messner [Vetere Berger McNamee Schmetterer Euro RSCG v Aegis Group]*, 93 NY2d [229] at 235 [1999]). The doctrine will apply only where the part performance is 'unequivocally referable' to the oral agreement (*Burns v McCormick*, 233 NY 230, 232 [1922])." (*Yenom Corp. v 155 Wooster St. Inc.*, 33 AD3d 67, 71 [1st Dept 2006]). At best, plaintiff's negotiations with Madison could be viewed as the acts of an overly optimistic potential purchaser. Plaintiff's assertion that Tiny Fiesta was a management company is belied by the statement in the Complaint that Tiny Fiesta was the owner of the property.

Nor is equitable estoppel appropriate as “the doctrine of equitable estoppel is to be invoked sparingly and only under exceptional circumstances” (*Badgett v New York City Health & Hosps. Corp.*, 227 AD2d 127, 128 [1st Dept 1996]). “[E]stoppel cannot operate to create a right where none exists (*Matter of Owens v McGuire*, 121 AD2d 292, 295 [(1st Dept) 1986]), nor can it relieve one from the mandatory operation of a statute (*Matter of Hauben v Goldin*, 74 AD2d 804, 805 [(1st Dept) 1980]).” As plaintiff never acquired the rights to LB’s shares, the doctrine is inapplicable.

Similarly, the doctrine of promissory estoppel is not appropriate. The doctrine of promissory estoppel applies to a limited class of cases in which a person to whom a promise is made has suffered an unconscionable injury because of reliance on the promise (*see Laurel Hill Advisory Group, LLC v American Stock Transfer & Trust Co., LLC*, 112 AD3d 486 [1st Dept 2013]). Plaintiff does not allege facts indicating unconscionable injury, or identify a clear and unambiguous promise from LB, on which plaintiff, reasonably relied to his detriment, which are necessary elements (*see Schwartz v Miltz*, 77 AD3d 723, 724 [2nd Dept 2010]).

Further, the sale of the membership interests in Tiny Fiesta would be subject to Limited Liability Company Law § 601, which states that a “membership interest in the limited liability company is personal property. A member has no interest in specific property of the limited liability company.” Uniform Commercial Code § 1-206, provides in part that “a contract for the sale of personal property is not enforceable by way of action or defense beyond five thousand dollars in amount or value of remedy unless there is some writing which indicates that a contract for sale has been made between the parties at a defined or stated price, reasonably identifies the subject matter, and is signed by the party against whom enforcement is sought or by his authorized agent.” If the

transaction between plaintiff and LB were considered a sale of personal property, Uniform Commercial Code § 1-206 would be applicable and a signed writing would be required.

The essential elements of the doctrine of collateral estoppel are “[f]irst, the identical issue necessarily must have been decided in the prior action and be decisive of the present action, and second, the party to be precluded from relitigating the issue must have had a full and fair opportunity to contest the prior determination” (*Kaufman v Lilly & Co.*, [65 NY2d 449] *supra*, at 455, citing *Gilberg v Barbieri*, 53 NY2d 285, 291 [1981]).” (*Matter of Juan C. v Cortines*, 89 NY2d 659, 667 [1997]). JB has the burden of demonstrating the identity of the issues in the present litigation and the prior determination, and in attempting to defeat its application, plaintiff has the burden of establishing the absence of a full and fair opportunity to litigate the issue in the prior action (*id.* at 667). Plaintiff ignores the determination by the Florida court. Having received notice of the proceedings, plaintiff decided not to pursue his claim, taking the erroneous position that he had acquired the 75% interest in Tiny Fiesta. JB has met his burden of showing that the Florida court addressed the issue of the 75% interest in Tiny Fiesta and that the Florida court determined that LB’s estate asset should be sold to JB. Plaintiff concedes that he received notice, had an opportunity to adjudicate his claim, and did not do so.

Plaintiff must also overcome CPLR 4519, which “prevents any person ‘interested in the event’ from testifying to a ‘personal transaction’ with the deceased unless the representative of the deceased has waived the protection of the statute by testifying himself or introducing the testimony of the decedent into evidence at trial” (*Matter of Wood*, 52 NY2d 139, 144 [1981]).

Plaintiff’s first cause of action is for a declaratory judgment (CPLR 3001) on the ownership of the 75% interest in Tiny Fiesta. As facts have not been alleged that there was agreement, relief cannot be granted as to this cause of action.

“To establish a breach of fiduciary duty, the movant must prove the existence of a fiduciary relationship, misconduct by the other party, and damages directly caused by that party’s misconduct (*see Kurtzman v Bergstol*, 40 AD3d 588, 590 [2d Dept 2007]).” (*Pokoik v Pokoik*, 115 AD3d 428, 429 [1st Dept 2014].) While the Complaint refers to a fiduciary relationship among LB, JB, and Tiny Fiesta, plaintiff is not a member of Tiny Fiesta and cannot show that he has standing to sustain the second cause of action that JB breached his fiduciary duty to Tiny Fiesta.

“A claim for aiding and abetting a breach of fiduciary duty requires: (1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach” (*Kaufman v Cohen*, 307 AD2d 113, 119-120 [1st Dept 2003]). Since plaintiff cannot assert a claim that JB breached his fiduciary duty, plaintiff cannot maintain the third cause of action against Madison that it aided and abetted JB in that breach (*see Genger v Genger*, 121 AD3d 270, 279 [1st Dept 2014]).

As stated in *Kaufman v Cohen* (307 AD2d at 119-120), “a fraud cause of action may be predicated on acts of concealment where the defendant had a duty to disclose material information.” The Court noted the elements of a cause of action for fraud: “a plaintiff must allege a representation of material fact, the falsity of the representation, knowledge by the party making the representation that it was false when made, justifiable reliance by the plaintiff and resulting injury” (*id.* at 119). (*See Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009].) “The general rule is that fraud cannot be predicated upon statements that are promissory in nature at the time they are made and which relate to future actions or conduct” (*Cerabono v Price*, 7 AD3d 479, 480 [2nd Dept 2004]). Madison is a financial institution that engaged in negotiations with plaintiff. The alleged misrepresentation by Madison amounted to nothing more

than a mere unfulfilled promise as to what Madison might do in the future, and thus, it is not actionable as fraud.

Plaintiff did not justifiably rely on any representation made by either Madison or JB. Plaintiff had information available to him to ascertain who held the mortgage on the property. As a business person, plaintiff would not have attained interest in a property without doing his due diligence and searching the public records. There are no allegations that JB made any direct misrepresentations to plaintiff. Plaintiff does not allege facts showing the elements of a claim of fraud by either Madison or JB.

During the course of the negotiations, Madison ultimately realized that plaintiff was never the owner of the 75% interest in Tiny Fiesta . In *Oddo Asset Mgt. v Barclays Bank PLC* (19 NY3d 584, 593 [2012]), the Court stated that “generally ‘no fiduciary obligation in a contractual arm's length relationship between a debtor and a note-holding creditor’ (see *AJW Partners LLC v Itronics Inc.*, 68 AD3d 567, 568 [1st Dept 2009]; *SNS Bank v Citibank*, 7 AD3d 352, 354 [1st Dept 2004]). A debtor and creditor have no special relationship of confidence and trust (see *Dobroshi v Bank of Am., N.A.*, 65 AD3d 882, 884 [1st Dept 2009], *lv dismissed* 14 NY3d 785 [2010]), and the relationship is generally controlled by contract.” Madison did not owe any special obligation to plaintiff.

“A claim for tortious interference with prospective business advantage must allege that: (a) the plaintiff had business relations with a third party; (b) the defendant interfered with those business relations; (c) the defendant acted with the sole purpose of harming the plaintiff or by using unlawful means; and (d) there was resulting injury to the business relationship (*Carvel Corp. v Noonan*, 3 NY3d 182, 189-190 [2004]; *NBT Bancorp v Fleet/Norstar Fin. Group*, 87 NY2d 614 [1996]; *Hoesten v Best*, 34 AD3d 143, 159 [(1st Dept) 2006]).” (*Thome v Alexander & Louisa*

Calder Found., 70 AD3d 88, 108 [1st Dept 2009].) The allegations in the Complaint do not include the existence of a valid contract between plaintiff and LB (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]), thus, plaintiff cannot allege sufficient facts to show the elements of the Complaint's fifth cause of action.

Plaintiff has no claim for tortious interference with prospective economic advantage, thus, relief cannot be granted for JB having aided and abetted Madison in that effort.

Inasmuch as plaintiff is not a member of Tiny Fiesta, consequently, there is no basis for plaintiff's seventh cause of action for an equitable accounting of Tiny Fiesta (*cf. East Quogue Jet, LLC v East Quogue Members, LLC*, 50 AD3d 1089, 1091 [2nd Dept 2008] [the defendants admitted that the plaintiff was a member of the limited liability company and, therefore, had standing to demand an accounting]).

Accordingly, the motions of Madison and JB to dismiss the Complaint are granted.

The foregoing constitutes the Decision and Order of the court.

Dated: May 14, 2019



Rubén Franco, J.S.C.

HON. RUBÉN FRANCO