

J-Bar Reinforcement Inc. v Crest Hill Capital LLC

2020 NY Slip Op 31446(U)

May 11, 2020

Supreme Court, New York County

Docket Number: 654712/2019

Judge: Andrew Borrok

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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. ANDREW BORROK PART IAS MOTION 53EFM

Justice

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INDEX NO. 654712/2019

J-BAR REINFORCEMENT INC.,RAYMOND BOUDERAU,

MOTION DATE 11/08/2019

Plaintiff,

MOTION SEQ. NO. 001

- v -

CREST HILL CAPITAL LLC,MANTIS FUNDING LLC,MICHAEL MARANO, EDWARD LOVETTE

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60 were read on this motion to/for DISMISS.

Upon the foregoing documents, and for the reasons set forth below, Crest Hill Capital LLC (Crest Hill), Mantis Funding LLC (Mantis), and Michael L. Marano, Jr.'s (Mr. Marano, together with Crest Hill and Mantis, collectively, the Moving Parties) motion to dismiss the complaint of J-Bar Reinforcement Inc. (J-Bar) and Raymond Bouderau pursuant to CPLR §§ 3016 (b) and 3211 (a) (5) and (7) is granted in part solely to the extent that the complaint is dismissed as against Mr. Marano.

I. The Relevant Facts and Circumstances

Mr. Marano is a managing partner of Crest Hill and Mantis and, at all times relevant to the motion, Edward Lovett was acting as an agent of Crest Hill and Mantis. In April 2014, Mr. Lovett contacted Mr. Bouderau, the principal of J-Bar, in April 2014 and solicited Mr. Bouderau to make a \$1 million loan (the Loan) to Crest Hill and Mantis (compl., ¶¶ 16-17). J-Bar and Mr. Bouderau allege that Mr. Lovette was acting at the direction of Mr. Marano and on behalf of

Crest Hill and Mantis (*id.*, ¶¶ 62-69). As an inducement for Mr. Bouderau to make the Loan, Mr. Lovett offered Mr. Bouderau and J-Bar an option to purchase membership interests in Crest Hill and Mantis at a 50% discount if either company were to conduct an initial public offering (*id.*, ¶ 18).

In June 2014, Mr. Lovett told Mr. Bouderau that the proposed Loan would be subordinate to the debt issued by two existing lenders, Dominion Capital, LLC (**Dominion**) and DC CHMF I, LLC (**CHMF**, and Dominion together with CHMF, collectively, the **Senior Lenders**) (*id.*, ¶ 20). To wit, Dominion made a loan to Crest Hill on or before October 30, 2013 and CHMF made a loan to Crest Hill on or before May 21, 2014, and each lender perfected its respective security interest by filing a UCC-1 Financing Statement (NYSCEF Doc. No. 2, 3). But according to J-Bar and Mr. Bouderau, Mr. Lovett stated that the subordination of the Loan “was only a formality” and that Crest Hill and Mantis would still repay the Loan in full, with interest, on or before the maturity date, if J-Bar and Mr. Bouderau so desired (*id.*).

Pursuant to a certain Promissory Note (the **Note**), dated July 17, 2014, by and between J-Bar, as lender, and Crest Hill and Mantis, as borrowers, J-Bar loaned Crest Hill and Mantis the principal sum of \$1 million, with interest to be paid thereon at the rate of 15% per annum, for a term of eighteen-months, ending on the initial maturity date of January 16, 2016 (NYSCEF Doc. No. 4, §§ 1, 2). Section 2.1 of the Note states:

[t]he initial maturity date of this Note shall be January 16, 2016 (the “**Initial Maturity Date**”) provided that the Initial Maturity Date shall be automatically extended continuously for additional six month terms (as so extended, the “**Extended Maturity Date**”) unless the Lender shall provide a notice (a “**Non-Extension Notice**”) six months prior to the Initial Maturity Date or the Extended

Maturity Date, as applicable, that the then applicable Maturity Date (as defined below) shall not be extended. All principal and interest on the Note will be due and payable on either the Initial Maturity Date or the Extended Maturity Date as determined in accordance with the immediately preceding sentence (such date the “**Maturity Date**”).

Section 6 of the Note states that “[e]ach of the Borrowers and Lender agrees that the obligations under this Note are subject and subordinate to the obligations of the Borrowers to [CHMF and Dominion] pursuant to the terms of the Subordination Agreement attached hereto.”

Pursuant to the Subordination Agreement, of even date therewith, by and among J-Bar, Crest Hill, Mantis, and the Senior Lenders, J-Bar agreed to subordinate repayment of the Loan to the existing loans issued by the Senior Lenders (NYSCEF Doc. No. 5 at 1). The Subordination Agreement states, in relevant part:

Creditor hereby acknowledges that the Subordinated Indebtedness is and shall be expressly subordinated in right of payment to the Obligations and Creditor will not accept and Company shall not make any payment in respect of the Subordinated Indebtedness until such time as the Obligations have been indefeasibly paid in full, ***Creditor will not now or hereafter directly or indirectly (i) ask, demand, sue for, take or receive payment of all or any part of the Subordinated Indebtedness or any collateral therefor, and Company will not be obligated to make any such payment, and the failure of Company so to do shall not constitute a default by Company in respect of the Subordinated Indebtedness (id. [emphasis added]).***

On March 1, 2019, Crest Hill, Mantis, and Mr. Marano filed an action against Mr. Lovette for (i) Fraud, (ii) fraudulent inducement, and (iii) fraudulent concealment, among other claims, in the New York State Supreme Court, New York County, in the matter bearing the caption *William Street Holdings LLC et al. v Edward Lovette et al.*, Index No. 651252/2019. Mr. Lovette has not filed an answer or otherwise moved in that case and is in default.

On April 16, 2019, J-Bar contacted Crest Hill and Mantis and inquired as to when they would be making payment in full of the outstanding principal and interest on the Loan, but Crest Hill and Mantis did not respond (compl., ¶ 32; NYSCEF Doc. No. 7). To date, Crest Hill and Mantis have not made payment in full of the \$1 million principal with all accrued and unpaid interest due under the Note (compl., ¶ 51).

On January 26, 2015, J-Bar filed a motion for summary judgment in lieu of complaint against Crest Hill and Mantis for payment on the Note in the New York State Supreme Court, New York County, in the matter captioned *J-Bar Reinforcement Inc. v Crest Hill Capital LLC et al.*, Index No. 650404/2016 (**J-Bar I**). Crest Hill and Mantis opposed the motion for summary judgment and filed a cross-motion to dismiss the complaint, arguing that (1) J-Bar failed to serve them with a Non-Extension Notice pursuant to Section 2.1 of the Note, and (2) under the terms of the Subordination Agreement, Crest Hill and Mantis were not required to pay J-Bar until they have fully repaid the Senior Lenders (NYSCEF Doc. No. 33).

By decision and order, dated September 26, 2016, the court (Scarpulla, J.) granted Crest Hill and Mantis' cross-motion to dismiss in part, holding that (i) the Subordination Agreement was not a bar to enforcement of the Note, (ii) the Non-Extension Notice sent by J-Bar's counsel on July 16, 2015 was ineffective as to Mantis because it was only addressed to Crest Hill, and (iii) there was an issue of fact as to whether Crest Hill and Mantis were aware that J-Bar's counsel was authorized to send the Non-Extension Notice on behalf of J-Bar (NYSCEF Doc. No. 34 at 6, 8-9). The court granted the motion to dismiss as to Mantis and the matter was referred to a Special

Referee to hear and report on the issue of whether Crest Hill knew or reasonably should have known that J-Bar's counsel had authority to serve the Non-Extension Notice on behalf of J-Bar (*id.* at 11-12). Subsequently, pursuant to the report and recommendation of the Special Referee, the court granted J-Bar's motion for summary judgment against Crest Hill.

On January 18, 2017, J-Bar commenced a second action in the New York State Supreme Court, New York County against Mantis captioned *J-Bar Reinforcement, Inc. v Mantis Funding, LLC*, Index No. 650294/2017 (**J-Bar II**) by filing a summons and notice of motion for summary judgment in lieu of complaint. In support of its motion for summary judgment, J-Bar alleged that it had cured the deficiency with respect to its service of the Non-Extension Notice as to Mantis. Mantis cross-moved to dismiss. By decision and order, dated October 5, 2017, the court (Scarpulla, J.) granted J-Bar's motion for summary judgment and denied Mantis' cross-motion to dismiss (NYCSEF Doc. No. 27). The court explained that "it would be commercially unreasonable to perpetually deny a junior creditor the right to reduce a defaulted, unpaid junior debt to a judgment," but that "execution of the judgment must await payment in full of the Senior Lenders, or termination of the Subordination Agreement" (*id.* at 4).

Crest Hill appealed from the order in J-Bar I and Mantis appealed from the order in J-Bar II. The appeals were consolidated and by decision and order, dated February 14, 2019, the First Department unanimously reversed both orders and granted Crest Hill and Mantis' cross-motions to dismiss (*J-Bar Reinforcement, Inc. v Crest Hill Capital LLC*, 169 AD3d 499, 499 [1st Dept 2019]), reasoning that:

[u]nlike subordination agreements that merely order the priority of plaintiffs rights as against other creditors and have no bearing on plaintiffs' rights against defendant[,] . . . the plain, unambiguous language of the subject Subordination Agreement *limited plaintiff's right to demand or sue for payment, or declare a default prior to satisfaction of the senior debt*. The commercial reasonableness of this agreement is irrelevant where there is no ambiguity (*id.* at 499-500 [internal quotation marks and citations omitted] [emphasis added]).

On August 18, 2019, J-Bar and Mr. Bouderau commenced this action against Crest Hill, Mantis, Mr. Marano, and Mr. Lovette for breach of contract and fraudulent inducement and seeking a declaratory judgment that Crest Hill and Mantis are in default under the Note.

II. Discussion

A party may move for judgment dismissing one or more causes of action on the ground that the pleadings fail to state a cause of action for which relief may be granted (CPLR § 3211 [a] [7]).

On a motion to dismiss pursuant to CPLR § 3211 (a) (7), the court must afford the pleadings a liberal construction and accept the facts alleged in the complaint as true, according the plaintiff the benefit of every favorable inference (*Morone v Morone*, 50 NY2d 481, 484 [1980]). The court's inquiry on a motion to dismiss is whether the facts alleged fit within any cognizable legal theory (*id.*). Bare legal conclusions are not accorded favorable inferences, however, and need not be accepted as true (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999]). A party may also move to dismiss on the ground that a cause of action is barred under the doctrine of res judicata pursuant to CPLR § 3211 (a) (5).

i. The Moving Parties' Motion to Dismiss under the Doctrine of Res Judicata is Denied.

The Moving Parties argue that the First Department's decision and order granted Crest Hill and Mantis' cross-motions to dismiss constitutes a final determination on the merits and the claims

asserted in this action are therefore barred under the doctrine of res judicata. They further argue that Mr. Bourderau is in privity with J-Bar and Mr. Marano is in privity with Crest Hill and Mantis and the claims against them are likewise barred. The arguments are unavailing.

The doctrine of res judicata bars a party from asserting a claim “where a judgment on the merits exists from a prior action between the same parties involving the same subject matter” in which the party opposing preclusion “had a full and fair opportunity to litigate” the claim (*In re Hunter*, 4 NY3d 260, 269 [2005]). As the Court of Appeals has observed, “[t]he rule applies not only to claims actually litigated but also to claims that could have been raised in the prior litigation” (*id.*). Under New York’s transactional res judicata analysis, “once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy” (*O’Brien v City of Syracuse*, 54 NY2d 353, 357 [1981], citing *Matter of Reilly v Reid*, 45 NY2d 24, 29–30 [1978]).

Res judicata does not, however, bar claims that could not have been raised in the prior litigation.

As the United States Supreme Court has explained:

That both suits involved ‘essentially the same course of wrongful conduct’ is not decisive. Such a course of conduct . . . may frequently give rise to more than a single cause of action. . . . While the [prior] judgment precludes recovery on claims arising prior to its entry, ***it cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case*** (*Lawlor v Nat’l Screen Serv. Corp.*, 349 US 322, 327–28 [1955] [emphasis added]).

Accordingly, dismissal of a claim on the ground of ripeness does not constitute a final determination on the merits and therefore is not a ground for the application of res judicata (*Sudarsky v City of New York*, 220 AD2d 353, 354 [1st Dept 1995]).

Here, and as J-Bar and Mr. Bourderau argue, the First Department effectively dismissed J-Bar I and J-Bar II because they did not have standing – or because their claim was not ripe inasmuch as the First Department’s decision was based on the express terms of the Subordination Agreement which barred demand for payment prior to satisfaction of the senior debt – *i.e.*, not a final determination on the merits of their claims. As discussed above, in reversing the order of the trial court and granting Crest Hill and Mantis’ cross-motions to dismiss, the First Department reasoned that the Subordination Agreement “limited plaintiff’s right to demand or sue for payment, or declare a default *prior to satisfaction of the senior debt*” (*J-Bar Reinforcement, Inc.*, 169 AD3d at 499-500 [emphasis added]). In other words, the First Department did not hold that the Subordination Agreement was a complete bar to recovery for payment on the Note forever. Rather, the import of the holding is that the claim was not ripe until the senior debt is satisfied. Put another way, the First Department “expressly reserved the plaintiff’s right to maintain the second action” (*Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 349 [1999]).

Inasmuch as the First Department held that the Plaintiffs did not have the right to demand payment until satisfaction of the senior debt, the cause of action for breach of contract had not yet accrued when the prior actions were filed (*Hahn Automotive Warehouse, Inc. v Am. Zurich. Ins. Co.*, 18 NY3d 765, 770 [2012] [stating that a cause of action for payment of money pursuant to a contract accrues when the plaintiff has a legal right to demand payment]). Therefore, the prior judgments did not bar the breach of contract claim (*TechnoMarine SA v Giftports, Inc.*, 758 F 3d 493, 504 [2d Cir 2014] [explaining that a judgment does not ordinarily bar claims that have not yet accrued under *res judicata*]). The Plaintiffs now allege that the CHMF and Dominion

loans have been extinguished (compl., ¶¶ 33-34). In opposition to the Defendants' motion to dismiss, the Plaintiffs have submitted New York State Department of State filing data reports showing that the CHMF and Dominion liens have lapsed and there are no other active liens (NYSCEF Doc. No. 58, 59). Therefore, because Crest Hill and Mantis have not responded to the Plaintiffs' demand for payment and have failed to repay the Loan, the cause of action for breach of contract has now accrued and is proper. In other words, J-Bar and Mr. Bouderau's day in court has arrived. Finding otherwise would work considerable injustice and deprive the plaintiffs of a single day in court where their claims are heard on the merits:

We remain mindful that if applied rigidly, res judicata has the potential to work considerable injustice. 'In properly seeking to deny a litigant 'two days in court,' courts must be careful not to deprive him of one' (*Landau v LaRossa, Mitchell & Ross*, 11 NY3d 8, 14 [2008], quoting *Matter of Reilly v Reid*, 45 NY2d 24, 28 [1978]).

Therefore, the Defendants' motion to dismiss on the ground of res judicata is denied.

ii. The Moving Parties' Motion to Dismiss the Second Cause of Action for Fraudulent Inducement is Granted as to Mr. Marano.

"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]). In addition, "[a] fraud-based cause of action is duplicative of a breach of contract claim 'when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract'" (*Mañas v VMS Assoc., LLC*, 53 AD3d 451, 453 [1st Dept 2008], quoting *First Bank of Ams. v Motor Car*

Funding, 257 AD2d 287, 291 [1999]), unless the plaintiff alleges a breach of a duty separate from the breach of contract (*First Bank of Ams.*, 257 AD2d at 291). For any cause of action based on fraud, the circumstances constituting the alleged fraud must be stated with particularity (CPLR § 3016 [b]).

The Moving Parties argue that the fraudulent inducement claim must be dismissed as duplicative of the breach of contract claim, and that the claim is not pled with the requisite particularity as to Mr. Marano. They further contend that the claim fails because the only fraud alleged is that the they were insincere when Mr. Lovette represented that they would repay the loan. In their opposition papers, J-Bar and Mr. Bourderau argue that they have adequately alleged the elements of a fraudulent inducement claim and that that the claim is pled with sufficient particularity as against Mr. Marano. The court agrees.

Here, the Plaintiffs have sufficiently alleged that Mr. Lovette made false representations to J-Bar and Mr. Bouderau under the direction of Mr. Marano and on behalf of Crest Hill and Mantis with the intent of inducing J-Bar and Mr. Bouderau to rely on them, and that they justifiably relied on the statements and were damaged as a result (*id.*, ¶¶ 62-69). Significantly, the complaint does not merely allege that the Moving Parties were insincere concerning their future intent to perform under the Note. The complaint also alleges that the Defendants falsely represented that the Subordination Agreement “was only a formality” and that they would still be repaid within 18 months if they wanted to be. This constitutes a misrepresentation of *present* facts collateral to the Note, and as such, implicates a separate breach of duty (*First Bank of Ams.*, 257 AD2d at 292 [“Unlike a misrepresentation of future intent to perform, a misrepresentation of present facts is

collateral to the contract (though it may have induced the plaintiff to sign the contract) and therefore involves a separate breach of duty”). Accordingly, the fraudulent inducement claim is not duplicative of the breach of contract claim and the motion to dismiss is denied as against Crest Hill and Mantis.

However, the complaint fails to allege fraud with sufficient particularity as to Mr. Marano, individually. Simply put, the complaint is devoid of any detailed allegations concerning Mr. Marano. The Plaintiffs merely allege that Mr. Lovette was acting at Mr. Marano’s direction, but fail to allege any specific words or actions attributable to Mr. Marano. Therefore, the motion to dismiss is granted as to Mr. Marano.

Accordingly, it is

ORDERED that the motion to dismiss is granted to the extent that the second cause of action (fraudulent inducement) is dismissed as against Mr. Marano, and the Clerk is directed to enter judgment accordingly, and the motion is otherwise denied; and it is further

ORDERED that action is severed and continued as to the remaining defendants; and it is further

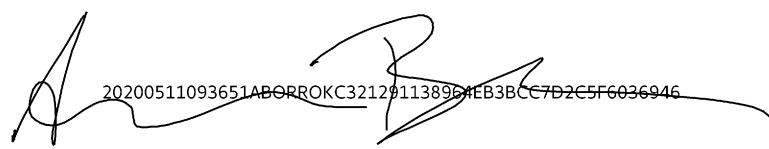
ORDERED that the caption shall be amended to reflect the dismissal of Mr. Marano and all future papers filed with the court shall bear the amended caption; and it is further

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/suptctmanh); and it is further

ORDERED that the defendants shall file an answer to the complaint within 30 days of the date of service of Notice of Entry of this decision and order.

5/11/2020
DATE



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ANDREW BORROK, J.S.C.

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