

Gomez v 419-21 E. 157th St. Hsng. Develop. Fund Corp.

2020 NY Slip Op 31613(U)

April 27, 2020

Supreme Court, Bronx County

Docket Number: 29542/2018E

Judge: Alison Y. Tuitt

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NEW YORK SUPREME COURT-----COUNTY OF BRONX

PART IA - 5

LUIS G. GOMEZ & MELISA J. GOMEZ,

INDEX NUMBER: 29542/2018E

Plaintiffs,

-against-

Present:
HON. ALISON Y. TUITT
Justice

419-21 EAST 157TH STREET HSNG. DEVELOP. FUND CORP., BETZI LOZADO (President), EUGENIA GONZALEZ (Treasurer), JENNYVETTE TORREZ (New President), THE JUDICIAL TITLE INSURANCE AGENCY, LLC, SERGIO MARQUEZ, ESQ. & JOSE LUIS TORRES, ESQ.,

Defendants.

The following papers numbered 1 to 3,

Read on this Defendant Jose Luis Torres, Esq.'s Motion to Dismiss and Plaintiffs' Motion to Amend the Complaint

On Calendar of 12/9/19

Notices of Motion-Exhibits, Affirmations 1, 2

Affirmation in Opposition 3

Reply Affirmation 4

Upon the foregoing papers, defendant Jose Luis Torres, Esq.'s ("Torres") motion to dismiss the action and plaintiffs' motion to amend the complaint are consolidated for the purposes of this decision. For the reasons set forth herein, the motion to dismiss is granted to the extent that the complaint is dismissed as against defendant Torres, and plaintiffs' motion to amend the complaint is granted.

Defendant Torres moves to dismiss the action against him pursuant to CPLR §3211(a)(7) on the grounds that plaintiffs have failed to state a cause of action against him, and imposing sanctions and reasonable attorney's fees and costs. Plaintiffs purchased shares in defendants' cooperative corporation 419-21 East 157TH

Street Hsng. Develop. Fund Corp., and claim they suffered damages as a result of the cooperative corporation, its attorney in the transaction defendant Torres, plaintiffs' own attorney and the title company's failure to disclose, prior to the closing, that the building had a large outstanding real estate tax bill and that the city had commenced an "in rem" foreclosure proceeding. Plaintiffs allege that they would not have purchased the shares to their units if they had been informed of this fact. They further allege that all the defendants colluded to keep the outstanding real estate taxes and foreclosure proceeding from them in order to fraudulently induce them into purchasing shares of the cooperative corporation.

Defendant Torres states that in or about September 2015, he was retained by Betsy Lozada, the then president of the board of directors of 419-421 East 157th Street Housing Development Fund Corporation (the "HDFC") to represent the HDFC as transfer agent in the sale and purchase transactions of the shares to two apartments. Torres states that HDFC was his client, not the plaintiffs. The HDFC is a not-for-profit housing development fund corporation formed by the City of New York through its Department of Housing Development and Preservation. The HDFC was created to provide residential ownership for low-income families under strict income guidelines. Defendant Torres has never been a member of the board of directors, and he has never served as their general counsel. For the subject transaction, plaintiffs retained their own attorney who, in the course of his representation, ordered lien searches from a title company. Torres states that he never made any representations to plaintiffs as to the financial condition of the HDFC. To his knowledge, no financial reports had been prepared for the HDFC in the several years preceding the subject closing and none were provided to the plaintiffs who, despite the lack of financial records, proceeded to purchase the shares to their respective apartments.

Defendant Torres argues that plaintiffs claims are frivolous in that they have no privity with him; plaintiffs were represented by their own counsel; he had no duty to disclose any financial information to the plaintiffs; there were no financial reports available with respect to the building and plaintiffs, despite that fact, decide to purchase the shares; and, there could be no reasonable reliance on any statements regarding outstanding taxes owed by the building allegedly made by Torres to plaintiffs because they could have easily ascertained the tax status of the cooperative as it was public information and easily obtainable on the internet.

Defendant Torres moves to dismiss the action against him pursuant to C.P.L.R. §3211 (a)(7) on the grounds that the complaint fails to state a cause of action. Generally, on a motion to dismiss made pursuant to CPLR §3211, 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 into any cognizable legal theory". Leon v. Martinez, 84 N.Y.2d 83 (1994); Weil, Gotshal & Manges, LLP v. Fashion Boutique of Shirt Hills, Inc., 780 N.Y.S.2d 593 (1st Dept. 2004). On a motion to dismiss pursuant to CPLR §3211(a)(7), the complaint survives when it gives notice of what is intended to be proved and the material elements of each

cause of action. Rovello v. Orofino Realty Co., Inc. 40 N.Y.2d 633 (1976); Underpinning & Foundation Construction v. Chase Manhattan Bank, 46 N.Y.2d 459 (1979).

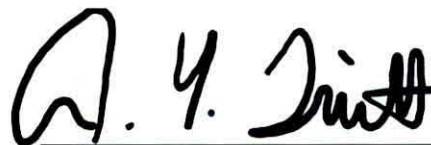
“Before a party may recover in tort for pecuniary loss sustained as a result of another's negligent misrepresentations there must be a showing that there was either actual privity of contract between the parties or a relationship so close as to approach that of privity”. Prudential Insurance v. Dewey, Ballantine, 80 N.Y.2d 377 (1992). An attorney does not owe a duty of care to his adversary or one with whom he is not in privity. Aglira v. Julien & Schlesinger, P.C., 631 N.Y.S.2d 816 (1st Dept. 1995). Or the relationship must be so close as to approach that of privity. Parrott v. Coopers & Lybrand, L.L.P., 95 N.Y.2d 479 (2000). The established test to determine whether such a relationship is present has been termed the “tripartite test” by which the party seeking to recover must demonstrate “(1) an awareness by the maker of the statement that it is to be used for a particular purpose; (2) reliance by a known party on the statement in furtherance of that purpose; and (3) some conduct by the maker of the statement linking it to the relying party and evincing its understanding of that reliance”. Id.

Here, it is undisputed that there was no privity of contract as plaintiffs and defendant Torres did not enter into any contracts or written agreements. Since privity of contract did not exist between them, a “relationship approaching privity” must exist for plaintiffs to succeed. Securities Investor Protection Corp. v. BDO Seidman, LLP, 95 N.Y.2d 702 (2000). Here, plaintiffs fail to make such a showing. Plaintiffs’ claim for fraudulent inducement required them to allege that Torres first had a duty to disclose material information, and they failed to do so. See, P.T. Bank Central Asia v. ABN AMRO Bank N.V., 754 N.Y.S.2d 245 (1st Dept. 2003); 900 Unlimited, Inc. v. MCI Telecommunications Corp., 626 N.Y.S.2d 188 (1st Dept. 1995)(In the absence of a contractual relationship or a confidential or fiduciary relationship, a party may not recover for fraudulent concealment of fact, since absent such relationship, there is no duty to disclose). Moreover, plaintiffs’ cause of action for unjust enrichment fails to allege essential elements of the cause of action and must be dismissed. There is no indicia of an unjust enrichment where the pleadings fails to allege a relationship between the parties that could have caused reliance or inducement. Mandarin Trading Ltd. v. Wildenstein, 16 N.Y.3d 173 (2011). Additionally, plaintiffs allege nothing more than a conclusory allegation that Torres and the other defendants “have retained the benefits of the plaintiffs’ purchase.” Plaintiffs fail to allege sufficient facts demonstrating how Torres retained any benefits from the purchase by plaintiffs, as transfer agent of the HDFC. No facts are stated as to how Torres was unjustly enriched and, as a result, this fatal deficiency warrants dismissal of the cause of action against Torres. Plaintiffs’ causes of action for breach of fiduciary duty, intentional misrepresentation and, indemnification are also dismissed for failing to state a claim. The branch of defendant Torres’ motion that seeks sanctions, attorneys’ fees and costs is denied as defendant failed to show that the litigation was “blatantly frivolous” as he argues.

Plaintiffs' motion to amend the Verified Complaint, removing defendant Judicial Title Insurance Agency, LLC, and adding the defendant Titlevest Services, LLC, pursuant to CPLR 3025(b), is granted without opposition. Plaintiffs are directed to serve the Amended Verified Complaint on all parties within 60 days after service of this Order with Notice of Entry.

This constitutes the decision and Order of this Court.

Dated: 4/27/20



Hon. Alison Y. Tuitt