

Treacy v Ferder

2020 NY Slip Op 33036(U)

September 10, 2020

Supreme Court, New York County

Docket Number: 654145/2018

Judge: Debra A. James

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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. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

-----X

TEGAN TREACY,

Plaintiff,

INDEX NO. 654145/2018

MOTION DATE 07/12/2019

MOTION SEQ. NO. 001

- v -

ILAN FERDER, ILAN FERDER STABLES, INC., OLD SALEM FARM ACQUISITION CORP., KAMRAN HAKIM, ELLEN HAKIM, and SCOTT HAKIM,

Defendants.

DECISION + ORDER ON MOTION

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 26, 27, 28, 29, 30, 32, 33

were read on this motion to/for

DISMISS

ORDER

Upon the foregoing documents, it is

ORDERED that the motion is granted to the extent that it seeks dismissal of the claims against Ellen Hakim and Scott Hakim, and the complaint is dismissed in its entirety as against such defendants, with costs and disbursements to such defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of such defendants; and it is further

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

ORDERED that the caption be amended to reflect such dismissal and that all future papers filed with the court bear the amended caption, as follows:

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TEGAN TREACY,

Plaintiff,

Index No.: 654145/2018

- against -

ILAN FERDER, ILAN FERDER STABLES INC.,
 OLD SALEM FARM ACQUISITION CORP., and
 KAMRAN HAKIM,

Defendants.

-----X; and it is further

ORDERED that counsel for the moving parties 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/supctmanh); and it is further

ORDERED that defendants Old Salem Farm Acquisition Corporation and Kamran Hakim are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to submit a proposed preliminary conference order (or counter proposed preliminary conference order) by filing such proposed order(s) with NYSCEF and IAS Part 59 mailbox (59nyef@nycourts.gov) on or before October 30, 2020.

DECISION

In this pre-answer motion, defendants Old Salem Farm Acquisition (Old Salem) and its owners, Kamran Hakim (Kamran), Ellen Hakim (Ellen), and Scott Hakim (Scott), seek dismissal of the complaint as against them.

For the reasons below, the court shall grant the motion to the extent that it asserts claims against Ellen Hakim and Scott Hakim and otherwise denies the motion.

According to the verified complaint, defendant Ilan Ferder (Ferder) was the sole owner of defendant Ilan Ferder Stables Inc. (Ferder Stables) (collectively, the Ferder defendants), a business incorporated in Florida and that transacted business in New York. Old Salem was incorporated and did business in New York. Kamran, Ellen, and Scott (together with Old Salem, the Hakim defendants), the sole owners of Old Salem, resided and did business in New York.

Plaintiff Tegan Treacy (Treacy) wanted to purchase a horse, and she hired Old Salem as her agent. Old Salem located Duchesse Fortuna, which Ferder Stables owned. Treacy purchased the horse around May 24, 2017 for \$325,000 and paid a brokerage fee and commission to Old Salem. In addition, the complaint states, Old Salem received brokerage and commission fees from the Ferder defendants.

Dr. Audrey DeClue examined the horse prior to the sale, and represented, among other things, that "concern for purchase and continued competition soundness is warranted due to moderate thoracic, including mild lumber overriding spinous processes ('kissing spines')" and that there was evidence of back pain, but that a number of videos "showed no resistance, difficulty, or overt lameness during competition" and showed that the horse had no problem jumping (NYSCEF Doc. No. 1 [Complaint] Exhibit A [Horse Purchase and Sale Agreement, at Exhibit C (DeClue letter)]). The contract provided that Treacy could return Duchesse Fortuna within three years if a veterinarian stated in writing that the horse's underlying conditions had irremediably deteriorated. If this occurred, the Ferder defendants would find Treacy another horse of a suitable temperament and skill or else would refund the purchase price. The contract also provided that the Ferder defendants would attempt to sell Ella, another of Treacy's horses, and that any proceeds would be split between Treacy and the Ferder defendants.

Treacy received Duchesse Fortuna around May 25, 2017. By June 11, 2017, however, it was evident that the horse's condition was worse than expected and would not improve. Accordingly, in July or August of 2017, Treacy returned the horse to the Ferder defendants. However, instead of providing Treacy with an acceptable horse or returning her fee, the Ferder defendants refused to return the purchase price and stated it would provide her with another horse only if she paid an additional fee. According to the complaint, when the parties entered the contract, Ferder and the Hakim defendants knew that, despite Dr. DeClue's assessment, Duchesse Fortuna already was "lame and serviceably unsound" (NYSCEF Doc. No. 1 ¶¶ 87, 92, 95, 101, 104) and they concealed this information from Treacy.

Subsequently, Treacy filed the current lawsuit against the Ferder defendants and the Hakim defendants. The second through sixth causes of action are relevant to the motion at hand, in which only the Hakim defendants seek dismissal.¹ The second cause of action asserts that movants violated General Business Law § 349, which precludes deceptive acts and practices. In the third cause of action, Treacy asserts that the Hakim defendants owed her a fiduciary duty as her agents and that they breached this duty when they concealed Duchesse Fortuna's condition from her. Fourth,

¹The Ferder defendants have answered the complaint (see NYSCEF Doc. No. 21) and they are not involved on this motion.

Treacy claims that, in their effort to facilitate the sale of Duchesse Fortuna, the Hakim defendants made false statements that misrepresented critical facts about the horse's physical condition. The fifth cause of action asserts negligent misrepresentation, stating that the Hakim defendants made false statements knowing that Treacy would reasonably rely on them. Finally, the sixth cause of action alleges that the Hakim defendants were unjustly enriched by their misconduct.

The Hakim defendants raise several arguments in support of their motion for dismissal. First, they assert that Kamran is the sole officer of Old Salem, and that Ellen and Scott are uninvolved in the business. Second, because Kamran is an officer of the corporation and allegedly does not control its daily affairs, they claim that he bears no individual liability for any purported wrongdoing by the company. They argue, therefore, for dismissal of the claims as they apply to the individual defendants. They support these arguments with the affidavit of Alan Bietsch, the facilities manager at Old Salem (NYSCEF Doc. No. 13). Bietsch attests to the lack of involvement of Ellen and Scott in the business and to Kamran's lack of involvement in the Old Salem's relationship with Treacy. In addition, the Hakim defendants submit a copy of Old Salem's New York business registration, which lists Kamran as the sole executive of the company, a domestic business

corporation, and as both its chief executive officer and its principal executive officer (NYSCEF Doc. No. 17).

Third, the Hakim defendants argue that Old Salem cannot be liable because it was uninvolved in the transaction at issue here. Instead, according to Bietsch, Frank Madden, a former horse trainer at Old Salem, brokered the sale. Moreover, he asserts that Madden was not acting on behalf of Old Salem when he did so. Bietsch states that Treacy "asked Madden to help her find and purchase a new horse without Old Salem's knowledge" (NYSCEF Doc. No. 13 ¶ 10). He points out that paragraph 9 of the purchase agreement states that "Ilan Ferder has represented Ilan Ferder Stables, Inc., in this transaction and has not represented Treacy in this transaction. Treacy has been represented in this transaction by Frank Madden, a horse trainer of Treacy's choice" (id. ¶ 11 [quoting contract]). He contends that Old Salem was unaware of the transaction until Madden sought to board Duchesse Fortuna there.

In addition, Bietsch states that Old Salem did not receive a commission. Instead, Madden paid his commission to Old Salem to reduce Treacy's outstanding debt. The Hakim defendants have annexed a copy of Treacy's July 31, 2017 bill in support (NYSCEF Doc. No. 16), and Bietsch contends that \$28,750 of the credits on the bill are the result of Madden's transfer of the commission to Old Salem.

Treacy opposes the motion to dismiss. Overall, she argues that the Hakim defendants have not satisfied the rigorous standard necessary to prevail on a pre-answer motion to dismiss. She points out that the moving parties must show that the complaint does not state a legal claim, either based on the law itself or on documentary evidence. She contends that the Bietsch affidavit does not qualify as documentary evidence under CPLR § 3211(a)(1). Further, she states that the boarding agreement has no probative value because she concedes she owed movants a commission for the transaction at issue. In addition, she states that the July 31, 2017 bill is not probative and does not justify dismissal as it is not irrefutable.

Moreover, Treacy points out that she raises numerous factual issues in her complaint. She stresses that when she negotiated the deal with the Ferder defendants, Madden was still an employee of Old Salem. She states that neither she nor her father had any reason to believe that Madden acted outside the scope of his employment. She asserts that, in response to an invoice from the Hakim defendants relating to both Ella and Duchesse Fortuna and pursuant to the boarding agreement, her father paid them a \$35,000 commission. According to Treacy, the Ferder defendants also paid a commission to the Hakim defendants, and this demonstrates their conflict of interest and breach of fiduciary duty. She states

that the Ferder defendants and the Hakim defendants did not disclose their private agreement to her.

As for the individual moving defendants, Kamran, Ellen, and Scott, Treacy argues that they are sole owners of Old Salem and a page of the company's website identifies them as such. Based upon that relationship, Treacy claims, "it is entirely plausible that they could be found liable for the allegations contained in [the] complaint" (NYSCEF Doc. No. 26 [Ayoub Affirmation] ¶ 58). Thus, Treacy contends that the claims against them are viable.

In addition to the page from Old Salem's website, Treacy relies on her own affidavit and that of her father Michael Treacy. Treacy states that the boarding agreement, which sets forth that Old Salem would receive a 15% commission on all sales and leases, thus implicitly provided that Old Salem would represent her "in the purchase, sale, or lease of any horse acquired or sold by me while I was a customer of Old Salem Farm and that for representing me OSF would charge a commission" (NYSCEF Doc. No. 27 [Treacy Aff] ¶ 2). She states that this arrangement had existed at other stables she and her father had used, and that it led her to believe Madden acted on behalf of Old Salem. The affidavit of Michael Treacy confirms this understanding of the arrangement between his daughter and Old Salem. Michael Treacy reiterates that Madden was an employee of Old Salem when he represented his daughter in the purchase of Duchesse Fortuna and the attempt to sell Ella. He

states that the bill he received from Old Salem stated it was for the "Commission Ella & Fortuna (15% of \$325,000) (\$48,750 less Adj of \$13,750)" and that he paid this bill on behalf of his daughter (NYSCEF Doc. No. 27 [Michael Treacy Aff] ¶ 5). He also asserts that he was not aware of any agreement between Old Salem and Ferder, and that this raises an issue as to whether Old Salem and Ferder colluded in the sale of a lame, unsound horse to his daughter.

In reply, the Hakim defendants reiterate that Treacy hired "a horse trainer . . . named Frank Madden, who was previously employed by Old Salem Farm" to broker the purchase of Duchesse Fortuna and the sale of Ella, and that Madden "acted outside the scope of his employment" (NYSCEF Doc. No. 33 [Affirmation in Reply] ¶ 2). They restate their prior arguments about their lack of involvement in the transaction. In addition, they reiterate that the Hakims have no direct involvement in the disputed transaction, and they state that in opposition to their motion Treacy was required to provide information showing that the Hakims were potentially liable.²

When a party moves for failure to state a claim under CPLR 3211 (a) (7), "the court must accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts

²The court does not address any newly asserted arguments (see EPF Intl. Ltd. v Lacey Fashions Inc., 170 AD3d 575, 575 [1st Dept 2019]).

as alleged fit within any cognizable legal theory” (Doe v Ascend Charter Schs., 181 AD3d 648, 649 [2d Dept 2019] [internal quotation marks and citations omitted]). The complaint’s potential to survive a summary judgment motion or to be established at trial is irrelevant to the court’s evaluation (id.). Further, the plaintiff may remedy defects in the complaint through affidavits (Grassi & Co., CPAS, P.C. v Honka, 180 AD3d 564, 565 [1st Dept 2020] [Grassi]). Bare legal conclusions, however, are insufficient even under this liberal pleading standard (Doe v Bloomberg, LP, 178 AD3d 44, 47 [1st Dept 2019]).

The Hakim defendants do not prevail on such basis. Their contention that all claims against them fail because they were not involved in the subject transaction is inadequate. The complaint asserts that Old Salem represented Treacy in the purchase of Duchesse Fortuna and possible sale of Ella although it knew that Duchesse Fortuna was lame. Although, as the Hakim defendants note, the contract names Madden rather than Old Salem itself as Treacy’s representative, Treacy and her father’s affidavits adequately supplement the complaint (see Grassi, 180 AD3d at 565). Specifically, they point out that the boarding contract Treacy signed with Old Salem - which the Hakim defendants annexed as an exhibit to their motion (NYSCEF Doc. No. 15) - provides for a 15% commission for all purchases and leases, and that this was typical in relationships in which boarding stables represented horse

owners in transactions. The affidavits further stress that Madden was an Old Salem employee when Treacy signed the purchase and sale contract, and they note that Old Salem deposited the commission. This is sufficient to allege viable claims. The Hakim defendants' responses - including that Madden acted outside of the scope of his authority and without the knowledge and consent of Old Salem, and that the money they received in additional commissions were in fact transfers from Madden to reduce Treacy's debt - merely raise issues of fact.

Under CPLR § 3211 (a) (1), for dismissal based on documentary evidence, it is necessary that "the documentary evidence resolves all factual issues and disposes of plaintiff's claim as a matter of law" (Array BioPharma, Inc. v AstraZeneca AB, 184 AD3d 463, 464 [1st Dept 2020]). In addition, the evidence "must be unambiguous" (Victory State Bank v EMBA Hylan, LLC, 169 AD3d 963, 965 [2d Dept 2019] [internal quotation marks and citation omitted]). "Judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case" (id.). An employee's affidavit is not documentary evidence within the meaning of the statute (Bou v Llamaza, 173 AD3d 575, 575 [1st Dept 2019]).

The boarding agreement and the contract with the Ferder defendants for Duchesse Fortuna and Ella are not sufficient as

documentary evidence, as they do not unambiguously establish the Hakim defendants' position. For the reasons set forth above, the mandatory commission to the Hakim defendants creates an issue as to whether these defendants were indirectly involved in the sale - particularly as, in the case at hand, Treacy was represented by one of their employees.³ The invoice also is not conclusive - among other things, there is no concrete evidence in it showing that Old Salem applied the credit in question based on a payment or payments from Madden, and there is no documentary evidence showing that Madden gave his commission to Old Salem. In addition, as Treacy stated, the Bietsch affidavit and the statements therein do not qualify as documentary evidence (see Bou, 173 AD3d at 575). Even aside from its self-serving nature, the affidavit relies on factual assertions as to the purported inaccuracy of the statements in the complaint (see Art & Fashion Group Corp. v Cyclops Prod., Inc., 120 AD3d 436, 438 [1st Dept 2014]).⁴ Thus, the documentary evidence argument fails as well. For these reasons, the claims asserted against Old Salem must stand.

However, the Hakim defendants also seek dismissal of the claims against Kamran, Ellen, and Scott Hakim. In support, the

³The Hakim defendants repeatedly state that Madden no longer works at Old Salem, but this is irrelevant. During the period in question, Madden was a trainer at Old Salem and Treacy allegedly knew him in this capacity.

⁴Treacy does not state this explicitly; moreover, Bietsch lacks firsthand knowledge of the events leading up to the transaction (see Bou, 173 AD3d at 575-576 [affidavit lacked probative value where, among other things, the affiant did not establish personal knowledge of the agreement in question]).

Hakim defendants submit a printout from the New York State Department of State, Division of Corporations, which states that Kamran, who is Old Salem's chief executive officer and its principal executive officer, is the company's only executive (NYSCEF Doc. No. 17). This is not conclusive as to Kamran's liability. Although "[c]orporate officers may not be held personally liable on contracts for their corporation, . . . [they] may be held personally liable for torts committed in the performance of their corporate duties" (Hartnagel v FTW Contr., 147 AD3d 819 [2d Dept 2017] [internal quotation marks and citation omitted]). Thus, the documentary evidence does not dispose of the issue. Moreover, for the reasons already set forth, statements in the Bietsch affidavit stating that Kamran was not involved in Old Salem's daily operations do not rebut the contrary allegations in the complaint.

The court reaches a different decision as to Ellen and Scott, neither of whom are listed as corporate officers. To counter the Hakim defendants' contention that Ellen and Scott should be dismissed, Treacy relies on a press clipping of an event at Old Salem that includes a photo of the Hakim family and mentions them as the stable's sole owners (NYSCEF Doc. No. 29). Treacy's argument that relies upon hearsay evidence that this makes it "entirely plausible that they could be found liable" (NYSCEF Doc.

No. 26 ¶ 58) is insufficient even under the liberal standards under which courts evaluate CPLR 3211 (a) (1) motions.

<u>9/10/2020</u> DATE	<u>Debra A. James</u> DEBRA A. JAMES, J.S.C.			
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE
			<input type="checkbox"/>	OTHER