

**Labusov v Bachner**

2020 NY Slip Op 33369(U)

October 14, 2020

Supreme Court, New York County

Docket Number: 650524/2020

Judge: Arlene P. Bluth

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 14

Justice

-----X

PAVEL LABUSOV, ALINA LABUSOVA,

Plaintiff,

- v -

MICHAEL BACHNER,

Defendant.

-----X

MICHAEL BACHNER

Plaintiff,

-against-

WILLIAM REDFERN, EQUITY TRUST COMPANY

Defendant.

-----X

INDEX NO. 650524/2020
MOTION DATE 10/08/2020
MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

Third-Party
Index No. 595535/2020

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 12, 33, 34, 35, 36, 37, 38, 39, 40, 42, 43, 53

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

The following e-filed documents, listed by NYSCEF document number (Motion 002) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 41, 44, 45, 46, 47, 48, 49, 50, 51, 52, 54

were read on this motion to/for DISMISS

Motion sequence numbers 001 and 002 are consolidated for disposition.

The motion (MS001) by plaintiffs for summary judgment is denied. The motion (MS002) by third-party defendant Equity Trust Company ("Equity Trust") to dismiss the third-party complaint is denied.

Background

This cases relates to the settlement of a lawsuit in the Southern District of New York. Plaintiffs, defendant, and third-party defendant (Mr. Redfern) entered into an escrow agreement

in December 2018. Mr. Redfern acted as the guarantor and defendant was the escrow agent as well as the attorney for Redfern.

Plaintiffs claim that the underlying dispute in the SDNY dealt with a \$1.5 million line of credit extended to plaintiffs in exchange for title to plaintiff's portfolio of real properties held by a corporate entity. Plaintiffs contend they used the loan to buy another property in Florida and the property was ultimately pledged as more collateral for the loan. They alleged that non-parties misappropriated the construction budget by over half a million dollars and plaintiff eventually decided to exercise the cancellation clause the agreement, which would entitle them to the immediate return of their interests in the real estate properties. Plaintiffs brought a lawsuit when the assets were not returned.

**MS001**

Plaintiffs bring a motion for summary judgment against defendant. They claim that Redfern violated the terms of the settlement agreement in December 2019 and that defendant failed to comply with his obligations as an escrow agent. Plaintiffs argue that defendant was supposed to send a certified check to plaintiffs for the net of an IRA account (over \$400,000) and instead tendered his resignation as escrow agent. They also claim that defendant did not transfer the documents associated with his status as escrow agent to plaintiffs or to a successor agent. Plaintiffs insist that it then discovered that Redfern never transferred money pursuant to the agreement nor did he transfer his interest in a certain property (the Willow Narrows) into escrow.

In opposition, defendant claims that plaintiffs were represented by counsel when the SDNY action was settled and that he had no role in plaintiff's understanding of the value of the IRA account. He claims that when Redfern defaulted, he discovered for the first time that the

representations made by Redfern and Equity Trust (where the IRA was located) about the value of the IRA were false and the value was never the amount represented to him.

Defendant claims that Equity Trust never independently verified the amount in the IRA account. He also asserts that summary judgment would be premature and the parties need to engage in discovery first. Defendant insists he acted in good faith and was misled by both Redfern and Equity Trust.

In reply, plaintiffs argue that no discovery is necessary. They insist that defendant did nothing to verify the value of the IRA account or inquire about the procedures in the escrow agreement. Plaintiffs maintain that defendant did nothing and hoped that his client (Redfern) would not breach the agreement.

The Court denies that motion. This case clearly requires more discovery. Plaintiffs' causes of action against defendant for breach of fiduciary duty and for gross negligence are dependent on specific factual findings. Both claims make assertions about actions defendant took or failed to take. The Court is unable to make a ruling as a matter of law about these accusations at this stage of the litigation, particularly before paper discovery has concluded or depositions have been held.

And defendant raised issues of fact. His claim is that he relied on representations from Redfern and Equity Trust and has started a third-party action based on his theory. Ultimately, plaintiffs contend that defendant basically ignored his job as an escrow agent to enforce the terms of the settlement agreement and defendant claims he was misled by the third-party defendants. The Court cannot grant the motion under these circumstances. The Court declines to dismiss any of defendant's affirmative defenses as plaintiffs did not address them in detail in the moving papers; they merely asserted that these fourteen claims are "facially deficient."

**MS002**

Third-party defendant Equity Trust Company (“Equity Trust”) moves to dismiss the third-party complaint on the ground that it was not a party to the escrow agreement. Equity Trust claims that it made no representations about the value of the IRA account or the ability of any party to liquidate the assets held in this account. It points out that this account consists of memberships in two LLCs and that these non-traditional assets do not have a readily ascertainable value.

Equity Trust claims that when the account was opened, Redfern provided his own asset valuations to Equity Trust and that it later sent subsequent requests to the asset sponsors to verify the claimed value. However, Equity Trust admits that it never received responses and that the value of the account is what Redfern initially represented. It claims that it owes no independent duty to its customer or to defendant to value the assets in question. Equity Trust claims that it cannot be held liable for common law indemnification or under a contribution theory.

In opposition, defendant insists that Equity Trust cannot evade responsibility by relying on disclaimers sent to third-party defendant Redfern. He points out that Equity Trust’s quarterly statements to Redfern would be rendered utterly meaningless under Equity Trust’s arguments. Defendant claims that “Equity Trust represented to me the IRA Account held a total portfolio market value of \$444,027. Specifically, between December 2018 and December 2019, I had several telephone calls with representatives of Equity Trust, during which Equity Trust confirmed that the total portfolio market value of the IRA Account was equal to or greater than \$444,027. I also reviewed documents from Equity Trust during this time period purporting to assign the same value to the contents of the IRA Account” (NYSCEF Doc. No. 47, ¶ 5).

Defendant claims that when he tried to liquidate the account after receiving the demand from plaintiffs, he discovered that the value of the account represented was false (*id.* ¶ 6).

In reply, Equity Trust claims that the language included in the quarterly statements about the value of the assets requires dismissal. It claims that it provided proper disclaimers noting that the value was merely an estimate. Equity Trust maintains that defendant should have done his own due diligence before entering into the escrow agreement.

A Court considering a motion to dismiss for failure to state a cause of action “must give the pleadings a liberal construction, accept the allegations as true and accord the plaintiffs every possible favorable inference. We may also consider affidavits submitted by plaintiffs to remedy any defects in the complaint” (*Chanko v American Broadcasting Companies Inc.*, 27 NY3d 46, 52, 29 NYS3d 879 [2016]).

The Court denies the motion. Defendant clearly stated causes of action in his third-party complaint against Equity Trust. He claims that he had numerous phone calls with Equity Trust where the value of the IRA account was confirmed. Setting aside the significance of the disclaimers in the quarterly statements, Equity Trust cannot make such representations and then blame defendant. It may be that discovery reveals that defendant should not have relied on those representations but at this stage of the case, the Court cannot dismiss the third-party complaint.

With respect to the disclaimer language included in the quarterly statements, the Court finds that this does not compel dismissal at the motion to dismiss stage. Equity Trust admitted in its moving papers that it tried to verify the value but did not receive confirmation. Then, it decided to simply repeat the valuation placed on the assets by Redfern and produce quarterly statements reflecting that valuation.

As defendant pointed out, Equity Trust’s position is essentially that these statements have no meaning and they cannot be trusted. What is the purpose of producing such statements? Equity Trust knows that individuals and entities rely on these statements when making financial decisions. Certainly, illiquid assets such as these will likely have variability in their value. But Equity Trust’s position is that it can issue statements and not have any responsibility for the contents simply because it included some equivocating language at the end of the statement. That is not a basis to dismiss pursuant to CPLR 3211.

The Court stresses that it is not making any affirmative finding regarding Equity Trust’s culpability. It is merely finding that when accepting defendant’s allegations as true, as the Court must on a motion to dismiss, he claimed that he relied on Equity Trust’s representations (both oral and in the statements) which turned out to be false. These circumstances suggest that defendant has stated causes of action against Equity Trust.


Accordingly, it is hereby

ORDERED that the motion (MS001) by plaintiffs for summary judgment is denied; and it is further

ORDERED that the motion (MS002) by third-party defendant Equity Trust Company to dismiss the third-party complaint is denied.

Remote Conference: February 3, 2021.

10/14/2020  
DATE

  
ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  OTHER  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT  REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: