

Divine Capital, L.L.C. v Legado Inv. Group, L.L.C.

2020 NY Slip Op 33490(U)

October 23, 2020

Supreme Court, New York County

Docket Number: 650535/2018

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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DIVINE CAPITAL, L.L.C., KB CAPITAL, L.L.C.,

Plaintiff,

- v -

LEGADO INVESTMENT GROUP, L.L.C., ROD SIMON,
DOES 1-100 XXX

Defendant.

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INDEX NO. 650535/2018

MOTION DATE 06/02/2020

MOTION SEQ. NO. 011

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 011) 423, 424, 425, 426, 427, 428, 429, 430, 431

were read on this motion to/for

DISMISS

Upon the foregoing documents, Rod Simon's motion to dismiss is denied.

The Relevant Facts and Circumstances

Divine Capital, LLC (**Divine**) and KB Capital, LLC (**KB Capital**) (Divine and KB Capital together, the **Plaintiffs**) commenced this action to recover \$4,000,000 pursuant to (i) a Project Equity Reserve Agreement (the **Divine PERA**), dated May 26, 2017, by and between Divine and Legado Investment Group, LLC (**Legado**), and (ii) a Project Equity Reserve Agreement (the **KB PERA**), dated January 3, 2017, by and between Legado and KB Capital (NYSCEF Doc. Nos. 409-410). Although Divine provided Legado with \$4,000,000 to finance an assisted living project in New Windsor, New York, Legado allegedly diverted these funds to unrelated investments and has refused to return these funds to the Plaintiffs (NYSCEF Doc. No. 408, ¶¶ 1-

11). Mr. Simon is the chief executive officer and managing member of defendant Legado (*id.*, ¶ 23).

In their Second Amended Complaint, the Plaintiffs assert claims against Mr. Simon for breach of fiduciary duty (third cause of action), inducement of breach of fiduciary duty (fourth cause of action), conversion (fifth cause of action), unjust enrichment (sixth cause of action), an accounting (seventh cause of action), constructive trust (eighth cause of action), bailment (ninth cause of action), fraud (tenth cause of action), fraudulent concealment (eleventh cause of action), and negligent misrepresentation (twelfth cause of action) (NYSCEF Doc. No. 408).

Mr. Simon now moves to dismiss the claims for fraud (tenth cause of action), fraudulent concealment (eleventh cause of action), and negligent misrepresentation (twelfth cause of action).

Discussion

On a motion to dismiss, the pleadings are to be afforded a liberal construction and the facts as alleged in the complaint are accepted as true (*Leon v Martinez*, 84 NY2d 83, 87 [1994]).

Dismissal under CPLR § 3211 (a)(7) requires the court to assess whether the proponent of the pleading has a cause of action and not whether he has stated one (*id.*).

A. Tenth Cause of Action (Fraud) and Eleventh Cause of Action (Fraudulent Concealment)

The elements of a fraud claim are (i) a material misrepresentation of a fact, (ii) knowledge of its falsity, (iii) an intent to induce reliance, (iv) justifiable reliance by the plaintiff, and (v) damages

(*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). When a party to whom a misrepresentation is made has hints that it may be false, that party must employ a heightened degree of diligence and it cannot reasonably rely on such representations without making additional inquiry about their accuracy (*ACA Fin. Guar. Corp. v Goldman, Sachs & Co.*, 25 NY3d 1043, 1044 [2015]). In addition, “the question of what constitutes reasonable reliance is not generally a question to be resolved as a matter of law on a motion to dismiss” (*id.* at 1045).

Mr. Simon argues that the fraud claim must be dismissed because the Plaintiffs did not reasonably rely on the alleged misrepresentations. The Plaintiffs argue that they have sufficiently pled justifiable reliance and that Mr. Simon simply mischaracterizes the allegations. The court agrees.

The Plaintiffs allege that Mr. Simon falsely represented, *inter alia*, that he was an experienced real estate lender with access to a proprietary financing model that would guarantee investors a 6% return due to his special banking relationships (NYSCEF Doc. No. 408, ¶¶ 149-152, 154). Although the Plaintiffs attempted to verify Mr. Simon’s representations, they were unable to do so because Mr. Simon withheld further information on the basis that Legado was part of a “private ‘family office’” and the Plaintiffs were asked to trust Mr. Simon’s representations, which they did (*id.*, ¶¶ 153-154). According every favorable inference to the Plaintiffs as this court must do on a motion to dismiss, the pleadings fail to indicate that the Plaintiffs should have suspected that Mr. Simon’s representations were false at the time they were made so as to trigger the Plaintiffs’ heightened degree of diligence (*see generally DDJ Mgt., LLC v Rhone Group L.L.C.*, 15 NY3d 147, 154 [2010] [a plaintiff that has taken reasonable steps to protect itself

against deception should not be denied recovery merely because hindsight suggests that it might have been possible to detect the fraud when it occurred]).

In addition, the Plaintiffs allege that Mr. Simon held himself out as an expert investor and under these circumstances, the Plaintiffs have sufficiently pled that the allegedly misrepresented facts are peculiarly within Mr. Simon's knowledge to justify their reliance at this stage of the proceedings (*id.*, ¶¶ 42-43; *Schumaker v Mather*, 133 NY 590, 596 [1892] [defendant's representation lay peculiarly within his knowledge and plaintiff was entitled to rely absolutely upon it]). Accordingly, the Plaintiffs state a claim for the tenth cause of action for fraud and eleventh cause of action for fraudulent concealment and these claims are sustained.

B. Twelfth Cause of Action (Negligent Misrepresentation)

A claim for negligent misrepresentation requires that (i) a defendant had a duty to use reasonable care to impart correct information due to a special relationship existing between the parties, (ii) that the information was false, and (iii) that a plaintiff reasonably relied on the information (*Fresh Direct, LLC v Blue Martini Software, Inc.*, 7 AD3d 487, 489 [2d Dept 2004] [citations omitted]). A party is only exposed to liability for negligent misrepresentation where it possesses "unique or specialized expertise, or ... are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified" (*Kimmell v Schaefer*, 89 NY2d 257, 263 [1996]).

Mr. Simon argues that the Plaintiffs fail to allege a special or privity-like relationship to state a claim for negligent misrepresentation. The court disagrees.


The court notes that Mr. Simon did not move to dismiss the claim for breach of fiduciary duty against him, which allegations ground a claim for negligent misrepresentation (*Sebastian Holdings, Inc. v Deutsche Bank AG*, 78 AD3d 446, 447 [1st Dept 2010] [absence of fiduciary relationship is fatal to claim for negligent misrepresentation]).

In any event, even if the existence of a fiduciary relationship were called into question, the Plaintiffs have sufficiently pled the existence of a special relationship under the special facts doctrine, which requires that the material facts be within the knowledge of the defendants and that such information could not be discovered by plaintiffs through the exercise of ordinary intelligence (*Jana L. v W. 129th St. Realty Corp.*, 22 AD3d 274, 277-278 [1st Dept 2005]).

Here, Mr. Simon allegedly had unique knowledge of Legado's business due to his control over the private family office and his role as managing member and CEO of Legado, he held himself out as a highly skilled expert investor with substantial experience in commercial real estate lending, all of which is sufficient to plead a special relationship given Mr. Simon's specialized expertise which the Plaintiffs relied upon when \$4,000,000 was entrusted to Legado (*see also Kimmel*, 89 NY2d at 264 [special relationship existed where defendant was chief financial officer and chairman of the company that developed a project plaintiff invested in and as a result, defendant possessed expertise and was "uniquely situated" to evaluate economics of investments plaintiff made]; NYSCEF Doc. No. 408, ¶¶ 8, 35-43, 177-184). Accordingly, the branch of Mr. Simon's motion to dismiss the twelfth cause of action for negligent misrepresentation is denied.

Accordingly, it is

ORDERED that Mr. Simon's motion to dismiss is denied.



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10/23/2020
DATE

ANDREW BORROK, J.S.C.

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