Ye Shen v Zhou
2020 NY Slip Op 34321(U)
November 27, 2020
Supreme Court, Queens County
Docket Number: 715756/19
Judge: Richard G. Latin

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable **RICHARD G. LATIN**
Justice

IA PART 40

----------X

YE SHEN, XIAOLING WU, DONG WU, HAITAO WANG, AND CHENYAO RONG,

Plaintiff(s),

-against-

JOE ZHENGHONG ZHOU, RAYMOND KU, NYC METRO REGIONAL CENTER, LLC, AND NYC FUND, L.P,

Defendant(s).

----------X

Index No.: 715756/19
Motion Date: 9/10/2020
Motion Seq. Nos.: 3, 4

The following numbered papers read on the pre-answer motion by defendants Joe Zhenghong Zhou, (Zhou), Raymond Ku, (Ku), seeking to dismiss plaintiffs' complaint pursuant to CPLR § 3211 (a) (5) and (7), and on the separate motion by NYC Metro Regional Center LLC., (Metro), and NYC Fund, (Fund), seeking to dismiss plaintiffs' complaint, pursuant to CPLR § 3211 (a) (7).

PAPERS	NUMBERED
Notices of Motion - Affidavit - Exhibits	EF 31-35; 36-38
Answering Affidavits- Exhibits	EF 42-44
Reply Affidavits	EF 47-48

Upon the foregoing papers it is ordered that the motions are determined as follows:

In their complaint, the plaintiffs allege fraud in the inducement, fraud, breach of fiduciary duty, aiding and abetting the allegedly fraudulent scheme, violation of GBL §349, civil conspiracy. The relief sought is rescission and a return of their investments made to the Fund, as well as a permanent injunction to prevent the waste of their assets and as prevention of harm to others similarly situated. The defendants Zhou and Ku move pursuant to CPLR 3211 (a) (5) & (7) to dismiss plaintiffs' complaint as against each of them, contending the actions are time barred, that disclaimers in the Private Placement Memorandum, (PPM), preclude fraud claims, that there is no recognized cause of action in New York State for civil conspiracy, that there is no fiduciary duty owed to the plaintiffs, that since the project is ongoing, there are no damages to the plaintiffs, and that since these actions seek primarily monetary damages, that an injunction is not a suitable remedy available to the plaintiffs.

In support of their motion, the defendants Fund and Metro submit, inter alia, their attorney's affirmation, and a copy of the pleadings, and exhibits thereto, including a copy of the PPM. The defendants Zhou and Ku submit, inter alia, their attorney's affirmation. In opposition to the motion, the plaintiffs submit, inter alia, their attorney's affirmation. No affidavits of fact were submitted to support the defendants' motions.

At the outset, according to affidavits of service, the defendants were served on November 7, 2019, and according to the plaintiffs' complaint, the subject agreements with the defendants were executed, in or about May, 2014. CPLR 213 (8) provides that the time within which an action based upon fraud must be commenced is the greater of six years from the date the cause of action accrued or two years from the time the plaintiff or the person under whom the plaintiff claims discovered the fraud, or could with reasonable diligence have discovered it, whichever is later (*see O'Reilly v Klar,* 167 AD3d 920 [2d Dept 2018]). Since the plaintiffs claim to have signed on to the project, in May 2014, the action was commenced well within the 6 year statute of limitations for fraud (CPLR 213 [8]; *Lama Holding Co., v Smith Barney,* 88 NY2d 413 [1996]; *Loeuis v Grushin,* 126 AD3d 761 [2d Dept 2015]). Furthermore, since the underlying action is premised on allegations of fraud, and the plaintiffs are seeking the equitable remedies of rescission and injunction, the claim of breach of fiduciary duty also is subject to the 6 year statute of limitations (*see Monaghan v Ford Motor Co.,* 71 AD3d 848 [2d Dept 2010]). Therefore, that branch of the defendant Zhou and Ku's motion seeking dismissal of the counts for fraud and breach of fiduciary duty pursuant to CPLR 3211 (a) (5) is denied.

In consideration of a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only if the facts alleged fit within any cognizable legal theory (*see Leon v Martinez,* 84 NY2d 83 [1994]; *Travelsavers Enterprises, Inc., v Analog Analytics, Inc.,* 149 AD3d 1003 [2d Dept 2017]). An affidavit submitted by the movant will almost never warrant dismissal under CPLR 3211 unless it establishes conclusively that the proponent of the pleading has no cause of action (*see Phillips v. Taco Bell Corp.,* 152 AD3d 806 [2d Dept 2017]; *Bokhour v. GTI Retail Holdings, Inc*., 94 AD3d 682 [2d Dept 2012]). Dismissal should not be granted unless it has been shown that a material fact as claimed by the proponent to be one is not a fact at all, and unless it can be said that no significant dispute exists regarding it (*see Guggenheimer v. Ginzburg*, 43 NY2d 268 [1977]). However, if it is shown that a material fact as claimed by the pleader is not a fact at all, dismissal is warranted (*id.; MJK Building Corp., v Fayland Realty Inc.,* 181 AD3d 860 [2d Dept 2020]).

The elements of a cause of action for fraud or fraudulent inducement, require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages (*see Pludeman v Northern Leasing Systems Inc.,*10 AD3d 386 [2008]; *Qureshi v Vital Trans. Inc.,* 173 AD3d 1076 [2d Dept 2019]; *Ross v. Louise Wise Servs., Inc.*, 8 NY3d 478 [2007]). Relief in the form of rescission is an equitable remedy, and actual damages need not be plead, however, it is noted that far more than the money invested will be lost if the purveyors of the project never intended to fulfill its very purpose of providing a qualifying investment for the EB5 investors. Whether a party's reliance is justified is often a question of fact not amenable to resolution on a motion to dismiss (*see ACA Fin.Guar. Corp., v Goldman, Sachs & Co.,* 25 NY3d 1043

[2015]). A fiduciary relationship exists when confidence is reposed on one side and there is resulting superiority and influence on the other (*see AG Capital Funding Partners, L.P v. State St. Bank & Trust Co.*, 11 NY3d 146 [2008]). Partners owe fiduciary duties to one another, and a general partner owes fiduciary duties to the limited partners (*see Slocum Realty Corp., v Schlesinger,* 162 AD3d 939 [2d Dept 2018]). Ascertaining the existence of a fiduciary relationship inevitably requires a fact-specific inquiry (*see Roni LLC, v Arfa,* 18 NY3d 846 [2011]).

Although New York does not recognize civil conspiracy to commit a tort as an independent cause of action, however it may be plead if the plaintiff alleges a cognizable tort, coupled with an agreement between the conspirators regarding the tort, and an overt action in furtherance of the agreement (*see Blanco v Polanco,* 116 AD3d 892 [2d Dept 2014]; *Faulkner v. City of Yonkers*, 105 AD3d 899 [2d Dept 2013]). A plaintiff may plead the existence of a conspiracy in order to connect the actions of the individual defendants with an actionable, underlying tort and establish that those actions were part of a common scheme (*see JP Morgan Chase Bank, N.A., v Hall,* 122 AD3d 576 [2d Dept 2014]; *Blanco,* 116 AD3d 892).

As to the plaintiffs' claims under GBL § 349, a plaintiff must allege that (1) the challenged transaction was consumer-oriented; (2) defendant engaged in deceptive or materially misleading acts or practices; and (3) plaintiff was injured by reason of defendant's deceptive or misleading conduct (*see Denenberg v. Rosen*, 71 AD3d 187 (1st Dept 2010).This transaction involved sizeable investments by each plaintiff, of over $500,000 each, and a clear statement in the PPM describing this investment as suitable only for sophisticated investors. There was no sale of any consumer product or service, but instead consisted of investments made in the form of loans to the project to be secured by apparently secondary liens upon the property. These transactions were not the modest type of transaction the statute was primarily intended to reach (*see New York University v Continental Ins. Co.*, 87 NY2d 308 [1995]; *Denenberg*, 71 AD3d 187).

CPLR § 3106 (b) provides that where a cause of action is based upon fraud, the circumstances constituting the wrong shall be stated in detail. However, the pleading requirements of CPLR 3016(b) may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct (*see Pludeman v. Northern Leasing Sys., Inc.*, 10 N.Y.3d 486 [2008]). Allegations of fraud, and fraudulent inducement are not duplicative as a matter of law, and can not be said to be duplicative at this early stage of the litigation (*see Ramirez v Donado Law Firm,* 169 AD3d 940 [2d Dept 2019]).

In their complaint, the plaintiffs allege that Fund, as the limited partner, along with its general partner, Metro, made knowingly false misrepresentations to the plaintiffs in order to induce them to participate as investors in the subject hotel development project, as a means to participate in the EB5 immigration program of the United States to gain permanent residence status. The EB5 program began in 1991 seeking a pathway for Chinese nationals to enter the United States and become permanent residents. One of the conditions of this program is that one invest a substantial amount of money into a qualified project which, among other things, creates or sustains a minimum of ten jobs per investor. The plaintiffs allege that although the PPM states that Fund was created for the very purpose of being a Qualifying Investment for those seeking the benefits of the EB5 immigration

program. The executive officers of each entity provided biographies attesting to their experience and expertise in the immigration business. Implicit in these representations is the promises that the officers involved take all necessary actions to assure that the project meet the requirements of the EB5 program. The plaintiffs allege that based upon the performance and status of the project, this was never intended to be the case, and that they were fraudulently induced to trust in these representations and invest their money.

Among other false representations made by the defendants, and relied upon by the plaintiffs, included a representation that former New York State Governor David Paterson endorsed the project, and according to the PPM, had ostensibly obtained millions of dollars of funding towards the completion and success of the project. In addition, alleged misrepresentations were made as to the project's financial stability, including statements that the project had secured sufficient financial commitments to complete the project even without their additional investments. Another false statement allegedly relied upon by the plaintiffs, referred to the experience and savvy of the particular construction company used by the project.

The plaintiffs contend that these representations were not only false, but that the defendants knew them to be false when made, intending to entice the plaintiffs to invest millions of dollars into this project. The plaintiffs allege that they reposed great trust in the Fund and Metro chief executive officers who touted themselves as experts in the EB5 program, thus taking advantage of their desires and trust in them to help them become permanent residents of the United States. Specifically, they assert that the representation as to former Gov. Paterson was, in fact, false, that he was not involved with the project, and had not endorsed it. They claim that both Zhou and Ku, knew or should have known that the project lacked sufficient funding, and did not have an adequate plan to create or support enough jobs to comply with the job creation requirement of the EB5 program for its EB5 investors.

With regard to the allegations of breach of fiduciary duties against Zhou and Ku, the plaintiffs allege that the EB5 immigration program was intertwined with this investment program, and was the sole reason why the plaintiffs would invest in such a program. The PPM states basically the same in its initial paragraphs. In this regard, it is alleged that in touting their expertise in the EB5 program, that Ku, and Zhou, especially as an immigration lawyer, and as the CEOs of the project, each assumed the fiduciary responsibility to protect the interests of the Chinese national investors, at least insofar as planning and creating the necessary 890 jobs that are required by the EB5 program. In addition, the plaintiffs assert that although claiming the construction company was a crucial element in the success of the project due to their years of experience, in truth and in fact, prior to the plaintiffs signing onto the project, the defendants knew that the owner and key employee of the construction company had passed away, and that the construction company was engaged in the throes of litigation and potential financial ruin, as the deceased owner's heirs fought for control of the construction company in Surrogates Court.

Since all the representations were attributed to the Fund and Metro, either contained in the PPM itself, or the marketing materials distributed to potential investors, and since Zhou and Ku were the chief executive officers of each entity, it is alleged that they worked together, in concert, for the presentation and operation of the alleged fraudulent

scheme.

To further support their claim of fraudulent intent, the plaintiffs allege the failure of the project to obtain proper permits over an extensive period of time, the allegedly incessant delays which inure to the benefit of the limited and general partners, in that they receive, what is alleged to be fees, stipends and allowances beyond that which was represented in the PPM, which are paid as time slips by in increasing amounts eating into the available funds, that the increase of EB5 investors from 89 to 99, increased the required job creation number from 890 to 990.

The gist of the plaintiffs' complaint, is that the very construct of the hotel project, included promises that the project would comply with the requirements of the EB5 program for the benefit of each of the plaintiffs seeking permanent resident status in the United States, but that instead, it consisted of allegedly fraudulent promises never intended to be fulfilled, for the self aggrandizement of the defendants.

Here, assuming the facts alleged to be true and according the plaintiffs the benefit of every favorable inference, (*see Leon,* 84 NY2d 83 [1994]; *Travelsavers Enterprises, Inc.,* 149 AD3d 1003 [2d Dept 2017]), the plaintiffs have set forth in sufficient detail the cognizable causes of action to recover damages and equitable relief requested for fraudulent inducement, fraud, aiding and abetting a fraud, breach of fiduciary duty, (*see Slocumj Realty Corp.,* 162 AD3d 939), and civil conspiracy to commit a fraud (*see Pludeman,* 10 NY3d 486; *Hiu Ian Cheng v. Salguero*, 164 AD3d 768 [2d Dept 2018]). However, the plaintiffs' claims pursuant to GBL § 349 do not make out what can be considered to be a consumer oriented transaction as required by statute (*see New York University,* 87 NY2d 308).

At this time, without any affidavits of fact to contest plaintiff's allegations in its complaint, which, for the purposes of this motion, must be assumed as true, the plaintiff's cause of action seeking a permanent injunction will not be addressed, as it may be, that if the allegations are shown to be true, that a permanent injunction may be considered to curtail any other allegedly fraudulent activity.

Accordingly, the defendants Zhou and Ku's motion to dismiss pursuant to CPLR 3211 (a) (5) is denied, and the separate motions by defendants Zhou and Ku, and Fund and Metro to dismiss the plaintiffs' complaint pursuant to CPLR 3211 (a) (7) are granted only insofar as dismissing Count 7 of the plaintiffs' complaint based upon GBL § 349, but are denied in all other respects.

FILED

Dated: November 27, 2020

11/27/2020
1:43 PM

RICHARD G. LATIN, J.S.C.

COUNTY CLERK
QUEENS COUNTY