

Karp v Madison Realty Capital L.P.

2021 NY Slip Op 32324(U)

November 15, 2021

Supreme Court, Kings County

Docket Number: Index No. 513756/21

Judge: Leon Ruchelsman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8
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ELI KARP, HELLO NOSTRAND LLC, 271 LENOX LLC
AND HELLO FLATBUSH LLC,

Plaintiffs,

Decision and order

- against -

Index No. 513756/21

MADISON REALTY CAPITAL, L.P.,
JOSHUA B. ZEGEN, MARK GORMLEY,
1580 NOSTRAND AVENUE LLC,
1357 FLATBUSH AVENUE 1 LLC,
BROOKLYN THREE LLC,
MRC RE HOLDINGS II LLC,
271 LENOX LENDER LLC, and
FULTON STREET LENDER LLC,

Defendants,

November 15, 2021

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PRESENT: HON. LEON RUCHELSMAN

The defendants have moved pursuant to CPLR §3211 seeking to dismiss the complaint on the grounds it fails to state any cause of action. The plaintiffs filed an amended complaint and also opposed the motion. Papers were submitted by the parties and after reviewing all the arguments this court now makes the following determination.

On December 6, 2017 the plaintiff Hello Nostrand entered into a loan agreement with non-party Prophet Mortgage Opportunities LP whereby Hello Nostrand borrowed \$63,000,000 for a construction project located at 1580 Nostrand Avenue in Kings County. To secure the notes underlying such loan the plaintiff executed mortgages and security agreements. On June 7, 2019 defendant Madison Realty Capital LP purchased the loan documents from Prophet. The first complaint provides great detail explaining how the defendants essentially engaged in predatory

lending practices and manufactured defaults against the plaintiffs. That complaint alleged causes of action for fraud, breach of contract and a breach of the covenant of good faith and fair dealing. On August 10, 2021 the defendants filed a motion to dismiss. On September 15, 2021 the plaintiff filed a stipulation adjourning the return date of the motion to October 18, 2021 and required opposition papers by October 1, 2021. On October 5, 2021 defendant's counsel notified plaintiff's counsel that no opposition had yet been filed. The plaintiff's counsel responded that they were under the belief the opposition papers were due on October 8. Plaintiff's counsel indicated he would file them within a few days and afford defendant's counsel ample time in which to file a reply. Plaintiff's counsel did not file opposition within a few days. However, on October 15, 2021 filed an amended complaint as well as a cross-motion seeking to disqualify defendant's counsel. Further, on October 18, 2021 the plaintiff opposed the motion to dismiss. The court afforded defendant's counsel an opportunity to reply to the opposition to the motion to dismiss.

Conclusions of Law

It is well settled that upon a motion to dismiss the court must determine, accepting the allegations of the counterclaim as true, whether the party can succeed upon any reasonable view of those facts (Dauids v. State, 159 AD3d 987, 74 NYS3d 288 [2d

Dept., 2018])). Further, the allegations of the counterclaim are deemed true and all reasonable inferences may be drawn in favor of the plaintiff (Dunleavy v. Hilton Hall Apartments Co., LLC, 14 AD3d 479, 789 NYS2d 164 [2d Dept., 2005]). Whether the counterclaim will later survive a motion for summary judgment, or whether the party will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR §3211 motion to dismiss (see, EBC I, Inc. v. Goldman Sachs & Co., 5 NY3d 11, 799 NYS2d 170 [2005]).

It is further well settled that to succeed upon a claim of breach of contract the plaintiff must establish the existence of a contract, the plaintiff's performance, the defendant's breach and resulting damages (Harris v. Seward Park Housing Corp., 79 AD3d 425, 913 NYS2d 161 [1st Dept., 2010]).

First, the amended complaint was filed late and without court approval. Thus, it need not be considered. Notwithstanding the lateness of the opposition to the motion to dismiss the court will address the merits of the arguments contained in the motion to dismiss and the opposition.

The plaintiff executed a forbearance agreement which governs the claims asserted in this case. Paragraph 4 of the agreement states that "the Borrower and Guarantor hereby acknowledge and agree that they have no offsets, defenses, claims, or counterclaims against the Lender, its predecessors in interest,

or any of their respective parents, subsidiaries, affiliates, members, managers, partners, agents, officers, principals, directors, shareholders, employees, attorneys, representatives, servicers, participants, predecessors, successors, assigns, or any person holding an interest in the Existing Loan...with respect to the Existing Loan, the Existing Loan Documents, or the Existing Loan Obligations, including, without limitation, the Existing Default, or otherwise, and that if the Borrower or the Guarantor now have, or ever did have, any offsets, defenses, claims, or counterclaims whatsoever against the Lender Parties, whether known or unknown, foreseen or unforeseen (regardless of by whom raised), at law or in equity (or mixed), from the beginning of the world through the Effective Date and through the time of execution of this Agreement, all of them are hereby expressly WAIVED, and the Borrower and Guarantor each hereby remises, RELEASES, acquits, and discharges the Lender Parties from any liability therefor" (Id).

The plaintiffs do not really argue the above clause bars the breach of contract and breach of good faith and fair dealing causes of action. Instead the plaintiff assert the amended complaint addresses claims that are not governed by such waiver and release clauses and that the amended complaint validly asserts such claims. However, the amended complaint required prior court approval. A motion to dismiss that is addressed to

the merits of a case requires opposition to the motion and such opposition cannot take the form of an amended pleading (Livadiotakis v. Tzitzikalokis, 302 AD2d 369, 753 NYS2d 898 [2d Dept., 2003]). The arguments presented in the opposition that plaintiff's counsel failed to inform them of such waiver and release clauses and failed to explain to them the consequences of such clauses does not undermine their applicability since a party that signs and agrees to a contract is generally presumed to know the contents of the contract and to have assented to its terms (Choung v. Allstate Insurance Co., 283 AD2d 468, 724 NYS2d 882 [2d Dept., 2001]). The plaintiffs might have malpractice claims against their counsel if all the allegations in this regard prove true, however, as noted, there is no basis upon which to impugn the waiver and release clauses themselves. Therefore, the motion seeking to dismiss the breach of contract and breach of good faith and fair dealing causes of action are granted.

Turning to the fraud claim, it is well settled that to successfully plead fraud the claims must be plead with particularity (Lee Dodge Inc., v. Sovereign Bank, N.A., 148 AD3d 1007, 51 NYS3d 531 [2d Dept., 2017]). Thus, to successfully plead fraud the pleadings must contain allegations of a representation of a material fact, falsity, scienter, reliance and injury (Moore v. Liberty Power Corp., LLC, 72 AD3d 660, 897 NYS2d 723 [2d Dept., 2010]). Further, the allegations must be

"stated in detail" (CPLR §3016(b)) and must include dates, details and items to the extent relevant. (see, Orchid Construction Corp., v. Gottbetter, 89 AD3d 708, 932 NYS2d 100 [2d Dept., 2011]).

In this case, essentially, the plaintiff argue the defendants made various promises to the plaintiff and failed to fulfill those promises. As noted, specifically, the complaint alleges that "on July 1, 2019, during a meeting at defendant Madison Capital offices, defendants Madison Capital, Zegen, and Gormley represented to plaintiff Karp that they would assist him to complete the Nostrand Project, would work with him to upsize the Loan, and would provide him with requested loan advances" (see, Complaint ¶ 335). Further the complaint asserts that "Instead, defendants Zegen and Gormley intended to engage in a fraudulent scheme of delaying the funding of the Nostrand Project to prevent its timely completion to manufacture an alleged default by plaintiff Hello Nostrand on the Loan; to trigger millions of dollars in default interests at the default interest rate of 24%; and ultimately to obtain ownership of the building with the commencement of a foreclosure proceeding (see, Complaint ¶ 337). However, it is well settled that "although fraud may exist in the inducement of a contract, where, as here, it is based solely on the failure to perform a promised future act, plaintiff's remedy lies in an action on the contract" (see,


Locascio v. James V. Acquavella M.D. P.C., 185 AD2d 689, 586 NYS2d 78 [4th Dept., 1992]). Thus, to assert a misrepresentation, the misrepresentation must concern a present fact, not a future promise (see, Scialdone v. Stepping Stones Associates L.P., 148 AD3d 953, 50 NYS2d 413 [2d Dept., 2017]). The complaint in this case does not allege any misrepresentation of any present fact. Rather, it solely concerns itself with promises made to the plaintiffs that were not kept. Therefore, the motion seeking to dismiss the fraud claim is granted.

Consequently, the motion seeking to dismiss the complaint is granted and the cross-motion seeking to disqualify defendant's counsel is now moot.

So ordered.

ENTER

DATED: November 15, 2021
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC