

Goldberg v KOSL Bldg. Group LLC

2022 NY Slip Op 34957(U)

December 28, 2022

Supreme Court, Westchester County

Docket Number: Index No. 61968/2022

Judge: Damaris E. Torrent

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
MICHAEL GOLDBERG and KATIE GOLDBERG,

Plaintiffs,

-against-

KOSL BUILDING GROUP LLC, COOPER LOTS,
LLC, BOBBY BEN-SIMON, XYZ COMPANIES
and JOHN OR JANE DOES,

Defendants.

-----X
DAMARIS E. TORRENT, A.J.S.C.

DECISION AND ORDER

Index No.: 61968/2022

Motion Date: 11/01/2022

Seq. No. 1

The following papers numbered 1 to 13 were read on this motion (Seq. No. 1) by defendants for an order dismissing certain causes of action in the complaint pursuant to CPLR 3211(a)(1) and (7):

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion / Affirmation (Lang) / Affidavit (Ben-Simon) / Exhibits A – E / Memorandum of Law	1 – 9
Memorandum of Law in Opposition / Affirmation (Swanson) / Exhibit 1	10 – 12
Memorandum of Law in Reply	13

Upon the foregoing papers, the motion is granted in part and denied in part.

This action arises out of a failed real estate transaction pursuant to which plaintiffs entered into contracts with defendants for the purchase of a parcel of real property in Scarsdale, New York, (the purchase contract) and the construction thereon of a luxury home (the construction contract). Plaintiffs’ complaint asserted causes of action for (1) declaratory judgment (in connection with certain deposits which have been retained by defendants), (2) fraud, (3) breach of contract, and (4)

breach of the implied duty of good faith and fair dealing. The complaint throughout also alleged that defendant Ben-Simon treated the defendant companies as his alter ego and sought punitive damages.

By Notice of Motion filed on August 17, 2022, defendants seek an order dismissing the first, second and fourth causes of action in the complaint as well as any claims for alter ego liability or piercing the veil and any demand for punitive damages. Plaintiffs filed an Amended Complaint on October 11, 2022, supplementing the allegations in the original complaint and asserting three new causes of action: (1) aiding and abetting fraud against defendants Ben-Simon and Cooper Lots, LLC (Cooper), (2) deceptive business practices in violation of GBL § 349 against Ben-Simon and defendant KOSL Building Group LLC (KOSL), and (3) false advertising in violation of GBL § 350 against Ben-Simon and KOSL. Defendants elected to have their motion applied to the amended complaint. Accordingly, the motion seeks dismissal of the First (declaratory judgment), Second (Fraud), Third (aiding and abetting fraud), and Fifth (breach of implied duty of good faith and fair dealing) causes of action in the First Amended Complaint.

Declaratory Judgment

The First cause of action seeks a declaration of plaintiffs' rights against defendants with respect to deposits paid by them on the purchase contract and the construction contract. Plaintiffs allege that defendants have wrongfully asserted rights to the deposits. Defendants seek dismissal of this cause of action, asserting that it is duplicative of the cause of action for breach of contract (now numbered Fourth in the amended complaint).

In opposition, plaintiffs contend that the claims are not duplicative, and even if they did overlap, the breach of contract claim requires determination of a broad range of factual issues which need not be determined on the declaratory judgment claim, and that determination of those

factual issues would unduly delay determination of the much narrower issue of plaintiffs' right to recover the deposits. In reply, defendants contend that the allegations in the First cause of action, if proven, would support a claim for breach of contract, and thus that the declaratory judgment claim cannot stand.

As a general rule, a cause of action for declaratory judgment "is unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action, such as breach of contract" (*187 Schermerhorn Owners Co., LLC v Board of Mgrs. of the Be @Schermerhorn Condominium*, 186 AD3d 1467, 1468 [2d Dept 2020] [citations omitted]). Plaintiffs present no authority to the contrary and make no persuasive argument as to why the remedy available in their breach of contract cause of action is not adequate. The First cause of action in the amended complaint thus is dismissed.

Fraud; Aiding and Abetting Fraud

The Second cause of action asserts that Ben-Simon, acting by and through his alter-ego entities KOSL and Cooper, induced plaintiffs to enter into the subject transaction by making several misrepresentations and omissions of material fact as to, inter alia, the status of KOSL as a licensed contractor with an extensive operational history and good financial standing, and the absence of any disputes relating to title to the property. Plaintiffs further assert that defendants possessed superior knowledge of such facts, that plaintiffs justifiably relied on these representations and omissions in entering into the transaction, and that defendants knew plaintiffs would rely on such facts, which plaintiffs could not have discovered by any legally required inquiry. The Third cause of action asserts that Ben-Simon and Cooper aided and abetted KOSL's fraud by intentionally concealing information which they knew KOSL had misrepresented to

plaintiffs and by wrongfully demanding a time-of-the-essence closing in an effort to cause plaintiffs to complete the transaction without conducting any further investigation.

Defendants contend that the Second cause of action must be dismissed because it fails to plead any actionable misrepresentation. Defendants contend that any failure to disclose is not actionable in the absence of a fiduciary duty, that defendants are immune as to any undisclosed deficiencies under the doctrine of caveat emptor, and that the information plaintiffs claim to have discovered after the subject contracts were executed was at all relevant times available to plaintiffs by the exercise of ordinary diligence. Further, defendants contend that plaintiffs cannot claim justifiable reliance in light of the plain language of the contracts, which recites that neither party relied on any statement made by anyone else and that all prior representations and statements are merged therein.

Plaintiffs in opposition to the motion do not address defendants' contention that the fraud claim is barred by plaintiffs' lack of diligence in taking steps to protect themselves. Plaintiffs do not advance any argument that the information they claim to have uncovered after entering into the subject contracts as to the status of KOSL or title to the subject property was not discoverable to them at any time. "The general rule was enunciated by this court over a half century ago... that if the facts represented are not matters peculiarly within the party's knowledge, and the other party has the means available to him of knowing, by the exercise of ordinary intelligence, the truth, or the real quality of the subject of the representation, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations" (*Dannan Realty Corp. v Harris*, 5 NY2d 317, 322 [1959] [citation omitted]).

The information plaintiffs assert they uncovered only after entering into the subject contracts, relating to defendants' alleged misrepresentations as to the status of KOSL as a licensed

contractor with an extensive operational history and the absence of any disputes relating to ownership of the subject parcel, all were matters of public record and thus discoverable to plaintiffs at all relevant times. Plaintiffs' fraud claims thus fail as a matter of law. The related claim for aiding and abetting fraud cannot stand in the absence of a viable fraud claim. The Second and Third causes of action in the amended complaint thus are dismissed.

Breach of the Implied Duty of Good Faith and Fair Dealing

The Fifth cause of action in the amended complaint asserts that defendants acted in bad faith by, inter alia, providing incomplete disclosures to plaintiffs and their lender, denying the existence of any obligation under the contracts to provide further disclosures or otherwise cooperate in plaintiffs' attempt to secure financing, wrongfully issuing a time-of-the-essence closing demand in an attempt to prevent plaintiffs from conducting further diligence, and asserting claims to the deposits despite knowledge that they have no claim to same, all of which conduct was calculated to and did deprive the plaintiffs of the fruits of their agreement.

Defendants contend that the claimed wrongs are not distinguishable from the conduct underlying plaintiffs' breach of contract claim, and that any damages in connection with the conduct alleged in this cause of action are necessarily tied to damages associated with the claimed breach of contract. Plaintiffs contend that they have alleged additional wrongdoing beyond the conduct which forms the basis for the breach of contract claim, and thus that the Fifth cause of action is not duplicative of that claim.

A close review of the claims for breach of contract and breach of the implied duty of good faith and fair dealing reveals that the claims are based on the same conduct, to wit: defendants' failure to cooperate with plaintiffs' lender, failure to file revised building plans, failure to disclose disputes relating to the property, and wrongfully issuing a time-of-the-essence closing demand (*see*

First Amended Complaint, NYSCEF Doc. # 20, at ¶¶ 122, 133). Accordingly, it is clear that the alleged breach of the covenant of good faith and fair dealing is “intrinsically tied to the damages allegedly resulting from a breach of the contract” (*Deer Part Enters., LLC v Ail Sys., Inc.*, 57 Ad3d 711, 712 [2d Dept 2008]). The Fifth cause of action thus is dismissed as duplicative of the breach of contract claim.

Piercing the Veil / Alter-Ego Liability

Defendants seek dismissal of any claim in the amended complaint seeking to pierce the corporate veil and impose personal liability on Ben-Simon for the claimed wrongs of KOSL and Cooper. Defendants contend that the complaint fails to allege specific facts sufficient to warrant imposing personal liability on Ben-Simon for the actions of the defendant companies. Defendants contend that a mere breach of contract is not sufficient, regardless of Ben-Simon’s alleged complete domination of the companies, to warrant imposing personal liability.

Plaintiffs contend that Ben-Simon negotiated the subject contracts as a single transaction through his wholly-owned entities, then caused one of the entities to breach its obligations and simultaneously caused the other to attempt to extort plaintiffs,¹ and assert that such allegations are sufficient to survive a motion to dismiss a claim to pierce the veil.

The conduct complained of in plaintiffs’ attempts to impose personal liability on Ben-Simon consists merely of his participation in the alleged breach of the subject contracts on behalf of the defendant companies. “A simple breach of contract, without more, does not constitute a fraud or wrong warranting the piercing of the corporate veil” (*Boncasa Realty Co., LLC v*

¹ The Court notes that the alleged attempt to “extort” plaintiffs consists merely of the demanding of a time-of-the essence closing, and that plaintiffs cite no authority supporting their colorful choice of language in characterizing such conduct.

Salvatore, 109 AD3d 946 [2d Dept 2013] [citation omitted]). To the extent to which the amended complaint can be construed to assert a claim to pierce the corporate veil, such claims are dismissed.

Punitive Damages

In their moving papers, which addressed the original complaint, defendants sought dismissal of plaintiffs' claims for punitive damages on the ground that plaintiffs did not plead an independent compensable tort or that defendants' conduct was part of a pattern of similar conduct directed at the public generally. However, the amended complaint adds causes of action for violations of GBL §§ 349 and 350, which allege a pattern of conduct that is directed at consumers and the public generally (*cf Lynch v McQueen*, 309 AD2d 790 [2d Dept 2003]). Defendants in their reply do not address the allegations of wrongful consumer-oriented conduct in the amended complaint. The motion insofar as it seeks dismissal of the claim for punitive damages thus is denied.

Accordingly, it is hereby

ORDERED that the motion is granted to the extent of dismissing the First, Second, Third and Fifth causes of action in the First Amended Complaint and any claim to pierce the corporate veil, and the motion is otherwise denied; and it is further

ORDERED that, within ten (10) days of the date hereof, defendants shall serve a copy of this Decision and Order, with notice of entry, upon plaintiffs; and it is further

ORDERED that within ten (10) days of service of notice of entry, defendants shall file proof of said service via NYSCEF; and it is further


ORDERED that the parties shall complete and file to NYSCEF a Preliminary Conference Stipulation to be so ordered, a copy of which is available on the Court's web site at:

https://www.nycourts.gov/LegacyPDFS/courts/9jd/civilCaseMgmt/12_6_PC.pdf; on or before
January 27, 2023.

The foregoing constitutes the Decision and Order of the Court.

Dated: December 28, 2022
White Plains, New York

ENTER:


HON. DAMARIS E. TORRENT, A.J.S.C.

FILED VIA NYSCEF