

Cimen v HQ Capital Real Estate L.P.

2023 NY Slip Op 30820(U)

March 13, 2023

Supreme Court, New York County

Docket Number: Index No. 656205/2020

Judge: Joel M. Cohen

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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 HANNA CIMEN, JAN BORCHERS, PANSE
 VERMOGENSVERWALTUNG GMBH, JURGEN
 NEUHAUS BETEILIGUNGSGESELLSCHAFT MBH, EMS
 VEJEN APS, TREGALE GROUP LIMITED, AL YASRA
 INVESTMENT COMPANY LIMITED, REDINA HOLDINGS
 LIMITED, THE RMH TRUST, TAS INTERNATIONAL
 FOUNDATION

Plaintiffs,

- v -

HQ CAPITAL REAL ESTATE L.P. F/K/A REAL ESTATE
 CAPITAL PARTNERS LIMITED PARTNERSHIP, RECAP
 CLINTON HILL GP, LLC, RECAP CLINTON HILL
 (CAYMAN) GP, LLC, RECAP CLINTON HILL INVESTORS
 MANAGER, LLC, RECAP CLINTON HILL (CAYMAN), LP,
 RECAP CLINTON HILL INVESTORS, LLC,

Defendants.

INDEX NO. 656205/2020
 MOTION DATE 02/14/2023
 MOTION SEQ. NO. 002

**DECISION + ORDER ON
 MOTION**

-----X
 HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 46, 47

were read on this motion to DISMISS AMENDED COMPLAINT.

This case arises from Defendants'¹ solicitation of Plaintiffs'² investment in a limited partnership in certain properties located in Brooklyn, New York. Defendants move to dismiss Plaintiffs' Amended Complaint on the ground that it fails to adequately plead viable claims

¹ HQ Capital Real Estate L.P. f/k/a Real Estate Capital Partners L.P.; RECAP Clinton Hill GP, LLC; RECAP Clinton Hill (Cayman) GP, LLC; RECAP Clinton Hill Investors Manager, LLC; RECAP Clinton Hill (Cayman), LP; and RECAP Clinton Hill Investors, LLC (collectively, "Defendants")

² Hanna Cimen, Jan Borchers, Panse Vermögensverwaltung GMBH; Jurgen Neuhaus Beteiligungsgesellschaft MBH; EMS Vejen APS; Tregale Group Limited; Al Yasra Investment Co. Limited; Redina Holdings Limited; The RMH Trust; and TAS International Foundation (collectively, "Plaintiffs")

based on fraud, gross negligence, and breach of fiduciary duty. For the following reasons, the motion is **granted**.

LEGAL STANDARD

When assessing a motion to dismiss under CPLR 3211 (a)(7), the Court gives “the pleadings a liberal construction, accept[s] the allegations as true, and accord[s] the plaintiffs every possible favorable inference” (*Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46, 52 [2016]). The question “is whether plaintiffs have a cause of action, not whether they have properly labeled or artfully stated one” (*id.*). However, “bare legal conclusions and factual claims, which are either inherently incredible or flatly contradicted by documentary evidence” are insufficient to withstand a motion to dismiss (*JFK Holding Co., LLC v City of New York*, 68 AD3d 477, 477 [1st Dept 2009] [internal quotation omitted]).

DISCUSSION

a. Plaintiffs’ First and Second Causes of Action – Fraud and Negligent Misrepresentation

To state a viable claim of fraud, a party must allege “material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff, and damages” (*Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009] [internal citation omitted]). Under CPLR 3016 (b), claims based on alleged instances of fraud or misrepresentation must be pled with particularized facts, though that requirement “should not be confused with unassailable proof of fraud” (*Pludeman v. Northern Leasing Systems, Inc.*, 10 NY3d 486, 492 [2008]). Similarly, “the tort of negligent misrepresentation involves most of the same elements as fraud, with a negligence standard substituted for the scienter requirement”

(*M&T Bank Corp. v Gemstone CDO VII, Ltd.*, 23 Misc.3d 1105(A), at *14 [Sup. Ct. Erie Cnty., April 7, 2009] [internal citations omitted], *aff'd as mod*, 68 AD3d 1747 [4th Dept 2009]).

Plaintiffs' principal allegations of fraud and misrepresentation in the Amended Complaint concern alleged projections and estimates contained in Defendants' Investment Memorandum with respect to (i) renovation rates of apartments in the properties; (ii) market rental rates of three-bedroom apartments in the vicinity; and (iii) the projected annual vacancy losses (*see* NYSCEF 37 at 11). However, Plaintiffs fail to adequately allege that these projections were based on actionable *factual* misrepresentations, or that they did not reflect the views of Defendants, with the requisite particularity to sustain a claim for fraud or misrepresentation.

Turning first to Plaintiffs' claims based on the projected renovation rates, Plaintiffs allege Defendants' Investment Memorandum "falsely stated that an annual turnover rate of 23 apartments per year was in line with the 'portfolio's historical natural turnover rate'" (NYSCEF 26 ¶ 140). This allegation is based on the fact that "a maximum of only 65 apartments would be available from 2015 through 2018 to effectuate the contemplated" renovations (*id.* ¶ 147). This was due, in part, to certain apartments being subject to the Home Written Agreement (*id.* ¶ 146). As Plaintiffs point out, "the Investment Memorandum thus projected that 92% of the available apartments would be vacated and renovated during such period" and, therefore, Plaintiffs allege Defendants "had no reasonable reason to believe that such number would be vacated and renovated" (*id.* ¶¶ 149-150).

However, the Investment Memorandum *disclosed* that the 52 apartment units subject to the HOME Written Agreement would not be "candidates for the upgrade strategies" until the program's expiration in 2018 (NYSCEF 33 at 3). Plaintiffs have not adequately or specifically alleged why Defendants' projections, with that disclosure, constituted a misstatement of present

fact or lacked a reasonable basis. The challenged statements are “not actionable because such projections are merely statements of prediction or expectation” (*ESBE Holdings, Inc. v Vanquish Acquisition Partners, LLC*, 50 AD3d 397, 398 [1st Dept 2008] [internal citation omitted]).

Similarly, the only support for Plaintiffs’ allegations based on the vacancy loss projections is the fact that the actual vacancy losses were higher than those projected (*see* NYSCEF 37 at 14). This, too, is insufficient to sustain their claims as neither the Amended Complaint nor Plaintiffs’ opposition contain allegations that Defendants knowingly made factual misstatements at the time they were made (*cf. CPC Int’l Inc. v McKesson Corp.*, 70 NY2d 268, 274, 286 [1987] [finding financial projections were sufficient to form the basis for common-law fraud where the plaintiff alleged defendant knowingly “created fictitious projections... which they knew were at odds with the unfavorable projections... prepared... two weeks earlier”]).

Finally, Plaintiffs argue in their opposition that the Investment Memorandum falsely represented the market rental rates for three-bedroom apartments (NYSCEF 37 at 12). This allegation is “not based on any alleged arithmetical error but on the fact that the Investment Memorandum utilized apartments which were not representative of the true state of the market” (*id.*). Plaintiffs’ only support of this allegation is in the form of an attorney affirmation stating the data underpinning Plaintiffs’ alleged market rates in the Amended Complaint was provided by CoStar Group Inc. (NYSCEF 38). Even accepting this assertion (not based on personal knowledge), Plaintiffs’ allegations amount to a disagreement with Defendants’ business judgment and are insufficient to sustain a claim based on fraud or misrepresentation (*see e.g., Olkey v Hyperion 1999 Term Tr. Inc.*, 98 F3d 2, 7-8 [2d Cir. 1996] [rejecting fraud claims based on allegations that the defendants made wrong assumptions about interest rates holding that plaintiffs’ claim that the “balancing was not as skillfully done as it should have been” or “that

another set of investment choices should have been made” constitute unactionable hindsight speculation]).

Additionally, Plaintiffs fail to adequately allege scienter. Plaintiffs’ sole allegation that Defendants knew the representations were false, or were made recklessly, is “upon information and belief” (NYSCEF ¶ 157). “While information peculiarly within the opposing party’s knowledge may be pleaded generally, or upon information and belief, the allegations must be accompanied by a statement of the facts upon which the belief is based” (*Bd. of Managers of Beacon Tower Condominium v 85 Adams St., LLC*, 136 AD3d 680, 686 [2d Dept 2016] [internal citations omitted]). Stated differently, claims “made upon information and belief [are] not sufficient to establish the necessary quantum of proof to sustain allegations of fraud” (*Weinberg v Kaminsky*, 166 AD3d 428, 429 [1st Dept 2018] [internal citation omitted]; *see also Facebook, Inc. v DLA Piper LLP (US)*, 134 AD3d 610, 615 [1st Dept 2015] [“Allegations regarding an act of deceit or intent to deceive must be stated with particularity” and “the claim will be dismissed if the allegations as to scienter are conclusory and factually insufficient”] [internal citations omitted], *lv denied* 28 NY3d 903 [2016]). Here, Plaintiffs fail to support their allegations with any “statement of facts upon which [their] belief is based” (*Bd. of Managers*, 136 AD3d at 686).

Accordingly, Plaintiffs’ First and Second Causes of Action are dismissed.

b. Third, Fourth, Fifth, Sixth, Seventh, and Eighth Causes of Action – Breaches of Fiduciary Duty & Gross Negligence

“To state a claim for breach of fiduciary duty, plaintiffs must allege (1) defendant owed them a fiduciary duty, (2) defendant committed misconduct, and (3) they suffered damages caused by misconduct” (*Burry v Madison Park Owner LLC*, 84 AD3d 699, 699-700 [1st Dept 2011] [internal citations omitted]). Similarly, a claim for gross negligence requires existence of a duty,

breach of that duty, injury as a result of the breach, and conduct that evinces “a reckless disregard for the rights of others or smacks of intentional wrongdoing” (*Mancuso v Rubin*, 52 AD3d 580, 583 [2d Dept 2008]; *see also Schwartzco Enters. LLC v TMH Mgmt., LLC.*, 60 F Supp3d 311, 355 [EDNY 2014] [applying New York law]). In support of these claims, Plaintiffs allege that Defendants RECAP Clinton Hill GP, LLC; RECAP Clinton Hill (Cayman) GP, LLC; and RECAP Clinton Hill Investors Manager, LLC “fail[ed] to verify the accuracy of the statements contained in the Investment Memorandum prior to contributing funds to [RECAP Clinton Hill]” (NYSCEF 26 ¶¶ 173, 178, 183, 187, 191, 196).

As an initial matter, the allegations in the Amended Complaint mirror those previously alleged, and dismissed, in the original Complaint insofar as they are based on the failure to verify the accuracy of the statements contained in the Investment Memorandum (*cf.* NYSCEF 1, 26; *see also* NYSCEF 25 at 43). In any event, a plaintiff cannot claim breach of fiduciary duty unless the defendant owes the plaintiff a fiduciary duty (*see Burry*, 84 AD3d at 700 [1st Dept 2011]). Here, Plaintiffs had no relationship with Defendants creating a fiduciary duty prior to their investment. As a result, Plaintiffs’ Fourth, Sixth, and Eighth Causes of Action are dismissed.

Plaintiffs’ Third, Fifth, and Seventh Causes of Action are dismissed for similar reasons. As an initial matter, Plaintiffs’ claims for gross negligence mimic their fraud claim. “Moreover, although it is unclear, but unlikely, that a cause of action for gross negligence exists separately from a cause of action for fraud” (*Water St. Leasehold LLC v Deloitte & Touche LLP*, 19 AD3d 183, 185 [1st Dept 2005] [internal citations omitted]), Plaintiffs’ claims are “unsupported by any factual allegations of conduct evincing a reckless disregard for the rights of others or smacking of intentional wrongdoing [and are] insufficient to state a cause of action alleging gross negligence” (*Mancuso*, 52 AD3d at 583).

Accordingly, it is

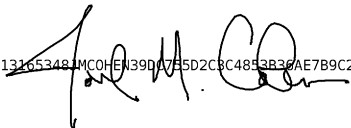
ORDERED Defendants motion to dismiss Plaintiffs' Amended Complaint is **granted**;

and it is further

ORDERED that the Clerk is directed to enter judgment in favor of Defendants, upon submission by Defendants in appropriate form, in accordance with this Decision and Order.

This constitutes the Decision and Order of the Court.

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JOEL M. COHEN, J.S.C.

3/13/2023
DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE