Lapin v Verner
2023 NY Slip Op 32726(U)
August 3, 2023
Supreme Court, Kings County
Docket Number: Index No. 511987/2023
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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BENJAMIN LAPIN,

Plaintiff, Decision and order

- against - Index No. 511987/2023

ADAM VERNER and SPRINGHOUSE PARTNERS, INC.,

Defendants, August 3, 2023

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PRESENT: HON. LEON RUCHELSMAN Motion Seq. #1

The defendants have moved pursuant to CPLR §3211 seeking to dismiss the complaint for the failure to allege any cause of action. The plaintiff opposes the motion. Papers were submitted by the parties and arguments were held. After reviewing all the arguments this court now makes the following determination.

According to the complaint, the defendants solicited the plaintiff to invest in a real estate project located at 51 Irving Street in Kings County. Specifically, "the investment was portrayed as a very conservative, long-term investment that would generate an annual return of 5%, and which expected to begin making cash distributions within 18-24 months" (see, Summons and Complaint, ¶5 [NYSCEF Doc. No. 1]). Therefore, "on the basis of these representations" the plaintiff invested $250,000 (see, Summons and Complaint, ¶7 [NYSCEF Doc. No. 1]). The complaint alleges the defendants purchased another property in Florida and dedicated all their resources and energy to that project, essentially ignoring the Irving Street property. The plaintiff commenced this action seeking recovery of the money he invested. The complaint alleges two causes of action, for breach of a fiduciary duty and fraud. The defendants have moved seeking to dismiss the complaint on the grounds the complaint fails to allege any causes of action. As noted the plaintiff opposes the motion.

Conclusions of Law

It is well settled that upon a motion to dismiss the court must determine, accepting the allegations of the complaint as true, whether the party can succeed upon any reasonable view of those facts (Ripa v. Petrosyants, 203 AD3d 768, 160 NYS3d 658 [2d Dept., 2022]). Further, all the allegations in the complaint are deemed true and all reasonable inferences may be drawn in favor of the plaintiff (BT Holdings, LLC v. Village of Chester, 189 AD3d 754, 137 NYS2d 458 [2d Dept., 2020]). Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff 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, Redwood Property Holdings, LLC v. Christopher, 211 AD3d 758, 177 NYS3d 895 [2d Dept., 2022]).

The first cause of action alleges a breach of a fiduciary duty alleging the majority shareholders owed duties to the minority shareholders. Specifically, the cause of action alleges the majority shareholders mismanaged the project, diverted their attention to other ventures, failed to anticipate changes in the real estate market and failed to inform the shareholders of the progress of the project or of their plans for the project.

In Serino v. Lipper, 123 AD3d 34, 994 NYS2d 64 [1st Dept., 2014] the court explained that to distinguish a derivative claim from a direct claim the court must engage in two inquiries. First, whether any harm was suffered by the corporation or an individual stockholder and whether the corporation or the individual stockholder would receive the benefit of any recovery. As the court stated "if there is any harm caused to the individual, as opposed to the corporation, then the individual may proceed with a direct action…On the other hand, even where an individual harm is claimed, if it is confused with or embedded in the harm to the corporation, it cannot separately stand" (id). Thus, where the alleged injury affects all shareholders not just the plaintiff then the action is derivative and not direct (Vaughan v. Standard General L.P., 154 AD3d 581, 63 NYS3d 44 [1st Dept., 2017]).

The breach of fiduciary claim as noted asserts the defendants essentially failed to adequately manage the project. However, all these alleged wrongs are harms to the corporation itself not the plaintiff in his individual capacity even though the plaintiff was allegedly harmed by the defendant's activities. Therefore, it was necessary for the plaintiff to bring this action derivatively, on behalf of the corporation. Consequently, the motion seeking to dismiss the first cause of action is granted.

It is further well settled that to succeed upon a claim of fraud it must be demonstrated there was a material misrepresentation of fact, made with knowledge of the falsity, the intent to induce reliance, reliance upon the misrepresentation and damages (Cruciata v. O'Donnell & Mclaughlin, Esqs,149 AD3d 1034, 53 NYS3d 328 [2d Dept., 2017]). Further, to succeed upon a claim of fraudulent concealment it must be demonstrated that in addition to the above requirements there was a fiduciary or confidential relationship which would impose a duty upon the defendant to disclose material information (Mitschele v. Schultz,36 AD3d 249, 826 NYS2d 14 [1st Dept., 2006], Wallkill Medical Development LLC v. Catskill Orthopaedics P.C., 178 AD3d 987, 115 NYS3d 67 [2d Dept., 2019]). Moreover, even absent a fiduciary relationship a duty to disclose may arise under the 'special facts' doctrine where one party maintains superior knowledge of essential facts as to render the entire transaction inherently unfair absent the disclosure (Jana L. v. West 129th Street Realty Corp., 22 AD3d 224, 802 NYS2d 132 [1st Dept., 2005]). As with all fraud claims, these elements must each be supported by factual allegations containing details constituting the wrong alleged (see, JPMorgan Chase Bank, N.A. v. Hall, 122 AD3d 576, 996 NYS2d 309 [2d Dept., 2014]).

The complaint does not specifically allege any representations or omissions at all that could constitute fraud. First, the allegations of express fraud are contained in the assertions of the complaint noted above. However, promises of a conservative investment are considered mere puffery and not fraud (Tobia v. United Group of Companies Inc., 2016 WL 5417824 [N.D.N.Y. 2016]). In In re Security Capital Assurance Ltd., Securities Litigation, 729 F.Supp2d 569 [S.D.N.Y. 2010] the court observed that representations that investments are ""disciplined" and "conservative"...are classic examples of puffery" which are not actionable (see, also, Greco v. Qudian Inc., 2022 WL 4226022 [S.D.N.Y. 2022]).

Furthermore, the misrepresentations are wholly conclusory. The allegations do not describe when such representations were made, who made them and the precise contents of such representations. Thus, pursuant to CPLR §3016(b) to plead fraud the complaint must "sufficiently detail the alleged conduct" and contain fact that "are sufficient to permit a reasonable inference of the alleged conduct" (Pludeman v. Northern Leasing Systems Inc., 10 NY3d 486, 860 NYS2d 422 [2010]).The Complaint in this case does not contain any facts supporting allegations of fraud. The allegations merely contain conclusions that fraud was committed without explaining, with the detail required, how such fraud occurred. Thus, a complaint that alleges fraud "absent

INDEX NO. 511987/2023
RECEIVED NYSCEF: 08/07/2023

specific and detailed allegations establishing a material misrepresentation of fact, knowledge of falsity or reckless disregard for the truth, scienter, justifiable reliance, and damages proximately caused thereby, is insufficient to state a cause of action for fraud" (Old Republic National Title Insurance Company v. Cardinal Abstract Corp., 14 AD3d 678, 790 NYS2d 143 [2d Dept., 2005]).

Therefore, the allegations in this case that the investment was "portrayed" as conservative is not fraud. Consequently, that portion of the motion seeking to dismiss the fraud claim is granted.

Turning to allegations of fraudulent concealment, there are no allegations contained in the complaint which support such fraud. The complaint alleges that "just prior to the time that Defendants were purchasing 51 Irving Place for $55 million dollars, Defendants had purchased a commercial property in Miami Beach, Florida for $21 million dollars" (see, Verified Complaint, ¶12 [NYSCEF Doc. No. 1]). However, the failure to inform an investor of another investment is not fraud at all. Moreover, the allegations the defendants dedicated their energies to the Florida property at the expense of the investment property does not further buttress any claims for fraudulent concealment.

Consequently, the motion seeking to dismiss the fraud claim is granted in its entirety.

Therefore, based on the foregoing, the motion seeking to dismiss the complaint is granted.

All motions seeking sanctions are denied.

So ordered.

ENTER:

DATED: August 3, 2023
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC