

Meisels v Bernstein

2023 NY Slip Op 32871(U)

August 17, 2023

Supreme Court, Kings County

Docket Number: Index No. 6060/10

Judge: Wayne Saitta

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At an IAS Part Term, Part 29 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the day 17th of August, 2023.

P R E S E N T:

HON. WAYNE SAITTA,

Justice.

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MOSHE MEISELS AND PREMIER ESTATES NY, INC.,

Plaintiff,

-against-

Index No.: 6060/10

MICHAEL I. BERNSTEIN, ESQ., MICHAEL I. BERNSTEIN, P.A. AND JOHN DOES (1 - 10),

Defendants.

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The following e-filed papers read herein:

NYSCEF Doc Nos.:

Notice of Motion/Order to Show Cause/Petition/
Cross Motion and Affidavits (Affirmations) _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____

198-219
221-225
227-230

In this action seeking damages based upon fraud and breach of contract, defendants Michael I. Bernstein, Esq. (Bernstein) and Michael I. Bernstein, P.A. (Bernstein PA) (collectively, defendants) move (in motion sequence [mot. seq.] twenty-three) for an order granting summary judgment in their favor and dismissing the complaint of plaintiffs Moshe Meisels (Meisels) and Premier Estates NY, Inc. (Premier) (collectively, plaintiffs) pursuant to CPLR 3212 with prejudice, or, alternatively, dismissing plaintiffs' complaint pursuant to CPLR 3126 and imposing sanctions against them pursuant to 22 NYCRR 130-1.1, in the form of attorneys' fees and costs, for "perpetrating a fraud on the court" and entering a

default judgment against plaintiffs with the scheduling of an immediate inquest to determine the amount of damages, attorneys' fees and costs owed to defendants.

Facts and Procedural History

Meisels is a real estate investor, who resides in London, England. Premier is a New York corporation, whose sole shareholder and director is Meisels. On April 12, 2017, plaintiffs commenced this action by the filing of a summons and complaint against defendants. In their complaint, plaintiffs allege that they invested over \$3,400,000.00 with non-party Eli Weinstein (Weinstein),¹ defendants' former client, and were defrauded of said monies by Weinstein and the defendants. More specifically, plaintiffs allege that, in July 2007, Meisels met with Weinstein and Weinstein's associate, non-party Meir Taouzer (Taouzer), to discuss investing money in property located at 230 Southwest 3rd Street, Miami, Florida, known as Riverside Place (Riverside Place). At that time, Weinstein indicated that Taouzer was going to buy Riverside Place and that the investment was guaranteed to be profitable. Taouzer spoke about how unique Riverside Place was and how excited he was to be buying it.

Weinstein then showed Meisels a contract dated March 30, 2007 (sales contract), prepared by Bernstein as attorney for the seller, Riverside Place Ltd. (Riverside Ltd.), an entity owned by Weinstein, which indicated that the property was to be sold to KLY Investment, Inc. (KLY), an entity owned by Taouzer, for \$25,000,000.00. Thereafter,

¹ Plaintiffs allege that they actually invested a total of \$25,000,000.00 with Weinstein and his affiliated entities during the period of 2007 through 2008. However, only \$3,412,163.50 of the total investment is at issue in this action.

Weinstein showed Meisels a copy of a check in the amount of \$2,500,000.00 (deposit), which he claimed was deposited into Bernstein PA's escrow account pursuant to the terms of the sales contract. Weinstein next called Bernstein, who confirmed the sales contract and stated that he expected it to close "fairly shortly." Bernstein also confirmed that he was holding the deposit in escrow. Relying on these representations, Meisels agreed to invest \$3,412,163.50 in Riverside Place.

According to plaintiffs, the \$3,412,163.50 comprises of \$2,412,163.50, which Meisels paid to Weinstein, from his personal funds, as an investment in an unrelated property, known as Berkeley Terrace (Berkeley Terrace), plus \$1,000,000.00 in alleged profits from that investment. Upon investing in Berkeley Terrace in May 2007, Meisels wired the \$2,412,163.50 through Rightmatch Ltd. (Rightmatch), a London corporation of which he is the sole shareholder and director, to the attorney trust account of Fox Rothschild LLP (Rothschild), counsel for Weinstein. However, plaintiffs allege that Weinstein never provided Meisels with the principal (\$2,412,163.50) or profits (\$1,000,000.00) from the Berkeley Terrace investment. Instead, they allege that Weinstein² and defendants fraudulently induced Meisels to apply the full \$3,412,163.50 to the Riverside Place investment to their detriment, as they later learned that Bernstein PA was not holding the deposit in escrow and that the sales contract was never intended to close

² Weinstein was later imprisoned for fraud, having plead guilty to "operating a Ponzi scheme from 2002 through 2011 whereby he misappropriated hundreds of millions of dollars that victims thought they were investing in specific real estate transactions" (*United States v Weinstein*, 658 Fed Appx 57, 58 [3d Cir 2016]). Weinstein was later granted clemency by former President Donald Trump in January 2021.

but was made to fraudulently induce investors to invest in Riverside Place. Based upon these allegations, the complaint asserts three causes of action against defendants for fraud, aiding and abetting fraud, and breach of contract.

Defendants' Motion to Dismiss

On May 20, 2010, defendants moved to dismiss plaintiffs' complaint pursuant to CPLR 327 based upon forum non conveniens, or, alternatively, pursuant to CPLR 3211 (a) (1) and (7) and 3016 (b), on the basis that a defense is founded on documentary evidence and for failure to state a cause of action. By decision and order dated December 23, 2010 (December 2010 decision), the court denied defendants' motion in its entirety, finding, among other things, that plaintiffs sufficiently stated their causes of action.

Defendants' Answer

On April 11, 2011, defendants filed an answer, denying having sufficient knowledge or information as to Meisels' alleged meeting with Weinstein and Taouzer in July 2007 (July 2007 meeting); whether Weinstein and/or Taouzer fraudulently misrepresented that Riverside Place would be sold to Taouzer; whether Weinstein and/or Taouzer solely entered into the sale contract to fraudulently induce investors and never intended the sales contract to close; and whether plaintiffs invested over \$25,000,000.00 with Weinstein and his affiliated allies (*see* NYSECF Doc No. 113, answer at ¶¶ 6, 8-11, 12, 17 and 28).

However, defendants admitted that they “prepared the [sales contract] dated March 30, 2007 as attorneys for the seller, non-party Eli Weinstein[;]” that “Weinstein did at some point in time telephone [Bernstein] to briefly discuss the [sales contract;]” and “that after

the [sales contract] was executed defendants received a deposit check from [Taouzer] in the amount of \$2,500,000.00 and were instructed to hold the check and not deposit it until authorized to do so [; and that u]ltimately, defendants were never granted authorization to deposit the check and accordingly never did so” (see NYSECF Doc No. 113, answer at ¶¶ 12, 15 and 18).

Instant Motion

Defendants now move for an order granting summary judgment in their favor and dismissing plaintiffs’ complaint pursuant to CPLR 3212 with prejudice or, alternatively, dismissing plaintiffs’ complaint pursuant to CPLR 3126 and imposing sanctions against them, pursuant to 22 NYCRR 130-1.1, for ”perpetrating a fraud on the court” by knowingly taking false positions in this action that are contrary to positions taken by Meisels in another action, which prove plaintiffs’ lack standing to maintain this action. Upon the grant of said relief, defendants also seek the entry of a default judgment against plaintiffs and the scheduling of an immediate inquest to determine the amount of damages, attorneys’ fees and costs owed to defendants.

In asserting their entitlement to summary judgment, defendants first argue that plaintiffs’ complaint should be dismissed, since plaintiffs recouped \$5,000,000.00 from Weinstein and, thus, did not suffer any damages stemming from their claims against defendants. Next, defendants contend that, as they neither had actual knowledge of the alleged fraud when the sales contract was drafted nor intended to aid in the alleged fraud, plaintiffs’ fraud claims should be dismissed. Notwithstanding, defendants argue that

plaintiffs' fraud claims should further be dismissed, since any reliance on the alleged misrepresentations was not reasonable. Defendants argue that had plaintiffs used due diligence and obtained a copy of the Riverside Place deed prior to making the investment, they could have discovered that Weinstein only paid \$3,400,000.00 for Riverside Place less than two years earlier, thus demonstrating that the \$25,000,000.00 purchase price in the sales contract was an implausible amount and, thus, unreasonable.

Defendants further aver that plaintiffs' breach of contract claim should be dismissed, since plaintiffs cannot be considered third-party beneficiaries of the sales contract, which was entered into between Riverside Ltd and KLY months before Meisels invested in Riverside Place and which expressly precluded third-party beneficiaries.

Alternatively, defendants contend that plaintiffs' complaint should be dismissed pursuant to CPLR 3126, and sanctions imposed under 22 NYCRR 130-1.1, on the basis that plaintiffs perpetrated "a fraud on the court" by intentionally concealing the fact that Meisels loaned the money that it seeks to recover from defendants to Rightmatch, and, thus, it was Rightmatch, not plaintiffs, that paid the \$2,412,163.50 toward the Berkely Terrace investment, despite plaintiffs' argument to the contrary in this action.

In support of their argument, defendants submitted Meisels' Second Witness Statement (*see* NYSCEF Doc No. 213) filed by Meisels in support of his cross claims against Rightmatch in a London bankruptcy proceeding commenced by Rightmatch through its receiver (Rightmatch proceeding). Defendants argue that, in that action, Meisels succeeded in having a money judgment obtained by Rightmatch against him extinguished

by asserting cross claims, alleging that he loaned the \$2,412,163.50 to Rightmatch, which Rightmatch then paid into the Rothschild account for the Berkeley Terrace investment. Given this alleged admission, defendants argue that plaintiffs are now estopped from taking the contrary position that said monies were his personal funds. As a result, defendants contend that plaintiffs lack standing to maintain this action, since it was Rightmatch, not plaintiffs, that invested in Berkeley Terrace and consequently in Riverside Place.

Opposition

In opposition, plaintiffs assert that there remain triable issues of fact as to each of their causes of action that preclude the grant of summary judgment to defendants. Moreover, plaintiffs correctly argue that, as Meisels invested more than \$25,000,000.00 with Weinstein and his affiliated entities in the United States (US) and lost all the money when he was defrauded by Weinstein, the \$5,000,000.00 that they recouped cannot be specifically applied to its claims herein.

Next, with the submission of Meisels' affidavit, plaintiffs argue that they have standing to maintain this action, since the \$2,412,163.50 at issue here was not at issue in the Rightmatch proceeding. Instead, the monies at issue in that proceeding totaled approximately \$844,393.30 and the last three installments of that sum were wired in July, September and October 2007, which is well after the subject \$2,412,163.50 was wired to Rightmatch in May 2007.

Additionally, plaintiffs maintain that the \$2,412,163.50 invested in Berkeley Terrace were Meisels' personal funds obtained through various mortgages on his properties in London. In his affidavit, Meisels claims that Rightmatch was only used as a conduit to change his monies from British pounds to US dollars to be invested in the US. Therefore, plaintiffs argue that Rightmatch has no interest in the \$2,412,163.50, as it was merely plaintiffs' nominee. Nevertheless, while maintaining that said monies were his personal funds, Meisels asserts that, as the sole shareholder and director of Rightmatch and, thus, its agent, he has authority to use the monies transferred through Rightmatch to invest in Riverside Place and to recover said monies in his or Rightmatch's name. Regarding Premier, Meisels states that Rightmatch assigned its interests in the US to Premier.³

Reply

In reply, defendants argue that plaintiffs' own submissions demonstrate that it was Rightmatch, not plaintiffs, that invested in Riverside Place, as the evidence submitted by plaintiffs shows that the May 2007 wire transfers, totaling \$2,412,163.50, were sent by Rightmatch to the Rothschild trust account; and that, one week before Rightmatch wired said monies, Meisels entered into a loan agreement with Rightmatch dated May 10, 2007. Notably, however, the loan agreement does not state a dollar amount or reference Berkeley Terrace or any other investment property (*see* NYSCEF Doc No. 215). Defendants further

³ Although plaintiffs did not submit the assignment and does not explain the basis of Premier's standing in light of Meisels' claim that the \$2,412,163.50 were his personal funds, these omissions are of no event since defendants do not challenge standing on these bases in their motion and since, as will be further discussed herein, plaintiffs are not moving for summary judgment and, thus, does not have the burden to prove standing at this time.

argue that Meisels lacks standing to maintain this action as Rightmatch's agent, since a receiver was appointed for Rightmatch. Therefore, defendants contend that only the receiver or another fiduciary appointed by the London bankruptcy court can properly assert claims on behalf of Rightmatch.

Discussion

Standing

Although an alternative argument, the court will first address the issue of standing, as it is a justiciable controversy, which should generally be addressed in the first instance.

Upon a defendant's motion seeking dismissal based upon lack of standing, "the burden is on the moving defendant to establish, prima facie, the plaintiff's lack of standing, rather than on the plaintiff to affirmatively establish its standing in order for the motion to be denied. To defeat a defendant's motion, the plaintiff has no burden of establishing its standing as a matter of law" (*Aurora Loan Services, LLC v Mercius*, 138 AD3d 650, 652 [2d Dept. 2016], citing *Deutsche Bank Trust Co. Ams. v Vitellas*, 131 AD3d 52, 59-60 [2d Dept 2015]). Instead, a plaintiff need only raise a triable issue of fact as to its standing (*Deutsche Bank Trust Co. Ams. v Vitellas*, 131 AD3d at 60; *Alvarez v Prospect Hospital*, 68 NY2d at 324).

In this action, defendants argue that Meisels' averment, in his Second Witness Statement filed in the Rightmatch proceeding, that the judgment monies sought by Rightmatch in that proceeding were loaned to Rightmatch by him, is a judicial admission which estops Meisels from arguing contrarily in this action that the monies used to invest

in the Berkeley Terrace were his personal funds. Based upon this alleged admission, defendants assert that plaintiffs lack standing to maintain this action, as they claim that it was Rightmatch, and not plaintiffs, that invested in Berkeley Terrace, and consequently in Riverside Place.

The doctrine of judicial estoppel or estoppel against inconsistent positions “precludes a party who assumed a certain position in a prior legal proceeding and who secured a judgment in his or her favor from assuming a contrary position in another action simply because his or her interests have changed” (*Ford Motor Credit Co. v Colonial Funding Corp.*, 215 AD2d 435, 436 [2d Dept 1995] [citations omitted]).

Here, however, defendants’ lack of standing argument fails since they have not established that Meisels took inconsistent positions in the Rightmatch proceeding and this action. As raised by plaintiffs, the amount at issue in the Rightmatch proceeding only totaled £663,604.27 (approximately \$844,393.30), which is less than the amount at issue in this action and which was paid in three installments several months after the amount at issue in this action was paid.

Notwithstanding, as defendants do not point to an alleged admission in plaintiffs’ pleadings in this action, any alleged admission in Meisels’ Second Witness Statement would merely constitute an informal admission, which would not warrant dismissal but, instead, merely create a triable issue of fact (*see Re/Max of NY, Inc v Weber*, 177 AD3d 910 [2d Dept 2019]; *Wenger v DMR Realty Mgt., Inc.*, 90 AD3d 647 [2d Dept 2011]). While facts admitted by a party’s pleadings constitute formal judicial admission, which are

conclusive of the facts admitted in the action in which they are made (*Zegarpwocz v Ripatti*, 77 AD3d 650, 653 [2d Dept 2010]), “facts incidentally admitted during the trial or in some other judicial proceeding, as in statements made by a party as a witness, or contained in a deposition, a bill of particulars, or an affidavit” are informal judicial admissions, which are not conclusive, but can serve as evidence of the facts admitted (*Matter of Liquidation of Union Indem. Ins. Co. of NY*, 89 NY2d 94, 103 [1996]; *Wenger v DMR Realty Mgt., Inc.*, 90 AD3d 647, 648-649 [2d Dept 2011]).

Similarly, any issue regarding the principal-agent relationship between Meisels and Rightmatch must also be determined at trial (*see Key Int’l Mfg v Morse/Diesel*, 142 AD2d 448 [2d Dept 1988]).

In light of the foregoing, those branches of defendants’ motion seeking dismissal of plaintiffs’ complaint, pursuant to CPLR 3126, based upon lack of standing and sanctions, pursuant to 22 NYCRR 130-1.1, are denied.

Summary Judgment

Turning to that branch of defendants’ motion seeking summary judgment in their favor and dismissal of plaintiffs’ complaint pursuant to CPLR 3212, it is well settled that summary judgment may only be granted when it is clear that no triable issues of fact exist (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). The movant has the burden to make a prima facie showing of entitlement to summary judgment as a matter of law, by submitting admissible evidence demonstrating that there

are no material facts that require a trial (*see Giuffrida v Citibank*, 100 NY2d 72 [2003]). Failure to make this showing requires denial of the motion, regardless of the opposing papers' adequacy (*see Ayotte v Gervasio*, 81 NY2d 1062 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at 853). If a prima facie showing is made, the burden shifts to the opposing party to produce admissible evidence demonstrating the existence of a triable issue of fact (*see Alvarez v Prospect Hospital*, 68 NY2d at 324).

Fraud and Aiding and Abetting Fraud

“The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity [scienter], an intent to induce reliance, justifiable reliance by the plaintiff and damages. A claim rooted in fraud must be pleaded with the requisite particularity under CPLR 3016 (b)” (*Eurcyleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009] [citations omitted]; *see also Schomaker v Pecoraro*, 237 AD2d 424, 426 [2d Dept 1997]).

The elements of a cause of action for aiding and abetting fraud are “(1) the existence of an underlying fraud, (2) knowledge of the fraud by the aider and abettor, and (3) substantial assistance by the aider and abettor in the achievement of the fraud” (*Betz v Blatt*, 160 AD3d 696, 700 [2d Dept 2018] [citations omitted]).

Here, defendants have failed to demonstrate the absence of triable issues of facts as to these causes of action. The December 2010 decision previously determined that plaintiffs' causes of action for fraud and aiding and abetting fraud were sufficiently particularized as required by CPLR 3016 (b). More specifically, the court found that

plaintiffs' allegations, that they relied on Bernstein's misrepresentations by telephone, during the July 2007 meeting, that a \$2,500,000.00 deposit had been made and that a conveyance of the Riverside Place property was imminent, despite Bernstein's knowledge that the contract, which never closed, was a "sham," were sufficient to state causes of action for fraud and aiding and abetting fraud.

With the submission of Meisels' affidavit, plaintiffs re-assert these allegations and, thus, have raised material issues of fact that warrant a trial, as the element of scienter, which is the same requisite knowledge required to establish aiding and abetting fraud, is within defendants' exclusive knowledge (*see Liberty Mut. Ins. Co. v Aetna Casualty & Sur. Co.*, 168 AD2d 121 [2d Dept 1991]; *Jered Contracting Corp. v New York City Transit Auth.*, 22 NY2d 187 [1968]). Similarly, whether plaintiffs reasonably or justifiably relied on defendants' misrepresentations must also be determined at trial, as this issue is so "fact intensive" that it is "ordinarily relegated to the finder of fact" (*see Feldman v Byrne*, 210 AD3d 646, 649 [2d Dept 2022], quoting *DDJ Mgt. LLC v Rhone Group LLC*, 15 NY3d 147 [2010]; *see also Lunal Realty, LLC v DiSanto Realty, LLC*, 88 AD3d 661, 665 [2d Dept 2011]).

Defendants' arguments that plaintiffs could have discovered the alleged fraud by exercising due diligence in checking the prior sales price of Riverside Place is unavailing. The question of whether a plaintiff could have, with due diligence, discovered the alleged fraud is generally a mixed question of law and fact not appropriate for a summary judgment motion (*see House of Spices (India), Inc. v SMJ Servs., Inc.*, 103 AD3d 848 [2d Dept 2013];

Trepuk v Frank, 44 NY2d 723, 724 [1978]). Mere suspicion will not substitute for knowledge of the fraudulent act (*see Sariss v Magarelli*, 12 NY3d 527, 531 [2009]). Here, comparison of the prior and contract sales prices, standing alone, is not determinative of fraud, as sales prices are negotiated terms and the defendants allegedly assured plaintiffs that the sales contract, which they prepared, was valid and that they were holding the deposit in escrow. Defendants' argument to the contrary only serves to raise triable issues of fact, particularly given their non-specific admission of taking part in a telephone conversation with Weinstein regarding the sales contract in their answer in response to plaintiffs' allegation as to the July 2007 meeting.

Therefore, those branches of defendants' motion seeking dismissal of plaintiffs' fraud and aiding and abetting fraud causes of action, pursuant to CPLR 3212, must be denied.

Breach of Contract

"A non-party [to a contract] may sue for breach of contract only if it is an intended, and not a mere incidental, beneficiary" (*Town of Huntington v Long Is. Power Auth.*, 130 AD3d 1013, 1014 [2d Dept 2015], quoting *East Coast Athletic Club, Inc. v Chicago Tit. Ins. Co.*, 39 AD3d 461, 463 [2d Dept 2007]). "A party asserting rights as a third-party beneficiary must establish (1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for [its] benefit and (3) that the benefit to [it] is sufficiently immediate . . . to indicate the assumption by the contracting parties of a duty to compensate [the third-party] if the benefit is loss" (*Nanomedicon, LLC v Research*

Found. of State Univ. of N.Y., 112 AD3d 594, 596 [2d Dept 2013] [internal quotation marks omitted]).

“[T]he best evidence of whether contracting parties intended their contract to benefit third parties remains the language of the contract itself. Where a provision exists in an agreement expressly negating an intent to permit enforcement by third parties, as exists in the agreement at bar, that provision is decisive” (*Nepco Forged Products, Inc. v Consolidated Edison Co.*, 99 AD2d 508 [2d Dept 1984] [citations omitted]).

Here, plaintiffs allege, in their complaint, that upon investing in Riverside Place, they became third-party beneficiaries of the sales contract. Thus, they allege that defendants had a contractual duty to place the deposit check in Bernstein PA’s escrow account within three days of receipt as required by the contract and that defendants’ failure to do so constituted breach of contract. They posit that defendants knew that that they were intended third-party beneficiaries, since defendants knew that the contract was made with the intent to induce plaintiffs to invest in Riverside Place, entitling them to an interest in the property upon sale.

Plaintiffs’ argument, however, fails, in light of the express language of the sales contract, which states, in pertinent part,

“[t]he provisions and covenants set forth in this Agreement are made solely for the benefit of the parties to this Agreement and are not for the benefit of any other person, and no other person shall have any right to enforce these provisions and covenants against any party to this Agreement” (*see* NYSCEF Doc No. 222, contract at ¶ 23 [u]).

Thus, as the sales contract negates an intent to permit enforcement by third parties, plaintiffs' breach of contract cause of action must be dismissed (*see Nepco Forged Products, Inc. v Consolidated Edison Co.*, 99 AD2d at 508).

Conclusion

Accordingly, it is hereby

ORDERED that the branch of defendants' motion (mot. seq. twenty-three) seeking to dismiss plaintiffs' breach of contract cause of action pursuant to CPLR 3212 is granted. Plaintiffs' breach of contract cause of action is hereby dismissed, with prejudice. The remaining branches of defendants' motion are denied.

This constitutes the decision and order of the court.

E N T E R,



J. S. C.