

Elberg v Capital One Fin. Corp.

2024 NY Slip Op 33244(U)

September 12, 2024

Supreme Court, New York County

Docket Number: Index No. 653076/2022

Judge: Andrew Borrok

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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 53

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RUBEN ELBERG,

Plaintiff,

- v -

CAPITAL ONE FINANCIAL CORPORATION, CAPITAL ONE TAXI MEDALLION FINANCING COMPANY, CAPITAL ONE, NATIONAL ASSOCIATION, TAMARA PEWZNER, FAIVISH PEWZNER, CHARLES LIEBMAN, JOHNSON LIEBMAN, LLP, HOWARD GARFINKEL, LAUTERBACH GARFINKEL DAMAST & HOLLANDER, LLP, SKADDEN, ARPS, SLATE, MEAGHER & FLOM, LLP, TROUTMAN PEPPER, FOX ROTHSCHILD, LLP, BRETT BERMAN, ROSENBERG MUSSO & WEINER, LLP, BRUCE WEINER

Defendant.

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INDEX NO. 653076/2022

MOTION DATE 03/09/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 53, 56, 61, 64, 65, 69, 71

were read on this motion to/for

DISMISSAL

Upon the foregoing documents, Fox Rothschild and Brett Berman (collectively, the **Fox Rothschild Defendants**)’s unopposed motion to dismiss the Complaint levelled against them is granted. The branch of their motion seeking sanctions however is denied.

On a motion to dismiss under CPLR 3211(a)(7) for failure to state a claim, the Court must “accept the facts as alleged in the complaint as true, [and] accord plaintiffs the benefit of every possible favorable inference.” *Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994). But “factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration.” *Skillgames, LLC v. Brody*, 1 A.D.3d 247, 250 (1st Dep’t 2003).

In support of their motion, Fox Rothschild argues that Ruben Elberg complaint should be dismissed for failure to state a claim and otherwise based on documentary evidence.

Additionally, they argue that because the Complaint is “so utterly devoid of merit, while hurling the most offensive charges against an attorney based on literally nothing,” that the Court should sanction Mr. Elberg and his attorney (*id.*).

The elements of fraud are (1) defendant made a representation of material fact; (2) the representation was false; (3) defendant intended to deceive plaintiff; (4) plaintiff believed and justifiably relied upon the statement; and (5) plaintiff suffered a pecuniary loss as a result of such reliance (*Ross v. Louise Wise Services, Inc.*, 8 N.Y.3d 478, 488 (2007)). Each element must be pled with particularity under CPLR 3016(b). *Sirohi v. Lee*, 222 A.D.2d 222, 222 (1st Dep’t 1995). The Fox Rothschild Defendants argue that Mr. Elberg has failed to adequately plead his cause of action sounding in fraud pursuant to CPLR 3016(b). According to the Complaint, the Fox Rothschild Defendants were “collud[ing] to make false and misleading statements” (Complaint ¶ 186). Fox Rothschild that this is insufficient because the Complaint fails to allege false words or phrases used by the Fox Rothschild Defendants. Mr. Elberg does not submit opposition papers, Thus, dismissal is required.

Collateral estopped applies when (1) the issues in both proceedings are identical; (2) the issue in the prior proceeding was actually litigated and decided; (3) there was a full and fair opportunity to litigate in the prior proceeding; and (4) the previously-litigated issue was necessary to support

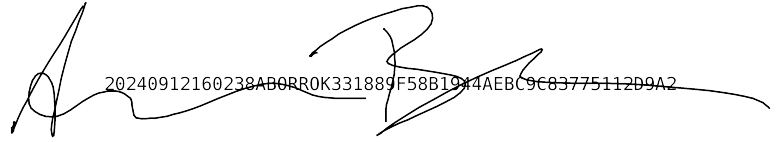
a valid and final judgment on the merits (*Conason v. Megan Holding, LLC*, 25 N.Y.3d 1, 17 (2015)). Fox Rothschild argues that it is also entitled to dismissal because these requirements are indisputably satisfied on the record before the Court. In short, the Fox Rothschild Defendants argue that Mr. Elberg already had an opportunity to vet his concern in the bankruptcy proceeding where in that proceeding, the Bankruptcy Court was required to determine “the extent to which the settlement is truly the product of ‘arms length’ bargaining, and not of fraud or collusion” (*In re Texaco Inc.*, 84 B.R. 893, 902 (Bankr. S.D.N.Y. 1988); see also *In re Iridium Operating LLC*, 478 F.3d 452, 462 (2d Cir. 2007) (court must consider “the extent to which the settlement is the product of arm’s length bargaining”). In its Order dated June 30, 2019, the Bankruptcy Court found that the Settlement Agreement meets the criteria set forth “in Rule 9019 and the applicable Second Circuit case law” (*Id.*). The Fox Rothschild Defendants argue that the Bankruptcy Court court could not have approved the settlement without finding that it was not fraudulent. Thus, they argue that they are entitled to dismissal. Again, Mr. Elberg does not oppose this motion.

Accordingly, the motion is granted and the case is dismissed against the Fox Rothschild Defendants.

Lastly, the Court notes that the decision to award sanctions is left to the sound discretion of the Court which the Court declines to award at this time.

Accordingly, it is hereby

ORDERED that the motion to dismiss is granted solely to the extent that the Complaint is dismissed against the Fox Rothschild Defendants.


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9/12/2024
DATE

ANDREW BORROK, J.S.C.

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