

Mizrahi v Mizrahi

2025 NY Slip Op 30869(U)

March 18, 2025

Supreme Court, New York County

Docket Number: Index No. 156113/2024

Judge: Mary V. Rosado

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. MARY V. ROSADO PART **33M**

Justice

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INDEX NO. 156113/2024

EITAN MIZRAHI, EMS15A LLC,
Plaintiff,

MOTION DATE 08/07/2024

MOTION SEQ. NO. 001

- v -

EMIL MIZRAHI, LEVI YITZCHOK LLC, MR13 LLC, E N E LTD

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28

were read on this motion to/for DISMISS.

Upon the foregoing documents, and a final submission date of January 7, 2025, Defendants Emil Mizrahi (“Emil”), Levi Yitzchok LLC (“Levi Yitzchok LLC”), MR13 LLC, and E N E Ltd’s (“ENE”) (collectively “Defendants”) motion to dismiss Plaintiffs Eitan Mizrahi (“Eitan”) and EMS15A LLC’s (collectively “Plaintiffs”) Amended Complaint and seeking costs is granted in part and denied in part.¹

I. Background

Plaintiffs allege a fraudulently induced transfer of real property located at 188 East 78th Street, New York, NY, Unit 15A (“Premises”) and a fraudulently induced transfer of ownership of a company, ENE (*see generally* NYSCEF Docs. 1, 12). Eitan and Emil are brothers. Eitan purchased the Premises on March 15, 2001. Premises were mortgaged multiple times from 2001 to 2021. In March of 2007, the Premises were transferred to EMS15A LLC, an LLC wholly owned

¹ To the extent Plaintiffs demand declaratory judgment solely in the “wherefore” clause of the Complaint, this is not part of a cause of action and does not determine the sufficiency of the Complaint (*Planned Consumer Marketing, Inc. v Coats & Clark, Inc.*, 127 AD2d 355, 371 [1st Dept 1987]). Plaintiffs have not otherwise demonstrated the right to this relief under the facts pleaded (*Id.*).

by Eitan. On April 14, 2016, FYM Millbrook LLC (“Millbrook”), which held multiple mortgages encumbering the Premises, attempted to foreclose. Millbrook voluntarily discontinued its foreclosure action in September 2016 after Defendant Levi Yitzchok LLC purchased the mortgages.

On March 23, 2022, EMS15A LLC, Eitan, individually, and Levi Yitzchok LLC executed a deed in lieu of foreclosure to transfer the Premises to Levi Yitzchok LLC in satisfaction of the mortgages (NYSCEF Doc. 7). Plaintiffs allege Defendants fraudulently omitted that the mortgages were unenforceable. Eitan also alleges that Emil forced him to transfer his ownership interest in ENE, a company co-owned by the brothers, through fraud and duress. Defendants move to dismiss Plaintiffs’ Amended Complaint pursuant to CPLR 3211 and request costs and fees.

II. Discussion

A. Amended Complaint and Opposition

Plaintiffs’ Amended Complaint supersedes the original, and Defendants have elected to apply the pending CPLR 3211 motion to the amended pleadings (*Plaza PH2001 LLC v Plaza Residential Owner LP*, 98 AD3d 89 [1st Dept 2012]; *Sage Realty Corp. v Proskauer Rose*, 251 AD2d 35 [1st Dept 1998]).² Thus, the Court will address Plaintiffs’ opposition, the Amended Complaint, and the Defendants’ reply.³

B. Standard

When reviewing a pre-answer motion to dismiss for failure to state a claim, the Court must give the Plaintiff the benefit of all favorable inferences which may be drawn from the pleadings

² As no responsive pleading had been served and the instant motion to dismiss is pending, Plaintiffs’ filing of the Amended Complaint on September 30, 2024 (NYSCEF Doc. 12) was as of right (*see Roam Capital, Inc. v Asia Alternatives Management LLC*, 194 AD3d 585, 585-86 [1st Dept 2021]).

³ Plaintiffs filed opposition to Defendant’s motion on September 30, 2024, delayed by ten days only. Defendants have not articulated substantial prejudice and have successfully filed their reply seeking dismissal of the Amended Complaint. While the Court does not condone the late opposition, in the interest of resolving the motion on the merits, and in the absence of prejudice, the Court will consider Plaintiffs’ tardy opposition.

and determines only whether the alleged facts fit within any cognizable legal theory (*Sassi v Mobile Life Support Services, Inc.*, 37 NY3d 236, 239 [2021]). All factual allegations must be accepted as true (*Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172, 174 [1st Dept 2004]). Conclusory allegations or claims consisting of bare legal conclusions with no factual specificity are insufficient to survive a motion to dismiss (*Godfrey v Spano*, 13 NY3d 358, 373 [2009]; *Barnes v Hodge*, 118 AD3d 633, 633-634 [1st Dept 2014]). A motion to dismiss for failure to state a claim will be granted if the factual allegations do not allow for an enforceable right of recovery (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017]). Where a cause of action is based upon misrepresentation, fraud, or undue influence, the circumstances constituting the wrong shall be stated in detail (CPLR 3016[b]).

C. First Cause of Action

Plaintiffs' first cause of action alleging fraud related to the real estate transfer is dismissed. The elements of a cause of action for fraud require a 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, 558-59 [2009]). Accepting the allegations as true, the Amended Complaint insufficiently pleads justifiable reliance. Plaintiffs, which constitute a corporate entity and a businessman, were sufficiently sophisticated to ascertain the truth of the mortgage's enforceability (*Ventur Group, LLC v Finnerty*, 68 AD3d 638, 639 [1st Dept 2009]). There are no facts alleged to the contrary. Thus, Defendants' motion is granted as to Plaintiffs' first cause of action. Plaintiffs are granted leave to replead the requisite facts regarding justifiable reliance, if they exist.

D. Second Cause of Action

This cause of action is likewise dismissed. The Complaint is devoid of any facts as to how Plaintiff was defrauded to transfer his ownership stake in ENE. It merely alleges in conclusory terms “without Eitan’s knowledge Emil caused Eitan to transfer ownership of ENE to Emil.” There are no facts as to how Emil had authority to transfer unilaterally Eitan’s ownership interest without his knowledge. This is insufficient to meet CPLR 3016(b)’s pleading standard. Plaintiffs are granted leave to replead, if possible.

E. Third Cause of Action

Plaintiffs’ third cause of action alleging duress is dismissed. A plaintiff who seeks to recover under a theory of duress is required to bring the claim promptly or allege facts which excuse its delay (*Beltway 7 & Properties, Ltd. v Blackrock Realty Advisers, Inc.*, 167 AD3d 100 [1st Dept 2018]). Plaintiffs did not bring a claim alleging duress for more than two years after the threat of foreclosure had subsided when the deed in lieu of foreclosure was signed on March 29, 2022. Plaintiffs provide no excuse for this delay other than vague and conclusory allegations related to threats of harm to Eitan’s family, which are devoid of any specific facts regarding when those threats were made. This is insufficient to withstand a motion to dismiss. As this cause of action is dismissed for failure to plead specific facts regarding the duress, Plaintiffs are granted leave to replead, if possible.

F. Fourth Cause of Action

Plaintiff’s fourth cause of action for restitution is dismissed. The essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered (*Sperry v Crompton Corp.*, 8 NY3d 204, 215 [2007]). Plaintiffs’ allegations are insufficient to establish justifiable reliance to support

a claim for restitution based on fraud (*see Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]). Plaintiffs are granted leave to replead with the requisite facts, if they exist.

G. Costs and Fees

The Court, in the exercise of its discretion, denies Defendants’ request for the reimbursement of costs associated with this motion pursuant to CPLR 8106.

Accordingly, it is hereby,

ORDERED that Defendants Emil Mizrahi (“Defendant Emil”), Levi Yitzchok LLC, MR13 LLC, and E N E Ltd’s motion to dismiss Plaintiffs Eitan Mizrahi and EMS15A LLC’s Amended Complaint is granted; and it is further

ORDERED that Plaintiffs are granted leave to replead to correct pleading deficiencies, and the Second Amended Complaint must be refiled within thirty days of this Decision and Order; and it is further

ORDERED that the branch of Defendants’ motion seeking reimbursement of costs associated with this motion is denied; and it is further

ORDERED that within ten days of entry, counsel for Defendants shall serve a copy of this Decision and Order, with notice of entry, on all parties via NYSCEF.

This constitutes the Decision and Order of the Court.

3/18/2025
DATE

Mary V Rosado JSC
HON. MARY V. ROSADO, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER		
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE