Taillie v Lawler
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September 1, 2011
Sup Ct, Wayne County
Docket Number: 61891
Judge: John B. Nesbitt
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STATE OF NEW YORK
SUPREME COURT COUNTY OF WAYNE

KEVIN S. TAILLIE

Plaintiff,

-vs-

MICHAEL A. LAWLER

Defendant.

Index No. 61891
2010

APPEARANCES: DONALD R. ADAIR, ESQ.
Attorney for the Plaintiff

DAVID V. DELUCA, ESQ.
Attorney for Defendant

MEMORANDUM - DECISION

John B. Nesbitt, J.

In many communities, private or semi-private golf clubs have been going the way of the dinosaur. In recent years, two esteemed Wayne County golf clubs - The Newark Country Club and the Ontario Golf Club - have folded, burdened by debt and declining revenues. Our present purpose is not to autopsy the remains of the latter, but analyze legal issues relating to its attempted resurrection. Those issues surface in this litigation between protagonists Kevin Taillie and Michael Lawler. What prompts the instant writing is defendant Lawler's motion to dismiss this action on both procedural and substantive grounds. For the foregoing reasons, the motion must be denied.

This litigation emerges from the failure of the Ontario Golf Club. The club had a venerable past, with beginnings going back to 1928, and a 18-hole golf course and clubhouse located at 2102 Country Club Lane, in the Town of Ontario, County of Wayne. By the middle of the 2000's, however, with its salad days well behind it, and crippled by cascading debt, the Club reached its nadir when HSBC Bank commenced an action to foreclose its million and a half dollar mortgage upon the real and personal property of the Club. At the foreclosure sale on January 9, 2007, Kevin Taillie stepped forward to submit the winning bid of $1,575,000. While the bid was not made on a

lark,[1] it nevertheless was a very bold move, inasmuch as Taillie had neither the personal wherewithal nor the immediate network of contacts from which to raise that type of money.[2] Nor was Taillie a real estate speculator, who intended to peddle the property for a quick profit. Rather, Taillie fully intended to own and manage the property as a commercial golf course and club house backed by whatever investment capital he could secure and whatever loans he would need for the balance of the acquisition costs.

While Taillie's immediate financial resources were limited, he was able to put forward a vision that provided for the club's salvation through smart management, aggressive marketing, and lucrative development of the club's real estate surrounding the club and golf course. That vision was sufficiently convincing to attract his parents, his sister, and a good friend to augment Taillie's own $100,000 ("just about all the money I had in the world")[3] with an additional $178,300.[4] The $278,300 sufficed as earnest money deposit on Taillie's bid for the real estate as well as a separate deposit for purchase of the club's personal property. To close upon the property, Taillie would need additional funding approximating $1,500,000. This proved difficult, and in the end, the best Taillie could do was the promise of a mortgage commitment from Monroe Capital upon onerous if not predatory terms. Faced with notice of default from HSBC and probable loss of his deposit if closing did not occur, Taillie was willing to agree to almost anything - even a 16 percent annual interest rate

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[1] In his affidavit sworn to January 11, 2011, at ¶7, Taillie states:

"I have lived in the Town of Ontario, New York, all my life. My family has lived there for four generations. I and my family and friends played golf there for a great many years. We also dined at the clubhouse restaurant and attended various weddings, retirement parties, and other major events held at the Club. It was a major community institution, of which we were all proud and happy to have around. I and my family and friends hated to see the Club's Real Estate go up for auction. We were very worried about the possible loss of the Club and considered any true loss to our community. I went to the HSBC Bank's auction on the Real Estate on January 9, 2007, and I made the winning bid." (pp. 3-4)

[2] The boldness of Taillie's move is underscored by the fact that he quit his job as a mortgage and real estate broker the same day he won the bid (Taillie Deposition at p. 15 [8/28/07]).

[3] Taillie Affidavit, sworn to January 11, 2011, at p. 4 at ¶ 7.

[4] Mackey Affidavit, sworn to April 22, 2010 at p. 7 at ¶ 37.

- to secure the funds from Monroe Capital. His willingness to promise, however, was not sufficient to meet Monroe Capital's demand that a further half million dollar letter of credit be pledged to secure the loan in addition to the first mortgage upon the property being purchased from HSBC.[5] Having already used whatever funds he had personally, or available through family and friends, just to make the bid deposit, Taillie now faced a brick wall in his quest to purchase the club. In early February, at the end of his rope, Taillie shared his lament with the club's golf pro, Jim Hungerford, of being unable to close with HSBC and consequently losing not only his dream of saving the club but also the $278,000 deposit. Hungerford then hit upon an idea that would at once rescue Taillie's project from immediate demise, but also stage the future course of events that would lead directly to the courthouse door. Hungerford identified a potential savior in one Michael Lawler, a former member of the club who would not be indifferent to its survival.

Taillie and Lawler did not know each other, but Hungerford knew Lawler fairly well and called Lawler to explain the problem. Lawler was generally familiar with the club's financial plight, and had been sought out in earlier years as one who might finance its continuation. Although Lawler was not interested in previous proposals, he did not summarily dismiss Taillie's plan and promised to give it study and consideration. After a few days, Lawler agreed to provide the additional collateral required by Monroe Capital by means of a letter of credit in the amount of $500,000, which issued on February 16, 2007, causing Monroe Capital to issue its mortgage commitment to Taillie and HSBC to extend Taillie's time to close until March 2, 2007.

According to Lawler, his final, albeit unmemorialized, agreement with Taillie was that, in consideration for providing the letter of credit, Lawler would have controlling interest in the enterprise. Taillie would have until the due date of the Monroe Capital mortgage loan - twelve (12) months from closing - to obtain permanent financing to pay off Monroe Capital and concomitant release of Lawler's letter of credit. If Taillie was able to do so, then Lawler would transfer any

[5] In fact, not only did Monroe capital demand the half million dollar letter of credit in addition to the first mortgage, it also demanded a collateral mortgage on property in Florida belonging to Taillie's parents, a collateral mortgage on a property in Penfield, New York belonging to Taillie's friend Mark Cataldo, the personal guaranties of both Taillie and Mark Cataldo, as well as a $2,500 annual credit extended to Monroe Capital's investors for pro shop, greens and clubhouse fees. Jason Roth Affirmation, undated, at ¶4 and ¶11.

interest he had to Taillie, and if Taillie could not, then Taillie would transfer his interest to Lawler. (Mackey Affirmation, dated April 22, 2010, at p. 10 ¶48 and p. 11 ¶52). In Lawler's view then, while Monroe Capital was the vehicle for financing the acquisition of the golf club, there were no long term arrangements contemplated between Taillie and Lawler. Either Taillie or Lawler would end up the owner, depending upon whether Taillie could arrange long term financing without Lawler's letter of credit.

What was unclear, at least upon the present record, was how Lawler's and Taillie's interests were to be reflected once closing occurred under the proposed Monroe Capital financing. In a memorandum sent to Lawler dated February 13, 2007, Taillie summarized their mutual understanding as Lawler becoming a "full partner" with Taillie regarding the golf club and all property, real and personal, being purchased from HSBC, such "partnership" continuing until Taillie secured permanent financing within twelve months, failing which "Michael Lawler will have the right to take the club over at no expense to himself." Further, said Taillie in this memorandum, "Michael Lawler will be on deed and title with full benefits of ownership." According to Jason Roth, an attorney engaged by Taillie to create and represent KST Holdings Corporation, he personally discussed with both Taillie and Lawler the fact that Lawler would be the controlling shareholder of this corporation and that both were in full agreement. Secondly, Roth states that it was understood that the corporation would be the entity purchasing the property from HSBC and be the owner or record owner thereafter. In anticipation of closing with HSBC under the Monroe Capital financing plan, Roth created the corporation, prepared and arranged execution of documents for issuance of 51 and 49 shares of stock to Lawler and Taillie respectively, and awaited further instructions from these parties as to the terms of a shareholder's agreement. Roth states that neither party informed him that there was any agreement or expectation that Lawler would have any interest in the property other than as a shareholder of the corporation; that is, neither as a title holder nor mortgagee.

In early March, with closing with HSBC imminent, circumstances arose that caused financing to take a new direction. Totaling up the closing expenses in preparation for closing, Attorney Roth discovered that they needed at least another $30,000 to close, funds that Taillie did not have. Roth called Lawler and asked whether he would cover the shortage. According to Lawler, he then started to become suspicious about whether the information he had been given was complete and accurate.

Before committing further to the project, Lawler insisted upon further discussions with Taillie and Roth. It was then that Lawler was informed of the terms of the proposed Monroe Capital financing, including the 16 percent annual interest and the 2.5 percent broker fee attached to the loan, and moreover, that the majority of funds that Taillie had already put towards acquisition costs were advances from others. Lawler recoiled at the draconian terms of the Monroe Capital financing, exclaiming that the $240,000 interest payment at year's end "doomed" the project and rendered the deal "dead for me" (Lawler Affidavit, sworn to February 18, 2010, at p. 6 ¶30).

No sooner, however, did Lawler seemingly kill the acquisition did he come to the rescue by agreeing to take Monroe Capital out of the picture and supplying all the financing himself. That is, instead of putting up $500,000 in the form of a letter of credit, Lawler more than tripled his financial involvement (and risk exposure) by wire transferring on March 7th the sum of $1,575,467.83 to HSBC to cover all remaining costs necessary to close in accordance with the terms of sale. Remarkably, however, this major shift in financing did not importune Lawler and Taillie to create the usual shareholder agreements that go along with this type of venture. Being a successful, self-made multi-millionaire businessman, Lawler was nevertheless no fool. In his words, he would not loan his own mother that type of money without adequate security, and would be satisfied with no less in this matter (Lawler Depo. at p. 150.) Accordingly, before he wired the money, and two hours before closing on March 7th, Lawler spoke with both Roth and Taillie by telephone.[6] Lawler emphatically testifies that he told Taillie and Roth that he would wire $1,575,467.83 to HSBC in order to close upon the express assurance "that the deed and title are put in my name" (Id. at p. 149). As described earlier, however, attorney Roth affirms under oath that neither Lawler nor Taillie said anything about title reposing in Lawler individually either as HSBC's grantee or purchase money mortgagee.[7]

At closing, title to the property was transferred not to Lawler, but to the newly formed KST Holdings Corporation, which prior to closing was worth $100 by virtue of 100 outstanding shares

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[6] Lawler was in Australia at the time

[7] Taillie joins Lawler on this point rebutting Roth's assertion. In his complaint in this action, Taillie alleges at paragraph 22: "On The day of the closing of the sale of the property Lawler instructed his attorney to prepare the deed to indicate that he was the sale owner of the Brookwoods, not KST, in violation of the agreement between Lawler and Taillie."

of common stock issued for a dollar a share, fifty-one to Lawler and forty-nine to Taillie. At the time of closing, there were no corporate documents, or collateral shareholder agreements, that specified how Lawler's outlay was to be reflected in the corporation's capitalization. In the present litigation, Taillee takes the position that Lawler's $1,575,467.83 outlay was a capital contribution by Lawler as was the $278,000 outlay by Taillie. Given that Lawler and Taillie owned 51 percent and 49 percent of the corporation, respectively, this would ostensibly translate into a magnificent windfall to Taillie. In rough figures, as it stood at closing, Lawler would have contributed 82 percent of the corporation's assets with Taillie 18 percent. The relative percentage of stock ownership - 51/49 - was , of course, not congruent. As such, based upon the percentage reflected in the stock ownership, Taillie gained over $600,000 in the wink of an eye upon closing, more than tripling his investment. Lawler, on the other hand, would have effectively lost a third of his capital outlay.

Taillie argues that this result is not as unreasonable as it intuitively appears and, in fact, does reflect the intention of the parties. First, Taillie had the entrepreneurial spark that gave the venture life and such individuals typically get the cheaper stock when the enterprise is capitalized (Transcript of Oral Argument, January 19, 2011, at p. 23 [Attorney Adair]). Second, Taillie had special, if not unique, abilities and contacts not only to manage the club successfully, but to secure the approvals necessary to develop the surplus real estate not necessary for golf club operation.[8]

In any event, Lawler and Taillie had but the briefest of honeymoons. According to Taillie, on March 22nd, a couple of weeks after closing, Lawler started stripping Taillie of managerial responsibilities.[9] According to Lawler, that action was more than justified by his discovery shortly

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[8] As Taillie put it:

"[I sought] removal of an 80 year standing deed restriction held by the Ontario Fireman's Exempt that would not allow for development of the Real Estate. After length negotiation with the Fireman's Exempt, the Exempts voted 39 to 1 in favor of lift the deed restriction for a project *that I support*. The Exempts had previously denied all efforts and requests to lift that deed restriction but decided that *for me* they would lift it in order to do their part in helping me bring the Club back from financial ruin" (Taillie Aff, sworn to January 11, 2011, at p. 5-6 at ¶8)(emphasis added).

[9] "[O]n March 22, 2007, Mr. Lawler approached me and stated that Mr. Hungerford and Mr. Cox would not be reporting to me but would be reporting directly to him" (Taillie Aff., sworn to May 19, 2010, at p. 6 ¶ 17.)

after closing that Taillie was grossly incompetent. Further, Lawler discovered after closing that Attorney Roth had failed to put title into Lawler's name despite clear instructions to do so (Lawler Aff., sworn to February 18, 2010, at p.7 ¶37.) Engaging independent counsel, Lawler was advised that "[t]he easiest and most efficient solution to correct Roth's error and to secure my loan was to have KST grant me a mortgage" (id at ¶38), especially since this arrangement would be "consistent with the previous unanimous consent of the officers, directors and shareholders of KST to authorize the execution and delivery of a $1,650,000 first mortgage lien on the property" (Mackey Affirmation dated April 22, 2010 at p. 14 ¶76).

On April 10, 2007, a shareholder's meeting of KST Holding Corporation was convened, with Taillie and Attorney Roth present, together with Lawler and his confidants, Lee Walter, CPA and David DeLuca, Esq. Not surprisingly, based upon Lawler voting his majority shares, Taillie was ousted as an officer or director of the corporation, and Roth was discharged as corporate counsel. Among the resolutions then adopted, were these two penultimate resolutions.

> 7. RESOLVED, to approve the borrowing of the sum of $1,575,467.83 from Michael A. Lawler and the issuance of a Note and first Mortgage obligation to Michael A. Lawler in the amount of $1,575,467.83 with interest at the rate of ten (10) percent, all due and payable on March 7, 2008.
> 8. RESOLVED, to approve the borrowing of the sum of $278,300.00 from Kevin S. Taillie and the issuance of a Note and subordinate Mortgage obligation in the amount of $278,300.00 to Kevin S. Taillie with interest at the rate of ten (10) percent, all due and payable on March 7, 2008.

The notes and mortgages authorized were prepared, executed, and filed in the Wayne County Clerk's Office. By letter dated April 13th from Lawler, Taillie was informed that "effective immediately" he (Taillie) had "no authority to make any decisions concerning The Brookwoods Country Club."

Finding himself in a classic case of minority shareholder freeze-out, Taillie instituted this action about a month later on May 11, 2007. The complaint seeks monetary damages allegedly sustained by Taillie as a result of Lawler's alleged (1) misrepresentation, (2) breach of fiduciary duty and (3) breach of implied covenant of good faith and fair dealing. Issue was joined by service of an answer and counterclaims on or about June 7, 2007. The counterclaims alleged (1) multiple misrepresentations by Taillie, ranging from the amount and sources of Taillie's financial contribution and his experience and skill at operation and management of a golf course and restaurant business, (2) fraudulent diversion of title of the golf course at time of closing from the agreed grantee - Lawler

- to KST Holdings Corporation, (3) unjust enrichment of Taillie at the expense and detriment of Lawler, in that Taillie "received a 49 percent interest in a corporation in exchange for a cash contribution ... represent[ing] only 18 percent of the total consideration paid by the parties, and (4) breach of Taillie's fiduciary duty as Lawler's agent and as a corporate officer of KST.

A second action between Taillie and Lawler was commenced the following spring on May 25, 2008, entitled *Lawler v KST Holdings Corp and Kevin S. Taillie*, Index No. 64725-2008 (Sup Ct Wayne Co), this time with Lawler as plaintiff. Not surprisingly, KST Holdings Corp. did not make the March 7, 2008 payment due Lawler under the terms of the note and mortgage executed and recorded pursuant to the enabling corporate resolutions adopted April 10, 2007. Thus, this second action seeks foreclosure of that mortgage in order to satisfy the $1,575,464.83 obligation it secures.[10] This foreclosure action was answered by defendants by, among other means, contesting the very validity of the Lawler mortgage. As noted by Justice Fisher in denying plaintiff Lawler's motion for summary judgment in that action:

> "Taillie, on the other hand, contends that Lawler obtained his 51 percent interest in KST by advancing the $1.5+ million to consummate the purchase, thus making his contribution in the nature of a capital contribution, and that the corporate authorization of the mortgage was designed to defeat his junior position and in any event cannot be sustained under BCL §911 and the business judgment rule. While the former contention is strongly refuted by plaintiff's reference to the timing of issuance of the stock certificates well prior to his decision to pull out of the Monroe Capital portion of the deal, and the lack of any writings to evidence the nature of the advance as a capital contribution (which he ruefully describes would be a "gift" to an essentially debt-free corporation), and further because fraud in the underlying transaction is generally no defense to a foreclosure action, the circumstances of the making of the mortgage cannot be resolved on summary judgment on the current written record. What happened after plaintiff rejected the Monroe Capital option and decided to use his own funds is not documented to an extent that precludes parol evidence" (citations omitted).

Lawler v KST Holdings Corp, Index No 64725-2008 (Sup Ct, Wayne Co 2010)(Fisher, J.)

Now before this Court is another motion by Mr. Lawler for dispositive relief, this time in his capacity as a defendant in the instant action, *Taillie v Lawler,* Index No. 61891-2007. The motion

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[10] A second cause of action seeks enforcement of Lawler's rights to the corporation's personalty collateralized under the Security Agreement executed simultaneously with the Note and Mortgage.

is presented in the alternative. First, Lawler moves for an order dismissing plaintiff's complaint pursuant to CPLR 3216 for failure to prosecute.[11] Alternatively, Lawler moves for an order pursuant to CPLR 3211(a)(1) dismissing the first cause of action in the complaint upon a defense founded upon documentary evidence.

At the outset, the Court denies defendant's motion to dismiss the complaint for failure to prosecute. Although defendant complied with the conditions precedent such motion set forth in CPLR 3216(b), the granting of such relief is permissive. Plaintiff proffered a reasonable explanation for failure to file a note of issue, and given the lack of prejudice to the defendant and the judicial preference for deciding issues on the merits, denial of defendant's CPLR 3216 motion is appropriate. Nevertheless, such denial is conditioned upon plaintiff filing a note of issue within 30 days of service of the order memorializing this decision unless another date for filing thereof is set by further order of the Court.

Inasmuch as defendant's CPLR 3216(b) motion has been denied, albeit conditionally, it is necessary to address his request for similar relief upon alternate grounds. Defendant moves for dismissal of the first cause of action (misrepresentation), because "the plaintiff alleges that he terminated his employment as a 'mortgage loan originator and real estate broker' because Mr. Lawler promised him he could manage [the country club when] ... [i]n fact, under-cross examination, the plaintiff admitted that he gave up his employment on January 9, 2007, and that he did not meet Mr.

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[11] CPLR 3216. Want of prosecution

(a) Where a party unreasonably neglects to proceed generally in an action or otherwise delays in the prosecution thereof against any party who may be liable to a separate judgment, or unreasonably fails to serve and file a note of issue, the court, on its own initiative or upon motion, may dismiss the party's pleading on terms. Unless the order specifies otherwise, the dismissal is not on the merits.

(b) No dismissal shall be directed under any portion of subdivision (a) of this rule and no court initiative shall be taken or motion made thereunder unless the following conditions precedent have been complied with:

(1) Issue must have been joined in the action;

(2) One year must have elapsed since the joinder of issue;

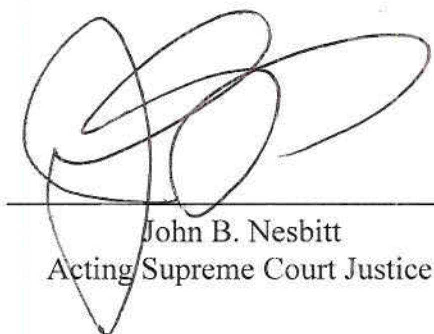
(3) The court or party seeking such relief, as the case may be, shall have served a written demand by registered or certified mail requiring the party against whom such relief is sought to resume prosecution of the action and to serve and file a note of issue within ninety days after receipt of such demand, and further stating that the default of the party upon whom such notice is served in complying with such demand within said day period will serve as a basis for a motion by the party serving said demand for dismissal as against him for unreasonably neglecting to proceed.

Lawler until the following month." (DeLuca Affirmation dated November 10, 2010). Plaintiff concedes that this is factually correct and that he did not, and indeed, could not have terminated his extant employment based upon any representations by Lawler.[12] Plaintiff did not know Lawler at the time plaintiff gave up his employment on January 9, 2007, and had his first contact with him in mid to late February when Hungerford connected the two by telephone.(Taillie EBT at 36.)

That said, however, plaintiff states that such error is not fatal to his first cause of action. He claims that once Lawler got involved, Lawler represented to plaintiff that they were partners and plaintiff would be running the day-to-day operations at the golf club. In reliance thereon, plaintiff says he agreed to Lawler's participation. Lawler then reneged, says plaintiff, throwing plaintiff to the curb, and relegating plaintiff's capital investment to a subordinate mortgage to be wiped out when defendant forecloses his first mortgage. In short, while he may not have "quit his day job" in response to Lawler's purported representations, plaintiff did rely upon those representations, which turned out to be false when plaintiff was ousted from the project and his dream opportunity highjacked. Construing the complaint sympathetically to the plaintiff, as the Court must, the Court finds that the first cause of action is sufficiently plead to state actionable fraud or misrepresentation *sans* allegations about loss of plaintiff's earlier employment.

Accordingly, the motion of the defendant for dispositive relief, either wholly or partially, is denied.

Dated: September 1, 2011
Lyons, New York



John B. Nesbitt
Acting Supreme Court Justice

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[12] "Defendant is correct in noting in Defendant's Motion papers that Mr. Taillie quit his job as a mortgage broker on January 9, 2007, which was prior to his communications with Mr. Lawler" (Adair Affirmation, dated January 10, 2011)