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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JOAN M. KENNEY J.S.C. Justice

PART 8

Index Number : 108094/2011
GORTON, MARK
vs.
MARMON, ESQ., JAMES L.
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. 108094/11
MOTION DATE 12/19/12
MOTION SEQ. NO. 001

The following papers, numbered 1 to 19, were read on this motion to/for dismiss

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ No(s). 1-6
Answering Affidavits — Exhibits ____ No(s). 7-17
Replying Affidavits ____ No(s). 18, 19

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

FILED

APR 23 2012

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: April 16, 2012

JOAN M. KENNEY, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☑ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS Part 8

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Mark Gorton and Jody Gorton,

Plaintiff,

-against-

James L. Marmon, Esq.

Defendant.

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DECISION AND ORDER
Index Number: 108094/11
Motion Seq. No.: 001

KENNEY, JOAN M., J.

Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion to dismiss.

Papers	**Numbered**
Notice of Motion, Affirmation and Exhibits, and Memo of Law	1-6
Opposition Affirmation and Exhibits, and Memo of Law	7-17
Reply Papers, and Memo of Law	18-19

In this matter sounding in contribution and/or indemnification, defendant, James L. Marmon, Esq. (Mr. Marmon), moves for an Order, pursuant to CPLR 3211(a)(5) and CPLR 3211(a)(7), dismissing the complaint.

Factual Background

This action arises out of a multi-million dollar real estate transaction in which Sharmon and Stephen Marcus (the sellers), acting as the purported sole shareholders of Reymar Realty Corp. (Reymar) and represented by defendant, Mr. Marmon, as sellers' legal counsel, transferred ownership of real property located at 108 W. 76th St., New York, NY 10023 (the property) to plaintiffs.

The purchase contract, drafted and negotiated by Mr. Marmon, was executed by the sellers and plaintiffs on May 13, 2005 (the contract). Paragraph 24.7 of the contract provides, in pertinent part, that:

> "Seller has the full power and authority to execute and deliver this agreement and all documents now or hereafter to be executed and delivered by it pursuant to this agreement

> and to perform all obligations arising under this agreement and under seller's documents. This agreement constitutes, and the seller's documents will each constitute, the legal, valid binding obligation of seller, enforceable in accordance with their respective terms, covenants, and conditions."

Prior to the transfer of the property, which took place on or around June 30, 2005, it is alleged that defendant expressly represented to plaintiffs that Sharmon Marcus was the holder of 48 of 100 shares of Reymar, that Stephen Marcus was the holder of 52 of 100 shares of Reymar, and that the sellers jointly had the authority to convey the property to plaintiffs.

In support of the sellers' supposed authority to sell the property, defendant gave plaintiffs what purported to be minutes from a special meeting of Reymar shareholders, resolving to sell the property to the plaintiffs. Based on these representations, plaintiffs agreed to, and did, purchase the property from Reymar for $4,800,000.00.

Rachel Hirsch and Richard Marcus (non-parties) are the children of Stephen Marcus (the Marcus children), and they allege that the sellers did not have the authority to convey the property. In fact, on June 26, 2009, approximately four years after the sale of the property, the Marcus children commenced an action in the United States District Court for the Southern District of New York, against plaintiffs and Reymar (the Federal Court Action), alleging that: (1) at the time of the sale, the Marcus children collectively held 42% of the shares of Reymar, and that Stephen Marcus held the remaining 58%; (2) that Sharman Marcus was not a shareholder of Reymar; and (3) that Reymar had more than 100 shares of stock. The Marcus children further allege that their consent, required to legally effectuate the sale of the property, was never obtained. Therefore, in the Federal Court Action, the Marcus children are seeking to rescind the sale of the property to plaintiffs.

It is undisputed that some documents produced by the sellers in the Federal Court Action reveal that defendant, Mr. Marmon, had in his possession, or had access to, certain documents

which included stock certificates demonstrating that the Marcus children collectively own 42% of Reymar, with Stephen Marcus owning the remaining 58% and Sharmon Marcus having no shares in Reymar. Despite having access to these documents, Mr. Marmon still counseled sellers to go forward with the transaction and allegedly facilitated a fraudulent sale of the property, according to plaintiffs herein.

Plaintiffs were first made aware of the alleged fraudulent nature of the transaction when they were served with the Federal Court Action complaint in September 2009. During discovery in the Federal Court Action, the Marcus children were made aware of a document purported to be a November 1988 Resolution (1988 Resolution) of Reymar, unilaterally transferring all of the shares from the Marcus children back to Stephen Marcus. The legality of this 1988 Resolution is disputed. Mr. Marmon, however, asserts that he was aware of the 1988 Resolution, and therefore did not participate in any purported fraudulent conveyance as this document did give Reymar authority to sell the property in question.

Arguments

Defendant contends that: (1) plaintiffs' cause of action for negligence is really one for legal malpractice and should therefore be dismissed because it is barred by the statute of limitations and plaintiffs lack of privity; (2) plaintiffs' fraud claim should be dismissed as improperly plead and barred by the statute of limitations; (3) plaintiffs' claim for contribution and indemnity should be dismissed because those claims are premature and for plaintiffs failure to state a claim for common law indemnification; and (4) plaintiffs' claim for a declaratory judgment must be dismissed, as it is premature.

Plaintiffs argue that this action cannot be dismissed because: (1) they have timely alleged a prima facie case for negligence; (2) the fraud claim is timely and properly plead; (3) their claims

for contribution and indemnification are ripe and sufficiently pled; and (4) the declaratory judgment claim is ripe for adjudication.

Discussion

When deciding whether or not a complaint should be dismissed pursuant to CPLR 3211(a)(7), the complaint must be construed in the light most favorable to the plaintiff, and all factual allegations must be accepted as true, limiting the inquiry to whether or not the complaint states, in some recognizable form, any cause of action known to our law (see, *World Wide Adjustment Bureau et al., v Edward S. Gordon Company, Inc.*, et al., 111 AD2d 98 [1st Dept, 1985]). In assessing the sufficiency of the complaint, this Court must also consider the allegations made in both the complaint and the accompanying affidavit, submitted in opposition to the motion, as true and resolve all inferences which reasonably flow therefrom, in favor of the plaintiff *(Joel v. Weber*, 166 Ad2d 130, [1st Dept, 1991]). The sufficiency of a pleading to state a cause of action generally depends upon whether or not there is substantial compliance with CPLR 3013, which requires that statements in a pleading be sufficiently particular to give the court and parties notice of the transactions or occurrences intended to be proved and the material elements of each cause of action. The burden is placed upon one who attacks a pleading for deficiencies in its allegations to show that he is prejudiced. The test of prejudice is to be given primary emphasis. Thereby, the court disregards pleading irregularities, defects, or omissions that are not such as to reasonably mislead one as to the identity of the transactions or occurrences sought to be litigated, or as to the nature and elements of the alleged cause or defense.

The existence of a legal duty is, of course, an essential element of any negligence claim. (*Pulka v. Edelman*, 40 N.Y.2d 781, 782, 390 N.Y.S.2d 393, 358 N.E.2d 1019). It is a plaintiff's obligation to establish a breach of that duty and that the injuries claimed were proximately caused

by the breach. *(Shante D. by Ada D. v. City of New York,* 190 A.D.2d 356, 361, 598 N.Y.S.2d 475, 478 [1st Dept. 1993] aff'd, 83 N.Y.2d 948, 638 N.E.2d 962 [1st Dept. 1994]). The statute of limitations for a negligence claim is 3 years from the accrual of the cause of action. (CPLR 214).

"The elements of a cause of action for fraud are a representation concerning a material fact, falsity of that representation, scienter, reliance and damages. Plaintiff must show not only that he actually relied on the misrepresentations, but also that such reliance was reasonable. Where a party has the means to discover the true nature of the transaction by the exercise of ordinary intelligence, and fails to make use of those means, he cannot claim justifiable reliance on defendant's misrepresentations." (*Stuart Silver Associates, Inc. v. Baco Development Corp.*, 245 A.D.2d 96, 665 N.Y.S.2d 415 [1st Dept. 1997]). CPLR 213(8), an action based upon fraud, states, in pertinent part:

> "...the time within which the action must be commenced shall be the greater of six years from the date the cause of action accrued or two years from the time the plaintiff or the person under whom the plaintiff claims discovered the fraud, or could with reasonable diligence have discovered it."

"Contribution is generally available as a remedy 'when two or more tort-feasors share in responsibility for an injury, in violation of duties they respectively owe to the injured person.' (*Garrett v. Holiday Inns,* 58 N.Y.2d 253, 258, 460 N.Y.S.2d 774, 447 N.E.2d 717, quoting *Smith v. Sapienza,* 52 N.Y.2d 82, 87, 436 N.Y.S.2d 236, 417 N.E.2d 530). 'A contribution claim can be made even when the contributor has no duty to the injured plaintiff.'(*Raquet v. Braun,* 90 N.Y.2d at 182, 659 N.Y.S.2d 237, 681 N.E.2d 404). In such situations, a claim of contribution may be asserted if there has been a breach of duty that runs from the contributor to the defendant who has been held liable. The 'critical requirement' for apportionment by contribution under CPLR Article 14 is that 'the breach of duty by the contributing party must have had a part in causing or

augmenting the injury for which contribution is sought.'(*Trump Vill. Section 3, Inc. v. New York State Hous. Fin. Agency*, 307 A.D.2d 891, 896, 764 N.Y.S.2d 17, 22-23 [1st Dept. 2003]). CPLR 1401 states that "two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought."

A right to indemnity, as distinguished from contribution, is not dependent upon legislative will, but springs from contract, express or implied, and full, not partial reimbursement is sought. *(McDermott v. City of New York*, 50 N.Y.2d 211, 406 N.E.2d 460 [1980]). Indemnification claims generally do not accrue for purpose of statute of limitations until party seeking indemnification has made payment to injured person and principle does not vary according to breach of duty for which indemnification is sought. (*Id.*). "The right to indemnification...includes the right to recover attorneys' fees, costs and disbursements for defending against plaintiff's action." (*Lowe v. Dollar Tree Stores, Inc.*, 40 A.D.3d 264, 835 N.Y.S.2d 161 [1st Dept. 2007]).

CPLR 3017(b) defines a demands for relief, and defines declaratory judgment as:

> "In an action for a declaratory judgment, the demand for relief in the complaint shall specify the rights and other legal relations on which a declaration is requested and state whether further or consequential relief is or could be claimed and the nature and extent of any such relief which is claimed."

A declaratory judgment "is usually unnecessary where a full and adequate remedy is already provided by another well-known form of action..... Where there is no necessity for resorting to the declaratory judgment it should not be employed." (*Automated Ticket Systems, Ltd. v. Quinn*, 90 A.D.2d 738, 455 N.Y.S.2d 799 [1st Dept. 1982]).

In reference to plaintiffs' negligence cause of action, moving defendant fails to refute

plaintiffs' claim on negligence, and instead argues that the negligence claim is really one for legal malpractice. Having failed to address the negligence claim at all, defendant is not entitled to its dismissal. Moreover, plaintiffs deny that they are alleging any legal malpractice claim against defendant and admit that he was not their attorney at the closing of the sale of this property in question.

Plaintiffs specified the elements of a claim of fraud in the pleadings and therefore the claim cannot be dismissed pursuant to CPLR 3211(a)(7). Specifically, plaintiffs allege that Mr. Marmon misrepresented the fact that the sellers had the legal right to transfer the property; he knowingly did so, due to his access to all of the Reymar records; plaintiffs relied on this representation, made the purchase and are now claiming damages as a resulf of Mr. Marmon's purported fraud. The fraud claim is also not barred by the statute of limitations. While the interposition date of July 14, 2011 is beyond 6 years from the June 30, 2005 sale of the property, plaintiffs assert that they did not discover the fraud until September 2009 when they were served with the pleadings in the Federal Court action and therefore the 2-years-from-discovery rule is applicable, and the claim of fraud, timely.

Plaintiffs' contribution claim is not premature. Plaintiffs have a possibility of losing the property in the Federal Court Action, having the sale of the property rescinded and losing the $4.8 million apartment. As per the "critical requirement" of CPLR Article 14, such a claim may be made before the potential judgment in the Federal Court Action. Moreover, plaintiffs have stated a cause of action for indemnification and at this juncture it is premature to dismiss this cause of action altogether.

Plaintiffs seek that the court declare that defendant be held liable for any damages awarded in the Federal Court Action. As the declaratory relief is an equitable remedy, and the remedy of

damages is more readily available, this cause of action must be dismissed. (*E-Z Eating 41 Corp. v. H.E. Newport L.L.C.*, 84 A.D.3d 401, 922 N.Y.S.2d 329 [1st Dept. 2011]). Accordingly, it is

ORDERED, that defendant's summary judgment motion to dismiss the action, is denied in part, and granted, in part; and it is further

ORDERED, that plaintiffs' 4th cause of action seeking declaratory relief, is hereby dismissed; and it is further

ORDERED, that defendant serve and file an answer to the complaint within 20 days from service of a copy of this order with notice of entry; and it is further

ORDERED that defendant shall serve a copy of this order with notice of entry on the County Clerk (Room 141B) and upon the Trial Support Office (Room 158) forthwith; and it is further

ORDERED that counsel are directed to appear for preliminary conference in Room 304, 71 Thomas St., NYC, 10013 on June 7, 2012, at 9:30 AM.

Dated: April 16, 2012

ENTER:

Joan M. Kenney, J.S.C.