Shum v Carpatia Resorts USA
2012 NY Slip Op 33495(U)
April 16, 2012
Sup Ct, New York County
Docket Number: 651669/11
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD PART 35
Justice

Index Number : 651669/2011
SHUM, CHI C.
vs.
CARPATIA RESORTS USA
SEQUENCE NUMBER : 002
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

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

Motion sequence 002 is decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that the motion (sequence number 002) of defendants John Yellon and WCS Lending, LLC to dismiss is granted and the complaint is severed and dismissed as against said defendants with costs and disbursements as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment in favor of said defendants; and it is further

ORDERED that counsel for defendants Yellon and WCS shall serve a copy of this order with notice of entry within twenty (20) days of entry on all counsel.

ORDERED that the remainder of the action shall continue.

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

Dated: 4.16.2012

HON. CAROL EDMEAD 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 35

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CHI C. SHUM, MD,

Plaintiff,

-against- Index No. 651669/11

CARPATIA RESORTS USA, CARPATIA RESORTS SRL, BRIAN BONNEMA, JIM SHIVERS, MARC A. STEIN, NORTH RIDGE SECURITIES CORP., JOHN YELLON, WCS LENDING LLC,

Defendants.

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HON. CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

In this action, plaintiff Chi C. Shum, MD (Shum) seeks to recover on a $250,000 loan he made to defendant Carpatia Resorts SRL (Carpatia) for the building of a luxury resort in Romania. The loan was allegedly used for the closing costs in order for Carpatia to obtain a $45,000,000 bridge loan from non-party Naranza Capital Partners (Naranza Capital). Defendants John Yellon and WCS Lending, LLC (WCS) (hereinafter, the Yellon defendants) move, pursuant to CPLR 3211 (a) (7), for an order dismissing the fifth, sixth, seventh, and eighth causes of action in plaintiff's complaint.

BACKGROUND

The following facts are taken from the complaint. In July 2008, defendants Jim Shivers, Brian Bonnema, and Carpatia represented to the public that they had acquired land, approvals, and zoning permission in Romania and were looking for $500,000 in interim loans to be used for development of a luxury resort (Complaint, ¶¶ 17-20). In late 2008 and 2009, Yellon, the principal of WCS, met Bonnema and Shivers and flew to Romania to inspect the property (*id.*, ¶¶

21-22). Thereafter, former defendants Marc A. Stein and North Ridge Securities Corp. (North Ridge)[1] were employed to raise interim funds for Carpatia (*id.*, ¶ 24). The complaint further alleges that former defendant Stein and Yellon purportedly "entered into an arrangement to work together to raise interim financing for the Carpatia project" (*id.*, ¶ 25).

On February 23, 2009, Yellon sent an e-mail to Shum to induce him to loan $250,000 to an unnamed company (*id.*, ¶ 27, Exh. A). The complaint alleges, upon information and belief, that Yellon made an investment in the Carpatia project (*id.*, ¶ 28). Yellon and WCS had acted as Shum's mortage broker and had obtained loans for him in connection with his home in Forest Hills, New York in 2006 and 2008 (*id.*, ¶ 15).

On February 25, 2009, Shum e-mailed Yellon and WCS to advise that he had read the "proposal," had spoken with Stein and would be meeting with Stein regarding the investment opportunity (*id.*, ¶ 29). On the same date, Shum e-mailed Stein to ask whether it was a sound investment (*id.*, ¶ 31). The following day, Stein met with Shum and told him that he would act as his financial consultant, and that Shum could depend on him for advice and guidance (*id.*, ¶ 33). Stein gave Shum a loan agreement and promissory note dated February 26, 2009 between Bonnema, Shivers and Carpatia as borrowers and Shum as lender that was signed by Bonnema and required the $250,000 to be repaid in full on or before May 30, 2009 (*id.*, ¶ 34). The loan agreement and promissory note had a 30% interest rate (*id.*, Exh. B). Stein informed Shum during that meeting on February 26, 2009 that if Carpatia could not obtain funding from Naranza Capital, Shivers and Bonnema were still responsible for payment of the loan (*id.*, ¶ 35). Shum

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[1]By stipulation dated July 15, 2011, Shum agreed to discontinue this action against Stein and North Ridge in favor of FINRA arbitration against Stein and North Ridge.

signed the note in Stein's presence and gave the note to Stein (*id.*, ¶ 36).

On February 27, 2009, Shum e-mailed an article about Naranza Capital to Stein which gave him second thoughts about the investment (*id.*, ¶ 40). Stein replied with several e-mails which allayed Shum's fears about the financing, and thereafter Shum signed three personal checks made payable to Carpatia in the sums of $100,000.00, $90,000.00, and $60,000.00 that were picked up by a messenger (*id.*, ¶¶ 41-46). Yellon sent Shum an e-mail stating that he was glad he was aboard and would be happy with the results (*id.*, ¶ 47).

On April 7, 2009, Stein and North Ridge sent Shum an e-mail stating that it looked like the loan was right on track (*id.*, ¶ 48). On May 28, 2009, Shivers sent Shum and others another e-mail indicating that repayment would be delayed for one month, but that the lender had signed a contract to fund on or before June 30 (*id.*, ¶ 49). The next day, Stein and North Ridge sent Shum an e-mail advising him that repayment would be delayed but this should not cause him to worry (*id.*, ¶ 50). On September 10, 2009, in response to an inquiry from Shum, Stein and North Ridge e-mailed Shum, stating that there had been a further delay and sent a signed commitment for funding that Carpatia would be receiving between October 2 and 16, 2009 (*id.*, ¶ 52). Stein also stated that he would speak to Yellon about Carpatia's failure to inform Shum about the delay (*id.*). On November 2, 2009, Stein and North Ridge advised Shum in an e-mail that most of the lenders were concerned by the lack of updates from Carpatia (*id.*, ¶ 53). On November 10, 2009, Shum sent a letter by certified mail to defendant Carpatia Resorts USA (Carpatia Resorts), Bonnema, and Shivers, demanding repayment of his loan with interest (*id.*, ¶ 70).

On December 7, 2009, Stein advised Shum that Carpatia had agreed to a monthly payment plan while it awaited final financing (*id.*, ¶ 55). Thereafter, on January 10, 2010,

Bonnema e-mailed Yellon and advised that the two loans were approved for financing (*id.*, ¶ 57). On the same date, Yellon sent an e-mail to Shum stating that "you made the decision based upon my advise [sic] . . ." (*id.*, ¶ 58).

On February 8, 2010, Shum asked Stein during a meeting why his checks had been drawn to Carpatia when the note named Carpatia Resorts as the borrower, to which Stein replied that Shum should not be concerned because Bonnema and Shivers were guarantors of the note (*id.*, ¶ 61). On March 30, 2010, Bonnema e-mailed Yellon and others, indicating that the project had secured the financial guarantee for the loan (*id.*, ¶ 65). In an e-mail dated April 2, 2010, Yellon stated to Shum that he was getting close to $1 million in accrued interest (*id.*, ¶ 66). On April 26, 2010, Yellon sent another e-mail, advising Shum that the funding should be available within a week (*id.*, ¶ 67). On August 10, 2010, Shum received an e-mail from Shivers or Carpatia which advised him that Carpatia's lender was under investigation for fraud (*id.*, ¶ 69). The e-mail from Shivers threatened Shum with a charge of usury due to the terms of the note (*id.*).

On February 10, 2011, Yellon forwarded an e-mail to Shum which advised Yellon and others that the Carpatia funds were to be received in short order (*id.*, ¶ 74). On March 11, 2011, Stein sent an e-mail to Shum, informing him that Carpatia's cash flow was not available to enter into a monthly payment plan with Shum, and that it would have sell its land in order to pay back its creditors (*id.*, ¶ 76).

On May 18, 2011, Shum's attorney sent a letter to Carpatia, Carpatia Resorts, Bonnema, and Shivers demanding payment of $250,000, within the cure period set forth in the note (*id.*, ¶ 86). However, these defendants have failed to repay Shum the $250,000 (*id.*, ¶ 87).

The complaint alleges four causes of action against Yellon and WCS: (1) negligence

(fifth cause of action); (2) breach of fiduciary duty (sixth cause of action); (3) negligent inducement (seventh cause of action) and (4) negligent misrepresentation (eighth cause of action). In opposition to the motion, Shum withdrew his cause of action for breach of fiduciary duty (Seltzer Affirm. in Opposition, ¶ 5).

DISCUSSION

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). "[A]llegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence are not presumed to be true and accorded every favorable inference" (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000] [internal quotation marks and citation omitted]).

Negligence and Negligent Misrepresentation (Fifth and Eighth Causes of Action)

The Yellon defendants argue that they did not owe Shum a duty, and that a special relationship did not exist between the parties because: (1) the alleged duty is based on the fact that the Yellon defendants acted as Shum's mortgage broker for loans obtained in 2006 and 2008; and (2) neither of those mortgages is at issue in this case. The Yellon defendants contend that Shum did not believe that the Yellon defendants owed him any duty either, because he obtained a second opinion from Stein on whether the loan was a sound investment.

In opposition, Shum contends that a special relationship existed between Shum and Yellon sufficient to sustain both the fifth and eighth causes of action. As argued by Shum, when

Yellon obtained mortgage loans for Shum, Yellon became privy to all of Shum's financial history and assets, his personal history, and his practice as a physician. In addition, Shum was the physician for Yellon and his wife since 2006 (Complaint, ¶ 16). Shum contends that Yellon made the following affirmative representations about existing facts in the e-mail dated February 23, 2009:

a) They (meaning Bonnema and Shivers) have invested over 40 million dollars of their own money this fall;
b) They own it free and clear with a value over 300 million euros;
c) The European faction of the PGA has signed on to do the first European PGA golf tour; and
d) The EU has already said that this project qualifies for funding on tourism so they are designating 1.4 billion in development dollars to be reimbursed para pur sue as the developer (Carpatia) lays out expense for development

(Complaint, Exh. A). Shum contends that, in that same e-mail, Yellon stated that "[t]hey are seeking 250 k only (*we've gotten the rest of our equity placement*) and will return the money by 5/20/09 with 30% return in interest" (*id.* [emphasis added]). Alternatively, Shum asserts that the motion should be denied pending completion of discovery.

"To establish a prima facie case for negligence, a plaintiff must prove that (1) defendant owed a duty to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom. The existence of a legal duty is, of course, an essential element of any negligence claim" (*Friedman v Anderson*, 23 AD3d 163, 164-165 [1st Dept 2005]). "Unlike foreseeability and causation, both generally factual issues to be resolved on a case-by-basis by the fact finder, the duty owed by one member of society to another is a legal issue for the courts" (*Eiseman v State of New York*, 70 NY2d 175, 187 [1987]).

To state a cause of action for negligent misrepresentation, the plaintiff must allege: "'(1)

the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information'" (*CMMF, LLC v J.P. Morgan Inv. Mgt., Inc.*, 78 AD3d 562, 565 [1st Dept 2010], quoting *J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148, *rearg denied* 8 NY3d 939 [2007]). In addition, "liability for negligent misrepresentation has been imposed only on those persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified" (*Kimmell v Schaefer*, 89 NY2d 257, 263 [1996]). New York courts take a cautious approach in determining whether the relationship sufficient to support a negligent misrepresentation exists (*Sykes v RFD Third Ave. 1 Assoc., LLC*, 67 AD3d 162, 165 [1st Dept 2009], *affd* 15 NY3d 370 [2010]).

In *Kimmell*, the defendant, the chairman of a board and chief financial officer of a corporation that developed a limited partnership, sought to induce plaintiffs to invest in the limited partnership by directly sending them a memo regarding business projections, meeting with each plaintiff personally, and sending out correspondence to assure the safety of the investment. The Court of Appeals held that the record supported a finding that defendant established a special relationship with the plaintiffs because of the financial expertise of the defendant, and his continued attempts to communicate directly with the plaintiffs concerning the investment (*Kimmell*, 89 NY2d at 264).

In *Fresh Direct v Blue Martini Software* (7 AD3d 487 [2d Dept 2004]), the plaintiff purchased software and related services from the defendant. The Second Department held that "the allegations in the complaint concerning the defendant's involvement in the plaintiff's

software needs for several months before the contract was entered into, together with the plaintiff's reliance on the defendant's expertise, were sufficient to plead the existence of a special relationship necessary to sustain this cause of action" (*id.* at 489).

While the question of whether a special relationship exists is generally a question of fact (*Kimmell*, 89 NY2d at 264), where the plaintiff's allegations, accepted as true and given every reasonable inference, fail to plead the existence of a special relationship, a negligent misrepresentation claim is subject to pre-answer dismissal (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 181 [2011]).

Here, the complaint alleges that, in an e-mail dated February 23, 2009, Yellon made factual representations as to the Carpatia project, which induced Shum into making his $250,000 loan (Complaint, ¶ 27). However, the court concludes that Shum has failed to allege a special relationship that would give rise to a duty on the part of Yellon to impart correct information. The complaint alleges that prior to February 27, 2009, Yellon and WCS acted as Shum's advisor and mortgage broker and obtained loans for him in the amounts of $971,000 and $400,000 (*id.*, ¶ 15). Shum had also established a personal relationship with Yellon as a result of his medical practice (*id.*, ¶ 16). Although Shum states, in opposition, that Yellon held himself out as having financial expertise relating to Carpatia (Shum Aff., ¶ 4), a special relationship must have existed prior to the transaction giving rise to the alleged wrong, and not as a result of it (*Emigrant Bank v UBS Real Estate Sec., Inc.*, 49 AD3d 382, 385 [1st Dept 2008]; *Elghanian v Harvey*, 249 AD2d 206 [1st Dept 1998]). In any event, any representations made by Yellon in the e-mail dated February 23, 2009 were of a casual and informal nature, unlike the defendant's representations in *Kimmell*.

The court finds Shum's reliance on *Suez Equity Inv. v Toronto-Dominian Bank* (250 F3d 87 [2d Cir 1999]) to be unpersuasive. In that case, the Second Circuit held that the complaint adequately pled a special relationship where the "defendants initiated contact with the plaintiffs, induced them to forebear from performing their own due diligence, and repeatedly vouched for the veracity of the allegedly deceptive information" (*id.* at 103). Here, in contrast, Shum allegedly sought a second opinion from Stein as to the investment (Complaint, ¶ 29, Exh. A). Shum also investigated Naranza Capital on his own (*id.*, Exhs. C, D). In addition, the complaint does not indicate that Yellon repeatedly vouched for the veracity of the information in his February 23, 2009 e-mail before Shum loaned the $250,000 to Carpatia.

Accordingly, the fifth and eighth causes of action are dismissed.

Negligent Inducement (Seventh Cause of Action)

The Yellon defendants argue that no New York cases have recognized a cause of action for negligent inducement. The Yellon defendants further contend that the only allegation in the complaint regarding the Yellon defendants' knowledge is a conclusory statement that they "knew or should have know" that Carpatia could not be funded, without any facts indicating how or why that would be the case. According to the Yellon defendants, the complaint makes clear that Yellon was merely passing on information to Shum from other defendants, rather than making representations based on any of his own knowledge. Finally, the Yellon defendants argue that the information they provided were opinions about future expectations.

In opposition, Shum contends that the elements of a negligent inducement claim are substantially similar to the elements of a cause of action for negligent misrepresentation. As indicated previously, Shum also requests that the motion be denied to allow for discovery.

The court finds that the negligent inducement cause of action is duplicative of the fifth and eighth causes of action (*see also Crabtree v Tristar Automotive Group, Inc.*, 776 F Supp 155, 164 [SD NY 1991] [New York does not impose liability upon a speaker for false statements recklessly or negligently made; however, there is an exception where the parties' relationship suggests a closer degree of trust and reliance than that of the ordinary buyer and seller]). Since Shum fails to allege any special relationship or other duty imposing a duty on Yellon to impart correct information, the seventh cause of action is dismissed.

CONCLUSION

Accordingly, it is

ORDERED that the motion (sequence number 002) of defendants John Yellon and WCS Lending, LLC to dismiss is granted and the complaint is severed and dismissed as against said defendants with costs and disbursements as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment in favor of said defendants; and it is further

ORDERED that counsel for defendants Yellon and WCS shall serve a copy of this order with notice of entry within twenty (20) days of entry on all counsel.

ORDERED that the remainder of the action shall continue.

Dated: April 16, 2012

ENTER:

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD