Gold Circle Fin., LLC v GC Sandton Acquisition, LLC
2017 NY Slip Op 30338(U)
February 21, 2017
Supreme Court, New York County
Docket Number: 652987/2015
Judge: Anil C. Singh

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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GOLD CIRCLE FINANCE, LLC,

Plaintiff,

-against-

GC SANDTON ACQUISITION, LLC,

Defendants.

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DECISION AND ORDER

Index No. 652987/2015

Mot. Seq. 001

HON. ANIL C. SINGH, J.:

Background

In this action for, *inter alia*, declaratory judgment, breach of contract, and breach of implied covenant of good faith and fair dealing, plaintiff Gold Circle Finance LLC ("Gold Circle" or "plaintiff") moves to amend its complaint pursuant to CPLR 3025(b) against defendant GC Sandton Acquisition, LLC ("Sandton" or "defendant"). Defendant opposes on the grounds that the motion is futile and the fraud claim is barred by the statute of limitations.

Analysis

Legal Standard

Generally, "leave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit … and the decision whether to grant leave to amend a complaint is committed to the sound discretion of the court." Davis v. South Nassau Communities Hosp., 26 N.Y.3d 563, 580 (2015) (internal citations omitted). Further,

> [m]otions for leave to amend pleadings should be freely granted absent prejudice or surprise resulting therefrom, unless the proposed amendment is palpably insufficient or patently devoid of merit. Plaintiff need not stablish the merit of its proposed new allegations buts simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit.

MBIA Ins. Corp. v. Greystone & Co. Inc., 74 A.D.3d 499, 499 (1st Dept 2010) (internal citations omitted); see also Fairpoint Companies, LLC v. Vella, 134 A.D.3d 645 (1st Dept 2015); Priestley v. Panmedix Inc., 134 A.D.3d 642, 643 (1st Dept 2015).

Defendant's Argument that the Motion is Futile

Plaintiff's motion for leave to amend the complaint under CPLR 3025(b) is denied. Defendant contends that the amendment is patently lacking in merit because the allegations in the proposed amended complaint do not state a claim for negligent misrepresentation. See Reply Memo, p. 6.

In order to state a viable claim for negligent misrepresentation, "a plaintiff must allege a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury." Mandarin Trading Ltd. v. Wildenstein, 16 N.Y.3d 173, 179 (2011); see also J.A.O. Acquisition Corp. v. Stavitsky, 8 N.Y.3d 144, 148 (2007) ("A claim for negligent misrepresentation requires the plaintiff to

demonstrate (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.").

Further, a claim of negligent misrepresentation requires a showing of the existence of a "special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff." Mandarin, 16 N.Y.3d at 180; see also OP Solutions, Inc. v. Crowell & Moring, LLP, 72 A.D.3d 622 (1st Dept 2010) ("the claim for negligent misrepresentation is also defective in the absence of a special relationship of confidence and trust between the parties.").

In the commercial context, "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." CMMF, LLC v. J.P. Morgan Inv. Management Inc., 78 A.D.3d 562, 565 (1st Dept 2010) quoting Kimmell v. Schaefer, 89 N.Y.2d 257, 263 (1996). "In order to impose tort liability in a commercial case, there must be some identifiable source of a special duty of care." J.P. Morgan Securities Inc. v. Ader, 127 A.D.3d 506, 507 (1st Dept 2015).

A special duty will be found "if the record supports a relationship so close as to approach that of privity." North Star Contr. Corp. v. MTA Capital Constr. Co.,

120 A.D.3d 1066, 1069 (1st Dept 2014). Generally, "an arm's length business relationship…is not generally considered to be the sort of confidential or fiduciary relationship that would support a cause of action for negligent misrepresentation." Greentech Research LLC v. Wissman, 104 A.D.3d 540 (1st Dept 2013); see also Fidelity Nat. Title Ins. Co v. N.Y. Land Title Agency LLC, 121 A.D.3d 401, 403 (1st Dept 2014).

As a preliminary matter, Gold Circle has not pled either in its complaint or its proposed first amended complaint ("FAC") that Sandton and Gold Circle had a relationship so close as to that of privity. In its amended complaint, plaintiff alleges that CIT, which ultimately assigned to Sandton all of its rights and obligations, set up a Working Capital Facility from which Gold Circle drew down funds pursuant to Borrowing Base Certificates that had to be approved by CIT. See FAC, ¶36.

Based upon numerous approvals of these Borrowing Base Certificates, Gold Circle made capital commitments to third parties and drew down funds to pay its operating, production and other expenses. Id. Further, plaintiff alleges that CIT informed Gold Circle that it had made an error regarding its interest calculation which would restrict the Borrowing Base Availability by $1 million and that it had mistakenly approved Borrowing Base Certificates because they included post-Maturity cash flows in the calculation of Working Capital Availability further reducing the availability by $3 million. Id. ¶37. Gold Circle alleges that they relied

upon CIT's initial approvals of the Borrowing Base Certificates and CIT's calculations of Gold Circle's Working Capital Availability. Id. ¶39. Further, they allege that if they had known that the calculations were false and that their Working Capital was going to be reduced they would not have made certain business decisions. Id. In other words, CIT, and by assignment defendant, provided plaintiff with false information that plaintiff reasonably relied upon.

Regardless, the relationship between plaintiff and CIT, which was the predecessor in interest to Sandton, is that of an arm's length business relationship. See Silvers v. State of New York, 68 A.D.3d 668, 669 (1st Dept 2009) (An arm's length business relationship is not considered to be confidential or fiduciary in nature and therefore does not support a cause of action for negligent misrepresentation.). The complaint and FAC state that Gold Circle and CIT entered into a Loan and Security Agreement and later, a First Amended and Restated Loan and Security Agreement, in which CIT agreed to advance certain amounts to Gold Circle. See Compl. ¶¶ 4-6; FAC ¶¶ 4-6.

New York courts have consistently held that relationships, such as the one between Gold Circle and Sandton, do not arise to the level of a special relationship. See Ader, 127 A.D.3d 506; Atkins Nutritionals, Inc. v. Ernst & Young, LLP, 301 A.D.2d 547, 548-49 (2d Dept 2003) (Finding that an alleged breach of an agreement between plaintiff and defendant, without more, did not rise to the level of negligent

misrepresentation as this is an arm's length transaction.). Plaintiff contends that there was a special relationship between CIT and Gold Circle because CIT "directed Gold Circle on preparation of, and approved, numerous Borrowing Base Certificates evidencing then current Borrowing Base Availability." FAC ¶36.

However, the First Department has held that even where a party has superior knowledge of a business and that businesses past dealings with defendant, this is still not sufficient to establish a special relationship that would justify reliance on alleged misrepresentations. Ader, 127 A.D.3d at 507. The alleged relationship did not create a separate duty and was simply a part of the negotiated agreements. Where a relationship arises out of an arm's length transaction, a special relationship will not be imposed on the parties. As Gold Circle has not adequately alleged a special relationship, its claim for negligent misrepresentation is dismissed.[1]

Whether the Proposed Fraud Claim is Timely

Additionally, plaintiff is time-barred from bringing this action for fraud based on a negligent misrepresentation. An action based upon negligent misrepresentation must be commenced within the greater of 6 years from the date the cause of action accrued or 2 years from the time plaintiff discovered or, with reasonable diligence, could have discovered the fraud. See CPLR 213(8); Sargiss v. Magarelli, 12 N.Y.3d

[1] As plaintiff has not satisfied the threshold matter of whether there is a valid claim for negligent misrepresentation, this court need not consider whether the negligent misrepresentation claim is duplicative of the claim for breach of contract.

527, 532 (2009) ("A fraud-based action must be commenced within six years of the fraud or within two years from the time the plaintiff discovered the fraud or could with reasonable diligence have discovered it."); Avalon LLC v. Coronet Properties Co., 306 A.D.2d 62, 63 (1st Dept 2003); Miller v. Polow, 14 A.D.3d 368 (1st Dept 2005). For negligent misrepresentation claims under the six-year statute of limitations of CPLR 213(8), the cause of action accrues "on the date of the alleged misrepresentation relied upon by the plaintiff." Gerschel v. Christensen, 143 A.D.3d 555, 557 (1st Dept 2016).

The test in determining when the fraud could have been discovered is an objective one. Gutkin v. Siegal, 85 A.D.3d 687, 688 (1st Dept 2011). "Where the circumstances are such as to suggest to a person of ordinary intelligence the probability that he has been defrauded, a duty of inquiry arises, and if he omits that inquiry when it would have developed the truth, and shuts his eyes to the facts which call for investigation, knowledge of the fraud will be imputed to him." Id. (internal citations omitted); see also Perini Corp. v. City of New York, 122 A.D.3d 528 (1st Dept 2014); Bohn v. 176 W. 87th St. Owners Corp., 106 A.D.3d 598 (1st Dept 2013).

Plaintiff alleges in its amended complaint that in March 2009, it was notified by CIT that it had made an error in the Working Capital Facility and the Borrowing Base Availability. See Amended Compl., ¶37. Therefore, plaintiff's cause of action for fraud began to accrue in March 2009, which is more than six years before it filed

its original complaint in August 2015. Plaintiff counters that it did not suffer damages from CIT's negligent misrepresentations until January 2010, however, the applicable accrual period began in March 2009, when the alleged fraud occurred. See Sargiss, 12 N.Y.3d at 532; Gutkin, 85 A.D.3d 687.

Additionally, plaintiff's claim is barred because it was not brought within 2 years from the time plaintiff discovered or could have discovered the fraud. Plaintiff admits that the fraudulent conduct continued through February 2012. See Reply Memo., p. 11. The claim must be brought, under CPLR 213(8) by February 2014, which it was not. Plaintiff mistakenly argues that either the 2 year or 6-year term applies to the February 2012 date. However, New York case law is clear that a party has either 6 years from the date the fraud occurred or 2 years from the time plaintiff discovered the fraud. See CPLR 213(8); Gerschel, 143 A.D.3d 555, 557 (1st Dept 2016) ("when a plaintiff alleges fraud...a cause of action for negligent misrepresentation accrues on the date of the alleged misrepresentation which is relied upon by the plaintiff.") (internal citations omitted); Sandpebble Bldrs., Inc. v. Mansir, 90 A.D.3d 888 (2d Dept 2011) (same). Therefore, plaintiff had either until March 2015 under the six-year statute or February 2014 under the two-year statute, to bring the claim for negligent misrepresentation.

Plaintiff contends that the accrual period does not being to run until the time of injury, which occurred in January 2010, thereby making the claim for negligent

misrepresentation timely. See Varga v. McGraw Hill Financial, Inc., 2017 WL 535902 (1st Dept Feb. 10, 2017); New York City Tr. Auth. v. Morris J. Eisen, P.C., 276 A.D.2d 78 (1st Dept 2000); House of Spices (India), Inc. v. SMJ Services, Inc., 103 A.D.3d 848 (2d Dept 2013). Even if this court were to recognize this accrual period for negligent misrepresentation claims, plaintiff's claim would still be time-barred. Plaintiff contends that its injury did not occur until January 2010 when, on reliance on CIT's misrepresentations, they defaulted on its loan payments and caused the interest rate to increase. See FAC ¶41. However, plaintiff's allegations within the same amended complaint contradict when the injury occurred. Gold Circle alleges that "CIT's errors, miscalculations and misrepresentations to Gold Circle resulted in the [immediate] constriction of the Borrowing Base by over $4 million." FAC ¶38.

Additionally, plaintiff contends that had it known that these approvals of the Borrowing Base Certificates and calculations of the Working Capital Availability were erroneous, "Gold Circle would not have made certain business decisions and would not have drawn down funds from the Working Capital Facility to pay certain of its operating, production (including pose-production), and other expenses." Id. ¶39. In other words, the injuries were sustained in March 2009, when the borrowing base was diminished by $4 million and not when Gold Circle defaulted on the loan.

Plaintiff also relies upon the Court of Appeals' decision in Kronos, Inc. v. AVX Corp., 81 N.Y.2d 90 (1993). However, the court in Kronos dealt with tortious inducement of a breach of contract and whether the three-year statute of limitations applies under CPLR 214(4). Id. at 92. Here, the issue is whether the six-year statute of limitation applies for a negligent misrepresentation claim under CPLR 213(8). Therefore, the reasoning in Kronos is inapposite.

Plaintiff's claim for negligent misrepresentation is time barred and its motion for leave to amend is denied.

Whether Plaintiff is Bound by Alleged Judicial Admissions in its Pleadings

Plaintiff has not made any judicial admissions in its pleadings that it is subsequently bound by. "Facts admitted in a party's pleadings constitute formal judicial admissions and are conclusive of the facts admitted in the action in which they are made." GMS Batching, Inc. v. TADCO Constr. Corp., 120 A.D.3d 549, 551 (2d Dept 2014); see also Goldman v. Malagic, 45 Misc.3d 37, 39 (1st Dept 2014); Milton Weinstein Assocs. v. Nynex Corp., 266 A.D.2d 138 (1st Dept 1999). Defendant alleges that plaintiff admitted to owing $8,490,631.65. See Compl. ¶¶19, 22, 44. However, paragraphs 22 and 44 both specifically state that its remaining payment obligations will total "no more" than $8,490,631.65 and paragraph 19 states that the balance would be "approximately" $8,490,631.65. Id.

These statements by plaintiff are not enough to hold that Gold Circle admitted to owing $8,490,631.55. Therefore, these statements are not judicial admissions.

Accordingly, it is hereby

ORDERED that plaintiff's motion for leave to amend its complaint is denied; and it is further

ORDERED that defendant's request for a formal judicial admission that plaintiff admitted to owing $8,490,631.55 is denied.

Date: February 21, 2017
New York, New York

Anil C. Singh