SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 47

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ASHWIN PANDYA

Plaintiff,

–against- Index No.: 155091/2015

HIMANSHU SHUKLA, CHANDRA PATEL, and EMERGING INDIA REAL ESTATE,

Defendants.

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

Papers	Numbered
Notice of Motion Affidavits/Affirmations annexed	1
Affirmation in Opposition	2
Reply Affirmation	3

Erika Edwards, J.:

This is an action for fraud in the inducement and false pretenses, fraud and intentional misrepresentation, civil conspiracy, breach of contract and to pierce the corporate veil brought by Plaintiff Ashwin Pandya ("Pandya"). The action arises from Plaintiff Pandya's investment in real estate in India with defendants Himanshu Shukla ("Shukla"), Chandra Patel ("Patel"), and Emerging India Real Estate ("EIRE"). The complaint alleges that Defendants Shukla and Patel fraudulently induced Plaintiff Pandya to enter into an agreement to invest in India's real estate industry, through EIRE, which was an investment management corporation over a period of four years. The complaint further alleges that the investments failed to produce any returns for Plaintiff Pandya and the loan money was not used for its designated purposes.

Defendants Shukla and EIRE now move, pursuant to CPLR 3211 (a) (5) and (7), for an order dismissing the complaint for failure to state a cause of action.[1] For the reasons stated below, the motion is ***granted in part*** and ***denied in part***.

Plaintiff Pandya alleges that Defendant Shukla, EIRE's Chief Executive Officer, and Defendant Patel approached Plaintiff Pandya in May 2006 with an opportunity to invest in the booming real estate market in India. Defendants allegedly represented themselves as successful real estate developers in India, both individually and through their joint partnership in non-party company Antarctica India Real Estate Advisors, LLC. Defendants Shukla and Patel allegedly offered Plaintiff Pandya an opportunity to invest in the real estate through EIRE, and promised substantial investment yields, along with certain safeguards against loss. Specifically, Defendants Patel and Shukla allegedly stated that they planned to solicit investments and loans from American investors for investment in real estate in India and Defendants promised substantial yields and interest payments to investors.

Additionally, Plaintiff Pandya alleges that Defendants Patel and Shukla explained to him that they employed certain safeguards to protect all principal investments from loss. Specifically, Defendants allegedly stated that all investments would be used to acquire and/or develop actual, physical real estate and that the investments were secured by a lien, ensuring that all investors were paid pursuant to the sale of any projects where investor funds were utilized. Plaintiff Pandya further alleges that Defendants Patel and Shukla represented that development projects were insured against loss, ensuring virtually no risk of loss to principal investments.

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[1] Although defendants purports to move under CPLR 3211 (a) (5), they fail to set forth any grounds to dismiss the complaint under this section.

Moreover, Plaintiff Pandya alleges in substance that on June 1, 2006, he and Defendants Shukla and Patel signed and executed a memorandum of understanding that set forth some of the terms of the parties' oral agreement. Thereafter, in 2010, Plaintiff visited Defendants' offices in Bombay, India, to view and discuss development projects. Defendants continued to make representations to Plaintiff Pandya through 2013 regarding the investments. Plaintiff Pandya relied on those representations and established a fund that raised more than $395,000.00 to invest in EIRE, by soliciting money from family members, friends, business clients and other members of his community.

Furthermore, Plaintiff Pandya alleges in substance that defendants promised to provide him with financial reports and a minimum return on investment of no less than 12% per year. Despite these assurances, Defendants failed to provide these reports and the minimum return promised. Plaintiff Pandya also alleges that upon the discovery of fraudulent behavior, he personally reimbursed his investors, so that he would be the only investor to sustain the financial loss.

Thereafter, Plaintiff commenced this action in May 2015, and Defendants now move to dismiss the complaint for failure to state a cause of action.

Discussion

When considering Defendant's motion to dismiss Plaintiffs' complaint for failure to state a cause of action, pursuant to CPLR 3211(a)(7), the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord Plaintiffs the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]). Normally, a court should not be concerned with the ultimate merits of the case (*Anguita v Koch*, 179 AD2d 454, 457,

579 NYS2d 335 [1st Dept 1992]). However, these considerations do not apply to allegations consisting of bare legal conclusions as well as factual claims which are flatly contradicted by documentary evidence (*Simkin v Blank*, 19 NY3d 46, 52, 945 NYS2d 222, [2012]).

Fraud

To demonstrate a valid cause of action based on fraud, "the complaint must allege misrepresentation or concealment of a material fact, falsity, scienter on the part of the wrongdoer, justifiable reliance and resulting injury" (*MP Cool Invs. Ltd. v Forkosh*, 142 AD3d 286, 290-291 [1st Dept 2016] [internal quotation marks and citation omitted]; *see also New York University v Cont'l Ins. Co.*, 87 NY2d 308, 318 [1995]). However the question of what constitutes justifiable or reasonable reliance is not generally a question to be resolved as a matter of law on a motion to dismiss" (*ACA Fin. Guar. Corp. v Goldman, Sachs & Co.*, 25 NY3d 1043, 1045 [2015]).

In the present case, Plaintiff Pandya alleges fraud in his first two causes of action. Defendants argue in substance that the fraud claims should be dismissed because Plaintiff Pandya was not entitled to rely on their alleged misrepresentations. Plaintiff Pandya argues in substance that he specifically pled his reliance on the Defendants' representations in the complaint.

The complaint alleges, among other things, that Defendants induced Plaintiff to invest and/or loan Defendants $395,000.00, by falsely representing themselves as experienced investors in real estate in India and by falsely representing that they had safeguards in place to protect Plaintiff Pandya's investment. The complaint further alleges that Plaintiff Pandya traveled to India at Defendants' request and he visited their office and specific real estate projects where Defendants allegedly invested the money. Additionally, Plaintiff Pandya alleges that Defendants falsely represented that certain project sites that he visited were pending sale. Those sales would result in

a return on his investment with profit.

Defendants failed to demonstrate, as a matter of law, that Plaintiff Pandya was not entitled to rely on their alleged misrepresentations. Therefore, the court finds that the complaint sufficiently alleges the causes of action for fraudulent inducement and fraud. As such, Plaintiff Pandya's first two causes of action based on fraud are sufficient and Defendants' motion to dismiss Plaintiff Pandya's first and second causes of action is ***denied***.

Conspiracy

In the state of New York, "civil conspiracy is not recognized as an independent tort" *(Mamoon v Dot Net Inc.*, 135 AD3d 656, 658 [1st Dept 2016], quoting *Shared Communications Servs. of ESR, Inc. v Goldman Sachs & Co.*, 23 AD3d 162, 163 [1st Dept 2005]; *see Johnson v Law Off. of Schwartz*, 145 AD3d 608 [1st Dept 2016][conspiracy to commit a tort is not a separate cause of action]). Plaintiff Pandya's third cause of action is for civil conspiracy to commit fraud. Given that this state does not recognize conspiracy as a separate cause of action, Plaintiff Pandya's third cause of action is dismissed. Therefore, Defendants' motion to dismiss conspiracy to commit fraud as the third cause of action is ***granted***.

Breach of Contract

Pursuant to the statute of frauds, "an agreement not reduced to writing is void if, by its terms, it cannot be performed within one year of its making" (*JNG Const., Ltd. v Roussopoulos*, 135 AD3d 709 710 [2d Dept 2016]; *see* General Obligations Law § 5–701 [a] [1]). "Only those agreements which, by their terms, have absolutely no possibility in fact and law of full performance within one year will fall within the statute of frauds" (*id.* [internal quotation marks and citations omitted]). "As long as the agreement may be fairly and reasonably interpreted such that it may be performed within

a year, the Statute of Frauds will not act as a bar however unexpected, unlikely, or even improbable that such performance will occur during that time frame" *(id.* [internal quotation marks and citations omitted]).

In Plaintiff Pandya's fourth cause of action, he alleges breach of contract. More specifically, Plaintiff Pandya alleges that the parties agreed that he would loan Defendants $395,000.00, at an annual interest rate of 12%. The parties also agreed that interest would accrue immediately and payments would become due thereafter. Plaintiff Pandya alleges that Defendants breached their contract, and continue to be in breach of contract, by failing to make payments toward the interest or principal.

Defendants argue in substance that this cause of action should be dismissed because the complaint fails to allege the existence of an enforceable contract. They further argue that, if Plaintiff Pandya is alleging the existence of an oral agreement, then such agreement violates the statute of frauds because it cannot be performed within a year.

Plaintiff Pandya contends that the various agreements between himself and Defendants were originally oral agreements made with the expectation that they would be reduced to writings. Plaintiff contends that some of the terms of the parties' business agreement were reduced to writing. Additionally there was no agreed upon time period for the agreement to expire, so it could have been fully performed within one (1) year.

The court finds that the complaint sufficiently alleges that Plaintiff Pandya agreed to loan Defendants $395,000.00, at an annual interest rate of 12%, and that defendants breached the contract by failing to make payments toward the interest or principal. Whether the alleged agreement is enforceable involves questions of fact which are not properly decided on a motion to dismiss

pursuant to CPLR 3211. Therefore, the motion to dismiss this cause of action for breach of contract is ***denied***.

Piercing the Corporate Veil

The doctrine of piercing the corporate veil is typically employed by a third party seeking to go behind the corporate entity to circumvent the limited liability of the owners and to hold them liable for some underlying corporate obligation (*see Morris v NYS Dep't of Tax and Fin.*, 82 NY2d 135, 141 [1993]). The concept is equitable in nature and assumes that the corporation itself is liable for the obligation sought to be imposed (*id.*). Therefore "an attempt of a third party to pierce the corporate veil does not constitute a cause of action independent of that against the corporation; rather it is an assertion of facts and circumstances which will persuade the court to impose the corporate obligation on its owners" (*id.*, citing, *Walkovszky v Carlton,* 18 NY2d 414, 417-19 [1966]).

A decision whether to pierce the corporate veil in a given circumstance will heavily depend on the specific facts of the case. Therefore, New York cases may not be reduced to definitive rules governing the varying circumstances when the power may be exercised. As such, a party seeking to pierce the corporate veil bears a heavy burden of showing that: "(1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" *(Skanska USA Bldg. Inc. v Atlantic Yards B2 Owner, LLC*, 146 AD3d 1, 12 [1st Dept 2016] [internal quotation marks and citations omitted]).

In the present case, Defendants argue that this cause of action must be dismissed because New York law does not recognize any such cause of action. Plaintiff Pandya does not specifically address this argument in his opposition. Notwithstanding, the court will address the merits of

Defendants' argument.

Defendants' argument that a cause of action for piercing the corporate veil does not exist in New York State, is misleading. New York State does recognize this cause of action, but acknowledges that there is a heavy burden to be met for a court to ultimately pierce the corporate veil (*Skanska,* 146 AD3d at 12).

In the present case, the complaint states that Defendants formed and maintained various corporate entities to perpetrate a fraud on Plaintiff and that the corporate structures were facades for various fraudulent and improper conduct. The court finds that Plaintiff Pandya's allegations are sufficient enough for the court to deny dismissal at the pleading stage. Therefore, Defendants' motion to dismiss the fifth cause of action to pierce the corporate veil is ***denied***.

Accordingly, it is hereby

ORDERED that the motion to dismiss the complaint by Defendants Himanshu Shukla and Emerging India Real Estate is granted to the extent that the third cause of action for conspiracy is dismissed as against Defendants; and it is further

ORDERED that the motion is otherwise denied; and it is further

ORDERED that the parties appear for a Compliance Conference on May 11, 2017, at 9:30 a.m. in part 47, Room 320, located in 80 Centre Street, New York, NY 10013.

DATED: March 17, 2017

ENTER:

ERIKA M. EDWARDS, J. S. C.