SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

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PAUL YABLON, JILL YABLON

Plaintiffs,

-against-

NICHOLAS STERN,

Defendant.

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DECISION/ORDER
Index No. 157327/2016

HON. DAVID B. COHEN, J.:

Nicholas Stern ("defendant") is a member and the principal of Stern Projects, LLC ("SP"). Plaintiffs are the owners of apartments 10C and 11C in the residential building located at 730 Park Avenue, New York, NY. In March 2016, plaintiffs and defendant discussed a renovation project to be performed by SP. According to the Complaint, plaintiffs and defendant had very detailed and substantive conversations about the project, specifically the tight time frame required, as all work needed to be complete by September 2016. The discussion included the fact that $840,000 needed to be advanced by plaintiffs in order to make sure that when the project could be started in June, materials, plans and labor would be ready to go and there would be no delay. The Complaint specifically alleges that defendant assured plaintiffs that SP had the knowledge, personnel and ability to perform the work within the required time restraints and that defendant would use the time between March 2016 and June 2016 to perform the necessary advance work in preparation for the renovation project. The Complaint further alleges that defendant promised that SP would assign specific budgetary and project management persons to the project and would provide regular updates through a control budget to track the work. Based upon the need for certain work prior to commencement of the actual renovation, plaintiff paid the $840,000 in requested down payment and deposits. The parties entered into a contract on March 18, 2016 (the "Contract"), detailing the renovation project.

The Complaint states that all of the representations were found to be false shortly into the contract and alleges that defendant never had any intention to have SP perform the necessary preliminary work. The Complaint further alleges that after signing the Contract, when pressing defendant for detailed records

memorializing payments made by defendant, defendant represented that he had made the payments and would furnish proof shortly, when in reality, SP had not placed many of the bargained for orders. Eventually, plaintiffs terminated the contract and demanded return of $400,000. On about July 29, 2016, $54,622.65 was returned. Plaintiffs commenced this action against defendant personally alleging three causes of action; (1) fraud in the inducement; (2) conversion; and (3) fraud. SP is not a named defendant. Defendant then filed this pre-answer motion to dismiss.

When deciding a motion to dismiss pursuant to CPLR §3211, the court should give the pleading a "liberal construction, accept the facts alleged in the complaint to be true and afford the plaintiff the benefit of every possible favorable inference" (*Landon v. Kroll Laboratory Specialists, Inc.*, 22 NY3d 1, 5-6 [2013]; *Faison v. Lewis*, 25 NY3d 220 [2015]. However, if a complaint fails within its four corners to allege the necessary elements of a cause of action, the claim must be dismissed (*Andre Strishak & Associates, P.C. v. Hewlett Packard & Co.*, 300 AD2d 608 [2d Dept. 2002]. Thus, in this case, the Court must decide whether the three causes of action asserted against defendant personally are properly stated.

It is undisputed that plaintiffs signed the contract with SP only and that SP is a separate legal entity from defendant. However, defendant is a member and principal of SP and Limited Liability Company Law § 609 does not insulate a member from a fraud in which he personally participated (*277 Mott St. LLC v Fountainhead Const., LLC*, 83 AD3d 541 [1st Dept 2011] *citing Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486 [2008]). It is important to note that plaintiffs have not filed a breach of contract claim in this matter as such a claim could only have be asserted against SP as the contracting party.

A fraudulent inducement claim will not be dismissed as duplicative of a breach of contract claim if plaintiff pleads "a breach of duty distinct from, or in addition to, the breach of contract" (*GoSmile, Inc. v Levine*, 81 AD3d 77, 81 [1st Dept 2010]). In *GoSmile* the Court wrote: "[T]his Court, as well as the Court of Appeals, has held that a misrepresentation of present fact, unlike a misrepresentation of future intent to perform under the contract, is collateral to the contract, even though it may have induced the plaintiff to sign it, and therefore involves a separate breach of duty" (*id.* at 81 *citing Deerfield Communications Corp. v Chesebrough-Ponds, Inc.*, 68 NY2d 954 [1986]).

Similarly, the Appellate Division, First Department has permitted an action to lie against the chief executive officer and sole shareholder of a corporate defendant, when said person misrepresented to plaintiffs that defendants had obtained all of the required permits and approvals and had completed the construction plans for their home renovation project, and said statements allegedly induced plaintiffs to enter into the construction contract with the corporate defendant (*Shugrue v Stahl*, 117 AD3d 527 [1st Dept 2014]). However, to the extent that a fraud in the inducement claim does not involve a separate duty and essentially alleges that defendant did not intend to perform under the contract when he made the promissory statements, such complaint may be dismissed under 3211(a)(7) as it only gives rise to a breach of contract claim (*Forty Central Park South, Inc. v Anza,* 117 AD3d 523 [1st Dept 2014]. The key question is whether there was a misrepresentation of a future intent to perform or a misrepresentation of present fact that induced plaintiff to enter into the contract (*First Bank of Americas v Motor Car Funding, Inc.*, 257 AD2d 287 [1st Dept 1999]). If the former, the claim should be dismissed as redundant (*id.*). However, if a plaintiff alleges that it was induced to enter into a transaction because of misrepresented material current facts, the plaintiff has stated a claim even though the same circumstances would also give rise to a breach of contract claim (*id.*).

Here, plaintiffs' allegations related to the fraudulent inducement all are for some future promise and not a present fact. For example, the Complaint alleges that during the meetings defendant said that SP would be able to complete the project in two phases in the appropriate summer time frame, that SP would use the time period after signing the contract and before June 2016 to obtain materials and bids, that SP would provide budgets, that SP would provide records and other similar promises. All of those are future promises and not present fact. Even the statement that it had competent personnel for the job capable of performing the work and ordering relates to actions to be done in the future and is simply an opinion. As none of the alleged representations made by defendant involves a separate duty, it is not collateral to the inducement and can only give rise to a breach of contract claim. Conversely, in *Shugrue* and *First Banks*, the Courts found that specific statements of pertinent current facts, were used to induce and then relied upon.

Additionally, Article 1 of the Contract states "[T]he Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements either written or oral." "While a general merger clause will not operate to bar parol evidence of fraud in the inducement, * * * where the parties expressly disclaim reliance on the representations alleged to be fraudulent, parol evidence as to those representations will not be admitted" (*Bando v Achenbaum*, 234 AD2d 242, 244 [2d Dept 1996]; *Stan Winston Creatures, Inc. v Toys "R" Us, Inc.*, 4 Misc 3d 1019(A) [Sup Ct 2004]; *see also Citibank, N.A. v Plapinger*, 66 NY2d 90, 92 [1985]; *Pine Equity NY, Inc. v. Manhattan Real Estate Equities Group LLC,* 2 AD3d 248 [1st Dept 2003]; *Richbell Information Services, Inc. v. Jupiter Partners, L.P.,* 309 AD2d 288 [1st Dept 2003]; *Basel v Traders Commercial Capital, LLC*, 11 Misc 3d 1089(A) [Sup Ct 2006]). Here, plaintiffs specifically disclaimed any reliance on prior negotiations and representations and the fraudulent inducement claim must be dismissed.

The second cause of action for conversion is also dismissed. "A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession" (*State of New York v. Seventh Regiment Fund,* 98 NY2d 249 [2002]). The two key elements of conversion are (1) plaintiff's possessory right or interest in the property (*Pierpoint v. Hoyt,* 260 NY 26 [1932]; *Seventh Regiment Fund,* 98 NY2d at 259) and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43 [2006]). In the Complaint, plaintiffs do not support the claim for conversion by alleging any facts that support even the inference that defendant personally has exercised any rights or has assumed control over the money. There is no allegation that SP diverted the funds the defendant or that defendant is personally holding the money. Although the Complaint does state that "upon information and belief defendant has converted to his personal use" use of the word conversion is a conclusory legal allegation not supported by any fact. There is no claim that defendant personally engaged in any conduct where he has exercised any dominion over the disputed funds. Thus, the conversion cause of action must be dismissed.

The third cause of action is for fraud. A claim rooted in fraud must be pleaded with the requisite particularity (CPLR 3016(b)). The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553 [2009]). However, because this action is brought against defendant in his personal capacity, the Complaint must allege facts that establish the elements of the cause of action in a manner demonstrating that defendant would not be personally insulated from liability (*Pludeman v N. Leasing Sys., Inc.*, 10 NY3d 486 [2008]).

In *Eurycleia Partners, LP v Seward & Kissel, LLP*, the Court of Appeals wrote:

> We recently explored the pleading requirements of CPLR 3016(b) in *Pludeman v. Northern Leasing Sys., Inc.*, 10 N.Y.3d 486, 860 N.Y.S.2d 422, 890 N.E.2d 184 [2008]. In that case, we noted that the purpose underlying the statute is to inform a defendant of the complained-of incidents. We cautioned that the statute "should not be so strictly interpreted as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting a fraud" (*id.* at 491, 860 N.Y.S.2d 422, 890 N.E.2d 184 [internal quotation marks and citation omitted]). Although there is certainly no requirement of "unassailable proof" at the pleading stage, the complaint must "allege the basic facts to establish the elements of the cause of action" (*id.* at 492, 860 N.Y.S.2d 422, 890 N.E.2d 184). We therefore held that CPLR 3016(b) is satisfied when the facts suffice to permit a "reasonable inference" of the alleged misconduct (*id.*). And, "in certain cases, less than plainly observable facts may be supplemented by the circumstances surrounding the alleged fraud" (*id.* at 493, 860 N.Y.S.2d 422, 890 N.E.2d 184).

Eurycleia Partners, LP v Seward & Kissel, LLP, 12 NY3d 553, 559 [2009].

In *Pludeman v. Northern Leasing Sys*, the Court of Appeals explained what was required when alleging fraud against a person normally protected from personal liability through a limited liability entity. Specifically, the complaint must sufficiently allege facts, in the light most favorable to the complainant, to permit a factfinder to infer that the individual defendant was involved with, or knew of, or participated, in the scheme to defraud (*Pludeman v N. Leasing Sys., Inc.*, 10 NY3d 486 [2008]; *see also Bd. of Managers of Beacon Tower Condominium v 85 Adams St., LLC*, 136 AD3d 680 [2d Dept 2016][members of limited liability companies, including officers, may be held personally liable if they participate in the commission of a tort in furtherance of company business]). Here, in viewing the facts in the light most favorable to plaintiffs, the Complaint alleges facts with enough particularity to sufficiently state a cause of action for fraud. To the extent that defendant argues that the Complaint does not state the justifiable reliance on the

post-contract statements with particularity, that argument is without merit. The Complaint details a number of transactions in which plaintiffs allegedly transferred money to SP at defendant's request in order for defendant to pay for deposits or down payments that were not made. As such, the motion to dismiss the fraud cause of action is denied.

For the above reasons it is therefore

ORDERED, that defendant's motion is granted in part and that the first and second causes of action are dismissed; and it is further

ORDERED, that defendant's motion is otherwise denied.

This constitutes the decision and order of the Court.

DATE : 3/24/2017

COHEN, DAVID B., JSC