Third District Court of Appeal

State of Florida

Opinion filed July 22, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D19-1119
Lower Tribunal No. 15-8170

GVK International Business Group, Inc.,
Appellant,

vs.

Michael Levkovitz, et al.,
Appellees.

An Appeal from the Circuit Court for Miami-Dade County, David C. Miller, Judge.

Morgan & Morgan, P.A., and Joshua B. Alper and William B. Lewis and Evan H. Frederick, for appellant.

Lavalle, Brown & Ronan, P.A., and Anthony D. Brown (Boca Raton), for appellees.

Before SALTER, LINDSEY and LOBREE, JJ.

SALTER, J.

GVK International Business Group, Inc. ("GVK"), appeals an amended circuit court order dismissing with prejudice all three claims in its second amended complaint (the "Complaint") against one of two defendants, Michael Levkovitz ("Levkovitz"). For the reasons which follow, we affirm the amended order of dismissal.

Facts and Procedural History

GVK alleged in the Complaint that its principal, Dr. Gary V. Karakashian, was wrongfully induced to cause GVK to loan $2,000,000.00 to Aerospace Center Corp. ("Aerospace"). GVK's tax and investment advisor, Martin Washofsky, introduced Dr. Karakashian and GVK to Aerospace and its principal, Levkovitz. As memorialized in a one-page promissory note ("Note") signed by GVK and Aerospace: (1) the loan proceeds could be used to acquire aviation equipment described in an attached list; (2) there were to be 24 monthly interest payments (12% per annum, $20,000.00 per month); and (3) all principal was to be repaid at the second anniversary of the loan.

The Note also referred to the purchased equipment as "Security" and authorized Aerospace to begin liquidating inventory ninety days before maturity in order to repay the loan. The Note further specified that any inventory of Aerospace to be sold could only be sold to a third party and at a price not less than market value. After a default in payment, or ten days after a demand for repayment and a failure

by Aerospace to return the purchased equipment to GVK, then GVK was "granted all rights of possession as the owner."

Another, seemingly inconsistent, provision stated that title to the Security (equipment to be purchased with the loan proceeds) would be retained by GVK until repayment of the loan in full.[1] The Complaint alleged that Levkovitz fraudulently (Count I) or negligently (Count II) failed to disclose that Washofsky had a financial interest in entities from which Aerospace would purchase aviation equipment using GVK's loan proceeds, and that Levkovitz thereby aided and abetted a breach of fiduciary duty owed to GVK by Washofsky (Count III).

Although all the monthly interest payments were made, the Complaint alleged that neither the principal of the loan nor the Security were ever repaid or turned over to GVK as agreed. In fact, GVK alleged, Aerospace never actually used the loan proceeds to purchase the aviation equipment it had promised to purchase and grant title in, or hold as security for, GVK.

The trial court granted Levkovitz's motion to dismiss the three counts against him, with prejudice. This appeal followed.

[1] There are several provisions in the Complaint, and in the Note itself, indicating that a person unfamiliar with secured transactions drafted the one-page promissory note. The parties did not use a separate security instrument or provide for a financing statement to perfect a security interest under the Uniform Commercial Code.

Analysis

Our standard of review in this appeal is de novo. "When reviewing a final order dismissing a complaint, we, like the lower court, are required to accept as true all well pled factual allegations contained in the complaint; and thus, our determination of whether the complaint states a cause of action is based on a pure question of law." Tabraue v. Doctors Hosp., Inc., 272 So. 3d 468, 471 n.6 (Fla. 3d DCA 2019).

The trial court's dismissal included findings that the Complaint's allegations regarding the loan arrangements were inconsistent with the written terms of the promissory note executed by GVK and Aerospace. A party to a contract may not recover in fraud for alleged oral misrepresentations that have been "adequately covered or expressly contradicted in a later written contract." B & G Aventura, LLC v. G-Site Ltd. P'ship, 97 So. 3d 308, 309–10 (Fla. 3d DCA 2012) (quoting Hillcrest Pac. Corp. v. Yamamura, 727 So. 2d 1053, 1056 (Fla. 4th DCA 1999)); see also TRG Night Hawk Ltd. v. Registry Dev. Corp., 17 So. 3d 782, 784 (Fla. 2d DCA 2009) ("A party cannot recover for alleged false misrepresentations that are adequately dealt with or expressly contradicted in a later written contract. To hold otherwise is to invite contracting parties to make agreements of the kind in suit and then avoid them by simply taking the stand and swearing that they relied on some other statement.") (citations omitted); Marriott Int'l, Inc. v. American Bridge Bah.,

Ltd., 193 So. 3d 902 (Fla. 3d DCA 2015); and Dentaland, P.A. v. St. Stephen Ltd. P'ship ex rel. LEF/Delray Mall, Ltd., 729 So. 2d 1012 (Fla. 3d DCA 1999).

As to GVK's claim that Levkovitz aided and abetted Washofsky's breach of a fiduciary duty, the trial court correctly concluded that Levkovitz owed no fiduciary duty to GVK to proactively disclose facts relating to business dealings between Washofsky and Levkovitz, as GVK could have discovered those facts through due diligence. GVK's agreements with Aerospace were at arms-length. See Watkins v. NCNB Nat'l Bank of Fla., N.A., 622 So. 2d 1063, 1065 (Fla. 3d DCA 1993) ("In an arms-length transaction, however, there is no duty imposed on either party to act for the benefit or protection of the other party, or to disclose facts that the other party could, by its own diligence have discovered. Furthermore, in the absence of a fiduciary relationship, [a party]'s nondisclosure of material facts in an arm's length transaction is not actionable misrepresentation unless [that party] employed an artifice or trick to prevent an independent investigation by [the other party].") (citations omitted). GVK did not allege that it was deceived or prevented in any way from discovering the information about Washofsky before signing the Note.

Based on this analysis, the trial court's amended order of dismissal with prejudice is affirmed in all respects. At the risk of stating the obvious, we express no opinion regarding any claim of GVK as against Washofsky or Aerospace.

Affirmed.