Edwards v Shah
2011 NY Slip Op 33906(U)
August 25, 2011
Supreme Court, New York County
Docket Number: 651070/10
Judge: Melvin L. Schweitzer

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER Justice PART 45

ROSEMARY EDWARDS and EILEEN McGRATH INDEX NO. 651070/10

MOTION DATE

- v -

MICHAEL SHAH and RICHARD DE CESARE MOTION SEQ. NO. 002

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion by plaintiff to dismiss defendant Michael Shah's counterclaim is GRANTED per the attached Decision and Order.

Dated: August 25, 2011

MELVIN L. SCHWEITZER J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

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

ROSEMARY EDWARDS and EILEEN McGRATH,	:	
Plaintiffs,	:	Index No. 651070/10
-against-	:	DECISION AND ORDER
MICHAEL SHAH and RICHARD DeCESARE,	:	Sequence No. 002
Defendants.	:	

MELVIN L. SCHWEITZER, J.:

This case arises out of a personal guaranty of a loan which was not repaid. One of the defendants, Michael Shah (Mr. Shah), has interposed a counterclaim for fraudulent inducement and seeks rescission of his guaranty.

Background

In December 2007, 163 W 80th Street LLC (Company) contracted to purchase real property located at 163 West 80th Street, New York, NY (Property) from Rosemary Edwards and Eileen McGrath (plaintiffs) for $5.4 million. The purchase was closed on May 23, 2008. Part of the $5.4 million purchase price was raised through a $700,000 loan (First Loan) made by plaintiffs to the Company. The First Loan was jointly and severally personally guaranteed (First Guaranty) by the defendants, including Mr. Shah. The First Loan initially was to be repaid on August 23, 2008, but the repayment term was extended until September 2008.

In Mr. Shah's Affidavit in Opposition to Motion to Dismiss, he claims that plaintiffs made certain representations to him in connection with the sale of the Property: "In order to justify the $5.4 million dollar asking price, plaintiffs represented to the Company and to me that the Property was eligible for the Historical Facade Easement program." Furthermore, he alleges

that "Plaintiffs agreed to undertake the necessary work relating to the easement." In addition, "Plaintiffs represented that the Property was not designated as a Landmark and was not located within a Landmark District."

In September 2008, 163 W 80th Street Associates (Associates) agreed to pay off the First Loan. However, there was a shortfall of approximately $140,000 due to certain reserves to be held on the First Loan. To overcome this obstacle, a second loan was arranged, whereby plaintiffs loaned $150,000 to Associates ("Second Loan"). This second loan was also jointly and severally personally guaranteed by the defendants, including Mr. Shah ("Second Guaranty"). It is this guaranty which forms the basis of Mr. Shah's counterclaim in question.

Associates wired $707,000 to plaintiffs on September 25, 2008. On September 29, 2008, plaintiffs wired $150,000 to Associates. Defendants' Second Guaranty was forwarded to plaintiffs on or about October 20, 2008.

The Second Loan was not repaid by either Associates or by defendants, and plaintiffs filed suit for breach of contract. They seek recovery of the unpaid principal remaining on the promissory note ($150,000) plus accrued interest at a rate of 12% from the date of maturity. Mr. Shah's counterclaim alleges fraud in the inducement as grounds for the rescission of the Second Guaranty.

Procedural History

Plaintiffs have moved to dismiss Mr. Shah's counterclaim pursuant to CPLR 3211(a) (1) and (7).

Discussion

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction, the facts as alleged taken as true, and the proponents are to be accorded the benefit

of every possible favorable inference. The court is to determine only whether the facts as alleged fit within any cognizable legal theory. *Morone v Morone*, 50 NY2d 481, 484 (1980). The criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one. *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). In assessing a motion under CPLR 3211 (a) (7), a court may freely consider affidavits submitted by the proponent to remedy any defects in the pleading. *Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 (1976).

In order to sustain a cause of action for fraudulent inducement, a claimant must show "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." *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421 (1996); *Channel Master Corp. v Aluminum Ltd. Sales, Inc.*, 4 NY2d 403 (1958); *Century 21, Inc. v F. W. Woolworth Co.*, 181 AD2d 620, 625 (1st Dept 1992). Such a claim, like any fraud cause of action, must set forth "the circumstances constituting the wrong . . . in detail." CPLR 3016 [b]; *Megaris Furs v Gimbel Bros.*, 172 AD2d 209, 210 (1st Dept 1991). If sufficient factual allegations of but a single element are lacking, then the cause of action must be dismissed.

Plaintiffs have argued that the pleadings and documentary evidence do not support Mr. Shah's counterclaim for five reasons. First, they assert that he relied on representations made in connection with the wrong transaction and has no evidence to sustain his claim. Second, they assert he has not identified a single contemporaneous misrepresentation. Third, they contend his alleged reliance is unreasonable as a matter of law. Fourth, they assert that the merger clause and the "absolutely and unconditionally" provision in the Second Guaranty preclude Mr. Shah from asserting a claim for fraud in the inducement. Fifth, they allege that

Mr. Shah knew the property had landmark status five months before signing the Second Guaranty. The plaintiffs also have argued that Mr. Shah's counterclaim cannot be sustained as a matter of law as it is unavailable to him as the guarantor.

The only representations Mr. Shah has identified were those made to him at the time of the sale and First Loan. He has identified two representations: (1) "In order to justify the $5.4 million dollar asking price, Plaintiffs represented to the Company and to me that the Property was eligible for the Historical Facade Easement program. . . .[They also] agreed to undertake the necessary work relating to the easement," and (2) "Plaintiffs represented that the Property was not designated as a Landmark and was not located within the Landmark District." [Mr. Shah's Affidavit]. Both of these representations were made in connection with the sale of the property, not the Second Loan and Second Guaranty. There is no allegation that the representations ever were discussed in connection with the $150,000 Second Loan and Second Guaranty. Mere silence on behalf of both parties will not turn these prior representations into contemporaneous ones. As Mr. Shah has failed to identify any misrepresentations or omissions contemporaneous with the execution of the Second Guaranty, this, of itself, is sufficient to support a dismissal of his counterclaim.

Mr. Shah also has not alleged facts sufficient to establish the element of reliance. Although the issue of justifiable reliance is normally an issue of fact not to be determined on a motion for summary judgment or a motion to dismiss, an action for fraudulent inducement may properly be dismissed when the record reveals that claimant's allegations concerning misrepresentations and failures to disclose consist of no more than conclusory statements. *See Shea v Hambros PLC* , 244 AD2d 39, 45-48 (1st Dept 1998). In *Shea*, the court stated, "in particular we find the element of reliance conspicuously absent. . . .Accordingly, as to this cause

of action, we conclude that there is simply no genuine issue of material fact to be resolved, and summary judgment dismissing this claim should have been granted." *Id. at* 46, 48.

Likewise, in the present case, there is simply no genuine issue of material fact to be resolved. Conclusory statements aside, Mr. Shah has not plead reasonable reliance. "To show reliance, [claimant] must demonstrate that he was induced to 'act [or] refrain from acting' to his detriment by virtue of the alleged misrepresentation or omission" *Shea v Hambros PLC* , 244 AD2d 39, 26 (1st Dept 1998), quoting *Megaris Furs v Gimbel Bros.*, 172 AD2d 209, 212 (1st Dept 1991).

Mr. Shah has nowhere indicated that he was induced to sign the Second Guaranty on the basis of any misrepresentations. He simply asserts that the two prior alleged misrepresentations made as part of an earlier transaction caused the indebtedness that necessitated the $150,000 Second Loan and Second Guaranty. Defendant's statement in his Affidavit in Opposition to Motion to Dismiss that "had Plaintiffs not made the misrepresented [sic] regarding the Property, the purchase price would have been reduced by $540,000, the $700,000 loan would not have been necessary, *and the $150,000 loan used to pay down the $700,000 loan certainly would not have been necessary!*" is irrelevant. He does not claim that he was induced to sign the Second Guaranty by the misrepresentations, but simply that the misrepresentations caused the need for money which motivated the borrowing and the Second Guaranty.

As the court already has concluded that the counterclaim is to be dismissed, there is no need to decide the issue of whether the terms of the Second Guaranty themselves preclude such a counterclaim. The court notes, however, that cases holding claims for fraudulent inducement are not precluded involve guaranties that either have had no merger clause or no "absolute and unconditional" language. *See e.g. GTE Automatic Electric Inc. v Martin's Inc.*, 127 AD2d 545,

547 (1st Dept 1987) ("In our case, the promissory notes do not contain a merger clause nor is there any language to bar parole evidence of fraudulent misrepresentations. While the promissory notes do provide that the obligation is 'absolute and unconditional,' there was similar language in the guarantee in *Millerton Agway Coop. v Briarcliff Farms*, 17 NY2d 57 which the court held there as insufficient to preclude proof of fraud in the inducement; *Sabo v Delman*, 3 NY2d 155, 162 (a merger clause alone does not preclude a defendant from claiming fraudulent inducement); *Zaro Bake Shop, Inc. v David*, 176 AD2d 721 (2d Dept 1991) ("although the guaranty provided that the Davids were 'absolutely and unconditionally' liable on the note, such language, in and of itself, was, contrary to the Plaintiff's contention, insufficient to preclude the Davids from introducing proof of fraud in the inducement").

The cases in which preclusion was found involved guaranties that had both a merger clause and specific language regarding preclusion. Most also involved "absolute and unconditional" language. *See e.g. Banco do Estado de Sao Paolo S.A. v Mendes Junior Int'l Co.*, 249 AD2d 137, 138 (1st Dept 1998) ("the guaranty in the integrated loan documents was both 'absolute and unconditional' and was enforceable 'irrespective of . . . any other circumstances which might constitute a defense' and, accordingly, was 'not [to be] affected or discharged by the unenforceability for any reason' of the loan agreement and accompanying notes. Thus, the express terms of the guaranty effectively barred the defense"); *Bank of India v Sanghvi*, 224 AD2d 347, 347 (1st Dept 1996) ("The unconditional guarantee specifically provided that the guarantors waived all defenses and counterclaims"); *Schwartz v Ross*, 233 AD2d 229, 229 (1st Dept 1996) ("the specific disclaimer and merger clauses in the contract barred Plaintiffs' fraudulent inducement claim").

In the case here, the terms of the guaranty do involve a general merger clause and "absolute and unconditional" language, and, thus, would favor preclusion. However, as noted above, the court's decision here is not predicated on this issue.

Lastly, the court rejects plaintiffs' contention that Mr. Shah's allegations of fraud can only be brought by the borrower. There is no rule prohibiting a fraudulent inducement case being brought in regards to a guaranty. What is prohibited is for a guarantor to pursue a claim based on allegations that the principal borrower was fraudulently induced. If misrepresentations induced *the guarantor* to sign the guaranty, he can bring a fraud in the inducement claim. The issue is who was defrauded. In the present case, Mr. Shah simply has not sufficiently plead the circumstances constituting the wrong in detail insofar as he has not identified relevant misrepresentations and has not alleged reasonable reliance on such misrepresentations. *See Hotel 71 Mezz Lender LLC v Mitchell.* 63 AD3d 447, 448 (1st Dept 2009) (claim dismissed).

Accordingly, it is

ORDERED that plaintiffs' motion to dismiss this counterclaim is granted.

Dated: August 25, 2011

ENTER:

J.S.C.

MELVIN L. SCHWEITZER
J.S.C.