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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ~~EMILY JANE GOODMAN~~ SHLOMO HAGLER J.S.C. PART 17

Justice

Index Number : 107212/2011
HARLEM SUITES, LLC
vs.
YERUSHALMI, DAVID
SEQUENCE NUMBER : 001
DISM ACTION/INCONVENIENT FORUM

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1

Answering Affidavits — Exhibits _____ | No(s). 2

Replying Affidavits _____ | No(s). 3

Upon the foregoing papers, it is ordered that this motion is

THIS MOTION/ORDER TO SHOW CAUSE
IS DECIDED IN ACCORDANCE WITH
THE ATTACHED ORDER.

FILED
SEP 28 2012
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 9/21/12

SHLOMO HAGLER J.S.C.

~~EMILY JANE GOODMAN~~

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

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HARLEM SUITES, LLC,

Index No. 107212/2011

Plaintiff,

-against-

DAVID YERUSHALMI, JOSEPH GOPIN, and 231 NORMAN AVENUE, LLC,

DECISION/ORDER

Defendants.

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HON. SHLOMO S. HAGLER, J.S.C.:

Defendant David Yerushalmi ("Yerushalmi") moves for an order pursuant to CPLR § 3211(a)(5) and (7), dismissing the action on the grounds that the statute of limitations has expired and the complaint fails to state a cause of action. Plaintiff Harlem Suites, LLC, ("plaintiff") opposes the motion.

On or about March 4, 2005, plaintiff and defendants 231 Norman Avenue, LLC ("231 LLC") and Joseph Gopin ("Gopin") entered into an operating agreement ("Agreement") relating to 231 Norman Avenue Property Development LLC (the "Company"). (See Exhibit "2" to the Motion). The Company was established to develop the property located at 231 Norman Avenue into a residential condominium building. Pursuant to Section 3.4 of the Agreement, defendants Yerushalmi, Gopin and 231 LLC, along with non-parties Jonathan Ilan Ofir ("Ofir") and Jonathan Rigbi ("Rigbi"), agreed to jointly and severally guaranty the return of plaintiff's capital contributions (the "HS Funds") within four years of the date of the Agreement. Simultaneously with the execution of the Agreement, defendants executed a Guaranty and Security Undertaking (the "Guaranty"), that bound them, jointly and severally, as guarantors of the return of the funds to plaintiff. (See Exhibit

"2" to the Motion). Section 3.4 of the Guaranty also contained representations and warranties as to the net worth of defendants. Specifically, it listed the net worth of David Yerushalmi at $8,000,000.00, Joseph Gopin at $10,000,000.00 and 231 LLC at $525,000.00. (See Exhibit "1" to the Motion). The parties also entered into a construction agreement on the same day. Pursuant to Section 3.6 of the construction agreement, plaintiff agreed to provide the Company with $1,750,000.00 of capital, which was to bear 10% interest per annum. Pursuant to section 3.9 of the construction agreement, the defendants along with non-parties Ofir and Rigbi agreed to be jointly and severally liable for the return of the HS funds within 4 years of the date of the construction agreement.

On September 5, 2007, the Company refinanced the project debt with North Fork Bank, paid off a prior mortgage and plaintiff received the remaining $917,000.00. An additional $45,000.00 was paid to plaintiff in November 2007. In a previous action filed in Supreme Court, New York County under the caption Harlem Suites, LLC v. 231 Norman Avenue, LLC, et al., Index Number 603178/2008, plaintiff, in the First Amended Complaint filed on or about October 5, 2009, claimed there was a sum of $1,525,759.00 of outstanding HS Funds as of March 4, 2009. Plaintiff was granted summary judgment in that amount for breach of contract against 231 Norman Avenue, LLC, DCI, USA, Inc, Yerushalmi, Gopin, Rigbi and Ofir.

Plaintiff, in this action, now claims that the representations of net worth made in section 3.4 of the Guaranty were knowingly false and/or recklessly misleading when they were made and in justifiable reliance on these representations, plaintiff agreed to provide the Company with funds. Plaintiff claims to have been damaged in the amount of $2,497,791.00. (See Exhibit "1" to the Motion).

Motion to Dismiss

It is well settled that in determining a motion to dismiss pursuant to CPLR §3211, the courts must liberally construe the pleadings, accept the facts as alleged to be true and interpret them in light most favorable to the non-movant. See, Leon v. Martinez, 84 N.Y.2d 83 (1994).

In Cron v. Hargro Fabrics, Inc., 91 NY2d 362 (1998), the Court of Appeals clearly set forth the standard for deciding a CPLR § 3211 motion to dismiss as follows:

> On a CPLR 3211 motion made against a complaint, a court must take the allegations as true and resolve all inferences which reasonably flow therefrom in favor of the pleader (*see,* Sanders v Winship, 57 NY2d 391, 394). In opposition to such a motion, a plaintiff may submit affidavits "to remedy defects in the complaint" and "preserve inartfully pleaded, but potentially meritorious claims" (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635, 636; *but see, American Indus. Contr. Co. v Travelers Indem. Co.*, 42 NY2d 1041, 1043). Though limited to that purpose, such additional submissions of the plaintiff, if any, will similarly be "given their most favorable intendment" (*Arrington v New York Times Co.*, 55 NY2d 433, 442).

91 NY2d at 366.

Statute of Limitations

An action based upon fraud must be commenced within six years from the date of the fraud or two years from the time the plaintiff discovered the fraud. CPLR §213(8). Plaintiff alleges that defendants committed fraud when they signed the Guaranty on March 5, 2005. (See Exhibit "1" to the Motion). This action was commenced more than six years later on June 21, 2011. There is no allegation in the complaint that there was any subsequent discovery within two years of the action. As such, the claim is seemingly time-barred pursuant to CPLR §213(8).

Once the defendant makes a *prima facie* showing that the action is seemingly time-barred, the plaintiff bears the burden of establishing the two year discovery exception. (Doyon v Bascom,

38 AD2d 645 [3rd Dept 1971]; Hillman v City of New York, 263 AD2d 529 [2d Dept 1999] lv denied 94 NY2d 759 [2000]).

In opposition to defendant's motion, plaintiff merely submitted an attorney's affirmation in opposition along with a deposition of David Yerushalmi, a no-show deposition transcript of Joseph Gopin and a memorandum of law. While plaintiff's attorney claims in the memorandum of law that plaintiff did not discover the alleged fraud until Yerushalmi's deposition in October 2010, and the action is timely under the two year discovery exception, there is no affidavit or any other evidence submitted to support this claim. An attorney's affirmation and memorandum of law have no probative value as they are not made by a party with personal knowledge of the facts. Wehringer v Helmsley Spear, 91 AD2d 585 (1st Dept 1982) aff'd 59 NY2d 688 (1983). The deposition, which was signed by Yerushalmi, has probative value but has no relation to the alleged fraudulent acts as it was merely a post-judgment deposition to ascertain defendant's assets following the summary judgment ruling in the earlier proceeding. Plaintiff took Yerushalmi's deposition to ascertain and discover the whereabouts of his assets in 2010 to obtain payment of the earlier judgment. The alleged fraud was that Yerushalmi misrepresented his assets in 2005. The deposition, however, does not contain information regarding Yerushalmi's assets in 2005. This Court, even after accepting all allegations as true, is not able to infer from either the complaint or the deposition that plaintiff discovered the fraud within the last two years. The discovery exception to the statute of limitations for fraud is inapplicable because plaintiff has failed to allege sufficient facts that it could not have discovered the fraud earlier than two years from the date the action was commenced. Gonik v Israel Discount Bank of N.Y., 80 AD3d 437, 438 (1st Dept 2011).

Even assuming *arguendo* that you can infer from the deposition that Yerushalmi misrepresented his assets in 2005, plaintiff failed to submit an affidavit that the information contained in the deposition was newly discovered at the deposition for the first time, and therefore falls within the two year discovery exception period. Therefore, the motion is granted and the action dismissed as being time-barred.

Conclusion

Accordingly, this Court grants the motion dismissing this action.

The foregoing constitutes the decision and order of the Court. Courtesy copies of this decision and order have been sent to counsel for the parties.

Dated: September 21, 2012
New York, New York

Hon. Shlomo S. Hagler, J. S. C.