Silver v Newman
2012 NY Slip Op 32572(U)
October 2, 2012
Supreme Court, Suffolk County
Docket Number: 22581/2010
Judge: Emily Pines
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[* 1]

SHORT FORM ORDER

Index No. 22581-2010

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

COPY

Present:

Hon. Emily Pines
Justice Supreme Court

Motion Date: 06-05-2012
Submit Date: 06-19-2012
Motion No.: 005 MOTD
006 MD

[ ] Final
[x] Non Final

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RHONA SILVER, individually and derivatively on, behalf of RHOBAR, INC., RHOBAR DEVELOPMENT ASSOCIATES, LLC., AND ACKERLY ASSOCIATES, LLC,

Plaintiff,

- against -

BARRY NEWMAN, UNITED KIRKWOOD, LLC, NORTHEAST UNITED CORPORATION, RHOBAR INC., RHOBAR DEVELOPMENT ASSOCIATES LLC., FIFTH AVENUE 781 ASSOCIATES, LLC., HOWARD RITTBERG, ESQ., LEVENE, GOULDIN & THOMPSON, LLP., NEWCO MANAGEMENT GROUP, LLC., LOWE'S HOME CENTERS, INC., JOHN & JANE DOE, 1-10,

Defendants.
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ORDERED that the motion (motion sequence number 005) by defendants Howard Rittberg, Esq. and Levene Gouldin & Thompson, LLP for an order dismissing the action as asserted against them is granted to the extent that the sixth and ninth causes of action are dismissed; and it is further

ORDERED that the motion (motion sequence number 006) by defendants Barry Newman, United Kirkwood, LLC, Northeast United Corporation, Fifth Avenue 781

10/5/12

Associates, LLC, Newco Management Group, LLC, Kid's Planet, LLC and United Stone Industries LLC for summary judgment dismissing the complaint as asserted against them is denied: and it is further

ORDERED that defendants Howard Rittberg, Esq.., and Levene Gouldin & Thompson, LLP are directed to serve and file their answer(s) pursuant to CPLR 3211 (f); and it is further

ORDERED that the parties are directed to appear at a conference in Part 46 on November 27, 2012; and it is further

ORDERED that counsel for defendant Howard Rittberg, Esq. defendants shall serve a copy of this Order with Notice of Entry upon counsel for plaintiffs and other defendants, pursuant to CPLR 2103(b)(l), (2) or (3), within thirty (30) days of the date the order is entered and thereafter file the affidavit(s) of service with the Clerk of the Court.

In this breach of contract and legal malpractice action, the plaintiff, Rhona Silver, individually and derivatively on behalf of plaintiffs Rhobar, Inc., Rhobar Development Associates, LLC and Ackerly Associates, LLC ("the plaintiffs") seek to recoup the proceeds of two real estate sales with which the defendants were allegedly involved.

The record reveals that the plaintiffs commenced a prior action on March 15, 2010[1], (hereinafter "Action 1"). On June 17, 2010, the plaintiffs commenced the instant action (hereinafter "Action 2").

Plaintiff Silver is currently the sole shareholder of Rhobar, Inc, Rhobar Development Associates, LLC and Ackerly Associates, LLC, which were established in 2004. On or about April 21, 1997, Silver, acting in the corporate capacity as Silver Huntington Realty, Inc., purchased 17 acres of real property located at 124 Jericho Turnpike in Huntington, New

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[1] The prior action was captioned *Rhona Silver, individually and derivatively on behalf of Rhobar, Inc., Rhobar Deelopment Associates, LLC, and Ackerly Associates*, LLC *v Howard Rittberg, Carrie A. Wenban, and Levine Golden & Thompson, LLP*, Index No. 9928/2010 and shall be referred to as "Action 1."

York, upon which she developed and operated a catering business known as the Huntington Townhouse (hereinafter "the Townhouse"). On or about May 28, 2003, Silver purchased 145 shares of capital stock in a residential cooperative known as the Sherry-Netherland, Inc. and acquired a proprietary lease to unit 1416, located at 781 Fifth Avenue in New York City. Silver met defendant Newman briefly in 1995 and later in 2003. Over time, Newman assumed control over the operations and finances of the Townhouse business. Upon Newman's advice, Silver retained defendant Howard Rittberg, Esq. and his law firm, defendant Levene Gouldin & Thompson, LLP (hereinafter, the Rittberg defendants) in or about November 2004, which representation allegedly continued through approximately 2008.

Some time in 2004 and 2005, the ownership of the 17 acres comprising the Townhouse was divided into three companies: Rhobar, Inc., Rhobar Development Associates, LLC and Ackerly Associates, LLC. Newman became the managing member or chief executive officer of all three entities. Beginning in November, 2004, Newman began to borrow money from various banks and lenders. Subsequently, the new companies borrowed funds from Newman, which were allegedly secured by subordinate mortgages. The Townhouse was sold to Lowe's on June 20, 2007. Shortly thereafter, Newman resigned from the three entities. On June 7, 2008, the plaintiff executed a general release relieving the Newman defendants and their attorney from all liability.

The complaint in Action 1 alleges two causes of action. In the first cause of action the complaint alleges that the Rittberg defendants, who represented the plaintiffs in the sale of the Townhouse to Lowes' Home Centers, Inc. for the purchase price of $38,500,000, negligently disbursed the proceeds of the sale to themselves, individuals, corporations and other business entities, other than the plaintiffs, without the knowledge, advice and consent of the plaintiffs. The complaint alleges in the second cause of action that the Rittberg defendants breached a fiduciary duty to the plaintiffs by misappropriating the proceeds of the sale of the Townhouse for their own benefit and for the benefit of others.

The complaint in the instant action, Action 2, alleges in the first cause of action that the plaintiffs are entitled to an accounting by all defendants. The complaint alleges in the second cause of action that defendant Barry Newman breached a contract with the plaintiffs,

and in the third cause of action that Newman breached his fiduciary duties to the plaintiffs. The complaint alleges in the fourth cause of action that all the defendants were unjustly enriched. The complaint alleges in the fifth cause of action that defendants Newman, and Fifth Ave. 781 Associates, LLC, as well as the Rittberg defendants committed fraud in the transfer of the plaintiffs' stock in The Sherry-Netherland coop apartment, and in the sixth cause of action, that these same defendants converted money and the coop apartment. With regard to the fraud action, Plaintiff asserts that the Defendants knowingly utilized forged documents, secreted money from Plaintiff and falsely endorsed checks payable to Plaintiffs and deposited them into accounts under the Defendants' control. Among the allegedly forged documents is a contract of Sale of the subject cooperative apartment, which Plaintiffs assert she never signed. The complaint seeks to impose a constructive trust against Newman and Fifth Avenue 781 Associates, LLC in the seventh cause of action with regard to the ownership of stock in The Sherry-Netherland coop apartment. The complaint seeks a declaratory judgment as against Newman and defendant United Kirkwood in the eighth cause of action. Finally, the complaint alleges in the ninth cause of action that the Rittberg defendants are liable for legal malpractice from October 2004 through February 2008.

The Rittberg defendants now move to dismiss the fifth, sixth and ninth causes of action as asserted against them on the grounds that the plaintiffs failed to state a cause of action, another action asserting the same cause of action is pending, a defense is founded on documentary evidence, the plaintiff failed to plead with specificity, and that the cause of action is time-barred. Defendants Newman, United Kirkwood, LLC, Northeast United Corporation, Fifth Avenue 781 Associates, LLC, Newco Management Group, LLC, Kid's Planet, LLC, and United Stone Industries, LLC (hereinafter "the Newman defendants") move for summary judgment dismissing the complaint on the ground that the plaintiff executed a release on July 7, 2008 and waived all liability against them.

Turning to the motion by the Rittberg defendants, in support, the defendants submit, *inter alia*, the pleadings, a letter dated August 16, 2007, and the documents related to The Sherry-Netherland coop apartment. The letter dated August 16, 2006 reveals that defendant Rittberg wrote to the plaintiff informing her that she would be entering into financing arrangements with Barry Newman involving the mortgaging and pledge of certain assets owned by the plaintiff and her affiliated entities, and that she had entered into a contract with Newman for the sale of her coop at The Sherry-Netherland. Rittberg stated that his

continued work in connection with these matters may constitute a conflict of interest since he had represented both parties in connection with these matters, and that Rittberg was counsel to Barry Newman. The letter further requested that the plaintiff acknowledge that Rittberg was not involved in any of the negotiations between the plaintiff and Newman, and that the plaintiff requested that Rittberg not provide her with any legal advice. The letter requested that the plaintiff execute a copy of the letter to acknowledge her consent to Rittberg's limited involvement in the financial transactions. The letter reveals that the plaintiff did execute the letter before a notary public.

The documents concerning the sale of The Sherry-Netherland coop reveal that the plaintiff executed the contract of sale on August 17, 2006 and the assignment of 145 shares capital stock of The Sherry-Netherland, Inc. and proprietary lease on October 13, 2006 to Fifth Avenue 781 Associates, LLC. In addition, the documents reveal that on October 18, 2006, Fifth Avenue 781 Associates, LLC assigned the stock to Barry Newman.

"In considering a motion to dismiss a pleading for failure to state a cause of action, the court must accept the allegations of the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." CPLR 3211 [a][7]; *Munger v Board of Educ. of the Garrison Union Free School Dist.*, 85 AD3d 747, 748, 924 NYS2d 578, 580 (2d Dept 2011); accord *Leon v Martinez*, 84 NY2d 83, 614 NYS2d 972 (1994). If the court can determine that the plaintiff is entitled to relief on any view of the facts stated, its inquiry is complete and the complaint must be declared legally sufficient. *Symbol Tech., Inc. v Deloitte & Touche, LLP,* 69 AD3d 191, 193-195, 888 NYS2d 538 (2d Dept 2009). Whether a plaintiff can ultimately establish its allegations is not part of the determination. *Sokol v Leader*, 74 AD3d 1180, 904 NYS2d 153 (2d Dept 2010). Pursuant to CPLR 3211 (a) (1), where a defendant moves to dismiss an action asserting the existence of a defense founded upon documentary evidence, the documentary evidence "must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." *Trade Source v Westchester Wood Works*, 290 AD2d 437, 736 NYS2d 605 (2d Dept 2002); *Berger v Temple Beth-El of Great Neck*, 303 AD2d 346, 756 NYS2d 94 (2d Dept 2003). Pursuant to CPLR 3211 (a) (4), a cause of action may be dismissed on the ground that there is another action pending between the same parties for the same cause of action in a court of any state or the United

States; however, the court need not dismiss upon this ground but may make such order as justice requires.

Turning to the branch of the Rittberg defendants' motion to dismiss the fifth cause of action, to properly plead a cause of action to recover damages for fraud, the plaintiff must allege that (1) the defendant made a false representation of fact, (2) the defendant had knowledge of the falsity, (3) the misrepresentation was made in order to induce the plaintiff's reliance, (4) there was justifiable reliance on the part of the plaintiff, and (5) the plaintiff was injured by the reliance. See *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 883 NYS2d 147 (2009); *New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 639 NYS2d 283 (1995); *Selechnik v Law Off. of Howard R. Birnbach*, 82 AD3d 1077, 920 NYS2d 128 (2d Dept 2011); *Cerabono v Price*, 7 AD3d 479, 775 NYS2d 585 (2d Dept 2004). A cause of action alleging fraud must be pleaded with the requisite particularity pursuant to CPLR 3016(b). "[T]he purpose underlying CPLR 3016(b) is to inform a defendant of the complained-of incidents." *Eurycleia Partners, LP v Seward & Kissel, LLP*, *supra*, at 559. While there is no requirement that there be "unassailable proof at the pleading stage," the basic facts constituting the fraud must be set forth (id. [internal quotation marks omitted]). "CPLR § 3016(b) is satisfied when the facts suffice to permit a reasonable inference of the alleged misconduct." *Id.* (internal quotation marks omitted).

Here, contrary to the defendants' contention, that cause of action was pleaded with sufficient specificity. See CPLR 3016 [b]; *Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 492, 860 NYS2d 422 (2008); *PDK Labs v Krape*, 277 AD2d 211, 716 NYS2d 323 (2d Dept 2000). In addition, the attorneys' documentary evidence failed to "resolve[ ] all factual issues as a matter of law, and conclusively dispose[ ] of the plaintiff's claim" *Putnam County Temple & Jewish Center, Inc. v Rhinebeck Savings Bank*, 87 AD3d 1118, 930 NYS2d 42 (2d Dept 2011); *Brunot v Eisenberger & Co.*, 266 AD2d 421, 421, 698 NYS2d 882 (2d Dept 1999); see CPLR 3211 (a) (1). Accordingly, that branch of the Rittberg defendants' motion which seeks to dismiss the fifth cause of action is denied.

With respect to that branch of the motion which was pursuant to CPLR 3211(a)(5) to dismiss the sixth cause of action for conversion, the law firm defendants have "the threshold burden of demonstrating . . . that the time within which to sue has expired." *Krichmar v Scher*, 82 AD3d 1164, 1165, 919 NYS2d 378 (2d Dept 2011); see *Fleyshman v Suckle &*

Schlesinger, PLLC, 91 AD3d 591, 593, 937 NYS2d 92 (2d Dept 2012), *lv denied* 19 NY3d 801 (2012); *East Hampton Union Free School Dist. v Sandpebble Bldrs. Inc.*, 90 AD3d 821, 822, 935 NYS2d 616 (2d Dept 2011). Based on the foregoing, the plaintiffs were required to commence their action for conversion by October 18, 2009, three years after the closing date of the sale of the coop apartment, which occurred on October 18, 2006. Since the instant action was not commenced until June 17, 2010, it is untimely under the applicable statute of limitations period. Thus, the plaintiffs' sixth cause of action for conversion must be dismissed as time-barred pursuant to CPLR 3211 (a) (5).

With regard to the branch of the Rittberg defendants' motion to dismiss the ninth cause of action, their submissions demonstrate that the plaintiff acknowledged that she was not seeking legal advice from Rittberg in regard to the Sherry-Netherland coop apartment and was aware of a conflict of interest for Rittberg to attempt to represent both herself and Newman. Therefore, since Rittberg and his law firm did not represent the plaintiffs in this transaction, no malpractice could have resulted from the transaction. Thus, that portion of the cause of action alleging legal malpractice against the Rittberg defendants for the transaction surrounding the Sherry-Netherland coop apartment is dismissed.

The remaining portion of the sixth cause of action relates to the Rittberg defendants' alleged malpractice in the Townhouse transaction, this allegation has also been asserted in Action 1. The Rittberg defendants also contend that the fourth cause of action alleging unjust enrichment was also asserted in Action 1. The Court is aware that the plaintiffs are represented by separate attorneys in each action, and in consideration of these circumstances, counsel for the plaintiffs are directed to determine in which action these claims shall be litigated and stipulate to same at the next court conference. Accordingly, only the portion of the ninth cause of action which alleges malpractice in the Sherry-Netherland transaction is dismissed at this time.

Accordingly, motion by the Rittberg defendants is granted to the extent that the sixth and the portion of the ninth causes of action alleging legal malpractice in the Sherry-Netherland transaction are dismissed.

Turning to the motion for summary judgment dismissing the complaint by the Newman defendants, the defendants contend that the plaintiff willingly executed a general

release of all claims before a notary public on July 7, 2008, thereby relieving them of all liability.

A party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 (1985); *Zuckerman v New York,* 49 NY2d 557, 427 NYS2d 595 (1980). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue. *Stewart Title Ins. Co. v Equitable Land Servs.*, 207 AD2d 880, 616 NYS2d 650 (2d Dept 1994), but once a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 (1986).

A valid release constitutes a complete bar to an action on a claim which the subject of the release. If the language of a release is clear and unambiguous, the signing of a release is a "jural act" binding on the parties. A release may be invalidated, however, for any of the traditional bases for setting aside written agreements, namely, duress, illegality, fraud, or mutual mistake. *Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V.*, 17 NY3d 269, 929 NYS2d 3 (2011). Although a defendant has the initial burden of establishing that it has been released from any claims, a signed release "shifts the burden of going forward . . . to the plaintiff to show that there has been fraud, duress or some other fact which will be sufficient to void the release" *Fleming v Ponziani*, 24 NY2d 105, 111, 299 NYS2d 134 (1969).

The evidence submitted by the Newman defendants was sufficient to meet their burden of establishing, as a matter of law, that the plaintiff executed a general release relieving them of all claims prior to the commencement of the instant action. In support of the motion, the Newman defendants submit, *inter alia*, the pleadings, a copy of the release, the personal affidavits of Barry Newman and Wayne F. Kellerman, and several articles related to the plaintiff's business savvy.

The release, dated July 7, 2008, reveals that

> the plaintiffs, as releasors, in consideration of the sum of one dollar received from the Newman defendants, as releasees, released and discharged the Newman defendants, employees, agents, servants, * * *, attorneys and assigns from all actions, causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims and demands whatsoever, in law, admiralty or equity, which against the releasees, the releasor, releasor's heirs, * * *, ever had, now have or hereafter can, shall or may have for, upon, or by reason of any matter, cause or thing whatsoever from the beginning of the world to the day of this Release.

The release was duly notarized by Wayne F. Kellerman, who avers in his affidavit that he observed the plaintiff execute the general release and that she knew that the document she was signing was a general release.

Defendant Newman avers in his affidavit that after meeting the plaintiff, he repeatedly loaned her money and began to supervise the collection of revenue from the Huntington Town House's catering operation and payment of expenses from 2005 through 2007. He states that as of 2007, he was on the hook for $11.9 million in loans and guarantees that he extended to the plaintiff. All of the loans were made before the plaintiff signed the general release. He states that he marketed the Townhouse for sale and he secured a $38.5 million offer from Lowe's. The closing took place on June 20, 2007. The plaintiffs claim that none of the sale proceeds were distributed to them, which Newman disputes. He states that a total of $34,494,342.41 representing the sellers' debt and expenses were paid off at the closing. Newman states that the closing statement from the sale identifies each entity that received money at the closing and the amount. Newman further states that he was paid $3.5 million for his efforts in marketing the property. The remaining $700,956.05 was used to pay other debts of the Townhouse, including reimbursements to clients whose events were scheduled after June 2007. There are no proceeds from the sale of the Townhouse that remain to be distributed to any of the plaintiffs. After the closing, Newman states that he loaned the plaintiff $1.05 million. In 2008, he asked the plaintiff to sign the general release. Newman states that since all the allegations made by the plaintiff in her complaint predated the execution of the general release, the plaintiffs are barred from recovering from the Newman defendants.

The Newman defendants' evidence of a signed release shifted the burden to plaintiffs to demonstrate that the release was invalid due to illegality, fraud, duress or mutual mistake. See *Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V.*, *supra* at 276; *Lodhi*

v Stewart's Shops Corp., 52 AD3d 1084, 1085, 861 NYS2d 160 (3d Dept 2008). The plaintiffs met their burden by the submission of the plaintiff's personal affidavit, wherein she avers that she was told that the net proceeds of the sale of the Townhouse were being held by defendant Newman in trust for her and that Newman would safeguard the funds for her benefit. She stated that Newman released funds in the approximate amount of $550,000 to her for a ten month period following the closing. As for the general release, although the plaintiff concedes that she signed it, the plaintiff states that Newman told her that there was a potential conflict between her and Newman as co-defendants in a matter captioned *Silver v Silver*,[2] which was commenced by the plaintiff's brother, and that it would be necessary for her to sign a release to avoid a conflict of interest for their attorney. In addition, the plaintiff states that Newman told her that she had to sign the release if she wanted to keep getting the money from the funds he was holding in trust for her.

In addition, the plaintiff submits the affidavit of Andrew Sulner, a forensic document examiner. Mr. Sulner opines that the plaintiff's purported signatures on two documents dated March 15, 2007 and June 14, 2007 were forgeries. In the letter dated March 15, 2007 the plaintiff requested Rittberg to "draw a check in the amount of $500,000 be made payable to United Kirkwood, LLC to pay various bills." In the letter dated June 14, 2007 the plaintiff requested Rittberg to "forward $3,500,000 to Northeast United Corporation in payment of its development fees and out of pocket engineering fees in connection with the sale to Lowe's and other costs and expenses."

"The meaning and scope of a release must be determined within the context of the controversy being settled." *Kaprall v WE: Women's Entertainment, LLC*, 74 AD3d 1151, 904 NYS2d 721 (2d Dept 2010), *quoting Matter of Schaefer*, 18 NY2d 314, 317, 274 NYS2d 869 (1966); see *Zichron Acheinu Levy, Inc. v Ilowitz*, 31 AD3d 756, 820 NYS2d 601 [2d Dept 2006]), and a general release cannot be construed "to cover matters which the parties did not desire or intend to dispose of." *Cahill v Regan*, 5 NY2d 292, 299, 184 NYS2d 348 (1959); see *Rotondi v Drewes*, 31 AD3d 734, 735-736, 819 NYS2d 779 [2d Dept 2006]). Contrary to the defendants' contention, the plaintiffs raised factual issues regarding the scope of the subject release based on the context and circumstances of its execution. See generally

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[2] *Howard Silver v Rhona Silver*, Index No. 112182/10, was disposed by stipulation of settlement filed on August 23, 2011.

Mangini v McClurg, 24 NY2d 556, 563,301 NYS2d 508 [1969]; *Lefrak SBN Assoc. v Kennedy Galleries*, 203 AD2d 256, 609 NYS2d 651 [2d Dept 1994]; *Perritano v Town of Mamaroneck*, 126 AD2d 623, 624, 511 NYS2d 60 [2d Dept 1987]). Issues of fact are also raised regarding whether the release was procured by fraud.

Accordingly, the motion for summary judgment is denied.

In sum, the motion by the Rittberg defendants is granted to the extent that the sixth and ninth causes of action are dismissed, and the motion for summary judgment by the Newman defendants is denied.

This constitutes the ***DECISION*** and ***ORDER*** of the Court.

Dated: October 2, 2012
Riverhead, New York

Emily Pines
J. S. C.

[ ] Final
[x] Non Final

To:
Attorney for Plaintiff
Jeffrey D. Buss, Esq.
Smith, Buss & Jacobs, LLP
733 Yonkers Avenue
Yonkers, New York 10704

Attorney for the Defendants Rittberg, Esq
& Levene, Gouldin & Thompson, LLP
John P. Bracken Esq.
Bracken Margolin Besunder LLP
1050 Old Nichols Road, Suite 200
Islandia, New York 11749

Attorney for the Defendants Newman, United Kirkwood, LLC,
Northeast United Corporation, Fifth Avenue 781 Associates, LLC.,
Newco Management Group, LLC, Kid's Planet, Llc and United Stone Industries, LLC
Ruskin Moscou Faltischek PC
Douglas A. Cooper, Esq.
Matthew F. Didora, Esq.
1425 RXR Plaza 15th Floor
Uniondale, New York 11553