

Grasshoff v Etra

2013 NY Slip Op 31713(U)

July 25, 2013

Sup Ct, New York County

Docket Number: 650832/2012

Judge: Eileen Bransten

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. EILEEN BRANSTEN
J.S.C.

PART 3

Index Number : 650832/2012
GRASSHOFF, SVEN K.
vs
ETRA, AARON
Sequence Number : 002
DISMISS ACTION INCONVENIENT FORUM

INDEX NO. 650832/2012
MOTION DATE 3/19/2013
MOTION SEQ. NO. 002

The following papers, numbered 1 to 3, were read on this motion to/for dismiss

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). <u>1</u>
Answering Affidavits — Exhibits _____	No(s). <u>2</u>
Replying Affidavits _____	No(s). <u>3</u>

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

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 7-25-13

Eileen Bransten
EILEEN BRANSTEN J.S.C.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART THREE

-----X
SVEN GRASSHOFF,

Plaintiff,

-against-

Index No. 650832/2012
Motion Date: 3/19/2013
Motion Seq. No.: 001

AARON ETRA,

Defendant.

-----X
BRANSTEN, J.

This matter comes before the Court on Defendant Aaron Etra’s motion to dismiss Plaintiff Sven Grasshoff’s Complaint pursuant to CPLR 3211(a)(7). Plaintiff opposes. For the reasons that follow, Defendant’s motion is denied.

I. Background

This litigation stems from Plaintiff Grasshoff’s investment in a business venture sponsored by non-party Purified Water and Construction (“Purified”). (Compl. ¶ 10.) Grasshoff’s investment in Transaction No. 07519936 (the “Transaction”) was solicited by non-party Daniel Hunter, as principal of Purified. *Id.* ¶ 10. Grasshoff alleges that Hunter engaged Defendant Etra to provide “Paymaster services” for the Transaction. *Id.* ¶ 12. The Complaint notes that Defendant Etra is an attorney. *Id.* ¶ 4.

On September 22, 2011, Defendant Etra entered into a Deposit Agreement with Plaintiff, which provided, in relevant part, that: “Upon receipt of [Grasshoff’s] payment

of One Hundred Fifty Thousand Dollars (\$150,000.00) for Transaction No. 07519936, [Etra] shall hold [Grasshoff's] deposit in escrow and shall release said funds only upon closing of Transaction No. 07519936 on or before September 30, 2011." Compl. Ex. A, at ¶ 1. In the event the Transaction failed to close on or before September 30, 2011, the Deposit Agreement provided that Etra "shall not release or pay said funds to anyone other than [Grasshoff] and shall immediately wire said funds back to [Grasshoff]..." *Id.* at ¶ 2.

Grasshoff alleges that Etra accepted his payment pursuant to the Deposit Agreement and placed the payment into an account, referred to as the "Indeva account" in the Complaint. (Compl. ¶ 23.) While Grasshoff's payment was supposed to be held in escrow, Etra purportedly transferred Grasshoff's funds to another account without Grasshoff's consent. *Id.* ¶ 26.

In response, Grasshoff filed the instant action, demanding, among other things, damages in the amount of his investment. Grasshoff's Complaint asserts five claims against Etra: (1) breach of contract; (2) promissory estoppel; (3) breach of fiduciary relationship; (4) negligent misrepresentation; and, (5) conversion.

II. Defendant Etra's Motion to Dismiss

Etra presents one argument in his motion to dismiss: that the facts alleged fail to establish that Etra "had a duty to Plaintiff with respect to the handling of funds sent by

Plaintiff to Defendant.” (Def.’s Br. at 1.) In the absence of such a duty, Etra contends that each of five claims asserted by Plaintiff must be dismissed.

However, only two of Plaintiff’s claims actually turn on the existence of a duty owed by Etra to Plaintiff – breach of fiduciary duty and negligent misrepresentation. A breach of fiduciary duty claim requires demonstration of “the existence of a fiduciary relationship [between plaintiff and defendant], misconduct by the defendant, and damages that were directly caused by the defendant’s misconduct.” *Kurtzman v. Bergstol*, 40 A.D.3d 588, 590 (2d Dep’t 2007). The elements of a claim for negligent misrepresentation are: “(1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information.”

MatlinPatterson ATA Holdings LLC v. Fed. Express Corp., 87 A.D.3d 836, 840 (1st Dep’t 2011).

Plaintiff’s breach of contract, promissory estoppel, and conversion claims do not require such a pleading of duty. *See Harris v. Seward Park Hous. Corp.*, 79 A.D.3d 425, 426 (1st Dep’t 2010) (stating that the elements of a breach of contract claim are “the existence of a contract, the plaintiff’s performance thereunder, the defendant’s breach thereof, and resulting damages.”); *MatlinPatterson ATA Holdings LLC v. Fed. Exp. Corp.*, 87 A.D.3d 836, 841-42 (1st Dep’t 2011) (“The elements of a claim for promissory

estoppel are: (1) a promise that is sufficiently clear and unambiguous; (2) reasonable reliance on the promise by a party; and (3) injury caused by the reliance.”); *Colavito v. N.Y. Organ Donor Network, Inc.*, 8 N.Y.3d 43, 50 (2006) (“Two key elements of conversion are (1) plaintiff’s possessory right or interest in the property and (2) defendant’s dominion over the property or interference with it, in derogation of plaintiff’s rights.”) Accordingly, since Etra’s argument is only potentially applicable to the fiduciary duty and negligent misrepresentation counts, the Court will turn its analysis to those claims below.

A. *Breach of Fiduciary Duty*

Defendant Etra grounds his motion to dismiss the breach of fiduciary duty claim in a single argument, contending that he owed Plaintiff no duty with respect the handling of Plaintiff’s funds under *Shapiro v. McNeil*, 92 N.Y.2d 91 (1998). As Plaintiff correctly notes, however, the facts as pleaded in this case render the holding of *Shapiro* distinguishable and thus inapplicable.

Shapiro was a highly fact-intensive ruling. The *Shapiro* Court held that an attorney owed no duty of care to a nonclient simply by accepting and disbursing funds sent by the nonclient to the attorney’s IOLA account, where “there were neither circumstances suggesting bad faith nor the total absence of any apparent authority on the

face of the checks which would put [attorney] on notice of an irregularity possibly triggering a duty to inquire” before making the disbursement. *Shapiro*, 92 N.Y.2d at 98. In particular, *Shapiro* noted the absence of any contractual relationship between the nonclient and the attorney, which further established the attorney’s lack of notice about any irregularity regarding the transfer of funds out of the IOLA account. *Id.*

Conversely, here a contractual relationship has been alleged between Defendant Etra and Plaintiff Grasshoff. Under the Deposit Agreement, Etra was the “Paymaster,”¹ and was required to hold Grasshoff’s funds in escrow until the Transaction’s closing, or in the event the Transaction did not close, return the funds to Grasshoff. Thus, unlike *Shapiro*, Plaintiff has pleaded facts that should have put Etra on notice that his disbursement of funds from the escrow account was unauthorized. Accordingly, *Shapiro* does not provide a basis for dismissal of Plaintiff’s breach of fiduciary duty claim. Since Etra makes no other argument in favor of dismissal, his motion is denied.

¹ The Court notes that the Complaint repeatedly refers to Etra as an attorney; however, the Complaint does not plead that he was acting as an attorney with regard to the Transaction. Instead, the Complaint asserts that Etra was acting as “Paymaster,” a position described by Plaintiff as akin to an escrow agent. *See* Pl.’s Opp. Br. at 2, 4.

B. *Negligent Misrepresentation*

Plaintiff's negligent misrepresentation claim stems from Etra's alleged misrepresentation of "his role as a neutral intermediary providing a safe vehicle to facilitate the transfer of capital, in that he did not hold or intend to hold any of the transferred funds in escrow, and he did not intend to provide any security whatsoever to the investors in the Transaction." (Compl. ¶ 60.) Defendant contends that this claim must be dismissed under *Shapiro*, again because Defendant owed no duty to Plaintiff. However, for the reasons discussed above, *Shapiro* does not govern this claim. Defendant asserts no other bases for the dismissal of this claim. Accordingly, Defendant's motion is denied on this basis.

(Order follows on next page.)

III. Conclusion

For the foregoing reasons, it is

ORDERED that Defendant Etra's motion to dismiss is denied; and it is further

ORDERED that counsel are directed to appear for a compliance conference in

Room 442, 60 Centre Street, on September 17, 2013, at 10 AM.

Dated: New York, New York
July 25, 2013

ENTER:

A handwritten signature in black ink, appearing to read "Eileen Bransten", written over a horizontal line.

Hon. Eileen Bransten, J.S.C.