Gregor v Rossi
2013 NY Slip Op 32800(U)
October 24, 2013
Sup Ct, New York County
Docket Number: 651432/2013
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: Hon. EILEEN A. RAKOWER **PART 15**
Justice

DEBORAH A. GREGOR AND CARL GERARDI,
Plaintiffs,

- v -

JOSEPH J. ROSSI, ANJI ROSSI, VTL DIAGNOSTICS LLC, VETAURA, INC., BRUCE BERNSTEIN, NANCY ZIMMERMAN TUNKEL, LUIGI CRESCITELLI, BARBARA ALESI, ROBERT GROMAN, THOMAS GLASCOCK, GREGORY TEMBECK, FREDERICK BLUMER, AND JAMES O'DAY,
Defendants.

INDEX NO. 651432/2013
MOTION DATE ______
MOTION SEQ. NO. 003
MOTION CAL. NO. ______

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2, 3
Answer — Affidavits — Exhibits	4
Replying Affidavits	5

Plaintiffs Deborah A. Gregor and Carl Gerardi (collectively, "Plaintiffs") bring the instant action for fraud, constructive fraud, fraudulent inducement, negligent representation, violation of North Carolina's RICO statute and civil conspiracy. In this action, Plaintiffs allege that they are were fraudulently induced by defendant Joseph J. Rossi ("Rossi"), who was assisted by co-defendants, to invest substantial sums of money through Rossi into defendant companies VTL Diagnostics, LLC ("VTL") and Veteaura, Inc. ("Vetaura").

Defendant Luigi Crescitelli ("Crescitelli"), an alleged shareholder of Vetaura, Inc., now moves pursuant to CPLR §3211(a)(7) for an Order dismissing the Amended Complaint.

CPLR §3211 provides, in relevant part:

> (a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
>
> (7) the pleading fails to state a cause of action.

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In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory." (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91[1st Dept. 2003]) (internal citations omitted) (*see* CPLR §3211[a][7]).

The first three causes of action against Crescitelli are fraud, fraudulent inducement, and constructive fraud. In an action to recover for fraud, Plaintiffs must prove (1) a misrepresentation or a material omission of fact; (2) which was false and known to be false by defendant; (3) made for the purpose of inducing the other party to rely upon it; (4) justifiable reliance of the other party on the misrepresentation or material omission; and (5) injury. (*Mandarin Trading Ltd. v. Wildenstein*, 16 NY3d 173, 919 NYS2d 465, 944 NE2d 1104 [2011]). Similarly, the elements of fraudulent inducement are: (1) a false representation of material fact; (2) known by the utterer to be untrue; (3) made with the intention of inducing reliance and forbearance from further inquiry; (4) that is justifiably relied upon; and (5) results in damages. (*See, MBIA Ins. Corp. v. Credit Suisse Securities USA LLC*, 32 Misc. 3d 758, 927 NYS2d 517 [Sup Ct NY Cty 2011]).

With respect to Crescitelli, the Amended Complaint alleges that the following representations were made by Crescitelli to induce Plaintiffs to make the subject investments: Crescitelli "represented to Mr. Gerardi [one of the Plaintiffs] that he had contributed [between $800,000.00 and $1,000,000.00 dollars in lab equipment] to Vetaura and that it was now an asset to the company" and "[o]ver the following months, Crescitelli repeated these same representations, about having contributed the equipment, to Mr. Gerardi, and made additional representations to Mr. Gerardi about meetings Crescitelli claimed to have had with prospective clients who would enter into lucrative, long-lasting contracts with Vetaura." The Amended Complaint further alleges that Crescitelli also made representations to Plaintiffs about several "investments" and "loans" he had made to Vetaura, including that Crescitelli had invested more than $800,000.00 into Vetaura himself, and his sons invested approximately $112,000 of their own money into the company, and that such representations turned out to be false, as all money was immediately removed from Vetaura by Rossi, his alleged co-conspirator.

The Amended Complaint states that Rossi and Crescitelli continued to make

these "false representations" in order to "induce Vetaura's investors, including Mr. Gerardi and the Gregors, to make further 'investments'." Plaintiffs' complaint asserts "[i]n reliance on these representations, from October 2010 to December 2010, Mr. Gerardi transferred $375,000.00 to Rossi for a purported 20% interest in Vetaura" and "[i]n further reliance on these representations, Mr. Gerardi later invested another $50,000.00 with Rossi in exchange for more ownership interests in Vetaura." Taking the allegations as true, the four corners of the Complaint state a cause of action for fraud and fraudulent inducement as against Crescitelli.

The elements of constructive fraud and actual fraud are identical, except that actual fraud requires an intentional deception, while constructive fraud generally requires "a confidential fiduciary relationship between the parties, or one having superior knowledge over the other" (*see, 60A N.Y. Jur 2d, Fraud and Deceit 2*), and in constructive fraud it is not necessary to demonstrate knowledge of the falsity of a representation (*see, Eden Rock Fin. Fund, L.P., v. Gerova Fin. Gruop, Ltd.*, 34 Misc. 3d 1205[A][Sup Ct NY Cnty 2011]). "A majority shareholder in a close corporation is in a fiduciary relationship with the minority." *(See, Richbell Information Services, Inc. v. Jupiter Partners, L.P.*, 765 NYS2d 575, 586 [1st Dept 2003]). In addition to fraud and fraud in the inducement, the Amended Complaint also states a cause of action for constructive fraud against Crescitelli based on the allegations that Crescitelli, by acting in concert with Rossi, represented the majority of the ownership of the company in which Plaintiffs were the minority shareholders, shared a fiduciary relationship to Plaintiffs, and made false representations to Plaintiff concerning the several investments and loans allegedly made to Vetaura, to induce Mr. Gerardi to make not only the initial investment, but also further investments to Vetaura.

The fourth cause of action against Crescitelli is for negligent misrepresentation. For Plaintiffs to recover damages, Plaintiffs must establish, (1) Defendant had a duty; (2) based upon some special relationship with Plaintiff; (3) to impart correct information; (4) that the information given was false or incorrect; and (5) that the Plaintiff justifiably relied upon that information provided. *(See, Berger-Vespa v. Rondack Building Inspectors*, 293 AD3d 838, 740 NYS2d 504 [2002]). CPLR §3016(b) provides that where a cause of action or defense is based on misrepresentation, it must be stated in detail. Here, accepting all allegations as true, the four corners of the complaint state a cause of action for negligent misrepresentation based on allegations that Crescitelli, by acting in concert with

Rossi, represented the majority of the ownership of Vetaura, the company in which Plaintiffs were the minority shareholders, and as such, owed a fiduciary duty to Plaintiffs to impart correct information concerning Vetaura, that the information he gave concerning certain investments and loans made to Vetaura was in fact false or incorrect, and that Plaintiffs justifiably relied upon the information provided in making further investments.

As claims based on fraud have been stated as against Crescitelli, a claim for civil conspiracy has been plead. (*see Romano v. Romano*, 2 A.D. 3d 430, 432 [2nd Dept 2003]("a cause of action sounding in civil conspiracy cannot stand alone, but stands or falls with the underlying tort").

The eighth, ninth and tenth causes of action allege violations by Crescitelli of the North Carolina RICO statute NCGSA §75D-4(a)(1)(Defendants engaged in a pattern of racketeering activity), NCGSA §75D-4(a)(2)("Defendants have conducted and participated in an enterprise"), and NCGSA §75D-4(a)(3)(Defendants have conspired with one another to violate sections 4(a)(a) and 4(a)(2)).

The alleged sections of the North Carolina RICO statute provide:

> §75D-4. Prohibited activities.
>
> (a) No person shall:
>
> (1) Engage in a pattern of racketeering activity or, through a pattern of racketeering activities or through proceeds derived therefrom, acquire or maintain, directly or indirectly, any interest in or control of any enterprise, real property, or personal property of any nature, including money; or
>
> (2) Conduct or participate in, directly or indirectly, any enterprise through a pattern of racketeering activity whether indirectly, or employed by or associated with such enterprise; or
>
> (3) Conspire with another or attempt to violate any of the provisions of subdivision (1) or (2) of this subsection.

Racketeering activity is defined as "to commit, to attempt to commit, or to solicit, coerce, or intimidate another person to commit an act or acts which would be chargeable by indictment if such act or acts were accompanied by the necessary mens rea or criminal intent under the following laws of this State..." "'Enterprise' means any person, sole proprietorship, partnership, corporation, business trust, union chartered under the laws of this state, or other legal entity; or any unchartered union, association or group of individuals associated in fact although not a legal entity; and it includes illicit as well as licit enterprises and governmental as well as other entities."

In his motion to dismiss, Crescitelli argues that the Amended Complaint fails to state a claim on the basis that there are no specific allegations identifying which acts Plaintiff are alleging constitute racketeering activity or a pattern of racketeering activity and further that, under choice of law principles, New York's choice of law principles mandate that New York law be applied in light of the fact that under New York's RICO statute, violations have criminal penalties but no civil remedy and therefore no civil liability. See New York State Penal Law, 460.20 et. seq. In opposition, Plaintiff argues that New York choice of law principles allow for the application of the North Carolina RICO statute in this matter, and that the counts brought under North Carolina's RICO statute have been sufficiently plead.

Where a conflict of law exists been two states, the courts look to the choice of law rules of the forum to decide which state's law applies. New York applies an interest analysis to determine which of two competing jurisdictions has the greater interest in having its law applied in the litigation. *See Schultz v. Boy Scouts*, 65 N.Y. 2d 189, 197 [1985]. Furthermore, if the plaintiff and the defendant are domiciled in different states the law of the place of the injury generally applies. *See generally Neumeier v. Kuehner*, 31 N.Y. 2d 121 [1972]. If however, the parties share a common state of domicile, the state with the predominant interest must applies. *Aviles v. Port Authority of New York and New Jersey*, 202 A.D. 2d 45, 64 [1st Dept 1994].

Here, there are sufficient facts alleged in the Amended Complaint demonstrating that North Carolina has an interest in this matter and that North Carolina law may apply. Deborah Gregor resided in North Carolina and there are

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allegations that Defendants acted in furtherance of the overall scheme by reaching out to the North Carolina resident and inducing her to wire funds from her North Carolina account to make continuing investments. As this is a motion to dismiss, all allegations are accepted as true, and dismissal is not warranted based on the contention that North Carolina law is not applicable as a matter of law.

Furthermore, accepting all allegations as true, Plaintiffs have set forth a cause of action under North Carolina RICO Statute NCGSA 75D-4(a)(1), NCGSA 75D-4(a)(2), and NCGSA 75D-4(a)(3). Plaintiffs have alleged a "pattern", defined as "more than two incidents", of "racketeering activity", based on allegations among others, that Crescitelli and Rossi,"attempted to lure Mr. Gerardi into a plan to steal Mrs. Gregor's stock in Vetaura, offering Gerardi a percentage of the stolen stock if he participate[d]" and that Crescitelli's made false representations to Plaintiffs concerning their investments. In addition, Plaintiffs have alleged that Crescitelli acting indirectly or directly through Vetaura, with Rossi, as a co-conspirator, in committing such acts.

Wherefore, it is hereby,

ORDERED that defendant Luigi Crescitelli's motion to dismiss is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: October 24, 2013

J.S.C.
HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE