

Tricounty Constr. Corp. v State Farm Ins. Co.

2013 NY Slip Op 33326(U)

December 19, 2013

Sup Ct, New York County

Docket Number: 653800/2012

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

TRICOUNTY CONSTRUCTION CORP.,

Plaintiff,

- against-

INDEX NO. 653800/12

MOTION SEQ. NO. 001

**STATE FARM INSURANCE COMPANY, DAVID VALES,
AND FRANKLIN CREDIT MANAGEMENT,
Defendants.**

The following papers were read on this motion by defendants to dismiss.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits (Memo) _____

Replying Affidavits (Reply Memo) _____

PAPERS NUMBERED

Cross-Motion: Yes No

This action arises out of a dispute over insurance proceeds received by nonparty Theodore Briggs because of loss and damage caused by a fire to his property located at 1118 Tinton Avenue, Bronx, New York 10456. On November 2, 2012, plaintiff Tricounty Construction Corp. (plaintiff) commenced this action against defendants State Farm Insurance Company (State Farm), David Vales (Vales), and Franklin Credit Management (Franklin). In its complaint, plaintiff asserts causes of action against State Farm for tortious interference with a contract (first), conversion (second), fraud (third), and negligence (fourth); and asserts causes of action against Vales for tortious interference with contract (first), conversion (second), conspiracy to defraud (third), and negligence (fourth).

Before the Court is State Farm and Vales' (collectively, defendants) motion, pursuant to CPLR 3211(5) and (7), for an order (1) dismissing plaintiff's complaint against Vales, individually, in its entirety for failure to state a cause of action; (2) dismissing plaintiff's first,

second and fourth causes of action against State Farm and Vales as time-barred; and (3) dismissing all of plaintiff's causes of action for failing to state a cause of action. Plaintiff is in opposition to defendants' motion.

DISCUSSION

CPLR 3211(a) provides that:

“A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

[5] the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds...

[7] the pleading fails to state a cause of action,...

When determining a CPLR 3211(a) motion, “we liberally construe the complaint and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion” (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]; see *Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409 [2001]; *Wieder v Skala*, 80 NY2d 628 [1992]). To defeat a pre-answer motion to dismiss pursuant to CPLR 3211, the opposing party need only assert facts of an evidentiary nature which fit within any cognizable legal theory (*Bonnie & Co. Fashions v Bankers Trust Co.*, 262 AD2d 188 [1st Dept 1999]). Further, the movant has the burden of demonstrating that, based upon the four corners of the complaint liberally construed in favor of the plaintiff, the pleading states no legally cognizable cause of action (see *Guggenheimer v Ginzburg*, 43 NY2d 268 [1997]; *Salles v Chase Manhattan Bank*, 300 AD2d 226 [1st Dept 2002]).

A motion to dismiss, pursuant to CPLR 3211(a)(5), will granted when “the cause of action may not be maintained because of statutes of limitations.”

Upon a CPLR 3211(a)(7) motion to dismiss for failure to state a cause of action, the “question for us is whether the requisite allegations of any valid cause of action cognizable by the state courts ‘can be fairly gathered from all the averments’” (*Foley v D’Agostino*, 21 AD2d

60, 65 [1st Dept 1964], quoting *Condon v Associated Hosp. Serv.*, 287 NY 411, 414 [1942]).

“However imperfectly, informally or even illogically the facts may be stated, a complaint, attacked for insufficiency, is deemed to allege 'whatever can be implied from its statements by fair and reasonable intendment'” (*Foley v D'Agostino*, 21 AD2d at 65, quoting *Kain v Larkin*, 141 NY 144, 151 [1894]). “[W]e look to the substance [of the pleading] rather than to the form (*id.* at 64).

The Court finds that the portion of defendants’ motion seeking to dismiss the complaint as asserted against Vales, individually, is granted as Vales was acting in the scope of his employment with State Farm, and as such, may not be held personally liable (*see Automatic Findings v Miller*, 232 AD2d 245 [1st Dept 2006]). Moreover, the portion of defendants’ motion seeking to dismiss the first, second, and fourth causes of action for tortious interference with a contract, conversion, and negligence, respectively, is granted as these causes of action are time-barred. Lastly, the third cause of action for fraud is also dismissed. In order to plead a claim for fraud, “the complaint must allege ‘a 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 on it, justifiable reliance of the other party on the misrepresentation or material omission, and injury’” (*FNF Touring LLC v Transform America Corp.*, 111 AD3d 401 [1st Dept 2013], quoting *Mardarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011] [internal quotations omitted]). “A claim rooted in fraud must be pleaded with the requisite particularity under CPLR 3016(b)” (*FNF Touring LLC*, 2013 NY Slip Op 07248 at *1, citing *Pludeman v Northern Leasing Sys. Inc.*, 10 NY3d 486 [2008]). The purpose behind the pleading requirement “is to inform a defendant with respect to the incidents complained of” (*Pludeman*, 10 NY3d at 491). Plaintiff fails to allege the elements of fraud with sufficient particularity to withstand a motion to dismiss.

Upon the foregoing it is hereby,

ORDERED that the portion of defendants' motion to dismiss the complaint as against defendant Vales, individually, in its entirety is granted; and it is further,

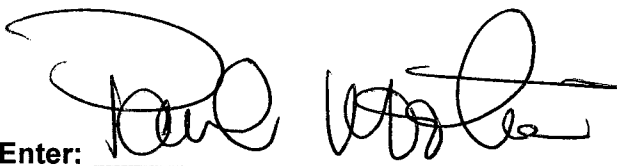
ORDERED that the portion of defendants' motion to dismiss the first, second, and fourth causes of action as time-barred is granted; and it is further,

ORDERED that the portion of defendants' motion to dismiss the complaint for failure to state a cause of action is granted to the extent that the third cause of action for fraud is hereby dismissed on those grounds; and it is further,

ORDERED that counsel for State Farm is directed to serve a copy of this Order with Notice of Entry upon plaintiff and upon the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 12/19/13

Enter: 
PAUL WOOTEN J.S.C.

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