

<b>Weinberg v Kaminsky</b>
2017 NY Slip Op 31628(U)
August 4, 2017
Supreme Court, New York County
Docket Number: 150869/2017
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ Justice

PART 13

SARAH WEINBERG,

-against-

Plaintiff,

INDEX NO. 150869/2017
MOTION DATE 06/28/17
MOTION SEQ. NO. 003
MOTION CAL. NO.

DAVID KAMINSKY, DANIELLE KAMINSKY, LINDA SALAMON, 371 WEST 46TH STREET PROPERTIES, LLC F/N/A 22 WEST 30TH STREET PROPERTIES, LLC, JEFFREY ASHER, ROBINSON BROG LEINWAND GREENE GENOVESE & GLUCK P.C., and LESLIE SULTAN,

Defendants.

The following papers, numbered 1 to 7 were read on this motion to dismiss the Verified Complaint.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits cross motion
Replying Affidavits

Table with 2 columns: PAPERS NUMBERED, 1-3, 4-6, 7

Cross-Motion: X Yes No

Upon a reading of the foregoing cited papers, it is Ordered that Defendants David Kaminsky, Danielle Kaminsky, Jeffrey Asher, Robinson Brog Leinwand Greene Genovese & Gluck P.C, and Leslie Sultan's (herein collectively "Moving Defendants") motion to dismiss the Verified Complaint pursuant to CPLR §3211[a][3], [5] and [7] is granted, the Verified Complaint is dismissed against them. Defendants Jeffrey Asher and Robinson Brog Leinwand Greene Genovese & Gluck P.C's motion for sanctions, is denied. Plaintiff's cross-motion to amend the Verified Complaint, is denied.

Plaintiff is an elderly widow who allegedly suffers from Alzheimer's disease. On May 10, 2013 Plaintiff sold two buildings including the "family home" she has resided in for the past fifty (50) years. Plaintiff commenced an action in Supreme Court, New York County, under Index No. 652273/2013 approximately one month after the sale of the properties. Plaintiff asserted causes of action for rescission and to set aside the sale and deed due to fraud, conversion, unjust enrichment and legal malpractice ("First Action"). The First Action was dismissed in the early stages of litigation and Plaintiff appealed.

On September 1, 2016 the Appellate Division, despite concerns over Plaintiff's representation, affirmed the dismissal finding that the complaint was "bare bones" and failed to allege any "material misrepresentation," as required on claims of fraud and undue influence, or "proximate cause" needed for the legal malpractice claims (Weinberg v Sultan, 142 AD3d 767, 37 NYS3d 13 [1st Dept. 2016]).

An eviction proceeding was commenced against Plaintiff and her co-tenant/daughter Iris DeMoyano (who has a power of attorney from Plaintiff) in the New York County Landlord and Tenant Court, seeking to evict them from Plaintiff's "Family Home". On January 26, 2017 after being served eviction notices, Plaintiff commenced this action asserting causes of action against the Defendants for overreaching, undue influence, fraud, and aiding and abetting.

Moving Defendants now move to dismiss the Verified Complaint pursuant CPLR §3211[a][3], [5] and [7]. Defendants Jeffrey Asher and Robinson Brog Leinwand Greene Genovese & Gluck P.C., also move for sanctions. Plaintiff opposes the Moving Defendants' motions and in the alternative, cross-moves to amend the Pleadings.

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

CPLR §3211[a][3] allows dismissal when the party asserting the cause of action does not have the legal capacity to sue. Pursuant to CPLR §3211[a][5], res judicata and collateral estoppel are rules of limitation recognized in a dismissal action (*People v Evans*, 94 NY2d 499, 706 NYS2d 678, 727 NE2d 1232 [2000]). Indeed, in a civil proceeding a party is entitled to dismissal based on issue preclusion or claim preclusion [id].

To dismiss a complaint for failure to state a cause of action pursuant to CPLR §3211[a][7], there can be no legally cognizable theory that could be drawn from the complaint. The test of the sufficiency of a complaint is whether liberally construed, it states in some recognizable form, a cause of action known to the law (*Union Brokerage, Inc. v Dover Insurance Company*, 97 AD2d 732, 468 NYS2d 885 [1<sup>st</sup> Dept. 1983]). Allegations that are nothing more than bare legal conclusions are not given any inference in determining whether the plaintiff has stated a cause of action (*Leder v Spiegel*, 31 AD3d 266, 267 [1<sup>st</sup> Dept. 2006]).

Under the doctrine of res judicata, a party may not litigate a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter. The rule applies not only to claims actually litigated but to claims that could have been raised in the prior litigation (*In re Hunter*, 4 NY3d 260, 794 NYS2d 286, 827 NE2d 269 [2005]). However, when dismissal of fraud is granted for failure to state a cause of action, a new complaint may be brought to rectify the previous deficiency [*Rechais v McGivan*, 119 AD3d 666, 988 NYS2d 895 [2<sup>nd</sup> Dept. 2014]).

When New York courts mention "overreaching" as a legal claim, they do so in the context of fraud or duress (*Cosh v Cosh*, 45 AD3d 798, 847 NYS2d 136 [2<sup>nd</sup> Dept. 2007]). A claim for "undue influence" is not a cause of action, but is grounds for rescission of a contract (*Hosseiniyar v Alimehri*, 48 AD3d 635, 852 NYS2d 338 [2d Dept 2008]). With Plaintiff failing to contend that a contract was rescinded, the court will solely analyze Plaintiff's cause of action for fraud.

To plead a cause of action for fraud, a party must allege the elements of representation of a material existing fact, falsity, scienter, justifiable reliance and damages (*Bramex Assocs., Inc. v CBI Agencies, Ltd*, 149 AD2d 383, 540 NYS2d 243 [1<sup>st</sup> Dept. 1989]). Each of these essential elements must be supported by factual allegations sufficient to satisfy CPLR §3016[b], which requires that the circumstances constituting the wrong shall be stated in detail. CPLR §3016[b] imposes a more stringent standard of pleading than the generally applicable 'notice of the transaction' rule of CPLR §3013, and complaints based on fraud which fail in whole or in part to meet this special test of factual pleading will be dismissed (*Megariss Furs v Gimbel Bros.*, 172 AD2d 209, 568 NYS2d 581 [1<sup>st</sup> Dept. 1991]). Actual knowledge of the fraud may be generally stated (*Stanfield Offshore Leveraged Assets, Ltd. v Metro. Life Ins. Co.*, 64 AD3d 472, 883 NYS2d 486 [1<sup>st</sup> Dept. 2009]). However, statements made in pleadings upon information and belief are not sufficient to establish the necessary quantum of proof to sustain allegations of fraud (*Facebook, Inc. v DLA Piper LLP (US)*, 134 AD3d 610, 23 NYS3d 173 [1<sup>st</sup> Dept. 2015]).

The Verified Complaint "fails to correct the defect ...determined to exist in the earlier complaint" (*Lampert v Ambassador Factors Corp.*, 266 AD2d 124, 698 NYS2d 234 [1<sup>st</sup> Dept. 1999]). Therefore, it must be barred (id). Plaintiff has filed this Verified Complaint in an attempt to rectify the previous filing in the First Action, where the court granted dismissal for failure to state fraud with specificity. This was affirmed by the First Department (*Weinberg*, supra). Unfortunately and fatal for Plaintiff, the alleged facts added to bolster Plaintiff's fraud allegation were made upon "information and belief" and therefore, not made with actual knowledge. With the added facts made upon "information and belief" being ineffective to plead fraud, the Verified Complaint as stated by this court in Motion Sequence 001, asserts "essentially the same claims as those asserted" in the First Action that were found to be "bare bone[d]" and which was dismissed (*Moving Papers Mot. 003 Ex. D*).

Leave to amend pleadings pursuant to CPLR §3025[b] should be freely given “absent prejudice or surprise resulting directly from the delay” (Anoun v City of New York, 85 AD3d 694, 926 NYS2d 98 [1<sup>st</sup> Dept. 2011]). “Prejudice arises when a party incurs a change in position or is hindered in the preparation of its case or has been prevented from taking some measure in support of its position, and these problems might have been avoided had the original pleading contained the proposed amendment” (Valdes v Marbrose Realty, Inc., 289 AD2d 28, 734 NYS2d 24 [1<sup>st</sup> Dept. 2001]). The Moving Defendants would be prejudiced here as this would be a “third bite” of the apple leading to additional significant legal fees when the allegations could have been pleaded sufficiently in the First Action. The court finds it difficult to contemplate how the Plaintiff would be able to verify the factual allegations at this time as Ms. DeMoyano has already stated Plaintiff suffers from cognitive difficulties that makes future affirmations difficult to foresee.

The court is constrained by the law in dismissing this case against the Moving Defendants. Had Ms. Weinberg been lucid, she may have been able to allege facts sufficient to state a viable claim. However, by Plaintiff’s own account she is not and her Verified Complaint against Moving Defendants alleged on “information and belief” must be dismissed.

ACCORDINGLY, it is ORDERED, that Defendants Danielle Kaminsky, Jeffrey Asher, Robinson Brog Leinwand Greene Genovese & Gluck P.C, David Kaminsky and Leslie Sultan’s motion to dismiss the Complaint pursuant to CPLR §3211 is granted, and it is further,

ORDERED, that the Complaint is severed and dismissed against Defendants David Kaminsky, Danielle Kaminsky, Jeffrey Asher, Robinson Brog Leinwand Greene Genovese & Gluck P.C, and Leslie Sultan, and it is further,

ORDERED, that Defendants Jeffrey Asher and Robinson Brog Leinwand Greene Genovese & Gluck P.C.’s motion for sanctions is denied, and it is further,

ORDERED, that Plaintiff’s cross-motion to amend the pleadings is denied, and it is further,

ORDERED, that the causes of action in the Verified Complaint asserted against Defendants Linda Salamon and 371 West 46<sup>th</sup> Street Properties, LLC F/N/A 22 West 30<sup>th</sup> Street Properties, LLC, remain in effect, and it is further,

ORDERED, that the caption in this action is amended and shall read as follows:

\_\_\_\_\_  
SARAH WEINBERG,  
Plaintiff,

-against-

LINDA SALAMON and 371 WEST 46<sup>TH</sup> STREET  
PROPERTIES, LLC f/n/a 22 WEST 30<sup>TH</sup> STREET  
PROPERTIES, LLC,  
Defendants.

\_\_\_\_\_  
and it is further,

ORDERED, that within twenty (20) days from the date of entry of this Order Moving Defendants shall serve a copy of this Order with Notice of Entry on all parties, upon the Trial Support Clerk located in the General Clerk’s Office (Room119) and the County Clerk (Room141B) who are directed to amend the caption and the court’s records accordingly, and it is further,

**ORDERED, that the parties appear for a Preliminary Conference on November 1, 2017 at 9:30 a.m. in IAS Part 13 at 71 Thomas Street, New York, NY 10013, and it is further,**

**ORDERED, that the Clerk enter judgment accordingly.**

**ENTER:**



**MANUEL J. MENDEZ,  
J.S.C.**

**MANUEL J. MENDEZ  
J.S.C.**

**Dated: August 4, 2017**

**Check one:  FINAL DISPOSITION     NON-FINAL DISPOSITION**  
**Check if appropriate:     DO NOT POST                     REFERENCE**