Gourary v Green
2017 NY Slip Op 32158(U)
October 13, 2017
Supreme Court, New York County
Docket Number: 651932/10
Judge: Saliann Scarpulla

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 39

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JOHN P. GOURARY, as Limited Administrator c.t.a. of the ESTATE OF PAUL GOURARY, deceased,

Plaintiff,

- against -

ALICE GREEN, as Executor of the ESTATE OF PAUL GREEN, deceased; ELIZABETH LASTER, as Executor of the ESTATE OF OLIVER LASTER, deceased; SCOTT A. MACOMBER; and GREEN & ETTINGER,

Defendants.

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Index No. 651932/10

Motion Sequence No. 003

SCARPULLA, J.:

In this breach of fiduciary duty and fraud action, defendants Elizabeth Laster, as executor of Oliver Laster's estate ("Laster"), and Scott A. Macomber ("Macomber") move, pursuant to CPLR 3211 (a) (7), to dismiss the complaint for failure to state a cause of action.

Background

This action was commenced in 2010, and the parties filed the note of issue on November 21, 2014. Defendants bring this motion to dismiss, at this stage, based on the procedural history of the case.

Decedents Paul Gourary and Oliver Laster were equal shareholders and directors of 127-131 West 25th St. Corp. (the "Corporation"), whose primary asset was a commercial building at 127-131 West 25th Street, New York New York. In the complaint, plaintiff John P. Gourary, as limited administrator c.t.a of the estate of Paul Gourary ("Gourary"), alleges that Laster and his son-in-law, Macomber, schemed to

purchase Gourary's interest in the Corporation for substantially less than its fair market value and asserts causes of action for: (1) breach of fiduciary duty against Laster; (2) aiding and abetting a breach of fiduciary duty against Macomber; (3) fraudulent concealment against Laster; and (4) civil conspiracy to commit fraudulent concealment against Laster and Macomber.

During the transaction underlying this dispute, real estate attorney Paul Green represented Gourary. On February 13, 2015, Alice Green, as executor of the estate of Paul Green ("Green") and Green & Ettinger (collectively, "Green defendants") moved for summary judgment dismissing the complaint insofar as asserted against them. By decision and order, dated January 15, 2016, I granted the motion. In relevant part, I found that "based on the fact that much of the circumstance surrounding the transaction will never be known, the Green defendants have met their prima facie burden of showing the [plaintiff] cannot adequately support a claim for legal malpractice against the Green defendants." I also dismissed the remaining causes of action against the Green defendants, for breach of fiduciary duty, fraudulent concealment and civil conspiracy to commit fraudulent concealment, as duplicative of the malpractice claim.

Plaintiff appealed, and the Appellate Division, First Department affirmed. The First Department held, in relevant part, that:

> "The Green defendants established prima facie, through deposition testimony and two experts' affidavits, that the sale was consistent with Gourary's objectives, that Green did not represent Macomber before the deal was struck, and that the evidence did not support an inference that Green's representation violated the ethics rules or was inconsistent with the standard of professional conduct. Moreover,

> defendants established the absence of proximately caused damages; since 'there is no way to know whether the advice not given . . . 'would have altered the [outcome],'' the claim of damages is speculative.
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> "In opposition, plaintiff failed to raise a triable issue of fact. There is no evidence that Green represented Macomber and Gourary dually in connection with the negotiations for the sale of Gourary's share of the corporation. Before making an offer, Macomber had consulted a tax lawyer; later he retained separate counsel to provide services in connection with the transaction. Moreover, Green's structuring of the transaction favored Gourary's interests over those of Macomber. . ..
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> "The fact that Gourary suffered from dementia did not necessarily render him incompetent to enter into the subject transaction. 'A party's competence to enter into a transaction is presumed, even if the party suffers from a condition affecting cognitive function.' Indeed, arguing that Green had a duty to take steps to protect Gourary as a client with diminished capacity, plaintiff apparently concedes that, with the proper protection, Gourary was capable of entering into the transaction. However, whether Green provided that protection cannot be known or reasonably inferred from the record."

Gourary v Green, 143 A.D.3d 580, 580–581 (1st Dept 2016) (internal citations omitted).

Based on the Appellate Division, First Department's decision, defendants now seek dismissal of the complaint for failure to state a claim.

Discussion

A. Motion to Dismiss

As a preliminary matter, the parties dispute whether this motion is an untimely summary judgment motion in the guise of a motion to dismiss. Unlike a motion for summary judgment, which is subject to statutory and court-ordered timeframes, *see*

CPLR 3212 (a), a motion brought pursuant to CPLR 3211 (a) (7) may be brought "at any . . . time." CPLR 3211 (e). Here, movants seek dismissal for failure to state a claim, thus I consider the motion.

"[O]n a motion to dismiss a complaint for failure to state a cause of action, the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true." *Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 A.D.3d 172, 174 (1st Dep't 2004); *see also Amaro v Gani Realty Corp.*, 60 A.D.3d 491, 492 (1st Dep't 2009). The court is not permitted "to assess the merits of the complaint or any of its factual allegations, but only to determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action." *Skillgames, LLC v Brody*, 1 A.D.3d 247, 250 (1st Dept 2003) (citation omitted). "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Id.* (citation omitted).

Moreover, "'[a]n appellate court's resolution of an issue on a prior appeal constitutes the law of the case and is binding on the Supreme Court. . ..'" *Carmona v Mathisson*, 92 A.D.3d 492, 492 (1st Dep't 2012). The doctrine of law of the case preludes parties from relitigating an issue previously decided in the same action, "either directly or by implication," where there was a fair and full opportunity to address the issue. *Holloway v Cha Laundry, Inc.*, 97 A.D.2d 385, 386 (1st Dep't 1983); *see also Moran Enters., Inc. v Hurst*, 96 A.D.3d 914, 916 (2d Dep't 2012) (stating that the law of

the case "bars reconsideration of issues which were raised and determined against a party or which could have been raised on a prior appeal").

1. Breach of Fiduciary Duty

Gourary's breach of fiduciary cause of action is based on Laster's alleged failure to disclose information about the value of the property, the Corporation, and other details about the transaction underlying this dispute.

Regardless of Laster's duty as a fiduciary to disclose information that could bear on Gourary's consideration of the transaction, the breach of fiduciary duty claim fails because the complaint alleges that each of the nondisclosed facts was known to Green. *See* Complaint ¶¶ 114, 115, 143-146. "The general rule is that knowledge acquired by an agent acting within the scope of his agency is imputed to his principal and the latter is bound by such knowledge although the information is never actually communicated to [him]." *Seward Park Hous. Corp. v Cohen*, 287 A.D.2d 157, 167 (1st Dep't 2001). Unless Green had an adverse interest or acquired his knowledge in a confidential setting, Gourary cannot avoid imputation. *See Farr v. Newman*, 14 N.Y.2d 186, 188 (1964); *see also Skiff-Murray v Murray*, 17 A.D.3d 807, 810 (3d Dep't 2005) (finding that attorney's knowledge could be imputed to a client, "regardless of when or how it was obtained—unless it was acquired confidentially").

Here, the law of the case is determinative. The First Department has already found that: "[t]he Green defendants established prima facie . . . that the sale was consistent with Gourary's objectives"; "[t]here [was] no evidence that Green represented Macomber and Gourary dually in connection with the negotiations for the sale of

Gourary's share of the corporation"; and "Green's structuring of the transaction favored Gourary's interests over those of Macomber." *Gourary*, 143 A.D.3d at 580, 581.

As the First Department's decision makes clear, Green did not totally abandon Gourary's interest and Gourary cannot avoid imputation by claiming the adverse interest exception. *See Center v Hampton Affiliates*, 66 N.Y.2d 782, 785 (1985) (stating that adverse interest exception requires a total abandonment of the principal's interests and "cannot be invoked merely because [the agent] ha[d] a conflict of interest or because he [was] not acting primarily for his principal.").

Nor can Gourary avoid imputation by speculating, as he does in his opposition papers, that Green may have acquired the information confidentially, as Laster's attorney. Nowhere in the complaint does Gourary allege such dual representation. Gourary's dismissed malpractice claim against Green was premised entirely on Green's alleged dual representation of Paul Gourary and Oliver Macomber. Having had a full and adequate opportunity to litigate the issue, Gourary may not now attempt to relitigate an issue "which [was] raised and determined against [him] or which could have been raised on a prior appeal." *Moran Enters., Inc.*, 96 A.D.3d at 916. Therefore, accepting the complaint's factual allegations as true, Green's knowledge concerning the transaction, including that the offer allegedly was substantially below market value, must be imputed to Gourary.

The imputation of Green's knowledge to Gourary renders plaintiff's allegations, that Laster's concealment of material facts proximately caused an injury to Gourary, "inherently incredible." *Skillgames, LLC*, 1 A.D.3d at 250. Therefore, to the extent that

the breach of fiduciary duty claim is premised on Laster's alleged failure to make material disclosures, the complaint fails to state a cause of action. *See, e.g., Laub v Faessel*, 297 A.D.2d 28, 31 (1st Dep't 2002) (stating that for breach of fiduciary, "plaintiff must establish that the alleged misrepresentations or other misconduct were the direct and proximate cause of the losses claim"); *Pokoik v. Pokoik*, 115 A.D.3d 428, 429 (1st Dep't 2014).

To the extent that Gourary's breach of fiduciary duty claim is premised on Laster's allegedly unauthorized actions on behalf of the Corporation, including violation of New York Business Corporation Law § 713, and the "waste of corporate assets for the benefit of a Director's relative, Macomber", such "allegations of mismanagement or diversion of assets by officers or directors to their own enrichment, without more, plead a wrong to the corporation only, for which a shareholder may sue derivatively but not individually." *Abrams v Donati*, 66 N.Y.2d 951, 953 (1985); *see also Serino v Lipper*, 123 AD3d 34, 40 (1st Dept 2014) ("even where an individual harm is claimed, if it is confused with or embedded in the harm to the corporation, it cannot separately stand"). Gourary pleads the breach of fiduciary duty claim individually, not derivatively on behalf of the Corporation.

For the foregoing reasons, the breach of fiduciary duty claim against Laster is dismissed for failure to state a cause of action.

2. Remaining Claims

The remaining claims are also dismissed. The fraudulent concealment claim against Laster and the aiding and abetting a breach of fiduciary duty claim against

Macomber fail for the same reasons as the breach of fiduciary duty claim, that is, plaintiff's inability to state proximately caused damages. *See Laub*, 297 A.D.2d at 31 ("[a]n essential element of the plaintiff's cause of action . . . for . . . any . . . tort, is that there be some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered"); *see also Bullmore v Ernst & Young Cayman Is.*, 45 A.D.3d 461, 464 (1st Dep't 2007) (a claim for aiding and abetting a breach of fiduciary duty requires "a breach of fiduciary duty, that the defendant knowingly induced or participated in the breach, and damages resulting therefrom"); *P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 A.D.2d 373, 376 (1st Dep't 2003) (to state a claim for fraudulent concealment, plaintiff must allege a duty to disclose, failure to make a material disclosure, with the intent to defraud, plaintiff's reasonable reliance, and resulting damages).

Contrary to plaintiff's contention, the law of constructive fraud does not operate here to shift the burden to defendants to demonstrate the absence of fraud from the transaction. As recently articulated in *Matter of Aoki v Aoki*, 27 N.Y.3d 32 (2016), when:

> "the relations *between the contracting parties* appear to be of such a character as to render it certain that they do not deal on terms of equality but that either on the one side from superior knowledge of the matter derived from a fiduciary relation, or from overmastering influence, or on the other from weakness, dependence, or trust justifiably reposed, unfair advantage in a transaction is rendered probable, there the burden is shifted, the transaction is presumed void, and it is incumbent upon the stronger party to show affirmatively that no deception was practiced, no undue influence was used, and that all was fair, open, voluntary and well understood"

Id. at 39–40.

Here, the contracting parties were Macomber and Paul Gourary, who were not in a fiduciary relationship. Even assuming the sale to Laster's son-in-law and the alleged benefit to Laster's future heirs, through the reduction of estate tax liability, meant that Laster "stood to directly benefit," the law of constructive fraud is, nonetheless, inapplicable here. *Id.* at 41. Paul Gourary was represented by counsel, whose knowledge of the pertinent facts is imputed to Paul Gourary. Moreover, the First Department found that Green's "structuring of the transaction favored Gourary's interests over those of Macomber." *Gourary*, 143 A.D.3d at 581. As such, Laster did not enjoy a position of superior knowledge to Paul Gourary. *See Chun Hye Kang-Kim v Feldman*, 121 A.D.2d 590, 592 (2d Dept 1986) (finding that the law of constructive fraud was inapplicable, where the fiduciary's allegedly false representation did not deal with matters in which the fiduciary's "special knowledge and expertise put him in a superior position to the plaintiff").

Additionally, the First Department found that "[t]he fact that Gourary suffered from dementia did not necessarily render him incompetent to enter into the subject transaction. A party's competence to enter into a transaction is presumed, even if the party suffers from a condition affecting cognitive function." *Gourary*, 143 A.D.3d at 581 (internal quotation marks and citations omitted). Therefore, Gourary may not allege that the parties dealt on terms of inequality, "either on the one side from superior knowledge of the matter derived from a fiduciary relation . . . or on the other from weakness," and,

as such, the law of constructive fraud is inapplicable here. *Matter of Aoki*, 27 N.Y.3d at 39.

Lastly, without an underlying claim for fraudulent concealment, the civil conspiracy claim fails. "A mere conspiracy to commit a [tort] is never of itself a cause of action. Allegations of conspiracy are permitted only to connect the actions of separate defendants with an otherwise actionable tort." *Alexander & Alexander of N.Y. v Fritzen*, 68 N.Y.2d 968, 969 (1986) (internal quotation marks and citations omitted); *Johnson v Law Off. of Kenneth B. Schwartz*, 145 A.D.3d 608, 611 (1st Dept 2016) ("conspiracy to commit a tort is not a cause of action").

Based on the foregoing, defendants' motion to dismiss the complaint for failure to state a cause of action is granted.

B. Leave to Amend

In his opposition, Gourary argues that he should be granted leave to amend the complaint. Pursuant to CPLR 3025 (b), "[a] party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court." "[L]eave to amend the complaint pursuant to CPLR 3025 (b) should be freely granted unless the proposed amendment is palpably insufficient to state a cause of action or is patently devoid of merit." *Bishop v Maurer*, 83 A.D.3d 483, 485 (1st Dep't 2011) (internal quotation marks and citation omitted).

Here, the proposed amended complaint is largely identical to the original complaint, except that it deletes all mention of Green. Having previously argued that Green had knowledge of all the pertinent facts, but withheld them from Paul Gourary,

and having fully litigated the issue, Gourary cannot now avoid the First Department's decision by excising Green out of the complaint. *See Bogoni v Friedlander*, 197 A.D.2d 281, 291-292 (1st Dep't 1994). Therefore, leave to amend the complaint is denied, because "the proposed amendment . . . is patently devoid of merit." *Bishop*, 83 A.D.3d at 485 (internal quotation marks and citation omitted).

Accordingly, it is hereby

ORDERED that the motion of defendants Elizabeth Laster, as executor of the estate of Oliver Laster, and Scott A. Macomber is granted, and the complaint is dismissed in its entirety as against said defendants; and it is further

ORDERED that the Clerk of the Court enter judgment dismissing the complaint in its entirety against the remaining defendants.

This constitutes the decision and order of the Court.

10/13/17
DATE

SALIANN SCARPULLA, J.S.C.

CHECK ONE:	X	CASE DISPOSED		DENIED		NON-FINAL DISPOSITION	
	X	GRANTED				GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
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