

**Gross v Chambre**

2017 NY Slip Op 32828(U)

May 15, 2017

Supreme Court, Rockland County

Docket Number: 031761/2015

Judge: Thomas E. Walsh II

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ROCKLAND

-----X  
LESSER GROSS, individually and on behalf of LASK  
DEVELOPERS LLC,

Plaintiff,

-against-

**DECISION & ORDER**

Index No. 031761/2015

Motion # 7

ROBERT J. CHAMBRE, 14 RT 59 LLC, YOEL Y. WEISS,  
GIBRALTAR ABSTRACT COMPANY, SHAUL KOPELOWITZ,  
VICTOR WEISS and ISAAC SCHEINER and  
LASK DEVELOPERS LLC,

Defendant.

-----X  
**Hon. Thomas E. Walsh II, J.S.C.**

The following papers numbered 1 -5 were considered in connection with Defendant ROBERT J. CHAMBRE's (hereinafter CHAMBRE) motion for an Order pursuant to Civil Practice Law and Rules § 3212 (I) granting Defendant CHAMBRE summary judgment dismissing the Complaint against Defendant CHAMBRE because the undisputed facts establish that Plaintiff has no valid cause of action against the Defendant and (ii) in the event summary judgment dismissing the Complaint is not granted, granting CHAMBRE summary judgment on his cross-claim for indemnification against Defendant SHAUL KOPLEOWITZ because the undisputed facts establish that CHAMBRE relied in good faith on the representations of SHAUL KOPLEOWITZ as to his authority to transfer the subject mortgage to CHAMBRE:

<b><u>PAPERS</u></b>	<b><u>NUMBER</u></b>
NOTICE OF MOTION/AFFIRMATION OF STUART A. BLANDER, ESQ./EXHIBITS (A-R)	1
AFFIRMATION OF LESSER GROSS/AFFIRMATION OF RYAN KARBEN, ESQ.	2
REPLY AFFIDAVIT OF STUART A. BLANDER, ESQ. IN FURTHER SUPPORT OF DEFENDANT CHAMBRE'S MOTION FOR SUMMARY JUDGMENT AGAINST KOPELOWITZ ON INDEMNITY CROSS-CLAIM AND IN OPPOSITION TO KOPELOWITZ' CROSS-MOTION TO DISMISS CROSS-CLAIM	3
REPLY AFFIDAVIT OF STUART A. BLANDER, ESQ. IN FURTHER SUPPORT OF DEFENDANT CHAMBRE'S MOTION FOR SUMMARY JUDGMENT DISMISSING PLAINTIFF'S COMPLAINT	4
CORRECTED REPLY AFFIDAVIT OF STUART A. BLANDER, ESQ. IN FURTHER	

SUPPORT OF DEFENDANT CHAMBRE'S MOTION FOR SUMMARY JUDGMENT  
DISMISSING PLAINTIFF'S COMPLAINT

5

Plaintiff brought this action against Defendant CHAMBRE regarding co-defendant KOPELOWITZ's assignment of a purchase money mortgage issued by co-defendant WEISS to himself. The original action arose from a dispute between Plaintiff and Defendant KOPELOWITZ with respect to the sale of the property located at 141 Route 59, Monsey, New York. The property was owned by a limited liability company, LASK DEVELOPERS, LLC, in which the Plaintiff and Defendant KOPELOWITZ were each members holding a 50% membership interest. Defendant CHAMBRE agreed that in exchange for the CHAMBRE GROUP's contribution of \$375,000 they would receive an equity interest in the property proportionate to their contribution. Based on the testimony of CHAMBRE in his Examination Before Trial (hereinafter EBT) the CHAMBRE GROUP asked several times for documentation regarding the distribution of LASK DEVELOPERS, LLC, which went undelivered. According to Defendant CHAMBRE, LASK DEVELOPERS, INC. sold the subject property in March 2014 to Defendant WEISS for \$1.1 million dollars without the CHAMBRE GROUP's knowledge. Defendant KOPELOWITZ subsequently brought an action against Plaintiff GROSS for an alleged fraud, conversion and other claims regarding the disposition of the sale proceeds from the sale of the subject property.

At around the same time Defendant KOPELOWITZ brought the main action against Plaintiff GROSS, Defendant KOPELOWITZ executed an Assignment of Mortgage on behalf of LASK DEVELOPERS, INC. in his capacity as manager of the LLC. According to Defendant CHAMBRE, the CHAMBRE GROUP was never informed of the sale and discovered that the sale of the subject property had occurred several months later upon an examination of the Rockland County Title Records. Defendant CHAMBRE submits that upon the discovery of the sale, Defendant CHAMBRE GROUP contacted Defendant KOPELOWITZ seeking a refund of the monies they invested. In CHAMBRE's EBT he and the members of the CHAMBRE GROUP testified that he and the members attended a mediation with Defendant KOPELOWITZ in December 2014 in which KOPELOWITZ offered to re-pay the loaned monies through an assignment of the Purchase Money Mortgage for Defendant WEISS to Defendant CHAMBRE. According to Defendant CHAMBRE, he took the offer and began to be contacted by Defendant WEISS to arrange an extension of the due date. Prior to receiving any money the Plaintiff filed the instant action and obtained a Temporary Restraining Order and a Preliminary Injunction prohibiting payment of the mortgage. Defendant CHAMBRE has agreed that he will not take any action regarding the mortgage until the undersigned

determines the validity of the Assignment of the Mortgage.

In the Complaint the Plaintiff has raised three (3) causes of action as to the Defendant CHAMBRE. The first cause of action seeks a Temporary Restraining Order and a Preliminary Injunction prohibiting the Defendants from taking any action to enforce the Mortgage. The second cause of action against Defendant CHAMBRE seeks a declaratory judgment that "only [plaintiff] has any authority to execute documents as Operating manager of Lask." Plaintiff is also seeking the court "declare and determine the [plaintiff] is the sole and only authorized Operating Manger of Lask." The third cause if action against Defendant CHAMBRE asserts that Defendant KOPELOWITZ committed fraud in transferring the Mortgage to his own name and that Defendants CHAMBRE and GIBRALTAR who sought to enforce the note aided and abetted the fraud.

As to the first cause of action, Defendant CHAMBRE argues that no such "cause of action" for either a Temporary Restraining Order (hereinafter TRO) or a preliminary injunction exists. Defendant CHAMBRE submits that a TRO and preliminary injunction are provisional remedies and not substantive causes of action that exist in their own right. Further, Defendant CHAMBRE asserts that he has agreed to take no action with respect to the Mortgage unless and until the Court determines the validity of the assignment of the Mortgage, which removes the need for any request for injunctive relief. Additionally, Defendant CHAMBRE avers that the Plaintiff will suffer no irreparable injury as he has filed a Notice of Pendency regarding his claims which precludes a transfer of the Mortgage free of Plaintiff's claims.

Plaintiff submitted Opposition that is in response to several of the pending motions in the instant action. The Opposition consisted of a general Affidavit of Plaintiff and an Affirmation of Ryan Karben, Esq. which contain minimal opposition to Defendant's motion. Plaintiff asserts that Defendant CHAMBRE had knowledge that co-Defendant KOPELOWITZ did not have authority to assign the Mortgage based on CHAMBRE's knowledge of KOPELOWITZ's deceptive business tactics. Much of the argument with the Affidavit of Plaintiff and the Affirmation of Ryan Karben, Esq. focuses on the conduct of co-Defendant KOPELOWITZ and his knowledge of Defendant CHAMBRE's knowledge of the agreement between Plaintiff and Defendant KOPELOWITZ. Within the Affirmation of Ryan Karben, the Court is directed to page 58 of Defendant KOPELOWITZ's testimony in which KOPELOWITZ testified that he told Defendant CHAMBRE about the dispute between himself and Plaintiff, but did not address his authority to transfer the Mortgage or his legal obligations to LASK DEVELOPERS, INC. Instead Defendant KOPELOWITZ testified that he informed Defendant

CHAMBRE that he was transferring the mortgage to protect the CHAMBRE GROUP partners money and "to ensure that everybody recovers their money so Mr. Gross wouldn't walk off with additional funds." Plaintiff avers that the knowledge of Defendant CHAMBRE of the dispute between Plaintiff and Defendant KOPELOWITZ is a central fact at the heart of the claims.

Turning now to the second cause of action, Defendant CHAMBRE submits that the declaratory judgment sought addresses Plaintiffs authority to execute documents as an Operating Manager of LASK DEVELOPERS, INC. Defendant CHAMBRE further asserts that the declaratory judgment does not relate to Defendant CHAMBRE and only addresses the dispute between Defendant KOPELOWITZ and Plaintiff.

In opposition, Plaintiff fails to raise any argument regarding the second cause of action and whether it pertains to Defendant CHAMBRE.

Finally, as to the third cause of action, Defendant CHAMBRE submits that Plaintiffs action for aiding and abetting claim against Defendant CHAMBRE is deficient as a matter of law. Specifically, Defendant CHAMBRE asserts that he is a bona fide purchaser for value under *Real Property Law* § 266, which protects a purchaser for valuable consideration unless the purchaser had previous notice of the fraudulent intent of the immediate grantor. Further, Defendant CHAMBRE avers that a claim of aiding and abetting of fraud cannot be maintained due to the lack of any evidence that Defendant CHAMBRE was aware of any facts that raised a question about Defendant KOPELOWITZ's authority to transfer the mortgage. Additionally, Defendant CHAMBRE argues that even if there was an issue of fact about whether he was a bona fide purchaser the Plaintiff cannot succeed on a claim of aiding and abetting a fraud, as he has failed to demonstrate the existence of an underlying fraud, Defendant CHAMBRE's knowledge of the fraud and Defendant CHAMBRE's substantial assistance in completing the fraud.

In opposition, Plaintiff argues that Defendant CHAMBRE has "provided affirmative assistance" to Defendant KOPELOWITZ at different times by being retained to perform legal work or execute documents and as to Defendant CHAMBRE by seeking counsel and a title company to record the "suspect" assignment. No further statements or facts are provided by Plaintiff in support of his opposition.

The proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. [*Giuffrida v. Citibank Corp., et al.*, 100 NY2d 72 (2003), citing *Alvarez v. Prospect Hosp.*, 68 NY2d 320

(1986)]. The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. [*Lacagnino v. Gonzalez*, 306 AD2d 250 (2d Dept 2003)]. However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. [*Gonzalez v. 98 Mag Leasing Corp.*, 95 NY2d 124 (2000), citing *Alvarez*, *supra*, and *Winegrad v. New York Univ. Med. Center*, 64 NY2d 851 (1985)]. Mere conclusions or unsubstantiated allegations unsupported by competent evidence are insufficient to raise a triable issue. [(*Gilbert Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966 (1988); *Zuckerman v. City of New York*, 49 NY2d 557 (1980)].

Pursuant to *Civil Practice Law and Rules* §§ 6001 and 6301, a Preliminary Injunction and a TRO are provisional request for relief and cannot be a cause of action raised in a complaint. [*319 Smile Corp. v. Forman Fifth, LLC*, 2005 WL 5872218 (Sup. Ct. NY Cty 2005); *1842 7<sup>th</sup> Ave. Deli Corp. v. 200 West 12<sup>th</sup> St. Housing Dev. Fund*, 2011 WL 2516745 (Sup. Ct. NY Cty 2011)].

As to the first cause of action, the Complaint in which Plaintiff seeks a TRO and a Preliminary Injunction is defective. The first cause of action is defective since it seeks a "preliminary injunction" and TRO which are provisional remedies pursuant to the Civil Practice Law and Rules and are not properly stated as a cause of action. Therefore, Defendant CHAMBRE's motion as to the first cause of action is granted.

The Court notes that the Plaintiff has failed to raise any opposition to Defendant CHAMBRE's argument regarding the second cause of action. The Court notes that upon review of the Complaint in the instant action, Defendant CHAMBRE is not mentioned within the allegations of the second cause of action. Further, the entire second cause of action seeks a declaratory judgment as to Plaintiff's authority in relation to his role at LASK DEVELOPERS, INC. Therefore, Defendant CHAMBRE's motion for summary judgment as to the second cause of action is granted.

To state a claim for aiding and abetting a fraud, a plaintiff must show allege the existence of an underlying fraud, actual knowledge and substantial assistance. [*Oster v. Kirschner*, 77 AD3d 51, 55-56 (1st Dept 2010); *Houbigant, Inc. v. Deloitte & Touche, LLP*, 303 AD2d 92, 100-101 (1st Dept 2003); *High Tides, LLC v. DeMichele*, 88 AD3d 954, 960 (2d Dept 2011)]. It is insufficient to merely raise allegations sufficient to state a claim against the principal participants for fraud and combine conclusory allegations that the aider and abettor had actual knowledge of the fraud. [*National Westminster Bank v. Wechsel*, 124 AD2d 144, 149 (1st Dept 1987). ] To satisfy the element of an underlying fraud the plaintiff

must establish that there is "misrepresentation or a material omission of fact which was false and known to be false by the defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury." [*Orlando v. Kukielka*, 40 AD3d 829, 831 (2d Dept 2007); *Lama Holding Co., v. Smith Barney*, 88 NY2d 413, 421 (1996)]. Further, as in the aiding and abetting of a breach of fiduciary duty, in the circumstance in which it is alleged that a party aided and abetted a fraud the "defendant substantially assists the commission of a fraud when it "affirmatively assists, helps conceal, or by virtue of failing to act when required to do so enables the fraud to proceed." [*Cromer Finance Ltd. v. Berger*, 137 FSupp2d 452, 470 (S.D.N.Y. 2001)]. In demonstrating substantial assistance the plaintiff must allege that the actions of the aider and abettor proximately caused the harm on which the "primary liability is predicated" and the "injury to be a direct or reasonably foreseeable result of the conduct." [*Cromer Finance Ltd.*, 137 FSupp2d at 470]. As stated with aiding and abetting a breach of fiduciary duty, inaction by a defendant is only considered "participation" when the defendant owes a fiduciary duty to the plaintiff." [*Kolbeck*, 939 FSupp at 247].

Defendant CHAMBRE has made a prima facie showing of entitlement to judgment as a matter of law as to the third cause of action aiding and abetting the fraud. Plaintiff has provided sweeping statements with no supporting facts regarding Defendant CHAMBRE's knowledge or familiarity with Defendant KOPELOWITZ's "pattern of evasion and deceit in business dealings." The evidence provided by Defendant CHAMBRE demonstrates that the Plaintiff has failed to show an existence of an underlying fraud committed. Further, the evidence from the multiple EBTs of the parties demonstrates that there is no admissible evidence that Defendant CHAMBRE had knowledge that Defendant KOPELOWITZ didn't have authority transfer the mortgage.

Upon Defendant CHAMBRE meeting his burden on the summary judgment motion, the burden shifted to Plaintiff to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. The Plaintiff has failed to produce any evidentiary proof in any form (admissible or not admissible) that demonstrates that there is a material question of fact as to the First, Second and Third causes of action that require a trial. Nothing in Plaintiff's opposition as to the First, Second and Third causes of action allege that an underlying fraud was committed by Defendant KOPELOWITZ against Plaintiff and that Defendant CHAMBRE's actions aided or abetted.

As to Defendant CHAMBRE's request to have his cross-claim for indemnification is

moot as each of the causes of action in the Complaint against Defendant CHAMBRE have been dismissed as stated in the Court's Decision and Order.

Accordingly, it is

**ORDERED** that Defendant CHAMBRE's motion for Summary Judgment (Motion #7) is granted in its entirety; and it is further

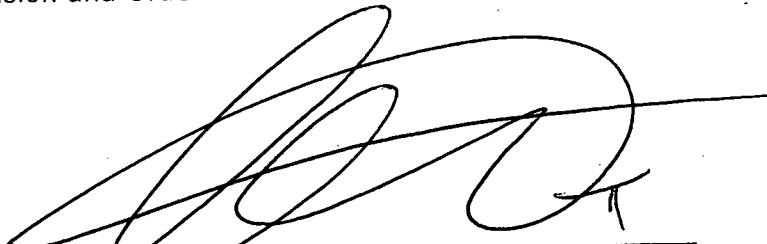
**ORDERED** that as to Defendant CHAMBRE the instant action is dismissed; and it is further

**ORDERED** that the previously granted Temporary Restraining Order and Preliminary Injunction issued in the instant action remains in effect; and it is further

**ORDERED** that Defendant CHAMBRE is directed to take no action with respect to the Mortgage assigned to Defendant CHAMBRE from Defendant KOPELOWITZ until further Order of this Court.

The foregoing constitutes the Decision and Order of this Court on Motion #7.

Dated: New City, New York  
May 15, 2017

  
**HON. THOMAS E. WALSH II**  
**Justice of the Supreme Court**

TO:

RYAN S. KARBEN, ESQ.  
Attorney for Plaintiff LESSER GROSS  
(via e-file)

JEFFREY FLEISCHMAN, ESQ.  
LAW OFFICE OF JEFFREY FLEISCHMAN, P.C.  
Attorney for Defendant KOPELOWITZ  
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STUART A. BLANDER, ESQ.  
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