

SR Holdings I, LLC v Cannavo
2017 NY Slip Op 33371(U)
June 30, 2017
Supreme Court, Westchester County
Docket Number: Index No. 54202/2016
Judge: Sam D. Walker
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. SAM D. WALKER, J.S.C.**

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SR HOLDINGS I, LLC

Plaintiff,

-against-

Index No. 54202/2016
DECISION & ORDER
Seq # 2

JOSEPH CANNAVO, LEONARD CANNAVO, CARMELA CANNAVO, IRVING PLACE PROPERTIES, LLC, ONE WAY PROPERTIES LLC, PUTNAM PARK PROPERTIES LLC, REGENT STREET PROPERTIES LLC, WASHINGTON PARK PROPERTIES LLC, BLUE MOUNTAIN PARTNERS LLC, CROWN ROYAL LLC, HASECO PROPERTIES LLC, WHITETAIL REATY GROUP LLC, CAPTIAL REATY PARTNERS LLC, ALL NY HOLDINGS LLC, M&T BANK, PROVIDENT BANK n/k/a STERLING NATIONAL BANK, RED SOX FUNDING LLC, BRANCA REATY LLC, CASTLE TITLE INSURANCE AGENCY INC., BLACK DIAMOND GROUP LLC, RANDOM PROPERTY GROUP LLC, 82-84 HAMILTON MANOR LLC, DEREK WASHINGTON, RANCA CONSULTING SERVICES LLC, CREATIVE SCAPES MANAGEMENT LLC, SINGER ENERGY GROUP LLC, SHANA SIMMONS, NEW YORK STATE DEPARTMENT OF TAXATION & FINANCE, JOHN DOE #1 through JOHN DOE #15 INCLUSIVE,

Defendant.
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The following papers were considered on the motion seeking dismissal of the complaint and all cross-claims against Castle Title Insurance Agency, Inc.:

PAPERS

NUMBERED

Notice of Motion/Affirmation/Exhibits A-H	1-10
Memorandum of Law in Support	11
Affirmation/Affidavit in Opposition/Exhibits A-M	12-26

Memorandum of Law in Opposition	27
Amended Affidavit in Opposition	28
Memorandum of Law in Reply	29

Based upon the foregoing the motion is GRANTED in part and DENIED in part.

The plaintiff commenced this action to recover on deficiency judgments against the named defendants from two previously filed actions ("Action 1 and Action 2"). The plaintiff states that on or about September 24, 2012, a judgment was entered in Action 1 in favor of SR Holdings I, LLC ("SR Holdings") against Fox Island Properties, LLC, Joseph Cannavo, Leonard Cannavo, Bridgeport Realty Group, LLC, Great American Development, Building & Remodeling, Inc., Haseco Properties LLC, Irving Place Properties LLC, One Way Properties LLC, Putnam Park Properties LLC, Regent Street Properties LLC, Washington Park Properties LLC and Western Greenwich Holdings LLC, in the amount of \$2,836,459.42 ("Judgment 1").

The plaintiff further states that on or about January 7, 2013, a judgment was entered in Action 2 in favor of SR Holdings against Fox Island Properties LLC, Joseph Cannavo, Leonard Cannavo, Irving Place Properties LLC, One Way Properties LLC, Putnam Park Properties LLC, Regent Street Properties LLC, Washington Park Properties LLC, and Western Greenwich Holdings, LLC in the amount of \$1,618,929.82 ("Judgment 2").

The plaintiff alleges that Judgment 1 and Judgment 2 remain wholly unsatisfied and this action seeks, *inter alia*, to set aside the alleged fraudulent conveyances of fifty six properties from Joseph Cannavo, Leonard Cannavo, Irving Place Properties LLC, One Way Properties LLC, Putnam Park Properties LLC, Regent Street Properties LLC, Washington Park Properties LLC, and Haseco Properties LLC (collectively "the transferor defendants") to the defendants Black Diamond Group LLC, Blue Mountain Partners LLC,

Crown Royal LLC, Whitetail Realty Group LLC, Capital Realty Partners LLC, Random Property Group LLC, and 82-84 Hamilton Manor LLC (collectively "the transferee defendants"), in violation of Debtor and Creditor Law 273, 273-a, 275 and 276. The action also seeks to set aside twelve mortgage encumbrances.

With respect to Castle Title Insurance Agency, Inc. ("Castle"), the Amended Verified Complaint alleges that Castle negligently and/or fraudulently delayed in recording the fifty six deeds and ten of the mortgage documents on behalf of the transferor defendants and the transferee defendants to aid in them avoiding payment of Judgment 1 and Judgment 2. The amended complaint also alleged conspiracy to defraud creditors and civil RICO violations against Castle.

Castle now files this motion seeking dismissal of the claims against it, pursuant to CPLR 3211(a)(7). Castle argues that the plaintiff's amended complaint fails to satisfy basic statutory pleading requirements as set forth in CPLR 3014 and 3013. It does not allege that Castle is a judgment debtor, nor does it allege that Castle had any connection with the plaintiff, the judgment debtors, or the other co-defendants. Castle argues that it does not specify the properties for which the property transfer or financial transaction filings were delayed and it does not specify which alleged delays were for the purpose of avoiding payment. Castle argues that the plaintiff does not allege that Castle performed title services on any party's behalf, nor does it allege that Castle deviated from accepted standards and practices in filing documents. Castle asserts that any answer would require it to speculate as to the specifics of the plaintiff's claims.

Castle also asserts that SR Holdings fails to plead a proper claim for negligence because the plaintiff does not allege a relationship between Castle and SR Holdings that

would trigger a duty on the part of Castle and without a duty the claims cannot survive. Castle further asserts that the plaintiff's amended complaint fails to plead a proper claim of fraud or civil RICO and that the plaintiff does not have a claim for civil conspiracy to commit fraud.

In support of the motion, Castle relies upon an attorney's affirmation, a memorandum of law and a copy of the pleadings. SR Holdings opposes the motion, relying on an affidavit, an attorney's affirmation, affidavits, transcripts and a decision and order from a previous action and copies of checks. The transferor defendants and the transferee defendants also opposes the motion, by submitting affirmations in opposition to Castle's motion to dismiss, requesting that the cross claims not be dismissed even if the plaintiff's claims are dismissed.

Discussion

Rule 3211 of the Civil Practice Law and Rules provides, in relevant part that,

"[a] party may move for judgment dismissing one or more causes of action asserted against [it] on the ground that:

(7) the pleading fails to state a cause of action..."
(N.Y. Civ. Prac. L. & R. 3211[a] [7]).

Under CPLR 3211(a)(7), initially "[t]he sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law..." (see *Guggenheimer v. Ginzburg*, 43 NY2d 268, 275 [1977]). On a motion to dismiss for failure to state a cause of action, the court must view the challenged pleading in the light most favorable to the non-moving party, and determine whether the facts as alleged fit within any cognizable legal theory

(see *Brevtman v Olinville Realty, LLC*, 54 AD3d 703 [2d Dept 2008]; see also *EBC 1, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, [2005]; *Leon v Martinez*, 84 NY2d 83 [1994]).

Thus, a motion to dismiss pursuant to CPLR 3211 (a) (7) will not succeed if, taking all facts alleged as true and affording them every possible inference favorable to the nonmoving party, the complaint states in some recognizable form any cause of action known to law (see *Leon v Martinez*, supra; *Fisher v DiPietro*, 54 AD3d 892 [2d Dept 2008]; *Shava B. Pac., LLC v Wilson. Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, [2d Dept. 2006]. “Indeed, a motion to dismiss pursuant to CPLR 3211(a)(7) must be denied ‘unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it’”. *Bokhour v GTI Retail Holdings, Inc.*, 94 A.D.3d 682, 683 [2d Dept. 2012]).

With regard to Castle’s claim that SR Holdings’ pleadings do not meet the requirements of CPLR 3013 and 3014, such is denied. The statements in the amended complaint are sufficiently particular as to give Castle notice of the transactions, occurrences or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense. The Court also finds the statements to be sufficiently concise, in numbered paragraphs and each contains, as far as practicable, a single allegation, in compliance with CPLR 3014.

With regard to any negligence claim, “a title company hired by one party is not, absent evidence of fraud, collusion or other special circumstances, subject to suit for negligent performance by one other than the party who contracted for its services” (see *Velazquez v Decaudin*, 49 AD3d 712 [2d Dept 2008]). Here, although there is no allegation

that SR Holdings had any relationship or contact with Castle, “[o]ne who aids and abets a breach of a fiduciary duty is liable for that breach as well, even if he or she had no independent fiduciary obligation to the allegedly injured party, if the alleged aider and abettor rendered ‘substantial assistance’ to the fiduciary in the course of effecting the alleged breaches of duty” (*Id.*). The plaintiff alleges fraud and collusion and that Castle aided and abet in a breach of a fiduciary duty, therefore, affording the plaintiff every possible favorable inference, the Court denies the motion as it pertains to any negligence claims.

Castle also argues that the plaintiff failed to plead a cause of action for fraud with sufficient particularity and that the plaintiff is unable to establish all of the elements of fraud. The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages (see *Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 488 [2007]; *Lama Holding Co. v. Smith Barney*, 88 NY2d 413, 421 [1996]). Additionally, a claim rooted in fraud must be pleaded with the requisite particularity under CPLR 3016 (see *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). CPLR 3016(b) requires that “[w]here a cause of action is based upon misrepresentation, fraud, mistake, willful deceit, breach of trust, or undue influence, the circumstances constituting the wrong shall be stated in detail.” (*Id.*).

Debtor and Creditor Law § 276 provides that “[e]very conveyance made...with actual intent...to hinder, delay, or defraud either present or future creditors, is fraudulent” (*Stout Street Fund I, L.P. v Halifax Group, LLC*, 148 AD3d 744 [2d Dept 2017]). “The requisite

intent required by this section need not be proven by direct evidence, but may be inferred from the circumstances surrounding the allegedly fraudulent transfer" (*Id.*). The court in its determination, may consider "badges of fraud" or "circumstances that accompany fraudulent transfers so commonly that their presence gives rise to an inference of intent" (*Id.*). "These badges of fraud include lack or inadequacy of consideration, family, friendship or close associate relationship between transferor and transferee, the debtor's retention of possession, benefit, or use of the property in question, the existence of a pattern or series of transactions or course of conduct after the incurring of debt, and the transferor's knowledge of the creditor's claim and the inability to pay it" (see *Steinberg v Levine*, 6 AD 3d 620 [2d Dept 2004]).

Here, despite Castle's contention, it is this Court's finding that the plaintiff has set forth and alleged sufficient badges of fraud to give rise to an inference of intent. There exists a pattern or series of transactions or course of conduct after the incurring of the debt and a lack of consideration. Further, "the heightened pleading requirements of CPLR 3016(b) may be met when the material facts alleged in the complaint, in light of the surrounding circumstances, 'are sufficient to permit a reasonable inference of the alleged conduct' including the adverse party's knowledge of, or participation in, the fraudulent scheme" (see *House of Spices (India), Inc. v SMJ Servs., Inc.*, 103 AD3D 848 [2d Dept 2013]). The allegation that Castle conspired with the other defendants gives rise to a reasonable inference that Castle was aware of a fraud and intended to aid in the commission of the fraud. (*Id.*). Additionally, since this is a motion to dismiss and not a summary judgment motion, the Court affords the complaint a liberal construction, accepting

all facts as alleged in the complaint as true and accords the plaintiff the benefit of every possible favorable inference (see *Lissauer v Guideone Specialty Mut. Ins.*, 109 AD3d 878 [2d Dept 2013]). Therefore, the Court denies dismissal based on fraud.

With regard to conspiracy to commit fraud, "conspiracy to commit a fraud is never of itself a cause of action" (*Agostini v Sobol*, 304 AD2d 395 [1st Dept 2003]). "While a plaintiff may allege, in a claim of fraud or other tort, that parties conspired, the conspiracy to commit a fraud or tort is not, of itself, a cause of action *Hoeffner v Orrick, Herrington & Sutcliffe LLP*, 85 AD3d 457 [1st Dept 2011]). Therefore, any independent civil conspiracy claim is dismissed and exists only within the plaintiff's claims of fraud (*Id.*).

Castle also seeks dismissal of the plaintiff's RICO claim. To establish a RICO claim, a plaintiff must show: "(1) a violation of the RICO statute, 18 U.S.C. § 1962; (2) an injury to business or property; and (3) that the injury was caused by the violation of Section 1962." (*DeFalco v Bernas*, 244 F3d 286, 306 [2d Cir. 2001]). "Racketeering activity" is broadly defined to encompass a variety of state and federal offenses including, *inter alia*, murder, kidnapping, gambling, arson, robbery, bribery and extortion." (*Id.*) "A 'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of [the] chapter [October 15, 1970] and the last of which occurred within ten years...after the commission of a prior act of racketeering activity." (*Id.*).

Plaintiff's alleges that Castle engaged in mail and/or wire fraud and perjury in its conspiracy to defraud the plaintiff. However, "[b]ecause the core of a RICO civil conspiracy is an agreement to commit predicate acts, a RICO civil conspiracy complaint, at the very least, must allege specifically such an agreement" (see *House of Spices (India), Inc. v SMJ*

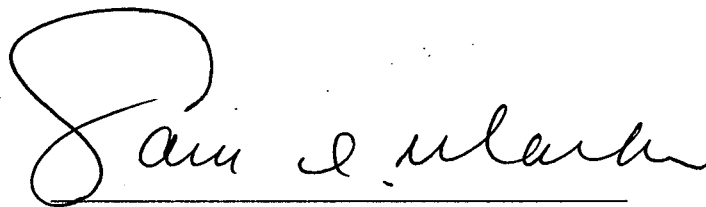
Servs., Inc., 103 AD3D 848 [2d Dept 2013]. Here, there is no such allegation of a conscious agreement. Therefore, Castle's motion to dismiss the plaintiff's RICO claim, is granted.

The Court denies Castle's motion to dismiss the cross claims against it. Castle provided no basis to dismiss the cross claims in its motion and only submitted an argument in its reply papers. The Court did not dismiss all of Castle's claims and therefore, the cross-claims will stand. Further, common law indemnification, which is being claimed by the co-defendants, need not be pled with particularity and may be enlarged in the bill of particulars. Viewing the challenged pleading in the light most favorable to the non-moving party, the facts as alleged fit within a cognizable legal theory (*see Brevtman v Olinville Realty, LLC*, 54 AD3d 703 [2d Dept 2008]; *see also EBC 1, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, [2005]; *Leon v Martinez*, 84 NY2d 83 [1994]).

The parties are directed to appear before the Preliminary Conference Part on August 7 at 9:30 am in Courtroom 811. To the extent any relief requested in motion sequence 2 was not addressed by the Court, it is hereby deemed denied.

The foregoing shall constitute the decision and order of the Court.

Dated: White Plains, New York
June 30, 2017



HON. SAM D. WALKER, J.S.C.