Bryan v Slothower
2018 NY Slip Op 32396(U)
September 21, 2018
Supreme Court, New York County
Docket Number: 651014/2018
Judge: O. Peter Sherwood

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

----------X

MARK BRYAN,

Plaintiff,

-against-

JEFFREY SLOTHOWER, BATTERY PRIVATE, INC., BATTERY PRIVATE RE, LLC and XYZ CORP. 1-10,

Defendants.

----------X

DECISION AND ORDER
Index No.: 651014/2018

Mot. Seq. No.: 001

O. PETER SHERWOOD, J.:

I. FACTS

As this is a motion to dismiss, the facts are taken from the Complaint (NYSCEF Doc. No. 2).

Defendant Jeffrey Slothower was plaintiff Mark Bryan's investment broker while Slothower was employed at Merrill Lynch between about August 2012 and December 2015. In late 2015, Slothower told Bryan he was going to start his own firm, defendant Battery Private, Inc (Battery).

Bryan never signed any agreements with Battery. Slothower forged both an account application under Bryan's name with Interactive Brokers, LLC (IB) and an Investment Advisory Agreement for Battery, as well as other documents. In September-November, 2016, Bryan sent defendants money to be invested. From August 2016 into November 2017, Slothower repeatedly reassured Bryan that his investments were doing well and making money. Slothower also periodically made small "dividend" payments to Bryan, including from Slothower's own funds, to convince Bryan all was well. Slothower denies these claims and offers some documentary evidence in support (Defendant's Memo pp 19-21).

In mid-November 2017, Bryan instructed Slothower to sell his stock in Alibaba, which had just hit an all-time high. Slothower informed Bryan that Bryan did not actually own the stock and that the money was gone. Slothower explained that he used the money from Bryan to purchase options, which did not pan out. Bryan believes Slothower defalcated with the funds and used them for himself or to cover other customer losses.

In December 2017, Slothower and Bryan entered into a Settlement Agreement to resolve the dispute. Under its terms, Slothower agreed to pay Bryan $775,000 by February 10, 2018 (the Settlement Agreement). Slothower failed to make the payment.

Plaintiff asserts claims for:

1) Fraudulent Inducement as to the Settlement Agreement- Slothower had no intent to make the required payment;

2) Fraud against All Defendants- for "untrue statements of material fact, or omi[ssions]";

3) Negligent Misrepresentation against Slothower and Battery- based on their status as investment advisor and registered representative, they had a special relationship with Bryan, and made untrue or misleading statements;

4) Breach of Fiduciary Duty against All Defendants- for forging Bryan's signature and stealing or mismanaging his funds;

5) Conversion against All Defendants; and

6) Breach of Contract against Slothower- for failure to make the payment required by the Settlement Agreement.

II. ARGUMENTS

A. Defendants' Arguments to Dismiss

Defendants move to dismiss the first through fifth causes of action pursuant to CPLR 3211(a)(5) and (7) (based on release and failure to state a claim) (leaving the sixth claim, against Slothower, for breach of the Settlement Agreement) and to file one document (the Settlement Agreement) under seal.

III. DISCUSSION

A. First Claim, Fraudulent Inducement as to the Settlement Agreement

Plaintiff seeks to void the Settlement Agreement on the grounds that defendants misrepresented their intent to make the payment contemplated therein and also that at the time he signed the Settlement Agreement, plaintiff did not know about various misrepresentations and omissions, including the forgery of Bryan's signature on various documents (Complaint, ¶¶ 66-69).

"In a fraudulent inducement claim, the alleged misrepresentation should be one of then-present fact, which would be extraneous to the contract and involve a duty separate from or in addition to that imposed by the contract . . . and not merely a misrepresented intent to perform" (*Hawthorne Group v RRE Ventures*, 7 AD3d 320, 323-24 [1st Dept 2004] [citations omitted]; *see also J.M. Bldrs. & Assoc., Inc. v Lindner*, 67 AD3d 738, 741 [2d Dept 2007] ["[a] present intent to deceive must be alleged and a mere misrepresentation of an intention to perform under the contract is insufficient to allege fraud"]). Representations of opinion, even as to matters of fact, are not representations and are not actionable unless guaranteed (*see Lanzi v Brooks*, 54 AD2d 1057 [1976], *affd* 43 NY2d 778 [1977]; *Mun. Metallic Bed Mfg. Corp. v Dobbs*, 253 NY 313 [1930]).

Plaintiff argues that Slothower's alleged preconceived intent not to perform is sufficient to sustain the fraud in the inducement claim, citing *White v Davidson* (150 AD3d 610, 611 [1st Dept 2017]). In *White*, the First Department held the plaintiff had "pleaded a cognizable claim for fraudulent inducement based on . . . misrepresentations" that the defendant had promised or claimed "(1) their record label was highly successful and that they had previously successfully represented famous recording artists; (2) they would promote plaintiff's music to radio broadcasting venues; (3) they would organize marketing events to promote plaintiff's single; (4) they would organize a radio tour; and (5) they would promote the re-release of the single around Valentine's Day 2015" (*id.*). The court found that these misrepresentations were collateral to the agreement at issue and therefore could support the claim asserted (*id.* at 611-12). The representation at issue here, that defendant would pay plaintiff, is not collateral to the contract. It is a term of the agreement.

Plaintiff also relies on *Neckles Builders, Inc. v Turner* (117 AD3d 923, 924 [2d Dept 2014]). In that case, the Second Department stated that "[w]here the gravamen of the alleged fraud does not arise from the mere failure of a promisor to perform his or her obligations under a contract, but arises from a promisor's successful attempts to induce a promisee to enter into a contractual relationship despite the fact that the promisor harbored an undisclosed intention not to perform under the contract, a proper cause of action sounding in fraud may be stated" (*id.* at 925). Here, the heart of the alleged fraud is defendant's failure to perform while still obtaining a release. The

alleged misrepresentation of Slothower's intent to perform under the Settlement Agreement cannot sustain a fraudulent inducement claim.

Plaintiff also claims defendants omitted material facts about forged documents and what happened to $60,000 of plaintiff's money, in an attempt to induce plaintiff to enter into the Settlement Agreement and to obtain the Release before Bryan became aware of the full extent of defendants' bad conduct.

The documentary evidence before the court belies this claim. The uncontestable documents provided show that prior to entering into the Settlement Agreement, plaintiff received account statements showing how plaintiff's funds were utilized (NYSCEF Docs. No. 8-11) as well as copies of most of the allegedly forged documents (*see* NYSCEF Docs. No. 26 and 24) and that plaintiff sent text messages complaining that his stock was improperly sold, options were improperly utilized and that plaintiff lost profits as a result (Slothower Ex. 6). This documentary evidence shows conclusively that Bryan was aware defendants had bought options with his money, instead of stock, when he signed the Settlement Agreement, and also that Bryan had concerns about Slothower lying and not following Bryan's instructions about what to do with his money. It also shows Bryan had knowledge of alleged wrongdoing and, armed with that knowledge, chose to settle his dispute (NYSCEF Doc. No. 33). Bryan was on notice of the alleged wrongdoing, and made an affirmative decision to proceed. Accordingly, he should not "be heard to complain that he has been defrauded when it is his own evident lack of due care which is responsible for his predicament" (*Rodas v Manitaras*, 159 AD2d 341, 343 [1st Dept 1990]). The Settlement Agreement provides that the "release is intended to be completely effective and binding irrespective of any present lack of knowledge on the party of any such claims and/or causes of action (or of any facts or circumstances pertaining thereto)" (Settlement Agreement, ¶ 4). Having explicitly disclaimed any right to reject the Settlement Agreement based on new information, the fraudulent inducement claim shall be dismissed.

B. Claims 2-5

Defendants argue that the Settlement Agreement contains a release (the Release), which precludes "known or unknown causes of action that relate to refer to act or omission of Mr. Slothower or any entity he was affiliated with, including, but not limited to, Battery Private" (*id.* at 17, citing Settlement Agreement, attached as Exhibit 15 to Slothower Aff, NYSCEF Doc. No.

34). There is no limitation on the Release, so claims 2 through 5 should be dismissed, as having been released.

Plaintiff argues that these claims should survive because the Release included in the Settlement Agreement is not enforceable, as Slothower failed to make the required payment (Opp at 13). Bryan, alternatively, seeks to enforce the Settlement Agreement and alleges breach of contract (Claim 6), stating that the Settlement Agreement is a valid and enforceable contract (Complaint, ¶97). Under *Awards.com, LLC v Kinko's, Inc.* (42 AD3d 178, 188 [1st Dept 2007], *affd*, 14 NY3d 791 [2010]), relied upon by the plaintiff, he would have the option to terminate the Settlement Agreement if Slothower materially breached. Plaintiff cannot argue both ways. "When a party materially breaches a contract, the nonbreaching party must choose between two remedies: it can elect to terminate the contract or continue it. If it chooses the latter course, it loses its right to terminate the contract because of the default" (*id.* at 188). As plaintiff has not stated his intent to terminate the Settlement Agreement based on defendant's failure to perform, and has chosen to enforce the Settlement Agreement, claims 2-5 fail.

C. Amend Complaint

As to plaintiff's request for leave to amend the complaint, the motion "should be freely granted . . . absent prejudice or surprise resulting therefrom . . ., unless the proposed amendment is palpably insufficient or patently devoid of merit . . . [Defendants] need not establish the merit of [their] proposed new allegations . . ., but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit" (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 499-500 [1st Dept 2010]; CPLR 3025 [b]). Prejudice in this context is shown where the nonmoving party is "hindered in the preparation of his case or has been prevented from taking some measure in support of his position" (*Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23 [1981]). Although leave to amend should be freely granted, an examination of the underlying merits of the proposed causes of action is warranted in order to conserve judicial resources (*see Eight Ave. Garage Corp. v H.K.L. Rlty. Corp.*, 60 AD3d 404, 405 [1st Dept 2009]). Whether to permit amendment is within the sound discretion of the court (*see Pellegrino v NYC Transit Auth.*, 177 AD2d 554, 557 [2d Dept 1991]).

In this case, a motion for leave to file an amended complaint has not been filed. Absent consent by defendants, plaintiff will need to file a formal motion. Assuming plaintiff meets the highly favorable standards described above and leave is granted, it is likely that a motion to dismiss will follow. In an effort to help the parties avoid the cost of proceeding by formal motion, the court notes the following as to viability of re-pleading of certain dismissed causes of action under the above described standards.

For the reasons discussed above the first claim cannot be revived.

Regarding the second claim for fraud, defendants argue it should be dismissed based on documentary evidence, specifically communications from plaintiff to defendants in which plaintiff mentions "coming with" Slothower, and account statements sent to the plaintiff (Memo at 19). Also, the documentary evidence contradicts the allegations of theft, as the documents show plaintiff wired funds to IB and that the funds were used to purchase options (*id.*). Plaintiff maintains that present intent not to perform can be the basis for a fraud claim (Opp. at 16). The court has already rejected this argument. Plaintiff has also alleged the following misrepresentations: Bryan did not sign an agreement with Battery Private; Slothower forged Bryan's name on several documents; Slothower took the September 8, 2016 check from Bryan which was to be for Bryan's account, but did not "properly apply" the check; Slothower misrepresented that Bryan's deposits were going to be invested in Alibaba; Slothower failed to tell Bryan his money was gone, and instead reassured him everything was fine and misrepresented how much Alibaba stock Bryan owned and the value of his holdings (*id.* at 17). Defendants' argument that the plaintiff received statements from IB (attached as Exhibit 5 to Slowthower aff, NYSCEF Doc. No. 24) and, previously, Pershing would fail because the statements are not documentary evidence conclusively establishing Bryan received such statements. Nor do the statements show the treatment of the September 8, 2016, check, mentioned above. Assuming plaintiff chooses to terminate the Settlement Agreement, these allegations could survive a motion to dismiss.

Regarding the third claim for negligent misrepresentation, plaintiff's texts showing Bryan's knowledge of the account's transfer, the account statements, and the wiring instructions showing Bryan knew of IB and Battery Private and sent the money at issue here directly to IB, constitute documentary evidence directly contradicting the claims made in the complaint. Thus, say defendants, this claim must be dismissed (Memo at 20). Plaintiff argues that defendants'

motion does not address the misrepresentations that Slothower forged plaintiff's signature, or that Slothower grossly mismanaged plaintiff's assets against his investment objectives and told Bryan the investments were making money (*id.* at 19-20). Further, if Bryan knew about the change of accounts (and the documents do not establish he did), that does not eliminate a claim for the forgery of the documents creating the account (*id.* at 20). Nor are the wiring instructions conclusive *(id.)*. That plaintiff wired the money to IB does not have anything to do with the fact that defendants lied (*id.* at 20-21).

By repleading, plaintiff may be able to overcome defendants' arguments that the documentary evidence conclusively refutes allegations of failure to impart accurate information and absence of detrimental reliance.

4. The conversion claim is not viable and cannot survive even upon repleading because the funds in issue are not "specific, identifiable fund[s]" subject to treatment in a particular manner (*see Amity Loans v Sterling Nat'l Bank & Trust Co.*, 177 AD2d 277 [1st Dept 1991]).

D. Seal Settlement Agreement

The parties have agreed to seal the Settlement Agreement. The fact of a settlement agreement is already established by this action. The request is granted.

It is hereby

ORDERED that the motion to dismiss the first through fifth causes of action is GRANTED; and it is further

ORDERED that the first cause of action is DISMISSED and the second through fourth causes of action are DISMISSED without prejudice to re-plead to upon plaintiff's election to terminate the contract and to pursue fraud, negligent misrepresentation and breach of fiduciary duty claims. Plaintiff shall inform defendants of his decision to amend or not by September 26, 2018. Should plaintiff so elect, plaintiff shall file his amended complaint within 20 days of the date of this decision and order. Should plaintiff elect not to amend, defendants shall file the answer within 30 days of this decision and order; and it is further

ORDERED that the request to seal the settlement agreement is GRANTED and NYSCEF Doc. No. 34 shall be sealed; and it is further

ORDERED that the County Clerk, upon service on him of a copy of this order, is directed to seal the abovementioned document, a confidential settlement agreements in this case, and to separate these papers and to keep them separate from the balance of the file in this action; and it is further

ORDERED that thereafter, or until further order of the court, the County Clerk shall deny access to the said sealed papers to anyone (other than the staff of the County Clerk or the court) except for counsel of record for any party to this case, a party, and any representative of counsel of record for a party upon presentation to the County Clerk of written authorization from said counsel; and it is further

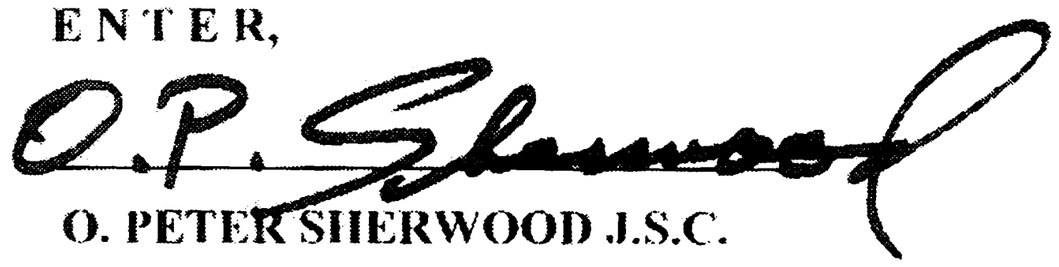
ORDERED that counsel to plaintiffs shall serve a copy of this order by e-mail upon the County Clerk (cc-nyef@courts.state.ny.us).

ORDERED that counsel shall appear at a preliminary conference at Part 49, Room 252, 60 Centre Street, New York, New York 10009 on December 11, 2018 at 9:30 am.

This constitutes the decision and order of the court.

DATED: September 21, 2018

ENTER,



O. PETER SHERWOOD J.S.C.