Dongwu v New York City Regional Ctr. LLC
2018 NY Slip Op 32678(U)
October 18, 2018
Supreme Court, New York County
Docket Number: 652024/2017
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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CHEN DONGWU, *et al.*, individually and derivatively on behalf of THE NEW YORK CITY EAST RIVER WATERFRONT DEVELOPMENT FUND, LLC,

Plaintiffs,

- against -

NEW YORK CITY REGIONAL CENTER LLC, GEORGE L. OLSEN, and PAUL LEVINSOHN,

Defendants,

THE NEW YORK CITY EAST RIVER WATERFRONT DEVELOPMENT FUND, LLC,

Nominal Defendant.

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DECISION AND ORDER
Index No.: 652024/2017

Motion Sequence No.: 001

O. PETER SHERWOOD, J.:

In this action, defendants New York City Regional Center LLC (NYCRC), George L. Olson (Olson), Paul Levinsohn (Levinsohn) and the New York City East River Waterfront Development Fund, LLC (the Fund), move, pursuant to CPLR 3211 (a) (1), (5), and (7) to dismiss the complaint. Plaintiffs oppose the motion.

BACKGROUND

Plaintiffs are approximately 154 non-English speaking Chinese nationals, each of whom purchased a membership interest in the Fund for $500,000 (*see* Wolfson affirmation in opposition [Wolfson Opp. Affirm.], exhibit 1 [Complaint], ¶¶ 1,167). Each participated in the EB-5 Immigrant Investor Program (EB-5 program), a program created by Congress to stimulate economic development and job creation through foreign investment while affording eligible foreign investors the chance to become lawful permanent residents of the United States (*see* Complaint, ¶ 2). Plaintiffs received approval for conditional green cards for themselves and immediate family members through the EB-5 program (*id.*). Of the plaintiffs who chose to pursue permanent residency, all have received permanent green cards except for 19 currently awaiting approval of their petitions.

Defendant NYCRC provides financing for real-estate and infrastructure projects in New York City. In 2008, the United States Citizenship and Immigration Services (USCIS) approved NYCRC to raise capital via the EB-5 program. Defendants Olsen and Levinsohn are New York real-estate attorneys who manage NYCRC (Complaint, ¶ 4). NYCRC, in turn, manages the Fund (*id.*, ¶¶ 3-4).

Plaintiffs purchased membership interests in the Fund to fund renovation of the Battery Maritime Building (BMB), a ferry terminal next to the Staten Island Ferry Terminal in Manhattan (*id.*, ¶¶ 3-4). The renovation of the BMB is a component of the New York City East River Waterfront Development Project (the Project) (*id.*). Non-party 10 SSA Landlord, LLC (Landlord) leased the BMB from the City of New York (the City). The Fund used the proceeds to make a $77 million secured loan (the Loan) to non-party 10 South Street Associates LLC (the Borrower), an affiliate of the Dermot Company (Dermot), the company named by the New York City Economic Development Corporation (NYCEDC) as developer for the renovation of the BMB. Landlord then entered two leasehold mortgages to secure the Loan. Dermot signed a guaranty for the Loan (the Deficiency Guaranty) to cover any unpaid money on the Loan not covered by foreclosure of the mortgages. Plaintiffs allege Dermot had no assets when it entered into the Deficiency Guaranty, and still has no assets, effectively making the Deficiency Guaranty worthless (*id.*, ¶¶ 8-9, 120-124, 165-168).

In July 2015, the Borrower stopped making payments on the Loan when only about 60% of construction of the BMB was completed. Plaintiffs allege that NYCRC then allowed Landlord to borrow $5.5 million without amending any of the Loan documents or receiving any additional security. In addition, plaintiffs claim that, in an attempt to continue to raise capital from investors interested in the EB-5 program, defendants did not reveal that the Borrower had defaulted on the Loan (*id.*, ¶¶ 8-9, 120-124, 165-168).

In October 2016, defendants purportedly revealed to plaintiffs that the Borrower had defaulted on the Loan and renovations to the BMB had ended. In December 2016, NYCRC revealed to plaintiffs that the Witkoff Group had offered to purchase the Fund's leasehold mortgages and complete renovations to the BMB, and counseled plaintiffs that it would be preferable to foreclose on Dermot in order to maximize investor value (*id.*, ¶¶ 178-181).

In December 2016 and January 2017, plaintiffs requested information about the status of the Fund and the Loan, and whether Dermot had invested $17 million dollars from defendants.

Plaintiffs allege that defendants did not provide the requested information (*id.*, ¶¶ 116-119, 122-124).

On April 14, 2017, plaintiffs commenced this action against defendants. The complaint alleges seventeen causes of action, which are as follows:

1) common law fraud;
2) derivative claim for breach of fiduciary duty against NYCRC;
3) aiding and abetting fraud;
4) derivative claim for breach of fiduciary duty against NYCRC;
5) breach of fiduciary duty against NYCRC;
6) derivative claim for aiding and abetting breach of fiduciary duty against Olsen and Levinsohn;
7) aiding and abetting breach of fiduciary duty against Olsen and Levinsohn;
8) breach of contract against NYCRC;
9) tortious inducement of breach of contract against Olsen and Levinsohn;
10) breach of implied covenant of good faith and fair dealing against NYCRC;
11) derivative claim of gross negligence;
12) gross negligence;
13) negligent misrepresentation;
14) unjust enrichment;
15) derivative claim of unjust enrichment;
16) accounting against NYCRC; and
17) violation of Limited Liability Company (LLC) Law § 1102 against NYCRC.

DISCUSSION

The standard of review on a motion to dismiss pursuant to CPLR 3211 is well established. The court must assume the truth of the allegations in the pleading and "resolve all inferences which reasonably flow therefrom in favor of the pleader" (*Sanders v Winship*, 57 NY2d 391, 394 [1982]). In assessing a complaint, the court must "determine simply whether the facts alleged fit within any cognizable legal theory" (*Morone v Morone*, 50 NY2d 481, 484 [1980].) "[T]he allegations of a complaint, supplemented by a plaintiff's additional submissions, if any, must be given their most favorable intendment" (*Arrington v New York Times Co.*, 55 NY2d 433, 442 [1982]). If the facts

stated are sufficient to support any cognizable legal theory, the motion to dismiss should be denied (*Campaign for Fiscal Equity v State of New York*, 86 NY2d 307, 318 [1995]).

"Under CPLR 3211 (a) (1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]). Pursuant to CPLR 3211 (a) (5), "the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds." Under CPLR 3211 (a) (7), "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" (*Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003]). "Whether the plaintiff will ultimately be successful in establishing those allegations is not part of the calculus" (*Landon v Kroll Lab. Specialists, Inc.*, 22 NY3d 1, 6 [2013] [internal quotation marks and citation omitted]).

Fraud and Aiding and Abetting Fraud (Claims 1 and 3)

A fraud claim must allege "misrepresentation or concealment of a material fact, falsity, scienter by the wrong doer, justifiable reliance on the deception and resulting injury" (*Zanett Lombardier, Ltd. v Maslow*, 29 AD3d 495, 495 [1st Dept 2006]). "A plaintiff alleging an aiding-and-abetting fraud claim must allege the existence of the underlying fraud, actual knowledge, and substantial assistance" (*Oster v Kirschner*, 77 AD3d 51, 55 [1st Dept 2010]). "[A]ctual knowledge need only be pleaded generally" (*id.*).

Plaintiffs allege that defendants made 17 omissions or misrepresentations before plaintiffs entered into the investment including, but not limited to, misrepresentations about the parties' involvement in the BMB, whether additional funds would be contributed by Dermot, and the risk level of the Loan. First, the Court will consider these claims, as far as they are based on post-investment statements by the defendants. Plaintiffs allege Olsen and Levinsohn aided and abetted the fraud by writing, editing, and approving various misleading documents. Defendants argue that the fraud claims based on misrepresentations before they entered into the investment fail because the allegations of misrepresentation and omissions are contradicted by the Offering Memorandum (OM) (*see* OM, attached as Exhibit C to Lender aff., NYSCEF Doc. No. 20). Defendants point to the following examples to demonstrate that defendants disclosed comprehensive qualifiers and risk factors in the OM:

- Plaintiffs were warned to rely on their own examination of the company and terms of the offering, and have their own advisors review it, especially if English was not their first language (*id.* at iv, 1, 7, 8, 25, 29, 33, 35, 39, 42).
- Certain information in the OM constituted forward looking statements from which actual results could differ materially, and the Fund was a "speculative investment" designed only for sophisticated investors able to bear substantial risk of loss (*id.* at v, 1, 9, 35, 36, 37).
- The OM disclosed that the Borrower was not Dermot but a "special purpose entity" and Dermot, along with the City, was disclaimed from having any obligation to pay the Loan or provide capital funding (*id.* at v-vi, 2, 22, 7).
- The OM disclosed the Fund has contractual remedies in the event of a default, but "there is no assurance that the Borrower would be able to make the company whole for any losses or damages suffered and the Company may lose all the value of its assets" (*id.* at 37).
- The OM stated that the "investment objective" was not for plaintiffs to make money but rather to "make investments . . . that satisfy the 'qualified investment' criteria of the EB-5 program so that investors in the Company may seek to obtain conditional or permanent resident status . . .," and that the investment must be "at risk" and cannot guarantee a return (*id.* at 2).

Plaintiffs contend the OM relied upon by defendants does not constitute documentary evidence because the Chinese version of the OM dated February 1, 2011, differed from the English version of the OM dated March 12, 2011, which defendants attached to their motion, and the Chinese version lacked many of the disclosures in the English version. Plaintiffs also argue the Chinese versions of the Subscription Agreement (SA), Operating Agreement (OA), certain newsletters, and other documents provided to them were substantially different than the English versions.

CPLR 3211 (a) (1) does not explicitly define documentary evidence. "Documentary evidence is a fuzzy term" (*Fontanetta v Doe*, 73 AD3d 78, 84, [2nd Dept 2010] [internal quotation marks and citations omitted]). "[I]t is clear that judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case" (*id.* at 84-85 [internal quotation marks and citations omitted]). Here, the documentary evidence, which includes the OM, is disputed. Plaintiffs dispute the authenticity of the OM and allege that different versions were provided in Chinese and English. Although defendants argue that plaintiffs signed defendants' versions of the OA and SA and submitted these versions to the Department of Homeland Security, this is an issue of fact, as defendants did not submit the executed versions of the OM and OA with their motion. Giving plaintiffs the most "favorable intendment," plaintiffs

have sufficiently pled fraud and aiding and abetting fraud claims (*see Arrington*, 55 NY2d at 442). Defendants' argument that plaintiffs failed to plead damages regarding pre-investment statements is unavailing because, as the BMB lease has already been terminated, plaintiffs will not be able to recover any of their investment and face a complete loss. It is possible to plead damages for a risky or speculative investments, as most investments are characterized as such (*see Basis Yield Alpha Fund (Master) v Goldman Sachs Group., Inc.*, 115 AD3d 128, 138 [1st Dept 2014] [affirming denial of motion of fraud claims for a "speculative and risky" investment because "[i]f plaintiff's allegations are accepted as true, there is a 'vast gap' between the speculative picture [defendant] presented to investors and the events [defendant] knew had already occurred"]; *see also Bernstein v Kelso & Co.*, 231 AD2d 314, 315 [1st Dept 1997] ["the plaintiff was not trying to recover profits received . . .but [i]nstead, he sought to recover the difference between the price he received in the sale of the company and the price he would have received had . . . [defendants] not deceived him"]).

Plaintiffs also claim they were damaged by post-investment statements and omissions by delaying their action against defendants, but plaintiffs have not stated any cognizable injury from the alleged delay, so the fraud-based claims are dismissed as far as they are based on post-investment statements. The court has considered the remaining arguments regarding the fraud-based claims and finds them unavailing.

Breach of Fiduciary Duty and Aiding and Abetting Breach of Fiduciary Duty (Claims 2, 4-7)

"To establish a breach of fiduciary duty, the movant must prove the existence of a fiduciary relationship, misconduct by the other party, and damages directly caused by that party's misconduct" (*Pokoik v Pokoik*, 115 AD3d 428, 429 [1st Dept 2014]). "A fiduciary relationship is necessarily fact-specific and is also grounded in a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions "(*Oddo Asset Mgt. v Barclays Bank PLC*, 19 NY3d 584, 593 [2012] [internal quotation marks and citations omitted]). "A claim for aiding and abetting a breach of fiduciary duty requires: (1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that the plaintiff suffered damage as a result of the breach" (*Kaufman v Cohen*, 307 AD2d 113, 125 [1st Dept 2003] [citations omitted). "A person knowingly participates in a breach of fiduciary

duty only when he or she provides substantial assistance to the primary violator" (*id.* at 126 [internal quotation marks and citations omitted]).

Plaintiffs allege NYCRC acted in bad faith and breached its fiduciary duty to the Fund when it failed to properly supervise the BMB renovation, released funds to the Borrower, accepted the worthless Deficiency Guaranty, failed to obtain a completion guaranty, failed to communicate with its investors, and rejected multiple proposals from other developers to buy out the Loan. Plaintiffs also allege Olsen and Levinsohn aided and abetted in breaching fiduciary duty by providing substantial assistance to NYCRC as the managers of NYCRC. Defendants contend that the allegations about NYCRC's conduct are covered by its contractual duties as Fund manager, so NYCRC had the authority to engage in that conduct, and, furthermore, these allegations are contradicted by the documentary evidence.

Giving plaintiffs the benefit of every reasonable inference, plaintiffs have adequately pled allegations to support the breach of fiduciary duty and aiding and abetting breach of fiduciary duty claims (second, third, fourth, sixth and seventh causes of action). Plaintiffs sufficiently alleged that NYCRC put its own interests in making the Loan appear to be a good investment and the BMB renovation appear to be going smoothly so that NYCRC could solicit more investors for other projects ahead of plaintiffs and the Fund, and that Olsen and Levinsohn substantially assisted NYCRC. As previously mentioned, the documentary evidence is disputed and presents an issue of fact. However, plaintiffs have failed to plead the fifth cause of action for breach of fiduciary duty against NYCRC because they have not sufficiently alleged damages. The damages plaintiffs allege for that claim are directly to the Fund, not to plaintiffs. Therefore, defendants' motion to dismiss the breach of fiduciary duty and aiding and abetting breach of fiduciary duty claims (second and fourth through seventh causes of action) is granted only with respect to the breach of fiduciary duty claim against NYCRC (fifth cause of action).

Breach of Contract and Tortious Inducement of Breach of Contract (Claims 8-9)

"The elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage" (*Flomenbaum v New York Univ.*, 71 AD3d 80, 91 [1st Dept 2009] *affd* 14 NY3d 901 [2010]). "[T]he interpretation of an unambiguous contract is a question of law for the court, and the provisions of the contract delineating the rights of the parties prevail over the allegations set forth in the complaint" (*Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150

[1st Dept 2001]). "Tortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom" (*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 424 [1996]).

Plaintiffs allege defendants breached the OA by using investors' contributions to pay its expenses. Section 5.2 of the OA states that the "Company shall . . . pay all expenses . . . but [they] shall only be payable from Distributable Cash realized from Interest Income" (Offering Mem. § 5.2). Defendants contend that section 5.4 of the OA allows them to use the Fund's money in this way because that section provides "Company Expenses [can] be collected against all revenue derived by the Company" (*id.* § 5.4). Given that money paid by investors is not revenue, plaintiffs have alleged defendants' failure to perform under the OA. However, plaintiffs have not alleged damages resulting from this breach. "In claims for breach of contract, a party's recovery is ordinarily limited to general damages which are the natural and probable consequence of the breach . . ." (*Brody Truck Rental v Country Wide Ins. Co.*, 277 AD2d 125, 125–26 [1st Dept 2000] [internal quotation marks and citations omitted]). Plaintiffs have not sufficiently pled any such damages. Therefore, defendants' branches of the motion to dismiss the breach of contract and tortious inducement of breach of contract claims are granted.

Implied Covenant of Good Faith and Fair Dealing (Claim 10)

"In New York, all contracts imply a covenant of good faith and fair dealing in the course of performance" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]). "This covenant embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract" (*id.* [internal quotation marks and citations omitted]). A breach of the covenant of good faith and fair dealing is a breach of contract (*Boscorale Operating v Nautica Apparel*, 298 AD2d 330, 331 [1st Dept 2002]). "For a complaint to state a cause of action alleging breach of an implied covenant of good faith and fair dealing, the plaintiff must allege facts which tend to show that the defendant sought to prevent performance of the contract or to withhold its benefits from the plaintiff" (*Aventine Inv. Mgt. v Canadian Imperial Bank of Commerce*, 265 AD2d 513, 514 [2d Dept 1999]).

Defendants' branch of the motion seeking to dismiss this claim is granted because it is duplicative of the breach of contract claim. Plaintiffs' only alleged misrepresentations supporting

this claim are the same as those supporting the breach of contract claim. "The claim that defendants breached the implied covenant of good faith and fair dealing [may be] properly dismissed as duplicative of the breach of contract claim [when] both claims arise from the same facts" (*Logan Advisors, LLC v Patriarch Partners, LLC*, 63 AD3d 440, 443 [1st Dept 2009]).

Gross Negligence (Claims 11-12)

"[G]ross negligence differs in kind, not only degree, from claims of ordinary negligence. It is conduct that evinces a reckless disregard for the rights of others or smacks of intentional wrongdoing" (*Colnaghi, U.S.A. v Jewelers Protection Servs.*, 81 NY2d 821, 823-824 [1993] [internal quotation marks and citations omitted]). The motion to dismiss the gross negligence claims is granted because the claims are also duplicative of the breach of contract claim. Plaintiffs' only alleged misrepresentations supporting the gross negligence claims are the same as those which underlie the breach of contract claim (*see OFSI Fund II, LLC v Canadian Imperial Bank of Commerce*, 82 AD3d 537, 539 [1st Dept 2011] [holding that gross negligence claim was properly dismissed as it was duplicative of the breach of contract claim]).

Negligent Misrepresentation (Claim 13)

"A claim for negligent misrepresentation requires the plaintiff to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information" (*J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148, [2007] [citations omitted]). Defendants' branch of the motion to dismiss this cause of action is granted, as the claim is duplicative of the breach of contract claim. "[Plaintiffs] cause[] of action for . . . negligent misrepresentation [is] not separate and apart from its claim for breach of contract. The claim[] [is] predicated upon precisely the same purported wrongful conduct as is the claim for breach of contract . . ." (*OP Solutions., Inc. v Crowell & Moring, LLP*, 72 AD3d 622, 622 [1st Dept 2010]).

Unjust Enrichment (Claims 14-15)

"The essential inquiry in any action for unjust enrichment . . . is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered. A plaintiff must show that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182, [2011] [internal quotation marks and citations omitted]). Plaintiffs' unjust enrichment claims are also duplicative of their breach of

contract claims; therefore, these branches of the motion are also granted (*Mark Bruce Intl Inc. v Blank Rome, LLP*, 60 AD3d 550, 551 [1st Dept 2009] [holding that the unjust enrichment claim was properly dismissed as it was duplicative of the breach of contract claim]).

Accounting and Violation of LLC Law § 1102 (Claims 16-17)

LLC Law § 1102 states that any member may, "subject to reasonable standards as may be set forth in, or pursuant to, the operating agreement, inspect and copy at his or her own expense" (LLC Law § 1102). Plaintiffs allege that before commencing this action, they requested documents, information, and an accounting regarding the Fund. Defendants argue that plaintiffs did not sufficiently plead allegations for an accounting or violation of LLC Law § 1102 because, under the OA, defendants were only obligated to ensure that "records shall be available upon ten (10) business days prior written notice to the Manager for inspection" (Lender Affirmation, exhibit D § 12.1). Plaintiffs do not allege they followed the prescribed procedure for gaining access to the documents, but only that defendants have not provided the documents (Complaint, ¶¶ 314-315). These branches of the motion are granted because plaintiffs have failed to plead that the requirements of the OA for requesting the documents have been met.

The court need not reach any remaining contentions.

CONCLUSION

Accordingly, it is hereby

ORDERED that defendants' motion to dismiss is granted in part, and the fifth, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, and seventeenth causes of action of the complaint are dismissed; and it is further

ORDERED that defendants are directed to serve an answer to the complaint within twenty (20) days after service of a copy of this order with notice of entry.

This constitutes the decision and order of the court.

DATED: October 18, 2018

ENTER,

O. PETER SHERWOOD J.S.C.