

Matter of Schleifer
2018 NY Slip Op 32808(U)
October 31, 2018
Surrogate's Court, New York County
Docket Number: 2010-3599/A
Judge: Rita M. Mella
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SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

New York County Surrogate's Court

Date: October 31, 2018

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In the Matter of the Application of Natalie Schleifer, as
Co-Executor of the Estate of Jack P. Schleifer, and as
Co-Trustee of the Jack P. Schleifer Revocable Trust, and
of Martin Rosen, as Co-Executor of the Estate of Jack P.
Schleifer and as Co-Trustee of of the Jack P. Schleifer
Revocable Trust,

DECISION and ORDER

JACK P. SCHLEIFER,

File No.: 2010-3599/A

Settlor, Deceased,

To Rescind a Settlement Agreement Entered in Connection
With the Estate of Jack P. Schleifer, Award Compensatory
And Punitive Damages; Disgorge and/or Surcharge Fees,
Payments, and Other Amounts Wrongfully Retained; Impose
A Constructive Trust and Equitable Liens; and Compel
Accountings.

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M E L L A, S.:

The following papers were considered in resolving these motions.

<u>Papers Considered</u>	<u>Numbered</u>
Notice of Motion, dated August 21, 2017, For Partial Reargument with Affirmation, dated August 21, 2017 of Wook Hwang, Esq., in Support, with Separately Bound Exhibits 1 through 21	1, 2
Petitioners' Memorandum of Law, dated August 21, 2017, in Support of Partial Reargument	3
Respondent David Marx's Affidavit in Opposition, dated October 3, 2017, Attaching Exhibits A through I	4
Marx Respondents' Memorandum of Law in Opposition, dated October 6, 2017	5
Petitioners' Reply Memorandum of Law, dated November 8, 2017	6
Notice of Motion, dated August 18, 2017, for Summary Judgment by Marx Respondents with Affidavit, dated August 17, 2017, of David Marx in Support and Affirmation, dated August 18, 2017, of Terence K. McLaughlin, Esq., in Support with Exhibits 1 and 2	7, 8, 9
Marx Respondents' Memorandum of Law, dated August 18, 2017, in Support of Summary Judgment Motion	10
Notice of Cross-Motion, dated October 6, 2017, by Petitioners to Lift Stay of Discovery and in Opposition to Summary Judgment Motion	11
Affirmation, dated October 6, 2017, of Paula K. Colbath, Esq. in Support of Cross-Motion, etc., attaching Exhibits 1 through 23	12
Petitioners' Memorandum of Law, dated October 6, 2017, in Opposition to Motion for Summary Judgment and in Support of Cross-Motion	13

<u>Papers Considered (cont.)</u>	<u>Numbered</u>
Petitioners' Response, dated October 6, 2017, to the Marx Respondents' Statement of Facts	14
Marx Respondents' Reply Memorandum of Law, dated November 7, 2017	15
Petitioners' Reply Memorandum of Law, dated November 13, 2017	16

In this dispute between two of the fiduciaries of the estate of decedent Jack Schleifer and David Marx, a real estate developer with whom decedent had substantial business dealings, this court, by decision dated July 14, 2017, dismissed eight of the eleven claims asserted by the two fiduciaries against the Marx Group¹ in a petition which sought, in essence, to rescind a settlement agreement executed by the parties in 2011. At the call of its November 14, 2017 calendar, the court considered the Marx Group's motion for summary judgment which raised the question of whether the petitioning fiduciaries lost the ability to seek relief as to the three remaining claims left standing by the court's decision: fraud, civil conspiracy and breach of the settlement agreement.²

Background

In 2011, a few months after decedent's death, the Marx Group represented to decedent's executors that it was insolvent as to loans and investments due to be repaid to the estate, which decedent had made during life to the Marx Group. That representation induced decedent's

¹The respondents in the Marx Group are David Marx, Robert Marx, and various entities: 34-10 Development LLC, 37-11 Development LLC, 338-342 East 110 LLC, 333-339 East 109 LLC, Louisiana Nursing Realty, LLC, 91- DMR of Queens, LLC, Douglaston Realty Associates, LLC, Atria Builders, LLC, and DSM Design Group, LLC.

²On February 15, 2018, after the instant motion was argued and determined in open court, the Appellate Division First Department modified this court's July 14, 2017 decision to the extent of dismissing the fraud and civil conspiracy claims. The First Department, however, declined to dismiss the breach of contract claims regarding the settlement agreement (*Schleifer v Yellen*, 158 AD3d 512 [1st Dept 2018]).

executors to enter into a September 30, 2011 agreement, and the fact of the Marx Group's then insolvency was incorporated explicitly into it as a material warranty. By this agreement, the fiduciaries ceded to the Marx Group the total indebtedness and ownership interests in certain real estate entities held by decedent and his daughter Natalie, who serves as one of three co-executors, in exchange for \$9.7 million in payments over a specified payout period.

The court's July 14, 2017 decision denied, in part, the Marx Group's motion to dismiss the petition by two of three of decedent's estate fiduciaries and Natalie personally seeking damages for fraud premised on an allegation that the insolvency warranty was false and part of a scheme by the Marx Group, with the complicity of decedent's attorney and the third co-executor, respondent Richard Yellen, to defraud the estate.³ In its motion to dismiss, the Marx Group conceded that the fraud claim was identical to the breach of contract claim and indeed, sought dismissal on this basis. Quoting the decision in *Wyle Inc. v ITT Corp.* (130 AD3d 438, 441 [1st Dept 2015]), this court denied dismissal of the fraud claim because such claim "can be based on a breach of contractual warranties notwithstanding the existence of a breach of contract claim" (*Matter of Schleifer*, 2017 NY Slip Op 31501[U] [Sur Ct, NY County 2017], *affd as mod.* *Schleifer v Yellen*, 158 AD3d 512 [1st Dept 2018]).

The Marx Group's Motion for Summary Judgment

The argument pressed by the Marx Group in the instant motion for summary judgment is that the fraud claim (and its derivative, the civil conspiracy claim) is barred by the release in the

³Yellen's motion to dismiss this petition was also denied in part and granted in part, but Yellen did not join or make a separate motion for summary judgment here.

settlement agreement, which this court held to be valid.⁴ Petitioners oppose the motion arguing that the fraud claims were not covered by the release. In its reply, the Marx Group posits that the only claims that are expressly excluded by the release are contractual in nature (and do not include tort claims such as fraud).

On the record, on November 14, 2017, the court denied the Marx Group's motion regarding any breach claim. The court concluded that while petitioners' claims of fraud regarding the representation of insolvency in the warranty are essentially coterminous with those for breach of the warranty as to such insolvency (*see generally Ainger v Michigan Gen. Corp.*, 476 F Supp 1209, 1234 [SDNY 1979] [reviewing New York law on the overlap of fraud and breach of warranty], *affd*, 632 F2d 1025 [2d Cir 1980]), they nonetheless are distinct claims. As explained by the court in its July 14, 2017 decision, claims of breach of the settlement agreement are specifically excluded from the scope of the release at issue, and the claimed breach of the Marx Group's insolvency warranty is a claim "for breach of or to enforce" the agreement clearly within the scope of that exception. Thus, petitioners' claim based on a breach of the representation of insolvency in the warranty remains viable (*see Marinaccio v Town of Clarence*, 151 AD3d 1784, 1786 [4th Dept 2017]; *Kaminsky v Gamache*, 298 AD2d 361, 362 [2d Dept 2002]; *TIC Holdings, LLC v HR Software Acquisition Group, Inc.* 194 Misc 2d 106, 112-113 [Sup Ct, NY County 2002]).

⁴The court's decision on the earlier motions to dismiss held that petitioners had ratified the agreement, which included its release provisions, and petitioners thus lost the right to seek rescission of the agreement for fraud, but not to seek damages (*Matter of Schleifer*, 2017 NY Slip Op 31501[U] [Sur Ct, NY County 2017], *affd as mod. Schleifer v Yellen*, 158 AD3d 512 [1st Dept 2018]).

The decision in *Centro Empresarial Cempresa S.A. v America Movil, S.A.B. de C.V.*, (17 NY3d 269 [2011]), on which the Marx Group relies, does not compel a contrary conclusion. This is so because the release at issue there did not reserve or make an exception for the very claim which a party to the release seeks to later bring. Here, the opposite is true. The alleged breach of the Marx Group's insolvency warranty, although tantamount or similar to a fraud claim, *i.e.*, whether the warranty was false or not, was an exception to the scope of the release for which the parties bargained and to which they agreed (*see Wilson Trading Corp. v David Ferguson, Ltd.*, 23 NY2d 398, 405 [1968]; *Norwest Fin. Leasing v Parish of St. Augustine*, 251 AD2d 125 [1st Dept 1998]). As a result, the Marx Group failed to make out a prima facie case for summary judgment that the release barred petitioners' claim of breach of the insolvency warranty (*see Ferrante v Am. Lung Ass'n*, 90 NY2d 623, 631 [1997] [standards for court to grant summary judgment], *citing Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980] and *Sommer v. Federal Signal Corp.*, 79 NY2d 540, 555 [1992]; *see Centro Empresarial Cempresa S.A. v America Movil, S.A.B. de C.V.*, 17 NY3d 269 [2011] [burden on defendant-respondent to show initially it has been released]; *see also Burgos v New York Presbyterian Hosp.*, 155 AD3d 598 [2d Dept 2017]).

The court also denied from the bench on November 14, 2017, that portion of the motion by the Marx Group which sought summary judgment on the claim of breach of the parties' September 30, 2011 agreement premised on the Marx Group's alleged failure to make timely payments under that agreement. Movants failed to demonstrate their entitlement to judgment as a matter of law and, in any event, there are issues of fact as to whether the Marx Group breached the agreement despite its offer to tender payments under certain conditions. Nevertheless, the

court directed the Marx Group to make any remaining payment under the agreement immediately.⁵

Petitioners' Motion for Reargument and Cross-Motion for an Order Lifting Stay

Also before the court on November 14, 2017, were petitioners' motion for partial reargument of their motion to dismiss as well as a cross-motion by them to lift the stay of discovery imposed under CPLR 3214 during the pendency of the summary judgment motion. The reargument motion was denied on the ground that this court did not overlook or misapprehend matters of law or fact (CPLR 2221[d]) that were not raised by the pleadings or in the submissions on the prior motion to dismiss (*see Mariani v Dyer*, 193 AD2d 456, 458 [1st Dept 1993]). To the extent that the motion could be construed as seeking renewal, petitioners failed to offer an excuse for their failure to raise the issue previously. Nor do they contend that the information that forms the basis of this new claim was then unknown. Consequently, renewal (CPLR 2221[e]) was also inappropriate and denied.

In light of the court's resolution of the summary judgment motion, the cross-motion to lift the CPLR 3214 stay was denied as moot.

Accordingly, the motion for summary judgment by the Marx Group, the cross-motion to lift the stay of discovery and the motion for partial reargument by petitioners were all denied.

This decision, together with the transcript of the November 14, 2017 proceedings, constitutes the order of the court. Clerk to notify.

Dated: October 31, 2018



SURROGATE

⁵There was no claim or defense here by the Marx Group that the amounts due the estate in the remaining payment under their agreement were not in fact due.