Bak v Rostek
2020 NY Slip Op 33142(U)
September 25, 2020
Supreme Court, Kings County
Docket Number: 508239/15
Judge: Leon Ruchelsman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

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ADAM BAK,

Plaintiff, Decision and order

- against - Index No. 508239/15

KRZYSZTOF ROSTEK,

Defendant, September 25, 2020

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PRESENT: HON. LEON RUCHELSMAN

The defendant has moved pursuant to CPLR §3212 seeking summary judgement dismissing the lawsuit. The plaintiff opposes the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

The plaintiff and defendant entered into a real estate venture together concerning a construction project located at 1059 Manhattan Avenue in Kings County. The venture was called Manhattan Avenue LLC and pursuant to the operating agreement which was executed on November 17, 2010 both the plaintiff and the defendant were required to invest equal shares and were required to invest specific sums. The plaintiff invested $820,761.50 and the defendant invested $847,875. Problems arose, primarily due to the location of the project and its proximity to a subway line. On July 24, 2012 the defendant purchased the plaintiff's share for $906,681.73 which was an approximate valuation for the property of $1.9 million. Approximately a month after the buyout the defendant sold the property for $2.9 million. The plaintiff instituted the

within lawsuit and has alleged numerous causes of action including breach of fiduciary duty, fraud, gross negligence, money had, negligent misrepresentation and unjust enrichment. Essentially, the complaint alleges the defendant purposely deceived the plaintiff concerning the proper valuation of the property and by doing so undersold the value of the plaintiff's share when the buyout occurred. This motion seeking summary judgement followed.

Conclusions of Law

Where the material facts at issue in a case are in dispute summary judgment cannot be granted (Zuckerman v. City of New York, 49 NYS2d 557, 427 NYS2d 595 [1980]). Generally, it is for the jury, the trier of fact to determine the legal cause of any injury (Aronson v. Horace Mann-Barnard School, 224 AD2d 249, 637 NYS2d 410 [1st Dept., 1996]). However, where only one conclusion may be drawn from the facts then the question of legal cause may be decided by the trial court as a matter of law (Derdiarian v.Felix Contracting Inc., 51 NY2d 308, 434 NYS2d 166 [1980]).

Thus, to succeed on a motion for summary judgement it is necessary for the movant to make a prima facie showing of an entitlement as a matter of law by offering evidence demonstrating the absence of any material issue of fact (Winegrad v. New York University Medical Center, 64 NY2d 851, 487 NYS2d 316 [1985]). Moreover, a movant cannot succeed upon a motion for summary

judgement by pointing to gaps in the opponents case because the moving party must affirmatively present evidence demonstrating the lack of any questions of fact (Velasquez v. Gomez, 44 AD3d 649, 843 NYS2d 368 [2d Dept., 2007]).

To succeed on a claim for breach of a fiduciary duty, a plaintiff must establish the existence of the following three elements: (1) a fiduciary relationship existed between plaintiff and defendant, (2) misconduct by the defendant, and (3) damages that were directly caused by the defendant's misconduct (Kurtzman v Bergstol, 40 AD3d 588, 835 NYS2d 644, 646 [2d Dept., 2007], see, Birnbaum v. Birnbaum, 73 NY2d 461, 541 NYS2d 746 [1989] stating individuals jointly managing a limited liability corporation creates a fiduciary duty among the members analogous to that of partners).

The first element, namely a fiduciary relationship, is satisfied as plaintiff adequately establishes that plaintiff and defendant were equal members of the corporation and that a fiduciary duty is owed to the members of the corporation (Greenberg v. Wiesel, _AD3d _, _NYS2d_, 2020 WL 5540420 [2d Dept., 2020]).

The second element of misconduct must now be examined. Misconduct by a fiduciary constituting a breach of duty can take one of two forms, either breach of loyalty or breach of care (Higgins v. New York Stock Exch., Inc., 10 Misc3d 257, 806 NYS2d 339 [Supreme Court New York County 2005]). The facts of this case concern the duty of care. "The duty of care refers to the

responsibility of a...fiduciary to exercise, in the performance of his or her tasks, the care that a reasonably prudent person would use under similar circumstances" In re Ticketplanet.com, 313 BR 46 (S.D.N.Y. Bankruptcy Court, 2004), citing Norlin Corp. v. Rooney, Pace, Inc., 744 F2d 255,[2d Cir. 1984]). In turn, the fiduciary duty of due care, "obligates [fiduciaries] to act in an informed and 'reasonably diligent' basis in 'considering material information'" (Higgins, supra). Lastly, concerning damages, plaintiff must demonstrate that they did in fact suffer financial injury caused by defendant's breach of duty (105 East Second St. Assocs. v. Bobrow, 175 AD2d 746, 573 NYS2d 503 [1st Dept., 1991]). To establish the damages component of a claim for a breach of fiduciary duty plaintiff is required to show at a minimum, that the defendant's actions were "a substantial factor" in causing an "identifiable loss" (see, (105 East Second St. Assocs. v. Bobrow, supra).

The defendant presents essentially two reasons seeking to dismiss the breach of fiduciary duty claim. The first is that at the time the property was sold the plaintiff had already been bought out so there was no longer any fiduciary relationship. However, there has been evidence submitted that at the time the plaintiff and defendant were negotiating the buyout the defendant was negotiating to sell the property to others for more than was evaluated between plaintiff and defendant. Surely, there are questions whether defendant owed the plaintiff a fiduciary

responsibility to inform him of those negotiations. The fact the actual transaction occurred after the buyout, does not absolve the defendant of his duty to the plaintiff of such vital and profitable information.

The defendant further argues the plaintiff never inquired concerning the valuation of the property and never expressed any interest as to the true worth of the property. Rather, the plaintiff merely adopted the representations of the defendant and was satisfied with a profit he was promised. However, even if true the defendant still maintained a duty to inform the plaintiff of the negotiations that were underway that would have yielded plaintiff far greater profits. The plaintiff's apparent indifference to the valuation of the property does not absolve the defendant from his fiduciary duty to the plaintiff as a member. In Hausen v. North Folk Radiology P.C., 171 AD3d 888, 98 NYS3d 224 [2d Dept., 2019] members of the corporation failed to share financial information of the corporation with the plaintiff awaiting her departure from the corporation so that she would be deprived the benefits of an impending sale. Specifically, the court noted that "these defendants planned the sale of assets of North Fork to occur after the plaintiff's departure from that practice and mandatory surrender of her shares, thereby depriving her of a share of any distribution of the profits of that transaction. These allegations sufficiently state a cause of action sounding in breach of fiduciary duty" (id). The defendant insists that plaintiff relied

upon the valuation presented by the defendant thereby waiving any claims to any additional value to the property. However, on the contrary, that merely supports the existence of a breach of a fiduciary duty and does not absolve the defendant in any manner. Therefore, there are questions of fact whether a breach of any fiduciary duty occurred and consequently, the motion seeking summary judgement dismissing that cause of action is denied.

Turning to the claim of fraud, it is well settled that to succeed upon a claim of fraud it must be demonstrated there was a material misrepresentation of fact, made with knowledge of the falsity, the intent to induce reliance, reliance upon the misrepresentation and damages (Cruciata v. O'Donnell & Mclaughlin, Esqs,149 AD3d 1034, 53 NYS3d 328 [2d Dept., 2017]). These elements must each be supported by factual allegations containing details constituting the wrong alleged (see, JPMorgan Chase Bank, N.A. v. Hall, 122 AD3d 576, 996 NYS2d 309 [2d Dept., 2014]). However, there can be no fraud if the misrepresentation was not a matter within the peculiar knowledge of the defendant and could have been discovered with due diligence (Rigney v. McCabe, 43 AD3d 896, 842 NYS2d 34 [2d Dept., 2007]).

In this case, there are questions of fact whether the plaintiff was a skilled real estate businessman and thus had an opportunity to discern the true value of the property. It is true the plaintiff relied upon the defendant's valuation (see, Deposition of Adam Bak, page 183). However, considering the

relationship between the parties, there are questions of fact whether any fraud exists. Consequently, the motion seeking summary judgement dismissing the fraud cause of action is denied.

Gross negligence is defined as a failure to use even slight care or involves conduct that is so careless as to demonstrate a complete disregard for the rights of others (Greenwood v. Daily News, Inc., 8 Misc3d 1002A, 2005 WL 1389052 [Nassau County 2005]). There is no evidence supporting this cause of action. Therefore, the motion seeking summary judgement dismissing this claim is granted.

Turning to the cause of action of negligent misrepresentation, it is well settled that the plaintiff must demonstrate the existence of a special relationship imposing a duty upon the defendant to impart correct information, that the information was incorrect and there was reasonable reliance upon the information (Ginsburg Development Companies LLC v. Carbone, 134 AD3d 890, 22 NYS3d 485 [2d Dept., 2015]). A special relationship either means a fiduciary relationship between the parties, a privity-like relationship or a relationship where the plaintiff "emphatically alleges" the defendant had unique or special expertise (see, Alley Sports Bar, LLC v. SimplexGrinnell LP, 58 F.Supp3d 280 [W.D.N.Y. 2014]). As noted, there was clearly such a relationship between the parties. Consequently, the motion seeking summary judgement dismissing the negligent misrepresentation claim is denied.

It is well settled that a claim of unjust enrichment is not

available when it duplicates or replaces a conventional contract or tort claim (see, Corsello v. Verizon New York Inc., 18 NY3d 777, 944 NYS2d 732 [2012]). As the court noted "unjust enrichment is not a catchall cause of action to be used when others fail" (id). Therefore, the unjust enrichment claim and the money had claim are duplicative of the fraud claim (see, American Mayflower Life Insurance Company of New York v. Moskowitz, 17 AD3d 289, 794 NYS2d 32 [1st Dept., 2005]). Therefore, the motion seeking summary judgement dismissing the cause of action for unjust enrichment and the cause of action for money had is granted.

So ordered.

ENTER:

DATED: September 25, 2020
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC