Sharma v Walia
2020 NY Slip Op 33511(U)
October 23, 2020
Supreme Court, New York County
Docket Number: 657002/2019
Judge: Arlene P. Bluth

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **IAS MOTION 14**

Justice

----------X

KRISHNA SHARMA,

Plaintiff,

- v -

JASPREET WALIA, LEVERICH ST. LLC,THIRD AVENUE SUBWAY INC.,SUBWAY 24597, INC.

Defendant.

----------X

INDEX NO. 657002/2019

MOTION DATE 10/20/2020

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 90

were read on this motion to/for DISMISS.

The motion to dismiss the second amended verified complaint is granted.

Background

This action arises out of the purchase of a three Subway franchises in Manhattan. In the operative complaint, plaintiff alleges three causes of action for fraud relating to the purchase of each of these three restaurants. The first cause of action concerns a Subway on Third Avenue and a contract dated October 19, 2013 for $150,000. Plaintiff contends that the sellers were the holders of a sublease from the prime tenant and there were five and a half years left on the lease at the time of the contract.

Plaintiff alleges that on April 10, 2013 (six months prior to the closing), defendant increased the purchase price to $450,000 because defendant Walia discovered that the sublessee had an option to execute a five-year renewal of the sublease. Plaintiff claims she never saw any documentation regarding the renewal option but decided to pay the extra $300,000 in reliance on

defendant Walia's representation. Plaintiff claims that Walia's claim was false and that she only discovered the purported fraud when she was told the sublease was expiring and she had to move out because no one had exercised the renewal option.

Plaintiff alleges similar fraud causes of action for the two other restaurants. She claims Walia's false claim about the lease extension for the Subway on Amsterdam Avenue led her to pay an additional $100,000. Similarly, she contends she paid an extra $275,000 for the restaurant on West 47th Street based on Walia's assertion about a lease extension.

According to plaintiff, the Third Avenue and Amsterdam store leases never contained a renewal option and the West 47th Street location actually had an option to renew but it required the renewal to be executed 180 days prior to the termination of the lease. Plaintiff says she thought Walia had already exercised this option and only found out that nothing was done when she was told to vacate the premises.

Defendants move to dismiss on the grounds that the fraud claims are time barred, they are precluded by written contracts and the causes of action are not sufficiently pled. They point out that the contract for the Third Avenue location was signed in October 2013, the Amsterdam Avenue agreement is from early 2013 and the West 47th Street contract contains a provision that shortened the limitations period.

Defendants stress that each of these transactions was governed by a written agreement and plaintiff failed to attach these contracts to her pleading. They conclude that a fraud claim cannot exist where a contract covers the dispute. Defendants also stress that plaintiff has not pled her fraud claims with the requisite particularity required under the CPLR.

In opposition, plaintiff insists that Walia had a pattern for each of these transactions. He would state a price and then demand that additional monies be paid after he discovered the

sublease contained a renewal option, which allegedly made the restaurants more valuable. She explains that "While I had been given the subleases and the prime leases at the 3 closings, I had no reason to investigate whether the 3 subleases contained options to renew and whether same had actually been exercised because I trusted Walia totally and he had represented that he knew as a matter of fact that the three subleases contained 5 year renewal options which had all been fully exercised" (NYSCEF Doc. No. 76, ¶ 28). Plaintiff maintains she would not have paid the additional $575,000 (for the three transactions) if Walia had not made these false claims.

Plaintiff argues that the non-existent renewal options have nothing to do with the written contracts for the sale of each restaurant and, therefore, are independent frauds that do not modify any existing agreement. She maintains that the statute of limitations has not run because the date should run from the discovery of the fraud in November 2018. Plaintiff insists that this is when she discovered that 2 of the 3 renewals did not exist and that the remaining sublease had not been timely renewed. Plaintiff was told to vacate all three locations. Plaintiff also argues that the one-year statute of limitations contained in the West 47th Street franchise agreement is not enforceable.

In reply, defendants assert that plaintiff's fraud claims fail because they are based upon statements that were promissory in nature—that Walia procured a renewal of the underlying lease agreements. They reject plaintiff's claims that these oral agreements were separate contracts from the original transactions. Defendants also point out that plaintiff failed to refute the authenticity of defendants' evidence and that these documents, including the subject contracts, compel dismissal of this case.

Discussion

A Court considering a motion to dismiss for failure to state a cause of action "must give the pleadings a liberal construction, accept the allegations as true and accord the plaintiffs every possible favorable inference. We may also consider affidavits submitted by plaintiffs to remedy any defects in the complaint" (*Chanko v American Broadcasting Companies Inc.*, 27 NY3d 46, 52, 29 NYS3d 879 [2016]).

"The elements of a cause of action for fraud are a representation concerning a material fact, falsity of that representation, scienter, reliance and damages" (*Stuart Silver Assocs., Inc. v Baco Dev. Corp*., 245 AD2d 96, 98, 665 NYS2d 415 [1st Dept 1997]).

As an initial matter, the Court finds that plaintiff has not stated a cause of action for fraud because neither the allegations in the operative pleading nor in plaintiff's affidavit support the reliance element. Plaintiff's claim is that she entered into three complicated transactions at a price of nearly half a million dollars but never sought any verification concerning the lease renewals. That does not constitute justifiable reliance. Plaintiff bizarrely admits that although she received the subleases and prime leases, she had no reason to read anything because she trusted Walia (who apparently used to be a close family friend). Blind trust in the seller that includes a failure to review the leases for the restaurants cannot support claims for fraud. Moreover, plaintiff claims that these supposedly newly discovered lease renewals led her *to pay more* than what she originally agreed to pay despite the fact that she never reviewed a single document supporting Walia's alleged statements.

Plaintiff could assert a claim for fraud here "only if the misrepresentations alleged consist of more than mere promissory statements about what is to be done in the future (*Eastman Kodak Co. v Roopak Enterprises, Ltd.*, 202 AD2d 220, 222, 608 NYS2d 445 [1st Dept 1994]). That

forecloses any claims about what Walia might do in the future regarding the renewals. In other words, a fraud claim cannot be based on a mere promise that Walia could renew the leases at some point.

Plaintiff even admits that "I did not have an attorney representing me, I did not realize that I should carefully read all the documents and should not have gone to the closing with[out] having done so. I should not have blindly accepted Walia's assertion that everything was taken care of and I should just sign where indicated" (NYSCEF Doc. No. 76, ¶ 19).

Unfortunately, this admission forecloses plaintiff's fraud claims. Plaintiff realizes that she should not have believed Walia's assertions about lease renewals without performing any due diligence. After all, the entire transaction related to the purchase of restaurants; the issue of the leases and potential lease renewals *for the restaurants she was purchasing* is fundamental to these transactions. It simply cannot constitute justifiable reliance to believe statements about the leases, admit to receiving the relevant documents and to pay substantially more money without looking at a single document.

The Court also finds that because each contract contained a clause prohibiting oral modifications, plaintiff is not entitled to damages based on what she now asserts were oral changes to each of the three contracts (*Tierney v Capricorn Invs., L.P.*, 189 AD2d 629, 631, 592 NYS2d 700 [1st Dept 1993] [concluding that an oral modification of an agreement is not enforceable where the contract states it can only be modified in writing]).

Statute of Limitations

"In moving to dismiss an action as barred by the statute of limitations, the defendant bears the initial burden of demonstrating, prima facie, that the time within which to commence

the cause of action has expired. The burden then shifts to the plaintiff to raise a question of fact as to whether the statute of limitations is inapplicable or whether the action was commenced within the statutory period, and the plaintiff must aver evidentiary facts establishing that the action was timely or [ ] raise an issue of fact as to whether the action was timely" (*MTGLQ Investors, LP v Wozencraft*, 2019 WL 2291865, 2019 NY Slip Op 04287 [1st Dept 2019] [internal quotations and citations omitted]).

With respect to the Amsterdam and Third Avenue locations, the Court finds that the claims related to these transactions are also time-barred. According to plaintiff's affidavit, the closing for the Amsterdam location was in July 2013 and she finished the "additional payments" for the lease renewal in July 2013 (NYSCEF Doc. No. 76 at 3-4). For the Third Avenue restaurant, plaintiff admits that she made the first payment for the "additional monies" on October 30, 2013 (*id*. ¶ 17). This case was not commenced until November 25, 2019, more than six years after these events.

The Court also rejects plaintiff's claim that the limitations period should run from November 2018, when she allegedly discovered the fraud for the first time. "To trigger the statute of limitations, it must conclusively appear that [the appellants] had knowledge of facts from which fraud could be inferred" (*CSAM Capital, Inc. v Lauder*, 67 AD3d 149, 157 [1st Dept 2009] [internal quotations and citations omitted]).

Here, plaintiff was told about the renewal lease issue in 2013 and was, therefore, on inquiry notice for these two locations at that time. Any reasonable inquiry—such as a review of the operative leases and subleases or a discussion with the landlord—would have revealed that the lease renewals didn't exist. The only other fact that plaintiff learned was the notice that she

had to vacate the premises because no renewals were in effect. Under either formulation, plaintiff's causes of action for these two restaurants is time barred.

The West 47th Street location presents a different analysis. The contract for this store was not entered into until 2014. However, the contract stated that the statute of limitations "for any action under this contract, by either party, shall be one year" (NYSCEF Doc. No. 67 at 3). Although plaintiff claims that this is unenforceable, this Court disagrees. The parties engaged in an arms-length transaction and agreed to a provision that affected both sides. To the extent that plaintiff claims that this was a separate oral transaction, that claim is rejected.

Summary

The Court recognizes that plaintiff obviously feels like Walia took advantage of her. Plaintiff's theory is that she agreed to certain prices and then Walia bumped up the prices based upon purported renewal lease options. For two of the locations, according to plaintiff, the lease renewals did not even exist and the extension was not executed for the third restaurant. Assuming plaintiff's allegations are true (as the Court must on a motion to dismiss), Walia's actions were reprehensible.

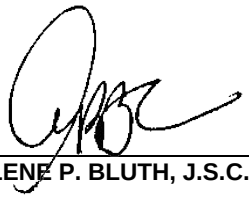
But plaintiff failed to sufficiently show that her reliance on these misstatements was justifiable. The transactions at issue dealt with the purchase of stores that operated under leases, which inevitably are based upon written agreements. And plaintiff claims that she paid more than what she originally agreed to pay solely because of certain oral statements made by Walia. Plaintiff does not claim that Walia failed to turn over the leases and subleases, that she asked to see additional documentation for Walia's claims and he refused, or that he produced false documents. Nor does she claim she did anything to check up on the status of these leases, or even read them, until she was told she had to vacate. The Court understands that plaintiff may have

been a neophyte in this business and did not know enough to consult with an attorney. But that does not mean she can pursue fraud claims based on agreements into which she voluntarily entered without even reading.

The Court declines to award defendants for the costs of this motion or for the prior motion to dismiss.

Accordingly, it is hereby

ORDERED that the motion by defendants to dismiss is granted and the Clerk is directed to enter judgment in favor of defendants and against plaintiff along with costs and disbursements after presentation of proper papers therefor.



10/23/2020
DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:	[X]	**CASE DISPOSED**		[ ]	**NON-FINAL DISPOSITION**		
	[X]	**GRANTED**	[ ] **DENIED**	[ ]	**GRANTED IN PART**	[ ]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**