Shavolian v. Donegan

2020 N.Y. Slip Op. 31181
Decided May 5, 2020

INDEX NO. 157834/2019

05-05-2020

DAN SHAVOLIAN, Plaintiff, v. BRIAN DONEGAN, ELITE REAL ESTATE CONSULTANTS LLC Defendants.

HON. JOEL M. COHEN

NYSCEF DOC. NO. 26 **MOTION DATE** 09/20/2019 **MOTION SEQ. NO.** 001

DECISION + ORDER ON MOTION

HON. JOEL M. COHEN: The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 15, 17, 19, 20, 23 were read on this motion to DISMISS.

In motion sequence number 001, defendants Brian C. Donegan ("Donegan"), Elite Real Estate Consultants LLC, d/b/a Elite Commercial Property Appraisals and New York City Commercial Appraisers ("Elite") (collectively, the "Defendants") move to dismiss Plaintiff's Complaint pursuant to CPLR §§ 3211(a)(1) and (7).

For the reasons set forth below, Defendants' motion to dismiss is denied in part and granted in part.

FACTUAL BACKGROUND

According to the factual allegations of the Complaint, Plaintiff Dan Shavolian ("Shavolian") agreed to buy out the interest of non-party Ben Mokhtar ("Mokhtar") in an office building located at 805 Northern Boulevard, Great Neck, NY 11021 (the "Property") pursuant to an "arbitration agreement." Under the agreement, Shavolian and Mokhtar agreed to each retain their own appraiser to "accurately and fairly value the Property." Per
2 the arbitration agreement, *2 an identified arbitrator would average the two party-tendered valuations to determine the buy-out price.[1]

[1] For purposes of this motion, the Court accepts as true Plaintiff's description of the terms of the arbitration agreement. The parties have not submitted a copy of the arbitration agreement.

Shavolian's appraiser valued the Property at $14 million. Mokhtar retained Defendants to serve as his appraiser under the arbitration agreement. Defendants appraised the Property at $38 million (the "Appraisal"). The arbitrator averaged the two appraisals and set a valuation of the Property in excess of $28 million.

Shavolian alleges that Defendants conspired with Mokhtar to appraise the Property at an inflated amount, so that Mokhtar could receive a larger buy-out price. Shavolian further alleges that Defendants were aware that Shavolian would be relying upon their Appraisal. As a result of Defendants' allegedly deceptive Appraisal, Shavolian claims that he suffered damages in excess of $850,000.

Shavolian asserts claims against Defendants for negligence, negligent misrepresentation, and fraudulent misrepresentation. Defendants argue that Shavolian's Complaint should be dismissed

because, *inter alia*, Defendants owed no duty of care to Shavolian (with whom they had no prior relationship, contractual or otherwise) when preparing their Appraisal and because the Appraisal merely reflected an "opinion."

ANALYSIS

In assessing a motion to dismiss under CPLR § 3211(a)(7), the Court must give the Complaint a liberal construction, accept its factual allegations as true, and provide Plaintiff with the benefit of every favorable inference. (*Nomura Home Equity*
3 *Loan, Inc. v. Nomura Credit & *3 Capital, Inc.*, 30 NY3d 572, 582 [2017]). However, "factual allegations ... that consist of bare legal conclusions, or that are inherently incredible ..., are not entitled to such consideration." (*Mamoon v. Dot Net Inc.*, 135 AD3d 656, 658 [1st Dept 2016]).

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]). A motion to dismiss may be granted only where the documentary evidence "utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." (*Goshen v. Mut. Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]; *see also Robinson v. Robinson*, 303 AD2d 234, 235 [1st Dept 2003]).

Negligence and Negligent Misrepresentation (Counts 1 and 2)

To establish a cause of action sounding in negligence, Shavolian must establish the existence of a duty on Defendants' part to Shavolian, in addition to an actual breach of the duty and damages. (*See Greenberg, Trager & Herbst, LLP v. HSBC Bank USA*, 17 NY3d 565, 576 [2011]). Similarly, a viable cause of action for negligent misrepresentation requires that the underlying relationship between the parties be one of contract, or the bond between them be so close as to be the functional equivalent of contractual privity. (*See, e.g., Mandarin Trading Ltd. v. Wildenstein*, 16 NY3d 173, 180 [2011]; *Kosterich v. Frank Ciotta & Associates*, 995 NYS2d 439, 441 [NY Sup Ct, August 8, 2014]).

For almost one hundred years, the New York Court of Appeals has been a leading jurisprudential voice in setting forth the grounds upon which a defendant owes a duty of care to a plaintiff with which, as in this case, it is not in contractual privity. In *Glanzer v. Shepard*, 233 NY 236 [1922] (Cardozo, J.), the Court found that a "public weigher" of beans owed a duty of care to a plaintiff with which it had no prior relationship.
4 The bean weigher was retained by the *4 bean seller, but knew that the result of the weighing would be relied upon by the bean buyer (who received a copy of the weighing certificate). On those facts, the buyer's reliance was the "end and aim of the transaction," and therefore "assumption of the task of weighing was the assumption of a duty to weigh carefully for the benefit of all whose conduct was to be governed .... Diligence was owing, not only to him who ordered, but to him also who relied." (*Id.* at 238-39, 242).

Nine years later, in *Ultramares Corp. v. Touche*, 255 NY 170 [1931] [Cardozo, J.], the Court rejected a cause of action in negligence against a public accounting firm for preparing inaccurate financial statements which were relied upon by a plaintiff who had no contractual privity with the accountants. The Court distinguished *Glanzer* on the ground that the service rendered by the public weigher in *Glanzer* was "primarily for the information of a third person, in effect..., and only incidentally for that of the formal promisee." (*Id.* at 183). In other words, in *Glanzer*, the allegedly negligent party owed a duty of care to a specific party for a specific purpose, compared to *Ultramares*, where the defendant could not be liable for negligent misrepresentation to a broad and undefined class of persons unknown to the defendant. (*Id.*). Notably, the Court made clear

that its holding "does not emancipate accountants from the consequences of *fraud*." (*Id*. at 189 [emphasis added]).

In *Credit All. Corp. v Arthur Andersen & Co*., 65 NY2d 536, 545-46 [1985], the Court reaffirmed *Ultramares*, and set forth a three-part test for determining when an accountant may be held liable in negligence to noncontractual third parties who relied to their detriment on inaccurate financial reports: "(1) the accountants must have been aware that the financial reports were to be used for a particular purpose or purposes; (2) in the furtherance of which a known party or parties was intended to rely; and (3) there must have been some conduct on the part of *5 the accountants linking them to that party or parties, which evinces the accountants' understanding of that party or parties' reliance." (*Id*. at 551).

"Although this rule first developed in the context of accountant liability, it has applied equally in cases involving other professions," such as lawyers and engineering consultants. (*Parrott v Coopers & Lybrand*, 95 NY2d 479, 483 [2000] [citations omitted]; *see also North Star Contracting Corp. v. MTA Capital Const. Co*., 120 AD3d 1066, 1069-70 [1st Dept 2014] [applying rule to construction manager]; *Sutton Apartments Corp. v. Bradhurst 100 Development LLC*, 107 AD3d 646, 648-49 [1st Dept 2013] [applying rule to architect]).

Consistent with that approach, *Glanzer*, *Ultamares* and their progeny have been applied to appraisers. (*See Chemical Bank v National Union Fire Ins. Co. of Pittsburgh*, 74 AD2d 786, 787 [1st Dept 1980] ["If it be shown that a real estate appraiser, retained by a property owner to make an appraisal that he knows the owner will use to obtain financing, makes it in a grossly negligent manner so as to inordinately overstate the value, we are not ... prepared to hold the appraiser exempt from liability to the damaged financing party."], app dismissed 53 NY2d 864 [1981]; *Federal Home Loan Mortgage Corp. v Portnoy*, 1992 WL 320813 [SDNY 1992] [sustaining negligence claim by federal agency that relied on defendant's appraisal report prepared for a Florida lender]; *Guildhall Ins. Co., Ltd. v Silberman*, 688 FSupp 910 [SDNY 1988] [sustaining negligence claim by insurer that relied on defendant's appraisal prepared for owner of certain artifacts specifically for the purpose of obtaining insurance]).

The negligence and negligent misrepresentation claims against Defendants do not fit neatly within the confines of the above cases. On the one hand, as in *Glanzer* et al., Defendants allegedly were aware that their appraisal was to be provided to Shavolian, albeit indirectly, for a narrow purpose that specifically implicated Shavolian's interests. Thus, this case does not *6 present the risk of exposing Defendants to liability from a large and indeterminate group. On the other hand, this case differs from the above line of cases in that Shavolian cannot be said to have "relied" on Defendants' appraisal in making a commercial decision. Instead, the appraisal was relied upon *by the arbitrator*. Unlike the insurers and lenders in the appraisal cases noted above, Shavolian does not claim to have been fooled or misled by the appraisal, which on its face conflicted with the report of his own appraiser. His only claim is that he was harmed by the appraisal because it skewed the result of a rigid valuation process - which apparently gave the arbitrator no discretion to do anything other than blindly accept the parties' appraisals and average them - to which he voluntarily agreed.

On balance, the Court finds that Defendants did not undertake a duty of care to Shavolian. They were engaged by Mokhtar as part of an arbitration process. Shavolian was affected by the appraisal, but he did not rely upon it.

Accordingly, Defendants' motion to dismiss Counts 1 and 2 is granted.

Fraudulent Misrepresentation (Count 3)

To state a legally cognizable claim of fraudulent misrepresentation, Shavolian must allege that Defendants made material misrepresentations of fact; that the misrepresentations were made intentionally in order to defraud or mislead Shavolian; that Shavolian reasonably relied on the misrepresentations; and that Shavolian suffered damages as a result of his reliance on the Defendants' misrepresentations. (*See Mandarin Trading Ltd*., 16 NY3d at 177). Privity is not an element of fraudulent misrepresentation. (*See John Blair Communications*, *Inc*. *v*. *Reliance Capital Group L.P*., 157 AD2d 490, 492 [1990]). *7

Here, Shavolian sufficiently alleges facts to support his fraud claim.[2] Shavolian alleges that Defendants, acting in concert with Mokhtar, made misrepresentations of fact in their Appraisal, *intending* to overvalue the Property for the arbitrator to Shavolian's detriment. Moreover, he alleges that Defendants had no genuine belief in the adequacy of their appraisal.

[2] Although labeled "fraudulent misrepresentation," the claim alleges fraud more generally. --------

To be sure, there is case law suggesting that appraisals ordinarily cannot support a claim for fraud, because an appraisal is a form of non-actionable opinion. (*See Mandarin Trading Ltd*. *v*. *Wildenstein*, 65 AD3d 448, 450 [2009] *aff'd Mandarin Trading Ltd*., 16 NY3d at 179; *Rubin v*. *Sabharwal*, 171 AD3d 580, 581 [1st Dept 2019]; *Newman v*. *Wells Fargo Bank*, *N.A*., 85 AD3d 435 [1st Dept 2011]). However, "even an opinion, ... may be found to be fraudulent if the grounds supporting it are so flimsy as to lead to the conclusion that there was no genuine belief back of it." (*Ultramares Corp*., 255 NY at 18; *see also MBIA v*. *Countrywide*, 87 AD3d 287, 294 [1st Dept 2011]; *Stewardship Credit Arbitrage Fund LLC v*. *Charles Zucker Culture Pearl Corp*., 31 Misc3d 1223(A), at *5 [Sup Ct NY Cty 2011]).

Here, Shavolian alleges that Defendants' Appraisal is based on misrepresented facts and does not reflect Defendants' honest opinion. Shavolian alleges, for example, that Defendants intentionally used an incorrect percent capitalization rate, undertook no rental comparisons, and failed to account for a wide arrange of expenses, including taxes, utilities, used water, all as part of a scheme to harm Shavolian.

Accordingly, Defendants' motion to dismiss Count 3 is denied.

CONCLUSION

In accordance with the foregoing, it is *8

ORDERED that Defendants' Motion to Dismiss is **granted** as to Counts 1 and 2 asserted by Plaintiff in the Complaint, and those claims are dismissed; it is further

ORDERED that Defendants' Motion to Dismiss is **denied** as to Count 3; and it is further

ORDERED that Defendants are to answer the Complaint within 30 days.

This constitutes the Decision and Order of the Court. **5/5/2020**

DATE

/s/ _____

JOEL M. COHEN, **J.S.C.**