

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BERNARD J. FRIED
Justice

PART 60

LITMAN, STEVEN
PLAINTIFF

INDEX NO. #602176-2006

MOTION DATE _____

- v -

MAGEE, JOHN W.

MOTION SEQ. NO. #002

MOTION CAL. NO. _____

DEFENDANT

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

FILED

FEB 14 2007

NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

This motion is decided in accordance with the accompanying memorandum decision.

SO ORDERED

Dated: 2/7/07

Bernard J. Fried
J.S.C.

BERNARD J. FRIED
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 60

-----X
STEVEN LITTMAN,

Plaintiff,

-against-

Index No.
602176/06

JOHN W. MAGEE, DANIEL J. McNULTY,
ELLEN BURKE, DTZ ROCKWOOD, LLC (formerly
known as ROCKWOOD REALTY ASSOCIATES, LLC),
ROCKWOOD REALTY ASSOCIATES, INC.,
HERRICK, FEINSTEIN LLP, and IRWIN KISHNER,

Defendants.
-----X

APPEARANCES:

For Plaintiff:

Deutsch, Coffey & Metz, LLP

18 East 41st Street
New York, New York 10017
(Alfred N. Metz)

For Defendants:

Quinn Emanuel Urquhart Oliver & Hedges,
LLP
51 Madison Avenue
New York, New York 10010
(Michael B. Carlinsky, David L. Elsberg,
Manny J.
Caixeiro)

Pillsbury Winthrop Shaw Pittman LLP
1540 Broadway
New York, New York 10036
(David G. Keyko, Andrew C. Smith)

FRIED, J.:

Motion sequence numbers 002 and 003 are consolidated for disposition.

The defendants John W. Magee, Daniel McNulty, Ellen Burke, DTZ Rockwood LLC,

and Rockwood Realty Associates, Inc. (collectively, the Rockwood defendants), move, and the defendants Herrick Feinstein, LLP and Irwin Kishner (collectively, Herrick) also move, pursuant to CPLR 3211 (a) (1), (5) and (7), for an order dismissing the complaint.

The plaintiff Steven Littman (Littman) was the owner of an 18.7085% membership interest in the defendant Rockwood Realty Associates LLC (Rockwood LLC). Rockwood LLC was a real estate investment firm. Littman was a passive investor in Rockwood LLC. The individual defendants John W. Magee (McGee), Daniel J. McNulty (McNulty) and Ellen Burke (Burke) were also investors in Rockwood LLC. The defendant Rockwood Realty Associates, Inc. (Rockwood Inc.) was the managing member of Rockwood LLC.

In 2003, the plaintiff Littman, in order not to continue to incur income tax on Rockwood LLC's "phantom profits," began to negotiate a sale of his interest. Littman considers that the profits were "phantom" profits because Rockwood LLC would not pay his taxes. Littman engaged legal counsel and an accountant. He also requested financial information in order to evaluate his interest in Rockwood LLC. On April 15, 2005, Littman sold his interest back to the existing members of Rockwood LLC, for the sum of \$2.125 million. Littman concedes that through his attorney and his accountant he requested, but was refused access to, Rockwood LLC's projected value. Littman also concedes that he did receive a balance sheet and income statement of Rockwood LLC for nine months ending September 2004, and the tax returns and actual full-year results of Rockwood LLC for 2002 and 2003, including the expectations for Rockwood LLC's prospects (the EBTIDA targets) for 2002 and 2003, and the revenue figures.

The defendant, Herrick, acted in the transaction as legal counsel to the Rockwood defendants. Although the plaintiff Littman alleges, in very carefully chosen language, that Herrick acted as his counsel before, during and after the transaction, Littman does not, and could not, allege that Herrick acted as his counsel in the sale of his interest in Rockwood LLC.

As part of the transaction, all of the parties, including the plaintiff Littman, executed a release, which provides in relevant part:

Each party hereto expressly waives any and all rights under any applicable statute, doctrine or principle of law restricting the right of any person to release claims which such person does not know or suspect to exist at the time of executing a release, which claims, if known, may have materially affected such person's decision to give such a release. In connection with such waiver and relinquishment, each party hereto acknowledges that it is aware that it may hereafter discover claims presently unknown or unsuspected, or facts in addition to or different from those which they now know or believe to be true, with respect to the matters released herein. Nevertheless, it is the intention of each party hereto to fully, finally and forever settle and release all such matters, and all claims relative thereto which now exist, may exist or theretofore have existed between and among the parties hereto, described above, as specifically provided herein.

Fourteen months later, in May 2006, apparently unconcerned with paying its taxes on profits, a non-party DTZ Holdings PLC purchased, for the sum of \$45 million, a 50% interest in Rockwood LLC, which then changed its name to the defendant DTZ Rockwood, LLC (DTZ Rockwood).

The complaint alleges that although the Rockwood defendants provided the actual Rockwood LLC financials and EBTIDA targets for the years 2002 and 2003, they did not disclose that their EBTIDA targets for the year 2004 were much greater than those financial figures bore out. It is alleged that a mere 13 months after Littman closed, his interest would have been worth not the \$2.125 million he received, but between \$16 million and \$47 million

based on the price paid by DTZ Holdings PLC. This action claims that Littman was defrauded into selling at a lower price than was later obtained by the Rockwood defendants.

The complaint sets forth a total of five causes of action. The first cause of action is against the Rockwood defendants, and is for breach of fiduciary duty and aiding breach of fiduciary duty. The second cause of action is against Herrick, and is for breach of fiduciary duty and aiding breach of fiduciary duty. The third and the fourth causes of action are against the Rockwood defendants, and are for unjust enrichment, a constructive trust, and an accounting. The fifth cause of action is against all of the defendants, and is for a declaratory judgment rescinding and declaring the general release void.

In support of their motion to dismiss the complaint, the Rockwood defendants allege that the plaintiff Littman is a sophisticated businessperson, who was represented both by separate counsel and an accountant. It is argued that when Littman signed the document releasing the very claims now asserted, he knew about the alleged material omissions, and only sued when the stock price increased.

In support of its motion to dismiss the complaint, Herrick argues that the mutual release signed by the plaintiff Littman in connection with the transfer agreement bars all claims against Herrick. It is also argued that in connection with the transfer agreement, Herrick owed no fiduciary duty to Littman.

In opposition to the motions, the plaintiff Littman makes the following four arguments. The allegations in the complaint are deemed true and construed liberally. The defendants' breaches of fiduciary duties to Littman vitiate the release. Herrick violated its fiduciary duties to the plaintiff Littman. The claims for aiding and abetting breach of fiduciary duty are

adequately stated.

On a motion to dismiss a complaint for legal insufficiency, the court accepts the facts alleged as true and determines simply whether the facts alleged fit within any cognizable legal theory (Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P., 96 NY2d 300 [2001]; Morone v Morone, 50 NY2d 481 [1980]). The pleading is to be liberally construed, accepting all the facts alleged therein to be true and according the allegations the benefit of every possible favorable inference (Goshen v Mutual Life Ins. Co. of New York, 98 NY2d 314 [2002]). Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss (EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11 [2005]). Any deficiencies in the complaint may be amplified by supplemental pleadings and other evidence (AG Capital Funding Partners, L.P. v State Street Bank and Trust Co., 5 NY3d 582 [2005]; Rovello v Orofino Realty Co., 40 NY2d 633 [1976]). Although the credibility of the parties is not under consideration (S. J. Capelin Assoc. v Globe Mfg. Corp., 34 NY2d 338 [1974]), evidentiary material may be considered to assess the viability of a complaint where such evidence demonstrates that a material fact alleged by the plaintiff to be true is “not a fact at all,” and that “no significant dispute exists regarding it” (Guggenheimer v Ginzburg, 43 NY2d 268, 275 [1977]). The documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim (Leon v Martinez, 84 NY2d 83, 87-88 [1994]).

A fiduciary relationship may exist where one party reposes confidence in another and reasonably relies on the other’s superior expertise or knowledge, but an arms-length business

relationship does not give rise to a fiduciary obligation (Wjener v Lazard Freres & Co., 241 AD2d 114 [1st Dept 1998]). A release may be set aside on the traditional bases of fraudulent inducement, fraudulent concealment, misrepresentation, mutual mistake or duress (Global Minerals and Metals Corp. v Holme, 35 AD3d 93 [1st Dept 2006]).

Here, the release is unambiguous on its face, and may be construed as a matter of law on this CPLR 3211 (a) motion (Reiss v Financial Performance Corp., 97 NY2d 195 [2001]). Even giving the complaint every favorable inference, no reasonable reading of the release permits the construction proposed by the plaintiff Littman. The plaintiff Littman is correct in his assertion that a fiduciary cannot by contract relieve itself of the fiduciary obligation of full disclosure by withholding the very information the beneficiary needs in order to make a reasoned judgment (citing Blue Chip Emerald LLC v Allied Partners Inc., 299 AD2d 278 [1st Dept 2002]). However, in the instant case the release refers to the specific subject matter as to which the representations are alleged, with precise specificity to put the plaintiff Littman on notice as the clause's intended effect (Danann Realty Corp. v Harris, 5 NY2d 317, 320 [1959]). Littman was given the actual full-year results, including the EBTIDA figures, of Rockwood LLC, and the tax returns for the two most recent years of Rockwood LLC. Littman also received a balance sheet and income statement of Rockwood LLC for nine months ending September 2004. Subsequently, when Littman and his accountants specifically requested information regarding the future value of Rockwood LLC, he was told that no further information would be made available. Therefore, Littman was clearly on inquiry notice of his potential claims against the defendants for misrepresenting the future profitability of his investment, a subject appropriate for determination on a motion to dismiss (Commerce and

Industry Insurance Company v Imrex Company, Inc., 270 AD2d 147 [1st Dept 2000]; Weisl v Polaris Holding Co., 226 AD2d 286 [1st Dept 1996]). The release signed by the plaintiff Littman precisely addresses the substance of the specific omission that is challenged. Thus, there can be no reasonable reliance in this case where the breach is premised on an omission explicitly contradicted by a written release (Knight Securities L.P. v Fiduciary Trust Co., 5 AD3d 172 [1st Dept 2004]).

Turning to the claims against Herrick, Littman signed a conflict letter that permitted Herrick to represent Rockwood LLC in connection with the transfer agreement. In addition, the transfer agreement itself acknowledges that Littman “has been represented in all matters relating to, or arising out of, this Agreement by separate legal counsel.” In addition, the mutual release signed by Littman in connection with the transfer agreement specifically discharges agents and attorneys of the principal. Finally, in fact, Littman was represented by separate counsel in the negotiation and execution of the transfer agreement.

Accordingly, it is

ORDERED that the motions to dismiss are granted and the complaint is dismissed with costs and disbursements to the to the defendants as taxed by the Clerk of the Court; and it is further

Industry Insurance Company v Imrex Company, Inc., 270 AD2d 147 [1st Dept 2000]; Weisl v Polaris Holding Co., 226 AD2d 286 [1st Dept 1996]). The release signed by the plaintiff Littman precisely addresses the substance of the specific omission that is challenged. Thus, there can be no reasonable reliance in this case where the breach is premised on an omission explicitly contradicted by a written release (Knight Securities L.P. v Fiduciary Trust Co., 5 AD3d 172 [1st Dept 2004]).

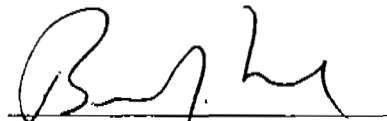
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Accordingly, it is

ORDERED that the motions to dismiss are granted and the complaint is dismissed with costs and disbursements to the to the defendants as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 2/7/07



J.S.C.

BERNARD J. FRIED
J.S.C.

FILED
FEB 14 2007
NEW YORK
COUNTY CLERK'S OFFICE