

Kaye v Levine Prospect, LLC
2019 NY Slip Op 31299(U)
May 6, 2019
Supreme Court, New York County
Docket Number: 653003/2018
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

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JEFFREY KAYE,

Plaintiff,

- v -

LEVINE PROSPECT, LLC, and DAVID LEVINE,

Defendants.

INDEX NO. 653003/2018

MOTION DATE _____

MOTION SEQ. NO. 001

DECISION AND ORDER

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MASLEY, J.:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41

were read on this motion to/for DISMISSAL.

Individual plaintiff Jeffrey Kaye is the CEO of Stone Street Properties, LLC, a real estate development and management company (NYSCEF Doc. No. [Doc] 1, ¶ 4 [summons and complaint]; *see also* Doc 8 [same]). Defendant David Levine is a principal and managing member of defendant Levine Prospect, LLC (LP), a real estate financing company (Doc 8, ¶¶ 5-6). Since 2014, Levine and plaintiff have been working together to purchase, develop, and operate various properties in New York City (*id.*, ¶ 10). Levine’s primary responsibility was to obtain financing for the projects while plaintiff was responsible for managing and operating the properties (*id.* ¶ 12). Plaintiff and Levine together engaged in real estate business endeavors through various jointly-formed special purpose entities.

This action arises from a \$4 million line of credit (the Loan) extended to one such entity, nonparty JKDL Invesco LLC (JKDL), by Signature Bank (the Bank) to finance

certain real estate investments (Doc 10 [Loan letter from Bank, 3/27/17]). JKDL was owned, in equal parts, by LP and plaintiff (Doc 8, ¶ 17).

Plaintiff alleges that defendants caused the \$4 million Loan principal to be repaid in full, then coerced plaintiff to sign a \$2 million promissory note (Note) in contravention of the parties' agreements and in breach of defendants' fiduciary duties owed to plaintiff by virtue of their joint ventures (*id.* ¶¶ 17-19). Plaintiff seeks the following: a declaratory judgment voiding the Note on the basis that it was obtained by economic duress (first cause of action); damages for defendants' breach of contract governing the parties' property at East 18th Street (E. 18th Property) (second cause of action); and breach of fiduciary duties for defendants' failure to sign paperwork necessary for plaintiff to make a required distribution for the E. 18th Property (third cause of action) (*see generally id.*). As discussed below, the E. 18th Property was subject to a mortgage loan unrelated to the \$4 million Loan at issue in plaintiff's economic duress claim.

In Motion Sequence Number (Motion) 001, defendants move, pursuant to CPLR 3211 (a) (1), (a) (4), (a) (5), and (a) (7), to dismiss the complaint in its entirety; alternatively, defendants seek to consolidate this action with *Levine Prospect, LLC v Jeffrey Kaye*, Index. No. 607953/2018 (Driscoll, J.) (Nassau Action), which LP commenced against plaintiff in Nassau County Supreme Court for breach of the Note here at issue (Doc 32 [Nassau Action Complaint]).

Plaintiff opposes Motion 001 and cross-moves to consolidate this action with a third case, *Jeffrey Kaye v David Levine and Levine Prospect LLC*, Index No. 153736/2018 (Sherwood, J.) (Defamation Action), instead of the Nassau Action. Plaintiff commenced the Defamation Action against defendants in New York County

Supreme Court for damages resulting from alleged defamatory statements published to the Bank (Doc 31 [Defamation Action Complaint]).

Facts

General background

For this motion, the court accepts the facts alleged in the complaint as true. Plaintiff alleges that, around the same time that the parties negotiated the Note, he and Levine were engaged in certain critical real estate transactions: (1) selling their joint interest in a property at 440 West 47th Street (47th Property); and (2) refinancing their mortgage loan for a property on West 18th Street (W. 18th Property) (Doc 8, ¶ 21). Plaintiff alleges that he would not have had sufficient capital to satisfy other business commitments, and his “investments [would] collapse like dominoes,” if Levine had followed through on his threat to not sign paperwork pertaining to the 47th Property and W. 18th Property transactions (*id.* ¶ 27); thus, Levine induced plaintiff to execute the Note through economic duress (*id.* ¶¶ 29-30). Ultimately, plaintiff signed the Note and Levine signed the paperwork for the 47th Property and W. 18th Property transactions (*id.* ¶ 31).

Nevertheless, after plaintiff executed the Note, Levine allegedly refused to contribute funds or sign a guarantee in connection with the E. 18th Property, preventing plaintiff from making a required distribution on the mortgage loan for that property, which resulted in a default (*id.* ¶¶ 33-34). Plaintiff alleges that, to avoid foreclosure on the E. 18th Property, he was forced to obtain funding from an alternative source on less favorable terms (*id.* ¶¶ 35-36). Thus, plaintiff asserts that defendants breached their contractual and fiduciary obligations regarding the E. 18th St. Property (*id.* ¶ 37).

Following that default, the lender that issued a mortgage loan for the E. 18th Property (the Arbor Loan), nonparty Arbor Realty Trust Inc. (Arbor), commenced an action on March 7, 2018 against Levine and plaintiff (as guarantors) for breach of the Arbor Loan (the Arbor Action) (Doc 15 [Arbor Action Complaint]). The Arbor Action was ultimately settled and, in connection with that settlement, plaintiff and Levine executed a Membership Interest Purchase and Release Agreement (the MIPRA) containing a claims release clause (Doc 17, ¶ 8). The MIPRA as to Levine and his E. 18th Property-related entities states that plaintiff and plaintiff's E. 18th Property-related entities "desire to release [Levine's special purpose entity for the E. 18th Property] and Levine from any and all claims relating to [plaintiff's entities], the [E. 18th Property], and/or all financing transactions in connection therewith" (*id.*). Moreover, plaintiff agreed to

"release, acquit and forever discharge [Levine's E. 18th Property entity] and Levine . . . of and from all manner of actions, suits, proceedings, and cause or causes of action, in law or in equity, whether foreseen or unforeseen, matured or unmatured, known or unknown, accrued or not accrued, direct or indirect, debts, assessments, dues, claims, losses, damages, judgments, executions, defaults, covenants, contracts, controversies, agreements, promises, attorneys' fees, costs, interest payments and expenses, accounts, bills, releases, rights, liabilities, obligations and demands of any kind whatsoever (collectively, 'Claims'), 'Claims' which the Kaye Release Parties ever had, now have, or hereafter can, shall or may have, relating to [plaintiff's E. 18th Property entity and Stone] (and the financing thereof and/or of [the E. 18th Property]) The Kaye Release Parties covenant that they will not sue or bring any actions on account of the matters released herein"

(*id.* ¶ 8 [a]). The MIPRA also directs the parties to determine the amount owed under the Note at issue in the economic duress claim (*id.* ¶ 9 [c]).

The Bank Loan and the Note

The \$4 million Loan was issued by the Bank to borrower JKDL and was guaranteed by various individuals and entities, including: LP, Par Plumbing Co. Inc.

(Par), in which Levine has an ownership interest; as well as plaintiff, Levine, and two of Levine's relatives (Docs 8, 10).

Plaintiff alleges that Levine directed LP to repay the Loan principal of \$4 million and "transferred that balance to a credit facility with" Par "with the expectation that plaintiff would owe \$2 million to [LP] instead of" the Bank (Doc 8, ¶ 17). Levine then "demanded" that plaintiff agree to repay plaintiff's \$2 million share of the Loan debt "within three years," essentially undermining plaintiff's ability to continue managing the parties' joint venture properties (*id.* ¶¶ 18-19 [alleging that the Loan structure facilitated the parties' long-term business plan, but the three-year repayment "demanded" by Levine "unilaterally eliminat(ed the parties') ability to borrow" against the (line of credit) and "compromised the parties' ability to continue to operate the joint venture properties"]).

Plaintiff alleges that Levine "first disclosed" that he had paid the Loan "in the summer of 2017"; Levine, "kn[o]w[ing] that [plaintiff] would never voluntarily agree to" a three-year repayment period, then "coerced [plaintiff] into signing" the Note by threatening that LP/Levine-owned entities would default on their obligations with respect to the parties' other business endeavors, including those discussed above (*id.* ¶¶ 20-23, 25).

Plaintiff asserts that Levine emailed him the Note "on October 16, 2017" (*id.* ¶ 26) and plaintiff executed the Note on October 25, 2017 (*id.* ¶¶ 27-28); however, the Note, signed by plaintiff, is dated April 25, 2017 (*see* Doc 11 [Note]). Levine then subsequently refused to contribute additional funds for parties' E. 18th St. Property and refused to sign a personal guarantee in connection with that property "as required under the parties' agreement;" thus, plaintiff asserts that defendants "repudiated [their]

obligations under the parties' contract," causing plaintiff to default on the Arbor Loan (*id.* ¶¶ 33-34).

Discussion

Defendant now moves, pursuant to CPLR 3211(a) (1), (a) (4), (a) (5), and (a) (7), to dismiss the complaint in its entirety.

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. [The court] accept[s] the facts as alleged in the complaint as true, [and] accord[s] plaintiff[] the benefit of every possible favorable inference" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [citation omitted]). However, bare legal conclusions and "factual claims which are either inherently incredible or flatly contradicted by documentary evidence" are not "accorded their most favorable intendment" (*Summit Solomon & Feldesman v Lacher*, 212 AD2d 487, 487 [1st Dept 1995]). Dismissal under subsection (a) (1) is warranted where the documentary evidence "conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]).

Declaratory judgment declaring the Note void as obtained by economic duress

"A contract is voidable on the ground of duress when it is established that the party making the claim was forced to agree to it by means of a wrongful threat precluding the exercise of [that party's] free will" (*Austin Instrument, Inc. v Loral Corp.*, 29 NY2d 124, 130 [1971]). A claim for economic duress must be premised on an entitlement to performance (*805 Third Ave. Co. v M.W. Realty Assoc.*, 58 NY2d 447, 453 [1983]). Further, a contract is not voidable if the defendant "refus[ed] to do that which it [was] not legally required to do (*id.* [holding no claim for economic duress where

the defendant had no contractual obligation to turn over documents that it threatened to withhold]).

Here, plaintiff claims that Levine threatened to breach the “operating agreements” of the parties’ numerous entities formed for each business venture property they purchased (*e.g.* Doc 8, ¶¶ 11-12). Specifically, plaintiff propounds only vague, unsupported statements that the parties had, and defendants breached, obligations under the “parties’ agreements,” the “parties’ contracts,” and the parties’ entities’ “operating agreements” (*e.g. id.* ¶¶ 3, 14, 16, 19, 25, 30, 33, 37, 39). Plaintiff explains vaguely, and without any support or detail regarding the terms of particular contracts at issue, that,

“[u]nder the operating agreements of [each of the parties’ real estate entities], [LP] and [plaintiff], either directly or indirectly through [a particular property entity], would provide capital contributions to purchase properties. [LP’s] primary responsibility was to provide financing and obtain investments from third parties, whereas [plaintiff’s] primary responsibility was to operate and manage the properties through [his management company,] Stone”

(*id.* ¶ 12).

First, plaintiff’s failure to identify with any specificity the agreements or the terms of the agreements that applied to the W. 18th and 47th Properties is fatal to its claim for economic duress with regard to Levine’s alleged threats to derail the sale and refinancing transactions for those two properties if plaintiff did not sign the Note. Plaintiff’s unsupported assertion that the operating agreements governing all of the parties’ 18 identified joint venture properties—including those for the W. 18th and 47th Properties—obligated “[LP and plaintiff], either directly or indirectly through [a special purpose entity,] to provide capital contributions to purchase properties” (*id.* ¶¶ 11-12)

does not bear upon Levine’s alleged threats to refuse to sign paperwork to sell and/or refinance the W. 18th or 47th Properties, which the parties had already purchased.

Further, plaintiff’s generalized allegation that, under the operating agreements for those 18 different properties, LP’s primary responsibility was to provide financing and obtain third-party investments and plaintiff’s primary responsibility was to manage the properties is, likewise, far too vague to state a claim for economic duress as plaintiff has not established that either defendant had any contractual obligation under any agreement to cooperate in a sale or refinancing of the W. 18th or 47th Properties. The allegations are devoid of necessary detail as to any alleged agreement for those two properties; for example, plaintiff does not state the actual parties to, the scope or duration of, or other necessary terms of any agreements controlling the W. 18th or 47th Properties, let alone defendants’ obligations under such agreements.

Plaintiff’s conclusory statement that Levine was “fully aware” of his “obligations to [plaintiff] under the parties’ agreement” and, in spite of that awareness, “threatened that he would not sign the paperwork for the sale [of W. 18th Property] or the refinancing [of 47th Property], nor would he contribute another dollar in capital for [the E. 18th Property],” are also entirely vague and unsupported (*id.* ¶ 25). Whether the agreements plaintiff asserts existed between the parties were oral partnership agreements, operating agreements of the property-business entities, or other contracts, the allegations are inadequate to state a claim for economic duress; as a threshold matter, plaintiff must state, with more than bare legal conclusions, unsupported or contradicted assertions, and obscure generalities, that defendants had an obligation to perform that which they improperly threatened to withhold (*see 805 Third Ave. Co.*, 58 NY2d at 453). Absent a legal obligation to execute paperwork for the sale of the W. 18th Property or the

refinancing of the 47th Property, there can be no economic duress arising from defendants' threat not to consummate those transactions.

Plaintiff's allegations do not establish that defendants had a contractual obligation to facilitate or consummate the transactions that were being negotiated for the W. 18th and 47th Properties, and, therefore, Levine's alleged threat not to perform the sale or refinancing of those properties does not adequately state a wrongful act to support a claim for economic duress. In fact, the operating agreement for the W. 18th Property demonstrates that unanimous consent of the parties (as members of the relevant property entity) is required to effectuate any refinance or sale of that property; thus, there is no contractual obligation to effectuate a sale or refinance of that property under the applicable agreement (Doc 35, ¶ 9 [d]).

Plaintiff's allegations that Levine also threatened not to contribute additional capital or sign a guarantee in support of the parties' E. 18th Property endeavor (*see* Doc 8, ¶ 33 [alleging that Levine "would not contribute any further funds and refused to sign a personal guaranty required under the parties' agreement with Arbor in connection with the [E. 18th Property]," thus, "Levine . . . repudiated his obligations under the parties' contract]) also do not support a claim for economic duress. Even if the E. 18th Property assertions in the complaint are not subject to the MIPRA's claims release provisions—as discussed below—plaintiff's allegations pertaining to an agreement for the E. 18th Property are also unsupported, vague assertions that are insufficient to demonstrate a legal obligation to perform those actions.

While plaintiff may have been "subject to financial pressures and may have lacked equal bargaining power," that alone does not constitute a valid claim for economic duress (*Bethlehem Steel Corp. v Solow*, 63 AD2d 611 [1st Dept 1978]).

Accordingly, the first cause of action for a declaratory judgment voiding the Note as procured under economic duress is dismissed.

Breach of contract and breach of fiduciary duty

Plaintiff alleges in support of his second cause of action that defendants breached the “parties’ contracts [that] governed the parties’ agreement with respect to the [E. 18th Property]” (Doc. 8, ¶¶ 45-46). Specifically, plaintiff asserts that the E. 18th Property contract “required [Levine] to take all reasonable steps necessary for [plaintiff] to make the required distribution to Arbor in connection with [that property] (including but not limited to signing the necessary personal guarantee in support of the distribution” (*id.* ¶ 46). Thus, plaintiff asserts defendants breached that contract as a result of Levine’s refusing to sign “the paperwork” required for that property, rendering plaintiff unable to make a distribution, and resulting in the parties’ default under the Arbor Loan. In support of his third cause of action, plaintiff alleges that defendants owed plaintiff a fiduciary duty as business partners in numerous joint real estate ventures, and defendants breached their fiduciary duty by refusing to sign paperwork necessary to issue the required distribution to Arbor for the E. 18th Property (*id.* ¶¶ 53-54). As a result, plaintiff was required to obtain funding from an alternative lender at less favorable terms (*id.* ¶ 55).

The court rejects plaintiff’s argument in opposition to this motion that the breach of contract and breach of fiduciary claims are not precluded by the MIPRA release. While the parties may have had numerous agreements pertaining to various properties and financing agreements and had plainly been doing business together for several years, the second and third causes of action in the complaint allege a breach of contract and breach of fiduciary duty relating only to the E. 18th Property and related financing.

The claimed breaches plaintiff alleges for those claims are only defendants' refusal to execute a personal guarantee or sign other "required" paperwork for the E. 18th Property; further, the claimed damages are the result of defendants' refusal to sign guarantees or other documents, which plaintiff purports rendered him unable to make a timely distribution to Arbor, and, ultimately, caused the parties to default on the Arbor Loan, requiring plaintiff to obtain alternate financing on less favorable terms.

The MIPRA release provision expressly and broadly releases Levine, his E. 18th Property entity, and any parent/subsidiary entities, from any and all claims relating to the E. 18th Property and its financing (Doc 17, ¶ 8). It further precludes plaintiff from commencing, at any time, any "all manner of actions, suits proceedings, and causes of action" against Levine and his related entities with respect to the E. 18th Property or its financing (*id.*).

Even assuming that defendants, together or singularly, owe a fiduciary duty to plaintiff as a result of their joint business ventures, the second and third causes of action are barred by the MIPRA release.

Generally, "a valid release that is clear and unambiguous on its face constitutes a complete bar to an action on a claim which is the subject of the release absent fraudulent inducement, fraudulent concealment, misrepresentation, mutual mistake or duress" (*Global Precast, Inc. v Stonewall Contr. Corp.*, 78 AD3d 432, 432 [1st Dept 2010]). "[T]o set aside a release on such grounds, a plaintiff must establish the basic elements of fraud" (*Global Minerals and Metals Corp. v Holme*, 35 AD3d 93, 98 [1st Dept 2006]).

Plaintiff does not assert in the complaint, or in his opposition to the motion, that the MIPRA, the release, or the parties' dealings with respect to the E. 18th Property or

other Arbor-related transactions were tinged with fraud. Accordingly, the second and third causes of action are dismissed as barred by the broad, valid release contained in the MIPRA, which forecloses these claims relating to the E. 18th Property.

Defendants' motion, in the alternative, to consolidate this action with the Nassau Action, and plaintiff's cross motion to consolidate this action with the Defamation Action

For the reasons stated above, plaintiff's complaint is dismissed in its entirety; therefore, the court need not reach or consider the motion or cross motion to consolidate this action. Thus, defendant's motion to consolidation this action with the Nassau Action, and plaintiff's cross motion to consolidate this action with the Defamation Action, are denied as moot.

Accordingly, it is

ORDERED that defendants' motion to dismiss the complaint is granted and the complaint is dismissed in its entirety, with costs and disbursements to the defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of the defendants; and it is further

ORDERED that defendants' motion and plaintiff's cross motion to consolidate this action with the Nassau and Defamation Actions, respectively, are denied as moot.

5/6/19
DATE

HON. ANDREW MASLEY

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input checked="" type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	NON-FINAL DISPOSITION
		<input type="checkbox"/>	GRANTED IN PART
		<input type="checkbox"/>	SUBMIT ORDER
		<input type="checkbox"/>	FIDUCIARY APPOINTMENT
		<input type="checkbox"/>	OTHER
		<input type="checkbox"/>	REFERENCE