

NOT TO BE PUBLISHED WITHOUT
THE APPROVAL OF THE COMMITTEE ON OPINIONS

MEGAN AMBROSIO,

Plaintiff,

v.

VINCENT CELII; LINDA BOVINO;
JAMES BOVINO; and LAND
LIMITED, LLC, a LIMITED
LIABILITY COMPANY,

Defendants.

SUPERIOR COURT OF NEW JERSEY

CHANCERY DIVISION

BERGEN COUNTY

DOCKET NO. BER-C-289-14

CIVIL ACTION

OPINION

VINCENT CELII; LINDA BOVINO;
JAMES BOVINO; and LAND
LIMITED, LLC, a LIMITED
LIABILITY COMPANY,

Plaintiffs,

v.

MEGAN AMBROSIO and
ANTHONY AMBROSIO,

Defendants.

Argued: April 2, 2015
Decided: April 7, 2015
Honorable Peter E. Doyne, A.J.S.C.

Batya G. Wernick, Esq. on behalf of the plaintiff, Megan Ambrosio and Anthony Ambrosio (Law Offices of Batya F. Wernick, Esq.).

David De Pierro, Esq. on behalf of the defendants, Vincent Celii, Linda Bovnio, James Bovino, and Land Limited LLC, a Limited Liability Company (De Pierro Radding, LLC).

Introduction

This matter concerns the purchase of property in North Carolina by a group that included recognizable New Jersey real estate developer, James Bovino (“James”). The dispute, at its core,

is simply who is the rightful owner of that property. Megan Ambrosio (“Megan” or “plaintiff”), asserts she loaned funds to Vincent Celli (“Vincent”), Linda Bovino (“Linda”), James and Land Limited, LLC (the “LLC” when referenced individually or the “defendants” when referenced collectively with Vincent, Linda and James) to purchase property that would be held by the LLC. The primary issue, and decisive factor, is what the terms of the loan are.

Plaintiff posits the terms made the lender the only member of the LLC, and the debtors would have eighteen months to repurchase plaintiff’s membership interest in the LLC at a forty percent premium over the face value of the original loan or forfeit their right to repurchase the membership interest, and accordingly, the property.¹ Defendants deny any such terms existed and have brought a third-party complaint against the lender and her husband, Anthony Ambrosio, Esq. (“Anthony” when referenced individually or the “Ambrosios” when referenced collectively with his wife Megan), for fraud premised upon Anthony’s purported misrepresentations that the loan’s terms would be worked out in due time and the Ambrosios failure to ever advise defendants of the loan’s terms both before and after the loan was made.

The Ambrosios’ had this motion filed to dismiss the third-party complaint for failing to plead fraud with specificity and/or state a claim.

Facts and Procedural Posture

Defendants arranged to purchase real property known as Avalon of the Carolinas in Lockwood Folly Township, North Carolina (the “property”) in consideration for \$121,000 (the “transaction”). It is asserted Anthony represented defendants in the transaction. Anthony’s wife, the plaintiff, loaned defendants the funds to purchase the property (the “loan”). The LLC, the

¹ Although the parties refer to “shares” of the LLC, Limited Liability Companies have members not shareholders. Accordingly, the terminology “membership interest” and “member” is used in lieu of “shares” or “shareholder.”

buyer, and Regions Bank, the seller, executed the transaction agreement on October 8, 2012. Closing was to take place on December 6, 2012.

On December 12, 2014, plaintiff filed a lis pendens on the property, though it is unclear whether this was filed in New Jersey or North Carolina.²

The remaining facts are disputed. As this is a motion to dismiss, the court's analysis is based on the pleadings and it must accept the facts alleged in the pleadings as true.³

In their third-party complaint, defendants assert Anthony had previously represented James, Linda and Vincent in other transactions.⁴ James's brother, Gabriel Ambrosio, Esq. ("Gabriel") was James' attorney for decades. Prior to the purchase of the property, defendants assert they were in discussion with various lenders to secure a loan to purchase the property.

Defendants posit no set terms were ever reached with any particular prospective lender. During the course of Anthony's representation of defendants in the transaction, defendants assert Anthony offered to lend them the funds to purchase the property through his wife, the plaintiff. The terms of the loan from the Ambrosios were never established. Anthony simply represented that the terms of the loan would be worked out "in due time" and they would be better than any terms another lender would offer. Defendants requested Anthony provide the terms of the loan on a number of occasions, but Anthony always advised the terms would be worked out "in due time."

Defendants assert the alleged default was created by the Ambrosios never communicating or memorializing the terms of the loan from plaintiff. Defendants posit the Ambrosios are attempting to use defendants' trust of Anthony, developed during Anthony's prior fiduciary

² The lis pendens is properly filed in the situs of the property. See N.C. Gen. Stat. § 1-116; N.J.S.A. 2A:15-6.

³ See Rieder v. State Dept. of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987). The court, however, makes no finding as to the truthfulness of the assertions that shall be detailed hereinafter.

⁴ It is unclear what the nature of the representations was, the frequency of any such representation or the dates of the same.

relationship with them, to take title and possession of the property by a loan mechanism deviously created by the Ambrosios.

To the contrary, in the complaint, plaintiff asserts defendants had reached an agreement to borrow funds from Kanti Patel (“Kanti”). The loan was purportedly structured in the following manner: Kanti would loan \$125,000 to the LLC at a seven percent interest per annum and become the sole member of the LLC. After eighteen months, Kanti would sell his membership interest in the LLC back to the defendants for \$175,000. This agreement was negotiated through and by Shay Hawkenberry (“Shay”).

Plaintiff asserts days before closing, however, defendants were advised Kanti would no longer participate. Plaintiff posits defendants offered her the same terms offered to Kanti. Accordingly, plaintiff was to loan the LLC \$125,000 at seven percent interest per annum, become the sole member of the LLC and resell her LLC membership interest to defendants for \$175,000 after eighteen months.

On October 23, 2014, a two-count complaint with a jury demand was filed on behalf of the plaintiff against defendants. On December 9, 2014, defendants had filed an answer on their behalf. On January 20, 2015, this court permitted defendants to file a third-party complaint within fifteen days. On February 3, 2015, counsel for defendants, David De Pierro, Esq. (“De Pierro”), had filed a third-party complaint against the Ambrosios, asserting claims of conspiracy to commit fraud, fraud and fraud in the inducement.⁵

⁵ The third-party complaint was improperly plead, as plaintiff was already a party. See R. 4:8-1 (allowing third-party complaints against non-parties only). Defendants should have sought and brought a counterclaim against plaintiff and a third-party complaint against Anthony.

On February 24, 2015, the Ambrosios' had filed this motion to dismiss the third-party complaint. On March 12, 2015, defendants' counsel filed opposition to the motion to dismiss. On March 18, 2015, the Ambrosios' counsel filed a reply in further support of the motion to dismiss.

Oral argument was entertained on April 2, 2015.

Law

A. Failure to State a Claim (4:6-2(e))

To survive a R. 4:6-2(e) motion to dismiss, an “indulgent reading of the allegations” in the complaint must simply suggest the fundamental cause of action. See Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989) (citing Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988)) (explaining “[t]he test for determining the adequacy of a pleading [is] whether a cause of action is ‘suggested’ by the facts”); State, Dep't of Treasury, Div. of Inv. ex rel. McCormac v. Qwest Commc'ns Intern., Inc., 387 N.J. Super. 469, 484 (App. Div. 2006). It is well-settled “motions to dismiss should be granted in only the rarest [of] circumstances.” Banco Popular N. Am. v. Gandi, 184 N.J. 161, 165 (2005) (internal quotation marks omitted) (quoting Lieberman v. Port Auth. of N.Y. & N.J., 132 N.J. 76, 79 (1993)). When analyzing a motion to dismiss for failure to state a claim under R. 4:6-2(e), the contested claims must be examined “in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary.” Ibid. At this preliminary stage of the litigation, the claimant need not prove her complaint and she is entitled to every reasonable inference of fact. Ibid. An allegation of fact should be examined painstakingly and with a generous and hospitable approach. Ibid.

A motion to dismiss pursuant to R. 4:6-2(e) should be based on the pleadings, with the court accepting the facts alleged as true. See Rieder, supra, 221 N.J. Super. at 552. Nevertheless,

the motion should be granted if even a generous reading of the allegations does not reveal a legal basis for recovery and discovery would not provide one. Pressler, Current N.J. Court Rules, comment 4.1 on R. 4:6-2 (2014).

B. Conspiracy to Commit Fraud - Civil Conspiracy

A civil conspiracy is "a combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties to inflict a wrong against or injury upon another, and an overt act that results in damage." Banco Popular, *supra*, 184 N.J. at 177 (internal quotation marks omitted) (quoting Morgan v. Union Cnty Bd. of Chosen Freeholders, 268 N.J. Super. 337, 364 (App. Div. 1993), certif. denied, 135 N.J. 468 (1994)).

The essence of a civil conspiracy "claim is not the unlawful agreement, 'but the underlying wrong which, absent the conspiracy, would give a right of action.'" Ibid. (internal quotation marks omitted) (quoting Morgan, *supra*, 268 N.J. Super. at 365)). A civil conspiracy is not the gravamen of the action and only serves to establish joint liability between the defendants. Morgan, *supra*, 268 N.J. Super. at 364; Landriani v. Lake Mohawk Country Club, 26 N.J. Super. 157, 159 (App. Div. 1953) (citation omitted). "The actionable element is the tort which the defendants agreed to perpetrate and which they actually committed." Landriani, *supra*, 26 N.J. Super. at 159.

C. Common Law Fraud

In New Jersey, common law fraud has five elements: "(1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages." Gennari v. Weichert Co. Realtors, 148 N.J. 582, 610 (1997) (citing Jewish Ctr. of Sussex Cty. v. Whale, 86 N.J. 619, 624 (1981)). The fraud must be "established by clear

and convincing evidence.” Weil v. Express Container Corp., 360 N.J. Super. 599, 613 (App. Div. 2003) (citing Albright v. Burns, 206 N.J. Super. 625, 636 (App. Div. 1986)). Importantly, to recover, a plaintiff must show they were injured and the fraud caused them damage. Landriani, supra, 26 N.J. Super. at 161.

R. 4:5-8(a) imposes a heightened pleading standard on “allegations of misrepresentation, fraud, mistake, breach of trust, willful default, or undue influence.” Pressler, Current N.J. Court Rules, comment 1.3 on R. 4:5-8 (2014). A complaint must set forth the “particulars of the wrong, with dates and items if necessary, stated insofar as practicable. Malice, intent, knowledge, and other conditions of the mind of a person may be alleged generally.” R. 4:5-8(a).

Analysis

The Ambrosios brought this motion to dismiss the third-party complaint pursuant to R. 4:6-2(e) and R. 4:6-5. First, it is unclear why the Ambrosios’ counsel, Batya G. Wernick, Esq. (“Wernick”), brought this motion under R. 4:6-5, as the rule governs motions to strike defenses that are insufficient at law. The third-party complaint only contains affirmative claims for damages, as such, the rule is inapplicable.⁶ Second, at this preliminary stage, defendants are given every favorable inference of fact. Therefore, the conflicting versions of the circumstances surrounding the purchase of the property that have been proffered are reconciled by accepting defendants’ version of the facts as true wherever there is a conflict of fact between plaintiff’s complaint and the third-party complaint. As such, for the purposes of R. 4:6-2(e) in this motion, defendants never reached a deal reached with Kanti, Anthony approached defendants and offered to loan the funds through his wife and Anthony repeatedly advised defendants that the terms of the

⁶ Although fraud may be an affirmative defense and/or claim, here, it is only brought as a claim in the third-party complaint as damages are sought.

loan would be worked out in due time. Thereafter, once eighteen months had passed, plaintiff declared the loan in default and asserted ownership of the property.

A. Conspiracy to Commit Fraud

In New Jersey, a claim for conspiracy to commit fraud is analyzed as a separate and distinct cause of action from the underlying fraud. Only the conspiracy need be established state a claim for conspiracy to commit fraud. The elements of the underlying fraud are only considered when analyzing the separate cause of action for fraud. If the fraud claim is ultimately unsuccessful, though, the conspiracy claim also fails. Other courts have acknowledged the same in unpublished decisions, and though the court is mindful they are not binding, R. 1:36-3, the court is free to adopt the reasoning therein. See Nova Bank v. Samuel D. Schenker, LLC, No. A-1840-12T2 (App. Div. Feb. 24, 2015) (slip op. at 6–8) (analyzing the claim for conspiracy to commit fraud as a claim for civil conspiracy separate from the claim for fraud); see also Advance at Branchburg II, LLC v. Branchburg Tp. Bd. of Adjustment, 433 N.J. Super. 247 (App. Div. 2013) (explaining unpublished decisions are not precedential and may be viewed as persuasive authority).

To state a claim for civil conspiracy under R. 4:6-2(e), a claimant only need establish the conspirators shared “the general conspiratorial objective,” accepted them and furthered them either explicitly or implicitly. Banco Popular, supra, 184 N.J. at 177–78 (quoting Jones, supra, 856 F.2d at 992). It has long been established “that the nature of a conspiracy is such that more often than not the only type of evidence available is circumstantial in nature.” Morgan, supra, 268 N.J. Super. at 365 (internal quotation marks omitted) (quoting Board of Education v. Hoek, 38 N.J. 213, 239 (1962)).

The court is satisfied the third-party complaint suggests a cause of action for conspiracy and survives a 4:6-2(e) motion to dismiss.⁷ Printing Mart, supra, 116 N.J. at 746. That is, defendants sufficiently pleaded that the Ambrosios accepted and shared the conspiracy's objective. The third-party complaint asserts the Ambrosios "conspired and acted in concert with one another to defraud and harm defendants." While there are no facts asserted showing the parties explicitly shared and accepted the conspiratorial objective, from the actions addressed below and the surrounding circumstances, it could be inferred that the Ambrosios were acting in concert. See Morgan, supra, 268 N.J. Super. at 365.

Defendants also adequately pleaded that the Ambrosios furthered the conspiracy. They assert plaintiff furthered the scheme by (1) loaning monies to defendants at unidentified terms; (2) subsequently filing the underlying lawsuit to obtain title to the property, the purported purpose of the conspiracy; and (3) filing the lis pendens. Anthony furthered the scheme when he (1) approached defendants with an offer to loan the funds through his wife and (2) represented that the loan terms would be worked out in due time, both before and after purchasing the property. By setting up the loan and not advising defendants of the terms despite their requests, it is asserted the goal of obtaining title to the property in said "fraudulent" manner was furthered as defendants would eventually "default" because they did not know of the loan's terms.

As such, the court is satisfied the defendants have stated a claim for conspiracy to commit fraud, which would create joint liability between the conspirators for the harm caused by the underlying fraud. Morgan, supra, 268 N.J. Super. at 364. Whether the necessary predicate of fraud is sufficiently plead, though, is another issue and is addressed below. See Farris v. County of

⁷ The Ambrosios' counsel did not assert R. 4:5-8 required a heightened pleading standard for the conspiracy.

Camden, 61 F. Supp. 2d 307, 326 (D.N.J. 1999) (finding civil conspiracy is a “‘liability expanding mechanism’ which exists only if [claimant] can prove the underlying ‘independent wrong’”).

B. Fraud

In light of the standards governing the pleading of fraud and motions to dismiss for failure to state a claim, only the individual cause of action for fraud against plaintiff must be dismissed.⁸ A claim for fraud must satisfy the heightened pleading requirements of R. 4:5-8(a). Qwest, supra, 387 N.J. Super. at 484. To satisfy the heightened pleading standard, the appellate division has found a pleading must simply provide a defendant with enough facts to deny or disprove the alleged misconduct, though, intent and knowledge may be alleged generally. See R. 4:5-8(a); Evangelista v. Pub. Serv. Coordinated Transp., 7 N.J. Super. 164, 169 (App. Div. 1950).⁹ Consequently, the complaint must plead the first, fourth and fifth elements of fraud with particularity; while the second and third elements may be alleged generally.¹⁰

To survive a R. 4:6-2(e) motion to dismiss, an “indulgent reading of the allegations” in the third-party complaint must simply suggest a claim for fraud. See Qwest, supra, 387 N.J. Super. at 485–86. A more stringent standard is imposed by R. 4:5-8(a). See Green v. Morgan Properties, 215 N.J. 431, 460 n.7 (2013) (noting the standard under “R. 4:6-2(e) cannot substitute for compliance with our ordinary pleading rules as they relate to claims of fraud”). As such, the third-

⁸ Defendants’ submission, as well as the Ambrosios’ submissions, failed to address the difference between the two fraud claims, fraud and fraud in the inducement, and any implications thereof. As such, this court need not address each separately. Nevertheless, it is noted that there is no written contract, and therefore no parole evidence issues. Consequently, it is unclear why there was a separate claim brought for fraud in the inducement that also seeks damages. It appears both types of fraud are legal fraud and both claims have the same five elements, which would not be the case if one claim was for equitable fraud. Where the relief sought is not damages, a claimant need only establish “equitable fraud, not legal fraud. In order to prove equitable fraud, a plaintiff must demonstrate a material misrepresentation made with intent that it be relied on, coupled with actual detrimental reliance.” Nolan v. Lee Ho, 120 N.J. 465, 472 (1990) (citing Jewish Ctr. of Sussex Cty, supra, 86 N.J. at 625).

⁹ Although this case predates modern R. 4:5-8, courts have interpreted the applicable rule in a similar manner.

¹⁰ As previously stated, the five elements of fraud are: “(1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages.” Gennari, supra, 148 N.J. at 610.

party is complaint is first analyzed to determine if it meets the more rigorous standard under R. 4:5-8(a), which will encompass much, if not all, that is necessary to determine whether an indulgent reading of the third-party complaint states a claim for fraud.

It is noted that the conspiracy claim is predicated upon a successful claim of fraud against at least one conspirator. See Farris, supra, 61 F. Supp. 2d at 326. Accordingly, to maintain the conspiracy claim at this stage of the litigation, the third-party complaint need only satisfy the heightened pleading requirement for one of the Ambrosios. As the third-party complaint has sufficiently plead fraud as to Anthony, no further inquiry is needed.

First, the court is satisfied the third-party complaint sufficiently pleaded Anthony made a material misrepresentation of present fact by representing the terms would be worked out in due time both before and after the purchase of the property on October 8, 2012.¹¹ Gennari, supra, 148 N.J. at 610. There are only two versions of this story, either the terms were set when the loan was executed, but never memorialized in a writing or no terms were ever set. Defendants have taken the latter position and posit the Ambrosios created a fraudulent scheme by representing the term's would be worked out in due time, when in fact, the Ambrosios always intended to assert the loan had the same terms that had been reached with Kanti.

Second, the third-party complaint states the Ambrosios "knew and/or believed these representations to be false." General allegations of the Ambrosios' states of mind are sufficient. R. 4:5-8(a). Third, the general allegation that the Ambrosios intended for defendants to rely on their misrepresentations is sufficiently plead. R. 4:5-8(a).

¹¹ Anthony is also alleged to have represented the loan would have better terms than third-party could receive elsewhere. Counsel have not briefed whether this is a statement of present or past fact, and it is not clear if this is a misrepresentation. As such, it is not considered for the purposes of the court's R. 4:5-8(a) analysis.

Fourth, whether Anthony's prior capacity as a fiduciary to defendants made defendants' reliance on Anthony's statements that the terms of the loans would be worked out in due time reasonable presents an intriguing question, which is sufficiently detailed for Anthony to know what facts he must prove or disprove. Although dates and times would be preferable, premised upon the submissions and lack of detail from either side, the court finds reliance was adequately pled. Lastly, defendants have satisfactorily pled damages by asserting Anthony's misrepresentations put plaintiff in a position to file a lis pendens, which has caused third-party plaintiff's damages by obstructing their ability to develop the property and profit from the investment. No other damages have been specifically pled.

At this preliminary stage, it is not for the court to decide whether the allegations are true, including whether defendants suffered actual damages, paid any consideration for the loan or whether the lis pendens affected their ability to improve the property. The only requirement is the pleading must give the Ambrosios' notice of sufficient facts to deny or disprove the alleged conduct. See Evangelista, supra, 7 N.J. Super. at 169. Here, the Ambrosios have been made aware that the misrepresentation alleged is that the terms would be worked out in due time, defendants' relied on Anthony due to his former fiduciary capacity to eventually offer favorable loan terms and suffered damages due to the lis pendens.

Furthermore, for the reasons set forth herein, the court is satisfied a generous reading of the third-party complaint states a claim for fraud against Anthony. R. 4:6-2(e); see Banco Popular, supra, 184 N.J. at 165. The third-party complaint, however, does not sufficiently plead an individual claim for fraud against plaintiff.

To satisfy R. 4:5-8, defendants needed to assert they reasonably relied on plaintiff's misrepresentation. Defendants failed to allege plaintiff made a misrepresentation and/or that

defendants relied upon it. At oral argument, De Pierro was given the opportunity to articulate the individual fraud claim against plaintiff, separate and apart from the conspiracy cause of action. De Pierro, as well as the complaint, failed to express a fraud claim against plaintiff distinct from the conspiracy. The record presented is completely void of any conduct or communications from plaintiff, other than making the loan, which could be construed as a representation by plaintiff that defendants detrimentally relied upon. Plaintiff's only conduct was loaning the funds. As such, defendant's fraud claim against plaintiff must be dismissed.

De Pierro requested leave to amend the third-party complaint, as a meeting with his client may elucidate the facts necessary to state a claim for fraud against plaintiff. De Pierro further advised that an amendment of this sort was within the contemplated framework of R. 4:6-2. Defendants are afforded the opportunity to replead within fifteen days of the date of the order, but to curtail frivolous expenses, plaintiff is permitted to seek sanctions if she must move again to dismiss the fraud claim and is successful.

Conclusion

An indulgent reading of the third-party complaint reveals a claim for conspiracy to commit fraud by the Ambrosios and fraud against Anthony. See R. 4:6-2(e). Defendants assert the Ambrosios had a plan to deceptively take title to the property knowing there were no loan terms, when in fact the Ambrosios planned to later assert the loan had terms that required repayment/repurchase in eighteen months, but only after eighteen months had expired, and continued to advise defendants the terms would be worked out in due time until defendants defaulted under the "terms" the Ambrosios had always planned to enforce.

The third-party complaint pleaded fraud with sufficient particularity as to give Anthony notice of his conduct at issue. Conversely, the third-party complaint did not plead fraud with

sufficient particularity as to give plaintiff notice of her conduct at issue. As neither counsel specifically addressed the fraud in the inducement claim in their papers or at oral argument, it survives this motion. If it had been presented, an intriguing question would have been raised – whether a claim for conspiracy to commit fraud may establish joint liability arising from a claim for fraud and/or fraud in the inducement.¹²

The motion is granted in part and denied in part.

Defendants' counsel shall submit an order under the five-day rule in conformity with this decision.

¹² It is unclear whether an additional claim for conspiracy to commit fraud in the inducement is required.