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| <b>CABS Nursing Home Co., Inc. v NNRC LLC</b>  |
| 2017 NY Slip Op 32087(U)   |
| October 3, 2017  |
| Supreme Court, Kings County  |
| Docket Number: 522385/2016   |
| Judge: Sylvia G. Ash   |
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At an IAS Term, Comm-11 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 3rd day of October, 2017.

P R E S E N T:

HON. SYLVIA G. ASH,

Justice.

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CABS NURSING HOME COMPANY, INC.,

Plaintiff(s),

- against -

NNRC LLC, NNRC PROPERTIES LLC, 270 NOSTRAND LENDER LLC, THE ALLURE GROUP, INC., JOEL LANDAU, MARVIN RUBIN, SHLOME LANDAU and SOLOMON RUBIN,

Defendant(s).

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The following e-filed papers numbered 42 to 157 read herein:

**DECISION AND ORDER**

Index # 522385/2016

**Mot. Seq. 1 - 4**

Papers Numbered

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and  
Affidavits (Affirmations) Annexed\_\_\_\_\_

42-75; 96-106

Opposing Affidavits (Affirmations)\_\_\_\_\_

76-95; 107-142

Reply Affidavits (Affirmations)\_\_\_\_\_

144-157

Before the Court are: (1) the motion to dismiss by Defendants, NNRC LLC (“NNRC”), NNRC PROPERTIES LLC (“NNRC Properties”), THE ALLURE GROUP, INC. (“Allure”), JOEL LANDAU (“Joel”), MARVIN RUBIN (“Marvin”), SHLOME LANDAU (“Shlome”) and SOLOMON RUBIN (“Solomon”)(hereinafter collectively referred to as the “Allure Group Defendants”); the motion to dismiss by Defendant, 270 NOSTRAND LENDER LLC (“270 Nostrand”); (2) the Allure Group Defendants’ motion for a protective order and a stay of discovery pending resolution of its motion to dismiss; and (3) the motion by Plaintiff, CABS NURSING HOME COMPANY, INC. (“CABS”), to vacate a Court Order dated April 3, 2015, which granted approval of CABS’s petition pursuant to Sections 510 and 511 of the Not-for-Profit Corporation Law

for the sale of its assets in a separate special proceeding under Kings County Supreme Court Index Number 2719/2015, and upon vacatur, denying said petition.

### *Background*

On December 16, 2016, CABS commenced the instant action for rescission of the subject contracts alleging, among other things, that it was induced to sell its nursing home and associated real property to the Allure Group Defendants on the false promise that the nursing home would be maintained on the premises in perpetuity. It is undisputed that the relevant agreements entered into for the aforementioned sale do not contain any language obligating Allure to maintain the premises as a nursing home. For the purposes of determining Defendants' motions, the Court accepts the facts as alleged in the Amended Complaint to be true.

Since 1973, CABS owned and operated a nursing home facility, CABS Nursing Home, at 270 Nostrand Avenue in Brooklyn, New York (nursing home at times referred to as "Nostrand"). In 2009, due to a "confluence of factors," and despite decades of previous prosperity, CABS began to suffer financial losses multiple years in a row, eventually reaching a loss of \$3 million per year (Amended Complaint, Paragraphs 8, 9). As a result, CABS's Board of Directors decided to sell Nostrand and "set out to find a buyer who had the experience and expertise necessary to continue to run CABS as a successful nursing home that would continue to meet the needs of the local community" (*Id.* at Paragraph 10). Out of multiple bidders, Allure,<sup>1</sup> owned and managed by the Rubin family, rose to the top as the winning bidder because Allure "had the right combination of experience, expertise and opportunity to turn the financial future of the nursing home around..." (*Id.* at Paragraph 13).

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<sup>1</sup> According to the Allure Group Defendants, Allure's main function is to provide back-office and logistical support to its for-profit nursing homes in New York City in which the Rubin family has an ownership interest. The Allure Group Defendants currently operate six nursing homes in New York City under the Allure brand.

Thus, on or about June 14, 2013, after some negotiation, CABS accepted the Allure Group Defendants' increased bid of \$20.6 million. By contract dated November 22, 2013, NNRC<sup>2</sup> purchased substantially all of CABS's assets for \$5 million ("Asset Purchase Agreement"). The Asset Purchase Agreement totals approximately 53 pages. By separate contract dated same, NNRC Properties purchased CABS's real property for \$15.6 million ("Real Property Agreement" and together with the Asset Purchase Agreement referred to as the "Purchase Agreements"). The Real Property Agreement totals approximately 18 pages. The closing of the Purchase Agreements did not occur until two years later, on June 30, 2015, due to the parties having to obtain all of the necessary regulatory approvals concerning the sale of a nursing home.

According to CABS, on October 9, 2015, it learned from a real estate blog that permits filed with the Department of Buildings revealed that developers were planning a new 241-unit residential building at Nostrand's premises (Amended Complaint, Paragraph 23, 171). On December 18, 2015, NNRC filed a letter with the regional office of the Department of Health ("DOH") indicating that Nostrand would close. On January 12, 2016, NNRC filed a revised closure plan advising DOH that the building would be sold to a developer who planned to demolish the nursing home to construct an apartment building. DOH approved NNRC's plan on February 12, 2016.

In its Amended Complaint, CABS alleges that Joel and Allure repeatedly and clearly represented that they would continue to maintain the nursing home in perpetuity and that CABS would not have sold the facility to Allure without the specific commitment that the premises would continue as a nursing home. CABS further alleges that, "on the eve of the closing of the sale to Allure, CABS rejected an offer from an unsolicited bidder that made clear its intentions to convert the Facility into luxury apartments, despite the fact that the offer was for more than double the offer presented by Allure" (Amended Complaint at Paragraph 15). According to CABS, that the purpose

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<sup>2</sup> According to the Allure Group Defendants, NNRC was formed to purchase the operating assets of CABS while NNRC Properties was formed to purchase the associated real property. Joel, Marvin and Solomon each own a one-third interest in NNRC and NNRC Properties. Shlome does not have any ownership interest in these entities but was, at all relevant times, employed by Allure.

of Nostrand's sale to Allure was for Allure to maintain the premises as a nursing home is evidenced by the way the deal was structured. Specifically, that CABS chose Loeb & Troper ("L&T") to broker the sale because L&T had previously assisted with the sale of skilled nursing facilities to entities that wished to continue to run the facilities as a nursing home, and, secondly, the parties would not have otherwise went through the long process of obtaining approvals from the Charities Bureau of the Attorney State General's Office and the DOH.

Allure Group Defendants' Motion to Dismiss

With the instant motion, the Allure Group Defendants move to dismiss the Amended Complaint.<sup>3</sup> The Allure Group Defendants argue that CABS is simply re-branding its legally insufficient breach of contract claims as fraudulent inducement. First, the Allure Group Defendants argue that CABS's breach of contract claim (second cause of action) must be dismissed because nothing in the Purchase Agreements obligates Allure to operate the premises as a nursing home for any length of time.

Secondly, the Allure Group Defendants contend that CABS's fraudulent inducement claim fails because the alleged promise that a nursing home would be operated in perpetuity is belied by the express terms of the Purchase Agreements. Specifically, that the Asset Purchase Agreement obligated CABS to "operate and conduct the Business in the Ordinary Course of Business consistent with past practice" until the closing date but no similar post-closing obligation was placed on Allure. Further, that because the parties knew how to draft a provision requiring continued operation of the nursing home, the failure to include any such obligation on the part of the Allure Group Defendants confirms that continued operation of a nursing home was not required. In addition, the Allure Group Defendants point out that the Purchase Agreements contain nearly identical integration clauses that unequivocally provide that the Purchase Agreements constitute "the entire agreement among the Parties" and "supersede all prior agreements and understandings of the Parties."

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<sup>3</sup> Although the motion is titled as one seeking to dismiss the Amended Complaint in its entirety, the motion, in fact, seeks to dismiss every cause of action except CABS's third cause of action seeking indemnification for union pension withdrawal liability.

The Allure Group Defendants also argue that CABS's fraud claims are duplicative of its defective breach of contract claim. Specifically, that CABS's breach of contract claim similarly alleges that "NNRC and NNRC Properties materially breached their obligations, *inter alia*, by not "continuing operating as a Nursing Home..." and that these "breaches go to the very heart of the Agreements and render them meaningless" (Amended Complaint, Paragraph 221, 224) and also seeks identical redress—rescission of the Purchase Agreements. Additionally, the Allure Group Defendants argue that the alleged false promise to operate the nursing home is not a collateral promise but, rather, goes to the very "heart" of the Agreements and is therefore duplicative of a breach of contract claim.

In opposition to the Allure Group Defendants' motion to dismiss, CABS submits that it has stated a claim for fraudulent inducement, one that began with a specific promise by Joel on July 12, 2013, that Allure would keep Nostrand as a nursing home in perpetuity, when he knew at that time that the promise was a lie. CABS alleges that this promise was repeated over two years and forms the basis for the Purchase Agreements' existence.

CABS argues that its fraudulent inducement claim is not belied by the explicit terms of the Purchase Agreements. According to CABS, the Asset Purchase Agreement's reference to CABS's obligation to operate the nursing home in the ordinary course of business until closing supports the notion that the nursing home would continue to operate as such because Allure would not have insisted that CABS operate the nursing home until closing unless Allure had also promised to do the same after the closing. Furthermore, CABS argues that the general integration clauses in the Purchase Agreements cannot bar its fraudulent inducement claim because a general disclaimer is insufficient to bar CABS's claim that Allure made a specific promise to operate a nursing home after the sale.

Secondly, CABS argues that its fraudulent inducement claim is not duplicative of its breach of contract claim because a fraud claim may be asserted where there is a duty independent of the contract or where the defendant fraudulently induces the making of the contract through false



representations of its then-existing intention to perform. CABS contends that its breach of contract claim concerns NNRC's failure to comply with indemnity obligations pertaining to withdrawal liability by the pension fund and, therefore, is independent of its fraudulent inducement claim. In addition, CABS submits that even if the Court determines that its fraud claim is duplicative of the breach of contract claim, that would only bar a fraud claim against the two signatories of the Purchase Agreements, NNRC and NNRC Properties, as there is no breach of contract claim asserted against the remaining Allure Group Defendants.

CABS further argues that its allegation that the Allure Group Defendants misrepresented its intention at the time of contracting is supported by: (1) the Rivington Comptroller Report which details the almost identical steps that Allure took in defrauding the city and state during its acquisition and sale of the nursing home known as the Rivington House Home including misrepresenting its intention to continue to operate the home; (2) the June 30, 2015 mortgage agreement with 270 Nostrand which clearly contemplated closure of the nursing home despite Joel's promises made the same day to CABS's employees stating that "nothing would change;" (3) Allure hiring an administrator on or around July 31, 2015, to start moving patients out of the home; and (4) the fact that Allure never ordered new stationary or changed the signs on the building or obtained a new provider number for Medicaid or Medicare reimbursements.

270 Nostrand's Motion to Dismiss

270 Nostrand also moves to dismiss the Amended Complaint as against them. It is undisputed that 270 Nostrand provided the funding to Allure to purchase the nursing home and associated real property. The mortgage agreement entered into between the Allure Group Defendants and 270 Nostrand is dated the same day as the closing of the Purchase Agreements and, according to CABS, serves as the basis for its claim against 270 Nostrand that it aided and abetted Allure's fraud. In its Amended Complaint, CABS alleges that 270 Nostrand knew of Allure's hidden intention to close the nursing home because (1) the mortgage agreement contains a provision that Allure must indemnify 270 Nostrand from any claims by or litigation with any current or former

occupants of the nursing home on account of the nursing home's closure; and (2) the mortgage agreement contains an option for 270 Nostrand to purchase the property at two different prices: at one price if the home was emptied of patients and there was no litigation pending and at another price if the home was not emptied and/or litigation was pending.

In addition to joining in the Allure Group Defendants' dismissal arguments, 270 Nostrand argues that CABS allegations against it for aiding and abetting fraud are insufficient because CABS fails to allege how the mortgage agreement's provisions reflect 270 Nostrand's "actual knowledge" that any defendant intended to deceive CABS into choosing Allure as the winning bidder two years before when the Purchase Agreements were entered into. 270 Nostrand argues that courts have repeatedly rejected aiding and abetting fraud claims based on the kind of "circumstantial leap of logic" employed by CABS by its mere allegation that 270 Nostrand "must have known" of the Allure Group Defendants' purported fraud based on certain provisions of the mortgage agreement.

In addition to being unable to satisfy the "actual knowledge" element of its claim, 270 Nostrand argues that CABS cannot show that it "substantially assisted" the alleged fraud because the 2015 loan could not constitute substantial assistance to a fraud that allegedly occurred in 2013. Secondly, 270 Nostrand argues that the loan was not the proximate cause of CABS's alleged harm since there is nothing to suggest that Allure would not have won the bid or acquired Nostrand without 270 Nostrand's financing.

In opposition to 270 Nostrand's motion to dismiss, CABS argues that it has sufficiently pled aiding and abetting fraud because it alleges that 270 Nostrand knew that CABS was entering this closing having been falsely told by Allure that the nursing home would remain open. CABS further alleges that 270 Nostrand negotiated with Allure to be reimbursed for its part in the fraud as evidenced by the mortgage agreement provisions expressly indemnifying 270 Nostrand in the event Allure emptied the nursing home as well as the mortgage agreement provision that provided separate option prices depending on whether Allure had emptied the home or not.



### Discussion

On a motion to dismiss a plaintiff's claim pursuant to CPLR §3211[a][7] for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see Campaign for Fiscal Equity v State*, 86 NY2d 307, 317 [1995]). Rather, the court is required to afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference (*Kamchi v Weissman*, 125 AD3d 142, 150 [2d Dept 2014]). The court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). "A motion to dismiss pursuant to CPLR 3211[a][1] will be granted only if the documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Fontanetta v John Doe 1*, 73 AD3d 78, 83-84 [2d Dept 2010] [*quoting Fortis Fin. Servs. v Fimat Futures USA*, 290 AD2d 383, 383 [1st Dept 2002]).

It is a well established principle that "written agreements are construed in accordance with the parties' intent and '[t]he best evidence of what parties to a written agreement intend is what they say in their writing'" (*Schron v Troutman Sanders LLP*, 20 NY3d 430, 436 [2013] [*citation omitted*]). "As such, 'a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms'" (*Id.*). "Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing" (*W.W.W. Assocs. v Giancontieri*, 77 NY2d 157, 162 [1990]). This rule imparts "stability to commercial transactions by safeguarding against fraudulent claims, perjury, death of witnesses \* \* \* infirmity of memory \* \* \* [and] the fear that the jury will improperly evaluate the extrinsic evidence" (*Id. citing Fisch*, *New York Evidence* §42, at 22 [2d ed]). Courts have "emphasized this rule's special import in the context of real property transactions, where commercial certainty is a paramount concern, and where... the instrument was negotiated between sophisticated, counseled business people negotiating at arm's length" (*Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]).

“The essential elements of a cause of action sounding in fraud are a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury” (*Orlando v Kukielka*, 40 AD3d 829, 831 [2d Dept 2007]). “In the context of a contract case, the pleadings must allege misrepresentations of present fact, not merely misrepresentations of future intent to perform under the contract, in order to present a viable claim that is not duplicative of a breach of contract claim” (*Wyle Inc. v ITT Corp.*, 130 AD3d 438, 439 [1st Dept 2015]). A claim for fraudulent inducement of contract can be predicated upon an insincere promise of future performance only where the alleged false promise is collateral to the contract the parties executed; if the promise concerned the performance of the contract itself, the fraud claim is subject to dismissal as duplicative of the claim for breach of contract (*HSH Nordbank AG v UBS AG*, 95 AD3d 185, 206 [1st Dept 2012]).

Upon review of the parties papers and the evidence submitted therein, the Court finds that CABS’s fraud related causes of action must be dismissed. First, the Court finds that CABS fails to state a cause of action for fraudulent inducement because there is a “meaningful” conflict between the written provisions of the Purchase Agreements and the alleged oral misrepresentation, which negates a claim of a reasonable reliance upon the oral representation (*see Stone v Schulz*, 231 AD2d 707, 707-08 [2d Dept 1996]). Upon the Court’s own review of the Asset Purchase Agreement totaling a comprehensive 53 pages, the Court notes that there is a section dedicated to the Representations and Warranties of the Buyer (Article V, Section 5.2) as well as a section dedicated to Continuing Covenants (Article VII). The Allure Group Defendants’ supposed covenant to continue the nursing home is not found in either of these sections.

The Asset Purchase Agreement is not silent, however, with regards to CABS’s obligation to operate and conduct the nursing home in the ordinary course of business consistent with past practice from the date of the agreement until the date of closing. In fact, the agreement delineates no less than 13 items that CABS must continue to do until closing, such as maintain sufficient personnel to

operate the business and use commercially reasonable efforts to maintain the goodwill of residents and vendors. That the agreement imposes no such obligations on Allure post-closing is fatal to CABS's claim.

CABS alleges that it was induced to enter into the Purchase Agreements on the false promise that the nursing home would be operated in perpetuity. But how can the promise of operating a business *in perpetuity*, especially one that had been bogged down by financial struggle, not be reflected and negotiated in a contract with terms outlining situations of permissible closure? The answer is not that the promise was not made but that any such promise, if made, cannot be reasonably relied upon if not embodied in an agreement. Based on the foregoing, the Court finds that CABS cannot show justifiable reliance and, absent the element of reliance, CABS fails to state a cause of action for fraud in the inducement (*see Bango v Naughton*, 184 AD2d 961, 963 [3d Dept 1992]).

Secondly, contrary to CABS's arguments, the Court finds that CABS's fraud claim is duplicative of its breach of contract claim. CABS's allegation that the Allure Group Defendants falsely promised to continue to operate the nursing home at the premises when it had no intention of doing so constitutes a misrepresentation of future expectation rather than a misrepresentation of present fact (*see Country-Wide Leasing Corp. v Subaru of America, Inc.*, 133 AD2d 735, 736 [2d Dept 1987]). Moreover, the false promise is not collateral to the contract, rather, it is the unreflected "heart" of the contract and the entire reason for its being, as CABS itself so represents.

For the reasons stated above, Defendants' motions to dismiss CABS's claims premised upon the alleged false promise, namely the first, second, fourth, fifth and sixth causes of action, is granted.

Having dismissed CABS's fraud claims, CABS's cause of action for aiding and abetting fraud against 270 Nostrand must also be dismissed. Even if the Court had denied the Allure Group Defendants' motion to dismiss, dismissal of CABS's claim for aiding and abetting fraud against 270 Nostrand would be warranted on the basis that CABS's allegations fail to state a cause of action against 270 Nostrand. A plaintiff alleging aiding and abetting fraud must allege the existence of the

underlying fraud, actual knowledge, and substantial assistance (*see Weinstein v CohnReznick, LLP*, 144 AD3d 1140, 1141 [2d Dept 2016]). Actual knowledge need only be plead generally, especially at the pre-discovery stage (*see Chambers v Weinstein*, 135 AD3d 450, 451 [1st Dept 2016]). Substantial assistance exists “where (1) a defendant affirmatively assists, helps conceal, or by virtue of failing to act when required to do so enables the fraud to proceed, and (2) the actions of the aider/abettor proximately caused the harm on which the primary liability is predicated” (*Stanfield Offshore Leveraged Assets, Ltd. v Metropolitan Life Ins. Co.*, 64 AD3d 472, 476 [1st Dept 2009]). Here, CABS cannot meet the “substantial assistance” prong of its aiding-and-abetting fraud claim as the alleged fraud occurred two years prior to 270 Nostrand’s involvement and, therefore, 270 Nostrand could not have aided and abetted the alleged fraud. Moreover, at the time of closing, presuming 270 Nostrand knew that Allure had perpetrated a fraud and was continuing to do so, CABS fails to allege that 270 Nostrand possessed any duty to disclose such fraud to CABS. Accordingly, CABS’s claim against 270 Nostrand fails.

As a result of the foregoing determinations, CABS’s application to vacate the petition approving the sale of the nursing home on the basis of fraud must be denied.

Accordingly, it is hereby

ORDERED that the Allure Group Defendants’ motion to dismiss the first, second, fourth, fifth and sixth causes of action is GRANTED; it is further

ORDERED that 270 Nostrand’s motion to dismiss is GRANTED; it is further

ORDERED that the Allure Group Defendants’ motion to stay discovery is GRANTED *nunc pro tunc* as of July 12, 2017; and it is further

ORDERED that CABS’s motion to vacate is DENIED.

This constitutes the Decision and Order of the Court.

E N T E R,



Sylvia G. Ash, J.S.C.