No. 155

James Sykes et al.,
Appellants,
v.
RFD Third Avenue 1 Associates, LLC, et al.,
Defendants,
Cosentini Associates, LLP,
Respondent.

Jeffrey R. Metz, for appellants.
Richard E. Lerner, for respondent.

SMITH, J.:

We hold that an action for negligent misrepresentation must be dismissed where the complaint does not allege that the misrepresentations were made with knowledge that plaintiffs would rely on them.

Cosentini Associates, a mechanical engineering firm,

was hired to design the heating, ventilation and air conditioning systems for a Manhattan condominium. Plaintiffs, who bought an apartment in the building, claim that Cosentini designed the systems negligently, with the result that their apartment was too cold in winter and too hot in summer. They brought claims against Cosentini for breach of contract, professional malpractice, fraud and negligent misrepresentation. It is now undisputed that the first two of those claims are barred by the statute of limitations, and that plaintiffs have not pleaded a valid fraud claim. Only the claim for negligent misrepresentation is now before us.

That claim is based on statements made in the offering plan given to plaintiffs before they purchased their apartment. The plan contained descriptions of the heating and air conditioning systems, saying among other things that they were capable of maintaining certain indoor temperatures in hot and cold weather. Plaintiffs allege that these statements can be attributed to Cosentini; that Cosentini was negligent in making them; that the statements were false; and that plaintiffs relied on them in purchasing their apartment.

Supreme Court denied Cosentini's motion to dismiss the claim. The Appellate Division, with two Justices dissenting, reversed, holding that plaintiffs had failed to allege a relationship between themselves and Cosentini of the kind that is necessary in a negligent misrepresentation case. Plaintiffs

appeal to this Court as of right, pursuant to CPLR 5601 (a), and we now affirm.

It has long been the law in New York that a plaintiff in an action for negligent misrepresentation must show either privity of contract between the plaintiff and the defendant or a relationship "so close as to approach that of privity" (Ultramares Corp. v Touche, 255 NY 170, 182-183 [1931] [Cardozo, Ch.J.]; see Glanzer v Shepard, 233 NY 236 [1922] [Cardozo, J.]). In Credit Alliance Corp. v Arthur Anderson & Co. (65 NY2d 536, 551 [1985]), an action against a firm of accountants, we listed "certain prerequisites" that "must be satisfied" before the necessary relationship will be found to exist:

> "(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 the accountants linking them to that party or parties, which evinces the accountants' understanding of that party or parties' reliance."

We have made clear since Credit Alliance that these requirements do not apply to accountants only -- indeed, we have applied them in an action against engineering firms (Ossining Union Free School Dist. v Anderson LaRocca Anderson, 73 NY2d 417, 424 [1989]).

Plaintiffs' claim here fails the second branch of the Credit Alliance test: plaintiffs have not sufficiently alleged that they were a "known party or parties," as Credit Alliance

requires. While Cosentini obviously knew in general that prospective purchasers of apartments would rely on the offering plan, there is no indication that it knew these plaintiffs would be among them, or indeed that Cosentini knew or had the means of knowing of plaintiffs' existence when it made the statements for which it is being sued.

The words "known party or parties" in the Credit Alliance test mean what they say. That is confirmed by Westpac Banking Corp. v Deschamps (66 NY2d 16 [1985]), decided a few months after Credit Alliance. There the plaintiff, Westpac, had made a bridge loan to a borrower, Turnkey, that was unable to repay it. Westpac sued an accounting firm, Seidman, for negligently certifying Turnkey's financial statements. Westpac alleged that, when Seidman made the certification, it knew that a bridge lender would rely on it, and that it knew or could have known that Westpac was a possible bridge lender. We held that this was not enough:

> "Westpac claims only that it was one of a class of 'potential bridge lenders,' to which class as a whole Seidman owed a duty, and that it should be considered a 'known party' because it was as of the date of the certification a substantial lender to Turnkey, and 'thus a prime candidate for a bridge loan.' This is not, however, the equivalent of knowledge of 'the identity of the specific nonprivy party who would be relying upon the audit reports' (Credit Alliance Corp. v Andersen & Co., 65 NY2d, at p 554, supra)."

(Id. at 19).

Westpac was, if anything, a stronger case for the plaintiff than this one. Here, it is not even alleged that Cosentini knew or had the means of knowing that plaintiffs were possible purchasers of an apartment. Since Cosentini did not know "the identity of the specific nonprivy party who would be relying," the complaint falls short of satisfying the Credit Alliance test. Board of Managers of Astor Terrace Condominium v Schuman, Lichtenstein, Claman & Efron (183 AD2d 488 [1st Dept 1992]), relied on by the Appellate Division dissenters, is, as the Appellate Division majority pointed out, inconsistent with Credit Alliance and our cases applying it.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

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Order affirmed, with costs. Opinion by Judge Smith. Chief Judge Lippman and Judges Ciparick, Graffeo, Read, Pigott and Jones concur.

Decided October 19, 2010