

Hansen-Nord v Youmans
2015 NY Slip Op 31684(U)
September 1, 2015
Supreme Court, New York County
Docket Number: 651924/2014
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

-----X
TOVE HANSEN-NORD, individually and on
behalf of PASTA LA VISTA, INC.,

Plaintiff,

-against-

DECISION AND
ORDER

Index No. 651924/2014

ANDREW YOUMANS, YOMO CONSULTING,
LLC, FEDERMAN, LALLY & REMIS, LLC, BRIAN
J. MCCANNENY, BRIAN J. MCCANNENY, INC.,

Defendants.

-----X
HON. ANIL C. SINGH, J.:

In this action for fraud, conspiracy and racketeering, defendant Meister Seelig & Fein LLP (“MSF”) and Judd H. Cohen, Esq., move to dismiss the amended complaint (Mot. Seq. 003); defendants Andrew Youmans and Yomo Consulting, LLC move to dismiss the amended complaint (Mot. Seq. 004); and defendants Brian J. McAnneny and Brian J. McAnneny Consulting, Inc., move to dismiss the amended complaint (Mot. Seq. 005). Plaintiff opposes motion sequence 003-005 in an omnibus brief and cross-moves for leave to file a second amended complaint.

Additionally, defendant Federman Lally & Remis LLC (“Federman”) moves to dismiss the first amended complaint. Plaintiff opposes. (Mot. Seq. 006).

Lastly, plaintiff moves to disqualify defendant Meister Seelig & Fein LLP, Christopher J. Major and Howard Koh as counsel, who in this action represent the following: defendants Andrew Youmans and Yomo Consulting, LLC (collectively "Youmans") and Brian J. McAnney and Brian J. McAnney Consulting, Inc. (collectively "McAnney"). Defendants Youmans and McAnney oppose. (Mot. Seq. 007). Motion sequence 003 – 007 are consolidated for disposition.

Facts

This case arises out of the commingling of funds between plaintiff, her ex-husband Stephen Fortier, and their restaurants, including Pasta La Vista, Inc. ("Pazza Notte") and Pazza Notte Columbus, LLC ("Loft"). Several promissory notes were executed by the corporate restaurants in favor of defendant Youmans. Ultimately, defendant Youmans initiated a lawsuit against plaintiff's husband Fortier in 2008 alleging breach of fiduciary duty and seeking the amount owed. Tove Hansen-Nord, Pazza Notte, and Fortier entered into a settlement agreement with Youmans dated June 5, 2008, as amended on June 27, 2008. Plaintiff Nord further executed a personal guaranty on June 13, 2008. Plaintiff now alleges, *inter alia*, fraudulent inducement in order to set aside that settlement agreement.

Cross Motion

This Court grant's plaintiff's motion for leave to file the second amended complaint. The amendments do not materially alter the allegations of the first

amended complaint and accordingly there is no prejudice (Demry v Wind, 82 AD3d 670, 671 [1st Dept 2011]). In the interest of judicial economy, this Court will apply defendants' motions for dismissal to apply to the second amended complaint herein.

Motion Sequence 003

Defendant Meister Seelig & Fein LLP ("MSF") and Judd H. Cohen, Esq. ("Cohen") move to dismiss the amended complaint pursuant to CPLR (a) (1), (5) and (7) on the first (aiding and abetting), fifth (breach of fiduciary duty), sixth (fraud), seventh (fraudulent inducement), eighth (unjust enrichment), ninth (indemnification) and tenth (injunctive relief) causes of actions. Plaintiff opposes.

Defendant Judd H. Cohen, Esq., is a partner at the law firm defendant MSF. They represented defendant-creditor Youmans in the underlying "Fortier" [the ex-husband] litigation, which resulted in the settlement agreement at issue. Plaintiff alleges that throughout the preparation and negotiation of the settlement agreement, MSF advised and counseled plaintiff Nord, "without consideration or representation by independent counsel." (Second Am. Compl. at ¶ 97-98). Subsequently, in 2011 defendant MSF and Cohen represented plaintiff in the negotiation of her lease with her landlord, subject to a conflict-of-interest waiver. (Second Am. Compl. at ¶ 83-4).

Statute of Limitations

The crux of plaintiff's complaint stems from her assertion that "defendants Meister, Cohen, Federman and McAnney lent active assistance to Youmans both in fraudulently inducing the settlement agreement, consulting agreements and Nord guaranty, and in the years which followed during which Pazza Notte was fleeced by these defendants and they each actively induced plaintiffs to make payments that Youmans was not entitled to." (Second Am. Compl. at ¶ 142). The settlement agreement is dated June 5, 2008, as amended on June 27, 2008. The consulting agreement is dated June 17, 2008.

Applicable Statutes of Limitations

Under the law of New York the claims herein for fraud, aiding and abetting, fraud, fraudulent inducement and unjust enrichment are subject to a six year statute of limitations (CPLR §213(1) and (8); Standard Realty Associates, Inc. v. Chelsea Gardens Corp., 105 A.D.3d 510, 964 N.Y.S.2d 94 [1st Dept 2013] (six year statute of limitations applies to a claim for unjust enrichment); Pike v. New York Life Insurance Co., 72 A.D.3d 1043 [2d Dept 2010] (six year statute of limitations applies to a claim of fraudulent inducement); CSAM Capital, Inc. v. Lauder, 67 A.D.3d 149 [1st Dept 2009] (six year statute of limitations applies to a claim for aiding and abetting fraud); Avalon, LLC v. Derfner & Mahler, LLP, 16 A.D.3d 209 [1st Dept 2005] (six year statute of limitations applies to claim of fraud. A cause of action for breach of fiduciary, as herein, which seeks a monetary remedy,

is subject to a three year statute of limitations); CPLR 214(4); IDT Corp. v. Morgan Stanley Dean Witter & Co., 12 N.Y.3d 132 [2009]).

Accrual of claims

“Where an action for reformation or rescission is based on fraud, it must be brought either within six years of the commission of the fraud, or within two years from the discovery of the fraud or from when the fraud could have been discovered with reasonable diligence; these statutes of limitations govern all claims sounding in fraud (CPLR 213[8]; CPLR 203 [g])”. (Goldberg v Manufacturers Life Ins. Co., 242 AD2d 175, 180 [1st Dept 1998]).

Plaintiff argues that the statute of limitations began to accrue in 2010 when her first payment was due under the settlement agreement. She reasons that the payment constitutes her damages, which is the last element of her fraud claim. On the other hand, MSF and Cohen argue that plaintiff’s claims accrued at the time she executed the agreement in 2008.

The First Department has held that a claim for fraud in the procurement of a settlement agreement accrues at the time of settlement (New York City Tr. Auth. v Morris J. Eisen, P.C 276 AD2d 78, 85-86 [1st Dept 2000]). “Because a cause of action for fraud cannot accrue until every element of the claim, including injury, can truthfully be alleged, the motion court correctly concluded that [plaintiff’s] fraud claim accrued no earlier than the settlement.” (id.).

Likewise, the First Department has more recently held that the accrual period for a rescission of a contract commences when “through reasonable diligence, the fraud should have been discovered when the signatory signs the contract. ((Goldberg v Manufacturers Life Ins. Co., 242 AD2d 175, 180 [1st Dept 1998])). A party alleging it was fraudulently induced to sign an agreement is damaged immediately upon signing the agreement because the party at that moment becomes bound by the obligations the party was induced to undertake.

The settlement agreement and personal guaranty of the consulting agreement became effective when plaintiff executed the agreements on June 5, 2008, and June 13, 2008, respectively. The settlement agreement was amended on June 27, 2008, but the amendment only clarified a single term and did not change the substantive rights of the parties; thus, the facts became available for plaintiff to commence her claims at the execution of the original settlement agreement and consulting agreement (Hahn Automotive Warehouse, Inc. v Am. Zurich Ins. Co., 18 NY3d 765, 770 [2012]). Plaintiff has not pled with particularity any facts to give rise to fraud perpetrated by defendant Cohen and MSF after the execution of the agreements.

The Settlement Agreement and Personal Guaranty of the Consulting Agreement became effective on June 5, 2008 and June 13, 2008. Accordingly, under CPLR §213, plaintiff had until June 5, 2011, and June 13, 2011, to

commence a cause of action for breach of fiduciary duty based upon same, respectively, and until June 5, 2014, and June 13, 2014, respectively, to commence a cause of action for fraud, aiding and abetting fraud, fraudulent inducement or unjust enrichment based upon same.

Plaintiff's claims herein against defendant MSF and Cohen are untimely. Plaintiff did not commence this action until June 24, 2014, when she named only defendant Youmans in her summons with notice. It was not until November 21, 2014, that defendant MSF and Cohen were added as defendants when plaintiff filed her summons and original complaint. If the claims against MSF and Cohen were interposed at the time of the original pleading, it would still be untimely. Thus, any attempt by plaintiff to invoke the relation back doctrine is futile (See Alvarado v Beth Israel Med. Ctr., 60 AD3d 981, 983 [2d Dept 2009]). All such claims against defendant MSF and Cohen are therefore time-barred under CPLR §213.

Discovery Rule

Alternatively, plaintiff argues that her fraud, aiding and abetting fraud, fraudulent inducement and breach of fiduciary duty claims should be governed under the discovery rule in CPLR §203(g). In her papers, plaintiff has not alleged any facts to trigger the applicability of the discovery rule pursuant to CPLR §203 (g) as to defendants MSF and Cohen.

Plaintiff argues for the first time during oral argument that the version of the settlement agreement she signed was not the version that has been proffered by the defendants. Plaintiff contends that the discovery of her claims occurred when she obtained the settlement agreement from defendant McAnney in May of 2014. However, plaintiff does not dispute that her signature lies on the version proffered by defendants, nor does she proffer the version of the agreement she allegedly signed. Ultimately, this allegation of fraud in the factum will not be considered since it is unsupported in plaintiff's papers. Thus, the discovery rule does not apply to defendants MSF and Cohen.

Continuous Representation

Likewise, plaintiff alleges that the continuous representation doctrine applies to defendants MSF and Cohen. The continuous representation doctrine tolls the statute of limitations only where there is a mutual understanding of the need for further representation on the specific subject matter. (McCoy v Feinman, 99 NY2d 295, 306 [2002]). However, the continuous representation doctrine only applies to legal malpractice claims. The First Department has explicitly held that when the continuous representation doctrine is available “the tolling it allows only applies to the specific matter out of which the malpractice claim arises” (Johnson v Proskauer Rose LLP, 2015 NY Slip Op 03626 [1st Dept Apr. 30, 2015]).

Here, plaintiff has not asserted a legal malpractice claim against defendants MSF and Cohen. Thus, the continuous representation doctrine is inapplicable herein.

Tolling of Statute of Limitations by Equitable Estoppel

Plaintiff also argues that equitable estoppel applies to her claims. It is fundamental for a plaintiff to show that an act of deception, separate from the ones for which she sues, prevented the plaintiff from timely filing suit (Corsello v Verizon New York, Inc., 18 NY3d 777, 789 [2012]). “Plaintiff[] here [has] not alleged an act of deception, separate from the ones for which [she] sue[s], on which an equitable estoppel could be based.” (*id.*). Accordingly, equitable estoppel does not preserve her claims.

Merits

Even if not time barred, the breach of fiduciary duty, fraud, and fraudulent inducement claims which are the basis of plaintiffs theory for relief against MSF and Cohen, should be dismissed. Documentary evidence in the form of email utterly refutes her claim that MSF represented her and improperly counseled her during the negotiation and execution of the settlement agreement (see Kolchins v Evolution Markets, Inc., 128 AD3d 47, 59 [1st Dept 2015]).

Plaintiff knew that hiring an attorney of her own in connection with the settlement was advised. However, plaintiff utilized her independent judgment to

abstain from hiring an attorney immediately and, instead, ably advocated on behalf of herself. Plaintiff stated in an email dated April 23, 2008 that “I went through the deal and added a few comments. I also spoke with Anthony C over here and I am holding off on retaining him until the last minute to avoid incurring extra cost.”

Moreover, the language of the settlement agreement states: “[t]he Parties acknowledge that they have read this Agreement and the other Settlement Documents and have had the opportunity to consult with their own counsel as to their effect.” Documentary evidence refutes plaintiff’s claim that she had an attorney-client relationship with the attorney defendants who fraudulent induced her into entering into the settlement.

Indemnification

Plaintiff’s indemnification claim against all defendants fails for failure to state a claim. Plaintiff has not pled any contractual basis for indemnification (Linares v United Mgt. Corp., 16 AD3d 382, 385 [2d Dept 2005]). Nor has she suffered any damages that would invoke the restitution concept of implied indemnity (see 17 Vista Fee Assoc. v Teachers Ins. and Annuity Ass'n of Am., 259 AD2d 75, 80 [1st Dept 1999]). Plaintiff argues that she is seeking indemnification from potential tax liabilities, namely “the possibility of tax audits and associated penalties, as well as the loss of Subchapter S treatment.” (Second Amed. Compl. ¶ 115). However, such future damages are merely speculative and thus plaintiff

cannot sustain a claim for indemnification under those circumstances. (Pere v Vinscin Realty Corp., 251 AD2d 48 [1st Dept 1998] (“such claim is premature since there is no claim presently pending against appellants”).

Conclusion

Since plaintiff's claims are untimely as to defendant MSF and Cohen then their motion to dismiss the second amended complaint is granted.

Motion Sequence 004

Defendants Andrew Youmans [the creditor] and Yomo Consulting, LLC [creditor's company] move to dismiss the amended complaint pursuant to CPLR (a) (1), (5) and (7) on the third (declaratory judgment), fourth (breach of contract), sixth (fraud) seventh (fraudulent inducement), eighth (unjust enrichment), ninth (indemnification) and tenth (injunctive relief) causes of actions. Plaintiff opposes.

Statute of Limitations

Actions based upon fraud must be commenced within the greater of “six years from the date the cause of action accrued” or “two years from the time the plaintiff or the person under whom the plaintiff claims discovered the fraud, or could with reasonable diligence have discovered it (Apt v Sengupta, 115 AD3d 466, 466 [1st Dept 2014]).

Plaintiff argues that her fraud and fraudulent inducement claims should be governed under the discovery rule in CPLR §203(g). Specifically, plaintiff states

“Federman was Pazza Notte’s accountant until the middle of 2014 when its services were terminated upon discovery of its fraud.” (Second Amend. Compl. at ¶15) “Plaintiffs would discover (sic) in June 2014 when they retained competent accounting professionals that Defendants had been maintaining one set of books and records for Pazza Notte on site (the one that Nord saw), while Federman, [the accountant] Youmans [the creditor] and McAnneny [the CFO] were maintaining a wholly different set of "Pazza Notte books" at Federman's office which materially differed from the on-site books and records” (Second Amend. Compl. at ¶111). Plaintiff’s discovery pertains to the fraud allegedly permeated *after* the execution of her settlement agreement. Accordingly, plaintiff’s fraudulent inducement claim that led to the execution of the settlement agreement is dismissed as untimely. Conversely, plaintiff has sufficiently triggered the discovery rule as to defendant Youmans for her fraud claim to run “from actual or imputed discovery of facts” (CPLR §203(g)). As such, plaintiff’s fraud claim against defendant Youmans is timely.

Fraud

As to the merits of plaintiff’s fraud claim, a cause of action for fraud has four elements: (1) material false representations by the defendant; (2) made with knowledge that the statements were false and with the intent to deceive the plaintiff; (3) justifiable reliance by the plaintiff on defendant’s false

representations; and (4) damages to plaintiff caused by the defendant's misrepresentations (Mandarin Trading Ltd. v Wildenstein, 16 NY3d 173, 178 [2011]).

In the instant matter, plaintiff has failed to plead actionable misrepresentations by defendant Youmans. Plaintiff states that the misrepresentations by defendants Youmans includes (i) maintaining two sets of accounting books, (ii) providing a false Amortization Schedule, and (iii) promising that the Nord Guaranty would not be enforced against her.

First, plaintiff conclusory states that Youmans was part of the scheme to maintain two sets of accounting books. However, plaintiff does not provide any facts to explain how the scheme was effectuated by Youmans. It is unclear how Youmans, as an outside creditor, would have access to the accounting books. During oral argument plaintiff stated that the fraud was based upon "information and belief." This conclusory statement does not reach the heightened pleading standards of CPLR §3016.

Second, plaintiff states that defendants provided plaintiff with an amortization schedule dated August 31, 2011 knowing that the figures in the schedule were falsified in order to induce Pazza Notte to continue to make payments to Youmans. Plaintiff alleges that the defendants were "erroneously applying payments" to the principal due to defendants Youmans under the

settlement agreement and underlying notes. (Second Amend. Compl. at ¶179). However, plaintiff concedes she still has still not paid back the principal debt to which she acknowledged. Therefore, at this juncture, plaintiff has no damages (see infra 16, 19).

Third, pursuant to the consulting agreement between Youmans and the Fortier Group, the Fortier Group agreed to pay a consulting fee to Youmans. As a condition to the consulting agreement, plaintiff personally entered into a guaranty dated June 5, 2008, that guaranteed the consulting fee. The guaranty explicitly stated that plaintiff “represents and warrants that (i) this guaranty has been duly executed and delivered on behalf of guarantor and constitutes a valid and legally binding obligation of [plaintiff].” Plaintiff’s claim that defendant Youmans may have orally promised that the guaranty would not be enforced is barred by documentary evidence.

Accordingly, defendant Youmans’ motion to dismiss the fraud claim is granted for the aforementioned reasons.

Declaratory Judgment for Failure of Consideration

Plaintiff seeks declaratory judgment against defendant Youmans and Yomo Consulting stating that the settlement agreement and consulting agreements are void and unenforceable under the ground of lack of consideration. Documentary evidence illustrates that, *inter alia*, plaintiff received, an increased ownership from

50% to 100% of the Pazza Notte restaurant, and Fortier's share of ownership in South Beach Sandales Tropeziennes, LLC d/b/a as a shoe store "Tuccia". Furthermore, she received forbearance and an interest reduction under the Pazza loan and an \$80,000 a year consulting fee for her work with L'Atelier Miami Beach, LLC d/b/a the restaurant "Maison". Plaintiff Nord clearly received consideration for the settlement agreement and consulting agreement. (Ryan v Kellogg Partners Institutional Services, 19 NY3d 1, 14 [2012] (finding consideration for an oral employment contract)).

In the event, plaintiff does not challenge the existence of consideration for the agreement but rather the extent of the benefit. A cause of action for declaratory judgment pursuant to lack of consideration is not the proper remedy. "The slightest consideration is sufficient to support the most onerous obligation" (Mencher v Weiss, 306 NY 1, 8 [1953]).

Plaintiff also asserts unconscionability as a ground for declaratory judgment in her second amended complaint. Unconscionability claims are governed under by a six year statute of limitations, which accrues upon execution of the challenged agreement. (35 Park Ave. Corp. v Campagna, 48 NY2d 813, 814 [1979]).

Therefore the unconscionability claim is also time-barred.

Breach of Contract

Plaintiff argues that the settlement agreement was breached by creditor Youmans in that “the interest rate applied and the manner in which it was applied was different than what the settlement agreement required.” (Plaintiff’s opposition at 31). On the other hand, defendant Youmans argues, plaintiff cannot sufficiently allege all the elements of a breach of contract claim.

Damages are an essential element of a breach of contract claim. (Noise In Attic Productions, Inc. v London Records, 10 AD3d 303, 307-08 [1st Dept 2004]). Damages in a breach of contract is the amount that plaintiff would be entitled to in order to be “made whole” (Metro. Switch Bd. Mfg. Co., Inc. v B & G Elec. Contractors, Div. of B & G Indus., Inc., 96 AD3d 725, 726 [2d Dept 2012]). Here, plaintiff has no out-of-pocket losses. Plaintiff has not asserted that she has paid to her creditor more than the total principal of the note in order for her to be entitled to recover any damages from him. Thus, at this juncture she cannot plead any loss or injury in order to sufficiently state a breach of contract claim.

Indemnification

This claim is dismissed for failure to state a claim (see supra at 10).

Yomo Consulting, LLC

There is no specific allegation against Yomo Consulting nor is there any theory promulgated by plaintiff to support any liability onto Yomo Consulting

through defendant Youmans. Thus, all claims asserted against Yomo Consulting are dismissed.

Conclusion

Defendants Andrew Youmans and Yomo Consulting, LLC's motion to dismiss is granted in its entirety.

Motion Sequence 005

Defendants Brian J. McAnneny and Brian J. McAnneny Consulting, Inc. move to dismiss the amended complaint pursuant to CPLR (a) (1), (5) and (7) on the first (aiding and abetting), second (General Business Law §§349 and 350), fifth (breach of fiduciary duty), sixth (fraud), seventh (fraudulent inducement), eighth (unjust enrichment), and ninth (indemnification) causes of actions.

Defendant McAnneny provided accounting services for the restaurant Pazza Notte as its former Chief Financial Officer.

New York's Consumer Protection Act GBL §§349 and 350

Plaintiff has plead a deceptive business practices and unlawful false advertising claim under GBL §§349 and 350 against defendant McAnneny and McAnneny Consulting. To bring a claim under § 349 for deceptive business practices, a party need only prove: (1) that the challenged act or practice was consumer-oriented; (2) that it was misleading in a material way; and (3) that it

suffered injury as a result of the deceptive act (see Stutman v Chem. Bank, 95 NY2d 24, 29 [2000]). The elements for a cause of action under GBL §350 which prohibits false advertising are similar to that required under GBL §349 (Lucker v Bayside Cemetery, 114 AD3d 162, 174 [1st Dept 2013]).

Plaintiff argues that defendant McAnneny was deceptive in providing his services as a CFO because he failed to disclose a potential conflict of interest arising from his providing simultaneous accounting services to defendant Youmans. Plaintiff's claim is for a conflict of interest specific to her and thus are for a private wrong. A private wrong does not constitute widespread consumer deception in order to warrant a claim under New York's Consumer Protection Act (Sutton Apartments Corp. v Bradhurst 100 Dev. LLC, 107 AD3d 646, 648 [1st Dept 2013]) (dismissing the GBL claims because as "this action is limited to the parties in the subject building and does not involve 'the public at large'"). As such, plaintiff's deceptive business practices and unlawful false advertising claim is dismissed for failure to state a claim.

Breach of Fiduciary Duty

Plaintiff, a shareholder of the restaurant Pazza Notte, has pled a breach of fiduciary duty claim against defendant McAnneny and McAnneny's consulting firm McAnneny Consulting. "In order to plead breach of fiduciary duty, plaintiffs

must allege that (1) defendant owed [plaintiff] a fiduciary duty, (2) defendant committed misconduct, and (3) [plaintiff] suffered damages caused by that misconduct.” (Entwistle & Cappucci LLP v Bank of New York Mellon, 43 Misc 3d 887, 896 [Sup Ct, NY County 2014]).

As an officer, defendant McAnney had a fiduciary relationship with the corporation Pazza Notte and plaintiff who is an individual shareholder of the corporation (see Ficus Investments, Inc. v Private Capital Mgt., LLC, 61 AD3d 1, 11 [1st Dept 2009]).

The facts of wrongdoing underlying a breach of fiduciary duty claim are subject to heightened pleading standards pursuant to CPLR §3016 (Berardi v Berardi, 108 AD3d 406, 406 [1st Dept 2013]). Plaintiff contends while holding his position of trust to the corporation, defendant McAnney engaged in “creative” accounting in Pazza Notte’s books, records and tax returns to fraudulently benefit creditor-defendant Youmans to fleece plaintiff. (Second Amend Compl at ¶108).

Plaintiff’s allegations are vague and conclusory and are made without any specific instances of the alleged misconduct (Id.). Even if plaintiff sufficiently alleged wrongdoing, she has failed to establish her damages as an essential element of a breach of fiduciary duty claim (see supra at 15). Again, plaintiff has merely argued her loan payments were misapplied under McAnney’s direction, not that

she has any out of pocket losses. In respect to the damages caused by defendant McAnney, plaintiff stated for the first time during oral argument that her damages arise from hiring accountants to re-file her taxes and from hiring a legal team to assert the claims herein. Attorney fees are not damages as contemplated by common law fraud. Reviewing the four corners of plaintiff's complaint, it is unclear what, if any, tax damages Plaintiff has sustained. Accordingly, plaintiff's breach of fiduciary duty claim is dismissed without prejudice pursuant to CPLR §3211 (a) (7) with leave to replead.

Fraudulent Inducement

Plaintiff alleges fraudulent inducement of the settlement agreement against defendant McAnney and McAnney Consulting. This claim accrued at the time of the execution of the agreements. Thus, this claim is dismissed as untimely (see supra at 7 – 12).

Fraud, Aiding and Abetting of Fraud

Plaintiff also alleged a fraud claim against defendant McAnney and McAnney Consulting which are the basis of her aiding and abetting and unjust enrichment claims. Plaintiff has sufficiently invoked the benefit of the discovery rule for the accrual of the statute of limitations (see discussion supra at 11-12) The discovery rule states in pertinent part that the accrual of “time [is] computed from

actual or imputed discovery of facts” (CPLR §203(g)). Thus, plaintiff’s fraud, aiding and abetting and unjust enrichment claims are timely.

Plaintiff’s primary contention is that she is improperly making payments to creditor Youmans. Defendant McAnney served as the CFO to plaintiff and in that capacity created fraudulent books and records to which plaintiff relied upon up until his termination in 2014. Once again, even if plaintiff is able to sufficiently plead wrongdoing on behalf of defendant McAnney, she has failed to state what damages she has sustained. As such, plaintiff’s claims of fraud, aiding and abetting the fraud against defendant McAnney’s is dismissed without prejudice pursuant to CPLR §3211 (a) (7) with leave to replead.

Unjust Enrichment

To state a claim for unjust enrichment, plaintiff must plead that (1) defendant McAnney was enriched, (2) at plaintiff’s expense, and (3) that it is against equity and good conscience to permit McAnney to retain what Plaintiff seeks to recover. (Mandarin Trading Ltd. v Wildenstein, 16 NY3d 173, 182 [2011]). Defendant McAnney served as Pazzo Notte’s CFO and as such was compensated \$28,714.50 from 2008 until 2014. (Am. Compl. at ¶¶107-108). Plaintiff’s states that McAnney was compensated “for his purported services when, in fact, he was acting as Youman's accomplice in carrying out his orders to defraud Plaintiffs.” At this stage, the Court is concerned with whether the pleading

states a cause of action rather than an ultimate determination of the facts of what is considered against equity and good conscience. (Stukuls v State, 42 NY2d 272, 275 [1977]). According the plaintiff the benefit of every favorable inference, defendant's motion to dismiss the unjust enrichment claim is denied.

Indemnification

This claim is dismissed for failure to state a claim (see supra at 10).

Brian J. McAnney Consulting, Inc.

There is no specific allegation against McAnney Consulting nor is there any theory promulgated by plaintiff to support any liability onto McAnney Consulting through defendant McAnney. Thus, all claims asserted against McAnney Consulting are dismissed.

Conclusion

Defendant McAnney Consulting's motion to dismiss is granted in its entirety. Defendant McAnney's motion to dismiss is granted in part and denied in part.

Motion Sequence 006

Defendant Federman Lally & Remis LLC ("Federman") moves to dismiss the first (aiding and abetting), second (General Business Law §§349 and 350), fifth (breach of fiduciary duty), sixth (fraud), seventh (fraudulent inducement), eighth (unjust enrichment), and ninth (indemnification) causes of actions of the first

amended complaint pursuant to CPLR §§3211(a) (1) and (7), and CPLR §3016 (b). Plaintiff opposes.

Defendant Federman was plaintiff's accounting firm until it was terminated in 2014. Plaintiff alleges that Defendant Federman was also defendant Youmans and defendant Yomo's accountant. Furthermore, defendant McCanneny served as defendant Federman's CFO¹. (Second Amend. Compl. at ¶14).

Fraudulent Inducement

The fraudulent inducement claim is dismissed as untimely (see supra at 20).

Fraud, Aiding and Abetting of Fraud and Unjust Enrichment

A plaintiff alleging an aiding-and-abetting fraud claim must allege the existence of the underlying fraud, actual knowledge, and substantial assistance. Oster v. Kirschner, 77 A.D.3d 51 [1st Dept., 2010]. The allegations of such claims must also be stated with particularity (CPLR 3016(b); Foley v. D'Agostino, 21 A.D.2d 60 [1st Dept., 1964]).

Plaintiff's claims against defendant Federman on the first (aiding and abetting), fifth (breach of fiduciary duty), sixth (fraud), seventh (fraudulent inducement), eighth (unjust enrichment) claims are dismissed for failure to plead with particularity pursuant to CPLR §3016 (b). These claims all revolve around

¹ Defendant Federman disputes this. However, this is inapposite on a motion to dismiss.

plaintiff's theory that defendant aided and abetted fraud on the Youmans note by maintaining two sets of accounting books.

The purpose of section 3016(b)'s pleading requirement is to put the defendant on notice of specific allegations (Sargiss v Magarelli, 12 NY3d 527, 530 [2009]). Plaintiff contends that defendant Federman's accounting work was incorrect and, thus, a fraud must have been committed.

Plaintiff has not pled facts to ascertain defendants' knowledge of the fraud, his intent to deceive and how the deception caused any injury (Friedman v Anderson, 23 AD3d 163 [1st Dept 2005]) (dismissing plaintiff's claims of fraudulent misrepresentations since pleading merely asserted that accountants knew representations were false and were made without any knowledge or factual support and since accountants were not direct cause of plaintiff's losses). Plaintiff conceded during oral argument that her knowledge of the fraud was based on information and belief that there were two sets of accounting book. This conclusory allegation is not underpinned with any facts, nor does it satisfy the heightened pleading requirements of CPLR §3016(b).

New York's Consumer Protection Act GBL §§349 and 350

Defendant hired Federman as its outside accountant in 2003. (Second Amend Compl. at ¶106). Plaintiff contends that defendant engaged in deceptive conduct by keeping two sets of books to hide the amounts owed and paid on the

Youmans note. Once more, this is a private wrong specific to plaintiff and does not constitute widespread consumer deception in order to warrant a claim under New York's Consumer Protection Act (Sutton Apartments Corp. v Bradhurst 100 Dev. LLC, 107 AD3d 646, 648 [1st Dept 2013]). Accordingly, this claim is dismissed for failure to state a claim.

Indemnification

This claim is dismissed for failure to state a claim (see supra at 10).

Conclusion

Defendant Federman's motion to dismiss is granted as to all of the claims asserted against them.

Motion Sequence 007

Plaintiff moves to disqualify defendant Meister Seelig & Fein LLP ("MSF"), Christopher J. Major and Howard Koh as counsel who in this action represent the following: defendants Andrew Youmans and Yomo Consulting, LLC (collectively "Youmans") and Brian J. McAnneny and Brian J. McAnneny Consulting, Inc. (collectively "McAnneny"). Defendants Youmans and McAnneny oppose. (Mot. Seq. 007).

"A movant seeking disqualification of an opponent's counsel bears a heavy burden. A party has a right to be represented by counsel of its choice, and any

restrictions on that right ‘must be carefully scrutinized’” (Mayers v Stone Castle Partners, LLC, 126 AD3d 1, 5-6 [1st Dept 2015]). Plaintiff argues that the law firm MSF should be disqualified because of a conflict of interest. “The rules which govern the permissible conduct of lawyers are very clear that an attorney who has represented an individual may not subsequently represent an adverse person in the same matter.” (Alicea v Bencivenga, 270 AD2d 125, 126 [1st Dept 2000]).

First, plaintiff alleges that the law firm defendants represented her during the settlement negotiation in the Fortier action. However, plaintiff’s claim is belied by the email she sent on April 23, 2008 to the law firm defendants whereby she acknowledged it was advisable to obtain an attorney, she had a particular independent attorney in mind but that she was “holding off on retaining him until the last minute to avoid incurring extra cost.”

Furthermore, in the settlement agreement plaintiff explicitly “acknowledge[d] that they have read this Agreement and other Settlement Documents and have had the opportunity to consult with their own counsel as to their effect.” As such, plaintiff has not established an attorney-client relationship between herself and the law firm defendants as it relates to representing her in the settlement agreement.

Secondarily, she alleges that that the law firm defendants represented her in 2011 and 2012, on her lease renewal for Pazza Notte, which was subsequent to the

settlement and before the instant action was commenced. She reasons that the representation on the real estate matter creates an impermissible conflict of interest. However, plaintiff executed an advance conflict of interest waiver which permits the law firm defendants to serve as counsel to defendant Youmans and McAnney in this case (Centennial Ins. Co. v Apple Builders & Renovators, Inc., 60 AD3d 506 [1st Dept 2009]). The work the law firm defendants performed for plaintiff on her lease renewal was not substantially related to the instant matter which would place the law firm defendants in a position that is materially adverse (Jamaica Pub. Serv. Co. Ltd. v AIU Ins. Co., 92 NY2d 631, 636 [1998]).

Thus, disqualification of Meister Seelig & Fein LLP, Christopher J. Major and Howard Koh is not warranted.

Accordingly it is

ORDERED that defendant McCanneny is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 218, 60 Centre Street, on 10/22/15, 2015, at 2:30 PM.

Date: September 1, 2015
New York, New York



Anil C. Singh