

**New York Univ. v International Brain Research
Found., Inc.**

2016 NY Slip Op 30434(U)

March 14, 2016

Supreme Court, New York County

Docket Number: 652954/2013

Judge: Jeffrey K. Oing

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

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NEW YORK UNIVERSITY and NEW YORK
UNIVERSITY SCHOOL OF MEDICINE,

Plaintiffs,

Index No. 652954/2013

-against-

Mtn Seq. No. 003

INTERNATIONAL BRAIN RESEARCH
FOUNDATION, INC.,

DECISION AND ORDER

Defendant.

-----x

JEFFREY K. OING, J.:

This action arises out of the failure of defendant International Brain Research Foundation, Inc. ("IBRF") to make grant payments to plaintiff New York University School of Medicine ("NYU SOM") pursuant to a 2010 grant agreement, the third in a series of grants provided to NYU SOM by IBRF. The grant agreement committed IBRF to pay NYU SOM \$300,000 annually for three years to support the brain injury research of professor Dr. Max Hilz, and to pay Dr. Hilz's salary.

Plaintiffs, New York University ("NYU") and NYU SOM, move, pursuant to CPLR 3211(a)(1) and (7), and CPLR 3016 (b), for dismissal of IBRF's Second Amended Counterclaims.

For the reasons set forth below, plaintiffs' motion is granted, and the Second Amended Counterclaims are dismissed.

Factual Background

In July 2009, IBRF began providing a series of unrestricted grants to support the traumatic brain injury research of NYU SOM professor Dr. Max Hiltz (Complaint, ¶ 7). In 2009, IBRF provided NYU SOM with an initial \$165,000 unrestricted grant for the 12-month period from May 1, 2009 to April 30, 2010 (Id., ¶ 8). IBRF later supplemented that amount with an additional \$100,000 grant for the 2009-2010 period (Id.). IBRF remitted to NYU SOM the full amount owed on these two grants (Id., ¶ 9).

On June 28, 2010, IBRF entered into a third written grant agreement with NYU SOM (the "Grant Agreement"), pursuant to which IBRF committed to provide NYU SOM with a new three-year, \$300,000 per year (\$900,000 total) unrestricted grant to continue its support of Dr. Hiltz's research from May 1, 2010 to April 30, 2013 (Id., ¶ 10 and Ex. A). In return for provision of the grant, NYU SOM committed to fund Dr. Hiltz's research from the proceeds of the IBRF grant, to provide IBRF with regular progress reports, and to credit IBRF's funding support in any scientific presentations, abstracts or publications resulting from Dr. Hiltz's research (Id., ¶ 11). The Grant Agreement also required NYU SOM to accept the provisions of IBRF's Research Grants Policy (Id.).

NYU SOM alleges that it employed Dr. Hilz as a professor throughout the entire grant period, compensated Dr. Hilz with the proceeds from IBRF's grant, and performed all of its other obligations under the Grant Agreement (Id., ¶ 12). It alleges, however, that IBRF failed to remit payments in three separate quarters beginning in May 2011, resulting in a funding shortfall of \$173,487.21 (Id., ¶¶ 13-14).

Plaintiffs filed this action on August 22, 2013 asserting breach of contract and unjust enrichment claims based on IBRF's failure to remit payments due under the Grant Agreement. On November 4, 2013, IBRF filed an answer and counterclaims, which it amended on November 25, 2013. In its amended counterclaims, IBRF asserted claims for breach of contract, an accounting, breach of fiduciary duty, conversion, negligence and fraudulent inducement. IBRF sought to recover the full amount it had already paid to NYU SOM under the Grant Agreement, totaling \$726,512.88 (Amended Counterclaims, ¶¶ 23, 32, 36, 39).

On December 16, 2013, plaintiffs moved to dismiss IBRF's amended counterclaims. Following oral argument on August 4, 2014, this Court ruled that it could not evaluate IBRF's counterclaims without considering an IBRF Research Grants Policy (the "Research Grants Policy"), incorporated by reference into the one-page Grant Agreement, but not provided by IBRF to this

Court. Accordingly, I deemed the Research Grants Policy material and necessary "to determine whether or not these causes of action are sustainable," because the Research Grants Policy potentially "could address every single cause of action we have here" (8/12/14 Tr. at p. 17). As such, I granted NYU SOM's motion to dismiss without prejudice to IBRF's ability to re-plead.

On September 18, 2014, IBRF filed its Second Amended Answer and Counterclaims, attaching a draft version of the Research Grants Policy (the "Draft Policy"). IBRF does not explain why it failed to include a final version of its Research Grants Policy.

Discussion

Although on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), "the pleading is to be afforded a liberal construction," and "the facts as alleged in the complaint [are presumed] as true" (Leon v Martinez, 84 NY2d 83, 87 [1994]; Rovello v Orofino Realty Co., 40 NY2d 633 [1976]), "'factual claims [that are] either inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration'" (Mark Hampton, Inc. v Bergreen, 173 AD2d 220, 220 [1st Dept 1991] [citation omitted]; Caniglia v Chicago Tribune-N.Y. News Syndicate, 204 AD2d 233 [1st Dept 1994]).

In order to prevail on a motion to dismiss based upon documentary evidence, the movant must demonstrate that the

documentary evidence conclusively refutes the plaintiff's claims (AG Capital Funding Partners, L.P. v State St. Bank & Trust Co., 5 NY3d 582, 590-591 [2005]). In addition, "[f]actual allegations presumed to be true on a motion pursuant to CPLR 3211 may properly be negated by affidavits and documentary evidence" (Wilhelmina Models, Inc. v Fleisher, 19 AD3d 267, 269 [1st Dept 2005]). Thus, dismissal is warranted where documentary evidence establishes that "the allegations of the complaint fail to state a cause of action" (L.K. Sta. Group, LLC v Quantek Media, LLC, 62 AD3d 487, 491 [1st Dept 2009]). Moreover, where, as here, a written agreement "unambiguously contradicts the allegations supporting a litigant's cause of action for breach of contract, the contract itself constitutes documentary evidence warranting the dismissal of the complaint pursuant to CPLR 3211(a)(1)" (150 Broadway N.Y. Assoc., L.P. v Bodner, 14 AD3d 1, 5 [1st Dept 2004]; Hallman v Kantor, 72 AD3d 895, 896 [2d Dept 2010] [granting motion to dismiss where clear language in the retainer agreement "conclusively established a defense to the plaintiff's claims of malpractice"]).

Construing the allegations of the counterclaims in generously, this Court concludes that plaintiffs' motion to dismiss must nevertheless be granted, as each counterclaim is

legally deficient on its face, and is contradicted by clear documentary evidence.

Breach of Contract

IBRF fails to state a valid cause of action for breach of contract because it does not allege that NYU SOM breached any specific provision of the Grant Agreement or Research Grants Policy, or that IBRF itself fully performed under the Grant Agreement (Harris v Seward Park Hous. Corp., 79 AD3d 425, 426 [1st Dept 2010] [elements of a breach of contract claim include "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof and resulting damages"]). Indeed, in its opposition, IBRF fails to cite a single contractual provision that plaintiffs allegedly breached.

In the Second Amended Counterclaims, IBRF notes that the Grant Agreement "provides that the grant awarded is governed by [IBRF's] Research Grant Policy" (Second Amended Counterclaims, ¶ 19). IBRF then alleges that NYU SOM "failed to comply with their obligations to use the funding so provided by [IBRF] for the purpose of, and in accordance with, the terms of the aforesaid Exhibits 'A' [the Grant Agreement] and '1' [the Research Grants Policy]" (Id., ¶ 22).

The document attached to the Second Amended Counterclaims as exhibit 1, however, is marked "***DRAFT** 4/27/09." Under New

York law, the fact that a "document is prominently labeled 'DRAFT'" leads to the "conclu[sion] that [the parties] plainly reserved their right not to be bound by [it]" (O'Connor-Goun v Weill Cornell Med. Coll. of Cornell Univ., 956 F Supp 2d 549, 553 [SD NY 2013] [applying New York law]).

In any event, as more specifically set forth below, IBRF fails to allege sufficient facts to support its claim that NYU SOM breached either the Grant Agreement or the Draft Policy. The Second Amended Counterclaims do not refer to any specific provisions of either document, and merely plead conclusory allegations in support of IBRF's claim of breach. The principle is well established that "[i]n order to plead a breach of contract cause of action, a complaint must allege the provisions of the contract upon which the claim is based" (Atkinson v Mobil Oil Corp., 205 AD2d 719, 720 [2d Dept 1994]; see also Winsch v Esposito Bldg. Specialty, Inc., 48 AD3d 558, 559 [2d Dept 2008] [dismissing complaint that "failed to identify the provisions of the contracts which allegedly were breached"]).

More importantly, a close reading of the language set forth in the Grant Agreement and the Draft Policy clearly demonstrates that they directly contradict IBRF's allegations of breach. Accordingly, the breach of contract counterclaim must be dismissed under CPLR 3211(a)(1) (150 Broadway N.Y. Assocs, L.P.,

14 AD3d at 5 ["where a written agreement ... unambiguously contradicts the allegations supporting a litigant's cause of action for breach of contract, the contract itself constitutes documentary evidence warranting the dismissal of the complaint pursuant to CPLR 3211(a)(1), regardless of any extrinsic evidence or self-serving allegations offered by the proponent of the claim"]).

To begin, IBRF claims that the Grant Agreement required Dr. Hilz to conduct his research exclusively "at plaintiff New York University School of Medicine" (Second Amended Counterclaims, ¶ 23). IBRF fails to identify, however, any term in either the Grant Agreement or the Draft Policy that imposes any such geographic restriction on Dr. Hilz's research. The only provision that arguably relates to the researcher's physical location deals with situations where the researcher "changes institutions" (Draft Policy, § B [XIII] [2]). There are, however, no allegations here that Dr. Hilz ever changed institutions.

Next, IBRF alleges that the Grant Agreement required Dr. Hilz to be a "full or tenured professor" (Second Amended Counterclaims, ¶ 36). Contrary to this allegation, however, the Draft Policy expressly provides that the a grant recipient need not have tenure, stating that a "Principal Investigator" is

required only to be "a professional or faculty member (Professor, Associate Professor or Assistant Professor)," and "not a trainee, not a post-doctoral fellow, not a research assistant, not a research associate and not under the supervision of another person ... who is directing the research" (Draft Policy, § B [I]).

IBRF further alleges that "[u]pon information and belief," Dr. Hilz's TBI research was "funded and/or supported by others", NYU SOM did not "provide a laboratory for TBI research", and NYU SOM "terminated [its] relationship with Dr. Hilz by letter dated February 21, 2013" (Second Amended Counterclaims, ¶¶ 35, 36, 37). IBRF provides no factual basis for these conclusory assertions, which were made on information and belief. As such, these allegations are insufficient to withstand a motion to dismiss (Angel v Bank of Tokyo-Mitsubishi, Ltd., 39 AD3d 368, 370 [1st Dept 2007]; Mandarin Trading Ltd. v Wildenstein, 17 Misc 3d 1118[A], 2007 NY Slip Op 52059[U], *5 [Sup Ct, NY County 2007], *affd* 65 AD3d 448 [1st Dept 2009] [allegation based upon information and belief "is simply a conclusory claim or statement unsupported by factual evidence," and, as such, "the bald allegation is not entitled to preferential consideration" on a motion to dismiss]; Belco Petroleum Corp. v AIG Oil Rig, 164 AD2d 583, 598 [1st Dept 1991] [complaint dismissed for failure to

state a claim where plaintiff's allegations of defendant's patterns and practices were made "upon information and belief" and thus were wholly conclusory)).

Finally, although IBRF also alleges that "[p]laintiffs' attempted diversion of Dr. Hilz's research and pressure to devote his efforts to an area other than TBI and to the TBI laboratory and research was a violation and breach of the grant requirements" (Second Amended Counterclaims, ¶ 34), IBRF fails to identify any term of the Grant Agreement or Draft Policy that was allegedly breached.

Because IBRF fails to allege facts sufficient to support a claim of contractual breach on the part of plaintiffs, the claim must be dismissed.

IBRF's counterclaim for breach of contract must also be dismissed for the independent reason that it fails to allege that it fully performed its own obligations under the Grant Agreement (Harris, 79 AD3d at 426, supra [a party must plead its own performance in order to bring breach of contract claim]). Instead, IBRF concedes that it failed to pay \$173,487 of its \$900,000 grant (Second Amended Answer, ¶ 21).

Breach of Fiduciary Duty

In its counterclaim for breach of fiduciary duty, IBRF alleges that plaintiffs knew or should have known that "Dr. Hilz

was not conducting his TBI research at plaintiff school of medicine and/or that he was being paid by others to conduct such research, and that there was no laboratory at plaintiff school of medicine for the conduct of Dr. Hilz's TBI research" (Second Amended Counterclaims, ¶ 55).

This claim must be dismissed because it does not adequately allege the requisite fiduciary relationship (Baumann v Hanover Community Bank, 100 AD3d 814, 817 [2d Dept 2012] [one of the allegations of a cause of action for breach of fiduciary is the existence of fiduciary relationship]). In order to establish a fiduciary relationship, a party must "'set forth allegations that, apart from the terms of the contract' ... the parties 'created a relationship of higher trust than would arise from their contracts alone'" (Brooks v Key Trust Co. Natl. Assn., 26 AD3d 628, 630 [3d Dept 2006], quoting EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 20 [2005]).

Here, the Second Amended Counterclaims do not allege any facts suggesting that the parties intended to create such a "relationship of higher trust" beyond their contractual grantor-grantee relationship. Instead, IBRF merely pleads, in a conclusory manner, that plaintiffs, "either jointly or severally, owe a fiduciary duty to defendant" (Second Amended Counterclaims, ¶ 49). Although IBRF also asserts that a "confidential

relationship [was] established by the contract" (opposition memorandum at 7), this conclusory allegation fails to plead a "relationship of higher trust" existing "apart from the terms of the contract" and is thus insufficient under New York law (Brooks, 26 AD3d at 630, supra).

In addition, the breach of fiduciary duty counterclaim must be dismissed because it "merely duplicate[s] the breach of contract claim" (RNK Capital LLC v Natsource LLC, 76 AD3d 840, 842 [1st Dept 2010]; Brooks, 26 AD3d at 630 [breach of fiduciary duty claim is "properly dismissed as duplicative" where it "is based upon the same facts and theories as [a] breach of contract claim"]). Indeed, the Second Amended Counterclaims fail to plead any facts supporting a breach of fiduciary claim independent of the Grant Agreement (Second Amended Counterclaims, ¶¶ 55-56 [basing fiduciary duty counterclaim solely on plaintiffs' alleged "disregard to the terms and conditions of the grant"]).

Accounting

IBRF seeks an accounting from plaintiffs "of the use and disbursement of the sums paid to it pursuant to the grant" (*id.*, ¶ 53). This counterclaim must be dismissed because IBRF lacks "the requisite fiduciary relationship [with plaintiffs] that is a predicate to an equitable claim for an accounting" (Sirico v F.G.G. Prods., Inc., 71 AD3d 429, 434 [1st Dept 2010]; Gersten-

Hillman Agency, Inc. v Heyman, 68 AD3d 1284, 1286 [3d Dept 2009] ["[i]t is well settled that an equitable action for an accounting will not lie in the absence of a fiduciary relationship between the parties"]).

This counterclaim must also be dismissed for the independent reason that it is duplicative of IBRF's breach of contract counterclaim (Kurzman Karelsen & Frank v Kaiser, 283 AD2d 330, 331 [1st Dept 2001] [accounting claim is "properly dismissed" where it is "duplicative of the breach of contract claim"]).

Conversion and Negligence

IBRF alleges that plaintiffs' "failure and refusal to use the grant funds for the purpose intended and in accordance with [the Grant and the Draft Policy]" constitutes a conversion (Second Amended Counterclaims, ¶ 60). IBRF also alleges that plaintiffs "were negligent in the administration of funds disbursed to it by defendant" (Id., ¶ 63).

IBRF's Second Amended Counterclaims for conversion and negligence are insufficient because they "merely restate[] the cause of action for breach of contract and allege[] no independent facts sufficient to give rise to tort liability" (Yeterian v Heather Mills N.V., Inc., 183 AD2d 493, 494 [1st Dept 1992]; Sutton Apts. Corp. v Bradhurst 100 Dev. LLC, 107 AD3d 646, 648 [1st Dept 2013] [dismissing negligence claims that "are

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duplicative of the breach of contract claims"]; CDR Creances S.A. v Euro-American Lodging Corp., 40 AD3d 421, 422 [1st Dept 2007] [dismissing conversion claim as duplicative of breach of contract claim]; Fesseha v TD Waterhouse Inv. Servs., Inc., 305 AD2d 268, 269 [1st Dept 2003] [dismissing plaintiff's conversion claim that "'allege[d] no independent facts sufficient to give rise to tort liability' and, thus, was nothing more than a restatement of his breach of contract claim"])).

Because IBRF fails to allege that NYU SOM owed it a legal duty above and beyond the contractual relationship between the parties, its conversion and negligence claims must be dismissed (Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382, 389 [1987] ["It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated"])).

Fraudulent Inducement

IBRF's counterclaim for fraudulent inducement must be dismissed because it fails to detail the circumstances of the alleged misrepresentations with specificity, as required by CPLR 3016(b), which provides "(w)here a cause of action or defense is based upon ... fraud ... the circumstances constituting the wrong shall be stated in detail" (Accurate Copy Serv. of Am., Inc. v Fisk Bldg. Assoc. L.L.C., 72 AD3d 456, 456 [1st Dept 2010]

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[dismissing a fraud claim where the complaint "makes reference to representations purportedly made during ... negotiations" but "failed to include 'specific and detailed allegations of fact'").

Specifically, a fraud claim must be dismissed under CPLR 3016(b) where, as here, the pleading party "fails to set forth the substance of, and the dates upon which or the persons to whom, the alleged misrepresentations purportedly were made" (Mountain Lion Baseball v Gaiman, 263 AD2d 636, 638 [3d Dept 1999]; Moore v Liberty Power Corp., LLC, 72 AD3d 660, 661 [2d Dept 2010] ["CPLR 3016(b) ... requires that the circumstances of the fraud must be 'stated in detail,' including specific dates and items"]).

IBRF claims that "[a]t or prior to the execution of [the Grant Agreement] by defendant, plaintiffs, jointly and/or severally, represented to defendant that Dr. Hilz was, or would be, a full professor at [NYU SOM] receiving a salary as such and was, or would be, fully accredited and tenured" (Second Amended Counterclaims, ¶ 66). IBRF fails to identify, however, either the specific statements allegedly made, or the individuals who made and received them. Moreover, IBRF fails to allege the dates on which the alleged representations were made to it. Therefore,

IBRF's fraudulent inducement counterclaim fails to meet the pleading requirements set forth by CPLR 3016(b).

Nonetheless, defendants maintain that the representation that Dr. Hilz was a tenured professor was made in three separate appointment letters from NYU's Office of the Provost in 2010 (Second Amended Counterclaims, Exhibits 2-4). These letters, which post-date the Grant Agreement, state precisely the opposite. According to the letters attached to IBRF's Second Amended Counterclaims, Dr. Hilz's appointment had "no tenure implications" (Id.).

Aside from these appointment letters, IBRF fails to plead with particularity how "plaintiffs represented, in [writing], that Dr. Hilz was a full tenured professor at their institution" (opposition memorandum at p. 10). Without alleging what this purported writing was, who authored it, who it was delivered to and when, IBRF cannot advance a counterclaim based in fraud.

IBRF's remaining basis for its fraudulent inducement counterclaim is a bald statement that the Provost's office made a clerical error and indicated in its prior appointment letters to Dr. Hilz that he was a tenured professor (Second Amended Counterclaims, ¶¶ 68-70). IBRF fails to attach these letters. Moreover, even if true, this allegation is insufficient to support its claim that the alleged misrepresentations were made.

to IBRF, as opposed to Dr. Hilz (Moore, 72 AD3d at 661, supra [dismissing fraud claim where "[t]he plaintiff failed to allege or provide details of any misstatements or misrepresentations made specifically by the defendant's representatives to him, as required by CPLR 3016 (b)"]).

IBRF also fails to allege how it was damaged by NYU SOM's alleged misrepresentation. The Second Amended Counterclaims conclusorily assert that IBRF's affiliation with a full and tenured professor at NYU SOM would have "provided [IBRF] with certain standing and reputation to enable it to raise further funds to conduct further research in the field of TBI" (Second Amended Counterclaims, ¶ 67). IBRF does not allege, however, that Dr. Hilz disclosed his tenure status in any of the numerous publications that identified IBRF as collaborator, or that any of the readers of such publications discounted IBRF's "standing and reputation" as a result of Dr. Hilz's undisclosed lack of tenure at NYU SOM.

Nor does IBRF adequately allege that NYU SOM's purported misrepresentation was material to its decision to enter into the grant. Although IBRF claims that Dr. Hilz's tenure status was "essential" to its decision to award the grant, IBRF failed to include this requirement in either the Grant Agreement or its Draft Policy. In fact, the Draft Policy expressly states that the researcher need not have tenure to receive a grant.

In opposition to the motion, IBRF relies on Pludeman v Northern Leasing Sys., Inc. (10 NY3d 486, 492, 491 [2008]), which ostensibly replaces the CPLR 3016(b) particularity requirements with a "reasonable inference" standard. Dispensing with the particularity requirement, however, is only appropriate where "it may be impossible to state in detail the circumstances constituting a fraud" because "concrete facts are peculiarly within the knowledge of the party charged with the fraud."

Here, IBRF cannot rely on the "reasonable inference" standard because it alleges that plaintiffs made certain fraudulent statements directly to IBRF at some point "at or prior to the execution of the [Grant Agreement]" (Second Amended Counterclaims, ¶ 66). On these facts, New York courts have specifically rejected the "reasonable inference" standard because "in contrast [to the plaintiff in Pludeman], plaintiffs are alleging that defendants made misrepresentations to them, and thus should know what misrepresentations were made to them" (Art Capital Grp., LLC v Getty Images, Inc., 24 Misc 3d 1247[A], 2009 NY Slip Op 51909[U], *6-*7 [Sup Ct, NY County 2009]).

Thus, the counterclaim for fraudulent inducement must be dismissed for its failure to meet the heightened pleading requirements of CPLR 3016(b).

Accordingly, it is

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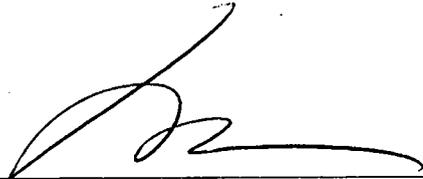
ORDERED that plaintiffs' motion to dismiss defendant's Second Amended Counterclaims is granted, and the Second Amended Counterclaims are hereby dismissed as against plaintiffs.

ORDERED that counsel shall appear in Part 48, 60 Centre Street, Room 242, on May 13, 2016 at 11 a.m.

This memorandum opinion constitutes the decision and order of the Court.

Dated:

3/14/16


HON. JEFFREY K. OING, J.S.C.

JEFFREY K. OING
J.S.C.