

**Orloff v English**

2016 NY Slip Op 31974(U)

October 14, 2016

Supreme Court, New York County

Docket Number: 162274/15

Judge: Nancy M. Bannon

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 42

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GEORGE ORLOFF

Plaintiff

INDEX NO. 162274/15  
MOT SEQ 001

v

DECISION AND ORDER

TODD ENGLISH and TODD ENGLISH  
ENTERPRISES

Defendant.

-----X

**NANCY M. BANNON, J.:**

I. INTRODUCTION

In this action to recover damages for breach of contract, fraud, fraudulent inducement, conversion, and unjust enrichment, defendants move pursuant to CPLR 3211(a) to dismiss the complaint. Plaintiff opposes the motion. The motion is granted.

II. BACKGROUND

The complaint alleges that plaintiff, an investor and/or consultant, and defendants Todd English, a restaurateur and celebrity chef, and Todd English Enterprises, English's business entity, electronically negotiated a loan agreement that was memorialized by a term sheet. The loan agreement, with a proposed term of five years, purportedly obligated plaintiff to assume defendants' obligations under a prior loan and to permit

defendants to enter into a business venture with plaintiff in connection with an entity to be known as Mass Market Food Company. Plaintiff alleges in the complaint that defendants continued to give him assurances that the arrangement would be consummated, but that scheduled meetings between the parties and a potential investor were cancelled before any contracts were executed. Plaintiff avers that he tendered to a third party named Betinna Klinger the sum of \$10,000 as an advance to be credited to defendants in consideration of the proposed loan agreement, but that Klinger instead allocated that money to pay for expenses incurred in producing an unrelated televised event involving defendants. Plaintiff further alleges that defendants entered into a second agreement with him, pursuant to which they promised that they would provide him with the rights to use certain intellectual property in connection with the venture. That purported agreement is also memorialized solely by a term sheet.

The term sheets were never executed by the parties, and the term sheet drafted in connection with the purported loan agreement expressly recites that it was a "Non-Binding Term Sheet." Although a draft agreement in connection with the proposed use of defendants' intellectual property was prepared, defendants never executed it, instead continuing to negotiate amendments to its terms.

Plaintiff commenced this action to recover damages for breach of contract, fraud, fraudulent inducement, conversion, and unjust enrichment. Defendants move to dismiss the complaint pursuant to CPLR 3211(a)(1) (defense founded on documentary evidence), (a)(5) (statute of frauds), and (a)(7) (failure to state a cause of action). Plaintiff opposes the motion.

### III. DISCUSSION

"Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." Leon v Martinez, 84 NY2d 83, 87-88 (1994); see Ellington v EMI Music, Inc., 24 NY3d 239 249 (2014); Heaney v Purdy, 29 NY2d 157 (1971).

When assessing the adequacy of a complaint in the context of a CPLR 3211(a)(7) motion to dismiss, the court's role is "to determine whether plaintiffs' pleadings state a cause of action." 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 151-152 (2002). To determine whether a complaint adequately states a cause of action, the court must "liberally construe the complaint," accept the facts alleged in it as true, and accord the plaintiff "the benefit of every possible favorable inference." Id. at 152; see Romanello v Intesa Sanpaolo, S.p.A., 22 NY3d 881, 887 (2013); Simkin v Blank, 19 NY3d 46, 52 (2012); CPLR 3026. "The motion must be denied if from the pleading's four

corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." 511 W. 232nd Owners Corp. v Jennifer Realty Co., supra, at 152 (internal quotation marks omitted); see Romanello v Intesa Sanpaolo, S.p.A., supra, at 887; Leon v Martinez, 84 NY2d 83, 87 (1994); Guggenheimer v Ginzburg, 43 NY2d 268 275 (1977).

"A court is, of course, permitted to consider evidentiary material submitted by a defendant in support of a motion to dismiss pursuant to CPLR 3211(a)(7)." Sokol v Leader, 74 AD3d 1180, 1181 (2<sup>nd</sup> Dept 2010); see CPLR 3211(c). "If the court considers evidentiary material, the criterion then becomes 'whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one.'" Sokol v Leader, supra, at 1181-1182, quoting Guggenheimer v Ginzburg, supra, at 275 (1977). "Yet, affidavits submitted by a defendant will almost never warrant dismissal under CPLR 3211 unless they establish conclusively that [plaintiff] has no cause of action." Sokol v Leader, supra, at 1182 (internal quotation marks omitted). "Indeed, a motion to dismiss pursuant to CPLR 3211(a)(7) must be denied 'unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it.'" Id., quoting Guggenheimer v Ginzburg, supra, at 275.

As relevant here, CPLR 3211(a)(5) provides that a complaint

may be dismissed where a cause of action may not be sustained by virtue of the statute of frauds, which requires certain agreements to be in writing and executed by the party sought to be charged with the obligations sought to be enforced.

#### A. BREACH OF CONTRACT

"The elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage." Flomenbaum v New York Univ., 71 AD3d 80, 91 (1<sup>st</sup> Dept 2009); see Clearmont Prop., LLC v Eisner, 58 AD3d 1052, 1055 (3<sup>rd</sup> Dept 2009). If the parties to an agreement do not intend it to be binding upon them until it is signed by both parties, they may not become obligated under a proposed contract that remains unexecuted. See Rhodium Special Opportunity Fund, LLC v Life Trading Holco, LLC, 128 AD3d 542, 542 (1<sup>st</sup> Dept 2015). Moreover, there must be a meeting of the minds of the parties as to all essential terms, and where a party attempts to negotiate amended or additional terms, there is a presumption that definite terms were never agreed upon. See Silber v New York Life Ins. Co., 92 AD3d 436, 439-440 (1<sup>st</sup> Dept 2012). A term sheet, particularly one that is expressly characterized as nonbinding, does not create a contractual obligation, but constitutes a mere "agreement to agree," which may not be enforced. See Richbell Info. Servs. v Jupiter

Partners, L.P., 309 AD2d 288, 297 (1<sup>st</sup> Dept 2003); see also StarVest Partners II, L.P. v Emportal, Inc., 101 AD3d 610, 613 (1<sup>st</sup> Dept 2012).

In view of these guidelines, documentary evidence submitted on this motion, ie., the subject term sheets, definitively establishes a complete defense to the plaintiff's breach of contract cause of action.

The court notes that, in any event, the cause of action alleging breach of contract must be dismissed since it is also barred by the statute of frauds. General Obligations Law § 5-701(a)(1) requires that any agreement not to be performed within one year must be in writing and signed by the party to be charged. The proposed five-year loan agreement, which remained unsigned, is thus unenforceable.

#### B. FRAUD AND FRAUDULENT INDUCEMENT

To state a cause of action sounding in fraud, a claimant must allege a misrepresentation or concealment of a material fact, falsity, scienter on the part of the wrongdoer, justifiable reliance, and resulting injury. See IKB Intl. S.A. v Morgan Stanley, 142 AD3d 447, 448 (1<sup>st</sup> Dept 2016); Dembeck v 220 Cent. Park S., LLC, 33 AD3d 491, 492 (1<sup>st</sup> Dept 2006). CPLR 3016 requires that allegations of fraud in a complaint must be stated in detail. See Katz 737 Corp. v Cohen, 104 AD3d 144, 163 (1<sup>st</sup>

Dept 2012). Moreover, a fraud claim that merely duplicates a breach of contract claim may not be maintained. See Orix Credit Alliance, Inc. v R.E. Hable Co., 256 AD2d 114, 115 (1<sup>st</sup> Dept 1998).

The allegations of fraud and fraudulent inducement in the complaint are insufficiently specific, and essentially mirror the allegations made in support of the breach of contract cause of action. In fact, the complaint alleges essentially that defendants misled plaintiff into believing that they would enter into contracts with him, but that they never did. These allegations are wholly insufficient to make out a cause of action sounding in fraud. As such, the fraud and fraudulent inducement causes of action must be dismissed for failure to state a cause of action pursuant to CPLR 3211(a)(7).

#### C. UNJUST ENRICHMENT

To establish unjust enrichment, "the plaintiff must show that the defendant was enriched, at the plaintiff's expense, and that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered." Castelotti v Free, 138 AD3d 198, 207 (1<sup>st</sup> Dept 2016); see Georgia Malone & Co., Inc. v Rieder, 19 NY3d 511, 516 (2012); Mandarin Trading Ltd. v Wildenstein, 16 NY3d 173, 182 (2011). Moreover, a plaintiff cannot succeed on an unjust enrichment claim unless he

or she has a sufficiently close relationship with the defendant. See Georgia Malone & Co., Inc. v Rieder, *supra*, at 516; Sperry v Crompton Corp., 8 NY3d 204 (2007).

However, "[t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter." Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382, 388 (1987).

Although there is no valid and enforceable written contract between the parties here governing the particular subject matter, plaintiff has failed to allege a sufficiently close relationship with defendants to sustain an unjust enrichment cause of action, and has not alleged facts sufficient to describe how defendants were enriched at his expense.

For these reasons, the unjust enrichment cause of action must be dismissed for failure to state a cause of action.

#### D. CONVERSION

To state a cause of action sounding in conversion of money, the complaint must allege that defendants retained money belonging to plaintiff, and "the money must be specifically identifiable and be subject to an obligation to be returned or to be otherwise treated in a particular manner." McBride v KPMG Intern., 135 AD3d 576, 580 (1<sup>st</sup> Dept 2016). Since the money

tendered by plaintiff to Klinger was not subject to an obligation to return it to plaintiff, and Klinger is not a party to this action, plaintiff failed to state a cause of action sounding in conversion.

IV. CONCLUSION

Accordingly, it is

ORDERED that defendants' motion is granted and the complaint is dismissed in its entirety, and it is further,

ORDERED that the Clerk shall enter judgment accordingly.

This constitutes the Decision and Order of the court.

Dated: October 14, 2016

ENTER: 

J.S.C.  
HON. NANCY M. BANNON