

**Rooney v Advent Prod. Dev., Inc.**

2007 NY Slip Op 31876(U)

June 22, 2007

Supreme Court, Suffolk County

Docket Number: 0012904/2006

Judge: Peter Fox Cohalan

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INDEX # 12904-06  
RETURN DATE: 6-3-06 (001)  
11-17-06 (002)  
MOT. SEQ. # 001 & 002

**SUPREME COURT - STATE OF NEW YORK**  
**I.A.S. TERM, PART XXIV - SUFFOLK COUNTY**

**PRESENT:**  
**Hon. PETER FOX COHALAN**

-----x  
KATHLEEN ROONEY,

Plaintiff,

-against-

ADVENT PRODUCT DEVELOPMENT, INC.,

Defendant.  
-----x

CALENDAR DATE: February 7, 2007  
MNEMONIC: MG; MG

PLTF'S/PET'S ATTORNEY:

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New York, NY 10017

Upon the following papers numbered 1 to 32 read on these motions to dismiss \_\_\_\_\_;  
Notice of Motion/Order to Show Cause and supporting papers 1-5; 16-21; Notice of Cross-Motion and  
supporting papers \_\_\_\_\_; Answering Affidavits and supporting papers 6-8; 22-25; Replying Affidavits  
and supporting papers 9-15; 26-32; Other \_\_\_\_\_; and after hearing counsel in support of and opposed  
to the motion it is,

**ORDERED** that these two (2) duplicative motions seeking to dismiss the first  
(1<sup>st</sup>) and third (3<sup>rd</sup>) causes of action of the plaintiff's complaint sounding in rescission and  
unjust enrichment pursuant to CPLR §3211(a)(7) for failure to state a cause of action is  
hereby granted in its entirety and the 1<sup>st</sup> (first) cause of action for rescission based on fraud,  
mistake, duress and/or undue influence and the 3<sup>rd</sup> (third) cause of action for unjust  
enrichment are hereby dismissed.

The plaintiff commenced this action seeking damages for the defendant's failure  
to perform certain services contracted for involving marketing her invention called "Kathy's  
Band" and the failure to get patent approval. Plaintiff claims that the defendant, Advent  
Product Development, Inc., (hereinafter Advent) advertised that it was in the business of  
representing inventors of new products, ideas and machines. Plaintiff contracted with Advent  
on June 25, 2001 for certain services enumerated in paragraph 7 of her complaint and paid it  
\$995.00 pursuant to the agreement. Advent claims that as part of the original agreement the  
plaintiff was provided with an attorney legal protection report indicating prior art similar or at  
least relevant to the functional and/or design feature of her invention. Notwithstanding this  
report, plaintiff entered into a second contract or marketing agreement, dated August 29,  
2001, with Advent to market her invention at a cost of \$9,240.00. On September 28, 2001,  
the United States Patent Office refused to issue her a patent and this lawsuit ensued.

Plaintiff alleges three (3) causes of action in her complaint. The first (1<sup>st</sup>) cause of action seeks rescission predicated upon fraud alleging certain representations were made that her invention was a viable product to place in commerce; the second (2<sup>nd</sup>) cause of action is for breach of contract; and the third (3<sup>rd</sup>) cause of action is for unjust enrichment. Plaintiff also seeks punitive damages in the amount of \$1,000,000.00. Advent now moves (twice) for dismissal of the first and third causes of action in the complaint pursuant to CPLR §3211(a)(7) arguing that they fail to state a cause of action because there are no detailed and specific allegations of fraud or misrepresentation to substantiate the rescission cause of action and the cause of action for unjust enrichment may not stand when the plaintiff has simultaneously stated a cause of action for breach of contract. The plaintiff opposes the requested relief. The Court would note that two (2) identical motions seeking the same relief with identical sets of opposition and reply papers were logged in as two separate motions and designated seq.# 001 with a return date of June 3, 2006 and seq. #002 with a return date of November 17, 2006 but each motion is identical and seeks the same relief and will be dealt with as one motion for the purposes of this decision.

For the following reasons, the plaintiff's motion seeking to dismiss the first (1<sup>st</sup>) and third (3<sup>rd</sup>) causes of action of the plaintiff's complaint sounding in rescission and unjust enrichment pursuant to CPLR §3211(a)(7) for failure to state a cause of action is hereby granted in its entirety and the 1<sup>st</sup> (first) cause of action for rescission based on fraud, mistake, duress and/or undue influence and the 3<sup>rd</sup> (third) cause of action for unjust enrichment are hereby dismissed.

Upon a motion to dismiss a complaint for legal insufficiency, the test to be applied is whether the complaint gives sufficient notice of the transactions, occurrences or series of transactions or occurrences intended to be proven and whether the requisite elements of any cause of action can be discerned from its averments. **Frank v. Daimler Chrysler Corp.**, 292 AD2d 118, 741 NYS2d 9 (1<sup>st</sup> Dept. 2002); **Gruen v. County of Suffolk**, 187 AD2d 560, 590 NYS2d 217 (2<sup>nd</sup> Dept. 1992); **Moore v. Johnson**, 147 AD2d 621, 538 NYS2d 28 (2<sup>nd</sup> Dept. 1989); **Conroy v. Cadillac Fairview Shopping Center Properties**, 143 AD2d 726, 533 NYS2d 446 (2<sup>nd</sup> Dept. 1988). Furthermore, the complaint should be liberally construed in plaintiff's favor and the facts alleged in the complaint should be assumed to be true. **P.T. Bank Central Asai v. ABN Amro Bank N.V.**, 301 AD2d 373, 754 NYS2d 245 (1<sup>st</sup> Dept. 2003); **Palazzolo v. Herrick, Feinstein, LLP**, 298 AD2d 372, 751 NYS2d 401 (2<sup>nd</sup> Dept. 2002); **Holly v. Pennysaver Corp.**, 98 AD2d 570, 471 NYS2d 611 (2<sup>nd</sup> Dept. 1984). The nature of the inquiry is whether a cause of action exists and not whether it has been properly stated. **McGill v. Parker**, 179 AD2d 98, 582 NYS2d 91 (1<sup>st</sup> Dept. 1992); **Marini v. D'Atolito**, 162 AD2d 391, 557 NYS2d 45 (1<sup>st</sup> Dept. 1990).

As noted by the Court in **Pace v. Perk**, 81 AD2d 444, 440 NYS2d 710 (2<sup>nd</sup> Dept. 1981) with regard to a motion to dismiss pursuant to CPLR 3211:

“ Upon such a motion to dismiss a complaint for legal insufficiency, the court must assume that the allegations are true (**Denihan**)

**Enterprises v. O'Dwyer**, 302 NY 451, 458, 99 NE2d 235), and must deem the complaint to allege whatever can be imputed from its statements by fair and reasonable intendment, however imperfectly, informally or illogically facts may be stated therein (**Condon v. Associated Hosp. Service of New York**, 287 NY 411, 40 NE2d 230). In making its analysis, the court is not bound by the constructions and theories of the parties (see, Siegel, Practice Commentaries, McKinney's Cons. Laws of NY, Book 7B, CPLR 3211:24). The test of the sufficiency of a complaint is whether it gives sufficient notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from its averments (CPLR 3013; **Foley v. D'Agostino**, 21 AD2d 60, 62-65, 248 NYS2d 121; **Guggenheimer v. Ginzberg**, 43 NY2d 268, 274-275, 401 NYS2d 182, 372 NE2d 17). Where the motion to dismiss for failure to state a cause of action is made under CPLR 3211, the plaintiff may rest upon the matter asserted within the four corners of the complaint and need not make an evidentiary showing by submitting affidavits in support of his complaint (**Rovello v. Orofino Realty Co.**, 40 NY2d 633, 389 NYS2d 314, 357 NE2d 970)."

The rules governing the Court's review of a motion to dismiss pursuant to CPLR 3211 (a)(7) are simple and straight forward. The Court must afford the complaint a liberal construction, accept as true the allegations contained therein, afford plaintiff the benefit of every favorable inference and determine only whether the facts alleged fit within any cognizable legal theory. **Guggenheimer v. Ginzburg**, 43 NY2d 268, 401 NYS2d 182 (1978); **One Acre Inc. V. Town of Hempstead**, 215 AD2d 359, 626 NYS2d 226 (2<sup>nd</sup> Dept. 1995). Although, as the Court noted, the plaintiff need not make an evidentiary showing by submitting affidavits or other documentation in support of the complaint, nevertheless, if submitted by the plaintiff, they "may be used freely to preserve inartfully pleaded, but potentially meritorious claims" (**Rovello v. Orofino Realty Co.**, supra, 635, 389 NYS2d 314, 316).

With these general principles in mind, the Court upon review of the plaintiff's complaint and the allegations contained therein, finds that the plaintiff's complaint fails to make out any cause of action upon which liability may be presumed as against Advent for rescission based upon fraud or misrepresentation or for unjust enrichment. With respect to the plaintiff's first cause of action alleging rescission of the contract based upon fraud or misrepresentation, it is well settled that bare allegations of fraud in a complaint without any allegation of the details constituting the wrong are insufficient to sustain a cause of action alleging fraud. **Kline v. Taukpoint Realty Corp.**, 302 AD2d 433, 754 NYS2d 899 (2<sup>nd</sup> Dept. 2003). Advent claims that the alleged facts supporting fraud amount to the plaintiff's claim that the defendant said that the invention was a "viable product to place in commerce" and this is not actionable because it is nothing more than opinion and may not serve as a predicate for a fraud claim.

In Chase Investments, LTD. v. Kent, 256 AD2d 298, 681, NYS2d 319 (2<sup>nd</sup> Dept. 1998) the court held

“ ‘In order to state a cause of action for fraud, a plaintiff must allege, inter alia, a misrepresentation of fact’ (Karsanow v. Kuehlewein, 232 AD2d 458), and ‘a representation of opinion or a prediction of something which is hoped or expected to occur in the future will not sustain an action for fraud’ (Zanani v. Savad, 217 AD2d 696, 697). “


Here, in the case at bar, plaintiff does not detail any “misrepresentations of fact” to support the claim of contract rescission on the grounds of fraud, mistake, duress and/or misrepresentation and/or undue influence. While Advent may have rendered an “opinion” that the plaintiff’s invention was commercially viable, the attorney legal protection report noted similar art to plaintiff’s invention and the subsequent attempt by plaintiff to patent the work and its rejection does not form a basis for fraud. Leszcynski v. Kelly & McGlynn, 281 AD2d 519, 722 NYS2d 254 (2<sup>nd</sup> Dept. 2001). The failure to set forth the circumstances constituting the wrong in detail so as to support the claims of fraud, mistake, duress and/or misrepresentation requires dismissal of the first (1<sup>st</sup>) cause of action for failure to plead with the requisite specificity the facts constituting the fraud. CPLR §3016(b); Dumas v. Fiorito, 13 AD3d 332, 786 NYS2d 106 (2<sup>nd</sup> Dept. 2004).

Advent also seeks dismissal of the third (3<sup>rd</sup>) cause of action alleging unjust enrichment arguing that the plaintiff’s second (2<sup>nd</sup>) cause of action for breach of contract precludes simultaneously bringing a cause of action for unjust enrichment. This Court agrees and the third (3<sup>rd</sup>) cause of action for unjust enrichment is dismissed. A cause of action for unjust enrichment is duplicative of a breach of contract claim for damages arising from an enforceable contract between the parties. Bettan v. Geico General Ins. Co., 296 AD2d 469, 745 NYS2d 545 (2<sup>nd</sup> Dept. 1996). Here, there were two (2) written agreements which the plaintiff claims Advent breached. The same subject matter does not give rise to an independent cause of action for unjust enrichment. Cooper, Bamundo, Hecht & Longworth, LLP v. Kuczinski, 14 AD3d 644, 789 NYS2d 508 (2<sup>nd</sup> Dept. 2005); Goldner v. Possilico, 7 AD3d 666, 776 NYS2d 818 (2<sup>nd</sup> Dept. 2005).

Accordingly, defendant’s motion for dismissal of the plaintiff’s first (1<sup>st</sup>) and third (3<sup>rd</sup>) causes of action sounding in rescission and unjust enrichment pursuant to CPLR §3211(a)(7) for failure to state a cause of action is hereby granted and the 1<sup>st</sup> (first) cause of action for rescission based on fraud, mistake, duress and/or undue influence and the 3<sup>rd</sup> (third) cause of action for unjust enrichment are hereby dismissed.

The foregoing constitutes the decision of the Court.

Dated: June 22, 2007

  
\_\_\_\_\_  
J.S.C.