

Cummin v Beard

2007 NY Slip Op 32131(U)

July 6, 2007

Supreme Court, New York County

Docket Number: 0114663/2006

Judge: Saralee Evans

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. SARALEE EVANS
Justice

PART 51

Cummin, A

INDEX NO. 114663/06

MOTION DATE _____

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

Beard, A

The following papers, numbered 1 to _____ were read on this motion to/for dismiss complaint

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1, 2

3

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion and cross motion

be decided in accordance with the attached decision/order.

FILED

JUL 16 2007

NEW YORK COUNTY CLERK'S OFFICE

RECEIVED

JUL 11 2007

IAS MILEY SUPPORT OFFICE

HON. SARALEE EVANS

Dated: 7/6/07

Saralee Evans
J.S.C.

FILED AT NY 7-6-07

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART 51

-----x
ARCH CUMMIN,

Plaintiff,

-against-

ANSON McCOOK BEARD, JR.,

Defendant.
-----x

SARALEE EVANS, JSC

DECISION/ORDER

Index No. 114663/06

FILED
JUL 16 2007
NEW YORK
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this motion to dismiss the complaint and cross motion for sanctions.

Papers	Numbered
Notice of Motion, Affirmation & Exhibits	1
Cross Motion in Opposition and for Sanctions, Affirmation & Exhibits.	2
Affirmation in Opposition to Cross Motion & Exhibits	3

Upon the foregoing papers, the decision and order of the court is as follows:

Plaintiff sues defendant for fraud, aiding and abetting a fraud allegedly perpetrated by plaintiff's former wife, and for conversion. Defendant has brought a motion to dismiss the complaint for failure to state a claim. He asserts that he was but a bystander in a dispute between plaintiff and his former wife precipitated by a clause in their divorce settlement whereby plaintiff is obliged to reimburse his former wife's payments for rent, up to \$15,000 a month. Defendant contends that plaintiff's claim that he was complicit in Ms. Cummin's actions is frivolous and sanctionable. Plaintiff cross moves that sanctions be imposed upon defendant.

In support of the motion to dismiss, defendant proffers a copy of the summons and complaint in the action, various papers filed in a post judgment dispute between plaintiff and his former wife, and

a memorandum of law.

The complaint alleges that defendant Beard and Diane Cummin (plaintiff's former wife and defendant's former girlfriend) engaged in a scheme to defraud plaintiff by entering into a sham lease from October 2002 through August 2006, whereby Ms. Cummin purportedly rented an apartment owned by defendant for \$19,300 per month. Pursuant to the terms of their divorce agreement, plaintiff reimbursed Ms. Cummin for those rent payments up to \$15,000 a month. According to the complaint, defendant entered into the purported lease, negotiated Ms. Cummin's checks monthly, and then returned the alleged rent payments to Ms. Cummin.

The complaint further alleges that in December, 2004, defendant entered into an agreement with Ms. Cummin whereby he agreed to transfer a one half ownership interest in the apartment to her in January 2005, and to transfer his remaining interest at some time between January 2006 and October 31, 2010. The agreement further provided that Ms. Cummin had the right to occupy the apartment without any obligation to pay rent to defendant, but that defendant would, at her option, enter into a new lease reciting the same terms as the prior lease, and that she could terminate the lease on 10 days notice without any impact on her continued right to reside in the apartment. Ms. Cummin continued to give defendant checks for the purported rent until she and defendant sold the apartment, at which time Ms. Cummin received the entire proceeds of sale.

According to the complaint, in reliance upon the allegedly fraudulent representations of Ms. Cummin and defendant, plaintiff paid rental reimbursements to Ms. Cummin and thereby suffered damage in the amount of \$550,000.

The complaint itemizes checks drafted by defendant that are alleged to constitute a return of Ms. Cummin's rental payments. It further itemizes alleged misstatements made by Ms. Cummin as to

the legitimacy of the landlord tenant relationship between herself and defendant.

Finally, the complaint details defendant's alleged misstatements made in affidavit he provided in support of Ms. Cummin's post judgment motion to enforce plaintiff's obligation to repay her living expenses. The complaint alleges that, at a time when he had agreed to give Ms. Cummin the apartment for no consideration, defendant affirmed to plaintiff's attorneys that there was a legitimate landlord tenant relationship between himself and Ms. Cummin, attaching the sham lease to his sworn statement. The complaint asserts that the affidavit was false and misleading in this regard, and that defendant made it with the intent to defraud plaintiff, and to assist Diane Cummin in defrauding plaintiff.

In reviewing the adequacy of a complaint, the allegations are given all favorable inferences. *CPC International v. McKesson Corp.*, 70 NY2d 268, 284-85 (1987). The court's task is to determine whether plaintiffs' pleadings state a cause of action and "the motion must be denied if from the pleadings' four corners 'factual allegations are discerned which taken together manifest any cause of action cognizable at law'" *511 West 232nd Owners Corp. v Jennifer Realty Corp.*, 98 N.Y.2d 144. [The court] must construe the complaint liberally, and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion, and accord plaintiffs the benefit of every possible favorable inference.' (id. at 152). *Richbell Info. Services v. Jupiter Partners, L.P.*, 309 AD2d 288, 289 (1st Dept. 2003).

The complaint at issue alleges fraud, aiding and abetting fraud and conversion. Defendant challenges that it is insufficient because plaintiff fails to allege that defendant made any material misrepresentations.

To set forth a claim of fraud, plaintiff must allege misrepresentation or concealment of a

material fact, falsity, scienter by the wrongdoer, justifiable reliance on the deception, and resulting injury” *Pope v. Saget*, 29 AD3d 437, 441 (1st Dept. 2006). A fair reading of the complaint establishes that plaintiff seeks to hold defendant liable for his participation in Ms. Cummin’s allegedly fraudulent scheme, and additionally, for his independent acts in furtherance of the conspiracy. It alleges in some detail that defendant and Ms. Cummin entered into a “sham lease,” at a time when defendant was aware of plaintiff’s obligation to reimburse Ms. Cummin’s rent expenses. The complaint further alleges that they entered into a later agreement in which defendant provided Ms. Cummin with the opportunity to enter into a second sham lease, at her option. According to the complaint, defendant accepted and negotiated Ms. Cummin’s checks pursuant to the terms of the sham lease, and then reimbursed her, and itemizes checks allegedly prepared by defendant for that purpose. Finally, the complaint alleges that defendant prepared a false and misleading affidavit to plaintiff’s attorneys asserting the validity of the lease at issue, in furtherance of the fraudulent scheme.

Construing these allegations most favorably to the plaintiff, they adequately set forth a contention that defendant knowingly made material misrepresentations intending to deprive plaintiff of a benefit and that plaintiff was thereby damaged. *CPC International, Inc., v. McKesson Corp.*, 70 NY2d 268, 285 (1987).

The second cause of action alleges that defendant aided and abetted Ms. Cummin in a scheme to defraud plaintiff. Defendant’s contention that the complaint refers only to alleged misrepresentations by Ms. Cummin overlooks plaintiff’s claim that defendant knowingly prepared misleading documents to assist Ms. Cummin in obtaining payments to which she had no right. These allegations support an inference that defendant knowingly agreed to cooperate in a fraudulent scheme and are sufficient to state a cause of action. Ms. Cummin’s own alleged misrepresentations are

therefore chargeable to defendant on the theories of conspiracy and aiding and abetting fraud. *Semi-Tech Litigation, L.L.C., v. Ting*, 13 AD2d 185, 187 (1st Dept.2004).

The third cause of action states a claim of conversion by defendant of “plaintiff’s monies.” Conversion is the “unauthorized assumption and exercise of the right of ownership of goods belonging to another, to the exclusion of the owner’s rights.” *Soviero v. Carroll Group International, Inc.*, 27 AD3d 276, 277 (1st Dept. 2006) (cites omitted). To state a cause of action for conversion with respect to money, there must exist a “specific identifiable fund and an obligation to return or otherwise treat in a particular manner the specific in question.” *Manufacturers Hanover Trust Co. v. Chemical Bank*, 160 AD2d 113, 124 (1st Dept. 1990). “[T]he law of conversion is concerned with possession. . . .” *State of New York v. Seventh Regiment Fund*, 13 Misc 3rd 222 (N.Y. Co. 2006); see also, *Republic of Haiti v. Duvalier*, 211 AD2d 379, 384 (1st Dept. 1995) (property in the unauthorized possession of another). In the absence of an allegation that defendant had or retains unauthorized possession of a specific fund of money to which plaintiff is entitled, and has refused its’ return upon plaintiff’s demand, the complaint has failed to set forth a claim for conversion.

According the pleadings every favorable inference, the first and second causes of action satisfy the requirements of CPLR 3016(b), especially at this procedural juncture, where “pleading requirements of CPLR 3016(b) should not be interpreted so strictly as to require specificity where it may be impossible to state in detail the circumstances constituting a fraud.” *Pludeman v. Northern Leasing Systems, Inc.*, __ AD2d __; Slip Op 4180 (1st Dept. May 15, 2007). See also, *Aetna Cas. & Sur. Co. v LFO Constr. Corp.*, 207 A.D.2d 274 (1st Dept. 1994). The third cause of action fails to set forth allegations which, if proven, would establish the tort of conversion. The third Cause of Action is therefore dismissed.

Defendant's motion for imposition for sanctions is denied as unwarranted, as is the cross motion for imposition of sanctions against defendant.

It is therefore

ORDERED that the motion to dismiss is denied with respect to plaintiff's First and Second Causes of Action and granted with respect to the Third Cause of Action, which is dismissed.

This constitutes the decision and order of the court. Any additional relief sought by plaintiff or defendant that is unaddressed has been considered and is denied.

ENTER:

Dated: New York, New York
July 6, 1007

FAXED, ATNY 7/6/07 LL

Saralee Evans
Saralee Evans, J.S.C.

HON. SARALEE EVANS

FILED
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