

Cuomo v Uppal

2009 NY Slip Op 30314(U)

February 6, 2009

Supreme Court, New York County

Docket Number: 400071/08

Judge: Martin Shulman

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

PRESENT: Shulman
Justice

PART 1

Cuomo Andrew
AG of NYS

INDEX NO. 400071/08

MOTION DATE _____

MOTION SEQ. NO. 3

Uppal

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for Dismiss order

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits A-M

PAPERS NUMBERED

1-4

Answering Affidavits -- Exhibits _____

5,6

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in
accordance with the attached decision
and order.

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

FILED

FEB 13 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: FEB 6 2009

MARTIN SHULMAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 1

-----x
ANDREW M. CUOMO, Attorney General of the
State of New York,

Plaintiff-Claiming Authority,

-and-

STATE OF NEW YORK,

Co-Plaintiff,

- against -

DARSHAN UPPAL, et al.,

Criminal Defendants.

-----x
HON. MARTIN SHULMAN, J.S.C.:

Index No.: 400071/08

DECISION & ORDER

FILED
FEB 13 2009
COUNTY CLERK'S OFFICE
NEW YORK

In this civil forfeiture action, non-criminal defendants RK Fragrances, Inc. dba Perfume Americana Wholesale ("Perfume"), Mukhtar Cheema and Bharattie Cheema (collectively the "Cheema defendants") move by order to show cause ("OSC") to dismiss the complaint on various grounds. Plaintiff-Claiming Authority Andrew M. Cuomo, Attorney General of the State of New York, and co-plaintiff State of New York (collectively "plaintiffs") oppose the OSC.¹

Perfume is a perfume wholesaler and Mukhtar Cheema is its principal. Bharattie Cheema is Mukhtar Cheema's wife. Plaintiffs commenced this action seeking *inter alia* forfeiture of the proceeds of a crime, alleging that the criminal defendants in this action engaged in a scheme to divert prescription medications and distribute the proceeds, a

¹ Counsel for the Cheema defendants and plaintiffs resolved those branches of the OSC seeking to vacate a previously issued order of attachment and temporary restraining order.

substantial portion of which was obtained from New York State Medicaid. The non-criminal defendants are the alleged distributees of such proceeds.² The complaint alleges six causes of action: forfeiture of the proceeds of a crime under CPLR Article 13-A (first cause of action); fraud and intentional misrepresentation (second cause of action); unjust enrichment (third cause of action); overpayment of public funds in violation of Executive Law §63-C (fourth cause of action); monies had and received (fifth cause of action); and treble damages pursuant to Social Services Law §145-b (sixth cause of action).³

The Cheema defendants' motion to dismiss is based upon: 1) plaintiffs' failure to include the date of filing on the summons (CPLR 305[a]); 2) documentary evidence (CPLR 3211[a][1]); 3) failure to state a cause of action (CPLR 3211[a][7]); 4) failure to allege fraud with particularity (CPLR 3016[b]); and 5) the interests of justice (CPLR §1311[4]).

At the outset, the branch of the OSC predicated upon non-compliance with CPLR 305 is denied. While plaintiffs do not dispute that the date of filing was not included on the summons and complaint, "a failure to comply with the technical requirements of CPLR 305(a) does not warrant dismissal unless there is a showing of prejudice caused by such defect". *Cruz v. New York City Hous. Auth.*, 269 A.D.2d 108 (1st Dept. 2000), *citing Bevona v. Malek*, 224 A.D.2d 317 (1st Dept.), *lv. denied* 88

² The parties named as non-criminal defendants in the case caption are designated as such solely with respect to the forfeiture cause of action, but are direct defendants for purposes of the statutory and common law causes of action.

³ Although the OSC requests dismissal of the entire action, it only addresses the first, second and sixth causes of action.

N.Y.2d 807 (1996). Here, the Cheema defendants do not allege any prejudice whatsoever.

The court now turns to the arguments that the complaint fails to state a cause of action against the Cheema defendants. To prevail in a CPLR Article 13-A forfeiture action brought against a non-criminal defendant, plaintiffs must: (1) obtain a felony conviction; (2) prove by a preponderance of the evidence that the property which is the subject of the action constitutes the proceeds or substituted proceeds of a crime; and (3) prove by a preponderance of the evidence that, *inter alia*, the defendants knew or should have known that the proceeds were obtained through the commission of a crime or that they fraudulently obtained their interest in the proceeds as part of a scheme to avoid forfeiture. See CPLR §1311(3)(b); *Morgenthau v. A.J. Travis Ltd.*, 184 Misc.2d 835, 708 N.Y.S.2d 827 (Sup. Ct., NY Cty, 2000).

The Cheema defendants argue that plaintiffs fail to allege that they knew or should have known that payments defendant Perfume received from alleged co-conspirator Afro-Caribbean Healthcare Supply Company, Inc. ("AC Healthcare") and deposited in Perfume's operating account⁴ were the proceeds of a crime. In his supporting affidavit, defendant Mukhtar Cheema states that alleged co-conspirator AC Healthcare is a wholesale perfume customer of defendant Perfume and denies knowledge of the source of the funds AC Healthcare used to pay Perfume and AC

⁴ As to the individual Cheema defendants, the complaint alleges that Perfume provided the proceeds of the alleged crimes to Mukhtar Cheema and Bharattie Cheema.

Healthcare's alleged involvement in criminal activities related to prescription medications.

On a motion to dismiss a complaint for failure to state a cause of action (CPLR 3211 [a] [7]), a court must take all allegations of the complaint as true and resolve all inferences that reasonably flow therefrom in favor of the plaintiff. *Caron v. Hargro Fabrics*, 91 N.Y.2d 362 (1998); *Marini v. D'Atolio*, 162 A.D.2d 391 (1st Dept. 1990). The court must deem the complaint to allege whatever can be reasonably inferred therefrom however imperfectly or informally its facts may be stated. *Barrows v. Rozansky*, 111 A.D.2d 105 (1st Dept. 1985); *see also, McGill v. Parker*, 179 A.D.2d 98 (1st Dept. 1992); *Blitman Constr. Corp. v. Kent Village Hous. Co.*, 91 A.D.2d 173 (1st Dept. 1983). Accordingly, a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 is available only where the dispute pertains to law, not facts. *Abrams v. Richmond County S.P.C.C.*, 125 Misc.2d 530 (Sup. Ct., Rich. Cty., 1984).

Arguably, the complaint, although lengthy, could be more clearly worded. However, contrary to the Cheema defendants' reading, paragraph 33 of the complaint alleges the knowledge element required under CPLR §1311(3)(b). Read as a whole and taking its allegations as true, the complaint sufficiently alleges a cause of action for forfeiture. Accordingly, this portion of the Cheema defendants' OSC is denied.

Plaintiffs' second cause of action alleges fraud and misrepresentation and the sixth cause of action seeks treble damages for violation of Social Services Law §145-b based upon the allegation that defendants "knowingly by means of false statements or representations, or by deliberate concealment of material facts or by other fraudulent

schemes or devices” obtained payments from Medicaid in an amount to be proved at trial. The OSC argues that the complaint fails to allege fraud with specificity as required by CPLR 3016(b), which requires that “the circumstances constituting the wrong shall be stated in detail.”

As the Court of Appeals recently observed in *Pludeman v. Northern Leasing Systems, Inc.*, 10 N.Y.3d 486, 491-492 (2008):

The purpose of section 3016(b)'s pleading requirement is to inform a defendant with respect to the incidents complained of. We have cautioned that section 3016(b) should not be so strictly interpreted “as to prevent an otherwise valid cause of action in situations where it may be ‘impossible to state in detail the circumstances constituting a fraud’” (*Lanzi v. Brooks*, 43 N.Y.2d 778, 780, 402 N.Y.S.2d 384, 373 N.E.2d 278 [1977], quoting *Jerred Contr. Corp. v. New York City Tr. Auth.*, 22 N.Y.2d 187, 194, 292 N.Y.S.2d 98, 239 N.E.2d 197 [1968]). Thus, where concrete facts “are peculiarly within the knowledge of the party” charged with the fraud (*Jerred Contr. Corp.*, 22 N.Y.2d at 194, 292 N.Y.S.2d 98, 239 N.E.2d 197), it would work a potentially unnecessary injustice to dismiss a case at an early stage where any pleading deficiency might be cured later in the proceedings (see *CPC Intl. v. McKesson Corp.*, 70 N.Y.2d 268, 285-286, 519 N.Y.S.2d 804, 514 N.E.2d 116 [1987]; *Houbigant, Inc. v. Deloitte & Touche*, 303 A.D.2d 92, 97-98, 753 N.Y.S.2d 493 [1st Dept.2003]; see also *Siegel*, 2003 Supp. Practice Commentary, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3016:3, 2008 Pocket Part, at 17 [“Misrepresenters have not been known to keep elaborate diaries of their fraud for the use of the defrauded in court]).

Pludeman, which analyzed whether plaintiffs sufficiently pleaded a fraud cause of action against individually named corporate defendants, is analogous to the case at bar. Like the corporate officers in *Pludeman*, the non-criminal Cheema defendants are charged with participation in and/or knowledge of another party's alleged fraud, here, Medicaid fraud. In sustaining the complaint as pleaded, the Court of Appeals noted that CPLR 3016(b)'s pleading requirements “should not be confused with unassailable

proof of fraud" and its requirements "may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct (citations omitted)." *Id.*, 10 N.Y.3d at 492.

Here, the complaint describes a scheme the nature of which gives rise to the reasonable, albeit rebuttable, inference that the Cheema defendants knew of and/or were involved in the fraud. Taken in the light most favorable to the non-moving party and according plaintiffs every possible favorable inference, this court finds that the complaint satisfies CPLR 3016(b)'s pleading requirements. Accordingly, the OSC must be denied on this ground.

The Cheema defendants also contend that a defense is founded upon documentary evidence. The OSC alleges that, in a related action (*Spitzer v. Mangar, et al*, Nassau County Index No. 13255/06), plaintiffs submitted an investigator's report detailing the funds Perfume allegedly received from AC Healthcare. This report indicates that Perfume was involved in seven transactions with AC Healthcare between September 2003 and January 2004, in the total amount of \$370,000. The Cheema defendants submit invoices, corresponding checks and bank deposit records representing all of its alleged perfume sales to AC Healthcare. The Cheema defendants deny references in the investigative report to hand written invoices from Perfume to AC Healthcare and further deny engaging in any cash transactions.

In response, plaintiffs question the authenticity of Perfumes invoices and the other documents proffered by the Cheema defendants. Plaintiffs also cite the affidavit of Special Auditor-Investigator Kyle Velasquez submitted in connection with plaintiffs' application for provisional remedies in motion sequence 001. This affidavit lists

payments from AC Healthcare to Perfume from November 4, 2002 through August 12, 2004 totaling \$3,198,007.68.

Under CPLR 3211(a)(1) a defendant has the burden of demonstrating that the documentary evidence conclusively resolves all factual issues and that plaintiff's claims fail as a matter of law. *Fortis Fin. Servs., LLC v. Fimat Futures USA, Inc.*, 290 A.D.2d 383, 737 N.Y.S.2d 40 (1st Dept., 2002). Here, the Cheema defendants' proof, while probative, does not conclusively resolve any factual issues, particularly in light of plaintiffs' allegations refuting same. Accordingly, dismissal of the complaint based upon documentary evidence is unwarranted.

Finally, the court declines the Cheema defendants' request to dismiss the action in the interests of justice pursuant to CPLR §1311(4). On this record, the court finds no "compelling factor, consideration or circumstance demonstrating that the forfeiture of the property of [sic] any part thereof, would not serve the ends of justice." See CPLR §1311(4)(d).

For all of the foregoing reasons, it is

ORDERED that the motion to dismiss is denied in its entirety.

The foregoing constitutes the Decision and Order of this Court. Courtesy copies have been sent to counsel for plaintiffs and movants.

Dated: February 6, 2009
New York, New York



Hon. Martin Shuman, J.S.C.

FILED
FEB 13 2009
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