

Mellow v Ropiak

2009 NY Slip Op 32538(U)

October 26, 2009

Supreme Court, New York County

Docket Number: 601869/08

Judge: Shirley Werner Kornreich

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

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54

Index Number : 601869/2008

MELLOW, DR. ELLEN

VS.

ELIGIUSZ "LEE" ROPIAK,

SEQUENCE NUMBER : 002

DISMISS

INDEX NO. 54

MOTION DATE 12/15/08

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1-2

3

4

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

OCT 30 2009

COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM AND ORDER.

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM AND ORDER.

JUSTICE SHIRLEY WERNER KORNREICH

[Signature]

J.S.C.

Dated: 10/26/09

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 54

-----X

DR. ELLEN MELLOW,

Index No. 601869/08

Plaintiff,

-against-

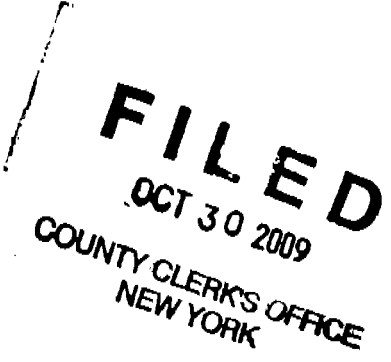
ELIGIUSZ "LEE" ROPIAK,
INTEGRATED MEDICAL SPECIALITIES, LLC,
(LEASEHOLDER), INTEGRATED MEDICAL
DIAGNOSTICS, LLC, INFINITY MEDICAL
BUSINESS SOLUTIONS and INFINITY MEDICAL
EQUIPMENT SERVICES,

Defendants.

-----X

SHIRLEY KORNREICH. J:

DECISION & ORDER



Defendants move, pursuant to CPLR 3211 (a) (1) and (a) (7), to dismiss the complaint.

Plaintiff, Dr. Ellen Mellow, brings this action to recover funds that she advanced to defendant Eligiusz "Lee" Ropiak as part of an oral joint venture agreement to create a suite containing cardiologists' offices and a diagnostic nuclear imaging facility. Mellow alleges that Ropiak fraudulently induced her into participating in the venture, first, by misrepresenting that he owned a "state of the art" nuclear camera, which would be the centerpiece of the suite, and secondly, by misrepresenting that he, and others, had also invested funds in the venture.

I. Verified Complaint

Mellow's verified complaint contains causes of action for breach of fiduciary duty (first cause of action), breach of contract (second cause of action), unjust enrichment (third cause of action), rescission (fourth cause of action), fraud (fifth cause of action), accounting and inspection (sixth cause of action) and punitive damages (seventh cause of action).

Mellow, a cardiologist who practices in Manhattan, alleges that she was introduced to

Ropiak in 2006 by a mutual acquaintance. Ropiak told her that he was a one-half owner of a state-of-the-art nuclear cardiology imaging system. He also owned Infinity Medical Equipment Services (Equipment Services), a company that specialized in diagnostic equipment and whose website boasted that the company would provide “turnkey solutions for all imaging and treatment modalities.” Complaint, ¶ 22. Ropiak proposed a business plan whereby he would locate and lease a site in midtown Manhattan, and would in turn, sublet space to Mellow and four other cardiologists. Each cardiologist would be able to refer his patients for nuclear imaging tests on-site. This would be financially beneficial to both the cardiologists, who would benefit from the convenience, and to Ropiak, who would provide the nuclear imaging system. Each cardiologist would be responsible for one-seventh of the cost of the lease, plus the needed renovations. Ropiak’s entity, defendant Integrated Medical Diagnostics, LLC (Medical Diagnostics), a nuclear imaging service business, would contribute two-sevenths of the costs. Ropiak stated that the total costs needed to get the project “up and running,” would be \$910,000.00, or \$130,000.00 per subtenant.

Mellow alleges that, in the fall of 2007, Ropiak told her that, through his entity, Integrated Medical Specialties, LLC (Medical Specialties), he had secured a lease for 5 East 59th Street (the Premises). He also represented that he and his partner, George Cohlma, who was the other half-owner of the nuclear camera, had funded their share of the renovation costs by contributing \$260,000.00.

On October 30, 2007, Ropiak arranged for Mellow to obtain a loan from JP Morgan Chase Bank (Chase) in the amount of \$450,000.00, which funds were “advanced” to Medical Specialties, on behalf of all of the subtenants. On that same day, Ropiak gave Mellow a

“Temporary Transfer of Subleases.” This document purported to give Mellow the leases of three subtenants as “collateral” for advancing the \$450,000.00. Mellow alleges that, in fact, Ropiak did not enter into a prime lease for the Premises until December 2007 and that at the time he gave her the “Temporary Transfer of Subleases,” there were no other subleases. In addition, Ropiak had not contributed any of his own funds to the project, and was not a one-half owner of the nuclear camera. Cohlmia owned the camera, and its use was subject to his discretion. Moreover, it was not a state-of-the-art camera, but rather a well-worn and dated camera.

Mellow alleges that she was eventually informed of the final lease signing in late December 2007, but never received a copy of her sublease or any of the subleases that were supposed to form the collateral. She further alleges that Ropiak used her funds to pay for his personal office supplies, cell phone expenses, food, meals, ATM cash disbursements, advertising and promotion for the space.

In addition, Mellow alleges that Ropiak promised her that she could move into the new office space on April 1, 2008. In reliance thereon, she made plans to terminate her lease on the space she had been using. Thereafter, in May 2008, all work on the project ceased, and Mellow discovered that all funds for the project were gone and that the contractor, bookkeeper and architect were owed substantial sums of money. Mellow commenced this action in June 2008.

II. Defendants' Motion

Defendants move to dismiss on the ground that Mellow has failed to state a cause of action against Ropiak individually. They also contend that plaintiff has failed to plead with particularity any type of misrepresentation on the part of the named defendants and that plaintiff has insufficiently pleaded breach of contract, breach of fiduciary duty and unjust enrichment. Lastly,

they contend that plaintiff's allegations cannot support an award of punitive damages.

In support of the motion to dismiss, defendants' attorney states the following: (1) Ropiak told Mellow that the nuclear camera that would be operated on site was owned by Cohlma, but that it would be operated by Ropiak's nuclear imaging service business, Medical Diagnostics; (2) Ropiak informed Mellow that the nuclear camera is a General Electric, 2003 model and in the mainstream of modern medical technology; and (3) Ropiak explained to Mellow that the cost of the lease would be divided seven ways, with each subtenant paying one-seventh of the lease cost and Medical Diagnostics paying two-sevenths of the lease costs, but that Medical Diagnostics would not be required to contribute money toward the "build-out" of the space since Medical Diagnostics facilitated the acquisition of the nuclear camera to be used on the site.

Defendants also contend that the documentary evidence demonstrates that Mellow has no valid claim against defendants. In support, defendants present the first and last pages of three subleases dated September 1, 2007, between Medical Specialties, as the prime tenant, and Drs. Mellow, Radwanter and Alain Fedida as subtenants. Defendants also present the first and last pages of an unsigned master lease agreement, which they claim was negotiated by August 15, 2007. However, defendants acknowledge that, at some point after October 30, 2007, the Premises were sold and the proposed master lease agreement and corresponding subleases did not materialize. Thereafter, Ropiak's deposit was returned to him. Ropiak then contacted the new landlord of the Premises and again began negotiations for the lease of the Premises. According to defendants' attorney, Mellow was fully informed of all negotiations.

Further, defendants claim that on December 26, 2007, a second master lease more advantageous to the new landlord, was agreed upon (the Second Master Lease). On that same

day, Drs. Mellow, Ropiak and Fedida signed a Guaranty relating to the Second Master Lease which is annexed to defendants' moving papers. Lore Aff., Exhibit K. Defendants also present the first and last page of a sublease of the Second Master Lease between Medical Specialties, as sublessee and Medical Diagnostics as sublessor, which is not approved by the prime landlord. Subleases of the Second Master Lease to plaintiff and other cardiologists are not in the record.

Defendants allege that Mellow was significantly involved in the design of the build-out and the efforts to secure funding for completion of construction in or about May and June of 2008. Finally, defendants contend that on June 1, 2008, when the Premises were ready and Mellow was informed that she could move into the Premises, she refused and this litigation ensued.

III. *Conclusions of Law*

On a motion to dismiss, the court is obliged to accept the complaint's factual allegations as true, and to accord the plaintiff the benefit of every possible favorable inference. *Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267 (1st Dept 2004). Where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion should be denied unless "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law [citation omitted]." *Goshen v Mutual Life Ins. Co. of N.*, 98 NY2d 314, 326 (2002); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

Moreover, while an attorney's affirmation may be an appropriate vehicle for introducing documentary evidence, an attorney may not affirm facts of which she has no knowledge, and when affirming facts as to which she does have knowledge, she must state the source of that knowledge. *Williamson, Picket, Gross, Inc. v Hirschfeld*, 92 AD2d 289 (1st Dept 1983); *1911 Richmond Ave. Assocs. v G.L.G. Capital, LLC*, 60 AD3d 1021 (2d Dept 2009).

Defendants' attorney's statements as to what Ropiak actually told Mellow are of no probative value, inasmuch as she has not alleged that she had personal knowledge of those representations. Additionally, even if she did have personal knowledge of the facts alleged in the complaint and sought to contradict them, the factual allegations asserted in the complaint would be deemed to be true. *Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc., supra.*

As to the documentary evidence submitted by defendants, including the purported lease agreements annexed as Exhibits C and E, it does not contradict Mellow's allegations that: Ropiak misrepresented that he owned a state-of-the-art nuclear camera; as of September 2007, he had obtained a lease for a suite of offices as well as subleases; and he and his partner had funded their share of the renovations. In particular, Exhibit C, the alleged August 17, 2007 master lease is unsigned, and defendants admit it never became operative; Exhibit E, the purported September 2007 subleases, were not approved by the landlord and purport to convey subleases of the admittedly never-obtained prime lease dated September 1, 2007. Defendants have not produced subleases of the Second Master Lease other than one between Medical Diagnostics and Medical Specialties, both executed by Ropiak, which lacks the landlord's signature of approval. Nor does the documentary evidence refute Mellow's assertion that Ropiak used Mellow's funds for his personal expenses.

Mellow has sufficiently alleged causes of action against Ropiak individually and the corporate defendants. A director or officer who participates in a fraud and profits from it will not be shielded from personal liability. *Ackerman v Vertical Club Corp.*, 94 AD2d 665, 666 (1st Dept 1983), *appeal dismissed* 60 NY2d 644 (1983). Here, there are allegations that Ropiak made

fraudulent representations and profited individually. With respect to the corporate defendants, they could be held liable for Ropiak's torts on the theory of *respondeat superior*. *Morell v Balasubramanian*, 70 NY2d 297, 302 (1987); *Colombini v Westchester County Healthcare Corp.*, 24 AD3d 712 (2d Dept 2005)(employer, on theory of *respondeat superior*, and employee individually can be liable for tort).

With respect to breach of contract, the complaint alleges the existence of an oral joint venture agreement and defendants' breach of its alleged terms. Plaintiff alleged that defendants agreed to provide the half-owned nuclear camera, the prime lease, marketing expertise, the other subtenants, two-sevenths of the rent and two-sevenths of the capital for the build out. Plaintiff and the other cardiologists were to pay five-sevenths of the rent pursuant to subleases, to guaranty the prime lease, to invest five-sevenths of the capital for construction and to refer their patients for diagnostic services to be provided by defendants. Plaintiff also sufficiently alleged breach, *i.e.*, no ownership of the camera, lack of investment by defendants, failure to obtain investments by the other cardiologists and failure to deliver plaintiff's sublease.

With respect to breach of fiduciary duty, it is well settled that joint venturers are fiduciaries and the alleged diversion of joint venture funds is sufficient to sustain a causes of action for breach of fiduciary duty and an accounting. *Chipman v Steinberg*, 106 AD2d 343 (1st Dept 1984), *aff'd* 65 NY2d 842 (1985).

Turning to unjust enrichment, "the essential inquiry ... is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered." *Mandarin Trading Ltd. v Wildenstein*, 884 NYS2d 47 (1st Dept 2009)(n.o.r.); *see also, Waldman v. Englishtown Sportwear, Ltd.*, 92 AD2d 833, 836 (1st Dept 1983); *Tarrytown House*

Condominiums, Inc. v. Hainje, 161 AD2d 310, 313 (1st Dept 1990). Recovery for unjust enrichment is barred if there is an oral or written agreement for events arising from the same subject matter. *Morales v Grand Cru Assoc.*, 305 AD2d 647 (2d Dept 2003), citing *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 (1987).

In this case, the unjust enrichment claim cannot be dismissed because it is still a question of fact whether the parties had an oral joint venture agreement. Plaintiff properly pleaded the advance of a substantial sum of money that it would be unjust for defendants to retain if, as plaintiff alleges, it was used for purposes unrelated to the joint venture. Although plaintiff pleads an oral agreement, which if it existed would bar recovery for unjust enrichment, defendants deny that the agreement was formed and disputes its alleged terms. Hence, in the event that plaintiff is unsuccessful in proving the agreement, unjust enrichment would be a proper, alternative basis for recovery.

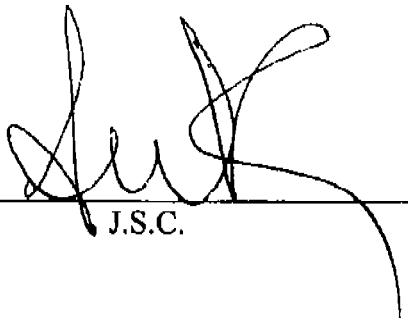
Lastly, a demand for punitive damages is not a separate cause of action and possesses no viability absent its attachment to a substantive claim. *Rocanova v Equitable Life Assur. Socy. of US*, 83 NY2d 603, 617 (1994). However, punitive damages are awarded to punish a tortfeasor for conduct that exhibits a high degree of moral culpability and manifests a willful, wanton or reckless disregard of the rights of others. *Home Ins. Co. v American Home Products Corp.*, 75 NY2d 196, 204 (1990). Such conduct may be alleged here and the court will convert the seventh cause of action to an *ad damnum* clause. CPLR 104. Accordingly, it is

ORDERED that defendants' motion to dismiss the complaint is granted only to the extent that the seventh cause of action for punitive damages is converted to an *ad damnum* clause and is otherwise denied; and it is further

ORDERED that the parties are directed to appear for a pretrial conference on November 19, 2009 at 9:30 a.m. in Part 54, Room 418 of the courthouse located at 60 Centre Street, New York, NY.

Dated: October 26, 2009

ENTER:



J.S.C.

FILED
OCT 30 2009
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