

<b>Kleyburn v Schneider</b>
2009 NY Slip Op 32706(U)
November 18, 2009
Supreme Court, New York County
Docket Number: 600757/09
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUDITH J. GISCHE, J.S.C.

PART 10

Index Number : 600757/2009

KLEYNBURD, MAX

vs

SCHNEIDER, LAURIE

Sequence Number : 001

COMPEL DISCLOSURE

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:      Yes      No

Upon the foregoing papers, it is ordered that this motion

**FILED**

NOV 18 2009

NEW YORK  
COUNTY CLERK'S OFFICE

motion (s) and cross-motion(s)  
decided in accordance with  
the annexed decision/order  
of even date.

*and PC scheduled  
for 1/14/10 @ 9:30 am*

Dated: 11/13/09

JUDITH J. GISCHE, J.S.C. J.S.C.

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: IAS 10

-----x  
Max Kleyburd and Marina Kleyburd,

Plaintiffs,

-against-

Laurie Schneider, Craig Peterson, Darrell Martin,  
Janitorial Close-out LLC, Sax & Sounds Productions,  
Inc., All Clean Janitorial Supply, Inc., Janitorial  
Close-out City LLC, Cambia Inc., and Janitorial  
Close Out Citigroup,

Defendants.

-----x  
Hon. Judith J. Gische:

Decision/Order  
Index # 600757/09  
Mot. Seq. # 001

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Pursuant to CPLR §2219(a) the court considered the following numbered papers on this motion and cross-motion:

PAPERS	NUMBERED
Notice of Motion, Transcript dated June 30, 2009.....	1
Notice of Cross-Motion, NBS affirm. dated 7/23/09, exhibits.....	2
PA affirm.,MK affd., exhibits.....	3

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

Plaintiffs seek and order directing defendants Darrell Martin ("Martin") and Craig Peterson ("Peterson") to appear for deposition and for collateral relief following their alleged failure to appear for a deposition duly noticed by the plaintiffs. Martin and Peterson, jointly represented, oppose the motion and have cross-moved to dismiss the complaint. Since the disposition of the cross-motion will necessarily impact the motion in chief, the court considers the cross-motion first.

Motion to Dismiss

On a motion to dismiss, the court accepts the facts as alleged by plaintiff as true,

affording them the benefit of every possible favorable inference (EBC I, Inc v Goldman, Sachs & Co., 5 NY3d 11, 19 [2005]; Sokoloff v Harriman Estates Development Corp., 96 NY2d 409, 414 [2001]; P.T. Bank Central Asia v ABN AMRO Bank NV, 301 AD2d 373, 375-6 [1st Dept 2003]), unless clearly contradicted by evidence submitted in connection with the motion (see Zanett Lombardier, Ltd v Maslow, 29 AD3d 495 [1st Dept 2006]). In asserting a motion to dismiss under CPLR 3211 (a) (7), the Court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint, and “the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one” (id., quoting Guggenheimer v Ginsburg, 43 NY2d 268 [1977]).

The underlying complaint in this action alleges that Peterson was a principal and officer of each of the corporate defendants. It further claims that in or about September 2007, Martin and Peterson proposed that the plaintiffs make investments in the corporate defendants and that they “could promise” a 20% return on any investment. Plaintiffs made investments in the corporate defendants. Thereafter, in 2009 Peterson and Martin announced that the “entire matter was a scam” and that there was no money to be paid to the investors. Plaintiffs allege that Peterson and Martin also announced “the Agreement and guaranty would not be performed,” referring to exhibit A annexed to the complaint.

The exhibit referred to is a document on the letterhead of All Clean Supplies, Inc. and it is identified as an “investment Agreement.” It is “signed under penalty of Perjury, January 15, 2009” by “Craig Peterson, All Clean Janitorial Supply, Inc/Janitorial Close-Out City Corporation.” Although there is a signature line for “Max Kleynburd, Max

Kleyburn Ventures, Inc.”, no signature appears for Mr. Kleyburn.

The exhibit provides in pertinent part that Peterson (along with defendant Schneider) guarantees full payment of both profit and original investment to be returned to the investor within six months to the date of the agreement. Peterson, however, has not signed the agreement in his personal capacity.

Plaintiffs have asserted five causes of action<sup>1</sup> against all defendants, including Peterson and Martin for: common law fraud (first cause of action); negligent misrepresentation (second cause of action); breach of contract (third cause of action); recoupment (fifth cause of action) and breach of promissory note (sixth cause of action).

Peterson and Martin claim that the complaint should be dismissed as to them because: [1] it fails to allege the fraud with sufficient particularity; [2] it fails to and cannot identify a duty that would support their claim for negligent misrepresentation; [3] it fails to state the nature of the parties' contract; [4] the “contract” provided as exhibit A to the complaint is insufficient as a matter of law because it is not signed by either of the plaintiffs; [4] the contract is a usurious loan and unenforceable; and [5] there is no cognizable cause of action for recoupment.

In opposition, plaintiffs have provided an “amended complaint” which they seek to interpose. CPLR § 3211 (e). The amended complaint and Max Kleyburn’s affidavit amplify plaintiffs’ claims to provide that they were victims of a Ponzi scheme in which they invested large sums of money. The plaintiffs are mother and son. Max Kleyburn

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<sup>1</sup>Although plaintiffs assert five causes of action they have inadvertently numbered them first, second, third, fifth and sixth causes of action.

claims that all defendants falsely represented the nature of the investments to him and his mother and further falsely guaranteed the prospect for huge returns. Relying on these representations plaintiffs invested approximately \$250,000. Plaintiffs claim that these were not legitimate investments at all, but rather a Ponzi scheme, by which the defendants wrongfully retained the money given to them. Plaintiffs claim that exact nature of the scheme at this time is best known to the defendants and that the court should not dismiss this action before they have an opportunity for discovery.

Preliminarily, the court rejects plaintiffs' argument that the cross-motion is defective and should be denied outright because it does not identify the nature of the relief being sought. Notwithstanding that the Notice of Cross-motion does not specify the exact CPLR provision upon which the motion is based, it does specify that it is seeking dismissal. The body of the motion makes it perfectly clear the legal basis for the motion, thereby satisfying due process. Turning to the merits of the cross-motion the court holds as follows:

#### Fraud

Plaintiffs first cause of action alleges common law fraud. The elements of a common law cause of action for fraud are: [1] a misrepresentation of a material fact; [2] which was known by the maker to be false; [3] and made with the intention of inducing plaintiff to rely upon it; [4] justifiable reliance by the plaintiff and [5] resulting damages. (Lama Holding Co. v. Smith Barney Inc., 88 NY2d 413 [1996]). CPLR §3016 requires that any cause of action for fraud be plead with particularity.

At bar the cause of action for fraud survives a motion to dismiss. Plaintiffs are claiming that all defendants, which would include Peterson and Martin, made

representations to them about the nature of the investment and the prospect for profits. They further claim that these representations were false, because there never was a viable investment at all, only a scheme to improperly retain plaintiffs' money. The plaintiffs claim that the representations were made for the purpose of inducing plaintiffs to invest large sums of money in the venture. The plaintiffs relying on the false statements made such investments and they lost money because the so called investments were never really investments in the first place. This is sufficient to state a cause of action for fraud.

While the claim does lack certain specificity as to who said what to whom at what time and the nature of "scheme", much of the information about the mechanics of the scheme, and the role that each defendant played in it, is within the purview of defendants' own knowledge. Under the circumstances, where the facts are "peculiarly within the knowledge of the party against whom the [fraud] is being asserted" (Jered Contr. Corp. v New York City Tr. Auth., 22 N.Y.2d 187, 194 [1968]), it is impossible at a pleading stage for plaintiff to state the circumstances in more detail because only the defendants may know the details (Grumman Aerospace Corp. v Rice, 196 AD2d 572 [2d Dept 1993]). Further detail may be revealed during discovery. In this situation, CPLR § 3016 is not to be so strictly interpreted as to prevent an otherwise valid cause of action. Id; cf Glatzer v. Scapptura, 116 AD2d 697 (2d Dept 1986).

#### Negligent Misrepresentation

Plaintiffs' second cause of action is for negligent misrepresentation and it must be dismissed. Plaintiffs have failed to allege facts supporting a conclusion that either Peterson and/or Martin owed plaintiffs a special duty, a necessary prerequisite for such

cause of action to exist. ( Sykes v. RFD Third Ave. 1 Associates, LLC, \_\_\_ AD3d \_\_\_, 884 NYS2d 745 [1<sup>st</sup> dept. 2000]). Here, the parties had no relationship other than an arms length business transaction. Therefore, a negligent misrepresentation claim does not lie (see Parisi v. Metroflag Polo, LLC, 51 AD3d 424 [1st Dept 2008]).

#### Breach of contract/ breach of promissory note

The third and sixth causes of action overlap and are based upon the same contract that is annexed as exhibit A to the original complaint. While the copy of the contract sued upon does not contain the signature of plaintiff, Max Kleynburd, even if it did, the causes of action for breach of contract would still have to be dismissed. Neither plaintiff was a party to the contract. The contract, if it was signed by Max Kleynburd at all, was only signed by him on behalf of Max Kleynburd Ventures, Inc. Since neither plaintiff is an individual party to the contract, neither one of them can sue to enforce it. Moreover, neither Martin nor Peterson, as individuals are parties to the contract. Martin is not mentioned in the contract and has not signed it in any capacity. Peterson has signed the contract but only in a representative capacity. Although he has personal obligations under the contract, he has not signed the contract in any individual capacity.

In view of the court's conclusion that the named parties are not parties to the contract, the court does not reach any arguments raised about the validity of such a contract.

#### Recoupment

There is no independent, cognizable cause of action for recoupment by a plaintiff. At common law, that right is defensive in nature and applies to off set or

reduce plaintiff's right of recovery by sums owed to a defendant arising from the claims made in the case in chief. Peuser v. March, 167 AD 604 (3<sup>rd</sup> dept. 1915). This cause of action, therefore, must be dismissed.

#### Leave to Replead

Plaintiffs seek leave of this court to serve an amended complaint. The proposed amended complaint asserts additional factual material as otherwise set forth in the plaintiff Max Kleyburd's affidavit in opposition to the cross-motion to dismiss. The court has considered the additional material in deciding the cross-motion. There is, however, no need to otherwise include such material in a new pleading. This relief is, therefore, denied as unnecessary.

#### Motion to Compel Discovery

Plaintiffs move to compel the deposition of Martin and Peterson. They claim both defendants willfully failed to appear for deposition on June 30, 2009, in violation of a validly served Notice. They further seek costs and punitive damages.

The motion is procedurally defective for failure to comply with 22 NYCRR 202.7(a) which requires an affidavit from counsel, stating that the moving attorney had conferred with opposing counsel in a good faith effort to resolve the discovery dispute. Even were this procedural impediment not present, the motion would still be denied, because although Martin and Peterson could not appear on the date in question, there is every indication that they were and are still willing to appear for deposition without compunction of court order.

The court, therefore, sets this matter down for a preliminary conference at which all discovery, including deposition dates for the parties, can be scheduled.

**Conclusion**

In accordance with this decision, it is hereby:

ORDERED that plaintiff's motion to compel the depositions and for costs and punitive damages against defendants Craig Peterson and Darrell Martin is denied, and it is further

ORDERED that this case is set for a preliminary conference in courtroom 232 at 60 Centre Street in New York County on **January 14, 2010 at 9:30 am**, and it is further

ORDERED that plaintiffs' attorney shall notify all appearing parties of the date and time of the conference, and it is further

ORDERED that, the cross-motion is granted only to the extent that the causes of action for negligent misrepresentation, breach of contract, recoupment, and breach of promissory note are dismissed against defendants Craig Peterson and Darrell Martin and it is further

ORDERED that the cross-motion is otherwise denied, and it is further

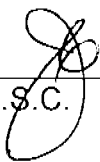
ORDERED that plaintiffs' request for leave to serve an amended complaint is denied as unnecessary, and it is further

ORDERED that any requested relief not expressly granted herein is denied and that this constitutes the decision and order of the court.

Dated: New York, New York  
November 13, 2009

**FILED**  
NOV 18 2009  
NEW YORK  
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SO ORDERED:

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