

Zhong v Capstone Bus. Credit, LLC

2009 NY Slip Op 33198(U)

December 23, 2009

Supreme Court, New York County

Docket Number: 100429-2009

Judge: Judith J. Gische

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12-30-09

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

PRESENT: HON. JUDITH J. GISCHE

PART 10

Justice

Index Number : 100429/2009

ZHONG, MICHAEL

VS.

CAPSTONE BUSINESS CREDIT

SEQUENCE NUMBER : 004

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

on this motion to/for _____

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

PAPE(S) NUMBERED _____


DEC 30 2009

NEW YORK COUNTY CLERK'S OFFICE

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

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

Dated: December 23, 2009



HON. JUDITH J. GISCHE 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: PART 10**

-----x
Michael Zhong,

Plaintiff (s),

-against-

Capstone Business Credit, LLC, John Rice, III,
Yechezkel Menashe, Esq., and "John Doe,"

Defendant (s).
-----x

DECISION/ORDER

Index No.: 100429-2009
Seq. No.: 004

PRESENT:

Hon. Judith J. Gische
J.S.C.

FILED
DEC 30 2009
NEW YORK
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
CBC and Rice n/m [CPLR 3211, 3212], w/SAB affirm, Rice affid, exhs	1
MZ opp w/TDG affirm, exhs	2
CBC and Rice reply w/SAB affirm, exhs	3
Steno Mins 10/1/09, 10/29/09	4, 5

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

This lawsuit arises from a failed business transaction involving financing for the purchase of copper. Plaintiff Michael Zhong ("plaintiff") has asserted six causes of action against the defendants, including claims for fraud and unjust enrichment.

Issue was joined by Capstone Business Credit, LLC and John Rice ("Capstone" and "Rice") who now move for the dismissal of this action because: [1] plaintiff has failed to name a necessary party (CPLR 3211 [a] [10]), [2] plaintiff has not stated a cause of action against them (CPLR 3211 [a] [7]), and [3] this court does not have subject matter jurisdiction over this dispute because it arose in the People's Republic of China. Although Capstone and Rice did not assert this jurisdictional defense in their

answer, they seek permission to do so now (CPLR 3025 [b]) and consequently also dismissal on that basis. Capstone and Rice have also moved for summary judgment resolving all of plaintiff's claims against them in their favor (CPLR 3212 [a]).

The other named defendant (Yecheskel Menashe, an attorney admitted to practice) ("Menashe") has not taken any position on the relief sought by his co-defendants although he was allowed to interpose an answer to the complaint and assert counterclaims (see, Order, Gische J., 10/1/09).

This motion, to the extent it seeks summary judgment, is timely because issue has been joined by the moving defendants and the note of issue has not yet been filed.

Since the moving defendants are seeking the dismissal of the complaint and summary judgment, the court has to first determine whether, accepting all of plaintiff's facts as true, and providing him with the benefit of every possible inference he has a cause of action (Goshen v. Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326 [2002]; Leon v. Martinez, 84 NY2d 83 [1994]; Morone v. Morone, 50 NY2d 481 [1980]; Beattie v. Brown & Wood, 243 AD2d 395 [1st Dept. 1997]). If the claims survive, then the court must go on to consider whether Capstone and Rice have made a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]).

Applying these legal principles, the court's decision on this motion is as follows:

Arguments and Facts Considered

Plaintiff is an investor. Defendant Rice is the President of Capstone and also the Chief Financial Officer of non-party Capstone Feed (Beijing) Company, Inc.

("Capstone/China"). Defendant Menashe is an attorney who represented plaintiff for several years and in connection with the dispute at bar. Plaintiff has filed a professional grievance against Menashe which has not yet been resolved.

Plaintiff alleges that Menashe contacted him about a business opportunity entailing the purchase of copper in the People's Republic of China. According to plaintiff, Menashe told him that a very wealthy business man named Frank Regina ("Regina") wanted to sell 10,000 metric tons of Russian copper and that he was willing to sell it at a greatly reduced price. Zhong was very interested and negotiations began.

The price for the copper started out over two million dollars, and initially Regina placed limitations on how much copper he was willing to sell to the plaintiff. Eventually, however, plaintiff reached an agreement with Regina that he could purchase the copper for an initial down payment of "only" \$1,000,000 with the understanding that there would be a limitless supply available to him. None of this is in a written contract. Those negotiations took place at or about the same time that Regina entered into a Guaranteed Purchase and Sale Agreement with a non-party, which was guaranteed by Capstone/China, also a non-party. Plaintiff is not a party to that Guaranteed Purchase and Sale Agreement, nor was the agreement for his benefit. According to Rice, Capstone/China agreed to provide debt to purchase financing on approved trades for Regina's companies in the People's Republic of China. Rice contends that he knew nothing about Regina's dealings or negotiations with plaintiff or that Regina had a "side" agreement" with plaintiff to sell copper to him. Rice denies anyone from Capstone/China ever dealt with plaintiff or Menashe in connection with the contract guaranteed by Capstone/China. Rice acknowledges, however, that the Regina contract

guaranteed by Capstone/China was never performed and was terminated. Rice also denies that his signature appears on another document that plaintiff apparently produce during discovery.

Plaintiff contends Menashe acted as his lawyer and helped him work out the agreement with Regina and his company. Plaintiff also claims Regina assured him that he did not have to produce certified funds to buy the copper because Capstone (Rice) would guarantee the money for him. Plaintiff was only able to raise \$700,000 and thereafter, in August 2007, Capstone obtained a mortgage on plaintiff's house in the amount of \$350,000.

Plaintiff alleges that there was no copper to be sold and it had never existed. He contends this was an elaborate scheme by Menashe, Rice, Capstone and others to defraud him of money. Plaintiff has not asserted a breach of contract claim against any of the defendants. The basis of his claims against them are that they made knowingly false statements with the intent to defraud him.

Capstone and Rice seek the dismissal of the complaint. Alternatively, they contend there are no material triable issues of fact and they should be granted summary judgment.

One basis for the motion to dismiss is that Regina is a necessary party who must be named in order for plaintiff to obtain full relief. Capstone and Rice contend neither of them were involved in Regina's negotiations with plaintiff, nor did they make any fraudulent statements. They deny they have contractual privity with plaintiff, and rely upon Regina's unsworn statement about a course of dealing between plaintiff and Regina involving the copper. Alternatively, both moving defendants allege they were

disclosed agents for Regina and, therefore, any claim that plaintiff may have against them arises under his agreement with Regina. Rice denies that Capstone had any involvement with Regina, even if Capstone/China did.

Another basis for dismissal, according to Capstone and Rice, is that this court is without subject matter jurisdiction because this dispute arose in the People's Republic of China, not in New York. They seek permission to serve an amended answer to assert this affirmative defense which was not originally pled.

Rice relies on his own sworn statement, the sworn statement of Regina, and various documents, including a series of emails and other correspondence that Rice sent and received. Rice also relies on two agreements that Regina entered into with plaintiff. One is a "Non-disclosure Non-circumvention Agreement" among plaintiff, his company, Regina and his company, dated 11/11/07 ("11/11/07 agreement"). The other is an "Operating Agreement Noncircumvention, Nondisclosure and Confidentiality Agreement" ("operating agreement") for a newly created company ("eTMC"). Neither Capstone nor Capstone/China is a signatory to either of these agreements. The operating agreement does, however, refer to some "Capstone" companies as companies that Regina "introduced" to plaintiff, and that "the introduction of a company, corporation, entity [etc.], hereinafter client, remains the client of the Party that introduced the client . . ." Similarly, the 11/11/07 agreement recites that Regina has introduced "Capstone Corporation" to plaintiff.

Capstone and Rice rely on proof that it received funds in the form of wire transfer on the behalf of Regina, which the company then forwarded to Regina, and that Rice and Regina had a commission agreement for this service. Rice also states he played

no role in the operation of eTMC, he has never communicated with plaintiff, and that his company has no involvement with Regina's companies. The moving defendants also provide a letter from Regina to a non-party (attorney) dated April 2, 2008 in which Regina states that "Capstone has nothing to do with USD deposits . . . They only acted as an RMB [Chinese currency] depository . . . and they want nothing to do with the USD deposits . . ." The letter was written by Regina's attorney to plaintiff in connection with threatened legal action by plaintiff against Regina, based upon the non-receipt of the copper.

Capstone and Rice maintain that the mortgage on plaintiff's house had nothing to do with plaintiff's agreement with Regina, but is an entirely separate agreement between Capstone and plaintiff for financing secured by a mortgage.

In his sworn affidavit, Regina states that he had an agreement with plaintiff for the purchase of cathode copper in exchange for plaintiff using his influence in the People's Republic of China. Regina also states that Rice and Capstone were used strictly to receive Chinese currency and then pay Regina in U.S. dollars. Otherwise, according to Regina, he had no relationship with Rice or any of the Capstone companies, and none of the Capstone companies had any relationship with his companies.

In opposition, plaintiff initially argued that defendants' motion was premature because he had not yet received discovery responses from them, nor had they been deposed, and he had brought a motion to enforce his discovery demands. At oral argument, however, plaintiff acknowledged he had received documents from defendant and he withdrew his motion to strike their answer (Steno Minutes 10/1/09).

Plaintiff contends that although Regina was involved in the conspiracy to defraud him, he is not a necessary party (CPLR 1001 [a]) because plaintiff is not suing for breach of contract, but a tort. Plaintiff argues that there is a disputed issue of fact that Rice was not just acting as Regina's agent, but was a co-conspirator in a scheme to defraud him (plaintiff). This is partly based on an email dated April 30, 2007 sent by Rice to Regina which states:

"there is about \$3.4 Million of new funds in my account. Please send the deposit slip so I have the exact amount. We will need to sign some sort of contract showing that the funds are payment for goods we are buying here with some small fee to Capstone TMR in China or I will have to pay income tax of 33% on this money. Send me an agreement made out to Capstone Asia Trading Corp., which is the parent of Capstone TMR."

Plaintiff claims that Capstone and Rice agreed to guarantee plaintiff's performance of his agreement with Regina, even though they had no financial information about the plaintiff at the time. He points out Regina had him send money directly to Rice and Capstone which is further proof they were all co-conspirators.

Discussion

Motion to Amend the Answer

The court first addresses Capstone and Rice's motion to amend their answer to assert the affirmative defense of lack of subject matter jurisdiction and dismissal of this action for that reason.

Generally, "[i]n the absence of prejudice or surprise to the opposing party, leave to amend a pleading should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit . . ." (Morris v. Queens Long Island

Medical Group, P.C., 49 A.D.3d 827, 828 [2nd Dept 2008] *internal citations omitted*). If the proposed amendment alleges facts that are not actionable, then leave to amend must be denied (Rappaport v. VV Publishing Corp., 223 AD2d 515, 516 [1st Dept 1996]). Capstone and Rice's proposed defense is that this court lacks subject matter jurisdiction over the parties' dispute because the underlying events occurred in China. Plaintiff, however, is a New York resident, he alleges this action arises from transactions of business by the defendants and others within this state, Menashe is a New York State resident, and plaintiff gave Capstone a mortgage on his house which is in Queens. Capstone and Rice rely upon Regina's sworn affidavit in support of their motion to dismiss. According to Regina's affidavit, payments were made through the United States and the "balance is stilled owed in the USA . . ." There is, therefore, no factual support for Capstone and Rice's proposed amended answer to assert an affirmative lack of subject matter jurisdiction. Consequently, Capstone and Rice's motion for leave to amend their answer is denied.

Necessary Parties

CPLR § 1001 [a] mandates that a necessary party who is subject to the court's jurisdiction must be joined and failure to join the necessary party is grounds for the dismissal of the action (CPLR §§ 1003; 3211 [a][10]). A necessary party is someone who must be brought into the case if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action.

Although a contract action may require joinder of specific persons who are necessary parties in order for a judgment rendered in the case to be effective, that is

not true in a tort action. Joint tortfeasors need not be sued together because liability is joint and several (Peak v. Bartlett, Pontiff, Stewart & Rhodes, P.C., 28 AD3d 1028 [3rd Dept 2006]). Capstone and Rice have failed to show that this case must be dismissed because Regina is a necessary party. Plaintiff's allegations against Capstone and Rice, individually do not arise from a contract he has with them, nor is he alleging that they breached any agreement with him. His claim is that the parties (and others) defrauded him (a tort). Therefore, Regina is not a necessary party and this case does not have to be dismissed because he is not a named party that should be named.

Failure to State a Cause of Action

Plaintiff has asserted 5 causes of action against Capstone and Rice, individually. The 6th cause of action (breach of fiduciary duty) is asserted against Menashe (reportedly, plaintiff's lawyer in the transaction) only

The basis for all of plaintiff's claims against Rice individually is that he is a managing member/president of Capstone and also the principal of Capstone/China and the "Capstone" companies were involved in these transactions. Rice correctly argues, that under LLC § 609, a member or managing member of a limited liability company is shielded from personal liability for debts, obligations, or liabilities of an LLC, whether arising in tort, contract or otherwise. Although a managing member may still be held personally liable if he participated in the commission of a tort in furtherance of company business (Pepler v. Coyne, 33 AD3d 434 [1st Dept 2006]), plaintiff has not provided any facts that support his claims against Rice. All the allegations set forth in the complaint and in opposition to this motion were statements made by Menashe. No statements have been attributed to Rice nor has plaintiff connected Rice in any way to any tortuous

act. Therefore, Rice's motion for the dismissal of all claims against him individually is granted and they are hereby dismissed.

Plaintiff's 1st cause of action is for fraud and his 2nd cause of action is for "conspiracy to defraud." The necessary elements of a fraud cause of action are that there has been a misrepresentation of material facts, falsity, scienter, reliance and injury (Standish-Parkin v. Lorillard Tobacco Co., 12 AD3d 301 [1st Dept 2004]). A "conspiracy to defraud" is punishable as a felony under Penal Law § 190.65 and there is no private right of action because it is prosecuted by the state (People v. First Meridian Planning Corp., 86 NY2d 608 [1995]). A "conspiracy to commit fraud" is, however, a civil action than can be pursued by a private individual.

Assuming that plaintiff's claim is really for a "conspiracy to commit fraud," he must allege facts showing a sufficient connection between the actions of the named individuals and the fraud alleged, such as a scheme or plan in common (Agostini v. Sobol, 304 AD2d 395 [1st Dept. 2003]; see, Callahan v. Gutowski, 111 AD2d 464 [3rd Dept. 1985]).

Affording the complaint a liberal construction and providing the plaintiff with the benefit of every possible inference, plaintiff has not stated any facts supporting either of these causes of action against Capstone. Although plaintiff suspects that the moving defendants were "involved" in the scheme because the Capstone name was associated with Regina, he does not specify what facts Capstone and/or Rice (on behalf of Capstone) misrepresented which were false, known to be false and with an intent to deceive. Nor has he set forth any facts that support his claim that Capstone and/or Rice conspired with Menashe to defraud him. Therefore, the 1st and 2nd causes of

action must be dismissed.

Plaintiff's 3rd cause of action is based upon an alleged violation of General Business Law § 349. GBL § 349 provides that "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful." It is an intentionally broad statute, applying "to virtually all economic activity." Goshen v. Mutual Life Ins. Co. of New York, 98 N.Y.2d 314, 324 (2002). To establish a violation of GBL § 349 the conduct complained of must be consumer-oriented and have a broad impact on consumers at large as compared to a private contract dispute that is unique or particular to one of the parties to the lawsuit. New York University v. Continental Ins. Co., 87 NY2d 308, 324 (1995); Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, 85 NY2d 20, 25 (1995).

Even if plaintiff can prove at trial that he is a consumer within the meaning and spirit of the law, the deceptive acts alleged only involve him, not the public at large. Therefore, accepting plaintiff's facts as true and affording the complaint a liberal construction, plaintiff has not stated a cause of action against the defendants based upon a violation of General Business Law § 349. Therefore, Capstone's motion to dismiss the 3rd cause of action must be granted and the 3rd cause of action is also dismissed.

Plaintiff's 4th cause of action is for unjust enrichment and his 5th cause of action is for money had and received. The two actions are similar. Each is based upon a claim that someone has received the money or goods of another and that it is inequitable or against good conscience for that receiving party to retain what he has received (Miller v. Schloss, 218 N.Y. 400 [1916] [unjust enrichment]; Parsa v. State of New York, 64

N.Y.2d 143 [1984] [money had and received]). In each claim the relief sought is the return of the money or goods. Where the claim is for money had and received, the money has come into the hands of the defendant "impressed with a species of trust." Parsa v. State of New York, 64 NY2d at 148.

Capstone concedes that money was deposited into Capstone/China's account and then transferred to Regina. Although Capstone contends Capstone/China was merely providing a service for which it charged Regina a fee, plaintiff states otherwise.

Although these two causes of action survive defendants' motion to dismiss for failure to state a cause of action (plaintiff has stated facts that support them), defendants have, nonetheless proved they are entitled to summary judgment in their favor for the reasons that follow.

Summary Judgment

Capstone and Rice argue they are entitled to summary judgment because they were the agents of a fully disclosed principal, (i.e. Regina and his companies). As the movants seeking summary judgment in their favor, Capstone and Rice have the burden of proving their defenses, tendering sufficient evidence to eliminate any material issues of fact from the case (Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]). On a motion for summary judgment, the court's function is "issue finding," not issue resolution (Sillman v. 20th Century Fox Film Corp., 3 NY2d 395, 404 [1957]). Where there are unresolved issues of fact, or there is any doubt as to their existence, a motion for summary judgment must be denied so the trier of fact can decide the facts (Cross v. Cross, 112 AD2d 62, 64 [1st Dept. 1985]).

Capstone and Rice have proved that they had an agreement with Regina to

facilitate the movement of Chinese RMB into and out of China. Although these financial dealings were related to Regina's business transactions for the purchase of copper from a non-party, and Regina was also, at the same time, negotiating to sell that copper to plaintiff, Capstone and Rice have established that they had no direct relationship, contact, or role that agreement between Regina and plaintiff. Although the 4th and 5th causes of action state a cause of action, affording the complaint its most liberal construction, they survived for that reason alone. However, on a motion for summary judgment, once the movant meets its burden, the opposing party must present disputed material issues of fact that must be tried. Plaintiff does not offer any additional facts or support for his claims against Capstone. Conjecture and innuendo will not suffice. Thus, his speculation that Capstone "kept" his money and has been unjustly enriched is wholly unsupported. The moving defendants have established that their agreement with Regina was to receive currency on his behalf and then transfer it to him. For this service, Capstone received and was apparently paid a commission.

The circumstances of the mortgage by Capstone do not raise any material triable issues of fact. Plaintiff acknowledges he owed a non-party a debt and that Capstone provided a mortgage using his home as collateral. Thus, the mortgage on plaintiff's home is entirely separate and distinct from the transaction in the People's Republic of China involving Regina. Although plaintiff suspects the party were working closely together and they conspired to defraud him, there is simply nothing to support those factual claims. Plaintiff was provided with discovery and he withdrew his motion to strike the defendants' answer. He has not identified any missing information he needs to fully defend his claims.

Since defendants have met their burden and plaintiff has not raised triable issues of fact to defeat their motion, defendants' motion for summary judgment on the 4th and 5th causes of action is granted and those claims are dismissed as well.

Conclusion

The motion by Capstone and Rice to dismiss the complaint is granted as to the 1st, 2nd and 3rd causes of action. It is denied as to the 4th and 5th causes of action. However, as to the 4th and 5th causes of action, defendants are granted summary judgment dismissing the complaint.

The 6th cause of action is against defendant Menashe who has appeared and interposed an answer. Since this motion does not resolve this remaining claims, a **preliminary conference will be held on February 4, 2010 at 9:30 a.m.** and the remaining parties shall appear that day.

Conclusion

In accordance with the foregoing,

It is hereby

ORDERED that the 1st, 2nd and 3rd causes of action are dismissed in their entirety; and it is further

ORDERED that the motion by Capstone Business Credit, LLC and John Rice, III for summary judgment on the 4th and 5th causes of action is granted and those claims are dismissed as well; and it is further

ORDERED that the clerk shall enter judgment against plaintiff dismissing the 1st, 2nd, 3rd, 4th and 5th causes of action; and it is further

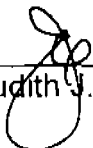
ORDERED that the 6th cause of action against defendant Yechezkel Menashe, Esq. survives and the remaining parties shall appear for a **preliminary conference on February 4, 2010 at 9:30 a.m.**; and it is further

ORDERED that any relief not expressly addressed herein is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
December 23, 2009

So Ordered:



Hon. Judith J. Gische, JSC

FILED
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