

House of Spices (India), Inc. v SMJ Servs., Inc.

2011 NY Slip Op 31072(U)

March 7, 2011

Supreme Court, Queens County

Docket Number: 700178/2010

Judge: Orin R. Kitzes

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES IA Part 17
Justice

	x	Index Number <u>700178</u> 2010
HOUSE OF SPICES (INDIA), INC.		
- against -		Motion Date <u>December 1,</u> 2010
SMJ SERVICES, INC., et al.		Motion Cal. Numbers <u>36 & 37</u>
	x	Motion Seq. Nos. <u>1 & 2</u>

The following papers numbered 1 to 10 read on this motion by defendant Varghese Varghese s/h/a Varghese Varghese and defendant Shafquat Chaudhary (the individual defendants) for an order, inter alia, dismissing the complaint against them pursuant to CPLR 3211(a)(5) and (7) and on this motion by defendant SMJ Services, Inc. for an order dismissing the complaint against it pursuant to CPLR 3215 (*sic*: CPLR 3211 [a][5] and [7]).

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	1-2
Answering Affidavits - Exhibits.....	3-6
Memoranda of Law	7-10

Upon the foregoing papers it is ordered that: That branch of the motion brought by the individual defendants which seeks an order pursuant to CPLR 3211(a)(5) dismissing the second cause of action as asserted against them is granted insofar as it seeks to recover for checks cashed by Triboro prior to December 16, 2003. That branch of the motion by the individual defendants which is for "further relief" is granted to the extent that the second cause of action is dismissed as asserted against them. That branch of the motion by defendant SMJ which is for an order pursuant to CPLR 3211(a)(7) dismissing the second cause of action asserted against it is granted. The remaining branches of the motions are denied. (See the accompanying memorandum.)

Dated: March 7, 2011

J.S.C.

MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 17

	X	INDEX NO. 700178/10
HOUSE OF SPICES (INDIA), INC.		
- against -		MOTION SEQ. NOS.: 1 & 2 MOTION CAL NOS.: 36 & 37 MOTION DATE: 12/1/10
SMJ SERVICES, INC., et al.		
	X	BY: KITZES, J. DATED: March 7, 2011

Defendant Varguhese Varghese s/h/a Varghese Varghese and defendant Shafquat Chaudhary have moved for an order, inter alia, dismissing the complaint against them pursuant to CPLR 3211(a)(5) and (7). Defendant SMJ Services, Inc. (SMJ) has moved for an order dismissing the complaint against it pursuant to CPLR 3215 (*sic*: CPLR 3211 [a][5] and [7]).

The second amended complaint alleges the following: Plaintiff House of Spices (India), Inc. (HS), an importer and distributor of South Asian food products, employed Atul Puri as an accountant from June 30, 1998 until August 29, 2009. In or about January, 2001, Puri and Davinder Singh formed a conspiracy whereby Puri issued checks drawn on HS's account to fictitious payees and Singh cashed the checks, thereafter dividing the proceeds, which eventually amounted to at least \$868,480.75, between themselves. Puri falsified HS's business records to make it appear that the company issued the checks to pay its obligations. Singh cashed the checks issued to fictitious payees at Triboro Check Cashing Corp. (Triboro), a licensed casher of checks subject to the Banking Law, whose officers, shareholders, and directors were defendant Shi-Mei Stozek, defendant Shafquat Chaudhary, and defendant Varguhese Varghese, from in or about January, 2001 until 2003 when defendant SMJ purchased Triboro's business. Singh continued to cash the fraudulently issued checks at defendant SMJ until in or about May, 2009. Triboro's principals had

knowledge of the conspiracy to commit fraud against HS, and, in furtherance of the conspiracy and in violation of 3 NYCRR 400.2(a), failed to record the name and address of the person cashing HS's checks. SMJ did the same.

The plaintiff further alleges the following: Singh told Puri that he had a "connection" that would cash the checks. Varghese used Triboro's business to launder money from the proceeds of illegal drug sales, and Varghese pled guilty to federal criminal charges. In August, 2009, Gordhandas Soni received an anonymous telephone call informing him that Puri was stealing from the company, and he assigned Rajinkant Udeshi, the company's chief financial officer, to investigate. Udeshi examined company records and discovered the fraud.

The plaintiff's first cause of action is for fraud. The plaintiff's second cause of action is for money had and received. The plaintiff's third cause of action is brought pursuant to the Racketeer Influenced and Corrupt Organizations Act (RICO) (18 USC § 1961 *et seq.*).

The court turns first to that branch of the motion by defendant Varghese and defendant Chaudhary (the individual defendants) which is for an order pursuant to CPLR 3211(a)(7) dismissing the first cause of action (fraud) asserted against them. In determining a motion brought pursuant to CPLR 3211(a)(7), "[t]he court must accept the facts alleged in the pleading and the submissions in opposition to the motion as true, and accord the plaintiff the benefit of every possible favorable inference ***." (*Operative Cake Corp. v Nassour*, 21 AD3d 1020, 1021; *see, Aranki v Goldman & Associates, LLP*, 34 AD3d 510.) The court "must afford the complaint a liberal construction, *** and determine only whether the facts alleged fit within any cognizable legal theory ***." (*1455 Washington Ave. Assocs. v Rose & Kiernan*, 260 AD2d 770, 770-771; *Esposito-Hilder v SFX Broadcasting Inc.*, 236 AD2d 186.)

A party may commit fraud through words or conduct (*Lukowsky v Shalit*, 110 AD2d 563), and fraud may be perpetrated by misrepresentation, concealment, or false

pretenses. (60A NY Jur 2d, “Fraud and Deceit,” § 20.) Plaintiff HS alleges that Puri, its employee, committed fraud by pretending to issue checks to company creditors. Plaintiff HS further alleges that the individual defendants participated in a conspiracy to perpetrate that fraud. The individual defendants challenge the sufficiency of the first cause of action as asserted against them on the ground that the plaintiff failed to plead fraud against them in sufficient detail.

The elements of a cause of action for fraud are (1) the false representation or concealment of a material existing fact, (2) scienter, (3) deception, (4) reliance, and (5) injury. (*Lama Holding Co. v Smith Barney*, 88 NY2d 413; *New York Univ. v Continental Ins. Co.*, 87 NY2d 308; *New York City Transit Authority v Morris J. Eisen, P.C.*, 276 AD2d 78; *American Home Assur. Co. v Gemma Const. Co., Inc.*, 275 AD2d 616; *Swersky v Dreyer & Traub*, 219 AD2d 321.) “[E]ach of these essential elements must be supported by factual allegations sufficient to satisfy CPLR 3016(b), which requires, in the case of a cause of action based on fraud, that ‘the circumstances constituting the wrong shall be stated in detail.’ ” (*Megarix Furs, Inc. v Gimbel Bros., Inc.*, 172 AD2d 209; *Rotterdam Ventures, Inc. v Ernst & Young LLP*, 300 AD2d 963.) “[T]he standard is simply whether the allegations are ‘set forth in sufficient detail to clearly inform a defendant with respect to the incidents complained of ’ ***.” (*Caprer v Nussbaum*, 36 AD3d 176, 202, quoting *Lanzi v Brooks*, 43 NY2d 778, 780.) Plaintiff HS met this standard in regard to Puri and Singh, and the plaintiff connected the individual defendants to their actions through allegations of conspiracy.

All overt acts performed by any of the co-conspirators become the legal act of every other conspirator. (*See, People v Leisner*, 73 NY2d 140; *People v Adams*, 2 Misc 3d 166; 20 NY Jur 2d, “Conspiracy–Civil Aspects,” § 10.) The actual issue presented in regard to Chaudhary and Varghese is whether the plaintiff has adequately pleaded their participation in a conspiracy to commit fraud. The plaintiff did not have to plead every element of the tort of fraud in detail against Chaudhary and Varghese. The plaintiff has

alleged the existence of a conspiracy to commit fraud and that the individual defendants knew that Triboro, a corporation they controlled, was cashing numerous checks purportedly issued by the plaintiff without complying with New York State banking regulations. In pleading the existence of a conspiracy, “[t]he facts and circumstances which constitute the conspiracy, or from which it may be inferred, should be set out clearly, concisely, and with sufficient particularity ***.” (*Goldstein v Siegel*, 19 AD2d 489, 492; quoting 15 CJS., “Conspiracy,” § 25). Plaintiff HS had adequately pleaded that the individual defendants participated in a conspiracy to commit fraud.

Accordingly, that branch of the motion by defendant Varghese and defendant Chaudhary which is for an order pursuant to CPLR 3211(a)(7) dismissing the first cause of action asserted against them is denied.

The court turns next to that branch of the motion brought by defendant Chaudhary and defendant Varghese which is for an order pursuant to CPLR 3211(a)(7) dismissing the plaintiff’s third cause of action, which was brought pursuant to the Racketeer Influenced and Corrupt Organizations Act (RICO) (18 USC § 1961 *et seq.*). 18 USC § 1962(c) provides that “It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity or collection of unlawful debt.” (*See, Besicorp Ltd. v Kahn*, 290 AD2d 147.) In order to state a cause of action for damages based on RICO, a plaintiff must allege (1) that the defendant violated 18 USC § 1962 and (2) that the violation injured the plaintiff in his business or property. (*See, Niagara Mohawk Power Corp. v Freed*, 265 AD2d 938; *Moss v Morgan Stanley Inc.*, 719 F2d 5.) Insofar as the first branch is concerned, the plaintiff “must allege the existence of seven constituent elements: (1) that the defendant (2) through the commission of two or more acts (3) constituting a ‘pattern’ (4) of ‘racketeering activity’ (5) directly or indirectly invests in, or maintains an interest in, or participates in (6) an ‘enterprise’ (7) the activities of which

affect interstate or foreign commerce.” (*Moss v Morgan Stanley Inc.*, *supra*, 17; *see*, 18 USC § 1962[a]-[c]; *Whitehall Tenants Corp. v Whitehall Realty Co.*, 133 F3d 908; *D’Orange v Feely*, 101 F3d 1393.) Put more succinctly, “[t]he elements that must be pleaded to state a civil RICO claim are ‘(1) conduct (2) of an enterprise (3) through a pattern [footnote omitted] (4) of racketeering activity’ ***.” (*Podraza v Carriero*, 212 AD2d 331, 335, quoting *Sedima, S.P.R.L. v Imrex Co.*, 473 US 479, 496.)

The individual defendants first argue that plaintiff HS has not adequately pleaded the element of “enterprise.” The plaintiff alleged several “enterprises,” some of which may or may not meet the statutory definition of “enterprise.” (*See*, 18 USC § 1961 [4].) However, the plaintiff did adequately allege that, “Triboro, a corporation, is an enterprise within the meaning of 18 USC § 1961(4).” (Complaint, ¶ 46.) 18 USC § 1961(4) defines “enterprise” to include a corporation. In view of this allegation in regard to Triboro, plaintiff HS avoided the pleading defect of making the “person employed by or associated with any enterprise” (here the individual defendants) the same as the “enterprise.” (*See, Bennett v U.S. Trust Co. of New York*, 770 F2d 308; *Haroco, Inc. v American National Bank & Trust Co.*, 747 F2d 384, 400 [“section 1962(c) requires separate entities as the liable person and the enterprise”], *aff’d on other grounds*, 473 US 479.) “[T]o establish liability under § 1962(c) one must allege and prove the existence of two distinct entities: (1) a ‘person’; and (2) an ‘enterprise’ that is not simply the same “person” referred to by a different name.” (*Cedric Kushner Promotions, Ltd. v King*, 533 US 158, 161.) Chaudhary and Varghese are not the same as Triboro, “the enterprise.” (*See, Cedric Kushner Promotions, Ltd. v King, supra* [president and sole shareholder of corporation was a “person” distinct from the enterprise subject to liability under RICO].) The plaintiff has in essence properly pleaded that two “persons” Chaudhary and Varghese, corporate principals, used their “enterprise,” the Triboro corporation, to engage in activity prohibited by the RICO Act.

The plaintiff also adequately pleaded the participation of the individual defendants in a conspiracy that violated the RICO Act. 18 USC § 1962(d) provides: “It shall

be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.” Contrary to the argument made by the individual defendants, they did not have to personally commit or agree to commit two predicate acts requisite for a substantive RICO offense under § 1962(c). (*See, Salinas v U.S.*, 522 US 52.)

Accordingly, that branch of the motion brought by defendant Chaudhary and defendant Varghese which is for an order pursuant to CPLR 3211(a)(7) dismissing the plaintiff’s third cause of action is denied.

The court turns next to those branches of the motion brought by the individual defendants which seeks an order dismissing the first and third causes of action asserted against them pursuant to CPLR 3211(a)(5) (Statute of Limitations). The court notes initially that while paragraph 11 of the second amended complaint alleges that SMJ purchased Triboro’s business “sometime between April 2003 and December 2003,” the affirmation of Steven Finnell, Esq., the plaintiff’s attorney, dated October 13, 2010 and the attached bill of sale show that the actual sale date was April 19, 2004. The plaintiff’s memorandum of law also alleges April 19, 2004 as the sale date and further alleges that Triboro cashed the bogus checks until mid-April 2004. This court’s electronic records (WebCivil Supreme) show that the plaintiff began the instant action on December 16, 2009 by the filing of a summons and complaint. A cause of action alleging a violation of the RICO Act is governed by a four-year Statute of Limitations (*Rotella v Wood*, 528 US 549; *Kenny v RBC Royal Bank*, 22 AD3d 385), but the limitations period does not expire until four years after the time when the plaintiff discovered, or reasonably should have discovered, his injury. (*See, Rotella v Wood, supra*; 5B Fed. Proc., L. Ed. § 10:134.) A cause of action which alleges actual fraud must be commenced within six years of the commission of the fraud, or two years from the date the fraud could reasonably have been discovered, whichever is longer. (*See, CPLR 213[8], 203[g]; Von Blomberg v Garis*, 44 AD3d 1033.) The cause of action for fraud is timely for those checks allegedly cashed by Triboro from December 16, 2003 to April 19, 2004. In regard to the cause of action for fraud where based on checks cashed before

December 16, 2003 and in regard to the cause of action based on RICO violations, on the present state of the record, a dismissal pursuant to CPLR 3211(a)(5) is precluded because of an issue of fact concerning when plaintiff HS reasonably could have discovered the issuance of the bogus checks. (*See, Lessoff v 26 Court Street Associates, LLC*, 58 AD3d 610.)

Accordingly, those branches of the motion brought by the individual defendants which seeks an order dismissing the first and third causes of action asserted against them pursuant to CPLR 3211(a)(5) are denied.

The court next reaches that branch of the motion brought by the individual defendants which seeks an order pursuant to CPLR 3211(a)(5) dismissing the plaintiff's second cause of action asserted against them on Statute of Limitations grounds. A cause of action for money had and received is quasi-contractual in nature, and it comes into being when in the absence of an agreement one party possesses money that belongs to another and that in equity and good conscience the party ought not to retain. (*Board of Educ. of Cold Spring Harbor Cent. School Dist. v Rettaliata*, 78 NY2d 128.) CPLR 213, a six-year Statute of Limitations, applies to a cause of action for money had and received. (*See, North Salem Cent. School Dist. v Mahopac Cent. School Dist.*, 1 AD3d 418.) The plaintiff began the instant action on December 16, 2009, and, thus, the Statute of Limitations bars the claim for money had and received insofar as Triboro cashed bogus checks prior to December 16, 2003.

Accordingly, that branch of the motion brought by the individual defendants which seeks an order pursuant to CPLR 3211(a)(5) dismissing the second cause of action as asserted against them is granted insofar as it seeks to recover for checks cashed by Triboro prior to December 16, 2003.

Finally, the court reaches the motion brought by defendant SMJ which is largely based on the same grounds asserted by the individual defendants. As shown above, the causes of action based on fraud and violation of the RICO Act are sufficient to withstand a CPLR 3211(a)(7) motion, and, having purchased Triboro's business on April 19, 2004, CPLR 213(8) and CPLR 213(2), six year Statute of Limitations applicable to fraud and

quasi-contract respectively, did not bar the assertion of the first and second causes of action on December 16, 2009. Insofar as the RICO cause of action is concerned, there is an issue of fact concerning when plaintiff HS reasonably could have discovered its injury. Insofar as the second cause of action is concerned, defendant SMJ makes the additional argument that the fictitious payee rule embodied in UCC 3-405(1)(c) cannot be circumvented by claims for conversion and money had and received. This argument has merit (*see, Prudential-Bache Securities, Inc. v Citibank, N.A.*, 73 NY2d 263), and SMJ is entitled to the dismissal of the second cause of action on CPLR 3211(a)(7) grounds. For the sake of judicial economy and pursuant to that branch of the motion by the individual defendants which is for “further relief,” the court will also dismiss the second cause of action as asserted against them pursuant to CPLR 3211(a)(7) and *Prudential-Bache Securities, Inc. v Citibank, N.A.* (*supra*).

Accordingly, that branch of the motion by defendant SMJ which is for an order pursuant to CPLR 3211(a)(7) dismissing the second cause of action asserted against it is granted. The remaining branches of the motion brought by defendant SMJ are denied. That branch of the motion by the individual defendants which is for “further relief” is granted to the extent that the second cause of action is dismissed as asserted against them.

Short form order signed herewith.

J.S.C.