

**Ginsberg v Broome**

2011 NY Slip Op 32818(U)

October 18, 2011

Supreme Court, New York County

Docket Number: 101331/11

Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS  
*Justice*

PART 58

ROBERT M. GINSBERG,

INDEX NO. 101331/11

Plaintiff,

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

-v-

MOTION SEQ. NO. 001

ALVIN H. BROOME,

Defendant.

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

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

PAPERS NUMBERED

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

1

Answering Affidavits- Exhibits \_\_\_\_\_

2

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

**FILED**

CROSS-MOTION: \_\_\_\_\_ YES  NO

OCT 24 2011

Upon the foregoing papers, it is ordered that this motion is:

NEW YORK  
COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated: 10 / 18 / 11

*Donna Mills*

**DONNA M. MILLS, J.S.C.**

Check one: \_\_\_\_\_ FINAL DISPOSITION

NON-FINAL DISPOSITION

**FILED**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 58

**OCT 24 2011**

-----x  
ROBERT M. GINSBERG,

NEW YORK  
COUNTY CLERK'S OFFICE

Plaintiff,

-against-

Index No.

ALVIN H. BROOME,

101331/11

Defendant.

-----x  
DONNA MILLS, J. :

Defendant moves for dismissal of the first through fifth causes of action of the complaint, an order granting summary judgment, costs, and, alternatively, a stay of the action pending arbitration.

This is an action brought by one former legal partner against another former legal partner. Prior to the dissolution of the partnership, the parties had been partners for many years. According to the complaint, the parties were renegotiating the partnership agreement (Agreement) sometime in 2008, when defendant began to perform acts that constituted breach of fiduciary duty and fraud. Defendant brings this motion to dismiss the complaint on the ground that plaintiff has failed to state any cause of action. Defendant argues that documentary evidence entitles him to dismissal of the claims brought against him. He seeks damages, including costs, based upon the allegedly frivolous nature of this action.

Plaintiff contends that in 2008, the parties chose to revise the terms of the Agreement because they sought, among other things, a change in the distribution of proceeds from litigation activities. Prior to this time, the Agreement provided a 50-50 division of the proceeds between the parties. The Agreement was changed so that each partner received the proceeds on each case

the individual partner brought to the partnership. The Agreement also provided that any dispute or disagreement with regard to the terms of the Agreement or the terms of the partnership would be submitted to the American Arbitration Association by binding arbitration under New York rule. The Agreement was to commence on January 1, 2009 and to terminate on December 31, 2009.

The complaint alleges that during the course of the Agreement negotiation, defendant, without plaintiff's knowledge, was conferring with Boris Palant (Palant), a senior partner in the firm of Palant, Wolf and Shapiro, with the intention of eventually dissolving the partnership and working with Palant. This allegedly constituted a breach of fiduciary duty to plaintiff and this is the basis of the first cause of action against defendant. The second cause of action alleges unjust enrichment, whereby defendant received more money from cases taken by defendant than plaintiff. The third cause of action alleges that the Agreement, as revised, provided that the proceeds of any case that was settled prior to 2009 would be the partnership's income, and that of any case settled after January 2009 would be the income of the partner who brought in the case. Defendant allegedly failed to report settlements until the start of 2009, so that he would pocket the proceeds instead of providing the money to the partnership. The fourth cause of action alleges that defendant made fraudulent reports to an insurance carrier accusing plaintiff of legal malpractice. The fifth cause of action alleges that defendant disseminated false and negative information in the legal community about plaintiff's reputation.

Defendant moves for dismissal of the first cause of action, claiming that there is no evidence of secret conversations by him and Palant. An affidavit from Palant is submitted which denies any such discourse. Alternatively, defendant states that he could choose to dissolve the

partnership at any time, as provided in the Agreement.

Defendant moves for dismissal of the second cause of action, claiming that his actions as alleged did not violate the terms of the Agreement.

Defendant moves for dismissal of the third cause of action, claiming that he made all the alleged settlements after 2008 and was entitled to the payments. He provides documentary evidence of a case, *Downey v Local 46 Educators*, settled on February 3, 2009 by mediation. Moreover, he disputes any provision in the Agreement that states that money derived from any case settled prior to 2008 would be partnership income.

Defendant moves for dismissal of the fourth cause of action, claiming that plaintiff himself conferred with the carrier about certain matters involving personal liability. Defendant submits documents related to actions brought against plaintiff with regards to negligence. Letters sent to the carrier, non-party Mercury Insurance Company, refer to malpractice claims. The claims referred to in the complaint, relate to cases entitled *Williams*, *Cuadrado* and *Fontanez*. Defendant's evidence covers those cases.

Defendant moves for dismissal of the fifth cause of action, claiming that the alleged defamation is not specified and has been brought after the one-year statute of limitations, rendering the cause of action untimely.

Defendant moves for costs in the form of reimbursement for actual expenses incurred, based on the allegedly frivolous nature of plaintiff's lawsuit. He argues that there is no merit in any of plaintiff's claims and that the claims are brought in bad faith. He is willing to set this matter for a hearing for a determination of the amount of costs and damages. Alternatively, if any of the causes of action are deemed meritorious, defendant requests that the court stay the

action pending binding arbitration, as provided in the Agreement.

In opposition to this motion, plaintiff argues that defendant's position does not provide conclusive proof that this action lacks merit. For example, plaintiff states that whether defendant secretly settled cases and failed to report them in a timely manner will be resolved at depositions. Plaintiff claims that the arbitration clause in the Agreement does not relate to the issues raised in the complaint. He disputes the charges of malpractice asserted by defendant. He claims that some of the defamation allegedly articulated by defendant was timely.

In reply, defendant argues that plaintiff has failed to dispute any of his statements. He also argues that plaintiff has admitted that plaintiff accepted the terms of the revised Agreement, and that defendant has not violated any specific terms of the Agreement. Defendant asserts that the matters raised in plaintiff's opposition are largely irrelevant.

First, the court declines to stay the action because of the arbitration provision in the Agreement. Even if the partnership had not been dissolved, since the Agreement has terminated as of December 31, 2009, its terms are no longer enforceable at this time. The court will dismiss the motion for summary judgment, because defendant has essentially brought a motion to dismiss.

Defendant brings a pre-answer motion to dismiss each cause of action in the complaint based on different grounds. One ground is based on failure to state a cause of action pursuant to CPLR 3211 (a) (7). On a motion brought pursuant to CPLR 3211 (a) (7), "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion to dismiss will fail." *Weiner v Lenox Hill Hosp.*, 193 AD2d 380, 381 (1<sup>st</sup> Dept 1993), quoting

*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977).

This court dismisses the second cause of action on the grounds that plaintiff has failed to state any wrongdoing on defendant's part. Section 3 of the Agreement clearly provides that defendant would personally earn the proceeds from each case he brought to the partnership.

The fourth and fifth causes of action allege defamation against plaintiff. The fourth cause of action involves the disclosure of false reports to an insurance carrier. The fifth cause of action involves the communication of false information to an undisclosed community. The aforesaid information allegedly resulted in damages to plaintiff. The fourth and fifth causes of action shall be dismissed for failure to state any claim for defamation. CPLR 3016 (a) requires that in a defamation action, "the particular words complained of ... be set forth in the complaint." "The complaint also must allege the time, place and manner of the false statement and specify to whom it was made." *Dillon v City of New York*, 261 AD2d 34, 38 (1<sup>st</sup> Dept 1999). Here, plaintiff failed to specify the time and place of the alleged reports, the details of the defamation, or the identity of the carrier in the fourth cause of action. With respect to the fifth cause of action, nothing specific about defendant's alleged wrongdoing is articulated in the complaint, and therefore, the cause of action as stated lacks merit.

The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages. See *Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 488 (2007); *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 (1996). "A claim rooted in fraud must be pleaded with the requisite particularity under CPLR 3016 (b)." *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553,559 (2009). A cause of action for fraudulent concealment requires, in addition to

the four elements of fraudulent misrepresentation, “an allegation that defendant had a duty to disclose material information and that it failed to do so.” *P.T. Bank Cent. Asia, New York Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 376 (1<sup>st</sup> Dept 2003). “Absent a confidential or fiduciary relationship, failure to disclose cannot be the basis of a fraud claim.” *National Union Fire Ins. Co. of Pittsburgh, Pa. v Red Apple Group*, 273 AD2d 140, 141 (1<sup>st</sup> Dept 2000).

A fiduciary relationship arises “between two persons when one of them is under a duty to act or to give advice for the benefit of another upon matters within the scope of the relation” *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 (2005) (internal quotations marks and citations omitted). Put differently, “[a] fiduciary relation exists when confidence is reposed on one side and there is resulting superiority and influence on the other.” *AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 11 NY3d 146, 158 (2008) (internal quotation marks and citation omitted).

The first cause of action alleges defendant’s secret communications with a lawyer from another law firm as a breach of fiduciary duty. Plaintiff alleges said breach occurring while the parties were negotiating a revised partnership contract and he claims to have had no idea that defendant was considering dissolution at that time. The court finds that a breach of fiduciary duty exists as alleged in the complaint. The documentary evidence submitted by defendant is a denial of the allegations but is not conclusive as a matter of fact.

The third cause of action is dismissed. The Agreement lacks any term referring to the proceeds of a case settled prior to 2008 being held as partnership income, as alleged in the complaint. There is no mention of settlement of cases. The Agreement does provide that the *Downey* case, mentioned in the complaint, is designated as the sole property of defendant as per

the Agreement. Plaintiff has failed to make a cause of action for fraudulent concealment.

Regarding costs, this court, in its discretion, may award costs to any party or attorney in any civil action or proceeding resulting from frivolous conduct. *See* 22 NYCRR 130-1.1© (the Rule). The Rule defines conduct as “frivolous” if: (1) it is completely without merit in law or fact and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false. In determining whether the conduct undertaken was frivolous, the court shall consider the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent or should have been apparent to counsel. *Id.*

The court finds that several of the claims brought by plaintiff lack merit. Specifically, the second and fifth causes of action are lacking in substance and are not supported by any reasonable arguments. In his opposition papers, plaintiff does not offer a sufficient legal or factual basis for these claims. These causes of action are frivolous pursuant to the Rule. Therefore, the court shall order plaintiff’s counsel to pay costs in the amount of \$1,000 to defendant as a form of reimbursement.

Accordingly, it is

ORDERED that defendant’s motion to dismiss is granted and the second, third, fourth and fifth causes of action of the complaint are dismissed; and it is further

ORDERED that defendant is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that defendant's motion to stay this action pending arbitration is denied.

The court having determined that counsel for plaintiff has engaged in frivolous conduct as defined in Section 130-1.1© of the Rules of the Chief Administrator as set forth above and the costs should be awarded, and having found that the amount of costs to be awarded is appropriate as set forth above, it is now therefore

ORDERED that defendant's motion for costs is granted and counsel for plaintiff shall, without charge to his client, reimburse defendant for actual expenses reasonably incurred and reasonable counsel fees in the total amount of \$1,000; and it is further

ORDERED that payment of these costs shall be delivered to counsel for defendant and written proof of such payment shall be provided to the Clerk of Part 58 within 30 days after service of a copy of this order with notice of entry; and it is further

ORDERED that, in the event that timely payment is not made, the Clerk of the court, upon service upon him of a copy of this order with notice of entry and an affirmation or affidavit reciting the fact of such non-payment, shall enter a judgment in favor of the defendant and against said counsel in the aforesaid sum.

DATED: 10/18/11

**FILED**

**OCT 24 2011**

NEW YORK  
COUNTY CLERK'S OFFICE

ENTER:

*[Signature]*

J.S.C.

**DONNA M. BELLS, J.S.C.**