Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS PART 6**
Justice

TIMOTHY FULTON,

Plaintiff,

-against-

HANKIN & MAZEL, PLLC,

Defendant.

Index No. 10187/11

Motion
Date October 4, 2011

Motion
Cal. No. 13

Motion
Sequence No. 1

	Papers Numbered
Notice of Motion-Affidavits-Exhibits...	1-6
Opposition.....	7-9
Reply.....	10-12

Upon the foregoing papers it is ordered that this motion by defendant, Hankin & Mazel, PLLC for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the Complaint of plaintiff, Timothy Fulton is hereby decided as follows:

This action arises out of a business transaction regarding the sale of shares of stock in a corporation known as Emjay Environmental Recycling, Ltd. Plaintiff brings causes of action for unjust enrichment, conversion, fraud, aiding and abetting fraud, gross negligence, mutual mistake, and breach of contract. Defendant now moves to dismiss the plaintiff's Complaint in its entirety.

A. CPLR 3211(a)(1)

That branch of defendant's motion to dismiss plaintiff's causes of action pursuant to CPLR 3211(a)(1) is denied.

CPLR 3211 provides in relevant part: "(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 1. A defense is founded on documentary evidence ***." In order

to prevail on a CPLR 3211(a)(1) motion, the documentary evidence submitted "must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claim ***" (*Fernandez v. Cigna Property and Casualty Insurance Company*, 188 AD2d 700, 702; *Vanderminden v Vanderminden*, 226 AD2d 1037; *Bronxville Knolls, Inc. v. Webster Town Center Partnership*, 221 AD2d 248.)

To the extent the motion is based upon all of plaintiff's causes of action which are grounded in an Agreement of Sale dated February 3, 2010 and a Cross Receipt, Acknowledgment and Agreement dated July 26, 2010, this documentary evidence is insufficient to dispose of these causes of action. The documentary evidence that forms the basis of a 3211(a)(1) motion must resolve all factual issues and completely dispose of the claim (*Held v. Kaufman* 91 NY2d 425 [1998]; *Teitler v. Max J. Pollack & Sons*, 288 AD2d 302 [2001]). Here, the Agreement of Sale dated February 3, 2010 and Cross Receipt, Acknowledgment and Agreement dated July 26, 2010 are insufficient to dispose of the causes of action. Triable issues of fact exist regarding these documents.

B. CPLR 3211(a)(7)

That branch of the motion which is for an order pursuant to CPLR 3211(a)(7) dismissing the complaint against defendants for failure to state a cause of action is decided as follows: "It is well-settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference" (*Jacobs v. Macy's East, Inc.*, 262 AD2d 607, 608 [2d Dept 1999] [internal citations omitted]; *Leon v. Martinez* , 84 NY2d 83) and a determination by the Court as to whether the facts alleged fit within any cognizable legal theory (*1455 Washington Ave. Assocs. v. Rose & Kiernan, Inc.*, 260 AD2d 770 [3d Dept 1999]). The court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion (*see, Stukuls v. State of New York*, 42 NY2d 272 [1977]; *Jacobs v. Macy's East, Inc.*, *supra*), and the court will not examine affidavits submitted on a CPLR 3211(a)(7) motion for the purpose of determining whether there is evidentiary support for the pleading (*see, Rovello v. Orofino Realty Co., Inc.*, 40 NY2d 633). Such a motion will fail if, from its four corners, factual allegations are discerned which, taken together, maintain any cause of action cognizable at law, regardless of whether the plaintiff will ultimately prevail on

the merits (*Given v. County of Suffolk*, 187 AD2d 560 [2d Dept 1992]). The plaintiff may submit affidavits and evidentiary material on a CPLR 3211(a)(7) motion for the limited purpose of correcting defects in the complaint (*see, Rovello v. Orofino Realty Co., Inc., supra; Kenneth R. v. Roman Catholic Diocese of Brooklyn*, 229 AD2d 159). In determining a motion brought pursuant to CPLR 3211(a)(7), the court "must afford the complaint a liberal construction, accept as true the allegations contained therein, accord the plaintiff the benefit of every favorable inference and determine only whether the facts alleged fit within any cognizable legal theory" (*1455 Washington Ave. Assocs. v. Rose & Kiernan, supra,* 770-771). "However, dismissal is warranted if the documentary evidence contradicts the claims raised in the complaint" (*Jericho Group, Ltd. v. Midtown Development,* L.P., 32 AD3d 294 [1st Dept 2006][internal citations omitted]).

It is well-established law that: "[t]o prevail on a claim of unjust enrichment, a party must show that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered" (internal quotation marks and citations omitted)(*Blue Wolf Group, LLC. v. Gaiam, Inc.*, 847 NYS2d 895 [Civ Ct, NY County 2007]).

In the instant action, plaintiff alleges in Paragraphs 20-27 of the Complaint, inter alia, that defendant failed and/or refused to return monies in the sum of One Million One Hundred Thousand and 00/100 ($1,100,000.00) dollars to plaintiff, despite his having demanded its return, and as such, defendant has been unjustly enriched in the amount of One Million One Hundred Thousand and 00/100 ($1,100,000.00) dollars.

To state a cause of action for conversion, plaintiff must show legal ownership to a specific identifiable thing and that defendant exercised unauthorized dominion over it, to the exclusion of plaintiff's rights (*Batsidis v. Batsidis*, 9 AD3d 342 [2d Dept 2004], citing *Independence Discount Corp. v. Bressner*, 47 AD2d 756 [2d Dept 1975]).

Plaintiff alleges in paragraphs 28-33 of the Complaint, inter alia, that he has ownership interests in certain monies and that defendant has exercised control over such monies to the exclusion of plaintiff's rights and without his authority.

To state a cause of action for fraud, plaintiff must demonstrate that defendant knowingly misrepresented a material

fact, upon which plaintiff justifiably relied, resulting in an injury (*New York University v. Continental Ins. Co.*, 87 NY2d 308 [1995]). CPLR 3016 (b) states that in an action for fraud, "the circumstances constituting the wrong shall be stated in detail." It is well settled that a claim for fraud must satisfy the specificity and particularity requirements of 3016 (b) and allege the essential elements of a fraud claim, misrepresentation of a material fact, falsity, scienter and deception (*see, Barclay Arms, Inc. v. Barclay Arms Assocs.*, 74 NY2d 644, 647 [1989]; *Channel Master Corp. v. Aluminium Ltd. Sales, Inc.*, 4 NY2d 403 [1958]).

In Paragraphs 34-51 of the Complaint, plaintiff asserts, inter alia, a claim for fraud in that defendant knowingly represented the material fact that plaintiff was a Purchaser, and in reliance upon said representation, plaintiff authorized wire transfers in the amount of One Million One Hundred Thousand and 00/100 ($1,100,000.00) to defendant, which monies have not been returned to plaintiff.

"The general elements of a claim of aiding and abetting a common law fraud are: (1) a fraud; (2) defendant's knowledge of the fraud; and (3) defendant's knowing rendition of substantial assistance to advance the fraud (*Wight v. BankAmerica Corp.*, 219 F.3d 79, 91 [2nd Cir. 2000]; *VTech Holdings, Ltd. v. Pricewaterhouse Coopers, LLP*, 348 F. Supp. 2d 255, 269 [SDNY 2004]). The plaintiff must allege facts that show that the aider and abettor had had an actual knowledge of the fraud; constructive knowledge is not sufficient (*Filler v. Hanvit Bank*, 339 F. Supp. 2d 553, 557 [SDNY 2004])" (*High Tides, LLC v. DeMichele*, 2010 NY Slip Op 51018U [Sup Ct, Nassau County 2010]).

Plaintiff alleged the necessary elements for this cause of action in Paragraphs 52-56 of the Complaint, wherein he alleges inter alia, that: "[d]efendant knew . . .that Kelly and Cholowsky were working individually or in concert to cheat Plaintiff out of the One Million One Hundred Thousand and 00/100 ($1,1000,000.00) dollars that Plaintiff wired into Defendant's two bank accounts in connection with the Agreement of Sale which Fulton wired to those accounts for the express purpose of Fulton acquiring the majority of Kelly's ownership in Emjay".

"Gross negligence is reckless conduct that borders on intentional wrongdoing and is "different in kind as well as degree" from ordinary negligence *(Sutton Park Dev. Corp. Trading*

Co. v. Guerin & Guerin Agency, 297 AD2d 430, 431, 745 NYS2d 622 [2002]; *see e.g., Green v. Holmes Protection of N.Y.*, 216 AD2d 178, 178-179, 629 NYS2d 13 [1st Dept 1995]). It is conduct that "evinces a reckless disregard for the rights of others or 'smacks' of intentional wrongdoing" (*Sutton Park Dev. Corp. Trading Co. v. Guerin & Guerin Agency*, 297 AD2d 430, 745 NYS2d 622, *supra*). Gross negligence is defined as conduct of an aggravated character which discloses a failure to exercise even slight diligence (*Civil Service Employees Assn, Inc. v. Public Employment Relations Bd.*, 132 AD2d 430, 522 NYS2d 709 [3d Dept 1987] *citing* 41 NY Jur, Negligence, § 27, at 39-40 [1965]), and as the "disregard of the consequences which may ensue from the act, and indifference to the rights of others" (*id.*, at 40) (*Barton v. 157 Chambers Development Owner LLC*, 2008 NY Slip Op 32947U [Sup Ct, NY County 2008]). Gross negligence "is very great negligence, or the absence of slight diligence, or the want of even scant care. It amounts to indifference to present legal duty and to utter forgetfulness of legal obligations so far as other persons may be affected. * * * The element of culpability which characterizes all negligence is in gross negligence magnified to a high degree as compared with that present in ordinary negligence" (*Altman* v. *Aronson*, 231 Mass 588, 591, 592, *supra*) (*Sharick v. Marvin*, 1 AD2d 284 [3d Dept 1956]).

To establish a prima facie case of negligence, a plaintiff must establish the existence of a duty, a breach of the duty, and that said breach was the proximate cause of their injuries (*see, Gordon v. Muchnick*, 180 AD2d 715 [2d Dept 1992]). However, absent a duty of care, there is no breach and no liability.(*Id.; see also, Marasco v. C.D.R. Electronics Security & Surveillance Systems Co., et.al.*, 1 AD3d 578 [2d Dept 2003]).

In the instant action, plaintiff fails to allege even the elements of negligence, in that there is no allegation that defendant had a duty to plaintiff. As such, plaintiff cannot be said to have fulfilled the pleading requirements for asserting a cause of action for gross negligence.

To "vacate [a] stipulation of settlement on the ground of mutual mistake, [a party must] demonstrate that the mistake existed at the time the stipulation was entered into and that it was so substantial that the stipulation failed to represent a true meeting of the parties' minds" (*Gro-Wit Capital, Ltd. v. Obigor, LLC*, 33 AD3d 859, 859-860, 824 NYS2d 314 [2006]; *see, Maury v. Maury*, 7 AD3d 585, 586, 776 NYS2d 489 [2004]; *Mahon v. New York City Health & Hosps. Corp.*, 303 AD2d 725, 756 NYS2d 875 [2003]; *Hannigan v. Hannigan*, 50 AD3d 957 [2d Dept 2008]).

As there is no allegation in the Complaint, that defendant is a party to the Agreement of Sale dated February 3, 2010, this cause of action cannot be maintained.

"The elements of a cause of action for breach of contract are the formation of a contract between plaintiff and defendant, performance by plaintiff, defendant's failure to perform, and resulting damages" (*Beheer B.V.(Amsterdam) v. South Caribbean Trading Ltd.*, 801 NYS2d 243 [Sup Ct, NY County 2004][internal citations omitted]).

Since it has already been adjudged by the Hon. Orin R. Kitzes in an order dated January 31, 2011, in a related action, that plaintiff is not a Purchaser under the Agreement of Sale dated February 3, 2010, this cause of action cannot be maintained.

Accordingly, the court decides as follows:

(1) That branch of the motion for an order pursuant to CPLR 3211(a)(7) dismissing the first cause of action is denied, as the complaint adequately states a cause of action for unjust enrichment.

(2) That branch of the motion for an order pursuant to CPLR 3211(a)(7) dismissing the second cause of action is denied, as the complaint adequately states a cause of action for conversion.

(3) That branch of the motion for an order pursuant to CPLR 3211(a)(7) dismissing the third cause of action is denied, as the complaint adequately states a cause of action for fraud.

(4) That branch of the motion for an order pursuant to CPLR 3211(a)(7) dismissing the fourth cause of action is denied, as the complaint adequately states a cause of action for aiding and abetting fraud.

(5) That branch of the motion for an order pursuant to CPLR 3211(a)(7) dismissing the fifth cause of action is granted, as the complaint fails to adequately state a cause of action for gross negligence.

(6) That branch of the motion for an order pursuant to CPLR 3211(a)(7) dismissing the sixth cause of action is granted, as the complaint fails to adequately state a cause of action for mutual mistake, since there is no allegation by plaintiff that

defendant is a party to the Agreement of Sale dated February 3, 2010.

(7) That branch of the motion for an order pursuant to CPLR 3211(a)(7) dismissing the seventh cause of action is granted, as the Complaint fails to adequately state a cause of action for breach of contract since it has already been adjudged by the Hon. Orin R. Kitzes, in a related action, that plaintiff is not a Purchaser under the Agreement of Sale dated February 3, 2010.

Additionally, defendant has improperly sought to reach the merits of the complaint on this mere CPLR 3211(a)(7) motion (*see, Stukuls v. State of New York, supra; Jacobs v. Macy's East Inc., supra).*

Accordingly, the fifth, sixth, and seventh causes of action, for gross negligence, mutual mistake, and breach of contract, respectively, are dismissed.

Defendant may serve an Answer within twenty (20) days of service of a copy of this order with Notice of Entry regarding the remaining four causes of action.

The foregoing constitutes the decision and order of this Court.

Dated: December 13, 2011

.....
Howard G. Lane, J.S.C.