

Ovalle v Richmond Hill Pediatric Assoc., P.C.

2011 NY Slip Op 33980(U)

August 23, 2011

Supreme Court, Bronx County

Docket Number: 309751/10

Judge: Mary Ann Brigantti-Hughes

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AUG 29 2011

**SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15**

PRESENT: Honorable Mary Ann Brigantti-Hughes

-----X
JOSE OVALLE, R.P.A.,

Plaintiff,

-against-

DECISION / ORDER
Index No. 309751/10

RICHMOND HILL PEDIATRIC ASSOCIATES, P.C. and
NANCY WALLACH, M.D.,

Defendants.

-----X

The following papers numbered 1 to read on the below motions noticed on **February 18, 2011**
and duly submitted on the Part 1A15 Motion calendar of :

<u>Papers Submitted</u>	<u>Numbered</u>
Def. Notice of Motion, Exhibits	1,2
Pl. Affirmation in Opp., Exhibits	3,4
Def.'s Affirmation in Reply.	5

In an action to recover monetary damages arising from an alleged breach of contract and fraud claim, defendants Richmond Hill Pediatric Associates, P.C. and Nancy Wallach, M.D. (hereinafter "Defendants") move to dismiss counts two, three, and four of the complaint of Plaintiff Jose Ovalle, R.P.A. (hereinafter "Plaintiff"), pursuant to CPLR 3211(a)(7). Plaintiff opposes.

I. Factual History

Defendant Wallach is the president of Defendant Richmond Hill, a pediatric office that provides medical treatment to children with non-chronic illnesses. On or around July 13, 2009, Plaintiff and Defendants entered into a written employment contract. Plaintiff was terminated on September 8, 2010. On November 19, 2010, Plaintiff commenced action against Defendants, for (1) retaliatory discharge, (2) fraud, (3) breach of contract, and (4) recovery in quantum meruit.

The complaint alleges generally that Defendant Wallach misrepresented the work Plaintiff was to perform as a physician's assistant, and thus breached the parties employment contract.

Defendants now move to dismiss Plaintiff's second, third, and fourth causes of action, as well as his claim for damages for emotional distress.

II. Standard of Review

In determining a motion to dismiss, the Court's role is ordinarily limited to determining whether the complaint states a cause of action. *Frank v. DaimlerChrysler Corp.*, 292 A.D.2d 118 (1st Dept. 2002). In other words, the determination is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained. *See Stendig, Inc. v. Thom Rock Realty Co.*, 163 A.D.2d 46 (1st Dept. 1990); *Leviton Manufacturing Co., Inc. v. Blumberg*, 242 A.D.2d 205 (1st Dept. 1997) (on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see, CPLR* §3026). The court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory". *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). The motion should be denied if, from the pleading's four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law. *McGill v. Parker*, 179 A.D.2d 98 (1st Dept. 1992).

Factual allegations normally presumed to be true on a motion pursuant to *CPLR* 3211 (a)(7) may properly be negated by affidavits and documentary evidence. *Wilhemlina Models, Inc. v. Fleisher*, 19 A.D.3d 267 (1st Dept. 2005). Evidentiary material may be considered on a motion to dismiss for failure to state a cause of action to remedy defects in a complaint. *Beyer v. DaimlerChrysler Corp.*, 286 A.D.2d 103 (2nd Dept. 2001). On a motion to dismiss for failure to state a cause of action, any deficiency on the part of the complaint because of detailed pleadings of the facts and circumstances relied upon may be cured by details supplied in the affidavits submitted by plaintiff, resort to which is proper for the limited purpose of sustaining a pleading

against a motion under *CPLR* 3211(a)(7). *Ackerman v. Vertical Club Corp.*, 94 A.D.2d 665 (1st Dept. 1983).

On a motion to dismiss, parties are not required to provide affidavits unless the motion to dismiss is converted into a summary judgment motion (*Sokol v. Leader*, 74 AD3d 1180, 1181 [2d Dept., 2010]) holding that “*CPLR* 3211 allows a plaintiff to submit affidavits, but it does not oblige him [or her] to do so on penalty of dismissal” and “[u]nless the motion is converted into one for summary judgment pursuant to *CPLR* 3211(e), affidavits may be received for a limited purpose only, serving normally to remedy defects in the complaint’, and such affidavits are not to be examined for the purpose of determining whether there is evidentiary support for the pleading”.

III. Analysis

(1) Fraud

In this matter, Defendant initially seeks dismissal of Plaintiff’s fraud claim, as it is not plead with particularity and merely reinstates Plaintiff’s breach of contract claim.

A cause of action for fraud requires a plaintiff to plead: (1) a material misrepresentation of a fact, (2) knowledge of its falsity, (3) an intent to induce reliance, (4) justifiable reliance and (5) damages *Pludeman v. Northern Leasing Sys., Inc.*, 10 N.Y.3d 486 (2008), citing *Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 N.Y.3d 553, 559 (2009), *Nicosia v. Board of Managers of Weber House Condominium*, 77 A.D.3d 455 (1st Dept. 2010). It is not necessary that the measure of damages be pleaded, provided that facts are alleged from which damages may be properly inferred. *Black v. Chittenden*, 69 N.Y.2d 665 (1986). *CPLR* 3016 (b) provides that where a cause of action or defense is based upon fraud, “the circumstances constituting the wrong shall be stated in detail.” *Pludeman, supra*. The purpose of this heightened pleading requirement is to inform a defendant with respect to the incidents complained of. *Id.* This provision, however, should not be so strictly interpreted “as to prevent an otherwise valid cause of action in situations where it may be ‘impossible to state in detail the circumstances constituting a fraud’ *Pludeman, supra*, citing *Lanzi v Brooks*, 43 NY2d 778, 780 (1977), quoting

Jered Contr. Corp. v. New York City Tr. Auth., 22 NY2d 187, 194 (1968). Thus, where concrete facts “are peculiarly within the knowledge of the party” charged with the fraud (*Jered Contr. Corp.*, 22 NY2d at 194), it would work a potentially unnecessary injustice to dismiss a case at an early stage where any pleading deficiency might be cured later in the proceedings (*see CPC Int'l v. McKesson Corp.*, 70 NY2d 268, 285-286 (1987); *Houbigant, Inc. v. Deloitte & Touche*, 303 AD2d 92, 97-98 (1st Dept 2003);

“A fraud claim that only restates a breach of contract claim may not be maintained.” *Orix Credit Alliance v. Hable Co.*, 256 A.D.2d 114, 115 (1st Dept 1998). “Allegations that a party entered into a contract without intent to perform do not state a cause of action for fraud.” *Id.* A fraud claim should be dismissed as redundant where it merely restates a breach of contract claim, *i.e.*, when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract (*Gordon v. Dino De Laurentiis Corp.*, 141 A.D.2d 435, 436 [1st Dept 1988]). “[A] cause of action for fraud may be maintained where a plaintiff pleads a breach of duty separate from, or in addition to, a breach of contract. For example, if a plaintiff alleges that it was induced to enter into a transaction because a defendant misrepresented material facts, the plaintiff has stated a claim for fraud even though the same circumstances also give rise to the plaintiff’s breach of contract claim” (*First Bank of Ams. v. Motor Car Funding*, 257 A.D.2d 287, 291-292 [1st Dept 1999]; *see also Non-Linear Trading Co. v. Braddis Assoc., Inc.*, 243 A.D.2d 107, 118 [1st Dept 1998]). Unlike a misrepresentation of *future* intent to perform, a misrepresentation of present facts is collateral to the contract, even though it may have induced the plaintiff to enter into the contract, and therefore involves a separate breach of duty (*Deerfield Communications Corp. v. Chesebrough Ponds, Inc.*, 68 N.Y.2d 954, 956 [1986] [measure of damages for being fraudulently induced to enter a contract, *i.e.*, indemnity for the loss suffered through that inducement, is not duplicative of damages for breach of contract] *Board of Mgrs. of 411 E. 53rd St. Condominium v. Dylan Carpet*, 182 A.D.2d 551, 552 [1st Dept 1992] [fraud claim sufficient where complaint alleged that defendants made false statements of fact, as opposed to expressions of future intentions].

Here, Plaintiff's fraud claim alleges that Defendant Wallach misrepresented the amount of work he was expected to perform, and her compliance with Education Law §6542, inducing him to enter into the employment contract. The breach of contract claim alleges that Dr. Wallach breached by giving him more work than he initially anticipated. The gravamen of both causes of action is that Defendant did not perform on the contract and misrepresented that she would so perform, *i.e.*, by not adhering to Education Law and giving Plaintiff unreasonable duties or responsibilities. It is therefore clear that Plaintiff's second cause of action for purported fraud constitutes a mere restatement of his breach of contract claim. *Camiglia v. Chicago-Tribune-NY News Syndicate*, 204 A.D.2d 233 (1st Dept. 1994), citing (*Comtomark, Inc. v. Satellite Communications Network*, 116 AD2d 499, 500). Thus, Plaintiff's fraud claim is duplicative and therefore must be dismissed in its entirety.

(2) Breach of Contract

The elements of a cause of action for breach of contract are (1) formation of a contract between plaintiff and defendant, (2) performance by plaintiff, (3) defendant's failure to perform, and (4) resulting damage. *See Morris v. 702 E. Fifth St. HDBO*, 46 A.D.3d 478 (1st Dept. 2007), citing *Furia v. Furia*, 116 A.D.2d 694 (2nd Dept. 1986). To effectively plead breach of contract, the complaint must allege the provisions of the contract upon which the claim is based. *Sud v. Sud*, 211 A.D.2d 423 (1st Dept. 1995).

Here, the complaint refers to the employment contract, generally that Plaintiff performed on the contract, that Defendants failed to perform by requiring Plaintiff to work more strenuously and with more responsibility, which resulted in his termination and ultimately damages. Defendants attach the contract as documentary evidence refuting this cause of action. Defendants argue that Plaintiff cannot allege such a breach, because it would mean assessing previous extraneous promises or covenants that took place that may not be considered due to the contract's merger clause. The complaint, however, does allege each of the elements of a breach of contract. Giving Plaintiff all favorable inferences, he may argue that the duties he was ultimately given went beyond those of a "Physician's Assistant", the job he contracted for. He

may argue that the duties imposed were beyond "reasonable" requests as contemplated by Section 3(g) of the employment contract. At this juncture, it cannot be conclusively stated that the contract's Merger Clause foreclosed Plaintiff's instant breach of contract claim. Accordingly, this branch of Defendant's motion must be denied.

(3) Quantum Meruit

It is true, as Defendants argue, that recovery under the theory of quantum meruit is unavailable where an express contract covers the same subject matter (see *Parker Realty Group, Inc. v. Petigny*, 14 N.Y.3d 864 [2010]). See also *Shutty v. Speiser Krause P.C.*, 86 A.D.3d 484 (1st Dept. 2011). In this case, however, Plaintiff argues that there is a dispute whether a valid contract was ever entered into. In such a situation, recovery on the quantum meruit theory would be proper. See, e.g., *Lehrer McGovern-Boris, Inc. v. New York Yankees*, 207 A.D.2d 256 (1st Dept. 1994); *LaRose v. Becker*, 11 A.D.2d 314 (3rd Dept. 1960). Causes of action and grounds for relief may be pleaded in the alternative and are not barred for inconsistency. *Ellis v. Abbey & Ellis*, 294 A.D.2d 168 (1st Dept. 2002), citing *CPLR* 3002. Accordingly, as here, a plaintiff may plead both breach of contract and quantum meruit as alternative theories of recovery. *Id.* Defendant's motion is therefore denied as to this branch of Plaintiff's complaint.

(4) Emotional Distress under New York Labor Law §740

Plaintiff concedes emotional distress damages for fraud are inappropriate in this matter. Accordingly, said claims will be stricken.

IV. Conclusion

Accordingly, it is hereby

ORDERED, that Defendants' motion to dismiss the second cause of action(Fraud) of Plaintiff's complaint is hereby GRANTED, and it is further,

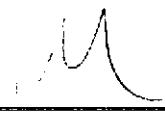
ORDERED, that count two (Fraud) of Plaintiff's complaint is hereby DISMISSED WITH PREJUDICE, and it is further,

ORDERED, that Plaintiff's claim for damages for emotional distress due to fraud are hereby DISMISSED WITH PREJUDICE, and it is further,

ORDERED, that Defendants' motion to dismiss counts three (breach of contract) and four (quantum meruit) of Plaintiff's complaint is hereby DENIED.

The above constitutes the Decision and Order of this Court.

Dated: August 23, 2011



Hon. Mary Ann Brigantti-Hughes, J.S.C.