

Kolodny v Byrne

2012 NY Slip Op 32604(U)

October 11, 2012

Supreme Court, Suffolk County

Docket Number: 11-28718

Judge: Hector D. LaSalle

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 48 - SUFFOLK COUNTY

P R E S E N T :

Hon. HECTOR D. LaSALLE
Justice of the Supreme Court

MOTION DATE 4-17-12
ADJ. DATE 7-10-12
Mot. Seq. # 001 - Mot D

ERIK KOLODNY,

Plaintiff,

- against -

BRENDAN B. BYRNE, AMY BETH BYRNE
(a/k/a AMY BETH STERN, EPIPHANY
CAPITAL MANAGEMENT LLC (formally
known as EPIPHANY TRADING LLC),
EPIPHANY SOLUTIONS INC.,
ANONYMOUS CAPITAL LLC, FRANK
MCDONALD, MASSETO LLC and
ELECTRONIC TRANSACTION CLEARING,
INC., EMPIRE TRADING SERVICES, LLC,
BRYAN LIBARDI, PENSION FINANCIAL
SERVICES, INC. and EMPIRE
EXECUTIONS, LLC,

Defendants.

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Upon the following papers numbered 1 to 16 read on this motion to dismiss ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 6 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 8 - 14 ; Replying Affidavits and supporting papers 15 - 16 ; Other memorandum of law, 7 ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion by the defendants Brendan B. Byrne, Amy Beth Byrne a/k/a Amy Beth Stern, Epiphany Capital Management LLC (formally known as Epiphany Trading LLC), Epiphany Solutions Inc., and Frank McDonald for an order pursuant to CPLR 3211 (a) (7), and (8) dismissing the complaint is granted to the extent that the plaintiff's Second Cause of Action against the moving defendants is dismissed, and is otherwise denied.

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This is an action to recover money deposited into the named corporate entities pursuant to a written agreement, and money allegedly earned by the plaintiff due to successful stock trading under that agreement. In his complaint, the plaintiff alleges that he entered into a Trader Consulting Agreement (Agreement) with the defendants Epiphany Capital Management LLC (formally known as Epiphany Trading LLC), Epiphany Solutions Inc., and Anonymous Capital LLC (collectively The Companies), and that he became a customer and “day trader” entitled to access The Companies’ web site and computer programs, and to trade using The Companies’ capital. The plaintiff further alleges that he deposited approximately \$30,000.00 into an escrow controlled by The Companies as required by the Agreement, that he began trading, and as a result of his success he was entitled to “commissions.” He alleges that after he was not paid the earned commissions, he properly terminated the Agreement, and commenced this action after the defendants refused to pay the commissions or return his \$30,000.00 deposit.

The complaint sets forth causes of action for breach of contract, fraud and conversion. In his cause of action for fraud, the plaintiff alleges that the defendant Brendan P. Byrne (Byrne) exercised dominion and control of The Companies to systematically defraud its customers with the assistance of the defendant Frank McDonald (McDonald), among others, and that Byrne and his wife, the defendant Amy Beth Byrne, “siphoned off assets of [The Companies], [and] converted customer-trader escrow funds for their own personal use ...” It is further alleged that Byrne, Amy Beth Byrne and McDonald perpetrated a “Ponzi” scheme using The Companies as alter egos.

Byrne, Amy Beth Byrne, McDonald, Epiphany Capital Management LLC, and Epiphany Solutions Inc. now move for an order dismissing the complaint pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, and McDonald moves pursuant to CPLR 3211 (a) (8) to dismiss the complaint against him on the ground that the Court lacks jurisdiction over his person. In deciding a motion to dismiss, pleadings shall be liberally construed, the facts as alleged accepted as true, and every possible favorable inference given to plaintiffs (*Leon v Martinez*, 84 NY2d 83, 614 NYS2d 972 [1994]). On such a motion, the Court is limited to examining the pleading to determine whether it states a cause of action (*Guggenheimer v Ginzburg*, 43 NY2d 268, 401 NYS2d 182 [1977]). In examining the sufficiency of the pleading, the Court must accept the facts alleged therein as true and interpret them in the light most favorable to the plaintiff (*Pacific Carlton Development Corp. v 752 Pacific, LLC*, 62 AD3d 677, 878 NYS2d 421 [2d Dept 2009]; *Gjonlekaj v Sot*, 308 AD2d 471, 764 NYS2d 278 [2d Dept 2003]). On such a motion, the Court’s sole inquiry is whether the facts alleged in the complaint fit within any cognizable legal theory, not whether there is evidentiary support for the complaint (*Leon v. Martinez, supra; International Oil Field Supply Services Corp. v Fadeyi*, 35 AD3d 372, 825 NYS2d 730 [2d Dept 2006]). Upon a motion to dismiss, a pleading will be liberally construed and such motion will not be granted unless the moving papers conclusively establish that no cause of action exists (*Chan Ming v Chui Pak Hoi et al*, 163 AD2d 268, 558 NYS2d 546 [1st Dept 1990]).

A review of the complaint reveals that the plaintiff has plead a cause of action for breach of contract, including allegations that may result in the liability of Byrne, Amy Beth Byrne, and Frank McDonald. To pierce the corporate veil requires a showing that the individual defendant (1) exercised complete dominion and control over the corporation, and (2) used such dominion and control to commit a fraud or wrong against the plaintiff which resulted in injury (*see Morris v New York State Dept. of Taxation and Fin.*, 82 NY2d

135, 603 NYS2d 807 [1993]; *Seuter v Lieberman*, 229 AD2d 386, 644 NYS2d 566 [2d Dept 1996]). “The decision whether to pierce the corporate veil in a given instance depends on the particular facts and circumstances” (*Weinstein v Willow Lake Corp.*, 262 AD2d 634, 692 NYS2d 667 [2d Dept 1999]; *see also Gateway I Group v Park Ave. Physicians, P.C.*, 62 AD3d 141, 877 NYS2d 95 [2d Dept 2009]). The plaintiff’s attempt to pierce the corporate veil is not a separate cause of action and he may seek a judgment against the corporation, and to pierce the corporate veil, all in one action (*Rosen v Kessler*, 51 AD3d 761, 856 NYS2d 861 [2d Dept 2008]; *Hart v Jassem*, 43 AD3d 997, 843 NYS2d 121 [2d Dept 2007]; *Fiber Consultants, Inc. v Fiber Optek Interconnect Corp.*, 15 AD3d 528, 792 NYS2d 89 [2d Dept 2005]; *Samsung Am. v Yugoslav-Korean Consulting & Trading Co.*, 248 AD2d 290, 670 NYS2d 466 [1st Dept 1998]).

The second branch of this motion seeks to dismiss the plaintiff’s second cause of action for fraud on the ground that it is not properly plead pursuant to CPLR 3016 (b), and that it is duplicative of the plaintiff’s cause of action for breach of contract. It is well settled that a simple breach of contract is not considered a tort unless a legal duty independent of the contract has been violated (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389, 521 NYS2d 653 [1987]; *see New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 639 NYS2d 283 [1995]; *Sommer v Federal Signal Corp.*, 79 NY2d 540, 583 NYS2d 957 [1992]). A party to a contract may be liable in tort when it has “breached a duty of reasonable care distinct from its contractual obligations, or when it has engaged in tortious conduct separate and apart from its failure to fulfill its contractual obligations” (*New York Univ. v Continental Ins. Co.*, 87 NY2d at 316, 639 NYS2d at 287; *see North Shore Bottling Co. v C. Schmidt & Sons*, 22 NY2d 171, 292 NYS2d 86 [1968]; *D’Ambrosio v Engel*, 292 AD2d 564, 741 NYS2d 42 [2d Dept], *lv denied* 99 NY2d 503, 753 NYS2d 806 [2002]). However, the legal duty must arise from circumstances “extraneous to, and not constituting the elements of, the contract, although it may be connected with and dependant on the contract” (*Clark-Fitzpatrick, Inc. v Long Is. R.R.*, 70 NY2d at 389, 521 NYS2d at 657; *see Rich v New York Cent. & Hudson Riv. R.R. Co.*, 87 NY 382 [1882]; *Krantz v Chateau Stores of Canada*, 256 AD2d 186, 683 NYS2d 24 [1st Dept 1998]).

The elements of a cause of action for fraud are (1) a misrepresentation of fact, (2) which was false and known to be false by the defendant, (3) made for the purpose of deceiving the plaintiff, (4) upon which the plaintiff justifiably relied, (5) causing injury (*e.g. Clearview Concrete Prods. Corp. v S. Charles Gherardi, Inc.*, 88 AD2d 461, 453 NYS2d 750 [2d Dept 1982]; *see also Ozelkan v Tyree Bros. Envtl. Servs.*, 29 AD3d 877, 815 NYS2d 265 [2d Dept 2006]; *Eades v Tadao Ogura, M.D., P.C.*, 185 AD2d 266, 587 NYS2d 209 [2d Dept 1992]).

CPLR 3016 (b) requires that in an action based upon fraud, “the circumstances constituting the wrong shall be stated in detail” in the pleading. Bare allegations of fraud without any allegation of the details constituting the wrong are not sufficient to sustain such a cause of action (CPLR 3016 [b]; *see Kline v Taukpoint Realty Corp.*, 302 AD2d 433, 754 NYS2d 899 [2d Dept 2003]; *Gill v Caribbean Home Remodeling*, 73 AD2d 609, 422 NYS2d 448 [2d Dept 1979]; *Biggar v Buteau*, 51 AD2d 601, 377 NYS2d 788 [3d Dept 1976]). Here, the causes of action alleging fraud are not pleaded with particularity, as there are no allegations concerning specific misrepresentations and when they were made (*see Nicosia v Board of Mgrs. of the Weber House Condominium*, 77 AD3d 455, 909 NYS2d 412 [1st Dept 2010]; *Daly v Kochanowicz*, 67 AD3d 78, 884 NYS2d 144 [2d Dept 2009]).

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In addition, plaintiff does not allege in its pleadings that the moving defendants breached a duty independent of their contractual obligations, or that they engaged in tortious conduct separate from their alleged duty to perform under the Agreement (*see Probst v Cacoulidis*, 295 AD2d 331, 743 NYS2d 509 [2d Dept 2002]; *Givoldi, Inc. v United Parcel Serv.*, 286 AD2d 220, 729 NYS2d 25 [1st Dept 2001]; *Massena Town Ctr. Assocs. v Sear-Brown Group*, 255 AD2d 893, 680 NYS2d 349 [4th Dept 1998]; *Bristol-Meyers Squibb, Indus. Div. v Delta Star*, 206 AD2d 177, 620 NYS2d 196 [4th Dept 1994]). A claim for damages for fraud does not lie where the only fraud alleged relates to a breach of contract (*Selinger Enters., Inc. v Cassuto*, 50 AD3d 766, 860 NYS2d 533 [2d Dept 2008]; *Melissakis v Proto Constr. & Dev. Corp.*, 294 AD2d 342, 741 NYS2d 731 [2d Dept 2002]; *Jackson Hgts. Med. Group, v Complex Corp.*, 222 AD2d 409, 634 NYS2d 721 [2d Dept 1995]). Accordingly, the second cause of action for fraud is dismissed.

The third branch of this motion seeks to dismiss the plaintiff's third cause of action for conversion on the ground that it fails to state a cause of action. Conversion is the unauthorized "exercise of dominion over or interference with" a specific identifiable piece of property in defiance of the owner's rights (*Petty v Barnes*, 70 AD3d 661, 894 NYS2d 85 [2d Dept 2010]; *Hoffman v Unterberg*, 9 AD3d 386, 780 NYS2d 617 [2d Dept 2004]; *Gilman v Abagnale*, 235 AD2d 989, 653 NYS2d 176 [3d Dept 1997]). Tangible personal property or specifically identified money must be involved in a conversion action (*Peters Griffin Woodward, Inc. v WCSC, Inc.*, 88 AD2d 883, 452 NYS2d 599 [1st Dept 1982]; *Independence Discount Corp. v Bressner*, 47 AD2d 756, 365 N.Y.S.2d 44 [2d Dept 1975]). Here the plaintiff has plead a cognizable cause of action for conversion regarding the moving defendants' obligation to escrow and return his "deposit" of approximately \$30,000.00, which is adequately identified. Accordingly, this motion to dismiss the plaintiff's third cause of action is denied.

The final branch of the instant motion seeks to dismiss the complaint against McDonald for lack of personal jurisdiction pursuant to CPLR 3211 (a) (8). It is undisputed that McDonald is a resident of the State of Idaho, and the plaintiff does not set forth the basis for jurisdiction over McDonald. However, a plaintiff is not required to allege in the complaint the basis for personal jurisdiction (*Fishman v Pocono Ski Rental*, 82 AD2d 906, 440 NYS2d 700 [2d Dept 1981]), and to withstand a pre-answer motion to dismiss pursuant to CPLR 3211 (a) (8), a plaintiff need only demonstrate that facts "may exist" to support the exercise of jurisdiction over the nondomiciliary defendant (CPLR 3211 [d]; *Peterson v Spartan Indus.*, 33 NY2d 463, 354 NYS2d 905 [1974]; *Lettieri v Cushing*, 80 AD3d 574 [2d Dept 2011]; *Castillo v Star Leasing*, 69 AD3d 551 [2d Dept 2010]; *Ying Jun Chen v Lei Shi*, 19 AD3d 407, 796 NYS2d 126 [2d Dept 2005]).

It appears that the plaintiff seeks to impose long arm jurisdiction, pursuant to CPLR 302 (a) (2) and (3), which requires that the defendant committed a tortious act. "CPLR 302 (a) is a 'single act statute [and] proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted'" (*Kimco Exch. Place Corp. v Thomas Benz, Inc.*, 34 AD3d 433, 434, 824 NYS2d 353 [2d Dept 2006], quoting *Deutsche Bank Sec., Inc. v Montana Bd. of Investments*, 7 NY3d 65, 71, 818 NYS2d 164 [2006], cert. denied 549 US 1095, 127 S Ct 832 [2006]; see *Grimaldi v Guinn*, 72 AD3d 37, 895 NYS2d 156 [2d Dept 2010]). Here, the plaintiff alleges, at a minimum, that McDonald is responsible for the conversion of his deposit of approximately \$30,000.00.

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In addition, the plaintiff contends that discovery in this action will reveal the full extent of McDonald's involvement in the relevant transactions between the parties. In opposing a motion to dismiss pursuant to CPLR 3211(a) (8) on the ground that discovery on the issue of personal jurisdiction is necessary, plaintiffs need not make a prima facie showing of jurisdiction, but instead must only set forth "a sufficient start, and show [] their position not to be frivolous" (*Shore Pharm. Providers, Inc. v Oakwood Care Ctr., Inc.*, 65 AD3d 623, 624, 885 NYS2d 88 [2d Dept 2009] citing *Peterson v Spartan Indus.*, 33 NY2d 463, 467, 354 NYS2d 905 [1974]).

Here, the plaintiff has established that facts "may exist" in the form of McDonald's alleged control over The Companies' bank accounts, and his alleged domination and control of said corporations to injure the plaintiff so as to exercise personal jurisdiction over McDonald, and he has made a "sufficient start" to warrant further discovery on the issue of personal jurisdiction over McDonald, which, pursuant to CPLR 3211 (d), is within the Court's discretion to grant (*see Ying Jun Chen v Lei Shi*, 19 AD3d at 408, 796 NYS2d at 127; *see also Grimaldi v Guinn, supra*). Therefore, the motion by McDonald pursuant to CPLR 3211(a) (8) to dismiss the complaint as against him for lack of personal jurisdiction is denied without prejudice to renewal upon the completion of discovery on the issue of whether personal jurisdiction may be established over him (*see Castillo v Star Leasing Co., supra*).

The foregoing constitutes the Order of this Court.

Dated: October 11, 2012
Central Islip, NY


HON. HECTOR D. LASALLE, J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION