

Chelsea Express Transp. v CWU'5 a Vi `Yth'GYfj gZ-bW

2012 NY Slip Op 33094(U)

October 12, 2012

Supreme Court, Queens County

Docket Number: 3595/12

Judge: Augustus C. Agate

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

Opposing Affirmation-Exhibits.....	12-14
Memorandum of Law.....	
Memorandum of Law.....	
Memorandum of Law.....	

Upon the foregoing papers the motion and cross motion are determined as follows:

A party moving for a preliminary injunction “must demonstrate by clear and convincing evidence (1) a likelihood of ultimate success on the merits, (2) irreparable injury absent the granting of the preliminary injunction, and (3) that a balancing of equities favors the movant's position” (*EdCia Corp. v McCormack*, 44 AD3d 991, 993 [2007], quoting *Apa Sec., Inc. v Apa*, 37 AD3d 502, 503 [2007]; see *Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839 [2005]; *W.T. Grant Co. v Srogi*, 52 NY2d 496, 517 [1981]; *Masjid Usman, Inc. v Beech 140, LLC*, 68 AD3d 942, 942 [2009]). Proof of a likelihood of success on the merits requires the movant to demonstrate a clear right to relief which is plain from the undisputed facts (see, *Cooper v Board of White Sands Condominium*, 89 AD3d 669 [2011]; *Related Properties, Inc. v Town Bd. of Town/Village of Harrison*, 22 AD3d 587 [2005]; *Abinanti v Pascale*, 41 AD3d 395, 396 [2007]; *Gagnon Bus Co., Inc. v Vallo Transp. Ltd.*, 13 AD3d 334, 335 [2004]). Thus, while the existence of issues of fact alone will not justify denial of a motion for a preliminary injunction, the motion should not be granted where there are issues subverting the likelihood of success on the merits to such a degree that it cannot be said that the plaintiffs established a clear right to relief. (*Advanced Digital Sec. Solutions, Inc. v Samsung Techwin Co., Ltd.*, 53 AD3d 612 [2nd Dept. 2008]), quoting *Milbrandt & Co. v Griffin*, 1 AD3d 327, 328 [2nd Dept. 2003]; see also, CPLR 6312[c]).

The movant must show that the irreparable harm is “imminent, not remote or speculative” (*Golden v Steam Heat*, 216 AD2d 440, 442 [1995]). Moreover, “[e]conomic loss, which is compensable by money damages, does not constitute irreparable harm” (*EdCia Corp. v McCormack*, 44 AD3d at 994; see, e.g., *Mabry v Neighborhood Defender Serv., Inc.*, 88 AD3d 505, 506 [2011]; *Family-Friendly Media, Inc. v Recorder Television Network*, 74 AD3d 738 [2010]; *White Bay Enters., Ltd. v Newsday, Inc.*, 258 AD2d 520 [1999]; *Schrager v Klein*, 267 AD2d 296 [1999]). The decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court (see, *Doe v Axelrod*, 73 NY2d 748, 750 [1988]; *Glorious Temple Church of God in Christ v Dean Holding Corp.*, 35 AD3d 806, 807 [2006]; *Ruiz v Meloney*, 26 AD3d 485 [2006]; *Ying Fung Moy v Hohi Umeki*, 10 AD3d 604 [2004]).

Plaintiffs allege eleven causes of action. The first five causes of action are brought on behalf of Daniel Khodzhandieyev. The first cause of action against Jeff Grobman and Ocean Ambulette Inc., alleges a breach of a stock purchase agreement, and seeks to recover

monetary damages. The second cause of action against Jeff Grobman and Ocean Ambulette Inc. seeks specific performance of the stock purchase agreement. The third cause of action against Jeff Grobman and Ocean Ambulette Inc. seeks rescission of the stock purchase agreement and the return of the funds paid. The fourth cause of action against Grobman and Boris Polykov for fraud in the inducement, and the fifth cause of action against these defendants for fraud, both seek to recover monetary damages.

Plaintiff Chelsea Express Transportation Inc., in the sixth and seventh causes of action against Ocean Ambulette Inc., asserts claims for breach of contract and for reasonable services provided, and seeks to recover monetary damages. Plaintiff Cintez, Inc., in the eighth and ninth causes of action against Ocean Ambulette Inc., asserts claims for breach of contract and for reasonable services provided, and seeks to recover monetary damages. Plaintiff Cintez, Inc., in the tenth cause of action, alleges that it loaned sums to Boris Polykov and seeks to recover a sum certain.

Plaintiff Daniel Khodzhandieyev, in the eleventh cause of action, seeks an accounting as a shareholder of Ocean Ambulette, Inc.

Plaintiffs' motion for a preliminary injunction is denied, as they have failed to establish a clear right to relief and that they will suffer irreparable harm, absent an injunction. With respect to the stock purchase agreement, plaintiff Daniel Khodzhandieyev states that the agreed upon purchase price was \$200,000.00 and that he paid defendant Grobman a total of a total of \$124,700.00, and would have paid the balance but that Grobman terminated the agreement, without notice or justification. He further states that although the stock purchase agreement filed with the New York State Department of Transportation (DOT) set forth the purchase price as \$66,925.00, the correct purchase price was \$200,000.00. As Khodzhandieyev concedes that he did not pay the entire amount of the purchase price, he has not established a likelihood of success on the merits on the claims for specific performance and for an accounting. In addition, there is a sharp factual dispute as to whether Khodzhandieyev or Grobman breached the purchase agreement. Finally, whether any sums are due to either Chelsea Express Transportation Inc. or Cintez Inc. is sharply in dispute. Plaintiffs, thus, has failed to establish a clear right to relief.

Plaintiffs have also failed to establish that they will sustain irreparable harm if an injunction is not issued. Plaintiffs Chelsea Express Transportation Inc. or Cintez Inc. seek to recover monetary damages, and thus cannot establish that they will sustain non-economic harm absent an injunction. With respect to plaintiff Khodzhandieyev's claims for specific performance and for an accounting, he has failed to establish that irreparable harm is imminent. The remainder of his claims seek to recover monetary damages and therefore he cannot establish the existence of non-economic harm. Although Khodzhandieyev claims

damage to his reputation arising out of a letter sent by Grobman's counsel, dated February 11, 2010, to the DOT, this claim is conclusory in nature and does not warrant the granting of injunctive relief.

Plaintiffs' request for a preliminary injunction directing Grobman and Polykov to maintain the business and not to dissipate the assets of Ocean Ambulette is denied. Plaintiffs have not submitted any evidence which would establish that the defendants have taken or are about to take any actions with respect to Ocean Ambulette's operations or assets.

Plaintiffs' request for an order directing defendants to maintain the books and records of "the business" from 2006 to date, during the pendency of this action, is denied as there is no evidence that the defendants have failed to maintain said books and records.

Plaintiffs' request that the defendants produce for discovery and inspection the original stock purchase agreements, as well as Ocean Ambulette Inc.'s stock ledger, bank account statements for 2011 and 2012, financial statements for 2011, and journals or reports for current receivables, is denied. Plaintiffs have failed to establish that they served the defendants with a notice for discovery and inspection pursuant to CPLR 3120, and that defendants have failed to comply with said notices. Plaintiffs, therefore, are not entitled to an order directing discovery at this time.

Defendant Boris Polykov cross moves to dismiss the first, second, third, fourth, fifth, seventh, ninth and eleventh causes of action on the grounds of documentary evidence and failure to state a cause of action. It is well established that on a motion to dismiss pursuant to CPLR 3211(a)(7), "the court must afford the pleadings a liberal construction, accept the allegations of the complaint as true and provide plaintiff the benefit of every possible favorable inference" (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005]; *see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). The court's "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 for dismissal will fail" (*Polonetsky v Better Homes Depot, Inc.*, 97 NY2d 46, 54 [2001], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *see also Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *Leon v Martinez*, 84 NY2d at 87-88; *Tom Winter Assoc., Inc. v Sawyer*, 72 AD3d 803 [2010]; *Uzzle v Nunzie Court Homeowners Assn. Inc.*, 70 AD3d 928 [2010]; *Feldman v Finkelstein & Partners, LLP*, 76 AD3d 703 [2010]). The facts pleaded are to be presumed to be true and are to be accorded every favorable inference, although bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration (*see Morone v Morone*, 50 NY2d 481 [1980]; *Gertler v Goodgold*, 107 AD2d 481 [1985], *affd* 66 NY2d 946 [1985]).

When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, *supra*). This entails an inquiry into whether or not a material fact claimed by the pleader is a fact at all and whether a significant dispute exists regarding it (*see, id.*; *accord*, Siegel, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C3211:25, at 39)” (*Gershon v Goldberg*, 30 AD3d 372 [2006]; *Hispanic Aids Forum v Estate of Bruno*, 16 AD3d 294, 295 [2005]; *Sesti v N. Bellmore Union Free Sch. Dist.*, 304 AD2d 551, 551-552 [2003]; *Mohan v Hollander*, 303 AD2d 473, 474 [2003]; *Doria v Masucci*, 230 AD2d 764, 765 [1996], *lv. to appeal denied* 89 NY2d 811 [1997]; *Rattenni v Cerreta*, 285 AD2d 636, 637 [2001]; *Kantrowitz & Goldhamer v Geller*, 265 AD2d 529 [1999]; *Mayer v Sanders*, 264 AD2d 827, 828 [1999]; *Sotomayor v Kaufman, Malchman, Kirby & Squire*, 252 AD2d 554 [1998]).

A motion to dismiss pursuant to CPLR 3211(a)(1) may be granted only where “the documentary evidence that forms the basis of the defense [is] such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claims’ ” (*HSBC Bank USA, N.A. v Decaudin*, 49 AD3d 694, 695 [2008], quoting *Saxony Ice Co., Div. of Springfield Ice Co., Inc. v Ultimate Energy Rest. Corp.*, 27 AD3d 445, 446 [2006]; *see Leon v Martinez*, 84 NY2d at 88; *Uzzle v Nunzie Ct. Homeowners Assn., Inc., supra*; *McMorrow v Dime Sav. Bank of Williamsburgh*, 48 AD3d 646 [2008]; *Sullivan v State of New York*, 34 AD3d 443, 445 [2006]; *Museum Trading Co. v Bantry*, 281 AD2d 524, 525 [2001]; *Nevin v Laclede Professional Prods.*, 273 AD2d 453, 453 [2000]) . Affidavits submitted by a defendant in support of the motion, however, do not constitute documentary evidence (*Berger v Temple Beth-El of Great Neck*, 303 AD2d 346, 347 [2003]).

That branch the cross motion which seeks to dismiss the first, second, third, seventh, ninth and eleventh causes of action, is denied, as moot, as these causes of action do not allege any claims against defendant Polykov.

Plaintiff Khodzhandieyev’s fourth and fifth causes of action against Polykov and Grobman assert claims for fraud in the inducement, and for fraud. Generally, in a claim for fraudulent inducement a plaintiff must allege “a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury” (*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421 [1996]; *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011]; *see also Channel Master Corp. v Aluminum Ltd. Sales*, 4 NY2d 403, 406-407 [1958]). Likewise, the elements of a cause of action alleging fraud are representation of a material existing fact, falsity, scienter, reliance, and injury (*see Channel Master Corp. v Aluminum Ltd. Sales, supra*; *Urstadt Biddle Props., Inc. v Excelsior Realty Corp.*, 65 AD3d 1135, 1136-1137 [2009];

Urquhart v Philbor Motors, Inc., 9 AD3d 458, 458-459 [2004]). Furthermore, where a cause of action is based in fraud, “the circumstances constituting the wrong shall be stated in detail” (see CPLR 3016 [b]; *see also Lanzi v Brooks*, 43 NY2d 778, 780 [1977]). Thus, plaintiff Khodzhandieyev must allege a misrepresentation or material omission by the defendants, on which he relied, that induced him to enter into the stock purchase agreement. General allegations that defendant entered into a contract while lacking the intent to perform it are insufficient to support a claim for fraud or fraudulent inducement (*see New York Univ. v Cont'l Ins. Co.*, 87 NY2d 308, 318 [1995]).

Here, the fourth cause of action for fraudulent inducement alleges that Polykov “told Khodzhandieyev that he would be interested in owning Ocean Ambulette and that he thought they could work together better than he could work with Grobman”. Plaintiff alleges that these statements by Polykov are believed to be false and part of a plan by Grobman and Polykov to swindle him. Polykov’s alleged statements are, at most, an opinion, and plaintiff does not allege that he relied on these statements when he entered into the contract with Grobman. Plaintiff’s allegations, thus, are insufficient to state a claim against Polykov for fraud in the inducement. That branch of the cross motion which seeks to dismiss the fourth cause of action against defendant Polykov, is granted.

The fifth cause of action alleges that “Grobman and Polykov told Khodzhandieyev that the business [Ocean Ambulette] would be turned over to him and that Chelsea and Cintez would be paid. Plaintiff refers to numerous, unspecified false statements made by Grobman and Polykov which were intended to keep his companies performing services for no payment, and were part of a scheme to wrongfully take money and services from the plaintiffs. These allegations are insufficient to state a claim of fraud or fraudulent inducement against Polykov. That branch of the cross motion which seeks to dismiss the fifth cause of action against defendant Polykov, is granted.

In view of the foregoing, plaintiffs’ motion for a preliminary injunction and for other relief, is denied in its entirety. Defendant Polykov’s cross motion for an order dismissing the fourth and fifth causes of action is granted, and the request to dismiss the first, second, third, seventh, ninth and eleventh causes of action, is denied, as moot.

Dated: October 12, 2012

AUGUSTUS C. AGATE, J.S.C.