

**Roven v Fraboni**

2013 NY Slip Op 30260(U)

January 30, 2013

Supreme Court, New York County

Docket Number: 103246/12

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

GLEN ROVEN,

Plaintiff,

-against-

ANGELO FRABONI,

Defendants.

INDEX NO. 103246/12

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

MOTION SEQ. NO. 001

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, 2

Answering Affidavits- Exhibits 3

Replying Affidavits 4

CROSS-MOTION:  YES  NO

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

**FILED**

FEB 07 2013

DECIDED IN ACCORDANCE WITH ATTACHED ORDER.

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 1/30/13

*Donna M. Mills*  
J.S.C.

Check one:  FINAL DISPOSITION

DONNA M. MILLS, J.S.C.  
NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
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DECISION/ORDER

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DONNA M. MILLS, J:

Plaintiff, Glen Roven initially brought this action for conversion against the defendant Angelo Fraboni. Defendant in his pre-answer motion seeks an order dismissing the complaint pursuant to CPLR §3211(a)(5) & (7). Plaintiff opposes the motion and cross-moves to amend the complaint, and for costs and sanctions.

Plaintiff's amended complaint alleges that defendant used the words "executive producer" as opposed to "co-executive producer" and "producer" as opposed to "associate producer" in his resume in describing jobs that took place in 2004 for the Mount Laurel Center for the Arts and in 2001 in connection with the animated TV show and CD for a program called "Santa Baby." Plaintiff alleges that because defendant supposedly misstated his job titles defendant wrongfully converted the property, product, title and qualifications that belonged to plaintiff. Additionally, plaintiff contends that as a result of the defendant's wrongful activities, plaintiff's future business opportunities were damaged.

A motion for leave to amend a complaint should be freely granted "unless the proposed amendment is 'palpably insufficient or patently devoid of merit, or where the

delay in seeking the amendment would cause prejudice or surprise' " (Commissioners of State Ins. Fund v. Service Unlimited, USA, Inc., 50 A.D.3d 1085, 1085, 857 N.Y.S.2d 231, quoting Lucido v. Mancuso, 49 A.D.3d 220, 222, 851 N.Y.S.2d 238; see G.K. Alan Assoc. Inc. v. Lazzari, 44 A.D.3d 95, 99, 840 N.Y.S.2d 378, *affd.* 10 N.Y.3d 941, 862 N.Y.S.2d 855, 893 N.E.2d 133).

The first, second and third causes of action sounding in conversion, are patently devoid of merit. " 'In order to establish a cause of action to recover damages for conversion, "the plaintiff must show legal ownership or an immediate superior right of possession to a specific identifiable thing and must show that the defendant exercised an unauthorized dominion over the thing in question . . . to the exclusion of the plaintiff's rights" ' " (Matter of Channel Mar. Sales, Inc. v City of New York, 75 AD3d 600, 601 [2010], quoting Messiah's Covenant Community Church v Weinbaum, 74 AD3d 916, 919 [2010], quoting Independence Discount Corp. v Bressner, 47 AD2d 756, 757 [1975]).

Here, the plaintiff failed to demonstrate any indicia of ownership or property interest in a particular title from a particular job that he and the defendant worked on together. The interest asserted by plaintiff is decidedly intangible, and this State does not generally recognize a cause of action for conversion of intangible property ( Sporn v. MCA Records, 58 N.Y.2d 482, 489, 462 N.Y.S.2d 413, 448 N.E.2d 1324).

The fourth cause of action in the amended complaint is based on the theory of unjust enrichment. An action to recover for unjust enrichment sounds in restitution or quasi-contract ( Waldman v. Englishtown Sportswear, 92 A.D.2d 833, 836, 460 N.Y.S.2d 552 [1983] ). The claim "rests upon the equitable principle that a person shall

not be allowed to enrich himself unjustly at the expense of another " ( Miller v. Schloss, 218 N.Y. 400, 407, 113 N.E. 337 [1916] [emphasis added]; Flag Wharf, Inc. v. Merrill Lynch Capital Corp., 40 A.D.3d 506, 836 N.Y.S.2d 406 [2007] ). Moreover, "[t]he general rule is that 'the plaintiff must have suffered a loss and an action not based upon loss is not restitutionary' " ( State of New York v. Barclays Bank of N.Y., 76 N.Y.2d 533, 540, 561 N.Y.S.2d 697, 563 N.E.2d 11 [1990] [quoting Restatement of Restitution § 128, comment f, at 531 (emphasis added) ] ).

Here, the plaintiff's cause of action for unjust enrichment is sufficient at this early stage of the proceeding based on the allegation that defendant wrongfully stole the qualifications and product of plaintiff.

The fifth cause of action in the amended complaint sufficiently make out a claim for tortious interference with prospective economic relations. Tortious interference with prospective economic relations requires an allegation that plaintiff would have entered into an economic relationship but for the defendant's wrongful conduct ( Snyder v. Sony Music Entertainment, 252 A.D.2d 294, 300, 684 N.Y.S.2d 235). At this early stage of the proceeding, the analysis is not whether the plaintiff can make out a prima facie case at trial, but whether the cause of action is properly pled and has an indicia of merit.

Based on the record, while defendant's counsel may have raised non germane matters in his moving papers, this Court does not find that his assertions rose to the level of sanctionable conduct.

Accordingly, it is

ORDERED that plaintiff's cross-motion to amend the complaint is granted to the limited extent that the fourth and fifth causes of action in the amended complaint

annexed to the moving papers shall be deemed to have been served upon service by movant of a copy of this order with notice of entry; and it is further

ORDERED that the first, second and third causes of action in the amended complaint are dismissed; and it is further

ORDERED that plaintiff's motion for costs and sanctions are denied; and it is further

ORDERED that defendant's motion to dismiss the complaint is denied as moot; and it is further

ORDERED that defendant shall serve an answer to the amended complaint or otherwise respond thereto within 20 days of said service; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 574, 111 Centre Street, on March 29, 2013, at 10 AM.

**FILED**

Dated:

*1/30/13*

FEB 07 2013

ENTER:

*DM*  
J.S.C.

NEW YORK  
COUNTY CLERK'S OFFICE

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