

Gregor v Rossi

2014 NY Slip Op 30015(U)

January 3, 2014

Supreme Court, New York County

Docket Number: 651432/2013

Judge: Eileen A. Rakower

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**SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: Hon. EILEEN A. RAKOWER PART 15**

Justice

DEBORAH A. GREGOR AND CARL GERARDI,
Plaintiffs,

INDEX NO. 651432/2013

- v -

MOTION DATE _____
MOTION SEQ. NO. 005

JOSEPH J. ROSSI, ANJI ROSSI, VTL DIAGNOSTICS
LLC, VETAURA, INC., BRUCE BERNSTEIN, NANCY
ZIMMERMAN TUNKEL, LUIGI CRESCITELLI, BARBARA
ALESI, ROBERT GROMAN, THOMAS GLASCOCK,
GREGORY TEMBECK, FREDERICK BLUMER, AND JAMES
O'DAY,

MOTION CAL. NO. _____

Defendants.

The following papers, numbered 1 to _____ were read on this motion for/to

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1, 2, 3</u>
Answer — Affidavits — Exhibits _____	<u>4</u>
Replying Affidavits _____	<u>5</u>

Plaintiffs Deborah A. Gregor and Carl Gerardi (collectively, "Plaintiffs") bring the instant action for among other claims, fraud, constructive fraud, fraudulent inducement, negligent representation, violation of North Carolina's RICO statute and civil conspiracy. In this action, Plaintiffs allege that they were fraudulently induced by defendant Joseph J. Rossi, who was assisted by co-defendants including his wife defendant Anji Rossi, to invest substantial sums of money through Rossi into defendant companies VTL Diagnostics, LLC ("VTL") and Vetaura, Inc. ("Vetaura").

Defendants Joseph Rossi and Anji Rossi (collectively, "Defendants" or "Movants") now move for an Order dismissing the first, second, third and fourth causes of action of the Amended Complaint pursuant to CPLR §3211(a)(7) and CPLR §3016(b); dismissing the fifth cause of action pursuant to CPLR §3211(a)(7), CPLR §3211(a)(5), and CPLR §3016(b)l dismissing the eighth, ninth, and tenth causes of action for lack of subject matter jurisdiction pursuant to CPLR §3211(a)(2), lack of standing pursuant to CPLR §3211(a)(3), and failure to state a claim under CPLR §3211(a)(7), and for dismissal of the remainder of the causes of action as against Defendants. In support, Defendants submit the attorney

affirmation of Gilbert L. Balanoff. Plaintiffs oppose.

CPLR §3211 provides, in relevant part:

1. a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(2) the court has not jurisdiction of the subject matter of the cause of action; or

(3) the party asserting the cause of action has not legal capacity to sue; or

(5) the cause of action may not be maintained because of ... statute of limitations . . . ; or

(7) the pleading fails to state a cause of action.

On a CPLR §3211(a)(5) motion to dismiss based on the running of the statute of limitations, the defendant has the initial burden of proving that the time to commence the claim has expired and the plaintiff's response "must be given their most favorable intendment." (*Benn v. Benn*, 82 A.D.3d 548 [1st Dept 2011])

In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory." (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91[1st Dept. 2003]) (internal citations omitted) (*see* CPLR §3211[a][7]).

The following paragraphs of the Amended Complaint refer to defendant Anji Rossi:

(2) Joseph Rossi is that confidence man, and his wife Anji, his accountants James O'Day and Frederick Blumer, his attorneys Barbara Alesi, Robert Groman, Thomas Glascock and Gregory Tembeck, and certain of his supposed fellow shareholders/investors, employees, and suppliers, including Nancy Zimmerman Tunkel and Luigi Crescitelli, were his accomplices, repeatedly making representations on his behalf, to give credibility to Rossi's lies so that the

Plaintiffs would continue to invest money in Rossi's scheme to defraud them out of their investments.

(6) Defendant Anji Rossi is the wife of the Defendant Rossi, a resident of the State of New York, and an owner, officer, manager/member, and/or director of VTL and Vetaura.

(17) Deborah and Stanley Gregor met Joseph Rossi and Anji Rossi in or about 2001, when they were neighbors in Lattingtown, New York.

(18) The couples become close social friends, sharing many interests; their sons went to school together; played sports together and regularly spent time at each other's homes.

(19) The two families were members of, and frequented, the same beach club.

(21) The bond of trust that the Gregors believed they had formed with the Rossis intensified when Mr. Gregor confided to Rossi that his mother was suffering from ovarian cancer; Rossi told Mr. Gregor that his own mother had the same disease, and they would "get through it together."

(31) Rossi enlisted his wife, Defendant Anji Rossi, to enhance the scheme by endorsing the proposed Gregor investment to Mrs. Gregor and later, by actively, participating in the solicitation, receipt, and conversion of funds from the Gregors.

(32) The Rossis invited the Gregors to dinner at LiMani Restaurant in Roslyn, New York, where the Rossis solicited the Gregors by saying we "can work together," "we'll make money as a family" and that an investment in VTL "would change your lives for the better."

(33) The Gregors trusted the Rossis.

(34) The Gregors told the Rossis that the Gregors could not be more than passive investors in VTL.

(36) The Gregors, having no reason to doubt the representations of their

longtime friends the Rossis, agreed to invest money in the Rossis' company, VTL.

(37) Based on Rossis' advice and encouragement, on July 16, 2009, Rossi and the Gregors reached an agreement whereby Mrs. Gregor would purchase a 3% ownership interest in VTL by remitting \$375,000 to Rossi, who would then purchase the ownership interests on her behalf.

(43) On July 20, 2009, in reliance of the representations made by Rossi, the Gregors wired \$375,000 from their bank account in Charlotte, North Carolina, held by the Bank of America ("the BOA Account"), to Rossi and Mrs. Rossi's joint Bank of America account in New York, for the purpose of acquiring a 3% interest in VTL from the company.

(51) On August 20, 2009, in reliance upon Rossi's representations, Mrs. Gregor wired \$125,000 from the BOA Account to Rossi and Mrs. Rossi's joint Bank of America account in New York.

(53) On November 23, 2009, again at the behest of Rossi and in reliance on his representations, Mrs. Gregor wired another \$220,000 from the BOA Account to Rossi and Mrs. Rossi's joint Bank of America account in New York, to purchase what Rossi represented as "the remaining 2%" ownership interest in VTL.

(58) On January 30, 2010 note states that Rossi and Mrs. Rossi affirm all prior notes and jointly and severally agree to repay Mrs. Gregor \$775,000, and that, upon Mrs. Gregor's payment of an additional \$80,000 she would receive an additional .5% ownership interest in VTL, which would then complete her entire investment in VTL at that time. A true and complete copy of the promissory note is attached hereto as Exhibit A.

(61) On February 1, 2010, in further reliance on the Rossis' representations, including the representations made in the January 30, 2010 note purportedly guarantying repayment of the entire Gregor investment within three months, the Gregors wired an additional \$80,000 from the BOA Account to Rossi and Mrs. Rossi's joint Bank of America account in New York to purchase an additional .5% interest in VTL.

(63) In reliance upon Rossi's representations, on April 4, 2010, the Gregors

wired an additional \$50,000.00 from the BOA Account to Rossi and Mrs. Rossi's joint Bank of America account in New York to purchase an additional .5% interest in VTL.

(66) Rossi also represented to the Gregors that he had more than \$5,000,000.00 that he was waiting to have released to him from his former company, BioReference, so that he and Mrs. Rossi could purchase even more ownership interests in VTL.

(67) Despite his numerous representations, in fact Rossi never purchased membership interests in VTL on behalf of Mrs. Gregor, and instead misappropriated the funds from Rossi and Mrs. Rossi's own personal gain.

(75) Rossi further advised the Gregors that Bernstein had absconded with all of the monies invested by both the Rossis and Mrs. Gregor and that Bruce Bernstein was a "crook."

(76) Rossi claimed he gave Bernstein 100% of Mrs. Gregor's investments, plus additional money invested by Rossi and Mrs. Rossi to purchase ownership interests in VTL.

(100) Upon information and belief, Rossi and Mrs. Rossi never invested any personal monies into Vetaura.

(101) Instead of investing the monies received from the Plaintiffs into VTL or Vetaura, the Rossis converted and misappropriated the funds they received from the Plaintiffs for the Rossis' own personal gain.

(163) Rossi and Mrs. Rossi, as well as Crescitelli and Bernstein, have diverted Vetaura assets from Vetaura for their personal use and benefit.

(164) Upon information and belief, Rossi, Mrs. Rossi, Crescitelli, and their accounts have unilaterally and wrongfully claimed and entered on the corporate books of Vetaura loan repayment obligations for the benefit of the Rossis and Crescitelli without Rossis' or Crescitelli ever making any actual loans to Vetaura.

(185) Both Defendants Rossi and Mrs. Rossi made or caused to made material representations, omissions, and false promises as previously detailed in the

foregoing paragraphs of the Complaint.

The first three causes of action against the Rossis are fraud, fraudulent inducement, and constructive fraud. In an action to recover for fraud, Plaintiffs must prove (1) a misrepresentation or a material omission of fact; (2) which was false and known to be false by defendant; (3) made for the purpose of inducing the other party to rely upon it; (4) justifiable reliance of the other party on the misrepresentation or material omission; and (5) injury. (*Mandarin Trading Ltd. v. Wildenstein*, 16 NY3d 173, 919 NYS2d 465 [2011]). Similarly, the elements of fraudulent inducement are: (1) a false representation of material fact; (2) known by the utterer to be untrue; (3) made with the intention of inducing reliance and forbearance from further inquiry; (4) that is justifiably relied upon; and (5) results in damages. (See *MBIA Ins. Corp. v. Credit Suisse Securities USA LLC*, 927 NYS2d 517 [Sup Ct NY Cty 2011]).

The Amended Complaint alleges that Joseph Rossi and Anji Rossi made false representations to induce Plaintiffs to make the subject investments regarding the alleged viability, profitability, and legitimacy of Defendant companies, that Plaintiffs relied upon these misrepresentations when investing their money in them, and resulting damages. Taking the allegations as true, the four corners of the Complaint state a cause of action for fraud and fraudulent inducement as against Joseph and Anji Rossi.

The third cause of action alleges constructive fraud as against defendants Joseph Rossi and Anji Rossi. The elements of constructive fraud and actual fraud are identical, except that actual fraud requires an intentional deception, while constructive fraud generally requires “a confidential fiduciary relationship between the parties, or one having superior knowledge over the other” (see, 60A N.Y. Jur 2d, *Fraud and Deceit* 2), and in constructive fraud it is not necessary to demonstrate knowledge of the falsity of a representation (see *Eden Rock Fin. Fund, L.P., v. Gerova Fin. Gruop, Ltd.*, 34 Misc. 3d 1205[A] [Sup Ct NY Cnty 2011]). “A majority shareholder in a close corporation is in a fiduciary relationship with the minority.” (See *Richbell Information Services, Inc. v. Jupiter Partners, L.P.*, 765 NYS2d 575, 586 [1st Dept 2003]).

The fourth cause of action against defendants Joseph Rossi and Anji Rossi is for negligent misrepresentation. For Plaintiffs to recover damages, Plaintiffs must establish, (1) Defendant had a duty; (2) based upon some special relationship

with Plaintiff; (3) to impart correct information; (4) that the information given was false or incorrect; and (5) that the Plaintiff justifiably relied upon that information provided. (*See Berger-Vespa v. Rondack Building Inspectors*, 293 AD3d 838, 740 NYS2d 504 [2002]). CPLR §3016(b) provides that where a cause of action or defense is based on misrepresentation, it must be stated in detail.

Here, accepting all allegations as true, the four corners of the complaint state a cause of action for constructive fraud and negligent misrepresentation against defendant Joseph Rossi based on allegations that Joseph Rossi, as alleged owner, officer, manager/member, director and President of VTL and the Chief Executive Officer of Vetaura, and Anji Rossi, as alleged owner, officer, manager/member, and/or director of VTL and Vetaura, owed a fiduciary duty to Plaintiffs, as shareholders, to impart correct information concerning Vetaura, that the information provided by him concerning certain investments and loans made to Vetaura was in fact false or incorrect, and that Plaintiffs justifiably relied upon the information provided in making further investments.

The fifth cause of action alleges conversion against defendants Joseph Rossi and Anji Rossi. “A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession.” *Colavito v. New York Organ Donor Network, Inc.*, 8 N.Y.3d 43, 49-50 (N.Y. 2006).

CPLR § 214[3] mandates that a cause of action for conversion be commenced within three years of the date that the action accrues. The three year statute of limitations “normally runs from the date the conversion allegedly took place. Where possession is originally lawful, a conversion does not occur until the owner makes a demand for the return of the property and the person in possession of the property refuses to return it.” *In re Estate of King*, 305 A.D. 2d 683, 683 [2nd Dept 2003]. The “[s]tatute of Limitations alleging conversion by a fiduciary only began to run when plaintiffs discovered facts upon which to demand the return of property allegedly converted.” *Elghanayan v. Victory*, 192 A.D. 2d 355, 356 [1st Dept 1993].

The four corners of the Complaint state a claim for conversion as against defendants Joseph Rossi and Anji Rossi based on the allegations that instead of using Plaintiffs’ funds to purchase ownership interests in either VTL and Vetaura on behalf of Plaintiffs, they converted the funds for their own personal use.

Moreover, based on the allegations of the Amended Complaint, it was not until April or early May 2010 after Plaintiffs made demands for documentation of their investments in VTL that Rossi represented to the Gregors that defendant Bruce Bernstein had stolen Mrs. Gregor's investments and that it was not until later in May that Rossi stated that he had converted the Gregors' investment into Vetaura stock and attempted to have Mrs. Gregor cancel the \$775,000 promissory note. Based on these allegations, the conversion claim is timely.

The eighth, ninth and tenth causes of action allege violations of North Carolina RICO statute NCGSA §75D-4(a)(1)(Defendants engaged in a pattern of racketeering activity), NCGSA §75D-4(a)(2) ("Defendants have conducted and participated in an enterprise"), and NCGSA §75D-4(a)(3)(Defendants have conspired with one another to violate sections 4(a)(a) and 4(a)(2)).

The alleged sections of the North Carolina RICO statute provide:

§75D-4. Prohibited activities.

(a) No person shall:

(1) Engage in a pattern of racketeering activity or, through a pattern of racketeering activities or through proceeds derived therefrom, acquire or maintain, directly or indirectly, any interest in or control of any enterprise, real property, or personal property of any nature, including money; or

(2) Conduct or participate in, directly or indirectly, any enterprise through a pattern of racketeering activity whether indirectly, or employed by or associated with such enterprise; or

(3) Conspire with another or attempt to violate any of the provisions of subdivision (1) or (2) of this subsection.

Racketeering activity is defined as "to commit, to attempt to commit, or to solicit, coerce, or intimidate another person to commit an act or acts which would be chargeable by indictment if such act or acts were accompanied by the necessary mens rea or criminal intent under the following laws of this State..." "Enterprise" means any person, sole proprietorship, partnership, corporation, business trust, union chartered under the laws of this state, or other legal entity; or any unchartered union, association or group of individuals associated in fact although

not a legal entity; and it includes illicit as well as licit enterprises and governmental as well as other entities.”

Where a conflict of law exists between two states, the courts look to the choice of law rules of the forum to decide which state’s law applies. New York applies an interest analysis to determine which of two competing jurisdictions has the greater interest in having its law applied in the litigation. *See Schultz v. Boy Scouts*, 65 N.Y. 2d 189, 197 [1985]. Furthermore, if the plaintiff and the defendant are domiciled in different states the law of the place of the injury generally applies. *See generally Neumeier v. Kuehner*, 31 N.Y. 2d 121 [1972]. If however, the parties share a common state of domicile, the state with the predominant interest must apply. *Aviles v. Port Authority of New York and New Jersey*, 202 A.D. 2d 45, 64 [1st Dept 1994].

Here, there are sufficient facts alleged in the Amended Complaint demonstrating that North Carolina has an interest in this matter and that North Carolina law may apply. Deborah Gregor resided in North Carolina and there are allegations that Defendants acted in furtherance of the overall scheme by reaching out to the North Carolina resident and inducing her to wire funds from her North Carolina account to make continuing investments. As this is a motion to dismiss, all allegations are accepted as true, and dismissal is not warranted based on the contention that North Carolina law is not applicable as a matter of law.

Furthermore, accepting all allegations as true, Plaintiffs have set forth a cause of action under North Carolina RICO Statute NCGSA 75D-4(a)(1), NCGSA 75D-4(a)(2), and NCGSA 75D-4(a)(3), against defendants Joseph and Anji Rossi.

The eleventh cause of action against the Rossis is for civil conspiracy. As claims based on fraud have been stated as against both Joseph Rossi and Anji Rossi, a claim for civil conspiracy has also been plead against said defendants. (*see Romano v. Romano*, 2 A.D. 3d 430, 432 [2nd Dept 2003]) (“a cause of action sounding in civil conspiracy cannot stand alone, but stands or falls with the underlying tort”).

The twelfth cause of action alleges breach of contract as against Joseph and Anji Rossi. It alleges that on January 30, 2010, defendants Rossi and Mrs. Rossi executed a promissory note in favor of plaintiff Mrs. Gregor in the amount of \$775,000 with a maturity date of May 1, 2010, that defendants have not repaid

any of the monies due under the note, and that they are in default under the terms of the note. Accepting all allegations as true, the twelfth cause of action states a claim for breach of contract.

The sixteenth cause of action is for unjust enrichment. A claim for unjust enrichment may be plead as alternative theory of recovery even if a breach of contract claim is also plead. *See Winick Realty Group, LLC v. Austin & Associates*, 857 N.Y.S. 2d 114 [1st Dept. 2008]. The Amended Complaint alleges that Plaintiffs “conveyed a benefit on the Defendants and received nothing in return, despite a myriad of promises, contracts, and agreements entered into by the parties evincing various compensation and certain results for the Plaintiffs,” “Defendants have unjustly enriched themselves at the expense of the Plaintiffs,” and “Plaintiffs are entitled to just and fair compensation owed to them by the Defendants.” Accepting all allegations as true, the sixteenth cause of action states a claim. In addition, as with Plaintiffs’ conversion claim, the unjust enrichment claim is timely based on the allegations that the Rossis did not benefit from Plaintiffs’ investment funds until after April 19, 2010.

The fifteenth cause of action is for shareholder oppression/dissolution. The Amended Complaint alleges that “Defendant Joseph J. Rossi, as a manager and officer of VTL, the Chief Executive Officer and a director of Vetaura, and a majority owner of Vetaura, and Defendants Nancy Zimmerman Tunkel and Luigi Crescitelli, as shareholders in the majority, acted in an oppressive manner towards the Plaintiffs, minority shareholders and/or owners of VTL and Vetaura,” details the alleged oppressive conduct, and seeks dissolution of VTL and Vetaura and damages. Movants contend that Plaintiffs lack standing to seek a petition for the dissolution of Vetaura Inc.

New York Business Corporations Law (BCL) §1104-a enables “the holders of shares representing twenty percent or more of the votes of all outstanding shares of a corporation ... entitled to vote in an election of directors” to “present a petition of dissolution on one or more of the following grounds:

(1) The directors or those in control of the corporation have been guilty of illegal, fraudulent or oppressive actions toward the complaining shareholders;

(2) The property or assets of the corporation are being looted, wasted,

or diverted for non-corporate purposes by its directors, officers or those in control of the corporation.”

(BCL §1104-a).

Here, accepting all allegations as true, if the Rossis did use the Plaintiffs’ monies to purchase the ownership interests in Vetaura, the Plaintiffs have the requisite number of outstanding votes to pursue this action for dissolution.

Defendants also seek to strike Plaintiffs’ claim for punitive damages as requested in the Amended Complaint. “Punitive damages are not available in the ordinary fraud and deceit case [internal quotation marks and citation omitted], but are permitted only when a defendant’s wrongdoing is not simply intentional but evince[s] a high degree of moral turpitude and demonstrate[s] such wanton dishonesty as to imply a criminal indifference to civil obligations. Mere commission of a tort, even an intentional tort requiring proof of common-law malice, is insufficient; there must be circumstances of aggravation or outrage, or a fraudulent or evil motive on the part of the defendant.” *Hoeffner v. Orick, Herrington & Stuclyffe, LLP*, 85 A.D. 3d 457, 458 [1st Dept 2011]. Here, the four corners of the Amended Complaint sufficiently allege allegations that if true, support a claim for punitive damages.

Defendants also seek to strike Plaintiffs’ claim for attorneys’ fees as requested in the Amended Complaint. “Under the general rule, attorney’s fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule.” *Hooper Associates, Ltd. v. AGS Computers, Inc.*, 74 N.Y. 2d 487, 491 [NY 1989]. While Plaintiffs’ opposition does not specifically address Defendants’ motion to dismiss their claim for attorneys’ fees, the Promissory Note annexed to the Amended Complaint executed by Joseph and Anji Rossi provides for attorneys’ fees upon an event of default.

Wherefore, it is hereby,

ORDERED that defendants’ motion to dismiss is denied.

This constitutes the decision and order of the court. The Court has reviewed Defendants’ remaining claims and all other relief requested is denied.

Dated: JANUARY 3, 2014

~~HON. EILEEN A. RAKOWER~~
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

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