

<b>Gansburg v Frankel</b>
2014 NY Slip Op 30084(U)
January 14, 2014
Sup Ct, Kings County
Docket Number: 501628/2012
Judge: Mark I. Partnow
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At an IAS Term, Part 43 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 2<sup>nd</sup> day of January, 2014.

P R E S E N T:

HON. MARK I. PARTNOW,  
Justice.

-----X  
ISRAEL GANSBURG,

Plaintiff,

- against -

Index No. 501628/12

BENZION FRANKEL, BENZION FRANKEL  
P.C., MOSHE TRESS and 1244 UNION LLC  
(d/b/a/ 1244 Union Holding, LLC),

Defendants.

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The following papers numbered 1 to 7 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and  
Affidavits (Affirmations) Annexed \_\_\_\_\_  
Opposing Affidavits (Affirmations) \_\_\_\_\_  
Reply Affidavits (Affirmations) \_\_\_\_\_  
\_\_\_\_\_ Affidavit (Affirmation) \_\_\_\_\_  
Other Papers \_\_\_\_\_

\_\_\_\_\_ 1-2, 3-4  
\_\_\_\_\_ 5, 6  
\_\_\_\_\_ 7  
\_\_\_\_\_

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Upon the foregoing papers, defendants Benzion Frankel and Benzion Frankel, P.C. (collectively Frankel) move, pursuant to CPLR 3211 (a) (1), (5), and (7), for an order dismissing the complaint of plaintiff Israel Gansburg (Gansburg) insofar as asserted against them. By separate motion, defendants Moshe Tress and 1244 Union Holding LLC (Tress)

move, pursuant to CPLR 3211 (a) (1), (5) and (7), for an order dismissing the complaint insofar as asserted against them.

*Background and Procedural History*

According to the complaint,<sup>1</sup> in September 2008, Tress represented to Gansburg that he owned property located at 1244 Union Street in Brooklyn. At the time, Tress was represented by Frankel. Gansburg expressed interest in buying the property and retained an attorney to represent him. On September 16, 2008, Frankel faxed a proposed Membership Purchase Agreement to Gansburg (the Agreement).<sup>2</sup> On September 18, 2008, Tress contacted Gansburg and insisted that he come to Frankel's office to demonstrate that Gansburg was serious about purchasing the property. Gansburg had previously informed Tress that his attorney was on vacation and requested that Tress wait until Gansburg's attorney returned before going forward with the deal. At the September 18<sup>th</sup> meeting, Frankel, with Tress in attendance, insisted that plaintiff go forward with the deal. Plaintiff expressed concern about his attorney's absence. Frankel then informed plaintiff that he could place money in escrow into the "Benzion Frankel Trust Account" to show his interest and ability to purchase the property, and that the money would be returned to him if his attorney did not approve the terms of the Agreement.

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<sup>1</sup> On a motion to dismiss pursuant to CPLR 3211, the court must accept all facts as alleged in the complaint as true.

<sup>2</sup> The proposed sale is the purchase of an LLC whose sole asset is the property.

Gansburg made out two checks (one for \$44,000, the other for \$3,000) payable to the “Benzion Frankel Trust Account.” Gansburg wrote on the memo line of each of the checks “Subject to my attorney Al Fogel reviewing the contract sent to him.” The Agreement was signed around this time. In his complaint, Gansburg does not state when the contract was signed. Tress and Frankel attest that it was signed at the September 18<sup>th</sup> meeting. When Gansburg’s attorney reviewed the Agreement he advised Gansburg that it was a bad and possibly illegal deal, and that Gansburg should request the return of the escrow funds. On October 6, 2008, Gansburg’s attorney advised, both verbally and in writing, that Gansburg was rejecting the Agreement and that Frankel should return the escrow funds. On October 8, 2008, Frankel responded by refusing to return the money.

Frankel commenced this action on June 21, 2012, by serving a summons and complaint. The complaint sets forth twelve causes of action.

The first four causes of action, respectively, asserted against Frankel, are for breach of a fiduciary duty, breach of a written escrow agreement, breach of an oral escrow agreement, and misappropriation of escrow funds. The sixth through eighth causes of action, respectively, asserted against all of the defendants, are for promissory estoppel, unjust enrichment, conversion, and fraud. The ninth through twelfth causes of action, respectively, are asserted against Frankel, and allege attorney misconduct, violation of General Business Law § 349, negligence, and seek a judicial accounting.

Defendants both move to dismiss the action pursuant to CPLR 3211 prior to answering. Additionally, defendants move for sanctions pursuant to 22 NYCRR 130-1.1 (a)

and (c). Finally, Frankel moves, pursuant to CPLR 3024, to strike prejudicial matter from the complaint.

#### *Discussion*

“On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court should accept the facts alleged in the complaint as true and afford the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*State Farm Ins. Co. v Shanley & Schwartz, Inc.*, 111 AD3d 918, 918 [2013]).

Gansburg’s first cause of action for breach of fiduciary duty must be dismissed because it is untimely. The breach of fiduciary duty claim is based on conversion of the alleged escrow funds, which is governed by the three-year statute of limitations (*see Gold Sun Shipping v Ionian Transp.*, 245 AD2d 420, 421 [1997] [“The cause of action alleging breach of fiduciary duty and the demand for the imposition of a constructive trust were also properly dismissed based on the three-year Statute of Limitations applicable to conversion, because the legal remedy for conversion would have afforded the plaintiffs full and complete relief”]). Here, the statute began running on October 8, 2008, when Frankel refused to return the money after Gansburg’s demand (*see Heede Hoist & Mach. Co. v Bayview Towers Apts.*, 74 AD2d 598, 598 [1980]). Because this action was commenced on June 21, 2012, more than three years after this cause of action accrued, this cause of action is time-barred.

Gansburg’s second cause of action for breach of a written escrow agreement must also be dismissed. Gansburg has not provided a sufficient writing to establish a written escrow agreement. The checks made out to “Benzion Frankel Trust Account” are insufficient to

create an escrow agreement (*see Shapiro v Snow Becker Krauss*, 208 AD2d 461, 461 [1994], *lv denied* 85 NY2d 803 [1995] [“That the check plaintiffs gave (defendant) was made payable to defendant's escrow account did not transform defendant into an escrow agent with a fiduciary duty to inquire of plaintiffs as to any conditions attached to the payment of the check”]).

Defendants are not entitled to dismissal of Gansburg's third cause of action; breach of an oral escrow agreement. Defendant first argues that this cause of action is duplicative of plaintiff's first cause of action (breach of fiduciary duty against Frankel) and is untimely for the same reason. However, the third cause of action is based on an implied oral contract between Gansburg and Frankel. An implied contract “applies in the absence of an express agreement, and is not really a contract at all, but rather a legal obligation imposed in order to prevent a party's unjust enrichment” (*Scott v Fields*, 92 AD3d 666, 669 [2012]). According to the complaint, Gansburg tendered the checks with the assurance from both Frankel and Tress that if Gansburg's attorney was dissatisfied with the proposed agreement, the money would be returned to Gansburg. Accepting these facts as true and giving every favorable inference to the plaintiff (*cf. Roth v R & P Rest. Corp.*, 68 AD3d 961, 963 [2009]), there is an adequate showing to maintain a pleading for an implied contract. Additionally, because the action is one for implied contract, the cause of action is timely (*see Gold Sun Shipping*, 245 AD2d at 421 [“Where, as here, a complaint alleges facts which support causes of action alleging conversion and breach of an implied contract, the plaintiff may waive the

conversion cause of action and proceed on a breach of an implied contract theory to which a six-year Statute of Limitations period is applicable”]).

Frankel further argues that the Agreement contains merger and integration clauses that bar any oral modifications. Accordingly, Frankel asserts that the alleged oral escrow agreement is barred. This argument is unavailing. The Agreement at ¶22 states that changes must be in writing, however, the checks at issue in this case were not written consistently with the Agreement. In this regard, Paragraph 4 (a) of the Agreement provides:

“Payment of Purchase Price The Purchase Price shall be paid as follows:

(a) FIFTY ONE THOUSAND TWO HUNDRED FIFTY (\$51,000.00) [sic] Dollars at [sic] Together with the execution of this Agreement by certified or bank check directly to the order of Seller.”

Here, the two checks written by Gansburg were not certified or bank checks, they totaled \$47,000.00, not \$51,250.00 (or \$51,000.00), and the checks were made out to “Benzion Frankel Trust Account,” not to Tress, the seller. In short, while these checks may represent a down payment, they were not made in accordance with the Agreement. Therefore, it is reasonable to consider parole evidence as to the intent of Gansburg when he executed these checks, as well as the promises exchanged for the checks.

Finally, Frankel argues that an escrow agreement is required to be in writing. This argument has no legal basis. There is nothing in the statute of frauds which states that an escrow agreement must be in writing (*see* General Obligations Law § 5-701; *Superior Group Ventures v Carocelli, Inc.*, 241 AD2d 489, 490 [1997]).

Gansburg's fourth cause of action, for misappropriation, is duplicative of Gansburg's seventh cause of cause of action for conversion (*see Cusimano v Schnurr*, 40 Misc 3d 1208[A], 2013 NY Slip Op 51077[U] [Sup Ct, NY County 2013]) and must be dismissed as untimely (*see Matter of Chung Li*, 95 AD3d 881 [2012]).

Gansburg's fifth cause of action for promissory estoppel, which has been reconstituted as a claim for a constructive trust, is dismissed as untimely. While a constructive trust has a six-year statute of limitations where there is an equitable remedy -where, as here, the legal remedy of conversion would suffice - a three-year statute of limitations applies (*see Gold Sun Shipping*, 245 AD2d at 421).

Defendants are not entitled to dismissal of Gansburg's sixth cause of action for unjust enrichment for the same reasons his third cause of action has been sustained. Additionally, the cause of action is viable against Tress because Gansburg alleges that Tress was present at the meeting where Gansburg signed the checks and since no discovery has been exchanged, it is not known whether Frankel has retained the money or whether it was transferred to Tress.

Gansburg's seventh cause of action for conversion is dismissed as untimely for reasons stated for dismissal of the fourth cause of action (*Matter of Chung Li*, 95 AD3d 881).

Gansburg's eighth cause of action for fraud must be dismissed. This cause of action is based on the premise that Frankel and Tress induced Gansburg to enter into the oral escrow agreement with the intention of retaining the funds if Gansburg's attorney rejected the Agreement. However, "[g]eneral allegations that defendant entered into a contract while

lacking the intent to perform it are insufficient to support [a] claim [of fraud]" (*New York Univ. v Continental Ins. Co.*, 97 NY2d 308, 318 [1995]).

Gansburg's ninth cause of action for treble damages for attorney misconduct, based upon Judiciary Law § 487 (1), is time-barred (*see Jorgensen v Silverman*, 224 AD2d 665, 666 [1996] ["the Supreme Court properly applied the three-year malpractice Statute of Limitations to the plaintiff's claims for treble damages pursuant to Judiciary Law § 487"]).

Gansburg's tenth cause of action for deceptive acts, based upon General Business Law § 349, must also be dismissed as time-barred. The statute of limitations for a claim pursuant to General Business Law § 349 is three years (*see Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 789 [2012]).

Gansburg's eleventh cause of action for negligence is also untimely. The claim essentially alleges professional misconduct against Frankel, which is subject to a three-year statute of limitations (*see Matter of R.M. Kliment & Frances Halsband, Architects v McKinsey & Co., Inc.*, 3 NY3d 538, 543 [2004]).

Gansburg's twelfth cause of action for a judicial accounting must be dismissed. "To be entitled to an equitable accounting, a claimant must demonstrate that he or she has no adequate remedy at law" (*Unitel Telecard Distrib. Corp. v Nunez*, 90 AD3d 568, 569 [2011]; *see also Kastle v Steibel*, 120 AD2d 868, 869 [1986]). Here, Gansburg's damages, if he is successful, are readily ascertainable, *i.e.*, the amount of the checks plus interest. Accordingly, Gansburg has an adequate remedy at law and cannot demonstrate "any special

circumstances justifying the equitable relief of an accounting” (*Grossman v Laurence Handprints-N.J.*, 90 AD2d 95, 105 [1982]).

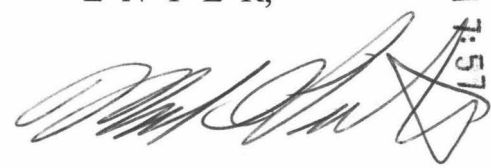
Finally, that part of Frankel’s motion to strike prejudicial matter from the complaint is granted. Gansburg makes allegations in his complaint (namely paragraphs 1, 2, 33, 37, 38, 39 and 92) that the proposed Agreement was illegal and that Frankel has a history of unprofessional conduct. “While the matter contained in those paragraphs may be admissible at trial, it is not necessary for the sufficiency of the [plaintiff’s] pleading, and it would cause undue prejudice to the [defendant]” (*JC Mfg. v NPI Elec.*, 178 AD2d 505, 506 [1991]). Accordingly, it is

ORDERED that defendants’ motions are granted insofar as plaintiff’s first, second, fourth, fifth, seventh, eighth, ninth, tenth, eleventh and twelfth causes of action are dismissed; and it is further

ORDERED that the language “and illegal terms” is stricken from the first paragraph of plaintiff’s complaint and paragraphs 2, 33, 37, 38, 39 and 92 are stricken from the complaint in their entirety; and it is further

ORDERED that the balance of the relief sought in the motions is denied.  
This constitutes the decision and order of the court.

E N T E R,



J. S. C.

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