# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER PART 15

Index Number : 651091/2013
HOMMEYER, MICHAEL
vs
DANIEL M PAFFORD INTERIORS
Sequence Number : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). 1, 2, 3

Answering Affidavits — Exhibits _____ No(s). 4

Replying Affidavits _____ No(s). 5

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 1/23/14

_____, J.S.C.
HON. EILEEN A. RAKOWER

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

----------X

MICHAEL HOMMEYER and
JENNIFER HOMMEYER,

Plaintiffs,

- v -

DANIEL M. PAFFORD INTERIORS, INC., and
DANIEL M. PAFFORD

Defendants.

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Index No.
651091/2013

**DECISION and ORDER**

Mot. Seq. 01

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

This is an action for breach of contract, conversion, unjust enrichment, and fraud based on defendants' alleged failure to perform contracted-for design services in a clients' home, as well as the alleged misuse of those clients' personal credit card information. Plaintiffs, Michael Hommeyer and Jennifer Hommeyer (collectively, "Plaintiffs"), claim to have entered into a written contract with defendants, Daniel M. Pafford Interiors, Inc. ("DMPI"), and Daniel M. Pafford ("Mr. Pafford") (collectively, "Defendants"), whereby DMPI was hired to perform interior design services in Plaintiffs' residence located at 28 Locust Lane, Bronxville, New York, 10708. Plaintiffs claim that DMPI failed to provide Plaintiffs with goods and services pursuant to this contract, that DMPI and Mr. Pafford used Plaintiffs' credit card information to purchase goods that were never delivered to Plaintiffs, and that Plaintiffs were forced to purchase additional goods and retain additional services from other providers as a result of the foregoing.

Defendants move for an Order dismissing Plaintiffs' complaint pursuant to CPLR § 3211(a)(7). Plaintiffs oppose.

CPLR § 3211 provides, in relevant part:

> (a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
>
> (7) the pleading fails to state a cause of action.

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 elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage." (*Flomenbaum v New York Univ.*, 2009 NY Slip Op 8975, *9 [1st Dept. 2009]).

Here, Plaintiffs' complaint alleges, "Plaintiffs entered into a written agreement (the 'Contract') with Defendants whereby Defendants agreed to perform, and Plaintiffs agreed to pay for, interior design services to be rendered by DMPI to Plaintiffs at their residence located at 28 Locust Lane, Bronxville, New York, 10708 (the 'Subject Premises')." Plaintiffs' complaint further alleges that Plaintiffs "tendered payment to Defendants," and that Plaintiffs "performed all of their obligations under the Contract." Plaintiffs' complaint also asserts that "Defendants failed to order, or deliver to Plaintiffs, certain agreed-upon goods and/or failed to pay for certain agreed-upon goods despite the fact that Plaintiffs had paid Defendants in advance for the goods," and claims that Plaintiffs were damaged as a result of "Defendants' failure to provide Plaintiffs with the required agreed upon goods and services." Accordingly, the four corners of Plaintiffs' complaint adequately plead a cause of action for breach of contract against Defendants.

As for Plaintiffs' second cause of action, the elements of conversion are: 1) plaintiff's possessory right or interest in the property, and; 2) defendant's dominion

over the property or interference with it in derogation of plaintiff's rights. *(Colavito v. New York Organ Donor Network*, Inc., 8 NY3d 43 [2006]). When funds are provided for a particular purpose, the use of those funds for an unauthorized purpose constitutes conversion. (*Hoffman v. Unterberg*, 9 A.D.3d 386 [2d Dep't 2004]).

A conversion claim cannot be maintained where damages are merely sought for a breach of contract. (*Daub v. Future Tech Enterprise, Inc.* 65 A.D.3d 1004 [2d Dep't 2009]). However, the same conduct that constitutes a breach of contract may also constitute the breach of a duty arising out of the contractual relationship that is independent of the contract itself and may give rise to a separate claim for conversion distinct from or in addition to the breach of contract. (*Hamlet at Willow Creek Development Co. LLC v. Northeast Land Development Corp.* 64 AD3d 85 [2d Dep't 2009]; *Sebastian Holdings, Inc.v. Deutche Bank AG*, 78 A.D.3d 446 [1st Dep't]).

"A corporate officer is personally responsible for any conversion of a third party's property committed in the scope of his employment, and it is no defense to personal liability that the officer or agent may have been acting on behalf of a corporate principal." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Arcturus Builders, Inc.*, 159 A.D.2d 283 (1st Dep't 1990) (internal quotations omitted). This is the case "regardless of whether the corporate veil is pierced." *Espinosa v. Rand*, 24 A.D.3d 102, 102 (1st Dep't 2005) *quoting American Express Travel related Servs. Co. v. North Atl. Resources*, 261 A.D.2d (1999). "However, to impose liability, generally there must be a showing that the corporate official knowingly participated in the wrong or, in the case of fraud, had knowledge of the misrepresentation. *American Feeds and Livestock Co. v. Kalfco, Inc.*, 149 AD2d 836, 837, 540 N.Y.S.2d 354 (3d Dep't 1989), *leave to appeal denied*, 74 NY2d 608, 543 N.E.2d 747, 545 N.Y.S.2d 104 (1989)." *Reilly Green Mtn. Platform Tennis v. Cortese*, 28 Misc. 3d 1234(A), 1234A (N.Y. Sup. Ct. 2007).

Here, Plaintiffs' complaint alleges that Defendants obtained Plaintiffs' credit card information in conjunction with the purported contract for interior design services, and that Plaintiffs tendered payment to Defendants for goods and services that were never rendered. The complaint further alleges, "Defendants made an unauthorized and unlawful charge on Jennifer Hommeyer's American Express card in the amount of $2,221.05 (the 'Amex Charge'). Upon information and belief the Amex Charge was for goods provided to a different client of Defendants'."

Accepting these allegations as true, the four corners of Plaintiffs' complaint adequately plead a separate cause of action for conversion.

As for Plaintiffs' third cause of action, to prevail on a claim for unjust enrichment, the "plaintiff must show that the other party was enriched, at plaintiff's expense, and that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered." (*Georgia Malone & Co., Inc. v. Rieder*, 86 A.D.3d 406 [1st Dep't 2011]).

"[T]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter." (*Clark- Fitzpatrick, Inc. v. Long Island R.R. Co.*, 70 N.Y. 2d 382, 399 [1987]). However, "where there is a bona fide dispute as to the existence of a contract or the application of a contract in the dispute in issue, a plaintiff may proceed upon a theory of quasi contract as well as breach of contract, and will not be required to elect his or her remedies." *Sabre Intl. Sec., Ltd. v. Vulcan Capital Mgt., Inc.*, 95 A.D.3d 434, 438-439 (1st Dep't 2012); *Loheac v. Children's Corner Learning Ctr.*, 51 A.D. 3d 476, 476 [1st Dep't 2008]).

Here, Plaintiffs' complaint alleges that "Defendants received payments from Plaintiffs without providing to Plaintiffs the required items," that "Defendants have failed to repay Plaintiffs for amounts which Plaintiffs remitted to Defendants, despite Plaintiffs' demand for the same," that "Defendants benefitted from said payments at Plaintiffs' expense," and that "Defendants have been unjustly enriched as a result of the foregoing." These allegations, if taken to be true, are sufficient to support a claim for unjust enrichment, at this early stage of litigation. Insofar as there appears to be a question concerning the scope or applicability of the purported contract, therefore, Plaintiffs may, at least at this stage, proceed based on an alternative quasi-contract theory.

Furthermore, "a claim for unjust enrichment may stand alongside a breach of contract cause of action at the pleading stage." (*Shilkoff, Inc. v. 885 Third Ave. Corp.*, 299 A.D.2d 253 [1st Dep't 2002]). Defendants' contention that Plaintiffs' unjust enrichment claim cannot stand in light of Plaintiffs' breach of contract action is therefore premature at this stage. Accordingly, accepting Plaintiffs' allegations as

true and drawing all inferences in favor of the non-moving party, Plaintiffs' third cause of action for unjust enrichment stands.

Finally, with respect to Plaintiffs' fourth cause of action, "[t]he elements of a cause of action sounding in fraud are material misrepresentation of an existing fact, made with knowledge of the falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation and damages." *(Orchid Constr. Corp., v. Gottbetter*, 89 AD3d 708, 932 NYS2d 1000 [2d Dep't 2011]).

CPLR §3016 requires particularity in the pleading of a fraud cause of action. Additionally, "[t]he courts of this State have consistently held . . . that a cause of action for fraud does not arise when the only alleged fraud relates to a breach of contract," (*Metropolitan Transp. Authority v. Triumph Advertising Productions, Inc.*, 116 A.D.2d 526, 527 [1st Dep't 1986]), and "[a] mere misrepresentation of an intent to perform under the contract is insufficient to sustain a cause of action to recover damages for fraud." (*Gorman v. Fowkes*, 97 A.D.3d 726, 727 [2d Dep't 2012]).

Here, Plaintiffs' complaint alleges that Defendants knowingly made false representations that Defendants intended to order and deliver certain goods to Plaintiffs in order to induce Plaintiffs to rely upon said representations, and that Plaintiffs justifiably relied on these misrepresentations and were damaged as a result. Accordingly, even accepting these allegations as true, the allegations contained in the four corners of Plaintiffs' complaint do not plead with particularity facts sufficient to support a cause of action for fraud that is distinct from Plaintiffs' breach of contract claim.

Wherefore, it is hereby

ORDERED that Defendants' motion to dismiss is granted only to the extent that Plaintiffs' fourth cause of action for fraud is dismissed as against Defendants, Daniel M. Pafford Interiors, Inc., and Daniel M. Pafford.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: JANUARY 23 ,2014

EILEEN A. RAKOWER, J.S.C.