

American Franchise Specialist Agency, Inc. v Henry
2014 NY Slip Op 31023(U)
April 11, 2014
Sup Ct, Suffolk County
Docket Number: 07-13335
Judge: Ralph T. Gazzillo
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. RALPH T. GAZZILLO
Acting Justice of the Supreme Court

MOTION DATE 12-28-12 (#008)
MOTION DATE 06-06-13 (#009)
MOTION DATE 08-02-13 (#010)
ADJ. DATE 11-12-13 (## 008 & 009)
ADJ. DATE 12-03-13 (#010)
Mot. Seq. #008 - MG
Mot. Seq. #009 - XMD
Mot. Seq. #010 - XMD

-----X
AMERICAN FRANCHISE SPECIALIST
AGENCY, INC., CHERYL GRAHAM and
JANICE CAVANAUGH-TETI,

Plaintiffs,

- against -

BRENDAN C. HENRY, KAH INSURANCE,
BROKERAGE, INC., HUDSON INSURANCE
GROUP, HUDSON INSURANCE COMPANY,
HUDSON SPECIALTY INSURANCE
COMPANY, CLEARWATER INSURANCE
COMPANY, CLEARWATER SELECT
INSURANCE COMPANY,

Defendants.
-----X

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Upon the following papers numbered 1 to 85 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause (#008) and supporting papers 1 - 14; Notice of Cross Motion (#009) and supporting papers 15 - 36; Notice of Cross Motion (#010) and supporting papers 37 - 70; Answering Affidavits and supporting papers 71 - 78; Replying Affidavits and supporting papers 79 - 85; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants Hudson Insurance Group, Hudson Insurance Company, Hudson Specialty Insurance Company, Clearwater Insurance Company, and Clearwater Select Insurance Company for an order pursuant to CPLR 3211 (a) (7) dismissing the complaint, or pursuant to CPLR 3212 granting summary judgment dismissing the complaint is granted; and, it is further

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ORDERED that the cross motion by plaintiffs for an order pursuant to CPLR 3212 granting summary judgment against defendants Brendan C. Henry and KAH Insurance Brokerage, Inc. is denied; and, it is further

ORDERED that the cross motion by defendants Brendan C. Henry and KAH Insurance Brokerage, Inc. for an order pursuant to CPLR 3212 dismissing plaintiffs' complaint and denying plaintiffs' motion is denied.

Plaintiffs commenced this action alleging breach of an agreement (the second, third, sixth, and seventh causes of action), conversion (the third, fifth, and eighth causes of action), unjust enrichment (the eighth and thirteenth causes of action), conspiracy (the eleventh and twelfth causes of action), seeking an accounting (the ninth cause of action) and to impose a constructive trust (the tenth cause of action) against defendants Brendan C. Henry and KAH Insurance Brokerage, Inc. ("defendants Henry and KAH"). Plaintiffs' complaint contains three causes of action interposed against defendants Hudson Insurance Group, Hudson Insurance Company, Hudson Specialty Insurance Company, Clearwater Insurance Company, and Clearwater Select Insurance Company ("the Hudson defendants"). One alleges a conspiracy (the eleventh cause of action), another a conspiracy and fraud (the twelfth cause of action), and the final one alleges that the Hudson defendants knew of an agreement between plaintiffs and defendants Henry and KAH, sent commission checks to them, but that plaintiffs did not receive commissions due and owing them from those proceeds (the fourteenth cause of action). The first "cause of action" contains twenty-six numbered paragraphs alleging jurisdictional type "facts" but fails to state any actions for which recovery could be based against any defendants. The fourth "cause of action" states that defendants Henry and KAH failed to remit fees, taxes, and other payments on clients' written policies which jeopardized plaintiffs' licenses and future business and damaged their "good business name."

The Hudson defendants now move for an order dismissing plaintiffs' complaint pursuant to CPLR 3211 (a) (7) on the ground that it fails to state a cause of action against them. In the alternative, they request an order dismissing the complaint pursuant to CPLR 3212 on the ground that there is no triable issue of fact with regard to plaintiffs' claims against them.¹ Plaintiffs cross-move for an order granting summary judgment to them as against defendants Henry and KAH and the defendants Hudson cross-move for an order dismissing the complaint against them and denying plaintiffs' motion in its entirety.

Plaintiffs Cheryl Graham and Janice Cavanaugh-Teti are principals of plaintiff American Franchise Specialist Agency, Inc., a retail insurance broker in the business of selling certain insurance products to commercial entities. Defendant Brendan C. Henry is the principal of defendant KAH Insurance Brokerage, Inc., which is an insurance broker which sells certain insurance policies to retail insurance brokers. Defendant Hudson Insurance Company is an insurer which underwrites certain insurance policies for commercial insurance entities. There is no dispute that plaintiffs and defendants

¹By order of this court dated March 28, 2013 the motion was reinstated after having been incorrectly withdrawn.

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Henry and KAH entered into a “Memorandum Agreement” dated June 15, 2005 (“the American Franchise/KAH agreement”) which provided, *inter alia*, that plaintiffs would provide certain “start-up” costs to defendants Henry and KAH, and that the parties to the agreement would share commissions as a result of the procurement of insurance policies for various McDonald’s franchises. In the course of their businesses and in furtherance of the agreement, defendants Henry and KAH contracted with defendant Hudson Insurance Company in order to obtain insurance policies for certain McDonald’s franchises. Pertinent portions of the American Franchise/KAH agreement state that

Purpose: This memorandum is to confirm the preliminary terms of agreement between the aforesaid parties concerning the sales and marketing of insurance policies to McDonalds’s franchisees [“McDonald’s business”]. All McDonald’s business relating to liability, property and umbrella package insurance policies [“PKG policies”] will be placed through KAH.

...

Approved Carriers: PKG policies– Hudson Insurance Company

...

Startup Costs: American Franchise will advance to KAH the amount of \$2,600.00 per week through September 30, 2005, so long as Hudson Insurance Company commits to write the PKG policies exclusively through KAH. KAH, including Brendan C. Henry, will not be required to repay any of these advances to American Franchise.

Operating Expenses: The parties agree to share equally the following operating expenses relating to the McDonald’s business PKG policies: rent, telephone, office supplies, postage, overnight carriers, employees’ payroll and fringe benefits, insurance (including E&O, WC, GL), copier, furniture, two PC’s, subscriptions, training, licensing, travel and entertainment, DP consulting, professional fees and automobile expenses not to exceed \$1,000.00 per month. Excluded from shared expenses are executive salaries and executive fringe benefits.

McDonald Business: The parties agree to work together to market and place PKG and EPLI policies to McDonald’s franchisees. American Franchise shall place its PKG policies exclusively through KAH. American Franchise shall be KAH’s exclusive sub-producer for PKG policies. KAH shall place its EPLI policies exclusively through American Franchise. American Franchise may have other sub-producers for the EPLI policies.

Commissions: The parties will share equally the net commissions paid to either party for any insurance policies generated through this agreement other than the following: PKG and EPLI accounts owned by either party prior to the commencement of this agreement; and excess commissions paid by Houston

Casualty Co. to American Franchise towards the settlement of \$75,000 in old debt. American Franchise shall pay a commission to KAH at the current broker's rate for KAH's existing EPLI accounts.

Plaintiffs aver that defendants Henry and KAH failed to pay them the commissions due and owing them under the terms of the American Franchise/KAH agreement. While the papers submitted in opposition to the Hudson defendants' motion for summary judgment dismissing the complaint seem to allege that plaintiffs had a "verbal agreement" with the Hudson defendants, no cause of action is plead alleging a breach of contract by the Hudson defendants, nor is an action for unjust enrichment alleged against them. The "Clearwater defendants" are not named in any contract provided to the court, nor are any specific factual allegations made as to any acts for which liability could be found on their part. As to the Hudson defendants, plaintiffs, Cheryl Graham and Janice Cavanaugh-Teti, testified during their numerous pre-trial depositions that neither they nor plaintiff American Franchise Specialist Agency, Inc. had any agreement with defendant Hudson (although plaintiff Cheryl Graham inferred that she believed an oral agreement may have existed between the two). Each of the plaintiffs testified that they did not communicate with the Hudson defendants about commissions due them and that they obtained licenses for surplus liability coverage in every state at the request of defendant Hudson Insurance Company. Plaintiffs could state no conduct on the part of the Hudson defendants which would evidence any type of "conspiracy" on their part to withhold commissions due plaintiffs from defendants Henry and KAH or which constituted fraud on their part.

In determining whether to dismiss a complaint pursuant to CPLR 3211 (a) (7), the court must assume to be true the facts plead, give every favorable inference to the allegations, and determine only whether the alleged facts fit any cognizable legal theory (*Dickinson v Igoni*, 76 AD3d 943, 908 NYS2d 85 [2d Dept 2010]; *Tsutsui v Barasch*, 67 AD3d 896, 892 NYS2d 400 [2d Dept 2009]). The test is whether the pleading states a cause of action, not whether the plaintiff has a cause of action (*Sokol v Leader*, 74 AD3d 1180, 904 NYS2d 153 [2d Dept 2010]). "Whether a plaintiff can ultimately establish [his or her] allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19, 799 NYS2d 170 [2005]). In determining if a pleading states a cause of action, "the sole criterion" for the Courts is whether "from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182 [1977]). The complaint must "contain statements of sufficient particularity to give the court and the parties notice of the transactions and occurrences intended to be proved, along with the material elements of each cause of action (CPLR 3013) ... [a] complaint is insufficient if based solely on conclusory statements, unsupported by factual allegations" (*Melito v Interboro-Mut. Indem. Ins. Co.*, 73 AD2d 819, 820, 423 NYS2d 742 [4th Dept 1979]).

Rule 3016 (b) of the CPLR mandates that where a cause of action is based upon fraud, "the circumstances constituting the wrong shall be stated in detail." The elements of common law fraud, which include a misrepresentation of a material fact, falsity, scienter, reliance, and injury, must be set forth in order for the complaint to withstand a motion for its dismissal; a dismissal of the complaint is warranted if the pleadings do not set forth the factual details and circumstances of the alleged fraud and misrepresentation with sufficient particularity (*see Black Car and Livery Ins. Inc. v H&W Brokerage*

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Inc., 28 AD3d 595, 813 NYS2d 751 [2d Dept 2006]; *68 Burns New Holding, Inc. v Burns St. Owners Corp.*, 18 AD3d 857, 796 NYS2d 677 [2d Dept 2005]; *Kline v Taukpoint Realty Corp.*, 302 AD2d 433, 754 NYS2d 899 [2d Dept 2003]).

Defendants Hudson request that the complaint be dismissed for failing to state a cause of action pursuant to CPLR 3211 (a) (7). The first cause of action fails to state or allege any acts of wrongdoing by any party, it merely recites the bases for jurisdiction and the differing roles of the parties. The fourth cause of action alleges that defendants Henry and KAH failed to remit taxes, fees, and other payments on clients' policies which "jeopardized the licenses of the plaintiff's" and "the future business of the plaintiff's". The pleading suggests that damages are due and owing to plaintiffs because defendants damaged their "good business name". The fourteenth cause of action alleges that plaintiffs entered into a written agreement with defendants Henry and KAH, that all defendants knew of the agreement, that the Hudson defendants knew of the agreement and intentionally caused "the commission checks to be drafted and sent to defendants [Henry and KAH] without any notification to the plaintiffs", and that plaintiffs did not receive their just, due, and owing commission as a result thereof. No actual wrongdoing is alleged (such as a breach of an agreement or that an agreement between plaintiffs and the Hudson defendants required notification before tendering commission checks to defendants Henry and KAH). The court can find no discernable cause of action within the four corners of the complaint for either the first, fourth, or fourteenth causes of action, as none has been plead sufficiently. Thus, the first, fourth, and fourteenth causes of action are dismissed in their entirety.

With regard to the eleventh and twelfth causes of action, plaintiffs allege a conspiracy and fraudulent activity and suggest that defendants "defrauded" them. However, they do not allege facts sufficient to withstand the pleading requirements of CPLR 3016 (b). There are no details as to the circumstances of the alleged fraud and any particularities as to the conduct which constituted the fraud. The general allegations plead are insufficient to maintain these causes of action. Consequently, the eleventh and twelfth causes of action are dismissed in their entirety.

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see, Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 413 NYS2d 141 [1978]; *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]). It is well settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (*S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (*Benincasa v Garrubbo*, 141 AD2d 636, 637, 529 NYS2d 797, 799 [2d Dept 1988]). Once this showing by the movant has been established, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (*see Alvarez v Prospect Hosp.*, *supra*).

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In support of their motion for summary judgment and in opposition to defendants' motions to dismiss and for summary judgment, plaintiffs offer absolutely no evidence that any claims against defendants Hudson Insurance Group, Hudson Specialty Insurance Company, Clearwater Insurance Company, or Clearwater Select Insurance Company can be maintained. There is no evidence of any wrongdoing, or involvement at all, by any of these defendants. Accordingly, summary judgment dismissing the entire complaint as to these four named defendants is warranted. With regard to defendant Hudson Insurance Company, the court having dismissed the first, fourth, eleventh, twelfth, and fourteenth causes of action herein above, none of the remaining causes of action allege any wrongdoing on its part. Accordingly, as to those causes of action, summary judgment dismissing them is granted to defendant Hudson Insurance Company.

Finally, the court finds that questions of fact exist as to each of the remaining causes of action (*i.e.* the second, third, fifth, sixth, seventh, eighth, ninth, tenth, and thirteenth). No party has made a sufficient showing that, as a matter of law, summary judgment is warranted. Clearly, plaintiffs and defendants Henry and KAH entered into a contract, and sufficient facts have been plead and alleged during depositions which show that a breach of the contract may have occurred, that defendants Henry and KAH may have been guilty of conversion or unjustly enriched, that an accounting may be warranted, and that a constructive trust may be imposed. Amid the voluminous transcripts of deposition testimony, defendant Henry admits that, from the KAH business account, he wrote himself and his wife checks, with no recall as to the purpose of those sums although he knew that neither was paid a salary; paid \$10,000.00 to Stony Brook University, but was unsure of the purpose of the check; paid checks to cash; and, paid over \$23,000.00 from the business account for work done to his home (with no business purpose whatsoever). As plaintiffs allege that defendants Henry and KAH did not pay them the proper commissions due them pursuant to the American Franchise/KAH agreement, and defendant Henry makes admissions that he has no recall as to the purpose of certain "questionable" payments, questions of fact exist as to the breach of contract, conversion, unjust enrichment, accounting, and constructive trust causes of action. Thus, the cross motion of plaintiffs is denied in its entirety and the cross motion of defendants Henry and KAH is denied except as may have been otherwise granted herein.

Dated: _____

4/18/14

 A.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION