Smallberg v Raich Ende Malter & Co. LLP
2015 NY Slip Op 32582(U)
June 30, 2015
Supreme Court, Suffolk County
Docket Number: 14E-64085
Judge: Jerry Garguilo
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INDEX No. 14E-64085

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION IAS PART 48 - SUFFOLK COUNTY

PRESENT:

Hon. JERRY GARGUILO
Justice of the Supreme Court

MOTION DATE 9-2-14 (001)
MOTION DATE 10-8-14 (002)
ADJ. DATE 1-14-14
Mot. Seq. # 001 - MG
002 - XMD; CASEDISP

LEONARD SMALLBERG and BRADLEY SMALLBERG,

Plaintiffs,

- against -

RAICH ENDE MALTER & CO. LLP and DOES 1-10,

Defendant.

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Upon the following papers read on this motion seeking dismissal and/or summary judgment and the cross motion for leave to amend the complaint ; Notice of Motion/ Order to Show Cause and supporting papers dated August 12, 2014; Notice of Cross Motion and supporting papers dated September 26, 2014; Answering Affidavits and supporting papers dated September 26, 2014; Replying Affidavits and supporting papers dated November 13, 2014; Other Affirmation of Alexander Widell dated November 13, 2014; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that defendant's motion to dismiss pursuant to CPLR 3211(a) (7) and/or for summary judgment pursuant to CPLR 3212 is granted; and it is further

ORDERED that plaintiff's motion to amend the complaint and consolidate this action with pending matters is denied.

In this action, plaintiffs seek monetary damages allegedly sustained as a result of the dissolution of an accounting firm, Smallberg, Sorkin and Company (hereinafter SSC). The complaint alleges interference with a contract as a first cause of action and unjust enrichment as a second cause of action. A proposed amended complaint alleges aiding and abetting breach of fiduciary duty as a third cause of action. The complaint was dated, and served, May 22, 2014. Defendant answered June 10, 2014. Discovery has not been completed and two other related law suits exist between the parties *Mitchell Sorkin, CPA v Leonard Smallberg, CPA and Bradley Smallberg*, Index No. 2110-2014 and *Leonard Smallberg and Bradley Smallberg v Peter Kutner*, Index No. 66618-2014 both in Suffolk County Supreme Court. Defendant, Raich

Ende Malter & Company LLP (hereinafter REM), now moves for dismissal of the complaint for failure to state a cause of action and/or summary judgment. Plaintiffs cross move for leave to amend the complaint and to consolidate the related pending actions.

Mitchell Sorkin (hereinafter Sorkin) was a partner in SSC. Following unsuccessful merger discussions in December of 2012, Sorkin withdrew from SSC, and joined REM. Plaintiff alleges Sorkin and "presently unknown and unnamed representatives of REM" and "DOES 1-10" conspired to, and in fact, contacted SSC clients and caused them to withhold payments lawfully due to SSC. The complaint alleges interference with contract and unjust enrichment.

As to the motion by defendant REM, when a party moves under CPLR 3211 (a)(7) for dismissal based on the failure to state a cause of action, 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]). A court must determine whether, accepting the facts as alleged in the pleading as true and according the plaintiff the benefit of every favorable inference, those facts fit within any cognizable legal theory (***Leon v Martinez***, 84 NY2d 83, 614 NYS2d 972 [1994]). Affidavits may be used to remedy pleading defects, thereby preserving "inartfully pleaded, but potentially meritorious, claims" (***Rovello v Orofino Realty Co.***, 40 NY2d 633, 635-636, 389 NYS2d 314 [1976]). "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]). However, "conclusory averments of wrongdoing are insufficient to sustain a complaint unless supported by allegations of ultimate facts" (***Muka v Greene County***, 101 AD2d 965, 965, 477 NYS2d 444 [4 th Dept 1984]; *see* ***DiMauro v Metropolitan Suburban Bus Auth.***, 105 AD2d 236, 483 NYS2d 383 [2d Dept 1984]; ***Melito v Interboro-Mutual Indem. Ins. Co.***, 73 AD2d 819, 423 NYS2d 742 [4th Dept 1979]; ***Greschler v Greschler***, 71 AD2d 322, 422 NYS2d 718 [2d Dept 1979]).

The branch of the motion seeking dismissal of the first and second causes of action for failure to state a cause of action is granted. To succeed on a claim for tortious interference with contractual relations, a plaintiff must show the existence of a valid contract between the plaintiff and a third party, the defendant's knowledge of such contract, the defendant's intentional and improper procurement of the breach of such contract by the third party, and damages (*see* ***White Plains Coat & Apron Co., Inc. v Cintas Corp.***, 8 NY3d 422, 835 NYS2d 530 [2007]; ***NBT Bancorp v Fleet/Norstar Fin. Group***, 87 NY2d 614, 641 NYS2d 581 [1996]; ***Lama Holding Co. v Smith Barney***, 88 NY2d 413, 646 NYS2d 76 [1996]; ***Miller v Theodore-Tassy***, 92 AD3d 650, 938 NYS2d 172 [2d Dept 2012]; ***Dune Deck Owners Corp. v Liggett***, 85 AD3d 1093, 927 NYS2d 125 [2d Dept 2011]). The tort of intentional interference with business relations requires a showing that the defendant intentionally and through wrongful acts prevented a third party from extending a contractual relationship to the plaintiff (*see* ***Smith v Meridian Tech., Inc.***, 86 AD3d 557, 927 NYS2d 141 [2d Dept 2011]; ***Adler v 20/20 Cos.***, 82 AD3d 915, 918 NYS2d 585 [2d Dept 2011]). The allegations set forth in the complaint are insufficient to state a cause of action for tortious interference with contract, as there is no allegation the defendant procured a breach of contract by any of SSC's clients (*see* ***Dune Deck Owners Corp. v Liggett***, 85 AD3d 1093, 927 NYS2d 125 [2d Dept 2011]; ***Ferrandino & Son, Inc. v Wheaton Bldrs., Inc., LLC***, 82 AD3d 1035, 920 NYS2d 123 [2d Dept 2011]). Similarly, the complaint fails to set forth sufficient allegations that the defendant interfered with a prospective business relationship between SSC and a third party (*see* ***Adler v 20/20 Cos.***, 82 AD3d 915, 918 NYS2d 585 [2d Dept 2011];

White v Ivy, 63 AD3d 1236, 880 NYS2d 374 [3d Dept 2009]; ***Pacheco v United Med. Assoc.***, 305 AD2d 711, 759 NYS2d 556 [3d Dept 2003]; ***Korn v Princz***, 226 AD2d 278, 641 NYS2d 283 [1st Dept 1996]; *cf.* ***534 E. 11th St. Hous. Dev. Fund Corp. v Hendrick***, 90 AD3d 541, 935 NYS2d 23 [1st Dept 2011]). Here, the complaint does not allege the name of any client whose contract with SCC was interfered with, the alleged time or date of the interference, or the specific amount of damage. Thus, the cause of action must be dismissed.

Turning to the second cause of action, unjust enrichment occurs where a defendant enjoys a benefit bestowed by the plaintiff without adequately compensating the plaintiff (*see* ***Sergeants Benevolent Ass'n Annuity Fund v Renck***, 19 AD3d 107,796 NYS2d 77 [1st Dept 2005]). A plaintiff must show "that (1) the other party was enriched, (2) at that party's expense, and (3) that 'it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered' " (***Citibank, N.A. v Walker***, 12 AD3d 480, 481, 787 NYS2d 48 [2d Dept 2004]; ***Baron v Pfizer, Inc.***, 42 AD3d 627, 629–630, 840 NYS2d 445 [3d Dept 2007]). Receipt of a benefit alone is insufficient to establish a cause of action for unjust enrichment (*see* ***Wiener v Lazard Freres & Co.***, 241 A.D.2d 114,672 NYS2d 8 [1st Dept 1998]). Rather, liability requires that under the circumstances and as between the parties to the transaction the enrichment be unjust (*see* ***McGrath v Hilding***, 41 N.Y.2d 625, 394 NYS2d 603 [1977]). Here, plaintiff has not pled what, if any accounts receivable, were taken by REM or by "DOES 1-10" and thus has not stated a cause of action.

The motion by defendants, in the alternative, for summary judgment is denied as moot given the courts determination herein.

As to the plaintiffs' motion for leave to amend the complaint, applications for leave to amend pleadings under CPLR 3025 (b) should be freely granted unless the proposed amendment (1) would unfairly prejudice or surprise the opposing party, or (2) is palpably insufficient or patently devoid of merit (*see* ***Maldonado v Newport Gardens, Inc.***, 91 AD3d 731, 937 NYS2d 260 [2d Dept 2012]; ***Lucido v Mancuso***, 49 AD3d 220, 851 NYS2d 238 [2d Dept 2008]). A determination whether to grant such leave is within the Supreme Court's broad discretion, and the exercise of that discretion will not be lightly disturbed (*see* ***Gitlin v Chirinkin***, 60 AD3d 901, 875 NYS2d 585 [2d Dept 2009]; ***Ingrami v Rovner***, 45 AD3d 806, 847 NYS2d 132 [2d Dept 2007]). Here, the proposed amendment can be characterized as palpably insufficient or patently devoid of merit on its face. The cause of action against REM for aiding and abetting a breach of fiduciary duty asserted in the proposed amended verified complaint is deficient. To establish a claim for aiding and abetting a breach of fiduciary duty, a plaintiff must establish a breach of a fiduciary obligation owed to another, that the defendant knowingly induced or participated in the breach, and that the plaintiff suffered damages as a result of the breach (*see* ***Baron v Galasso***, 83 AD3d 626, 921 NYS2d 100 [2d Dept 2011]; ***Kaufman v Cohen***, 307 AD2d 113, 760 NYS2d 157 [1st Dept 2003]; ***Global Mins. & Metals Corp. v Holme***, 35 AD3d 93, 824 NYS2d 210 [1st Dept 2006], *lv denied* 8 NY3d 804, 831 NYS2d 106 [2007]). "One who aids and abets a breach of a fiduciary duty is liable for that breach, even if he or she had no independent fiduciary obligation to the alleged injured party, if the alleged aider and abettor rendered substantial assistance to the fiduciary in the course of effecting the alleged breach of duty" (***Sanford/Kissena Owners Corp. v Daral Props., LLC***, 84 AD3d 1210, 1212, 923 NYS2d 692 [2d Dept 2011]; *see* ***Monaghan v Ford Motor Co.***, 71 AD3d 848, 897 NYS2d 482 [2d Dept 2010]; ***Velazquez v Decaudin***, 49 AD3d 712, 854 NYS2d 163 [2d Dept 2008]; *see also* ***Baron v Galasso***, 83 AD3d 626, 921 NYS2d 100 [2d Dept 2011]). The elements of substantial assistance can be established with proof showing the defendant affirmatively

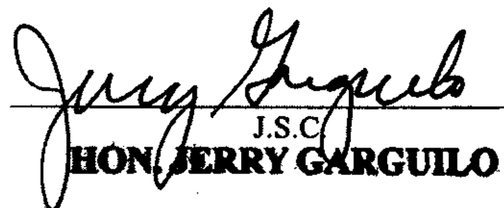
assisted, helped conceal, or, by virtue of failing to act when required to do so, allowed the breach to happen (*see* ***Kaufman v Cohen***, 307 AD2d 113, 760 NYS2d 157 [1st Dept 2003]). Mere inaction on the part of the defendant, however, will constitute substantial assistance only if the defendant owes a fiduciary duty directly to the plaintiff (***Sanford/Kissena Owners Corp. v Daral Props., LLC***, 84 AD3d 1210, 1212, 923 NYS2d 692 [2d Dept 2011]; ***Kaufman v Cohen***, 307 AD2d 113, 126, 760 NYS2d 157 [1st Dept 2003]). Further, the plaintiff must show that the defendant had actual knowledge of the breach of fiduciary duty; constructive notice of the breach is insufficient to impose liability for aiding and abetting (***Global Mins. & Metals Corp. v Holme***, 35 AD3d 93, 101, 824 NYS2d 210 [1st Dept 2006]; ***Kaufman v Cohen***, 307 AD2d 113, 125, 760 NYS2d 157 [1st Dept 2003]; *see* ***Baron v Galasso***, 83 AD3d 626, 921 NYS2d 100 [2d Dept 2011]).

Here, the proposed amended complaint does not allege that Les Chiffoniers was an actual client of SSC, and REM, therefore was free to negotiate or engage them as it saw fit. Moreover, the proposed complaint does not allege that Sorkin was surreptitiously soliciting Les Chiffonaire or that Sorkin had not already advised plaintiffs of his intent to leave SSC. Accordingly, plaintiff's application to amend the complaint is denied as the allegations in the proposed complaint do not state a cause of action for aiding and abetting a breach of fiduciary duty.

As to the request for consolidation, a motion to consolidate or join for trial two or more actions rests within the sound discretion of the trial court (*see* CPLR 602; ***Matter of Long Is. Indus. Group v Board of Assessors***, 72 AD3d 1090, 1091, 900 NYS2d 128 [2d Dept 2010]; ***North Side Sav. Bank v Nyack Waterfront Assoc.***, 203 AD2d 439, 610 NYS2d 862 [2d Dept 1994]). While CPLR 602 provides that actions "involving a common question of law or fact" may be consolidated by court order, consolidation or joinder is inappropriate where the cases involve different factual issues and legal claims (***Gibbons v Groat***, 22 AD2d 996, 997, 254 NYS2d 843 [3d Dept 1964]; *see* ***Pau v Bellavia***, 145 AD2d 609, 536 NYS2d 472 [2d Dept 1988]), and would result in jury confusion and prejudice to defendants (*see* ***Simoni v Costigan***, 100 AD3d 531, 953 NYS2d 858 [1st Dept 2012]; ***Suckishvili v Visiting Nurse Serv. of N.Y.***, 74 AD3d 433, 900 NYS2d 874 [1st Dept 2010]).

As no counterclaim survives the dismissal herein, the application to consolidate or join for trial *Mitchell Sorkin, CPA v Leonard Smallberg, CPA and Bradley Smallberg, CPA,* Index No. 2110-2014 is denied as moot (*see* ***Progressive Northeastern Ins. Co. v North State Autobahn, Inc.***, 71 AD3d 657, 896 NYS2d 137 [2d Dept 2010]; ***Beerman v Morhaim***, 17 AD3d 302, 791 NYS2d 854 [2d Dept 2005]; ***Heydt Contracting Corp. v Tishman Constr. Corp.***, 163 AD2d 196, 558 NYS2d 47 [1st Dept 1990]). The application to consolidate or join this matter for trial with *Leonard Smallberg and Bradley Smallberg v Peter Kutner* Index No. 6618-2014 is, likewise, denied as moot.

Dated: June 30, 2015



J.S.C.
HON. JERRY GARGUILO

__X__ **FINAL DISPOSITION** _____ **NON-FINAL DISPOSITION**