

**Pinnacle Sports Media & Entertainment, Inc. v
Greene**

2016 NY Slip Op 30843(U)

May 4, 2016

Supreme Court, New York County

Docket Number: 650046/2015

Judge: Nancy M. Bannon

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: IAS PART 42

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 PINNACLE SPORTS MEDIA & ENTERTAINMENT,
 INC., f/k/a PINNACLE SPORTS MEDIA &
 ENTERTAINMENT, LLC, plaintiff

Index No. 650046/2015

v

DECISION & ORDER

LESLIE KAI GREENE, a/k/a KAI L. GREENE,
 defendant, and ADAM PAZ, defendant third-
 party plaintiff; PETER ANSKE and VICTOR
 MURO, third-party defendants.

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BANNON, J.:

I. INTRODUCTION

The plaintiff, Pinnacle Sports Media & Entertainment, Inc. (Pinnacle), commenced this action against Leslie Kai Greene, a professional bodybuilder, alleging breach and anticipatory repudiation of a management services agreement, and against Adam Paz, a friend of Greene's who had previously provided certain management services to him, and had been hired as the plaintiff's employee shortly after Greene had entered into the management services agreement. The causes of action against Paz allege, inter alia, breach of contract and tortious interference with Greene's contract. Paz commenced a third-party action against Victor Muro, an insurance broker and acquaintance of the plaintiff's principal, Peter Anske, asserting causes of action sounding in fraud and negligent misrepresentation. Muro moves pursuant to CPLR 3211(a)(7) and 3016(b) to dismiss the third-party complaint insofar

as asserted against him for failure to state a cause of action and, in connection with the fraud cause of action, for failure to plead it with requisite particularity. Paz opposes the motion. The court grants the motion.

II. BACKGROUND

Pinnacle holds itself out to be in the business of providing management services to professionals in the sports, media, and entertainment industries, including financial planning, bill payment, insurance, and tax planning services, and advice in connection with wills, estates, and trusts. Anske, the plaintiff's principal, became acquainted with Greene and Paz at a gymnasium at which all three worked out. On January 10, 2014, Pinnacle and Greene executed an agreement, with a term of two years, pursuant to which Pinnacle agreed to provide certain financial and management services to Greene in return for a stated percentage of income that Greene realized during the term of the agreement. The agreement expressly recited that Pinnacle "may refer" Greene to several enumerated insurance providers "or any company" chosen by Pinnacle, "for the purpose of providing insurance, financial products and advice, however such companies are not part of Pinnacle . . . Any conflict that may exist between such companies and the employees Peter Anske and Victor Muro of [Pinnacle] are hereby waived by [Greene]." In a letter dated August 7, 2014, Pinnacle offered Paz a position as vice-president of operations, setting forth his

compensation and offering him an equity share in the business. Although Paz was designated as an at-will employee, the offer provided that during his employment, and for two years thereafter, he would not "divert" any clients or business from Pinnacle. Paz accepted the offer, and began to work for Pinnacle shortly thereafter.

In a letter to Anske dated December 8, 2014, Greene's attorney declared that the agreement between Pinnacle and Greene was terminated, and demanded that Pinnacle cease and desist from performing any services on Greene's behalf. At about the same time, Paz left his employment with Pinnacle.

Pinnacle commenced this action against Greene and Paz in January, 2015, alleging that Greene breached and anticipatorily repudiated the management services agreement, and that Paz breached his employment contract, tortiously interfered with Greene's contract and Pinnacle's business relations by convincing Greene to repudiate the management services agreement, and breached his duty of loyalty to Pinnacle by securing Greene as his own client after leaving its employ.

Paz commenced a third-party action against Muro, alleging that Muro is liable to him for fraud and, in effect, for aiding and abetting Anske's fraud, as well as for negligent misrepresentation. Paz asserts that, to the extent that he might be liable to Pinnacle, Muro is ultimately responsible for any such liability.

Paz alleges in the third-party complaint that Pinnacle fraudulently misrepresented that it was actually in the business of providing financial and management services to sports, media, and entertainment professionals. He asserts that, to the contrary, Pinnacle did not exist before Anske met him and Greene, that it was organized solely to permit Anske to profit both from Greene's renown in the world of bodybuilding and Paz's prior efforts on Greene's behalf, that it conducted no actual business either before or after Greene signed the management services agreement, that it had no clients other than Greene, and that it had no actual office at which it conducted business, but instead borrowed Muro's insurance brokerage and services office. The third-party complaint further asserts that, after Paz had accepted Pinnacle's offer of employment, he was not timely or fully paid, but was advised by both Anske and Muro that he should obtain an insurance brokerage license so that he could receive additional compensation for his work on behalf of Pinnacle in the form of insurance brokerage fees earned in the course of selling "Muro's insurance policies" to Pinnacle's alleged clientele. Paz alleges that this advice constituted "evidence that Mr. Anske and Mr. Muro conspired to commit fraud by duping Mr. Paz to bring his clients to them to sell them improper and unsuitable insurance products," and that he has now come to "learn, among other things, that the true nature and intent of Mr. Anske's scheme was to lure in these athletes through

Mr. Paz and under the auspices of Pinnacle, in hopes of selling them, among other things, insurance products through his close alliance with Mr. Muro." The pleading alleges that Muro

"engaged in the fraud by allowing Mr. Anske to conduct Pinnacle's fraudulent business from his office through, upon information and belief, National Life. Mr. Muro, upon information and belief, is closely affiliated with Mr. Anske in a larger scheme to sell insurance policies to unassuming high-profile sports, media, and entertainment personalities and therefore had knowledge of the fraudulent misrepresentations made by Mr. Anske on behalf of Pinnacle. Accordingly, Mr. Muro engaged in Pinnacle's fraud, by allowing Pinnacle to use its office in effort [sic] to allure [sic] individuals to Pinnacle, only to dupe those individuals to purchase expensive insurance policies."

Muro now moves pursuant to CPLR 3211(a)(7) to dismiss the fraud and negligent misrepresentation causes of action insofar as asserted against him in the third-party complaint for failure to state a cause of action, and additionally bases that branch of his motion which was to dismiss the fraud cause of action on CPLR 3016(b), contending that that cause of action was not pleaded with requisite particularity.

III. DISCUSSION

A third-party action must arise from or be conditioned upon the liability of the defendant third-party plaintiff in the main action. See Qosina Corp. v C & N Packaging, Inc., 96 AD3d 1032, 1034-1035 (2nd Dept 2012). Thus, although a third-party complaint is to be liberally construed (see id.), and may seek damages in excess of the liability that may be imposed in the main action (see George Cohen Agency v Donald S. Perlman Agency, 51 NY2d 358, 365

[1980]), the "third-party claim must be sufficiently related to the main action to at least raise the question of whether the third-party defendant may be liable to defendant-third-party plaintiff, for whatever reason, for the damages for which the latter may be liable to plaintiff." Zurich Ins. Co. v White, 129 AD2d 388, 390 (3rd Dept 1987) (internal quotation marks omitted). A motion to dismiss a complaint pursuant to CPLR 3211(a)(7) "must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 152 (2002) (internal quotation marks omitted). "The court must accept the facts alleged in the pleading as true and accord the opponent of the motion . . . 'the benefit of every possible favorable inference [to] determine only whether the facts as alleged fit within any cognizable legal theory'" Siegmund Strauss, Inc. v. East 149th Realty Corp., 104 AD3d 401, 403 (1st Dept 2013), quoting Leon v Martinez, 84 NY2d 83, 87-88 (1994). Notwithstanding this liberal standard, the third-party complaint fails to state a cause of action against Muro.

(A) THE FRAUD CAUSE OF ACTION

"The elements of fraud are a misrepresentation or a material omission of fact which was known to be false by the defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or

omission, and injury.” VisionChina Media, Inc. v Shareholder Representative Servs., LLC, 109 AD3d 49, 57 (1st Dept 2013); see Mandarin Trading, Ltd. v Wildenstein, 16 NY3d 173, 178 (2011). The only representation that was allegedly made by Muro to Paz was a suggestion that Paz could earn more money if he secured an insurance brokerage license. Paz does not allege that this representation is necessarily untrue, only that it solidified his belief that Anske and Muro were working together solely to bolster Muro’s insurance business, and not in the interests of Pinnacle’s purported business of providing broad-based financial planning services to athletes, entertainers, and media personalities. Hence, the third-party complaint does not sufficiently allege that Muro made a misrepresentation that he knew to be false. See Art Capital Group, LLC v Neuhaus, 70 AD3d 605, 607 (1st Dept 2010). Moreover, this one representation did not induce Paz to accept employment with Pinnacle, since it was made after he had begun working as its employee. Accordingly, the third-party complaint does not sufficiently allege that Paz justifiably relied on any representation made by Muro, or that Muro made that representation for the purpose of inducing Paz to accept employment he otherwise would have avoided. See VisionChina Media Inc. v Shareholder Representative Servs., LLC, supra, at 57. Moreover, Paz has not adequately alleged a cause of action against Muro based on aiding and abetting a fraud since “the transactions which [he] in

hindsight describes as 'sham' were, so far as can be gathered from the complaint, completely unobjectionable at the time they were agreed to" (National Westminster Bank v Weksel, 124 AD2d 144, 147 [1st Dept 1987]). Specifically, Muro never concealed the fact that the provision of insurance services was one of the services Pinnacle purported to provide to its clientele, including Greene. The remaining factual allegations against Muro, including Anske's use of Muro's office for Pinnacle's business and Anske's use of a corporate name partially derived from the name of one of Muro's insurance businesses, do not articulate any element of a fraud cause of action against Muro, or give rise to an inference of the existence of a fraudulent scheme in which Muro participated (see D. Penguin Bros., Ltd. v National Black United Fund, Inc., 137 AD3d 460 [1st Dept 2016]), but only highlight the fact that Anske and Muro knew and worked with each other, a fact that was never concealed from Paz. Additionally, the allegations of fraud and aiding and abetting a fraud were not pleaded with sufficient particularity, as required by CPLR 3016(b). See Camacho v IO Practiceware, Inc., 136 AD3d 415, 416 (1st Dept 2016).

(B) THE NEGLIGENT MISREPRESENTATION CAUSE OF ACTION

"A claim for negligent misrepresentation requires the plaintiff to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the

information was incorrect; and (3) reasonable reliance on the information." J.A.O. Acquisition Corp. v Stavitsky, 8 NY3d 144, 148 (2007); see Mandarin Trading, Ltd. v Wildenstein, supra, at 180; Parrott v Coopers & Lybrand, 95 NY2d 479, 483-484 (2000). The third-party complaint does not allege that Muro and Paz were in a special or privity-like relationship, or set forth facts from which it might be inferred that such a relationship existed. The pleading does not provide a factual basis from which it might be inferred that a duty was imposed upon Muro to impart correct information to Paz, or that a duty was imposed upon Muro to refrain from concealing any particular information. Nor does the third-party complaint allege that any information that was imparted by Muro to Paz was factually incorrect. As with the cause of action alleging fraud, there is no factual allegation in the third-party complaint from which it can be inferred that Paz reasonably relied on any representations made by Muro.

IV. CONCLUSION

ORDERED that the motion of the third-party defendant Victor Muro pursuant to CPLR 3211(a)(7) and 3016(b) to dismiss the third-party complaint insofar as asserted against him is granted.

This constitutes the Decision and Order of the Court.

Dated: 5/4/16

ENTER:


 J.S.C.
HON. NANCY M. BANNON