

**Capital Asset Recovery Fund, LP v Glacial Star
Group, Inc.**

2016 NY Slip Op 30938(U)

May 19, 2016

Supreme Court, New York County

Docket Number: 451887/2014

Judge: Eileen Bransten

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

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CAPITAL ASSET RECOVERY FUND, LP
and CAPITAL ASSET RECOVERY FUND II, L.P.,

Plaintiffs,

-against-

Index No. 451887/2014
Motion Seq. No. 002
Motion Date: 9/23/2015

GLACIAL STAR GROUP, INC., ICEWARE CORP.,
DARIA TELLER A/K/A DARIA CAMPISI-TELLER
and MARC CAMPISI,

Defendant.

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Eileen Bransten, J.:

This matter stems from contracts to collect on charged-off debt from credit card accounts and payday loans. Plaintiffs Capital Asset Recovery Fund, LP (“Car Fund I”) and Capital Asset Recovery Fund II, L.P. (“Car Fund II”) assert claims for rescission, fraud, breach of fiduciary duty, conversion, unjust enrichment and money had and received against Defendants Glacial Star Group, Inc. (“Glacial”), Iceware Corp. (“Iceware”), Daria Teller and Marc Campisi. Defendants now seek dismissal of Plaintiffs’ First Amended Verified Complaint in its entirety pursuant to CPLR 3211(a)(5) and (7). For the reasons stated below, the motion is granted in part and denied in part.

I. Background¹

A. *Car Fund I*

Plaintiff Car Fund I is a limited partnership, which was formed in 2006 to purchase portfolios of charged-off credit card accounts and collect on them. According to Plaintiffs, financial institutions that have extended credit to individuals commonly sell portfolios of uncollected and aged credit card accounts to debt-buyers and collection agencies for pennies on the dollar. The purchasers of such debt attempt to profit on the portfolios by settling with the debtors for less than the face value of the debt but at a higher rate than the purchaser paid for the portfolio.

While Car Fund I initially engaged the services of non-party Commonwealth Financial Services (“Commonwealth”) to purchase and collect charged-off debt on its behalf, Car Fund I later entered into an August 2007 agreement with Defendant Glacial to perform these services (“Car Fund I Servicing Agreement”). Pursuant to this agreement, Glacial purchased portfolios with funds provided by Car Fund I. Glacial agreed to pay Car Fund I the net collections, after deducting certain fees and compensation. In August 2007, Car Fund I provided \$673,628.52 to Glacial for the purchase of four different charged-off credit card portfolios. In November 2007, Car Fund I contributed

¹ The facts described in this section are drawn from the First Verified Amended Complaint.

\$339,351.72 towards Glacial's purchase of two payday loan portfolios,² which Glacial also administered pursuant to the Car Fund I Servicing Agreement.

At some point in 2008, the parties' relationship began to decline. On November 24, 2008, Car Fund I terminated the Car Fund I Servicing Agreement and requested that the relevant portfolios be transferred to Commonwealth. Beginning on December 2, 2008, Car Fund I and Glacial entered into a series of Brokerage Agreements ("Car Fund I Brokerage Agreements"), pursuant to which Glacial transferred each of the portfolios to Commonwealth.

B. *The Klein Settlement*

One of the credit card debts acquired by Glacial belonged to non-party Anthony Klein. The Klein debt was in the amount of \$23,459.87. Pursuant to the Car Fund I Servicing Agreement, Glacial commenced suit in its own name against Klein and obtained a judgment ("Klein Judgment") in July 2009.

Shortly thereafter, the Klein Judgment was assigned to Commonwealth. Nevertheless, on October 1, 2010, Glacial allegedly executed an agreement with Klein to accept a reduced payment ("Klein Settlement") in the amount of \$18,091.29 in full

² According to Plaintiffs, payday loans are short-term loans whereby a borrower writes a personal check to the lender for the amount borrowed, plus a fee. The lender gives the borrower the amount of the check, minus the fee, and holds the check until the loan is due on the borrower's next payday.

satisfaction of the Klein Judgment. On April 11, 2014, Commonwealth assigned the Klein Judgment to Car Fund I. However, Defendants purportedly have not remitted payment of the Klein Settlement to Car Fund I.

Plaintiffs allege that they learned about Glacial's collection of the Klein Settlement in February 2013, when Car Fund I attached one of Klein's bank accounts. Car Fund I ultimately released the Klein bank account without receiving any of the judgment's value.

C. Car Fund II

Like Car Fund I, Plaintiff Car Fund II is a limited partnership, which was formed to provide capital to Glacial for the purchase of delinquent pay day loan accounts.

In February 2008, Car Fund II entered into a servicing agreement with Glacial ("Car Fund II Servicing Agreement"). Glacial purchased the payday loan portfolios using funds received from Car Fund II. In return, Glacial paid Car Fund II the net collections from the payday loan accounts after fees and compensation. Between February and June 2008, Car Fund II paid \$1,574,313.67 to Glacial for purchase and service of eleven payday loan portfolios.

For each of the eleven portfolios, Glacial created an ICEScore, which was Glacial's proprietary scoring system. The ICEScore allegedly assessed expected returns and maximum payment price. In late March 2009, Glacial terminated the Car Fund II

Servicing Agreement, and the parties entered into a series of Broker Agreements pursuant to which Glacial facilitated the transfer of all of the Car Fund II portfolios it serviced to Commonwealth.

II. Discussion

In June 2014, Plaintiffs commenced the instant action and shortly thereafter filed the First Verified Amended Complaint (the “Complaint”). The Complaint asserts the following eight claims: (1) rescission of the Car Fund II Services Agreement; (2) fraud against all Defendants; (3) breach of fiduciary duty against Glacial, Teller, and Campisi; (4) conversion against all Defendants; (5) money had and received against all Defendants; (6) unjust enrichment against all Defendants; (7) accounting against all Defendants; and, (8) a request for attorney’s fees.

Defendants now seek dismissal of the Complaint in its entirety, pursuant to CPLR 3211(a)(5) and (7). On a motion to dismiss a complaint for failure to state a cause of action under CPLR 3211(a)(7), all factual allegations must be accepted as truthful, the complaint must be construed in a light most favorable to Plaintiffs and Plaintiffs must be given the benefit of all reasonable inferences. *Allianz Underwriters Ins. Co. v. Landmark Ins. Co.*, 13 A.D.3d 172, 174 (1st Dep’t 2004). “We ... determine only whether the facts as alleged fit within any cognizable legal theory.” *Leon v. Martinez*, 84 N.Y.2d 83, 87-88

(1994). This Court must deny a motion to dismiss, “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 N.Y.2d 144, 152 (2002) (internal quotation marks and citations omitted).

CPLR 3211(a)(5) provides for dismissal where the cause of action may not be maintained because of, *inter alia*, the statute of limitations. CPLR 3211(a)(5).

A. *Rescission and Fraud* (Counts One and Two)

The first claim in the Complaint seeks rescission of the Car Fund II Servicing Agreement on the grounds that Glacial, Campisi and Teller allegedly made certain misrepresentations to induce Car Fund II to enter into the Car Fund II Servicing Agreement, including that:

- Glacial was an experienced collector of payday loans and had the resources to handle the large amount of volume;
- Glacial conducted all collections in its New York Office;
- Glacial performed due diligence on all portfolios prior to purchase, including preparing ICEscores and conducting in-depth due diligence on portfolios with acceptable ICEscores;
- Glacial would not purchase portfolios that did not have ICEscores above a certain level and that such a level of collectability was necessary to maintain Glacial’s liquidity ratios;
- ICEscores were a viable tool to calculate and deliver fairly accurate projects; and
- ICEscores used a real methodology based on consistent real data.

Alternatively, the second cause of action asserts a claim for fraud on behalf of Car Fund II against all Defendants and seeks damages of \$934,843 plus interest, costs and attorney's fees.

1. Rescission

Defendants first assert that the rescission claim should be dismissed because the Plaintiffs have an adequate remedy at law, *i.e.* money damages, which is asserted in the second cause of action. However, CPLR 3002(e) specifically provides that a cause of action for damages sustained as a result of fraud or misrepresentation in the inducement of a contract is not inconsistent with a claim for rescission. *See* Patrick M. Connors, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3002:24 ("CPLR 3002(e) permits the court to make the plaintiff completely whole, not by allowing 'inconsistent' items of relief, but by realistically recognizing that they are not inconsistent at all. Plaintiff wants to be rid of the transaction, restored to status quo, and also recompensed for everything else lost along the way. ... The statute sees nothing inconsistent about that.") Therefore, Defendants' argument is unpersuasive and does not mandate dismissal of count one.

2. Fraud

a. **Statute of Limitations**

Defendants next argue that the fraud claim should be dismissed as untimely. “A cause of action in fraud must be commenced within six years of the date of the fraudulent act, or within two years of the date the fraud was, or with reasonable diligence could have been, discovered.” *Rite Aid Corp. v. Grass*, 48 A.D.3d 363, 364 (1st Dep’t 2008) (citing CPLR 213(8)). “An inquiry as to the time a reasonably diligent plaintiff could have discovered the fraud turns upon whether a person of ordinary intelligence possessed knowledge of facts from which the fraud could be reasonably inferred.” *Id.* (internal quotation marks and citation omitted). “Whether a plaintiff should have discovered a fraud is a mixed question of law and fact which should not be resolved summarily unless it conclusively appears that the plaintiff had knowledge of facts which should have caused him or her to inquire and discover the alleged fraud.” *Abele Tractor & Equip. Co., Inc. v. Balfour*, 133 A.D.3d 1171, 1173 (3d Dep’t 2015) (internal quotation marks and citation omitted); *see also Ghandour v. Shearson Lehman Bros.*, 213 A.D.2d 304, 305-306 (1st Dep’t 1995).

This action was commenced in April 2015. According to Defendants, the Car Fund II Servicing Agreement was signed on February 12, 2008, more than six years earlier. Defendants further assert that Car Fund II last wired funds to Glacial for the

purchase of a payday loan portfolio on June 4, 2008 – also more than six years before this action was commenced.

Car Fund II concedes that some of Defendants' actions occurred more than six years before this action was commenced. However, it contends that this action is timely because it falls within the two-year discovery exception of CPLR 213(8). Specifically, Plaintiff argues that the earliest date it could have discovered Defendants' alleged fraudulent actions was February 8, 2013 – the date Plaintiff learned of the Klein Settlement. Car Fund II alleges that such knowledge compelled it, with the assistance of outside experts, to revisit the documents and information that formed the basis of its relationship with Glacial and its affiliates. Car Fund II contends that it only became aware of the alleged fraud after an outside expert informed it that Defendants' rating system was flawed. Prior to learning of the Klein Settlement, Plaintiff asserts that it had not received any information sufficient to make a person of ordinary intelligence aware of fraud.

Defendants argue that Plaintiff is not entitled to the benefit of the two-year discovery exception for several reasons. First, Defendants maintain that Car Fund II is sophisticated and knowledgeable in the area of debt collection. Further, Defendants argue that Plaintiff had all of the information from which to discover the alleged fraud from the beginning of the parties' relationship and that Plaintiff's own failure to diligently

examine such information delayed discovery of the alleged fraud. Defendants also argue that reliance on the Klein Settlement is unavailing since that settlement arose from the Car Fund I Servicing Agreement, whereas the fraud cause of action arises in connection with the Car Fund II Servicing Agreement.

The motion to dismiss is denied with respect to the timeliness of the cause of action for fraud. Defendants have not demonstrated conclusively that Car Fund II had knowledge of facts which should have caused it to inquire and discover the fraud alleged in the complaint or when Car Fund II could have acquired such facts.

First, the fact that the Klein Settlement arose from a transaction connected to the Car Fund I Servicing Agreement does not necessarily mean that it could not have put Plaintiff on notice of improprieties related to the Car Fund II Servicing Agreement.

Further, as described above, the parties sharply dispute whether, and when, Plaintiff had sufficient information at its disposal to put it on notice of any fraudulent conduct. However, such a factual dispute is not properly decided on this motion to dismiss. Assuming the truth of the allegations in the Complaint for the purpose of this motion, the Court concludes that Defendants have not demonstrated that the cause of action for fraud is untimely, and this argument for dismissal fails.

b. Reliance

In the alternative, Defendants argue that the fraud claim must be dismissed because Car Fund II has failed to plead the element of reliance. Again, this argument lacks merit at this juncture.

First, “the question of what constitutes reasonable reliance is not generally a question to be resolved as a matter of law on a motion to dismiss.” *ACA Fin. Guar. Corp. v. Goldman, Sachs & Co.*, 25 N.Y.3d 1043, 1045 (2015). For the purposes of this motion, the Complaint adequately alleges that Car Fund II relied on the alleged misrepresentations made by Defendants to induce Car Fund II to execute the Car Fund II Servicing Agreement.

Defendants contend that Car Fund II is precluded from relying on any representations made before the execution of the Car Fund II Servicing Agreement because that agreement contained a merger clause. Defendants assert that, in such an event, Car Fund II, as a sophisticated entity, should have insisted on the inclusion of a prophylactic provision to ensure against the possibility of misrepresentations.

Defendants’ argument has been rejected by the Court of Appeals. The Court Appeals has stated that, in general, plaintiffs are not under a duty to insist on a “prophylactic provision” in agreements. *ACA Fin. Guar. Corp.*, 25 N.Y.3d at 1045. Such provisions may be required where a plaintiff is aware that defendants have not supplied it

with information to which it is entitled, thus “triggering a heightened degree of diligence.” *Id.* (internal quotations marks and citations omitted.) However, Defendants have not demonstrated that this exception applies to the instant case.

Defendants also argue that the fraud cause of action should be dismissed because the allegations in the complaint only amount to a claim for breach of contract. In addition, Defendants maintain that the statements set forth in the complaint amount only to non-actionable statements of expectation. Both arguments lack merit. As set forth above, the Complaint sufficiently alleges factual misrepresentations by Defendants that induced Plaintiff to enter into the Car Fund II Servicing Agreement.

Accordingly, the motion to dismiss the second cause of action as to Defendants is denied.

B. *Breach of Fiduciary Duty* (Count Three)

Plaintiffs’ third cause of action is for breach of fiduciary duty. In support of this claim, Plaintiffs allege that Glacial, Teller, and Campisi entered into the Car Fund I and the Car Fund II Servicing Agreements while aware that they had a separate and competing financial incentive to accrue a large volume of accounts to help sell Iceware software and/or franchise Iceware. Plaintiffs further allege that Glacial, Teller, and Campisi neglected to inform Car Fund I and Car Fund II of this direct conflict of interest

and took affirmative steps to hide it from them. In addition, Plaintiffs contend that Glacial, Teller, and Campisi breached their fiduciary duties by failing to disclose to Car Fund II that they were using the Car Fund II portfolios in an attempt to sell and/or franchise Iceware.

Defendants seek to dismiss this claim, contending that no fiduciary relationship existed between the parties. “A fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation.” *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19 (2005) (internal quotation marks and citation omitted). A conventional business relationship or transaction between parties dealing at arm's length, particularly sophisticated business entities, does not generally give rise to fiduciary duties. See *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 87 A.D.3d 287, 296 (1st Dep't 2011); *Sebastian Holdings, Inc. v. Deutsche Bank AG*, 78 A.D.3d 446, 447 (1st Dep't 2010). “Generally, where parties have entered into a contract, courts look to that agreement to discover...the nexus of the parties' relationship and the particular contractual expression establishing the parties' interdependency.” *EBC I, Inc.*, 5 N.Y.3d at 19-20. “If the parties do not create their own relationship of higher trust, courts should not ordinarily transport them to the higher realm of relationship and fashion the stricter duty for them.” *Id.* at 20.

Here, the complaint fails to adequately allege the existence of a fiduciary relationship between the Plaintiffs and any of the Defendants. Plaintiffs contend that Defendants owed them a fiduciary duty because, under both servicing agreements, Plaintiffs relied on Defendants' advice and entrusted them with monies to purchase financially viable portfolios, collect on said portfolios, and remit payment to the funds. However, a subjective claim of reliance on another party's expertise does not give rise to a fiduciary relationship. *See SNS Bank v Citibank*, 7 A.D.3d 352, 355-56 (1st Dep't 2004). Moreover, the parties' contracts, *i.e.*, the servicing agreements, support Defendants' contention that no fiduciary relationship was contemplated by the parties. The servicing agreements specifically state that Glacial was an independent contractor and that it was not an agent or employee of Car Fund I or Car Fund II.

Plaintiffs next contend that a fiduciary relationship existed with respect to Glacial because Glacial was required, under both Servicing Agreements, to deposit collected funds into a "Customer Escrow" account. Plaintiffs argue that Glacial therefore became an escrow agent, giving rise to fiduciary duties on its part.

However, contrary to Plaintiffs' assertion, an escrow agent generally acts as a fiduciary for the parties on whose behalf it holds money. *See Greenapple v. Capital One, N.A.*, 92 A.D.3d 548, 549 (1st Dep't 2012). Here, although the parties titled the account

an “escrow” account, the Servicing Agreements specifically state that Glacial was not an agent of Car Fund I or Car Fund II.

At most, the complaint alleges that Glacial breached the Car Fund I Servicing Agreement by failing to turn over the money from the Klein Settlement. This pleading does not allege a breach of fiduciary duty with respect to such money.

In sum, the Court concludes that Plaintiffs have alleged that the parties engaged in an arm’s-length business transaction between sophisticated business entities. Plaintiffs have failed to allege the existence of a fiduciary relationship or the breach of such relationship. Therefore, the third cause of action is dismissed.

C. *Accounting* (Count Seven)

Plaintiffs’ seventh cause of action asserts that they are entitled to an accounting, due to the parties’ fiduciary relationship. However, in light of the foregoing determination that the Complaint fails to adequately allege such a relationship, the cause of action for an accounting is dismissed.

D. *Conversion* (Count Four)

Car Fund I’s conversion claim alleges that Glacial unilaterally agreed to accept a reduced payment from non-party Klein in full satisfaction of the Klein Judgment. Glacial

then placed the funds from Klein in a Customer Escrow Account, from which the money was later removed by Defendants. Plaintiffs do not allege when the monies were removed; however, they maintain that the funds were never remitted to Car Fund I.

Defendants assert that the claim merits dismissal on timeliness grounds. “An action for conversion is subject to a three-year limitation period.” *Maya NY, LLC v. Hagler*, 106 A.D.3d 583, 585 (1st Dep’t 2013) (citing CPLR 214(3)). “The cause of action normally accrues on the date the conversion takes place and not the date of discovery or the exercise of diligence to discover.” *Id.*

The Complaint alleges that Defendants retained the Klein Judgment funds on October 1, 2010. *See* Compl. ¶¶ 285 (“On or about October 1, 2010, over a full year following the assignment of the Klein Judgment, GSG, without the right or authority to do so, agreed with Klein to accept a reduced payment in the amount of \$18,091.29 in full satisfaction of the Klein Judgment. ... Upon information and belief, either [Glacial], ICEware, Daria Teller, or Marc Campisi has retained the funds sent from Klein.”). This action was commenced in November 2014, more than three years later. Therefore, this cause of action is untimely.

Plaintiffs also argue that, because the parties were in a fiduciary relationship, the limitation period should not have commenced until they discovered the alleged conversion. However, the Court has already determined that the Complaint fails to allege

the existence of such a relationship. Therefore, this argument is unavailing, and the fourth cause of action is dismissed.

E. *Money Had And Received/Unjust Enrichment (Counts Five and Six)*

Plaintiffs next assert claims for money had and received and unjust enrichment on behalf of Car Fund I with respect to the Klein Settlement. Defendants argue that these claims should be dismissed because the subject matter is governed by a contract, *i.e.*, the Car Fund I Servicing Agreement.

“The 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, 388 (1987). As alleged in the Complaint, the Car Fund I Servicing Agreement required Glacial to “[d]eposit all funds collected on the purchased portfolios in a customer escrow account ... for Car Fund I.” (Compl. ¶ 23(f).) Plaintiffs’ unjust enrichment and money had and received claims each stem from alleged breaches of the Car Fund I Servicing Agreement, namely Defendants’ purported failure to remit the Klein Judgment funds to Plaintiff Car Fund I.³ See Compl. ¶ 298 (“By failing to remit to Car Fund I the proceeds

³ Defendants made this argument in their moving papers, and Plaintiffs offered no response to this point in their brief, aside from stating that they may have an alternative unpleaded breach of contract claim. See Pls.’ Opp. Br. at 23-24. Plaintiffs’ contention about an unpleaded contractual claim does not salvage their pleaded quasi contract claims.

of the Klein Judgment, Defendants took and retained for their own use monies rightfully belonging to Car Fund I.”), *id.* ¶ 302 (“Defendants have been unjustly enriched by their improper and unauthorized retention of the Klein Judgment.”). Accordingly, the quasi contract claims for unjust enrichment and money had and received are dismissed.

F. *Attorney’s Fees* (Count Eight)

Finally, Plaintiffs seek attorney’s fees from Glacial. In support, Plaintiffs allege that both the Car Fund I Servicing Agreement and the Car Fund II Servicing Agreement provide for Glacial’s payment of all costs and expenses, including reasonable attorney’s fees, resulting from acts or omissions in connection with the collection or ownership of accounts under the respective agreements. Glacial does not dispute that the agreements contained the fee language cited by Plaintiffs. Instead, Glacial maintains that the fee provisions cited do not apply to the claims in this case, of which only fraud and rescission remain. Since Plaintiffs offer no response whatsoever to Defendants’ dismissal argument, the Court grants dismissal of this claim. *See Gregor v. Rossi*, 120 A.D.3d 447, 449 (1st Dep’t 2014) (affirming dismissal of claim where “[p]laintiffs failed to respond to the arguments before the motion court in support of dismissing the claim”).

III. Conclusion

Accordingly, it is

ORDERED that the motion to dismiss the First Verified Amended Complaint by Defendants Glacial Star Group, Inc., Iceware Corp., Daria Teller and Marc Campisi is granted to the extent that the third, fourth, fifth, sixth, seventh, and eighth causes of action are dismissed; and it is further

ORDERED that Defendants are directed to serve an answer to the Complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 442, 60 Centre Street, on August 2, 2016, at 10 a.m.

Dated: New York, New York
May 19, 2016

ENTER



Hon. Eileen Bransten, J.S.C.