Drazin v The Lesser Group
2016 NY Slip Op 30958(U)
March 31, 2016
Supreme Court, Kings County
Docket Number: 7386/12
Judge: Carolyn E. Demarest

At an IAS Term, Part Com-1 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 31st day of March, 2016.

P R E S E N T:

HON. CAROLYN E. DEMAREST,
Justice.

----------X

AARON DRAZIN,

Plaintiff,

- against -

Index No. 7386/12

THE LESSER GROUP AND ABRAHAM LESSER,

Defendants.

----------X

THE LESSER GROUP AND ABRAHAM LESSER,

Third-Party Plaintiffs,

- against -

SAM SPREI A/K/A SHIMI SPREI AND CHARLES MANDELBAUM,

Third-Party Defendants.

----------X

The following e-filed papers read herein:	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	71-86, 87-99, 100, 101
Opposing Affidavits (Affirmations)	111-133, 134, 102-108, 109-110
Reply Affidavits (Affirmations)	136, 137-147 135
Memoranda of Law	
Other Papers	

Defendants/third party plaintiffs The Leser Group, i/s/h/a as The Lesser Group, and Abraham Leser, i/s/h/a Abraham Lesser (collectively referred to as the Leser Defendants), move for an order, pursuant to CPLR 3212, granting them summary judgment dismissing the complaint. Third-party defendant Charles Mandelbaum moves for an order, pursuant to CPLR 3212, granting him summary judgment dismissing the complaint.

The Leser Defendants' motion is granted only to the extent that the fourth cause of action for breach of trust is dismissed. The Leser Defendants' motion is otherwise denied. Mandelbaum's motion is denied.

In this action, plaintiff seeks the return of $560,000 that he alleges had been released to the Leser Defendants from an escrow account administered by Mandelbaum with the understanding that these funds were to be used by the Leser Defendants as part of a down payment for the purchase of a property located at 168 Meserole Street, in Brooklyn, New York. As alleged in the complaint, when plaintiff failed to see any evidence of an equity interest in the real estate venture relating to the property purchase, plaintiff demanded return of the $560,000, which demand has been refused by the Leser Defendants. Plaintiff alleges that it was third-party defendant Sam Sprei a/k/a Shimi Sprei who brought the investment opportunity to plaintiff's attention, that he understood that Mandelbaum was acting as an attorney for Sprei, and that it was Sprei who informed plaintiff that the down payment funds would have to go to Lesser. Based on the Leser Defendants' failure to return the funds,

plaintiff commenced this action in April 2012 in which plaintiff has pled causes of action premised on conversion, money had and received, unjust enrichment and breach of trust.

The Leser Defendants have since answered, and commenced a third-party action against Sprei and Mandelbaum. With respect to Mandelbaum, the Leser Defendants assert that, if plaintiff recovers from them, they are entitled to recover from Mandelbaum because he failed to inform them, in violation of a fiduciary duty owed to the Leser Defendants based on Mandelbaum's acting as escrow agent, that the $560,000 was from funds belonging to plaintiff, that the funds were to be used for a particular purpose, and that plaintiff was entitled to demand the return of such funds under an agreement plaintiff had reached with Sprei. Based on these factual allegations, the Leser Defendants have plead causes of action for common-law indemnification, contribution, and negligent misrepresentation.

In moving for summary judgment dismissing the complaint, the Leser Defendants assert that the $560,000 held by Mandelbaum was released to the Leser Defendants without any conditions on the Leser Defendants' use of the money. The Leser Defendants further assert that this money was released to the Leser Defendants because Sprei owed the Leser Defendants well in excess of $560,000 as a result of Sprei's failure to repay loans made by Leser with respect to unrelated transactions. In view of the competing factual representations and the various inferences that may be drawn from the facts in the record before the court, the court finds that the Leser Defendants have failed to demonstrate their prima facie

entitlement to dismissal of the money had and received and unjust enrichment causes of action.

In his own deposition testimony, plaintiff stated that he met Sprei in the summer or fall of 2011 and plaintiff and Sprei thereafter had discussions regarding the possible purchase of several different properties in Brooklyn for investment purposes. Towards that end, plaintiff wired $880,000 to Mandelbaum, who plaintiff understood to be Sprei's attorney, to be held on account or in escrow and used as directed by plaintiff for deposits on real estate purchases.[1] Plaintiff first became aware of Leser when plaintiff and Sprei had discussions regarding the purchase of a property in DUMBO. Plaintiff, who believed that Sprei worked out of Leser's office, understood that Leser would be one of the other partners involved in the purchase of the property in DUMBO.

After plaintiff decided not to proceed with the DUMBO purchase, plaintiff decided to move forward with Sprei on the purchase of a Brooklyn property located at 168 Meserole Street. In order to further that deal, Sprei informed plaintiff that he needed to have Mandelbaum make out a check in the amount of $560,000 to Leser because the deposit needed to come from a single source.[2] In addition, Sprei asked that plaintiff have

---

[1] In his deposition testimony, Mandelbaum stated that he actually received the money in the form of a check made out by Drazin that was given to him by Sprei.

[2] Although plaintiff split the money between Leser and Olden Equities, Sprei told plaintiff that Olden Equities and Leser worked together. Plaintiff understood that since additional money was needed, the funds would ultimately be combined at one place and a check would be made out to the title company for the deposit from a single entity.

Mandelbaum provide an entity, known as Olden Equities, which plaintiff understood to be a company controlled by Sprei, with a check for $320,000 and that plaintiff provide an additional $250,000 to Olden Equities. Plaintiff thereafter spoke with Mandelbaum over the telephone,[3] and instructed him to disburse the $560,000 to Leser[4] and the $320,000 to Olden Equities and plaintiff himself wrote an additional check to Sprei in the amount of $250,000. Upon the dispersal of this money, Sprei provided plaintiff with a handwritten note in which he acknowledged receiving $1,130,000 from plaintiff to "be used, if directed to do so by Aron Drazin, for the purchase of 168 Meserole St. Brooklyn NY. In the event Aron Drazin doesn't desire to purchase 168 Meserole St. then the undersigned shall repay such funds within one week of the herein date 12/10/11." At the time he agreed to release the funds, plaintiff had had no direct contact or conversation with Leser, and all communications with Leser regarding the deals where done indirectly through Sprei.

Leser, at his deposition, testified to a different understanding regarding the transactions at issue. In this regard, Leser stated that, approximately a year before his October 2012 deposition, Sprei came to his office with Chaim Miller (a person who worked for Leser and/or some of his entities) and asked Leser to help him (Sprei) to purchase a

---

[3] The Leser Defendants have also attached e-mails between plaintiff and Mandelbaum in which plaintiff confirmed that he agreed to the release of the funds to Olden Equities, Leser and the Leser Group.

[4] As noted below, with respect to this $560,000, Mandelbaum made out two checks, one to Leser individually in the amount of $260,000 and the other to the Leser Group in the amount of $300,000.

property in DUMBO that he (Sprei) intended to flip and sell to plaintiff. Leser asserted that Sprei thereafter called plaintiff while Leser was on the line and plaintiff confirmed that he was buying the property for $8,000,000. Subsequently, Leser learned that plaintiff had backed out of the deal for the DUMBO property.

After plaintiff backed out of the DUMBO deal, Leser asserted that he lent Sprei an additional $700,000 for a few days. Sprei, however, did not repay Leser within that time period. A few weeks later Sprei told Leser they he could get a portion of the $700,000 from Mandelbaum, who Sprei told Leser was holding money that had come from plaintiff. While Leser did not know if Mandelbaum was Sprei's attorney, he assumed he was acting as an escrow agent with respect to plaintiff's money. Leser thereafter met Sprei at Mandelbaum's office, and while Mandelbaum was on the telephone with plaintiff, he heard plaintiff give permission for Mandelbaum to release funds to Sprei.

Leser denied knowing about any proposed transaction relating to 168 Meserole Street or knowing that plaintiff had given the money to Mandelbaum for investment purposes. Leser further asserted that neither Sprei nor Mandelbaum told him the purpose of the fund held by Mandelbaum. Leser, nevertheless, conceded that he thought that the money held by Mandelbaum may have been held with respect to the DUMBO deal that plaintiff had backed out of. While Leser testified that he thought there was a possibility that plaintiff released the money to Sprei because plaintiff owed Sprei money, Leser admitted that this belief was only based on Sprei's representation that plaintiff and Sprei were working together and were

friendly. Indeed, when Leser was asked if Sprei had said that plaintiff owes Sprei money, Leser said, "[n]ot that I recall." Finally, Leser also conceded that Mandelbaum had written plaintiff's name on the memo line of the checks he gave to Leser and the Leser Group.

Turning the applicable law, "[t]he theory of unjust enrichment lies as a quasi-contract claim" and contemplates "an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties" (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009] [internal quotation marks omitted]). In order to adequately plead such a claim, the plaintiff must allege "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" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] [brackets and internal quotation marks omitted]). Although the parties need not be in contractual privity, an unjust enrichment claim requires the existence of some relationship between the parties that is not too attenuated (*see Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 517 [2012]; *Lebovits v Bassman*, 120 AD3d 1198, 1199-1120 [2d Dept 2014]; *Philips Intl. Invs., LLC v Pecktor*, 117 AD3d 1, 4 [1st Dept 2014]).

A cause of action for money had and received is simply a species of an unjust enrichment claim (*see Miller v Schloss*, 218 NY 400, 408 [1916]; *see also Stone v White*, 301 US 532, 534 [1937]). As the Court of Appeals has explained, the law recognizes a cause of action for money had and received "in the absence of an agreement when one party possesses money that in equity and good conscience [it] ought not to retain and that belongs to another"

(*Board of Educ. Of Cold Spring Harbor Cent. School Dist. v Rettaliata*, 78 NY2d 128, 138 [1991] [internal quotation marks and citations omitted]). Such a cause of action "allows [a] plaintiff to recover money which has come into the hands of the defendant impressed with a species of trust because under the circumstances it is against good conscience for the defendant to keep the money" (*id.* [internal quotation marks and citations omitted]). As it is merely a form of an unjust enrichment claim, a money had and received claim likewise requires a showing of a relationship between the parties that is not too attenuated (*Lebovits v Bassman*, 120 AD3d at 1199-1120; *see also Georgia Malone & Co., Inc.*, 19 NY3d at 517).

Based on this factual record, the Leser Defendants have failed to demonstrate that they are entitled to dismissal of plaintiff's money had and received and unjust enrichment causes of action. The Leser Defendants are correct that they are not a party to the agreement Sprei had with plaintiff to return the funds on demand, and thus may not be held liable to plaintiff on that agreement. As noted, however, both unjust enrichment and money had and received causes of action are premised on the absence of contractual relationship, and in fact, cannot be stated where there is in fact a valid and enforceable contract between the parties governing the issue (*see Goldman v Simon Property Group, Inc.*, 58 AD3d 208, 220 [2d Dept 2008]).

The Leser Defendants nevertheless argue that their relationship with plaintiff was too attenuated to hold them liable under an unjust enrichment theory. Although the plaintiff and the Leser Defendants did not meet face to face, and any interaction between them was done almost entirely through Sprei, Leser's own testimony demonstrates that there are at least

factual issues as to whether there was a sufficient relationship between them. Namely, Leser concedes that he knew plaintiff as the person to whom Sprei had intended to flip the DUMBO property. More importantly, Leser knew that the fund held by Mandelbaum belonged to plaintiff, and that Mandelbaum only released the money to the Leser Defendants after Mandelbaum had obtained plaintiff's consent. As Leser accepted this money directly from Mandelbaum, plaintiff's escrow agent, by way of checks issued by Mandelbaum containing plaintiff's name in the memo section, there are sufficient indicia of connection between plaintiff and the Leser Defendants to distinguish this case from cases finding the connection too attenuated (*cf. Georgia Malone & Co., Inc.*, 19 NY3d at 516-518; *Mandarin Trading Ltd.*, 16 NY3d at 182; *McBride v KPMG Intern.*, ___ AD3d ___, 2016 NYSlip Op 00306 *2-4 [1st Dept 2016]; *Lebovits*, 120 AD3d at 1198-1120; *Wai Kit Yan v Feng Mao Tan*, 41 Misc 3d 1232 [A], 2013 NY Slip Op 51961 *4 [U] [Sup Ct, Kings County 2013]).

The record here also shows the existence of factual issues as to whether the Leser Defendants' retention of the money would be against equity and good conscience. The record unequivocally shows that plaintiff intended the money released by Mandelbaum to be used towards or for the purpose of a deposit or down payment with respect the property on Meserole Street. That Sprei and Mandelbaum did not inform Leser of this intended purpose or restriction on the money released to Leser does not show the absence of factual issues here, where the record also provides no compelling reason for Leser to believe that plaintiff intended to give or loan money to Sprei without restriction on Sprei's use of the money or

that plaintiff would volunteer to pay Sprei's debts owed to Leser. Leser's self-serving statements relating to his knowledge of the purpose of the funds, a matter exclusively within his knowledge, creates an issue of credibility that should be assessed by the trier of fact (*see Quiroz v 176 N. Main, LLC*, 125 AD3d 628, 631 [2d Dept 2015]; *Guimond v Village of Keeseville*, 113 AD3d 895, 898 [3d Dept 2014]; *Tenkate v Moore*, 274 AD2d 934, 936 [3d Dept 2000]). There is thus at least a factual issue as to whether it would be inequitable for the Leser Defendants to retain funds that are the apparent fruits of a fraud committed by Sprei against plaintiff (*see Lau v Lazar*, 130 AD3d 413, 414 [1st Dept 2015]; *Carriafielio-Diehl & Assoc., Inc. v D&M Elec. Contr.*, 12 AD3d 478, 479 [2d Dept 2004]; *Wolf v National Council of Young Israel*, 264 AD2d 416, 417 [2d Dept 1999]; *Rocks & Jeans v Lakeview Auto Sales & Serv.*, 184 AD2d 502, 502-503 [2d Dept 1992]; *Cohn v Rothman-Goodman Mgt. Corp.*, 155 AD2d 579, 580-581 [2d Dept 1989]; *Swiss Air Transp. Co. v Benn*, 128 Misc 2d 657, 661 [App Term, 1st Dept 1985]; *cf. First Union Natl. Bank v A.G. Edwards & Sons*, 262 AD2d 106, 107 [1st Dept 1999] ["the victim of fraud cannot pursue funds taken from him by a wrongdoer into the hands of a third person, who has received such funds "in good faith in the usual course of business and for valuable consideration"]; *Cohen v BMW Invest., L.P.*, ___ F Supp 3d ___, 2015 WL 6619958 *7-8 [SDNY 2015]).[5] Although plaintiff could obtain recourse against Sprei, and, in fact, has obtained a confession of

[5] Of course, if the Leser Defendants knew that the funds from plaintiff were intended to be used towards a deposit on a real estate venture, and they did not use the funds for that purpose, their retention of such funds would be unjust (*Kain Dev., LLC v Kraus Props., LLC*, 130 AD3d 1229, 1235 [3d Dept 2015]).

judgment against Sprei, such facts do not preclude plaintiff from obtaining relief from the Leser Defendants (*see Carriafielio-Diehl & Assoc., Inc.*, 12 AD3d at 479).

Issues of fact likewise preclude dismissal of the conversion cause of action. "To establish a cause of action to recover damages for conversion, a plaintiff must show legal ownership or an immediate superior right of possession to a specific identifiable thing and must show that the defendant exercised an unauthorized dominion over the thing in question to the exclusion of the plaintiff's rights" (*see National Ctr. for Crises Mgt., Inc. v Lerner*, 91 AD3d 920, 920 [2d Dept 2012] [internal quotation marks and citation omitted]). Where the thing is money, it must be specifically identifiable and subject to an obligation to be returned or treated in a particular manner (*see Salatino v Salatino*, 64 AD3d 923, 925 [3d Dept 2009], *lv denied* 13 NY3d 710 [2009]; *9310 Third Ave. Assoc., Inc. v Schaffer Food Serv. Co.*, 210 AD2d 207, 208 [2d Dept 1994]). If the initial possession of the property is lawful, a conversion may still be made out when there is a refusal to return the property upon demand (*see Salatino*, 64 AD3d at 925; *Matter of White v City of Mount Vernon*, 221 AD2d 345, 346 [2d Dept 1995]).

While the Leser Defendants' possession of the funds may have initially been authorized by plaintiff, plaintiff, in his own affidavit submitted in opposition to the motion, states that he made repeated telephone calls to a Chaim Miller,[6] an employee of Lesser, demanding return of the funds. In addition, in March 2012, counsel for plaintiff sent Leser

[6] In his deposition testimony , plaintiff stated that he contacted Chaim Miller about the return of the funds in December 2011.

a letter demanding return of the funds. Certainly, these demands demonstrate, at least as of that point, the existence of factual issues as to whether the Leser Defendants' retention of the funds was unauthorized for purposes of a conversion claim (*Salatino*, 64 AD3d at 925; *Matter of White*, 221 AD2d at 346). As these funds were never used towards a deposit or as part of an investment, plaintiff's claim, contrary to the Leser Defendants' assertion, is not one merely for the right to payment (*cf. Zendler Constr. Co., Inc. v First Adj. Group, Inc.*, 59 AD3d 439, 440 [2d Dept 2009]). Finally, in this regard, since the Leser Defendants have not submitted evidentiary proof addressing the nature of the accounts into which the checks were deposited, they have failed to demonstrate, prima facie, that the funds from Drazin remained specifically identifiable for purposes of a conversion claim (*cf. Auguston v Spry*, 282 AD2d 489, 491 [2d Dept 2001]; *Walden Terrace, Inc. v Broadwall Mgt. Corp.*, 213 AD2d 630, 631 [2d Dept 1995]).

On the other hand, the Leser Defendants are entitled to dismissal of the breach of trust cause of action. There was no express trust created, in that the record shows that plaintiff did not unequivocally intend to have the Leser Defendants hold the money in trust (*see Matter of Alpert*, 37 AD3d 187, 188 [1st Dept 2007]). The record also shows that Leser never agreed to act as trustee of any such trust (*see Ross v Ross*, 233 App Div 626, 637 [1st Dept 1931], *affd* 262 NY 381 [1933]). To the extent that the cause of action may be read as an attempt to plead a constructive trust cause of action, nothing in the records suggests that the relationship between plaintiff and the Leser Defendants involved the high degree of trust and

confidence necessary to make out a fiduciary or confidential relationship, a prerequisite for a constructive trust cause of action (*see Kain Dev., LLC v Kraus Props., LLC*, 130 AD3d 1229, 1234-1235 [3d Dept 2015]; *Sears v First Pioneer Farm Credit, ACA*, 46 AD3d 1282, 1286 [3d Dept 2007]; *WIT Holding Corp. v Klein*, 282 AD2d 527, 529 [2d Dept 2001]; *see also Refreshment Mgt. Servs. Corp. v Complete Off. Supply Warehouse Corp.*, 89 AD3d 913, 915 [2d Dept 2011]). While plaintiff expected that a partnership or joint venture would be formed upon the purchase of the property - both relationships in which the partners or joint venturers would owe the other members fiduciary duties (*see Gibbs v Breed, Abbott & Morgan*, 271 AD2d 180, 184-185 [1st Dept 2000]) - the record clearly shows that the plaintiff and the Leser Defendants had not reached any agreement to create a partnership or joint venture at the time the plaintiffs' funds were released to the Leser Defendants (*see Mawere v Landau*, 130 AD3d 986, 988 [2d Dept 2015]; *Czernicki v Lawniczak*, 74 AD3d 1121, 1124 [2d Dept 2010]) .

Turning to Mandelbaum's motion for summary judgment dismissing the third-party complaint, the court finds that factual issues likewise preclude dismissal of the Leser Defendants third-party action as against Mandelbaum. At his deposition, Mandelbaum conceded that he was the person who handwrote the note signed by Sprei and addressed to plaintiff in which Sprei acknowledged the receipt of $620,000 from plaintiff to be used for the purpose of purchasing the Meserole property.[7] Based on this note, there is at least a

[7] Mandelbaum, however, denied ever seeing the subsequent note, which was exactly the same except that the dollar amount at issue was changed from $620,000 to $1,130,000.

factual issue as to whether Mandelbaum had notice that the fund he was holding was intended to be used for the purchase of that property. In view of Leser's deposition testimony that he told Mandelbaum that Sprei, "took from me money, and he's paying me back, and I want my money," there is also at least a factual issue as to whether Mandelbaum had notice that Leser was taking the money as repayment for a loan to Sprei and did not intend to use it towards the purchase of the Meserole property.

Given the convoluted relationship amongst the parties to this action and Mandelbaum's assumption of some form of obligation as escrow agent with respect to the fund from plaintiff, there are factual issues with respect to whether Mandelbaum may have owed Leser a fiduciary duty to disclose the restrictions on the fund imposed by plaintiff (*see Takayama v Schaefer*, 240 AD2d 21, 25 [2d Dept 1998]). Even if Mandelbaum cannot be deemed to owe defendants a fiduciary duty, there are factual issues as to whether Mandelbaum had superior knowledge of the restrictions on the use of the money from the fund such that he may be found to have had a duty to speak to Leser in view of Leser's apparently mistaken belief that he could use the funds to pay off a portion of Sprei's debt (*see Connaughton v Chipotle Mexican Grill, Inc.*, 135 AD3d 535, 537 [1st Dept 2016]; *Barrett v Freifeld*, 64 AD3d 736, 738 [2d Dept 2009]; *Swersky v Dreyer & Traub*, 219 AD2d 321, 327-328 [1st Dept 1996], *appeal withdrawn* 89 NY2d 983 [1997];

Brass v American Film Technologies, Inc., 987 F2d 142, 151-152 [2d Cir 1993]). The factual issues preclude the grant of Mandelbaum's motion for summary judgment.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. CAROLYN E. DEMAREST