

Battaglia v Tortato

2016 NY Slip Op 31791(U)

September 29, 2016

Supreme Court, New York County

Docket Number: 153643/2016

Judge: Carol R. Edmead

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

-----X

GIOVANNA BATTAGLIA,

Plaintiff,

-against-

RICCARDO TORTATO and
INNOVATIVE FASHION IDEAS, INC.

Defendants.

-----X

CAROL R. EDMEAD, J.:

Index No. 153643/2016

DECISION AND ORDER

Motion Sequence 001

MEMORANDUM DECISION

This is an action by Plaintiff Giovanna Battaglia (“Plaintiff”), a stylist and fashion editor, alleging embezzlement by her former agent, Defendant Innovative Fashion Ideas USA, Inc. (“IFI”/the “Former Agent”), and the Former Agent’s owner and manager, Defendant Riccardo Tortato (“Tortato”). Defendants move, pursuant to CPLR 3211(a)(1) and (7), to dismiss Plaintiff’s Complaint.

BACKGROUND FACTS

The Former Agent represented Plaintiff until March of 2015, at which time Plaintiff terminated the relationship and retained ITB Worldwide (“ITB”; the “New Agent”). According to the Former Agent, Plaintiff subsequently directed clients to pay the New Agent, despite numerous demands from the Former Agent to cease and desist. The New Agent, through Emma Grede (“Grede”), contacted Tortato to resolve the resulting dispute. An agreement between the New Agent, by Grede, and the Former Agent, by Tortato, was signed on April 29 and 30, 2015 and served to settle the billing dispute and release any related claims (*Exh A*, the “Agreement”). Plaintiff did not sign the Agreement, and subsequently filed this action.

Defendants now move to dismiss Plaintiff's complaint, arguing: first, that CPLR 3211(a)(1) justifies dismissal because the Agreement serves as documentary evidence that Plaintiff, through her New Agent, released all claims related to disputed funds, including the claims pled here; and second, that CPLR 3211(a)(7) justifies dismissal because the Complaint fails to state a cause of action for conversion or breach of fiduciary duty.

In opposition, Plaintiff argues: first, that the Agreement does not preclude this action because the Agreement's plain terms indicate that she was not a party to it and do not substantively apply to what is pled in this action; second, that there is no support for Defendants' argument regarding the New Agent's apparent authority to bind Plaintiff to the agreement; and third, that Plaintiff has adequately pled conversion and a breach of fiduciary duty.¹

DISCUSSION

CPLR 3211(a)(1)

A court may grant a motion to dismiss a complaint on the ground that the action is barred by documentary evidence only where said evidence utterly refutes plaintiff's factual allegations, thus conclusively establishing a defense as a matter of law (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]; *Amsterdam Hospitality Group, LLC v. Marshall-Alan Associates, Inc.*, 120 A.D.3d 431, 433 [1st Dept 2014] ["... to constitute documentary evidence, the papers must be 'essentially undeniable' and support the motion *on its own*" (emphasis added)]).

The material dispute between the parties regarding the terms of, and parties bound to, the Agreement demonstrates that the Agreement does not, on its own or factoring in Defendants'

¹ The Court has no record of any reply.

other submissions, merit dismissal. On its face, the Agreement transfers Plaintiff's representation from one agent to another, and serves as a general release of all claims between the parties and "all persons or entities claiming by, through or under them" relating to payment of several of Plaintiff's invoices. First, Plaintiff does not appear to have signed the Agreement. Second, the Complaint is not a claim "by, through, or under" the Former Agent. Thus, the Agreement in and of itself cannot serve as a basis for relief.

To the extent that Defendants argue that Grede had apparent authority to enter into the Agreement on Plaintiff's behalf, "the existence of apparent authority depends upon a *factual showing* that the third party relied upon the misrepresentation of the agent because of some misleading conduct on the part of the principal—not the agent" (*Hallock v State*, 64 NY2d 224, 231 [1984] [emphasis added]; *see also* (*1230 Park Assoc., LLC v N. Source, LLC*, 48 AD3d 355, 356 [1st Dept 2008] [an agent cannot, through his own acts, cloak himself with apparent authority, and a third party relying upon the agent must take steps to assure itself that the agent has actual authority]). Insufficient evidence, documentary or otherwise, has been presented to the Court that, at this juncture, conclusively demonstrates the apparent authority of the New Agent (through Grede) to bind Plaintiff to a general release. With the exception of the Agreement itself, the remaining evidence consists only of communications between the parties' attorneys interpreting the Agreement in a manner mirroring their arguments here, and does not illuminate the New Agent's apparent authority (*Exhs B-D*).

Moreover, the Complaint, on its face, alleges that the Former Agent concealed funds belonging to Plaintiff. Accepting Plaintiff's allegations as true solely for the purposes of this motion, the Former Agent's alleged actions could have prevented the incorporation of the

concealed funds into any transfer agreement and/or settlement, thus limiting the Agreement's scope of preclusion. Accordingly, the branch of Defendants' motion seeking dismissal of the Complaint under CPLR 3211(a)(1) is denied.

CPLR 3211(a)(7)

On a motion to dismiss made pursuant to CPLR 3211, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs "the benefit of every possible favorable inference," and "determine only whether the facts as alleged fit into any cognizable legal theory" (*Siegmund Strauss*, 104 AD3d at 401; *Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972, 638 NE2d 511 [1994]).

Conversion

Under New York law, a conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43 [2006]; *State of New York v Seventh Regiment Fund*, 98 NY2d 249, 746 N.Y.S.2d 637, 774 NE2d 702 [2002]). Two key elements of conversion are (1) plaintiff's possessory right or interest in the property and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43 [2006], internal citations omitted); *Employers' Fire Ins. Co. v Cotten*, 245 NY 102 [1927]; *see also* Restatement [Second] of Torts §§ 8A, 223, 243; Prosser and Keeton, Torts § 15, at 92, 102 [5th ed.]; *Vigilant Ins. Co. of America v Housing Authority of City of El Paso, Tex.*, 87 NY2d 36 [1995]; *Bankers Trust Co. v Cerrato, Sweeney, Cohn, Stahl & Vaccaro*, 187 AD2d 384, 590 NYS2d 201 [1st Dept 1992]).

According to Plaintiff, Defendants would accept payments from her clients on her behalf, deduct their fee therefrom and forward the residue to Plaintiff. However, Defendants intentionally misled her, stating that one or more of Plaintiff's clients had not yet paid for her services, when in fact defendants had already received said payment. Plaintiff alleges that Defendants are in possession of funds rightfully belonging to Plaintiff, to wit: a definite sum of \$23,400.00, and refuses to relinquish said funds notwithstanding her demand therefor (*Lemle v. Lemle*, 92 A.D.3d 494, 939 N.Y.S.2d 15 [1st Dept 2012] ("conversion occurs when funds designated for a particular purpose are used for an unauthorized purpose") citing *Meese v. Miller*, 79 A.D.2d 237, 436 N.Y.S.2d 496 ("plaintiff has alleged the three basic elements of a cause of action in conversion: (1) intent; (2) interference with his property rights to the exclusion of his rights; and (3) possession or the right to possession")). The disputed monies are allegedly the result of Tortato's alleged misrepresentation regarding a payment received on Plaintiff's behalf, and the alleged failure to remit the payment to Plaintiff.

Defendants' contention that the funds allegedly retained were not specifically identified by Plaintiff but were part of the general accounts, and that the New Agent, as Plaintiff's representative, provided the Former Agent with a comprehensive list of outstanding payments, are insufficient *at this juncture* to warrant dismissal for failure to state a cause of action (*cf.*, *McBride v. KPMG Intern.*, 135 A.D.3d 576, 24 N.Y.S.3d 257 [1st Dept 2016] (even assuming plaintiff's money was specifically identifiable when she sent it to Beacon Associates, there is no indication that Beacon Associates segregated it when it sent all its investors' money, including that of plaintiff, to Madoff. By the time Madoff deposited investors' money at JPMorgan, plaintiff's investments would not have been specifically identifiable)). Further, Defendants'

remaining contention that the money sought represents damages in contract is insufficient, as Plaintiff did not plead a breach of contract claim and is not required to make any factual showing at this juncture. Accordingly, dismissal of the first cause of action for conversion for failure to state a cause of action is denied.

Breach of Fiduciary Duty

A fiduciary relationship is necessarily fact-specific and “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 NY3d 11, 19 [2005]; see also *HF Mgt. Services LLC v Pistone*, 34 AD3d 82, 84 [1st Dept 2006] [no fiduciary duty between underwriter and issuer because, “...while the determination of a fiduciary relationship is fact-specific, generally no such relationship exists between those involved in arm’s length business transactions”]). The issue of the existence of a fiduciary relationship between contracting parties is fact-based and therefore not generally subject to dismissal on the pleadings (*Plaintiffs’ State and Sec. Law Settlement Class Counsel Entwistle & Cappucci LLP v Bank of New York Mellon*, 43 Misc 3d 887, 897 [Sup Ct NY County 2014], citing *Ritani, LLC v Aghjayan*, 880 F Supp 2d 425, 455 [SDNY 2012]).

Here, the Court finds that the Complaint has adequately pled the existence of a fiduciary relationship based on the alleged nature of the relationship between Plaintiff and the Former Agent, including the Former Agent’s acceptance of payments on Plaintiff’s behalf (*Complaint* ¶¶ 9-10; *Pl Affirm in Opp* ¶¶ 3-5, 12; see e.g., *T.T.S.G. v Kubic*, 226 AD2d 132, 133 [1st Dept 1996] (escrow agent owes fiduciary duty)).

Defendants’ only argument in support of dismissal is that, “by the very nature of the

circumstances underlying this case,” “a relationship of trust could not have been established between [Plaintiff] and Defendants” (*Defs Affirm* ¶ 30). To the extent that Defendants do not elaborate, it is not clear to the Court which “circumstances” Defendants are referencing. Moreover, as Plaintiff notes, Defendants’ assertion that no fiduciary duty could exist is undermined by its argument that the New Agent – in a role identical to that of the Former Agent – had a close enough relationship with Plaintiff to impute apparent authority to bind Plaintiff to a general release. Accordingly, Defendants’ motion to dismiss the second cause of action is denied.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that Defendants’ motion to dismiss the Complaint pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(7) is denied;

ORDERED that Defendants shall serve a copy of this Order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that Defendants shall, within 30 days of the date of this order, file and serve their Answer; and it is further

ORDERED that the parties shall appear for a Preliminary Conference on December 13, 2016, 2:30 p.m.

This constitutes the decision and order of the Court.

Dated: September 29, 2016



Hon. Carol R. Edmead, J.S.C.

HON. CAROL R. EDMOAD
J.S.C.