

Aliev v Borukhov
2017 NY Slip Op 31581(U)
June 21, 2017
Supreme Court, Queens County
Docket Number: 708955/2016
Judge: Marguerite A. Grays
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE MARGUERITE A. GRAYS

IAS PART 4

Justice

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FARIZ ALIEV,

Index

No.: 708955/2016

Plaintiff(s),

Motion

Date: February 8, 2017

-against-

Motion

INDIVIDUAL DEFENDANTS:

Cal. No.: 4

NERIYA BORUKHOV, ARON BORUKHOV,
STELLA AKBASHEV, ROSHEL MALAKOV,
WAYNE KING,

Motion

Seq. No.: 1

CORPORATE DEFENDANTS:

VIRGIN CAPITAL, LLC, ARON B. BORUKHOV
& ASSOCIATES, P.C. 31 SUMPTER, LLC,
BELLMORE COMMONS, LLC, SKYHIGH
EQUITIES, LLC, ROMAL EQUITIES, LLC,
175-31 JAMAICA, LLC., 41-21 REALTY, INC.,
84-19 KENT ST. REALTY, LLC.,

FILED

JUN 28 2017

COUNTY CLERK
QUEENS COUNTY

Defendant(s).

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The following papers numbered 1-4 read on this motion by defendants Neriya Borukhov, Aron Borukhov, Stella Akbashev, Roshel Malakov, Virgin Capital, LLC, Aron B. Borukhov & Associates, P.C., Skyhigh Equities, LLC, Romal Equities, LLC, 175-31 Jamaica, LLC, 41-21 Realty, Inc., and 84-19 Kent St. Realty LLC, for an Order pursuant to CPLR §3211(a)(7), dismissing the following causes of action: (1) the fraud cause of action as to the defendants; (2) the breach of fiduciary duty cause of action against the defendants; (3) the unjust enrichment cause of action against the defendants; (4) the conversion cause of action against the defendants; (5) the breach of good faith and fair dealing cause of action against the defendants Aron Borukhov and Neriya Borukhov; (5) the breach of fiduciary duty under Partnership Law cause of action against defendants; (6) the fraudulent conveyance cause of action against the defendants; (7) the accounting cause of action against the defendants; (8) the constructive trust cause of action against the defendants; (9) the cause of

action for attorneys' fees against the defendants and (10) the cause of action for punitive damages against the defendants.

PAPERS
NUMBERED

Notice of Motion - Affid.-Exhibits..... 1- 4

Upon the foregoing papers it is ordered that plaintiff's motion is determined as follows:

In determining whether a complaint is sufficient so as to withstand a motion to dismiss pursuant to CPLR §3211, the court must consider whether the pleading states a cause of action, and if, from its four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law (*1414 Realty Corp. v. G&G Realty Co.*, 272 AD2d 309 [2000]; *Sanders v. Winship*, 57 NY2d 391; *Guggenheimer v. Ginzburg*, 43 NY2d 268). When determining a motion to dismiss pursuant to CPLR §3211, a court must resolve all inferences which reasonably flow from the allegations contained in the complaint in favor of the pleader (*Cron v. Hargo Fabrics, Inc.*, 91 NY2d 362; *Rovello v. Orofino Realty Co., Inc.*, 40 NY2d 633), and the complaint should not be dismissed where a cause of action may exist (*Rovello*, 40 NY2d 633).

The branch of the defendants' motion to dismiss the First cause of action for fraud upon the ground that the cause of action is not plead with sufficient particularity, is denied. Giving the most favorable intendment to the complaint allegations, the Court finds that plaintiff has stated a claim for fraud with sufficient specificity pursuant to CPLR §3016(b).

The branch of the defendants' motion to dismiss the First cause of action for fraud upon the ground that the same is duplicative of the breach of contract cause of action set forth in the complaint, is granted. The fraud claim asserted in the complaint is based on the same facts as the breach of contract claim. It is well settled that a cause of action alleging fraud does not lie where the only fraud claimed relates to an alleged breach of contract (*WIT Holding Corp. v. Klein*, 282 AD2d 527 [2001]; *J.E. Morgan Knitting Mills v. Reeves Bros.*, 243 AD2d 422 [1997]). Accordingly, the First cause of action is dismissed.

The branch of the defendants' motion to dismiss the Second cause of action for Breach of Fiduciary Duty is denied as to defendants Neriya Borukhov and Aron Borukhov, but granted as to the remaining moving defendants. A cause of action sounding in breach of fiduciary duty must be plead with the particularity required by CPLR §3016(b) (*Deblinger v. Sani-Pine Products Company, Inc.*, 107 AD3d 659 [2014]; *Palmetto Partners, L.P. v. AJW Aqualified Partners, LLC*, 83 AD3d 804 [2011]; *Armentano v. Paraco Gas Corp.*, 90 AD3d

683 [2011]; *Chiu v. Man Choi Chiu*, 71 AD3d 621 [2010]). The elements of a cause of action for breach of fiduciary duty are: (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct (*Deblinger v. Sani-Pine Products Company, Inc.*, 107 AD3d 659 [2014]; *Rut v. Young Adult Institute, Inc.*, 74 AD3d 776 [2010]). A review of the pleadings herein shows that plaintiff's complaint adequately states a cause of action for breach of fiduciary duty as against defendants Neriya Borukhov and Aron Borukhov, but fails to sufficiently plead such cause of action as against the remaining moving defendants.

The branch of defendants' motion to dismiss the Fifth cause of action sounding in unjust enrichment upon the ground that said cause of action is duplicative of the breach of contract cause of action, is denied. Causes of action for breach of contract and unjust enrichment may be pleaded alternatively (*Tridee v. NYCSCAm* 292 AD2d 444 [2002]; *Strauss v. Di Cicco*, 64 AD2d 979 [1978]). To state a cause of action for unjust enrichment, a plaintiff must allege that it conferred a benefit upon the defendant, and that the defendant obtained such benefit without adequately compensating plaintiff therefor (*Nakamura v. Fujii*, 253 AD2d 387 [1998]; see, *MT Property, Inc. v. Ira Weinstein and Larry Weinstein, LLC*, 50 AD3d 751 [2008]; *Smith v. Chase Manhattan Bank, USA, N.A.*, 293 AD2d 598 [2002]). Plaintiff herein has adequately alleged a cause of action for unjust enrichment against the moving defendants.

The branch of the defendants' motion to dismiss the Sixth cause of action sounding in conversion is granted. A cause of action for conversion can not be maintained where, as here, damages are being sought merely for breach of contract and no wrong independent of the breach of contract claim is demonstrated (*Hassett-Belfer Senior Housing, LLC v. Town of North Hempstead*, 270 AD2d 306 [2000]).

The branch of the defendants' motion to dismiss the Seventh cause of action for breach of good faith and fair dealing as against defendants Neriya Borukhov and Aron Borukhov, is granted. A cause of action to recover damages for breach of good faith and fair dealing can not be maintained where the alleged breach is intrinsically tied to the damages allegedly sustained from the breach of the alleged contract (*Deer Park Enterprises, LLC v. Ali Systems, Inc.*, 57 AD3d 711 [2008]). Here, the alleged conduct of defendants Neriya Borukhov and Aron Borukhov set forth in the Seventh cause of action is basically the same as the conduct alleged in the Third cause of action for breach of contract. Thus, the Seventh cause of action is dismissed as duplicative as against defendants Neriya Borukhov and Aron Borukhov (*R.I. Island House, LLC v. North Town Phase II Houses, Inc.*, 51 AD3d 890 [2008]).

The branch of this motion to the dismiss the defendants' Ninth cause of action for

"breach of fiduciary duty under Partnership Law" as against defendants Neriya Borukhov and Aron Borukhov is denied. Plaintiff's complaint adequately alleged the existence of a partnership between plaintiff and defendants Neriya Borukhov and Aron Borukhov.

The branch of defendants' motion to dismiss the Tenth cause of action sounding in fraudulent conveyance is granted. CPLR §3016(b) sets forth heightened particularity requirements for pleading causes of action or defenses based on fraud. Plaintiff's complaint fails to plead the elements of fraudulent conveyance with statutorily required particularity (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v. Rabizadeh*, 131 AD3d 960 [2015]; *Fischer v. Sadow Realty*, 34 AD3d 632 [2006]).

That branch of the defendants' motion which is for an Order dismissing the Eleventh cause of action for an accounting is granted. "The right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest ***." (*Palazzo v Palazzo*, 121 AD2d 261 [1986]; see, *Adam v Cutner & Rathkopf*, 238 AD2d 234 [1997]). As stated above, the complaint fails to assert factual allegations of any fiduciary relationship between plaintiff and the moving defendants.

The branch of the defendants' motion to dismiss the Twelfth cause of action sounding in constructive trust is denied as to defendants Neriya Borukhov and Aron Borukhov, but granted as to the remaining moving defendants. The four essential elements of a cause of action for a constructive trust are: (1) a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance thereon and (4) unjust enrichment (*Modica v. Modica*, 15 AD3d 635 [2005]; *Nastasi v. Nastasi*, 26 AD3d 32 [2005]; *Koslowski v. Koslowski*, 297 AD2d 784 [2002]; *Crivaro v. Crivaro*, 295 AD2d 304 [2002]; *Levy v. Moran*, 270 AD2d 314 [2000]; *Neos v. Neos*, 262 AD2d 467 [1999]; *Vassel v. Vassel*, 40 AD2d 713 [1972]). Giving the most favorable reading to plaintiff's complaint, the pleadings sufficiently allege the essential elements of a cause of action for constructive trust as against defendants Neriya Borukhov and Aron Borukhov, however fail to allege any confidential relationship with the other movant defendants.

The branch of defendants' motion to dismiss the Thirteenth cause of action for attorneys' fees is granted. It is a well settled rule in New York that attorneys' fees are considered incidental to litigation and, unless authorized by statute, court rule or written agreement between the parties, is not recoverable (*Culinary Connection Holdings v. Culinary Connection of Great Neck, Inc.*, 1 AD3d 558 [2003]; *Hedaya Home Fashions, inc. v. American Motorist Insurance Company*, 12 AD3d 639 [2004]; *Buffalo v. J.W. Clement Co.*, 28 NY2d 241).

The branch of the defendants' motion to dismiss the Fourteenth cause of action for punitive damages is granted. To be entitled to punitive damages, there must exist a gross and wanton fraud upon the public involving a high degree of moral turpitude which does not involve an isolated transaction; thus the mere showing of bad faith in the failure to carry out a contract is not sufficient to award punitive damages (*Philips v. Republic Insurance Company*, 108 AD2d 845 [1985]; *Varveris v. Hermitage Insurance Company*, 24 AD3d 537 [2005]). Punitive damages may be recovered to vindicate a public right (*Logan v. Empire Blue Cross & Blue Shield*, 275 AD2d 187 [2000]). The alleged conduct must be part of a pattern of behavior directed at the public generally (*Johnson v. Allstate Insurance Company*, 33 AD3d 665 [2006]), which is not alleged in the complaint herein. The allegations set forth in the complaint pertain only to plaintiff and the named defendants.

Dated:

JUN 21 2017

MARGUERITE A. GRAYS
J.S.C.**FILED**
JUN 28 2017
COUNTY CLERK
QUEENS COUNTY