

Lader v Goodwin & Co.
2017 NY Slip Op 33256(U)
November 21, 2017
Supreme Court, Nassau County
Docket Number: 604645-17
Judge: Timothy S. Driscoll
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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----X
SPENCER LADER and MARIO VAGLICA,

Plaintiffs,

-against-

**GOODWIN & CO., BILL GOODWIN, Individually,
and BECKETT MEDIA LLC,**

Defendants.
-----X

**TRIAL/IAS PART: 12
NASSAU COUNTY**

**Index No: 604645-17
Motion Seq. Nos. 2 and 3
Submission Date: 10/13/17**

Papers Read on these Motions:

**Notice of Motion, Affirmation in Support and Exhibits.....X
Memorandum of Law in Support.....X
Notice of Cross Motion, Affirmation in Opposition/Support and Exhibit.....X
Memorandum of Law in Opposition/Support.....X
Reply Affidavit in Further Support/Opposition and Exhibit.....X
Reply Memorandum of Law in Further Support/Opposition.....X**

This matter is before the court on 1) the motion by Defendant Bill Goodwin, Individually ("Bill") filed on August 15, 2017, and 2) the cross motion by Plaintiffs Spencer Lader ("Lader") and Mario Vaglica ("Vaglica") ("Plaintiffs") filed on October 2, 2017, both of which were submitted on October 13, 2017. For the reasons set forth below, the Court 1) grants the motion; and 2) grants the cross motion to the extent that the Court will permit Plaintiffs to amend their complaint to specify that the breach of the consignment agreement between Lader and Defendant Goodwin & Co., which is the subject of the first cause of action in both the Amended Complaint and Proposed Second Amended Complaint, was the result of Goodwin & Co. selling Lader's memorabilia below the reserve price, but the Court will not permit Plaintiffs to reassert the third cause of action, alleging fraud against Defendant Bill, in their Second Amended Complaint. Accordingly, the Court deems the Proposed Second Amended Complaint (Ex. 1 to Harfenist Aff.

in Opp./Supp.) filed and served, but directs that Plaintiffs may not proceed on the third cause of action in the Proposed Second Amended Complaint. The Court directs Defendants to answer or move with respect to the Proposed Second Amended Complaint, as limited herein, on or before January 5, 2018. The Court reminds counsel for the parties of their required appearance before the Court for a compliance conference on February 7, 2018 at 9:30 a.m.

BACKGROUND

A. Relief Sought

Bill moves for an Order, pursuant to CPLR §§ 3211(a)(7) and 3016(b), dismissing the third cause of action in the Amended Complaint, and the complaint against Bill, as only the third cause of action has been asserted against Bill.

Plaintiffs cross move for an Order granting Plaintiffs leave to amend the complaint, and permitting Plaintiffs to file and serve their proposed Second Amended Complaint ("Proposed SAC") (Ex. 1 to Harfenist Aff. in Opp./Supp.). Bill opposes the cross motion.

B. The Parties' History

The Amended Complaint (Ex. A to Levi Aff. in Supp.) alleges as follows:

This is an action to recover damages incurred by Plaintiffs, as well as declaratory relief, as a result of the failure by Goodwin & Co. ("Goodwin") to properly value and sell various items of sports memorabilia, including baseball cards. Plaintiffs seek recovery against Defendants Goodwin and Beckett Media LLC ("Beckett"), an entity that exercised total dominion control over Goodwin, for breach of contract and against Bill, individually, for fraud. In addition, Plaintiffs allege that Goodwin has improperly claimed that Lader owes Goodwin over \$860,000 based on faulty accounting records, failure to provide credits and overcharges. Accordingly, Plaintiffs allege, Lader is entitled to an accounting and a declaratory judgment that he does not owe Goodwin or Beckett any fees.

Plaintiffs reside in Nassau County, New York. Goodwin is a limited liability company organized in the State of Missouri, with its principal office in Missouri. Bill is a principal and officer of Goodwin, and maintains an office for the transaction of business at Goodwin's principal office. Beckett is a limited liability company organized in the State of Texas, with its principal office in Dallas, Texas. Goodwin is a wholly owned subsidiary of Beckett. Defendants

all have substantial business contacts in the State of New York. Goodwin is an online auction company specializing in valuation and sale of vintage sports collectibles.

Beginning in or about April 2016, Lader entered into a series of agreements with Goodwin pursuant to which Goodwin agreed to grade certain pieces of memorabilia and sell them at public on-line auctions to the highest bidder (collectively the "Consignment Agreement"). According to the Consignment Agreement, within thirty (30) days of auction, Goodwin was to remit to Lader the net proceeds of the sale, calculated as the gross sale proceeds, less a twenty percent (20%) "Buyers Premium" (Am. Comp. at ¶ 16). Goodwin would issue Lader credits on Lader's account towards auction purchases in exchange for future consignments to Goodwin for upcoming auctions. The parties also agreed that, due to the high volume of memorabilia being commissioned by Lader, Goodwin would give Lader a five percent (5%) rebate on certain items purchased by Lader at Goodwin auctions.

Over several months in 2016, Goodwin made substantial mistakes in servicing Lader's account, including but not limited to 1) failing to meet the reserves on several items sold; 2) failing to credit Lader with the 5% rebate for at least three (3) separate auction purchases; 3) failing to properly credit Lader's account for commissioned items sold, including a particular 1953 Willie Mays card and 1951 Mickey Mantle card; 4) failing to properly pay third parties for purchases made by Lader; and 5) failing to place certain commissioned items into public auction. On December 4, 2016, Goodwin sent an email to Lader in which he acknowledged that due to "the complicated nature of your account mistakes were made in regards to a 5% on consignments, \$9,000 credit on a comic book sale, bid withdraws, and the inability to upgrade a 1955 Koufax card" (Am. Comp. at ¶ 20).

The Amended Complaint details the mistakes which involved the following:

1) Goodwin's failure to upgrade the 1st Sandy Koufax Card, which Goodwin admitted in an email dated December 22, 2016, 2) Goodwin's disregard of the parties' agreement and sale of a Superman Comic and 1952 Mickey Mantle Card at a private sale, 3) Goodwin permitting the high bidder to withdraw his bid as to a Mickey Mantle Card and selling the card to a lower bidder, which Goodwin admitted in an email dated December 23, 2016, 4) Goodwin underselling the 2nd Sandy Koufax Card, which Goodwin later acknowledged had been undersold, and 5) Goodwin holding onto a Roberto Clemente Card for several months after the purchaser had reneged on the bid, which Goodwin acknowledged in the December 23, 2016 email.

In or about May 2016, Plaintiffs jointly entered into a consignment agreement with Goodwin for Goodwin to sell, during a public on-line auction, 125 collectibles whose estimated value was approximately \$200,000. Instead of selling the collectibles in a public auction setting, as the parties had agreed, Goodwin failed to include the items in a public auction. Subsequently, without Plaintiffs' consent, Goodwin sold all of the lots in a single private sale for a total of \$30,000. Goodwin acknowledged this failure in the December 23, 2016 email.

In an email to Lader dated September 18, 2016, Goodwin acknowledged receiving \$438,500 in consignments from Lader and stated that "[t]he above consignments should resolve all outstanding invoices and advances" (Am. Comp. at ¶ 50) which at the time, according to Goodwin, was \$367,941. In the same correspondence, Goodwin also acknowledged a credit due to Lader of at least \$70,500 on the \$413,500 in consignments. On December 6, 2016, Bill sent an email to Lader confirming receipt of a \$20,000 payment and thanking Lader "for helping Beckett clear up these mistakes" (Am. Comp. at ¶ 52). Approximately nine days later, Goodwin acknowledged receipt of a payment from Lader in the sum of \$10,000 and acknowledged that "I know that there has been many mistakes [sic] with our failure to upgrade the Koufax rookie, bookkeeping errors, and withdrawn bids. I personally want to thank you for handling this in [a] positive manner" (Am. Comp. at ¶ 53).

On or about January 24, 2017, Bill sent an email to Lader stating that "[a]fter speaking this morning with Kevin Isaccson who as you know is an officer of Beckett Media, it is OK for you to make a \$186,000 payment today and pay the rest of your invoice with consignments starting with our February auction...We will correct any mistakes to your account at a later date. Any money due either Beckett or you will [be] paid after the February auction" (Am. Comp. at ¶ 54). On or about February 1, 2017, Goodwin began to assert that Lader owed \$248,806.00 on his account. In the same February 1, 2017 letter, Goodwin again acknowledged accounting mistakes made on the ledger sheet. Lader disputed this debt in several emails and asked Goodwin for a specific accounting to explain how his account could have such a deficit. On February 21, 2017, Goodwin's attorneys served a demand letter on Lader alleging that Lader's account had a deficit of \$880,876.30. Lader again disputed this debt in several emails and again demanded an accounting.

The Amended Complaint contains six (6) causes of action:

1) against Goodwin for breach of the Consignment Agreement he entered into with Lader by *inter alia* a) failing to meet the reserves on several items sold; b) failing to credit Lader with the 5% rebate for at least 3 separate auction purchases; c) failing to place certain commissioned items into public auction; d) failing to upgrade the 1st Sandy Koufax card; e) undervaluing the Superman Comic Book, Issue #1, the 1952 Mickey Mantle card and the 2nd Sandy Koufax card; f) failing to secure the high bid on the Mickey Mantle card; g) failing to properly credit Lader for commissioned items sold or returned; and h) failing to properly pay third parties for purchases made by Lader;

2) against Goodwin for breach of the consignment agreement that it entered into with Plaintiffs by failing to sell the 125 collectibles in a public auction setting;

3) by Lader against Bill for fraud based on the allegation that a) Bill accepted cash payment in excess of the reported purchase price for several items sold on Lader's behalf; b) several times in 2016, Bill accepted cash payments and then wrote a personal check to Goodwin for the alleged purchase price; c) Bill failed to produce signed receipts reflecting the actual purchase price paid by various purchasers; and d) Bill underreported the amounts paid to Lader, to defraud Lader out of a portion of the cash proceeds from the sales;

4) by Lader, against Beckett for breach of contract on a theory of alter ego liability based on the allegations that a) although Lader entered into the Agreements with Goodwin, Beckett exercised complete dominion and control over Goodwin with respect to decision making and accounting on Lader's account; b) Goodwin was directed by Beckett to provide erroneous information to Lader, resulting in the numerous alleged accounting mistakes on Lader's account; c) at Goodwin's direction, Lader made several payments on his account for transactions handled by Goodwin, including three in February 2017, to "Beckett Auctions" (Am. Comp. at ¶ 76); d) as Beckett has exercised complete dominion and control over Goodwin, Beckett is Goodwin's alter ego and has effectively eliminated Goodwin's corporate form; and e) by virtue of the foregoing, Beckett is liable to Lader on the breach of contract claims made against Goodwin;

5) by Plaintiffs, against Beckett for breach of contract on a theory of alter ego liability, with respect to the 125 collectibles that Goodwin sold at a single private sale instead of placing them into a public auction; and

6) a request by Lader for an accounting, and for a declaratory judgment stating that Lader does not owe Goodwin or Beckett payment for any services provided by them, advances made by them, or otherwise.

In his Answer (Ex. B to Levi Aff. in Supp.), Bill denies many of the allegations in the Amended Complaint. Bill also interposes numerous affirmative defenses, including the defense that Plaintiffs fail to plead the third cause of action against Bill with the particularity required by CPLR § 3016(b) (fourth affirmative defense).

Bill also provides a copy of the answer served by “Defendant Beckett Auctions, LLC d/b/a Goodwin & Co.” (“Entity Answer”) (Ex. C to Levi Aff. in Supp.). In the Entity Answer, it is asserted, at footnote one of the answer, that Defendant Beckett Auctions, LLC d/b/a Goodwin & Co. is incorrectly named in the Amended Complaint as Beckett Media, LLC and Goodwin & Co. The Entity Answer also contains a counterclaim asserted against Lader by Beckett Auctions, LLC d/b/a Goodwin & Co. based on the allegations *inter alia* that 1) in reliance on Lader’s promises to acquire particular collectibles and consign them to Beckett, Beckett paid Lader cash advances but Lader did not use the cash advances as promised and failed to acquire the collectibles; and 2) in violation of applicable rules, Lader used proxies to bid on multiple items that Lader had consigned, which caused damage to Beckett when the proxies refused to pay their winning bid amounts. Bill also provides a copy of Lader’s Reply to Counterclaims (Ex. D to Levi Aff. in Supp.).

In support of Plaintiffs’ cross motion, counsel for Plaintiffs (“Plaintiffs’ Counsel”) submits that the Court should deny Bill’s motion because the third cause of action in the Amended Complaint properly sets forth a claim for fraud. Plaintiffs’ Counsel submits that the third cause of action 1) asserts each of the essential elements of fraud; 2) is pleaded with the requisite particularity; and 3) is not duplicative of any other cause of action because the fraud falls outside the scope of the contracts.

Plaintiffs also ask the Court to permit Plaintiffs to file and serve the Proposed SAC. Plaintiffs assert that, out of an abundance of caution, they seek to further amend their complaint to provide additional factual particularity demonstrating that the fraud claim is not duplicative of the breach of contract claims against the other Defendants. Plaintiffs advise the Court that the proposed amendment also seeks to amend the complaint with respect to the breach of contract claim against Goodwin to specify that the breach of the consignment agreement between Lader and Goodwin was the result of Goodwin selling Lader’s memorabilia below the reserve price.

C. The Parties’ Positions

Bill moves to dismiss the third cause of action in the Amended Complaint on the grounds that 1) the third cause of action lacks the requisite particularity because it does not contain sufficient detail regarding the alleged fraud by Bill, as evidenced by the failure to specify the

dates of any alleged payments, the amounts of any alleged payments, the items sold, the identity of any of the purchasers, and other relevant specifics; 2) to the extent that the third cause of action relies on repeating and realleging the allegations that constitute the breach of contract claims against Goodwin, Lader cannot rely on those allegations to satisfy the specificity requirements of CPLR § 3016 because those allegations do not specify any acts or omissions of fraud by Bill; and 3) Lader fails to distinguish between the alleged fraud perpetrated by Bill and the alleged breach of contract perpetrated by Goodwin.

Plaintiffs oppose the motion submitting that Plaintiffs have pleaded the alleged fraud with adequate specificity by alleging that Bill accepted cash payments for items sold on Lader's behalf and wrote personal checks to Goodwin for the sale, and further alleging that the price claimed by Bill was less than what he actually received in cash. Plaintiffs contend, further, that the fraud claim is not impermissibly duplicative of the breach of contract claims in the Amended Complaint, as demonstrated by the fact that 1) no contractual relationship existed between Lader and Bill; 2) Lader only entered into a contractual relationship with Goodwin; and 3) Lader asserts that Bill pocketed cash for the sale of memorabilia not reported to either Goodwin or Beckett. Thus, the fraud allegations against Bill arise from his independent actions in selling several items belonging to Lader, in Goodwin's possession, and his deceit in failing to accurately report the actual sale amount and keeping some of the cash from those sales for himself and Goodwin/Beckett.

In reply, Bill reaffirms his position that Lader's fraud claim is duplicative of and arises directly from his breach of contract claim. Bill submits that Plaintiffs have failed to demonstrate, or even allege, that Bill had any legal duty to Plaintiff separate from his duty to perform under the Consignment Agreements. Bill submits that Plaintiffs' argument that Bill "took independent actions in selling several items belong[ing] to Lader, in Goodwin's possession" (Ps' Memo. of Law in Opp./Supp. at p. 7) cannot satisfy Plaintiffs' burden of establishing a legal duty separate from the duty under the contract between the parties. Plaintiffs allege, both in the Amended Complaint and the Proposed SAC, that all of the items owned by Lader and sold by Defendants were sold pursuant to the consignment agreements and, therefore, the only manner in which the consigned items came into Goodwin's possession was under the consignment agreements. Under these circumstances, Bill submits, Lader has not alleged, and cannot allege, any independent obligation of Bill to sell any of Lader's items, separate from the obligation under the consignment agreement. Moreover, Bill submits, Plaintiff has failed to demonstrate any representations that were extraneous to the contract, as any conduct by Bill in underreporting the

amounts paid and keeping cash for himself would constitute a breach of the consignment agreements.

Plaintiffs ask the Court to grant their cross motion and permit Plaintiffs to file and serve the Proposed SAC. Plaintiffs assert that, out of an abundance of caution, they seek to further amend their complaint to provide additional factual particularity demonstrating that the fraud claim is not duplicative of the breach of contract claims against the other Defendants. Plaintiffs advise the Court that the proposed amendment also seeks to amend the complaint with respect to the breach of contract claim against Goodwin to specify that the breach of the consignment agreement between Lader and Goodwin was the result of Goodwin selling Lader's memorabilia below the reserve price. Plaintiffs submit that, in consideration of the liberal amendment policy, and because the proposed amendments simply seek to further clarify and expand on Plaintiffs' claims, the Court should permit the amendment.

Bill opposes the cross motion submitting that the amendment lacks merit because the fraud claim is not sustainable. Bill submits that none of the proposed new allegations cure the deficiencies in the fraud claim because there are still no allegations, *inter alia*, establishing that Bill owed Lader a legal duty of any kind, let alone a duty that was separate and distinct from Goodwin's contractual duties under the consignment agreements.

RULING OF THE COURT

A. Dismissal Standards

In considering a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211(a)(7), 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 within any cognizable legal theory. *Bivona v. Danna & Associates, P.C.*, 123 A.D.3d 956, 957 (2d Dept. 2014), quoting *Alva v. Gaines, Gruner, Ponzini & Novick, LLP*, 121 A.D.3d 724 (2d Dept. 2014) (internal quotation marks omitted) and citing *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994).

B. Leave to Amend

Motions for leave to amend pleadings should be freely granted, absent prejudice or surprise directly resulting from the delay in seeking leave, unless the proposed amendment is palpably insufficient or patently devoid of merit. *Aurora Loan Services, LLC v. Thomas*, 70 A.D.3d 986, 987 (2d Dept. 2010), citing CPLR § 3025(b); *Lucido v. Mancuso*, 49 A.D.3d 220, 222 (2d Dept. 2008).

C. Fraud

To establish a *prima facie* case for fraud, plaintiff must allege that 1) defendant made a representation as to a material fact; 2) such representation was false; 3) defendant intended to deceive plaintiff; 4) plaintiff believed and justifiably relied upon the statement and was induced by it to engage in a certain course of conduct; and 5) as a result of such reliance plaintiff sustained pecuniary loss. *Ross v. Louise Wise Services, Inc.*, 8 N.Y.3d 478, 488 (2007).

It is well settled that to recover damages for fraud, the fraud alleged cannot relate to a breach of contract. *Weitz v. Smith*, 231 A.D.2d 518, 518-519 (2d Dept. 1996). To state a cause of action to recover damages for fraud, a plaintiff must allege a breach of duty which is collateral or extraneous to the contract between the parties. *Id.* at 519.

CPLR § 3016(b) provides that where a cause of action is based upon misrepresentation, fraud, breach of trust, and certain other claims the circumstances constituting the wrong shall be stated in detail. The purpose of this pleading requirement is to inform a defendant of the incidents which form the basis of the action. *Pludeman v. Northern Leasing Systems*, 10 N.Y.3d 486, 491 (2008). Where it is impossible to state the circumstances constituting the fraud in detail, CPLR § 3016(b) should not be so strictly interpreted as to prevent plaintiff from asserting an otherwise valid cause of action. *Pludeman v. Northern Leasing Systems*, 10 N.Y.3d at 491. There is no requirement of unassailable proof at the pleading stage. Rather, the complaint must allege the basic facts to establish the elements of the cause of action. *Id.* at 492. CPLR § 3016(b) is satisfied when the facts suffice to permit a reasonable inference of the alleged misconduct. In certain cases, less than plainly observable facts may be supplemented by the circumstances surrounding the alleged fraud. *Pludeman v. Northern Leasing Systems*, 10 N.Y.3d at 493.

D. Application of these Principles to the Instant Action

The Court grants Bill's motion and dismisses the third cause of action in the Amended Complaint based on its conclusion that Lader's fraud claim is duplicative of and arises directly from his breach of contract claim. Plaintiffs have failed to demonstrate, or allege, that Bill had any legal duty to Plaintiff separate from his duty to perform under the Consignment Agreements. Moreover, under the facts presented, Lader cannot allege any independent obligation of Bill to sell any of Lader's items, separate from the obligation under the consignment agreement, and therefore there is no basis for the reassertion of this claim in an amended complaint, and the Court denies the cross motion to the extent that it seeks to reassert this claim.

The Court grants the cross motion to the extent that the Court will permit Plaintiffs to amend their complaint to specify that the breach of the consignment agreement between Lader

and Defendant Goodwin & Co., which is the subject of the first cause of action in both the Amended Complaint and Proposed Second Amended Complaint, was the result of Goodwin & Co. selling Lader's memorabilia below the reserve price. In consideration of the liberal amendment policy, and based on the Court's conclusion that this proposed amendment is meritorious, the Court will permit this amendment. Accordingly, the Court deems the Proposed Second Amended Complaint filed and served, but directs that Plaintiffs may not proceed on the third cause of action in the Proposed Second Amended Complaint. The Court directs Defendants to answer or move with respect to the Proposed Second Amended Complaint, as limited herein, on or before January 5, 2018.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a Compliance Conference on February 7, 2018 at 9:30 a.m.

DATED: Mineola, NY

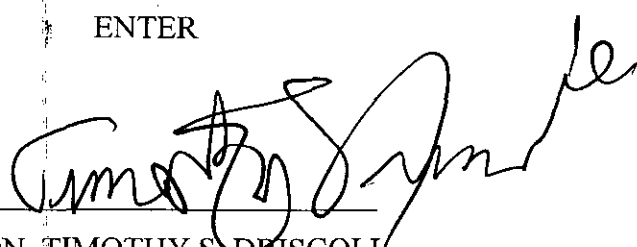
November 21, 2017

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HON. TIMOTHY S. DRISCOLL

J.S.C.