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| Byrd v Weiss |
| 2018 NY Slip Op 31173(U) |
| June 7, 2018 |
| Supreme Court, New York County |
| Docket Number: 653179/2017 |
| Judge: Arthur F. Engoron |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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FREDERICK E. BYRD, JR. a/k/a
RICK BYRD,

Index Number: 653179/2017

Sequence Number: 001

Plaintiff,

--against--

DECISION AND ORDER

ELISE WEISS, MD, BRODAN MANAGEMENT SERVICES,
INC., MALIA STAUFFER, and DAVID LAZAAR,

Defendants.
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In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 to 4, were used to decide this motion, pursuant to CPLR 3211(a)(7), to dismiss

- Moving Papers.....1
- Opposing Papers.....2
- Reply Papers.....3

Upon the foregoing papers, the motion is granted in part and denied in part.

Plaintiff Rick Byrd (“Byrd”) alleges that defendant Elise Weiss (“Weiss”), with the aid of co-conspirators Malia Stauffer (“Stauffer”), and David Lazaar (“Lazaar”) stole his apothecary. In his complaint, Byrd listed the following causes of action against the defendants: unjust enrichment, conversion, breach of contract, breach of Lazaar’s legal duty as notary, and misrepresentation.

Defendants now move, pursuant to CPLR 3211(a)(7), to dismiss this case on the ground that Byrd has failed to state causes of action. For the reasons stated herein, the motion is granted in part and denied in part.

The Complaint

On September 12, 2017, plaintiff Frederick E. Byrd, Jr. filed a complaint asserting five causes of action: unjust enrichment, conversion, breach of contract, breach of a notary’s legal duty, and misrepresentation, against defendants Elise Weiss, Brodan Management Services, Inc. (“Brodan”), Malia

Stauffer, and David Lazaar. Byrd owned an herbal supplement business known as Longevity for Life, Inc. He alleges that Weiss proposed to enter into a verbal partnership in which she would make an initial payment of \$30,000, and pay off his debts, amounting to approximately \$66,000. Additionally, Weiss promised to pay Byrd a monthly salary of \$10,000 until she recouped her investment of \$55,000 in the business. However, four months later, Byrd stopped receiving his monthly salary, and, also, Weiss never paid off his debts. Byrd found himself locked out of his Business, including its bank and social media accounts. When Byrd confronted Weiss for taking control of his business and related assets, which he had no intention of selling, she produced a purported contract indicating that Byrd had agreed to sell his business to Weiss's company, Brodan. The contract contained Byrd's and Weiss's purported signatures, as well as Stauffer's signature as a witness. Lazaar notarized the document. This was a falsified document that he never signed. Byrd seeks general and punitive damages

Discussion

CPLR 3211(a)(7) states that "a party may move for judgement to dismiss one or more causes of action asserted against him or her on the ground that the pleading fails to state a cause of action."

Dismissal of a complaint, pursuant to CPLR 3211(a)(7), is only warranted if, accepting the alleged facts as true and giving plaintiff benefit of every possible favorable inference, "the court determines that within the four corners of the complaint no cognizable cause of action has been stated," Scott v Bell Atl. Corp., 282 AD2d 180, 183 (1st Dept 2001). On a motion to dismiss, "so liberal is the standard to survive the motion that the test is simply whether the proponent of the pleading has a cause of action, not even whether he or she has stated one." Weiner v Lazard Freres and Co., 241 AD2d 114, 119 (1st Dept 1998).

Byrd has stated a cause of action for unjust enrichment. Byrd argues that allowing defendants to retain the benefits of Byrd's business would unjustly and inequitably enrich defendants at Byrd's expense. See Schroeder v Pinterest, Inc., 133 AD3d 12, 26 (1st Dept 2015) ("[The elements of unjust enrichment are] (1) the [defendant] was enriched, (2) at [plaintiff's] expense, and (3) that it is against equity and good conscience to permit the [defendant] to retain what is sought to be recovered"). In their motion to

dismiss, defendants argue that a party may not recover for unjust enrichment when they have entered into a contract that governs the subject matter.” Pappas v Tzolis, 20 NY3d 228, 234 (2012). However, the verbal contract between Byrd and Weiss does not govern the sale of Byrd’s Business. The verbal contract is a partnership agreement between Byrd and Weiss to run Longevity for Life Inc. jointly, making no mention of Byrd intending to sell his assets to Weiss. Therefore, as Weiss has allegedly benefitted at Byrd’s expense for far more than the contract dictated, plaintiff has stated a cause of action for unjust enrichment.

Plaintiff has stated a cause of action for conversion. In his complaint, Byrd states that defendants took Byrd’s property (his business), and denied him his right to that property. See Pappas, 20 NY3d at 234 (“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”). Byrd contends that he was no longer able to access his business and its bank and social media accounts due to the fact that the defendants took it from him without his permission.

Byrd’s also claims that defendants conspired to convert his property. Defendants allegedly conspired to forge the contract, and participated in its forgery to convert Byrd’s business. See Abacus Fed. Sav. Bank v Lim, 75 AD3d 472, 473 (1st Dept 2010) (“The following four elements [of civil conspiracy are] (1) an agreement between two or more parties, (2) an overt act in furtherance of the agreement, (3) the parties’ intentional participation in the furtherance of a plan or purpose, and (4) resulting damage or injury”). Here, the overt act is the alleged forgery. Additionally, defendants’ participation in the conspiracy is allegedly intentional. Also, as stated in Byrd’s complaint, Byrd suffered damages. Therefore, Byrd has stated a conspiracy to convert.

Byrd has stated a cause of action for breach of contract against Weiss. According to the complaint, a verbal contract existed between the two. Byrd performed his part of the contract, staying with Longevity for Life Inc. as chief creative director. However, Weiss allegedly did not fully perform her duties as stated in the contract. She stopped paying Byrd’s monthly salary prematurely and did not pay off his debts. See VisionChina Media Inc. v Shareholder Representative Servs., LLC, 109 AD3d 49,

58 (1st Dept 2013) (“To state a claim for breach of contract, a plaintiff must allege: (1) the parties entered into a valid agreement; (2) plaintiff performed; (3) defendant failed to perform; and (4) damages”). Thus, plaintiff has stated a cause of action for breach of contract. In any event, defendants do not dispute that Byrd has stated a contract cause of action.

NY Law Exec § 135 provides that for “any misconduct by a notary public in the performance of any of his [or her] powers such notary public shall be liable to the parties injured for all damages sustained by them”. NY Law Exec § 135. The law provides for a private right of action for defendants only if there are facts present that establish “that the alleged impropriety caused plaintiff to sustain damages”. Amodei v New York State Chiropractic Ass'n, 160 AD2d 179, 281 (1st Dept 1990). Here, Byrd has plead a cause of action against the notary, Lazaar, stating that due to Lazaar’s alleged false notarization Byrd has been damaged, because the fake contract has helped defendants steal Byrd’s business.

Byrd’s purported cause of action for misrepresentation against Weiss cannot stand. Byrd alleges that Weiss made representations to him that were materially false, including: indicating to Byrd that the two would be partners; assuring Byrd that Weiss would pay all of Byrd’s debts; and indicating that Weiss wanted to help Byrd because Weiss knew Byrd was having personal issues and Weiss sympathized with him. Byrd claims that he relied on these and other misrepresentations made by Weiss, causing him significant and specific harm. However, courts have routinely dismissed claims of misrepresentation when the facts for this claim and the damages requested for it are duplicate of those of a breach of contract claim. Cronos Group Ltd. v XComIP, LLC, 156 AD3d 54, 62 (1st Dept 2017). Courts have held that a contract action cannot be converted to one for fraud merely by alleging that the contracting party did not intend to meet its contractual obligations. Id. Here, the facts in support of the misrepresentation cause of action are exactly the same as the facts in support of the breach of contract cause of action. Therefore, dismissal for this cause of action is granted.


Byrd requests that the Court award punitive, not just general, damages. Punitive damages are only awarded in response to conduct that is “(1) egregious, (2) directed at the plaintiff and (3) part of a

pattern of similar conduct directed at the public at large”. Seynaeve v Hudson Moving & Storage Inc., 261 AD2d 168, 168 (1st Dept 1999). Additionally, for a breach of contract, punitive damages are only available where the breach involves “a high degree of moral turpitude and demonstrates such wanton dishonesty so as to imply a criminal indifference to civil obligations.” Mulder v Donaldson, Lufkin, and Jenrette, 208 AD2d 301, 308 (1st Dept 1995). The conduct of defendants that Byrd alleges does not satisfy the third element required to receive punitive damages. Seynaeve AD2d at 168. The pattern of activity of defendants’ conduct is only directed towards Byrd, not the public at large. Id. Also, “a technical conversion may not involve moral turpitude”. Johnson v Isaacs, 149 AD 640, 640 (1st Dept 1912). Therefore, punitive damages for Byrd are denied.

Conclusion

Defendants’ requests to dismiss Byrd’s cause of action for misrepresentation and to strike plaintiff’s claim for punitive damages is granted. However, defendants’ requests to dismiss plaintiff’s causes of action for unjust enrichment, breach of contract, conversion (including conspiracy), and breach of a notary’s legal duty is denied.

Dated: June 7, 2018



Arthur F. Engoron, J.S.C.