

Vlachos v Thomas

2018 NY Slip Op 31355(U)

June 27, 2018

Supreme Court, New York County

Docket Number: 152087/2017

Judge: Jennifer G. Schechter

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK -
NEW YORK COUNTY**

PRESENT: JENNIFER G. SCHECTER
Justice

PART 54

VLACHOS, JOHN

INDEX NO. 152087/2017

MOTION DATE

- v -

THOMAS, BRADLEY A.

MOTION SEQ. NO. 001

The following papers, numbered 1 to	<u>3</u>	were read on this motion to/for	<u>DISMISS</u>
Notice of Motion/Order to Show Cause - Affidavits - Exhibits	.....	No(s)	<u>1</u>
Answering Affidavits - Exhibits	.....	No(s)	<u>2</u>
Replying Affidavits	.....	No(s)	<u>3</u>
Cross Motion	.....		<u>No</u>

Upon the foregoing papers, it is ordered that this motion is

GRANTED IN PART. Pursuant to CPLR 3211, defendants Bradley A. Thomas (Thomas) and Akili Club, Inc (Akili), move to dismiss plaintiff's complaint.* The motion is granted in part.

Background

The facts alleged in the verified complaint are accepted as true for purposes of this motion to dismiss.

John Vlachos (Vlachos) is a 90-year-old man who lives alone (Affirmation in Support [Sup], Ex A [Complaint] at ¶ 30). In May 2016, he was diagnosed with a neurodegenerative disorder consistent with Alzheimer's disease (*id*).

Bradley Thomas is a personal trainer providing services through various gyms (Complaint at ¶¶ 34-36).

* Peter Athineos is a life-long friend of Vlachos and was his business partner for years (Complaint at ¶ 31). Athineos is Vlachos' designated agent by virtue of a power of attorney (*id.*). Vlachos acknowledges that he is not a proper party to this action (see NYSCEF DOC. NO. 14).

Thomas and Vlachos met in 2010, at a gym where Thomas worked as Vlachos' personal trainer (Complaint at ¶¶ 8, 39-41). They became friends and engaged in social activities together (*id.* at ¶ 9). At the time, Thomas also worked at a capital management firm (Firm) (*id.* at ¶ 43). Early in their relationship, Thomas persuaded Vlachos to make investments in a fund managed by the Firm (*id.* at ¶ 43).

Vlachos alleges that, in 2015, Thomas noticed that he was exhibiting early signs of forgetfulness and began taking advantage of him (Complaint at ¶¶ 10-11). Specifically, Vlachos pleads that Thomas encouraged him to withdraw money from his account at the Firm for Thomas' "personal use to help him start his own business" (*id.* at ¶ 44). Vlachos gave Thomas \$60,000 in August 2015, \$201,300 in September 2015 and another \$325,000 in May 2016 (*id.* at ¶¶ 44, 51, 57). All three times, Vlachos made the payments to Akili, which Thomas had allegedly formed solely for purposes of receiving Vlachos' funds (*id.* at ¶¶ 12-13, 37).

Vlachos pleads that (1) none of the money was given to Thomas as a gift, (2) the money was loaned to Thomas and (3) he never forgave Thomas' obligation to repay the money (*id.* at ¶¶ 47-48, 54-55, 60-61).

According to the complaint, "in December 2015, and perhaps on two other occasions, Thomas made an installment payment of \$3,266.25 to Vlachos toward repayment of the two payments Vlachos made to him in August and September 2015" and Thomas also agreed to provide Vlachos with 25 "complimentary" training sessions for which he would typically charge \$2,500 (*id.* at ¶¶ 56, 59). Other than that, "defendants have failed and refused to repay [Vlachos] for any of the money he gave to Thomas by making payments to Akili" (*id.* at ¶ 62).

In July 2016, Vlachos stopped working out with Thomas "after it was discovered he had been fraudulently induced by Thomas to unwittingly pay substantial sums of money to him without any documentation of the reason for the payments or of Thomas' obligation to pay the money back" (*id.* at ¶ 42).

In 2017, Vlachos commenced this action. He asserts four causes of action, three of which are dismissed in response to defendants' motion. Vlachos has sufficiently stated a viable unjust enrichment cause of action.

Analysis

On a motion to dismiss pursuant to CPLR 3211, the pleading is afforded liberal construction and the facts as alleged are accepted as true (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Plaintiffs are afforded the benefit of every possible inference and the court only determines whether the facts as alleged fit within any cognizable legal theory (*id.*).

Vlachos' **first cause of action**, which seeks recovery for fraud, is dismissed. The only facts alleged in support of the claim are that (1) "Thomas said he would use the money to help him establish his own business" but "all or substantially all of the funds" were never used for that purpose and (2) "despite promising to fully repay Vlachos, Thomas had no intention of doing so" (Complaint at ¶¶ 65-66, 69). This claim is redundant of plaintiff's unjust enrichment claim because it is predicated on the existence of an independent legal obligation that Vlachos is alleged not to have intended to honor (*cf. Cronos Group Ltd. v XComIP, LLC*, 156 AD3d 54, 62 [1st Dept 2017]).

The **second cause of action**, which seeks recovery for "breach of obligation to repay Vlachos" (Complaint at 12), is also dismissed. Plaintiff acknowledges that he is unaware of any enforceable agreement between the parties and only pleaded this cause of action hypothetically and alternatively in case during discovery he learns of the existence of an enforceable agreement (see Memorandum of Law in Opposition [Opp] at 5 ["in the Second Cause of Action, [plaintiff does] not allege a contract was formed, but only addresses the existence of a contract hypothetically because, among other things, material terms are not established"], 11-12). If plaintiff discovers the existence of an enforceable agreement with terms, then he may later properly move to amend the complaint.

Plaintiff's **third cause of action** seeks a judgment declaring that "any alleged forgiveness of the obligation to repay the amounts given by John Vlachos to defendants [is] void from the inception and awarding plaintiff John Vlachos recovery in full of the amounts paid to defendants, less any amounts repaid plus interest at the statutory rate" (Complaint at "WHEREFORE"). This cause of action is dismissed as duplicative (to the extent that it seeks money damages) and unnecessary (to the extent that it seeks declaratory relief). The critical question in this case will be whether in equity and good conscience defendants are required to make restitution for the money that they received from Vlachos.

To the extent that plaintiff seeks a money judgment for the amounts that he allegedly gave defendants, if he proves his fourth cause of action (and defendants fail to prove viable affirmative defenses or counterclaims if any), Vlachos will recover. In the end, plaintiff ultimately wants monetary relief and this action will resolve whether he is entitled to it.

In contrast, plaintiff's **fourth cause of action**, which seeks recovery against defendants for unjust enrichment, is viable. Plaintiff sufficiently pleads that defendants took advantage of him and were enriched at his expense under circumstances such that it would be against good equity and good conscience to permit them to retain his funds (see *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]). Vlachos alleges that he gave defendants money based on Thomas' promise that it would be repaid, that Thomas repaid some of the funds (evidencing the obligation) but that defendants have refused to repay hundreds of thousands of dollars that remain outstanding. That is enough to state a claim.

Accordingly, it is

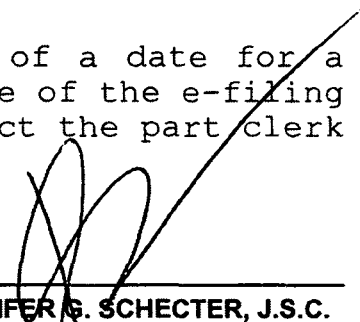
ORDERED that Peter Athineos be removed from the caption of this case and defendants are to serve a copy of this order on the County Clerk and on the Clerk of the Trial Support Office who are directed to mark the court's records to reflect that Peter Athineos is not a plaintiff; it is further

ORDERED that defendants' motion to dismiss is granted to the extent that the first (fraud), second (breach of obligation to repay) and third (declaratory judgment) causes of action are dismissed; it is further

ORDERED that defendants must answer the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that, if the parties are not notified of a date for a preliminary conference within 30 days of the date of the e-filing of this decision and order, counsel are to contact the part clerk for **part 33** to request a conference date.

DATED: 6/27/2018



JENNIFER G. SCHECTER, J.S.C.

- 1. CHECK ONE : CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE : MOTION IS : GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE : SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE