

**Marc J. Bern & Partners LLP v U.S. Legal Support,
Inc.**

2018 NY Slip Op 32831(U)

October 31, 2018

Supreme Court, New York County

Docket Number: 157566/2017

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
Part 57**

-----X
MARC J. BERN & PARTNERS LLP

Plaintiff(s)

Index no. 157566/2017

-against-

DECISION/ORDER

**U.S. LEGAL SUPPORT, INC. AND
PAUL LUCIDO**

Motion Sequence No. 1

Defendant(s)

-----X

Recitation, as required by CPLR § 2219(a), of the papers considered on the review of this motion to dismiss pursuant to CPLR § 3211(a)(7)

PAPERS

NUMBERED

- Notice of Motion and Affidavits
and Exhibits Annexed** **1**
- Answering Affidavits and
Exhibits Annexed** **2**
- Replying Affidavits and Exhibits Annexed
Sur-Reply Affidavits**

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

U.S. Legal Support, Inc. (**U.S. Legal**) and Paul Lucido’s motion to dismiss pursuant to CPLR § 3211(a)(7) is granted in its entirety for the reasons set forth below.

The Relevant Facts and Circumstances

U.S. Legal provides litigation and trial services to major corporations and law firms nationwide. More specifically, U.S. Legal provides court reporting, record retrieval, eDiscovery, and trial services. Mr. Lucido is a salesman for U.S. Legal. Marc J. Bern & Partners LLP (the **Plaintiff**) is a law firm – well known to the New York State Bar and the court system.

The Plaintiff brought this lawsuit against U.S. Legal and Mr. Lucido alleging that invoices issued to it were fraudulent and demanded cancellation of the same and return of \$286,517.18 paid on account of those fraudulent invoices between November and December, 2016.

Plaintiff U.S. Legal alleges multiple causes of action, to wit: (1) unlawful deceptive acts and practices (N.Y. General Business Law § 349) (first cause of action), (2) common law fraud (second cause of action), (3) unjust enrichment (fifth cause of action), (4) that the Defendants are entitled to a declaratory judgment (sixth cause of action) and (5) damages for breach of contract (seventh cause of action). Plaintiff Mr. Lucido, alleges (1) common law fraud (third cause of action) and (2) negligent misrepresentation (fourth cause of action). Essentially, Plaintiff claims (i) that Mr. Lucido promised the Plaintiff that it would not be required to pay for court reporting services unless Plaintiff was successful in obtaining a recovery and (ii) that U.S. Legal charged them for fees never agreed upon. The Defendants have moved to dismiss pursuant to CPLR § 3211(a)(7) with respect to the first, second, third, fourth, fifth, and sixth cause of action. For the avoidance of doubt, the Defendants did not move to dismiss the breach of contract claim (seventh cause of action).

A motion to dismiss should be denied if the facts as alleged fit within any cognizable legal theory. The burden is on the moving party to establish that the non-moving party has failed to present a viable cause of action, or that the cause of action alleged does not apply to the facts stated in the complaint. *Nonnon v. City of New York*, 9 N.Y.3d 825, 827, 842 N.Y.S.2d 756, 874 N.E.2d; see *Leon v. Martinez*, 84 N.Y.2d 83, 87–88, 614 N.Y.S.2d 972, 638 N.E.2d 511; see *Wieder v. Skala*, 80 NY 2d 628, 633.

I. Unlawful Deceptive Acts and Practices (New York General Business Law § 349) Claim against U.S. Legal (First Cause of Action)

A claim based on a violation of New York General Business Law § 349 requires (i) a deceptive consumer-oriented act or practice which is misleading in a material respect and (ii) injury resulting from such act. *Stutman v. Chemical Bank*, 95 NY2d 24, 29, 731 N.E.2d 608, 709 N.Y.S.2d 892 (2000). An act is deceptive if is likely to mislead a reasonable consumer acting reasonably under the circumstances. *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, 85 NY2d 20, 26, 647 N.E.2d 741, 623 N.Y.S.2d 529). The first cause of action must be dismissed because there simply are no allegations that the Defendants acts were deceptively “consumer-oriented.” The dispute in front of the Court arises solely

out of the business arrangement between the Defendants and the Plaintiff. Accordingly, the claim for unlawful deceptive acts and practices (New York General Business Law § 349) is dismissed.

II. Common Law Fraud against U.S Legal and Mr. Lucido (Second and Third Causes of Action)

The Defendant in this action argues that common law fraud claim against Mr. Lucidio and against U.S. Legal must be dismissed because the Plaintiff has failed to plead with particularity the basis of the alleged fraud.

CPLR § 3016(b) requires that fraud must be plead with particularity setting forth the details underlying the cause of action. *Stein v. Doukas*, 951 N.Y.S 2d 173 (2nd Dep't 2012); CPLR § 3016(b). Under New York law, a Plaintiff alleging fraud must plead: (1) a material misrepresentation or omission of fact (2) made by defendant with knowledge of its falsity (3) and intent to defraud (4) reasonable reliance on the part of the plaintiff; and (5) resulting damage to the plaintiff. *Crigger v. Fahnestock & Co.*, 443 F.3d 230, 234 (2d Cir. 2006); *Premium Mortgage Corp. v. Equifax, Inc.* 583 F.3d 103, 108 (2d Cir. 2009); *Lama Holding Co. v. Smith Barney, Inc.*, 88 N.Y.2d 413 (1996).

According to the complaint, the Plaintiff alleges that Mr. Lucido fraudulently induced the Plaintiff to form a business relationship by making the alleged unwritten promise that U.S. Legal would not charge the Plaintiff for services rendered unless the Plaintiff was successful in its litigation. It also alleges that U.S. Legal committed fraud by including charges in its invoices to which the Plaintiff had not agreed.¹ The argument however fails. Even taking the allegations set forth in the complaint as true and giving the Plaintiff every favorable inference, there is no credible basis upon which to find a cognizable legal theory under which the Plaintiff could maintain a claim of fraud as against either Mr. Lucido or U.S. Legal.

Under N.Y. General Obligations Law § 05-1507, an agreement which by its terms may not be performed in one year must be in writing. Moreover, if the Plaintiff only had to pay the Defendants if successful, then Plaintiff has entered into a contingent fee splitting agreement with a non-lawyer, which is unenforceable. *Bonilla v. Rotter*, 829 N.Y.S.2d 52 (1st Dep't 2007); *Ungar v. Matarazzo Blumberg*

¹ Complaint ¶46, ¶47, ¶48, and ¶58.

& Associates, PC, 688 N.Y.S.2d 588 (2d Dept' 1999); Rule 5.4 of New York's Code of Professional Responsibility; *Taylor-Burns v. AR Resources, Inc.*, No. 16 Civ. 1259(RWS), F. Supp 3d_, 2017 WL 3034353 (S.D.N.Y. July 17, 2017).

The Plaintiff in this case is sophisticated. It is simply not credible that the Plaintiff did not know that the contingent or springing obligation to pay the invoices, which Plaintiff alleges that it had, would have needed to be in writing and that any such deal would run afoul of its professional responsibility obligations. *Bonilla v. Rotter, supra*.

Accordingly, the second and third claims for common law fraud are dismissed.

III. Negligent Misrepresentation against Mr. Lucido (Fourth Cause of Action)

Under New York law, negligent misrepresentation requires: (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff (re: a fiduciary relationship and not merely an ordinary arms-length business transaction); (2) that the information was incorrect; and (3) reasonable reliance on the information. *Kimmel v. Schaefer*, 89 N.Y.2d 257 (1996); *J.A.O. Acquisition Corp. v. Stavitsky*, 8 N.Y.2d 144 (2007); *Lantau Holdings Ltd. V. Orient Equal Int'l Group Limited*, 161 A.D.3d 714 (1st Dep't 2018); *White v. Guarente*, 43 N.Y.2d 356 (1977); *Tuosto v. Philip Morris USA, Inc.* No 05 Civ. 9384 (PKL), 2007 WL 2398507 *15 (S.D.N.Y. Aug. 21, 2007); *EED Holdings v. Palmer Johnson Acquisition Corp.*, 387 F. Supp. 2d 265, 281 (S.D.N.Y. 2004); *Johnson v. Levin*, 83 N.Y.S.3d 886 (2018).

In this case, the Plaintiff fails to assert any special or privity-like relationship. Rather, Plaintiff pleads only that it had a relationship of "trust and confidence" with Mr. Lucido.² Mr. Lucido however is an employee and disclosed agent of U.S. Legal. Nothing suggests or is even alleged that the Plaintiff and Mr. Lucido's relationship was anything more than an arms-length business transaction. Accordingly, the claim for negligent misrepresentation against Mr. Lucido is dismissed.

² Complaint ¶13, ¶14 and ¶72.

IV. Unjust Enrichment Claim against U.S. Legal (Fifth Cause of Action)

It is well settled that a claim of unjust enrichment cannot be merely plead on the same facts as a breach of contract claim. *Curtis Properties Corp. v. Greif Companies*, 236 Ad2d 237, 239 (1st Dept' 1997); *Brown v. Brown*, 12 AD3d 176, 176 (1st Dep't 2004). Here, the Plaintiff has properly plead a claim based on breach of contract alleging that U.S. Legal breached its obligations by failing to respond to and fill record requests in a timely manner, charging the Plaintiff for services it did not authorize, and charging the Plaintiff for services that it failed to perform properly.³ Accordingly, the Plaintiff's claim for unjust enrichment is dismissed.

V. Declaratory Judgment against U.S. Legal (Sixth Cause of Action)

Under New York law, a party may not seek a declaratory judgment when other remedies are available. *Cronos Group Ltd*, supra (citing *Singer Asset Finance Co., LLC v. Melvin*, 33 A.D.3d 355 (1st Dep't 2006); *Artech Information Systems, LLC v. Tee*, 280 A.D.2d 117 (1st Dept 2001); *Apple Records, Inc. v. Capitol Records, Inc.*, 137 A.D.2d 50 (1st Dep't 1988). Inasmuch as there remains a cause of action for breach of contract against U.S. Legal, and in view of the fact that the Plaintiff's opposition papers do not address or oppose dismissal of this cause of action, the claim for a declaratory judgment is dismissed.

Accordingly, (i) the Defendant's motion to dismiss as to U.S. Legal, is granted in its to the extent that causes of action one, two, three, four, five, and six are dismissed, (ii) the Complaint and each of its causes of action are dismissed against Mr. Lucido, (iii) the Defendants are ordered to file an answer to the remaining claim within 20 days of this order, (iv) a Preliminary Conference is scheduled for December 5, 2018 at 2:30pm, and (v) the Clerk is directed to amend the caption of the case as follows:

MARC J. BERN & PARTNERS LLP

Plaintiff(s)

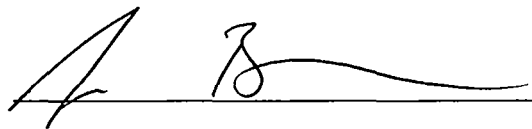
-against-

U.S. LEGAL SUPPORT, INC.

Defendants (s)

³ Complaint ¶90.

This constitutes the decision and order of this Court.

A handwritten signature in black ink, consisting of a stylized 'A' followed by a 'B' and a long horizontal flourish, positioned above a solid horizontal line.

Dated: October 31, 2018

Hon. Andrew Borrok, J.S.C.