

Samsara Settlement Funding, LLC v Gabel
2018 NY Slip Op 33867(U)
April 4, 2018
Supreme Court, Suffolk County
Docket Number: 617276/2017
Judge: Joseph A. Santorelli
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ORIGINAL

SHORT FORM ORDER

INDEX No. 617276/2017
CAL No. _____

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 10-9-17
SUBMIT DATE 2-22-18
Mot. Seq. # 01 - MD

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SAMSARA SETTLEMENT FUNDING, LLC,
and STAR LEGAL ADVANCES FUND, LP,

Plaintiffs,

-against-

WANDA GABEL, JON GABEL,
CHRISTOPHER J. CASSAR, ESQUIRE, and
the LAW OFFICES OF CHRISTOPHER J.
CASSAR,

Defendants.

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Upon the following papers numbered 1 - 52 read on this motion to dismiss; Notice of Motion/ Order to Show Cause and supporting papers 1 - 14; ~~Notice of Cross Motion and supporting papers _____~~; Answering Affidavits and supporting papers 15 - 45; Replying Affidavits and supporting papers 46 - 52; ~~Other _____~~; (and after hearing counsel in support and opposed to the motion) it is,

Defendants, Law Office of Christopher J. Cassar P.C. and Christopher J. Cassar, Esq., hereinafter collectively referred to as "Cassar defendants", move for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the plaintiffs' complaint: (1) "due to violations of New York's usury laws"; or alternatively, (2) dismissing the eleventh and twelfth causes of action as duplicative; and (3) dismissing the fifth, sixth, seventh, and eighth causes of action based upon conversion and aiding and abetting conversion. Plaintiffs oppose the motion in all respects and claims that there is a genuine issue of fact that requires further discovery as to whether the defendants received settlement proceeds that should have been repaid to the plaintiffs before other distributions were made.

The plaintiffs commenced this action to recover monies that were advanced to defendants, Wanda Gabel and Jon Gabel as part of a litigation finance agreement. The Gabel defendants entered into the litigation finance agreement which was allegedly signed by both Wanda Gabel and her attorney at the

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time, Ian Chaikin, Esq., of Paris and Chaikin, on or about May 20, 2010. Subsequent to the agreement being signed the plaintiffs advanced funds for the litigation. On or about November 2014, the Gabel defendants changed attorneys on the pending civil action and retained the Cassar defendants. It is alleged that the Cassar defendants were given notice of the liens of the plaintiffs on any potential proceeds of the litigation. The plaintiffs claim that in November 2015 the underlying civil matter was settled by the Cassar defendants and a Stipulation of Dismissal was filed. Attorney Chaikin sent the Cassar defendants a letter, dated September 22, 2016, requesting a closing statement for the settled civil matter and again advising the Cassar defendants of the existing liens on the litigation. It is alleged that the Cassar defendants disbursed the proceeds of the settlement without repaying the liens. The plaintiffs claim that they have requested repayment and copies of the settlement documentation on numerous occasions but the Cassar defendants have failed to provide any documentation except for an email response indicating that “there was no money paid to Ms. Gabel. This case settled for 25k but I will confirm amount with my bookkeeper.”

To succeed on a motion to dismiss pursuant to CPLR 3211 for failure to state a cause of action, the court must determine whether, accepting as true the factual averments of the complaint and granting plaintiffs every favorable inference which may be drawn from the pleading, plaintiff can succeed upon any reasonable view of the facts stated (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 754 NE2d 184, 729 NYS2d 425 [2001]; see also *Fowler, Rodriguez, Kingsmill, Flint, Gray & Chalos LLP v Island Prop., LLC*, 307 AD2d 953, 763 NYS2d 481 [2d Dept 2003], *Bartlett v Konner*, 228 AD2d 532, 644 NYS2d 550 [2d Dept 1996]). If 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, a motion for dismissal will fail (see *Wayne S. v County of Nassau Dept. of Social Services*, 83 AD2d 628, 441 NYS2d 536 [2d Dept 1981]). The documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim (see *Estate of Menon v Menon*, 303 AD2d 622, 756 NYS2d 639 [2d Dept 2003], citing *Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 NE2d 511, *Roth v Goldman*, 254 AD2d 405, 406, 679 NYS2d 92).

In the context of a CPLR 3211 motion to dismiss, the Court must take the factual allegations of the complaint as true, consider the affidavits submitted on the motion only for the limited purpose of determining whether the plaintiff has stated a claim, and in the absence of proof that an alleged material fact is untrue or beyond significant dispute, the Court must not dismiss the complaint (*Wall Street Assocs. v Brodsky*, 257 AD2d 526, 684 NYS2d 244 [1st Dept 1999], citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 634-636). In making a determination whether the complaint sets forth a cognizable claim, evidentiary material may be considered to “remedy defects in the complaint” (see *Dana v Shopping Time Corp.*, 76 AD3d 992, 908 NYS2d 114 [2d Dept 2010], quoting *Rovello v Orofino Realty Co.*, *supra* at 40 NY2d at 636).

In *Conklin v Owen*, 72 AD3d 1006, 1007 [2nd Dept 2010], the Court held that

the Supreme Court should have granted those branches of the defendants' motion which were for summary judgment dismissing

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the plaintiff's second cause of action to recover damages for breach of contract and third cause of action to recover damages for negligent representation, since these causes of action arise from the same facts as his legal malpractice cause of action and are duplicative of that cause of action (see *Sitar v Sitar*, 50 AD3d 667, 670, 854 NYS2d 536 [2008]; *Shivers v Siegel*, 11 AD3d 447, 782 NYS2d 752 [2004]; *Malarkey v Piel*, 7 AD3d 681, 776 NYS2d 845 [2004]; *Mecca v Shang*, 258 AD2d 569, 685 NYS2d 458 [1999]).

Similarly, in *Stuart v Robert L. Folks & Assoc., LLP*, 106 AD3d 808, 809 [2nd Dept 2013], the Court held that the Supreme Court properly directed the dismissal of the breach of contract cause of action because it was duplicative of the legal malpractice cause of action.

CPLR § 3211(d) states

Should it appear from affidavits submitted in opposition to a motion made under subdivision (a) or (b) that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion, allowing the moving party to assert the objection in his responsive pleading, if any, or may order a continuance to permit further affidavits to be obtained or disclosure to be had and may make such other order as may be just.

The Court in *Peterson v Spartan Indus., Inc.*, 33 NY2d 463, 466 [1974], held that

The practice under CPLR 3211 (subd. [d]) is quite analogous. (See *Potter Real Estate Co. v. O & S Bearing & Mfg. Co.*, 32 A D 2d 883.) It protects the party to whom essential jurisdictional facts are not presently known, especially where those facts are within the exclusive control of the moving party. The opposing party need only demonstrate that facts "may exist" whereby to defeat the motion. It need not be demonstrated that they do exist. This obviously must await discovery.

Here the plaintiffs have shown that there was a settlement in the underlying civil litigation wherein proceeds were received by the Cassar defendants and forwarded to at least one of the Gabel defendants without repayment of the underlying litigation liens. The plaintiffs are entitled to discovery of the settlement documentation as part of this litigation.

The Court concludes that, accepting as true the factual averments of the complaint and granting plaintiffs every favorable inference which may be drawn from the pleading, the plaintiffs have pled causes of action cognizable at law. The Court has reviewed the breach of contract and breach of fiduciary duty causes of action and does not find them duplicative. The first cause of action for breach of contract relates solely to the Gabel defendants, while the eleventh and twelfth causes of action for

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breach of fiduciary duty relate solely to the Cassar defendants. Therefore the Cassar defendants' motion to dismiss is denied in all respects. It is

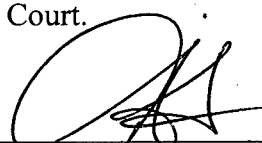
ORDERED, that the Cassar defendants shall serve their answer within twenty (20) days from service of a copy of this order; and it is further

ORDERED that a preliminary conference is hereby scheduled to be held on **Thursday, June 7, 2018 at 10:00 a.m.**, in the DCM courtroom 338 of the Hon. Alan D. Oshrin Supreme Court Building, 1 Court Street, Riverhead, New York. Counsel for the respective parties in this action are directed to appear at that time. It is further

ORDERED that counsel for the plaintiff is directed to serve a copy of this order upon any pro se defendants and defendants' attorneys by ordinary mail at their last known addresses.

The foregoing shall constitute the decision and Order of this Court.

Dated: April 4, 2018



HON. JOSEPH A. SANTORELLI
J.S.C.

___ FINAL DISPOSITION X NON-FINAL DISPOSITION