

Spivack v Pinker

2018 NY Slip Op 34585(U)

June 19, 2018

Supreme Court, Rockland County

Docket Number: Index No. 0034788/2017

Judge: Sherri L. Eisenpress

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

-----X
JOEL SPIVACK,

DECISION AND ORDER

Plaintiff,

-against-

Index No. 0034788/2017

BRUCE PINKER,

(Motion #1)

Defendant.

-----X
Sherri L. Eisenpress, J.

The following papers, numbered 1 to 5, were considered in connection with the Defendant's Notice of Motion for an Order, pursuant to Civil Practice Law and Rules § 3211, dismissing the first through fourth and sixth through thirteenth causes of action in the Verified Complaint dated October 3, 2017, on the grounds that Plaintiff has failed to state a claim upon which relief may be granted:

<u>PAPERS</u>	<u>NUMBERED</u>
NOTICE OF MOTION/AFFIRMATION IN SUPPORT/MEMORANDUM OF LAW/ EXHIBITS "A-B"	1-3
AFFIRMATION IN OPPOSITION BY PLAINTIFF/EXHIBIT "A"	4
AFFIRMATION IN REPLY/EXHIBIT "A"	5

Upon a careful and detailed review of the foregoing papers, the Court now rules as follows:

Plaintiffs filed a Summons and Complaint through the NYSCEF system on October 3, 2017. The Complaint alleges fifteen causes of action: (1) breach of fiduciary duty, (2) fraudulent conveyance; (3) conversion; (4) unjust enrichment; (5) breach of contract; (6) gross mismanagement; (7) fraudulent mismanagement; (8) fraudulent use of power as a manager to deny rights to proceeds; (9) negligence; (10) theft of corporate opportunity; (11) tortious interference with contract; (12) accounting; (13) permanent injunction; (14) forgery by check; and (15) forgery by letter.

In sum and substance, Plaintiff alleges that in October 2013, defendant Bruce Pinker ("Dr. Pinker"), a podiatrist, purchased the assets of two medical practices owned by plaintiff, Joel Spivack ("Dr. Spivack"), also a podiatrist, pursuant to a written Sale Agreement ("Agreement") entered into on June 24, 2013. Pursuant to the Agreement, Dr. Pinker agreed to purchase the equipment, list of patients, accounts and good will of Dr. Spivack. The purchase price payable to Dr. Spivack under the sales agreement was \$210,000.00. Paragraph 2 of the Sale Agreement provided that Dr. Spivack would "continue to own and operate said podiatric medical business up to and including the time Dr. Pinker takes ownership and occupancy of said business up to the time of closing. Dr. Spivack will receive all proceeds emanating from said podiatric medical business up to that time and shall pay all expenses of said business up to the time of closing. The closing of the Sale Agreement took place on October 1, 2013.

Dr. Spivack, in his Complaint, alleges that Dr. Pinker breached the Sale Agreement by "not conveying all earned or received proceeds collected for the Plaintiff from said podiatric medical business up to the time of closing." The action contains fifteen causes of action, thirteen of which share the same basic allegation- that Dr. Pinker failed to pay over to Dr. Spivack all proceeds of the podiatric business earned prior to the closing- and each cause of actions seeks the same \$250,000 plus statutory prejudgment interest from June 24, 2013, in damages.

Defendants filed the instant pre-answer motion to dismiss the First through Fourth and Sixth through Thirteenth Causes of Action, arguing that the complaint fails to state a cause of action upon which relief can be granted. On a motion to dismiss for failure to state a cause of action [§ 3211(a)(7)], the Court initially must accept the facts alleged in the complaint as true and then determine whether those facts fit within any cognizable legal theory, irrespective of whether the plaintiff will likely prevail on the merits. Campaign for Fiscal Equity, Inc. v. State, 86 N.Y.2d 307, 318, 631 N.Y.S.2d 565 (1995); Leon v. Martinez, 84 N.Y.2d 83,

87-88, 614 N.Y.S.2d 972 (1994); People v. New York City Transit Authority, 59 N.Y.2d 343, 348, 465 N.Y.S.2d 502 (1983); Morone v. Morone, 50 N.Y.2d 481, 429 N.Y.S.2d 592 (1980); Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 274-275, 401 N.Y.S.2d 182 (1977); Cavanaugh v. Doherty, 243 A.D.2d 92, 98, 675 N.Y.S.2d 143 (3d Dept. 1989); Klondike Gold, Inc. v. Richmond Associates, 103 A.D.2d 821, 478 N.Y.S.2d 55 (2d Dept. 1984). The complaint must be given a liberal construction and will be deemed to allege whatever cause of action can be implied by fair and reasonable reading of same. Shields v. School of Law of Hofstra University, 77 A.D.2d 867, 431 N.Y.S.2d 60 (2d Dept. 1980); Penato v. George, 52 A.D.2d 939, 383 N.Y.S.2d 900 (2d Dept. 1976).

First Cause of Action

The First Cause of Action is one for Breach of Fiduciary Duties. Plaintiff alleges that Defendant had a fiduciary duty to Plaintiff; that Defendant signed the Sale Agreement to purchase from Plaintiff equipment and good will, as well as a restrictive covenant regarding the businesses; that per the Agreement, Plaintiff was to receive all proceeds emanating from the business in the billing and assignment up to the time of closing and that Defendant breached his fiduciary duties to Plaintiff in refusing to account or make such payments in accordance with the agreement; in that he willfully failed to fully and accurately account for and report all financial transactions as required by the Agreement and that he failed to report to Plaintiff the transactions as required in accordance with the Agreement. He further alleges that Defendant breached his duties by not paying Plaintiff the earned proceeds and that he wrongfully denied Plaintiff the right to the earned proceeds as specified in the billing.

Defendant argues that this cause of action must be dismissed because the breach of Fiduciary Duty claim is based on the same facts, and seeks the same damages, as the breach of contract claim contained in the Fifth Cause of Action. In opposition, Plaintiff argues that he is permitted to argue alternative theories of liability. A fiduciary relationship "exists between two persons when one of them is under a duty to act for or to give advice for the benefit of

another upon matters within the scope of the relations." EBC I, Inc. V. Goldman, Sachs & Co., 5 N.Y.3d 11, 19, 799 N.Y.S.2d 170 (2005). "Such a relationship, necessarily fact-specific, is grounded in a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions." Id. "Generally, where parties have entered into a contract, courts look to that agreement 'to discover...the nexus of [the parties'] relationship and the particular contractual expression establishing the parties' interdependency." Id. at 20. "If the parties ...do not create their own relationship of higher trust, courts should not ordinarily transport them to the higher realm of relationship and fashion the stricter duty for them." Id.

A breach of fiduciary claim is properly dismissed where the agreement "cover[s] the precise subject matter of the alleged fiduciary duty", and is also duplicative of the breach of contract cause of action. Celle v. Barclays Bank PLC, 48 A.D.3d 301, 302, 851 N.Y.S.2d 500 (1st Dept. 2008). In Brooks v. Key Trust Co. Natl. Assn. 26 A.D.3d 628, 630, 809 N.Y.S.2d 270 (3d Dept. 2006), the Court dismissed the fiduciary duty claim since the "claims were expressly raised in plaintiff's breach of contract claim or encompassed within the contractual relationship by the requirement implicit in all contracts of fair dealings and good faith." Thus, "a cause of action alleging breach of duty which, as here, is merely duplicative of a breach of contract claim, cannot stand." Hyland Elec. Contracting, Inc. v. MasTec North America, Inc., 74 A.D.3d 1148, 1150, 903 N.Y.S.2d 528 (2d Dept. 2010). Here, upon examination of the Agreement itself, the parties do not appear to have established a relationship of higher trust. More significantly, however, is the fact that the allegations made are nearly identical to those set forth in the breach of contract cause of action. Accordingly, the First Cause of Action for breach of fiduciary duty is dismissed as duplicative of the breach of contract action.

Second, Seventh & Eighth Causes of Action

The Second, Seventh and Eighth Causes of Action each sound in fraud. The Second Cause of action for Fraudulent Conveyance alleges that Defendant fraudulently failed to notify or report the earned proceeds received as per the Sale Agreement to Plaintiff and as

a result, Defendant has wrongfully denied him his rightful proceeds. The Seventh Cause of Action for "Fraudulent Mismanagement" alleges that Defendant knowingly, fraudulently and improperly converted proceeds without notifying Plaintiff or accounting for same. The Eighth Cause of Action entitled "Defendant has Fraudulently used his power as Manager to deny Plaintiff his Rights to the Proceeds of the Aforesaid Business", alleges that Defendant has full control over the business and has been denied the right to inspect the financial documents.

"A cause of action premised upon fraud cannot lie where it is based on the same allegations as the breach of contract claim." Yenrab Inc. v. 794 Linden Realty, LLC, 68 A.D.3d 755, 757, 892 N.Y.S.2d 105 (2d Dept. 2009). Thus, "where a claim to recover damages for fraud is premised upon an alleged breach of contractual duties and the supporting allegations do not concern representations which are collateral or extraneous to the terms of the parties' agreement, a cause of action sounding in fraud does not lie." Id.; Celle v. Barclays Bank PLC, 48 A.D.3d at 302. Furthermore, a mere misrepresentation of an intention to perform under the contract is insufficient to allege fraud." Yenrab Inc., 68 A.D.3d at 758. In the instant matter, Plaintiff makes no allegations which are collateral to or extraneous from the terms of the Agreement, and as such, the Second, Seventh and Eighth Causes of Action are hereby dismissed.

Sixth and Ninth Causes of Action

Plaintiff's Sixth Cause of Action is for "Gross Mismanagement" and alleges that Defendant grossly mismanaged the business by the fraudulent conversion of proceeds of said business and failed to diligently perform all duties as manager of the business. Though labeled differently, this cause of action sounds in negligence. The Ninth Cause of Action for Negligence alleges that Defendant owed Plaintiff a duty to account or make any of the payments owed per the Agreement and that Defendant failed to preserve all transaction and denied an accounting.

It is well established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated. Clark-

Fitzpatrick, Inc. V. Long Island R. Co., 70 N.Y.2d 382, 389, 521 N.Y.S.2s 653 (1987). This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract. Id. Moreover, while tort and contract theories may be pleaded in the alternative, the law generally does not permit recovery in tort where the complaint states a legally sufficient claim sounding in contract. Pilewski v. Solymosy, 266 A.D.2d 83,84, 698 N.Y.S.2d 660 (1st Dept. 1999). Here, Plaintiff does not allege a tort independent of the contract and the complaint sufficiently pleads a breach of contract cause of action. As such, Plaintiff's Sixth and Ninth Causes of Action are hereby dismissed.

Third and Fourth Causes of Action

Plaintiff's Third Cause of Action is for Conversion. Plaintiff alleges that Dr. Pinker withheld proceeds earned or received by the aforesaid businesses prior to the closing of the sale of business. "In order to establish a cause of action to recover damages for conversion, the plaintiff must show legal ownership or an immediate superior right of possession to a specific identifiable thing and must show that the defendant exercised an unauthorized dominion over the thing in question...to the exclusion of the plaintiff's rights.") [internal citations omitted] Greater Bright Light Home Care Servs. Inc. v. Jeffries-El, 151 A.D.3d 818, 58 N.Y.S.3.d 68 (2d Dept. 2017). Although a contracting party may be charged with a separate tort liability arising from a breach of a duty distinct from, or in addition to, the breach of contract, a cause of action alleging conversion cannot be predicated on a mere breach of contract. Id. at 824-825. In the instant matter, Plaintiff's Third Cause of Action for Conversion must be dismissed, as it is predicated on breach of contract.

Similarly, Plaintiff's Fourth Cause of Action for Unjust Enrichment must also be dismissed. Plaintiff alleges that Defendant transferred and converted the proceeds for the aforesaid business without any consideration due to the Plaintiff and against his rightful share of the proceeds of the aforesaid businesses prior to the closing. Here, Plaintiff fails to state a

cause of action for unjust enrichment because the existence of a valid contract governing the subject matter generally precludes recovery in quasi contract for events arising out of the same subject matter. EBC I, Inc. v. Goldman, Sachs & Co., 5 N.Y.3d at 23. As such, Plaintiff's Third and Fourth Causes of Action are hereby dismissed.

Tenth and Eleventh Causes of Action

Plaintiff's Tenth Cause of Action alleges theft of corporate activity. "Interference with precontractual relations is actionable in New York when a contract would have been entered into but for the actions of the defendant if the defendant's sole purpose is to damage the plaintiff or if the means employed to induce termination of the relationship are dishonest, unfair or otherwise improper." Bankers Trust Company v. Bernstein, 169 A.D.2d 400, 401, 563 N.Y.S.2d 821 (1st Dept. 1991). "The doctrine of corporate opportunity" provides that corporate fiduciaries and employees, cannot without consent, divert and exploit for their own benefit an opportunity that should be deemed an asset of the corporation." Id. In the Complaint, Plaintiff alleges that by operating the businesses in the manner he has, Defendant has diverted a business opportunity for the Defendant's benefit and to the detriment of Plaintiff. However, based upon the allegations made, a cause of action for theft of corporate activity does not lie since Plaintiff points to no outside business opportunity that the Plaintiff could have availed himself of, but could not do so, as a result of Dr. Pinker's actions. Accordingly, the Tenth Cause of Action is dismissed.

The Eleventh Cause of Action alleges Tortious Interference with Contract. Tortious interference with a contract requires (i) the existence of a valid contract between the plaintiff and a third-party; (ii) defendant's knowledge of that contract; (iii) defendant's intentional procurement of the third-party's breach of the contract without justification; (iv) actual breach of the contract; and (v) damages resulting therefrom. Brooklyn Historic Railway Assn v. City of New York, 126 A.D.3d 837, 840, 7 N.Y.S.3d 152 (2d Dept. 2015); Gutierrez v. McGrath Management Servs. Inc., 152 A.D.3d 498, 59 N.Y.S.3d 52 (2d Dept. 2017). The law

is clear that no claim for tortious interference with a contract can be made against a contracting party. Hoag v. Chancellor, Inc., 246 A.D.2d 224, 677 N.Y.S.2d 531, 533 n.1 (1st Dept. 1998). Thus, "only a stranger to a contract, such as a third party, can be liable for tortious interference with a contract." Winicki v. City of Olean, 203 A.D.2d 893, 611 N.Y.S.2d 379, 380 (4th Dept. 1994), quoting Koret, Inc. v. Christian Dior, S.A., 161 A.D.2d 156; 554 N.Y.S.2d 867, 869 (1st Dept. 1990). Since the allegations are made against Dr. Pinker, who is a party to the contract, Plaintiff's Eleventh Cause of Action must also be dismissed.

Plaintiff's Thirteenth Cause of Action

Plaintiff's Thirteenth Cause of Action seeks a Preliminary Injunction and alleges that Defendant's failure to provide to Plaintiff proper accounting of taxes paid or owed, salaries of employees, social security payments and other payments to government entities is exposing the Plaintiff to substantial liability which is not compensable in monetary damages and that these illegal actions are placing the public at large and the businesses, at risk. Plaintiff seeks to have Defendant ordered to close all accounts and immediately deposit all proceeds in to the operating account of Plaintiff. Defendant seeks to dismiss this cause of action on the ground that the failure to pay monies allegedly owed to him under the Sale Agreement is not "irreparable harm" for the purposes of injunctive relief since the harm that he would allegedly sustain could be sufficiently compensated by money. Plaintiff fails to address this aspect of Defendant's motion in its opposition.

On an application for a preliminary injunction, the movant must prove three things: (1) the likelihood of his ultimate success on the merits, (2) irreparable injury to the movant absent granting of a preliminary injunction, and (3) a balancing of the equities. Jurlique, Inc. V. Austral Biolab Pty., 187 A.D.2d 637, 639, 590 N.Y.S.2d 235 (2d Dept. 1992). To show likelihood of success on the merits, the movant must show its right to a preliminary injunction is plain on the facts of the case. Melvin v. Union College, 195 A.D.2d 447, 448, 600 N.Y.S.2d 141 (2d Dept. 1993). A party fails to demonstrate that he would suffer irreparable

injury in the absence of a preliminary injunction where money damages are sufficient to compensate him with respect to the cause of action. Kurlandski v. Kim, 111 A.D.3d 676, 678, 975 N.Y.S.2d 98 (2d Dept. 2013). In the matter at bar, Plaintiff has failed to prove all of the requirements for a preliminary injunction, particularly with respect to irreparable injury since, should he prevail, he can be compensated with monetary damages. As such, the Thirteenth Cause of Action is dismissed.

The Twelfth Cause of Action

Lastly, Defendant moves to dismiss the Twelfth Cause of Action which seeks an Accounting. Plaintiff alleges that Defendant has a duty to account for all proceeds received by the two businesses prior to the closing date; that Defendant has failed or refused to do so; and that he seeks an Order for a full and immediate accounting of the monies earned or received by Dr. Pinker for all monies earned and/or received for the Plaintiff's fees prior to the closing in July 2013. Defendant seeks to dismiss this cause of action on the ground that Dr. Spivack's claim of ignorance as to the amount of proceeds to which he contends he is entitled to does not give rise to a fiduciary relationship or support a claim for an accounting. Defendant has failed to demonstrate how Plaintiff, as a matter of law, would not be entitled to an accounting for the purposes of determining the amount he is owed in the event there was a breach of the Agreement. Therefore, Defendant's motion to dismiss the Twelfth Cause of Action is denied.

Accordingly, it is hereby

ORDERED that Defendants' Notice of Motion to dismiss several Causes of Action in Plaintiff's Complaint is granted in part, and denied in part, and only to the extent set forth in this decision; and it is further

ORDERED that Plaintiff's First, Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh and Thirteenth Causes of Action are hereby dismissed; and it is further

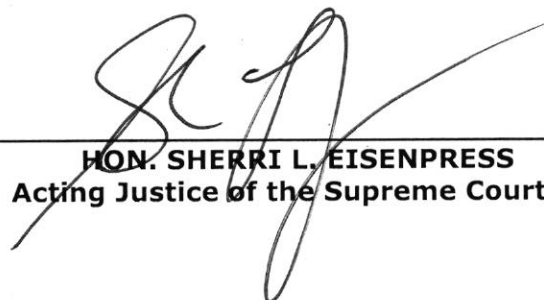
ORDERED that moving Defendants shall file an Answer on or before July 6,

2018; and it is further

ORDERED that all parties are ordered to appear for a Preliminary Conference on **THURSDAY, AUGUST 2, 2018** at 9:45 a.m.

The foregoing constitutes the Decision and Order of this Court on Motion # 1.

Dated: New City, New York
June 19, 2018



HON. SHERRIL EISENPRESS
Acting Justice of the Supreme Court

TO:

All Parties (via- NYSCEF)