

**Goldberg v Torim**

2019 NY Slip Op 30002(U)

January 3, 2019

Supreme Court, New York County

Docket Number: 151425/2018

Judge: Arlene P. Bluth

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

**PRESENT:** HON. ARLENE P. BLUTH **PART** **IAS MOTION 32**

*Justice*

-----X  
DAVID GOLDBERG, **INDEX NO.** 151425/2018

Plaintiff,

**MOTION DATE** 12/13/2018

- v -

**MOTION SEQ. NO.** 002

SHLOIME TORIM,

Defendant.

**DECISION AND ORDER**

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 5-10, 14, 15, 16, 17, 18, 19, 20, 21

were read on this motion to/for VACATE -  
DECISION/ORDER/JUDGMENT/AWARD

The motion to vacate the decision denying defendant’s motion to dismiss on default is granted. The motion to dismiss is granted in part and denied in part.

**Background**

This action arises out of a purported<sup>1</sup> real estate transaction between plaintiff and defendant. These two parties have known each other for nearly a decade. In fact, defendant bought plaintiff’s home in 2008. In connection with that transaction, plaintiff alleges that instead of paying for the property outright, defendant paid plaintiff \$2,000 a month for about seven years until the mortgage was paid off. Plaintiff stresses that he did not charge defendant interest on these payments.

<sup>1</sup> “Purported” is used because it is unclear whether any real estate was actually purchased; the complaint is devoid of even an address

In February 2017, defendant allegedly called plaintiff and told him that he found a property selling for \$500,000 that plaintiff should buy. Plaintiff maintains that defendant insisted that plaintiff would be able to flip the property for a ten percent return within a year. Plaintiff claims he thought he purchased the property. Plaintiff alleges that he made out a check to defendant's title company, National Abstract LLC, and that defendant assured plaintiff that defendant would handle everything. Plaintiff says he never saw any documentation for the purchase and he has submitted no documentation to show any purchase.

After several phone conversations over the next few months, plaintiff contends that defendant called him in early August 2017 and told him that the property sold for \$700,000 and that defendant was going to send plaintiff a check. Plaintiff complains that he only received a check for \$525,000 from defendant's company. Plaintiff insisted that he demanded defendant send him the remaining \$175,000 from the sale of the property but has yet to receive the money. Plaintiff brings causes of action for breach of fiduciary duty, conversion and fraud against defendant.

Defendant moved to dismiss but did not appear for oral argument on July 31, 2018. The Court denied the motion and directed defendant to answer (NYSCEF Doc. No. 11). Defendant then submitted an answer and moved to vacate the Court's decision on September 10, 2018 (NYSCEF Doc. Nos. 13, 14-18).

Defendant claims that he did not appear for oral argument because he thought that no appearance was necessary, and the motion would be decided on the papers. Defendant's counsel claims that he received a phone call on the date of oral argument requesting his appearance, but he was unable to appear because his law firm is located in Orange County. Defendant's counsel also claims that he spoke with plaintiff's counsel and it was understood the motion would be

decided on the papers. Defendant's counsel also claims that he immediately hired a per diem counsel to appear for oral argument once he found out an appearance was required.

In opposition, plaintiff's counsel denies that he agreed to have the Court decide the motion on the papers only and states he never saw the per diem counsel defendant allegedly hired to appear. Plaintiff also insists that the Court cannot consider the motion to dismiss because defendant submitted an answer.

As an initial matter, the Court prefers that motions be decided on the merits and grants the motion to vacate and will consider the underlying motion to dismiss on the merits. Obviously, defendant's counsel failed to check the court's online resources which made clear that the motion was on for oral argument on July 31, 2018 at 10 a.m. Nevertheless, plaintiff would suffer no prejudice if this Court were to consider the motion to dismiss on the merits. And the fact that defendant answered already is of no moment because the grounds upon which defendant moved to dismiss were not waived by submission of an answer.

### **Motion to Dismiss**

"On a CPLR 3211 motion to dismiss, the court will accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Nonnon v City of New York*, 9 NY3d 825, 827, 842 NYS2d 756 [2007] [internal quotations and citation omitted]).

In support of his motion to dismiss, defendant claims that plaintiff is attempting to recover based on an oral contract for real estate, which violates the Statute of Frauds. Defendant adds that plaintiff's tort claims should be dismissed because they are redundant of the breach of

contract claim. Defendant also points out that plaintiff failed to name a necessary party, National Abstract LLC—the entity which received the \$500,000 from plaintiff and which cut a check to plaintiff for \$525,000 six months later.

In opposition, plaintiff emphasizes that he is not pursuing a breach of contract claim. Plaintiff insists that the statute of frauds does not apply because the case is about theft of real estate proceeds by an agent. Plaintiff contends he has stated a cause of action for conversion because plaintiff is entitled to the proceeds from the sale. Plaintiff claims that he has adequately pled the breach of the fiduciary duty cause of action because defendant was acting as his agent. Plaintiff rejects defendant's claim that National Abstract LLC (defendant's title company) needs to be part of this lawsuit.

### **Breach of Contract**

Although defendant attempts to reframe plaintiff's complaint as one for breach of contract, this Court cannot do that. Plaintiff alleges three causes of action: breach of fiduciary duty, conversion and fraud. The Court must consider whether plaintiff has stated a cognizable cause of action for each.

### **Breach of Fiduciary Duty**

“Breach of fiduciary duty requires: (1) the existence of a fiduciary duty owed by the defendant; (2) breach of that duty; and (3) resulting damages” (*Jones v Voskresenskaya*, 125 AD3d 532, 533, 5 NYS3d 16 [1st Dept 2015]). “A fiduciary relation 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 a relation” (*Marmelstein v Kehillat New Hempstead*, 45 AD3d 33, 36, 841 NYS2d 493 [1st Dept 2007]).

Here, the Court finds the complaint fails to allege that a fiduciary relationship was established between plaintiff and defendant. Plaintiff contends that he and defendant were very close friends and that he gave money to his friend to buy a property with the expectation that he would receive a ten percent profit in a year. But there are no allegations that make out a fiduciary relationship.

The closest the complaint gets to alleging a fiduciary relationship is when plaintiff claims that “As David’s agent, Torim owed David fiduciary duties” (NYSCEF Doc. No. 1, ¶ 40). But that is a conclusory allegation and the complaint does not allege that plaintiff hired defendant as his real estate broker for this transaction (which would entitle defendant to a commission). Instead, the complaint suggests that plaintiff went along with purchasing the property because his friend thought it might be a good idea and it would make plaintiff money. The parties’ friendship does not equate to a fiduciary relationship. This cause of action is severed and dismissed.

### Conversion

“A conversion takes place when someone intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person’s right of possession. Two key 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” (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50, 827 NYS2d 96 [2006]).

The Court finds that plaintiff has stated a cause of action for conversion. Plaintiff alleges that he is entitled to the entire proceeds from the sale of the property (another \$175,000). He claims he bought the property and, therefore, defendant should not have kept the proceeds. Defendant's attempt to characterize this claim as a breach of contract cause of action (and therefore impermissible under the Statute of Frauds) is misplaced. This is not a case where defendant purchased the property from plaintiff; instead it is alleged that defendant was merely helping facilitate the transaction for plaintiff, apparently for free. And a plaintiff is entitled to bring a conversion action relating to the proceeds of a real estate transaction that were intercepted by defendant.

This is a motion to dismiss, and at this stage, it is enough for plaintiff to allege that he is entitled to the proceeds which defendant wrongfully kept for himself.

### **Fraud**

"The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559, 883 NYS2d 147 [2009]).

The Court severs and dismisses this cause of action because plaintiff failed to allege a material misrepresentation of fact. Plaintiff argues that defendant materially misrepresented that he would act as plaintiff's agent and sell a property for plaintiff. Plaintiff adds that "[t]hese misrepresentations were made to induce David's reliance into both buying and then selling the subject property" (NYSCEF Doc. No. 9 at 12 [plaintiff's memo of law]). However, the complaint contends that defendant *did* what he said he would do. Defendant took plaintiff's

money to buy the property, sold the property and sent plaintiff a portion of the proceeds. Even in the alternative, defendant said plaintiff could make ten percent a year and plaintiff made five percent in six months. This is not a case where plaintiff was lured into sending defendant \$500,000 and then the money disappeared. Here, according to plaintiff, he received \$525,000 from the sale-- a profit of \$25,000. The complaint simply does not establish a fraudulent scheme to steal plaintiff's money. It suggests a disagreement about how much of the proceeds plaintiff is owed.

In fact, the complaint alleges that defendant suggested that plaintiff might make a return of ten percent in a year; plaintiff did not say that defendant guaranteed the return. Simply put, defendant predicted the property would make plaintiff some money and that induced plaintiff to invest. That prediction (which was not a representation of a fact) turned out to be true—plaintiff made five percent in six months. This Court is unable to find that there was any misrepresentations or justifiable reliance by plaintiff based on his complaint.

### **Necessary Party**

CPLR 1001(a) provides that “Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so he may be made a defendant.”

At this stage, the Court is unable to determine whether defendant's title company, National Abstract LLC, is a necessary party as a defendant. The Court is cognizant of the allegations in the complaint that plaintiff paid the purchase price for the property to National Abstract LLC and that same company cut the check to plaintiff for \$525,000. It may be that

discovery reveals that National Abstract LLC must be added in order to provide plaintiff with complete relief (assuming, of course, that plaintiff is entitled to the entire \$700,000). But at the motion to dismiss stage, the Court cannot ascertain the involvement of National Abstract LLC and whether it must be included in this case. Certainly, the allegations in the complaint focus only on defendant's actions and only briefly mentions defendant's company as a facilitator for the transaction. Defendant also failed to explain why complete relief would not be available to plaintiff or how National Abstract would be inequitably affected if this entity were not in the case. Defendant can, of course, bring a third party action against that entity if he is so advised, but the claim of conversion is against defendant, that he took funds that belonged to plaintiff.

And, contrary to defendant's claim, dismissal due to the failure to name a necessary party is a last resort. "When a necessary party is subject to the jurisdiction of the court . . . the statute directs that the court order him summoned" (*Windy Ridge Farm v Assessor of Town of Shandaken*, 11 NY3d 725, 726 864 NYS2d 794 [2008]). If it becomes clear that National Abstract LLC is a necessary party, then the Court will order joinder of this entity assuming it is subject to the jurisdiction of this Court.


Accordingly, it is hereby

ORDERED that the motion to vacate (Mot. Seq. 002) is granted; and it is further

ORDERED that the motion to dismiss by defendant is granted only to the extent that the causes of action for breach of fiduciary duty and fraud are severed and dismissed and denied as to the remaining branches of the motion.

The parties are directed to appear for the already-scheduled compliance conference on March 19, 2019 at 2:15 p.m. The Court expects that parties to comply with the preliminary conference order (NYSCEF Doc. No. 22), which ordered that all depositions are to be completed by February 28, 2019.

1/3/19  
DATE

  
ARLENE P. BLUTH, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input checked="" type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE

HON. ARLENE P. BLUTH