

<b>Silverboys, LLC v Skordas</b>
2019 NY Slip Op 30330(U)
February 11, 2019
Supreme Court, New York County
Docket Number: 653874/2014
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK - PART 39

-----X  
SILVERBOYS, LLC, HENRY SILVERMAN AND  
KAREN SILVERMAN,

Plaintiffs,

-against-

Index No. 653874/2014  
Motion Seq. No. 006

YIANNI SKORDAS, SKORDAS DESIGN STUDIO,  
INC., MICHAEL JONES, CARLOS HEPBURN,  
CONRAY ROLLE, ATLAS BUILDING SUPPLIERS,  
EURO STONE FABRICATOR, INC., CUSTOM F/X,  
INC., REGENCY ARCHITECTURAL LIGHTING CORP.,  
AND EAGLE WOODWORK & CONSTRUCTION,  
INC.,

**DECISION/ORDER**

Defendants.

-----X  
HON. SALIANN SCARPULLA, J.

In this action, *inter alia*, to recover damages for fraud, defendant Custom F/X, Inc. (“CFX”) moves, pursuant to CPLR 3211(a)(7), to dismiss the second amended complaint insofar as asserted against it.

On April 25, 2013, plaintiffs signed a written agreement (the “SDS agreement”) with Yianni Skordas (“Skordas”) and his corporation, Skordas Design Studios, Inc. (“SDS”) for the management, construction and renovation of their vacation and retirement home in the Bahamas (the “project”).

On June 10, 2013, plaintiffs entered into a general contractor agreement with Michael Jones and Inline (the “Inline Agreement”) for construction of the project,

“exclusive of kitchen cabinets, security and surveillance systems, plumbing fixtures, landscape lights, pool patio tiles and automatic gates and controls.”

On July 21, 2017, I rendered a decision on plaintiffs’ motion for leave to file a second amended complaint in this action (motion sequence number 003). I granted, in relevant part, plaintiffs’ request to add CFX as well as other corporations and individuals as additional defendants, and to add new claims for fraud, conspiracy to commit fraud, aiding and abetting fraud, conspiracy to commit conversion, and aiding and abetting conversion.<sup>1</sup>

In the second amended complaint, plaintiffs alleged that CFX was a vendor hired as a subcontractor to design and build out the project’s audio/visual networking, cable system, security systems and controls for the HVAC and lighting systems. Plaintiffs claimed that CFX charged them for products and services that were not delivered or provided, sold equipment to them that was not of the quality that they had paid for and sold equipment to them that was incompatible with the systems for which the equipment was intended. Plaintiffs also alleged that they paid CFX \$290,000 for services rendered and goods provided, from which Skordas received a \$20,000 kick back. CFX now moves to dismiss the second amended complaint insofar as asserted against it.

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<sup>1</sup> Familiarity with the aforementioned decision is assumed. Therefore, the full factual background set forth therein will not be repeated here.

## Discussion

### The Fraud Claim

CFX argues that plaintiffs did not allege any fraudulent misrepresentation it made to them and did not allege reliance upon any purported misrepresentation by CFX. In addition, plaintiffs did not allege any fiduciary relationship with CFX that could possibly give rise to an omission-based fraud claim. CFX further argues that plaintiffs' fraud claim must be dismissed as duplicative of their breach of contract claim. It also maintains that the fraud claim actually sounds in conversion because plaintiffs' allegations consist only of under-delivery of goods' and over-retention of monies. Finally, CFX claims that plaintiffs' fraud claim fails to provide the requisite level of detail demanded of such a claim, pursuant to CPLR 3016(b), rather it is a "group pleading."

In opposition, plaintiffs argue that they clearly alleged that CFX, through its co-conspirators and directly, sought money and property from plaintiffs based on false representations that certain AV equipment and services were being provided, but those goods and services were (a) never delivered or rendered; (b) of a lesser quality than promised; (c) incompatible with the specifications of the project; and (d) not the products that plaintiffs were promised. For example, plaintiffs alleged that CFX conspired with Inline and Michael Jones, the corporation Regency, and Skordas to provide plaintiffs with cheaper magnetic transformers. The deceit involved CFX not revising its budget quote in which it agreed that more expensive electronic transformers would be provided. The substitution ultimately caused persistent disruption in plaintiffs' home lighting system. The complaint provided that "[b]y continuing to specify and invoice Plaintiffs for

electronic transformers, CFX was able to charge Plaintiffs about twice the cost of the transformers needed for the Project.”

Plaintiffs also alleged that CFX billed them for equipment and services that were not delivered, such as “AV equipment, including televisions, and other services.” Further, CFX allegedly sold plaintiffs goods incompatible with the specifications of the project or not conforming with their agreement, such as “older models of equipment, including music speakers, while billing them for more expensive models,” including “a waterproof model of outdoor music speakers while providing a cheaper indoor model.” In one instance, CFX caused plaintiffs to incur “substantial additional sums in customs duties” where “halogen fixtures, rather than” the agreed-upon “duty-free LED fixtures” were imported. In addition, plaintiffs allege that CFX conspired to allow Skordas to receive “a secret commission of \$20,000.00 from” the “\$290,000 for the AV materials and services billed by CFX.”

In addition, plaintiffs argue that the complaint adequately states that they justifiably relied on the integrity of the documents and information being submitted to them, surrendered payment intended for CFX in the amount of \$290,000, with the expectation it would be used for the project and related goods, when in fact, portions of the requested monies were used for kickbacks to Skordas /SDS.

Plaintiffs also dispute that their fraud claim actually sounds in conversion because CFX misrepresented certain facts, which resulted in money and property being taken from plaintiffs under false pretenses. They also maintain that the fraud claim is not duplicative of the contract claim because the fraud claims against CFX arise from

different conduct as the breach of contract claims against Skordas/SDS. Specifically, they argue that the, “fraud claims against CFX arise from wholly different conduct as the breach of contract claim against SDS. CFX's multiple misrepresentations about what the requested funds would be spent on, and the types, amount, and costs of A/V equipment that would be supplied for the project, for example, are irrelevant to claims against Skordas/SDS arising out of their failures to provide services pursuant to the SDS Agreement.”

A claim for fraud must be pled with particularity according to CPLR 3016 (b). *See EBC I, Inc. v. Goldman Sachs & Co.*, 91 A.D.3d 211, 219 (1<sup>st</sup> Dept. 2011). To withstand scrutiny under CPLR 3016, the complaint need only set forth the alleged misconduct in sufficient detail to inform the defendants of the substance of the claims. *Bernstein v. Kelso & Co.*, 231 A.D.2d 314, 320 (1<sup>st</sup> Dept. 1997). “A claim involving multiple defendants must make specific and separate allegations for each defendant.” *CIFG Assur. N. Am., Inc. v Bank of Am., N.A.*, 41 Misc.3d 1203(A), 2013 N.Y. Slip. Op. 51565(U), \*3 (Sup. Ct., N.Y. County 2013), *citing MBI Ins. Corp. v. Countrywide Home Loans, Inc.*, 87 A.D.3d 287, 295 (1<sup>st</sup> Dept. 2011).

Further, the essential elements of a cause of action for fraud include a misrepresentation or material omission of fact, known to be false when made, scienter, justifiable reliance and resulting damages. *See Lama Holding Co. v. Smith Barney*, 88 N.Y.2d 413, 421 (1996)

Upon close review of the allegations set forth in the complaint, I find that plaintiffs have adequately pled a claim for fraud against CFX. CFX's contention that

plaintiffs' fraud cause of action against it is duplicative of their breach of contract cause of action is without merit. Here, the fraud allegations are independent of the contract allegations. CFX was not a party to the Skordas/SDS agreement and the breach of contract claim was only brought against Skordas/SDS. Furthermore, the acts that give rise to the breach of contract cause of action differ from those relating to the fraudulent scheme. Finally, I find that plaintiffs sufficiently distinguished CFX's role in the alleged misrepresentation from that of the other defendants and as such, contrary to CFX's contention, plaintiffs did not engage in improper group pleading.

Based on the foregoing, that branch of the motion to dismiss the cause of action for fraud against CFX is denied.

#### The Conversion Claim

CFX argues that the conversion claim is time barred by the three-year statute of limitations because plaintiffs' allegations involve actions that occurred prior to August 1, 2013, and this action was commenced on September 19, 2017. It further maintains that, in any event, plaintiffs have failed to state a claim for conversion because plaintiffs concede that CFX never deposited the funds that were allegedly converted. CFX also contends that the conversion claim must be dismissed as duplicative of the breach of contract claim.

Plaintiffs argue that they adequately pled a claim for conversion. They contend that the statute of limitations ran from on or about June 2, 2014 when they "discovered CFX's fraud and misrepresentations, including billing for A/V and networking equipment that was never received." Plaintiffs aver that they filed

their motion for leave to amend the complaint less than two years later, on May 24, 2016, in order to add CFX as a defendant. While the court granted the motion on July 21, 2017, plaintiffs argue that the statute of limitations was tolled during the period in which the court considered the motion. Plaintiffs further argue that they subsequently filed the second amended complaint on September 19, 2017 within the applicable limitations period.

CPLR 214 (3) dictates that actions to recover damages for conversion must be commenced within three years. In the complaint, plaintiffs allege that the conspiracy to commit conversion began “at some time prior to April 2013.” Plaintiffs then contend that they only discovered the conversion on or about June 2, 2014 and that the court should consider it as the date of accrual for the running of the statute of limitations. However, a conversion cause of action accrues on the date the conversion takes place and not “the date of discovery or the exercise of diligence to discover.” *Vigilant Ins. Co. of Am. V. Housing Auth. of City of El Paso, Tex.*, 87 N.Y.2d 36, 44 (1995).

Even giving plaintiffs the benefit of the tolling period corresponding to the lapse of time between the filing of the motion for leave to amend and the date of the order granting them permission to add CFX as an additional defendant (*see e.g. Perez v. Paramount Communications*, 92 N.Y.2d 749, 753-756 [1999]), plaintiffs’ conversion cause of action is untimely and therefore dismissed.<sup>2</sup>

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<sup>2</sup> Plaintiffs’ claims for aiding and abetting conversion and conspiracy to commit conversion asserted against CFX are likewise barred by the statute of limitations and dismissed.

### The Aiding and Abetting Fraud Claim

CFX argues that plaintiffs' aiding and abetting fraud claim must be dismissed because plaintiffs do not plead actual knowledge by CFX of any fraud on the part of Skordas/SDS, and do not plead that CFX provided "substantial assistance" to Skordas/SDS.

In opposition, plaintiffs argue that their allegations establish how CFX, through its co-conspirators and directly, sought monies and property from the Silvermans based on false representations and the inflation of invoices, the furnishing of non-conforming equipment and services, and the creation of a paper trail which concealed kickbacks made to its co-conspirators.

A plaintiff claiming aiding and abetting fraud must allege the existence of the underlying fraud, actual knowledge, and substantial assistance. *Oster v. Kirschner*, 77 A.D.3d 51, 55 (1<sup>st</sup> Dept. 2010). Actual knowledge may be pled generally, particularly at the pre-discovery stage, so long as such intent may be inferred from the surrounding circumstances. *See Balance Return Fund Ltd. v. Royal Bank of Can.*, 83 A.D.3d 429, 431 (1<sup>st</sup> Dept. 2011); *DDJ Mgt., LLC v. Rhone Group L.L.C.*, 78 A.D.3d 442, 443 (1<sup>st</sup> Dept. 2010). Here, plaintiffs have set forth facts sufficient to permit an inference from the circumstances alleged in their complaint of the element of actual knowledge of aiding and abetting the fraud.

The element of substantial assistance exists "where (1) a defendant affirmatively assists, helps conceal, or by virtue of failing to act when required to do so enables the fraud to proceed, and (2) the actions of the aider/abettor proximately caused the harm on

which the primary liability is predicated.” *Stanfield Offshore Leveraged Assets, Ltd. v. Metro. Life Ins. Co.*, 64 A.D.3d 472, 476 (1<sup>st</sup> Dept. 2009)(internal quotations omitted). Here, similarly, plaintiffs have sufficiently alleged facts detailing circumstances from which the element of substantial assistance can be inferred.

Here, although some of the allegations are pled “upon information and belief,” plaintiffs set forth sufficient facts to support a claim that CFX was actively involved in the fraudulent scheme. *See generally Allenby, LLC v. Credit Suisse, AG*, 134 A.D.3d 577 (1<sup>st</sup> Dept. 2015).

#### The Conspiracy Claim

CFX argues that New York does not recognize an independent claim for civil conspiracy. In opposition, plaintiffs argue that they have met their burden of pleading that CFX acted in concert with at least two of the co-defendants, Skordas/SDS and Michael Jones of Inline, to perpetrate a fraud upon plaintiffs by, *inter alia*, submitting dishonest budget quotes, billing them for equipment and services that were not delivered or rendered, and selling them older models of equipment while billing for more expensive models. According to plaintiffs, CFX and Skordas/SDS intentionally acted in furtherance of that plan and plaintiffs were injured as a result of CFX’s conduct.

As defendant correctly noted, New York law does not recognize civil conspiracy to commit a tort as an independent cause of action. *Abacus Fed. Sav. Bank v. Lim*, 75 A.D.3d 472, 474 (1<sup>st</sup> Dept. 2010). However, a plaintiff may plead conspiracy “to connect the actions of separate defendants with an otherwise actionable tort.” *Id.*, quoting *Alexander & Alexander of N.Y., Inc. v Fritzen*, 68 N.Y.2d 968, 969 (1986)(internal

quotation marks omitted); *see also American Preferred Prescription v. Health Mgt.*, 252 A.D.2d 414, 416 (1st Dept. 1998).

To set forth a claim for civil conspiracy, a plaintiff “must demonstrate the primary tort, plus the following four elements: (1) an agreement between two or more parties; (2) an overt act in furtherance of the agreement; (3) the parties' intentional participation in the furtherance of a plan or purpose; and (4) resulting damage or injury’.” *Abacus Fed. Sav. Bank*, 75 A.D.3d at 474, quoting *World Wrestling Fedn. Entertainment, Inc. v. Bozell*, 142 F.Supp.2d 514, 532 (S.D.N.Y. 2001).

Here, as discussed above, plaintiffs’ underlying cause of action for fraud is viable. I find that the allegations supporting the claim for conspiracy to connect the actions of the separate defendants in committing fraud are neither patently insufficient or devoid of merit so as to require a dismissal at this stage in the litigation.

In accordance with the foregoing, it is hereby

ORDERED that the motion of defendant Custom F/X, Inc. to dismiss the complaint as pled against it is granted to the extent that the fourth and fifth causes of action of the second amended complaint are dismissed as against it and the motion is otherwise denied; and it is further

ORDERED that defendant Custom F/X, Inc. is directed to serve an answer to the remainder of the second amended complaint within 20 days of the date of this order; and it is further

ORDERED that counsel are directed to appear for a status conference in Room  
208, 60 Centre Street, on March 27, 2019 at 2:15 p.m.

This constitutes the decision and order of the Court.

Dated: 2/11/19

ENTER:

  
**HON. SALIANN SCARPULLA**  
J.S.C.