

Fink v Williams

2019 NY Slip Op 32160(U)

May 13, 2019

Supreme Court, Queens County

Docket Number: 716956-18

Judge: Leonard Livote

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SHORT FORM ORDER

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: Honorable Leonard Livote
Acting Supreme Court Justice

IAS TERM, PART 33

-----X
DENNIS H. FINK,

Index No: 716956-18

Plaintiff,

-- against --

Motion Date: 2/26/19

WILLIAM J. WILLIAMS and
WILLIAMS G. KINKEL,

Seq. No: 1

Defendants.
-----X

The following papers numbered 1 to 9 read on this motion by defendant for an Order:

Pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(7) dismissing the Complaint as against defendants WILLIAM J. WILLIAMS and WILLIAM G. KINKEL.

| | <u>PAPERS NUMBERED</u> |
|---|----------------------------|
| Notice of Motion, Affirmation, Affidavits and Exhibits..... | 1-4 |
| Cross Motion, Affirmation, Affidavits..... | |
| Answering Affirmations, Affidavits and Exhibits..... | 5-7 |
| Reply Affirmations, Affidavits and Exhibits..... | 8-9 |
| Other..... | |

Upon the foregoing papers, the motion is decided as more fully set forth below.

Plaintiff was the sole shareholder and chief instructor at New York Seibukan, Inc., a martial arts school. In April of 2017, Plaintiff following a scheduled heart surgery, suffered a massive stroke. In Plaintiff's absence, Defendants Williams and Kinkel continued to operate the martial arts school. However, there were no plans for plaintiff's extended absence. Defendants informed plaintiff's family that they were unwilling to continue to operate the school unless formal arrangements were made. On June 17, 2017, pursuant to a power of attorney, Sunny Fink signed a Stock Transfer Agreement by which Williams and Kinkel each became one-third shareholders of NY Seibukan.

Plaintiff commenced this action to, inter alia, rescind the stock transfer agreement. Defendants move to dismiss pursuant to

CPLR 3211(a)(1) and CPLR 3211(a)(7)

"On a motion to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Rabos v. R & R Bagels & Bakery, Inc.*, 100 AD3d 849, 2012 N.Y. Slip Op 07974, 2012 WL 5870676 [2nd Dept 2012]).

To grant a motion to dismiss due to "a defense that is founded upon documentary evidence" pursuant to CPLR § 3211(a)(1), the evidence in question must "utterly refute the plaintiff's allegations and establish a defense as a matter of law" (See, *Goshen v. Mutual Life Ins. Co.*, 98 NY2d 314, [2002]). "To be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" (*Fontanetta v Doe*, 73 AD3d 78, 86 [2d Dept 2010]).

In the instant case, much of the evidence alleged to be documentary is not unambiguous and of undisputed authenticity.

With respect to the motion to dismiss the complaint pursuant to CPLR 3211(a)(7), the first cause of action alleges duress. "Economic duress exists when a party is forced to agree to a contract by means of a wrongful threat which precludes the exercise of its free will" (See *Finserv Computer Corp. v. Bibliographic Retrieval Services, Inc.*, 125 A.D.2d 765, 766 [2d Dept 1986]). "The law in New York is clear that in order to have a situation involving economic duress' there must have been some sort of obligation on the part of the party to perform" (*Bethlehem Steel Corp. v. Solow*, 63 A.D.2d 611, 611 [1st Dept 1978]). Financial pressures and unequal bargaining power are not, in themselves, sufficient to show economic duress (See *id.*).

In the instant case, there was no obligation on the part of the defendants to perform and, therefore, no grounds for a claim of duress.

The second cause of action alleges a breach of fiduciary duty. "The elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct" (*Rut v. Young Adult Inst., Inc.*, 74 A.D.3d 776, 777). A cause of action sounding in breach of fiduciary duty must be pleaded with particularity (CPLR § 3016(b)). In the instant case, the

complaint adequately alleges a claim for breach of fiduciary duty.

The third cause of action alleges that defendants breached their fiduciary duty by concealing facts and making material misstatements of fact. The complaint is adequate to support this claim.

The fourth cause of action alleges fraudulent inducement. "To state a claim for fraudulent inducement, there must be a knowing misrepresentation of material present fact, which is intended to deceive another party and induce that party to act on it, resulting in injury" (*Gosmile, Inc. v Levine*, 81 AD3d 77, 81 [1st Dept 2010]). In the instant case, the allegations do not satisfy the particularity requirements for a fraud claim (CPLR 3016[b]).

The fifth cause of action alleges that defendants made a clear and unambiguous promise to cancel the Stock Transfer Agreement in the event that Dennis Fink survived his 2017 illness. This cause of action is barred by the merger clause of the stock transfer agreement.

The sixth cause of action alleges unjust enrichment. This claim is dismissed on the grounds that it is duplicative of the cause of action to recover damages for breach of contract (see *Cooper, Bamundo, Hecht & Longworth, LLP v Kuczinski*, 14 AD3d 644, 645 [2d Dept 2005]).

The seventh cause of action is sufficient to state a breach of contract claim.

The eighth cause of action alleges the conversion of plaintiff's personal property. "To establish a cause of action to recover damages for conversion, a 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" (*Cusack v. American Defense Sys., Inc.*, 86 A.D.3d 586, 587). In the instant case, the complaint is inadequate because it fails to allege any specific identifiable thing which defendants have converted.

Accordingly, the motion is granted to the extent that it is,

Ordered, that the first, fourth, fifth, sixth and eighth causes of action are dismissed.

This constitutes the Order of the Court.

Dated: May 13, 2019



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Leonard Livote, A.J.S.C.

FILED
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QUEENS COUNTY