Hecht v Hecht
2019 NY Slip Op 32593(U)
August 30, 2019
Supreme Court, New York County
Docket Number: 655734/2018
Judge: Andrea Masley

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREA MASLEY PART IAS MOTION 48EFM

Justice

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INDEX NO. 655734/2018

DONALD HECHT

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 001

- v -

MICHAEL HECHT,

DECISION + ORDER ON MOTION

Defendant.

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MASLEY, J.S.C.:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20

were read on this motion to/for DISMISS.

In motion sequence number 001, defendant Michael Hecht moves pursuant to CPLR 3211(a)(5) and (7), General Obligations Law (GOL) § 5-701, and CPLR 3016(b) to dismiss plaintiff Donald Hecht's complaint.

Background

Donald and Michael are brothers and accountants who were in business together for over fifty years. (NYSCEF Doc. No. 12, [complaint] at ¶ 2). Their enterprise, Hecht and Company, Certified Public Accountants, P.C. (HC), was incorporated in New York in 1977. (*Id.*) HC allegedly provides various services to businesses and individual clients, including tax preparation, audit, and business consulting services. (*Id.* at ¶ 16.) Donald and Michael are allegedly 50% shareholders in HC and have equally shared HC's profits since its incorporation. (*Id.* at ¶¶ 17, 18.) The parties allegedly agreed to equally share anything either of them received from HC clients, except for professional fees paid to HC. (*Id.* at ¶ 19.) This verbal agreement (First Agreement) allegedly provided for equal

sharing of income from outside work that either brother performed for HC clients and equal sharing of artwork that either brother received as a gift or compensation from HC clients. (*Id.*) The First Agreement operated such that "[i]immediately upon Michael Hecht's receipt of anything of value from such clients, including artwork or funds, Donald Hecht owned a fifty percent interest in such property." (*Id.* at 30.) Moreover, the parties allegedly purchased many pieces of artwork and entered into a second verbal agreement (Second Agreement) by which they would own 50% of each piece. (*Id.*)

Michael allegedly received valuable artwork from HC clients, either as compensation or as gifts. (*Id.* at ¶ 20.) He also received payment allegedly for serving as trustee or executor for HC clients and their estates. (*Id.* at ¶ 27-28.) In May 2018, during discussions concerning the dissolution of HC, Michael allegedly provided Donald with a document that Michael represented as a complete list of all the artwork the parties jointly owned. (*Id.* at ¶ 6.) The list allegedly did not include any of the artwork given to Michael by HC clients. (*Id.*) Additionally, Michael allegedly concealed outside income that he received from HC clients. (*Id.* at ¶ 9.) Lastly, Michael allegedly moved jointly purchased artwork into the offices of his new accounting firm without Donald's consent. (*Id.* at ¶ 8.)

Accordingly, on November 9, 2018, Donald commenced this action for conversion, fraud, and an accounting. (*Id.* at ¶ 1.) On January 26, 2019, Michael subsequently moved to dismiss these claims. (NYSCEF Doc. No. 9.)

Discussion

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must "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." (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994].) However, factual allegations "that consist of bare legal conclusions, as well as factual claims which are either inherently incredible or flatly contradicted by documentary evidence" cannot survive a motion to dismiss. (*Summit Solomon & Feldesman v Lacher*, 212 AD2d 487, 487 [1st Dept 1995] [citation omitted]; *see also* CPLR 3211 [a] [1].)

Statute of Frauds

Michael argues that the alleged verbal agreements cannot be performed within one year, and therefore, are barred by the Statute of Frauds. Because these verbal agreements are barred by the Statute of Frauds, Michael contends that the conversion, fraud and accounting claims based on these verbal agreements also fail. Donald opposes, arguing that the verbal agreements can be performed within one year, and in any event, two statutory exceptions apply under GOL 5-701.

"New York law provides that an agreement will not be recognized or enforceable if its not in writing and 'subscribed by the party to be charged therewith' when the agreement 'by its terms is not to be performed within one year from the making thereof.'" (*Cron v Hargro Fabrics*, 91 NY2d 362, 366 [1998], quoting GOL 5-701[a][1].) Indeed, this provision of the Statute of Frauds "encompass[es] only those contracts which, by their terms, have absolutely no possibility in fact and law of full performance within one year." (*Id.* [internal quotation marks and citations omitted].) "As long as the agreement may be fairly and reasonably interpreted such that it may be performed within a year, the Statute of Frauds will not act as a bar however unexpected, unlikely, or even improbable that such performance will occur during that time frame." (*Id.* [internal quotation marks and citations omitted].) "[I]n other words, if the obligation of the contract is not, by its very terms, or necessary construction, to endure for a longer

period than one year, it is a valid agreement, although it may be capable of indefinite continuance." (*D&N Boening v Kirsch Beverages*, 63 NY2d 449,454-455 [1984], citing *Trustees of First Baptist Church v Brooklyn Fire Ins. Co.*, 19 NY 305, 307 [1859].) To illustrate this point, the Court of Appeals stated,

> "[t]he parties may well have expected that the contract would continue in force for more than one year; it may well have been very improbable that it would not do so; and it did in fact continue in force for a much longer time. But they made no stipulation which in terms, or by reasonable inference, requires that result."

(*Id.* at 454, *citing Warner v Texas & Pacific Ry.*, 164 US 418, 434 [1896].)

Here, the facts alleged in the complaint sufficiently allege the existence of the First and Second Agreement between the parties to this action. Both agreements, the first to own a fifty percent interest in income received from HC clients and the second to own a fifty percent interest in any artwork purchased, can fairly and reasonably be interpreted such that they may be performed within a year. (*Cron v Hargro Fabrics*, 91 NY2d 362 at 366.) Nothing in the complaint indicates that these agreements, by their own terms or necessary construction, would endure for more than one year. As alleged, the First and Second Agreement cannot be said to have absolutely no possibility in fact and law of full performance within one year. The possibility that the First and Second Agreements were capable of indefinite duration does not bring them within the Statute of Frauds. (*D&N Boening v Kirsch Beverages*, 63 NY2d at 454-455.) Moreover, the possibility that Michael and Donald performed under these agreements for many years also does not bring these agreements within the Statute of Frauds. (*Id.* at 454.) Although Donald alleges the existence of enforceable oral contracts without interposing a claim for breach of contract, the court is nevertheless compelled to accept these allegations as true insofar as they impact the claims actually interposed by Donald.

Fraud

Michael allegedly communicated to Donald that he had no right and no interest in the artwork given to Michael by HC clients. (NYSCEF Doc. No. 12 at ¶ 55). Donald claims that this statement was false, that it was intended to deceive him, that he reasonably relied on it, and that he "sustained injuries from relying on this statement regarding his legal ownership of the artwork." (*Id.* at ¶¶ 56 - 59).

In moving to dismiss, Michael contends that Donald cannot avoid the Statute of Frauds by bringing a tort claim instead of a breach of contract claim. Michael asserts that the fraud claim should be dismissed despite Donald's decision not to interpose a breach of contract claim. Michael also argues that Donald's fraud claim fails because it does not meet the heightened pleading requirements of CPLR 3016(b). In opposition, Donald argues that fraud is not based on the verbal agreements, but on Michael's false representation. Moreover, Donald alleges that because he has not brought a breach of contract claim, there is nothing the fraud claim could duplicate.

"To state a cause of action for fraud, a plaintiff must allege a representation of material fact, the falsity of the representation, knowledge by the party making the representation that it was false when made, justifiable reliance by the plaintiff and resulting injury." (*Kaufman v Cohen*, 307 AD2d 113, 119 [1st Dept 2003][internal quotation marks and citations omitted].) However, "a cause of action for fraud will not arise when the only fraud charged relates to a breach of contract." (*Trusthouse Forte (Garden City) Mgt. v Garden City Hotel,* 106 AD2d 271, 272 [1st Dept 1984][citations omitted].) Indeed, "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 Is. R.R. Co.,* 70 NY2d 382, 389 [1987][citations omitted].) Accordingly, "it has long

been the rule that parties may not assert fraud claims seeking damages that are duplicative of those recoverable on a cause of action for breach of contract." (*MBIA Ins. Corp. v Credit Suisse Sec. (USA) LLC*, 165 at 114.)

Here, the First Agreement allegedly provided for equal sharing of income and artwork from outside work that either brother performed for HC clients and equal sharing of artwork that either brother received as a gift or compensation from HC clients. To the extent Michael did not equally share the income or artwork, for instance by communicating to Donald that Donald had no interest in certain pieces, the claim sounds in breach of contract. Indeed, the purported fraud is not collateral to the contract because it concerns the very subject that the First Agreement governed. Furthermore, Donald fails to allege damages in the fraud claim that would not be recoverable under a claim for breach of the First Agreement. (*MBIA Ins. Corp. v Credit Suisse Sec.* (USA) LLC, 165 AD3d 108, 114 [1st Dept 2018].)

Nevertheless, Donald also fails to state a fraud claim because he does not specify anything more than conclusory damages. Where "conclusory allegations of the complaint do not contain any factual detail showing specific damages resulting from the purported misrepresentations" they "are insufficient to establish a claim in fraud." (*Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435, 437 [1st Dept 1988][citations omitted]). Accordingly, the fraud claim is dismissed.

Conversion

Donald alleges that Michael exercised unauthorized dominion and control over the money and artwork despite Donald's 50% ownership interest. (NYSCEF Doc. No. 12 at ¶¶ 49, 50.) Specifically, Donald claims that Michael deprived him of his ownership interest in the artwork given to Michael by HC clients and the funds given to Michael by

HC clients. (*Id.* at 49). In moving to dismiss, Michael argues that the conversion claim is barred by the Statute of Frauds (NYSCEF Doc. No. 10 at 7) and impermissibly seeks damages for what is a breach of contract. Because the First Agreement and Second Agreement allegedly gave both parties equal joint ownership, Michael maintains that Donald cannot show a superior possessory right necessary to state a claim for conversion. Additionally, Michael claims that his alleged removal of the jointly owned artwork to his new office did not exclude Donald from any rights to the property, and therefore, Donald cannot state a claim for conversion.

"Conversion is the unauthorized assumption and exercise of the right of ownership over another's property to the exclusion of the owner's rights." (*Lemle v Lemle*, 92 AD3d 494, 497 [1st Dept 2012][citation omitted]). The elements of a conversion claim are "(1) plaintiff had legal ownership or immediate superior right of possession to specific identifiable personal property and (2) defendant exercised unauthorized dominion over property to the exclusion of plaintiff's rights." (*Aetna Cas. & Sur. Co. v Glass*, 75 AD2d 786, 786 [1st Dept 1980][citations omitted].)

Insofar as Donald's alleged possessory interest in the funds and artwork stems from the First Agreement and Second Agreement, Michael's failure to equally share the funds and artwork, recast here as a denial of Donald's ownership rights, is tantamount to a breach of the agreements. Indeed, a conversion claim cannot be predicated on a mere breach of contract. (*Jagarnauth v Massey Knakal Realty Servs., Inc.*, 104 AD3d 564, 565 [1st Dept 2013]).

Similarly, Donald's argument that the conversion claim against Michael is based on artwork and funds that Michael received as compensation for HC services, and not services simply provided to HC clients under the First Agreement, also fails to state a

claim for conversion. Although Donald relies heavily on *Lemle v Lemle* for the proposition that a conversion claim is stated when the directors of a professional corporation use corporate funds to enrich themselves or falsely eliminate their debts, Donald overlooks the fact that the conversion claim in *Lemle* belonged to the corporation, and not the shareholder. (*Lemle v Lemle*, 92 AD3d at 496 ["[P]laintiff asserted derivative claims against his siblings for breach of fiduciary duty, conversion, fraud and accounting. In his individual capacity, plaintiff asserted claims against the corporation for common-law dissolution and the appointment of a temporary receiver ... ."].) Indeed, if Michael provided the services on behalf of HC, and not pursuant to the First Agreement, the conversion of the compensation is a claim belonging to HC, not Donald. (*See Castelloti v Free*, 138 AD3d 198, 210-211 [1st Dept 2016] [noting that the conversion claim belongs to the entities and not the shareholder individually].) Accordingly, the conversion claim is dismissed.

Accounting

Donald alleges in the complaint that a confidential or fiduciary relationship existed between him and Michael that obligated Michael to observe the fiduciary duties of loyalty and care. (NYSCEF Doc. No 12 at ¶¶ 61, 62.) The complaint further provides that Michael "was entrusted certain artwork in which Donald ... holds a fifty percent interest" and that Michael received funds from HC clients in return for providing services outside of the Company. (*Id.* at ¶ 63.) Allegedly, Michael has not responded to Donald's demands for an accounting. (*Id.* at ¶ 64.) At oral argument, Donald clarified that the legal basis for the accounting was "as an equitable matter that [Michael has] an interest in these assets." (Tr. at 25:12-16)

> "The right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest. An allegation of wrongdoing is not an indispensable element of a demand for an accounting where the complaint indicates a fiduciary relationship between the parties or some other special circumstance warranting equitable relief."

(*Adam v Cutner & Rathkopf*, 238 AD2d 234, 242 [1st Dept 1997][internal quotation marks and citations omitted].) "The mere fact that the parties are siblings, standing alone is insufficient to support a fiduciary relationship" (*Castelloti v Free*, 138 AD3d at 209); however, "shareholders in a close corporation, owe fiduciary duties to one another." (*Unitel Telecard Distrib. Corp. v Nunez*, 90 AD3d 568, 569 [1st Dept 2011][citation omitted].)

Here, Donald alleges that he and Michael are 50% shareholders in HC, and therefore, Donald sufficiently alleges the existence of a fiduciary relationship between him and Michael. To the extent that the accounting claim is premised on the artwork entrusted to Michael in which Donald holds a 50% interest, Donald sufficiently states an accounting claim. Insofar as the accounting claim is premised on the First Agreement, an accounting claim is not stated because no fiduciary relationship arises out of the parties status as siblings, and no fiduciary relationship arises out of the First Agreement as alleged.

Accordingly, it is

ORDERED that the motion of defendant Michael Hecht to dismiss the complaint is granted in part and the first and second causes of action of the complaint are dismissed; and it is further

ORDERED that plaintiff is granted leave to serve an amended complaint so as to replead by September 30, 2019; and it is further

ORDERED that plaintiff's accounting claim is to proceed as set forth in this decision; and it is further

ORDERED that, in the event that plaintiff fails to serve and e-file an amended complaint in conformity with this decision by September 30, 2019, leave to replead shall be deemed denied, and defendant's counsel is to e-file and hand deliver to Part 48 (Room 242) an affirmation attesting to such non-compliance; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 242, 60 Centre Street, New York, New York, on October 10, 2019 at 11:30 AM.

8/30/19
DATE

ANDREA MASLEY, J.S.C.
HON. ANDREA MASLEY

CHECK ONE:		CASE DISPOSED		x	NON-FINAL DISPOSITION	
		GRANTED			GRANTED IN PART	
APPLICATION:		SETTLE ORDER			SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT	