Sprung v MacGregor
2019 NY Slip Op 33002(U)
October 3, 2019
Supreme Court, Kings County
Docket Number: 504677/19
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8
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RANDALL SPRUNG,
Plaintiff, Decision and order

- against - Index No. 504677/19

ms #'s 1, 2 & 3

BANNOR MICHAEL MacGREGOR, JEFFREY KATZ
& LIFE DESIGN INTERNATIONAL, INC.,
a/k/a Vastech Auto America, a/k/a Intuitive
Capital Management LLC, a/k/a Intuitive
Technology Ventures Corporation, a/k/a
Vastech Technologies Corporation,
Defendants, October 3, 2019
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PRESENT: HON. LEON RUCHELSMAN

The defendant Bannor Michael MacGregor and defendant Life Design International Inc., have moved pursuant to CPLR §3211 seeking to dismiss the complaint. The plaintiff has opposed the motions. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

On December 6, 2017 the plaintiff entered into a stock purchase agreement wherein he invested $400,000 with defendant Life Design that represented it had obtained a master license to manufacture motors by utilizing certain patented technologies for use in electric automobiles. On January 26, 2018 the parties entered into a second addendum whereby the plaintiff invested another $3,850,000 in assets in a Wyoming corporation called Sprung Investments LLC in exchange for stock in Life Design. The Life Design stock was placed in a second Wyoming corporation

called Randal S. Sprung LLC. A third addendum dated March 20, 2018 was signed by the parties wherein the plaintiff transferred his interest in Sprung Investments LLC to Life Design to improve Life Design's financial position. A fourth addendum was allegedly signed between the parties on July 5, 2018. This agreement, denominated a 'final agreement' waived many of Sprung's rights and required him to pay an additional $1,800,000 in exchange for more Life Design stock.

The plaintiff initiated this lawsuit and asserted six causes of action including fraud, breach of contract, unjust enrichment, money had, rescission and a constructive trust. The Complaint alleges the defendants committed fraud and misrepresented Life Design had a master license and essentially converted all of Sprung's investments to themselves. Further, the plaintiff alleges the fourth addendum was never signed by the plaintiff. Rather, the plaintiff signed a different document which the defendants then attached to a fictitious document called the fourth addendum.

The defendants Life Design and MacGregor have now moved seeking to dismiss the Complaint. Life Design has presented two distinct arguments. First, Life Design asserts the fourth addendum contains a forum selection clause which only permits litigation to be filed either in North Carolina or Nevada, thus this action in New York is improper (<u>see</u>, Fourth Addendum, ¶ 15).

Second, the fourth addendum releases Life Design's contractual obligations under all the prior agreements rendering the lawsuit moot (see, Fourth Addendum, Third Paragraph). The plaintiff argues the fourth addendum is void as a matter of law therefore it has no legal effect and this litigation should proceed. First, MacGregor argues he was never validly served with process. Further, he echoes the arguments of Life Design and asserts the lawsuit is improper because it violates the forum selection clause of the fourth addendum. He also argues that in any event each allegation fails to state a cause of action. The plaintiff opposes this motion as well.

Conclusions of Law

"[A] motion to dismiss made pursuant to CPLR §3211[a][7] will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law" (see, e.g. AG Capital Funding Partners, LP v. State St. Bank and Trust Co., 5 NY3d 582, 808 NYS2d 573 [2005], Leon v. Martinez, 84 NY2d 83, 614 NYS2d 972, [1994], Hayes v. Wilson, 25 AD3d 586, 807 NYS2d 567 [2d Dept., 2006], Marchionni v. Drexler, 22 AD3d 814, 803 NYS2d 196 [2d Dept., 2005]. Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its

claims, of course, plays no part in the determination of a pre-discovery CPLR §3211 motion to dismiss (see, EBC I, Inc. v. Goldman Sachs & Co., 5 NY3d 11, 799 NYS2d 170 [2005]). Moreover, to succeed on a motion to dismiss based upon documentary evidence such evidence must utterly refute the plaintiff's allegations (Gould v. Decolator, 121 AD3d 845, 994 NYS2d 368 [2d Dept., 2014]).

Fraud in the execution, also known as fraud in the factum occurs when a party signs a document that is different from what the party thought he or she was signing (see, Dalessio v. Kressler, 6 AD3d 57, 773 NYS2d 434 [2d Dept., 2004]). As the Supreme Court observed, this type of fraud occurs upon "the surreptitious substitution of one paper for another, or obtaining by some other trick or device an instrument which the party did not intend to give" (see, George v. Tate, 102 U.S. 564, 12 Otto 564 [1880]). Thus, fraud in the execution may be found to exist where a party signs an unattached signature page which is then annexed to a contract with terms of which the party did not agree (Connors v. Fawn mining Corp., 30 F3d 483 [3rd Cir. 1994]).

The defendant Life Design argues the plaintiff's claims of fraud in the execution are "unsupported and conclusory" and are insufficient to defeat a motion to dismiss (see, Reply Memorandum, page 3). They further assert these conclusory allegations can surely not raise any questions sufficient to

defeat the motion to dismiss since a fully executed contract unambiguously contradicts those allegations.

However, the plaintiff has presented sufficient evidence the fourth addendum is void and that consequently it cannot govern the dispute between the parties and thus, New York is a proper forum and the plaintiff's claims are viable.

First, it is surely true that where a party presents conclusory evidence of fraud in the execution, such allegation will not render the document void (Whitehead v. Town House Equities Ltd., 8 AD3d 367, 780 NYS2d 15 [2d Dept., 2004]). However, specific facts raising questions about the nature of the execution of the agreement can create a fraud in the execution defense.[1] Thus, contrary to the assertions of Design Life that "Plaintiff makes no specific allegations of falsehoods or under-handed trickery with respect to the binding (or non-binding) nature of any of the agreements that Plaintiff personally executed, including the Final Agreement (and its forum-selection clause)" (see, Memorandum of Law in Support, page 15) such allegations were emphatically made. Thus, the Complaint alleges that "Sprung crossed out portions of a purported Forth Addendum prior to signing it, but he never received a copy of that actual document. Instead he later received a 'Fourth Addendum' that

[1] Although the plaintiff is alleging fraud in the execution as a 'defense' the procedural posture of that allegation is designed to void the fourth addendum and reinstate the previous agreements.

contained provisions he never agreed to" (see, Complaint, ¶ 50). Further, the plaintiff's affidavit describes in great detail the fraud allegedly perpetrated by the defendants. Thus, Paragraph 5 of the plaintiff's affirmation states there were five distinct provisions of the proposed fourth addendum that he did not agree to including the hold harmless provision, that all previous guarantees of the defendants were null and void, that the plaintiff agreed to pay an additional $1,791,893, the forum selection clause and the application of North Carolina law. The plaintiff's affirmation continues to elaborate how the plaintiff crossed out portions he did not agree with and revisions were made and several versions of the agreement were printed and reviewed. The plaintiff asserts that the "language of the revised 'Fourth Agreement' that I agreed to did not, among other objections I had, provide that I would give up all protections I had, and pay an additional amount of nearly $1.8 million dollars..." (Affirmation of Randal Sprung, ¶ 8).

These allegations are hardly conclusory or speculative but are specific and surely raise questions concerning the validity of the fourth addendum that must be explored through discovery. Thus, in Fedorov v. Hussain, 17 Misc3d 1138(A), 856 NYS2d 23 [Supreme Court Kings County 2007] the court held that a motion to dismiss was inappropriate when an allegation of fraud in the execution was presented where the parties offered "radically

conflicting versions of the circumstances and the representations" of the nature of the execution of the agreement. Again, in Hetchkop v. Woodland at Grassmere Inc., 116 F3d 28 [2d Cir. 1997] the court held it was error to characterize allegations of fraud in the execution as conclusory where the facts supporting the allegation were "quite detailed" (id). In that case a party, DiGiovanni alleged the other party, Solaas switched documents and DiGiovanni signed a document he did not assent to. The court held that "DiGiovanni could not say that he saw Solaas switch documents; but his testimony that the document he signed was not the one he had just been shown, together with his description of the events, including Haagensen's [another party] distraction, constituted evidence from which a reasonable factfinder would be permitted to infer that there had been a surreptitious substitution" (id). Likewise, the plaintiff cannot say he observed a document switch, nevertheless, he has presented specific and detailed evidence sufficient to defeat a motion to dismiss. These allegations therefore, govern the entire document. There is no mechanism whereby an entire contract can be void when procured by fraud in the execution, yet somehow the forum selection clause can remain viable. The case cited by Design Life in Reply (page 11), British West Indies Guaranty Trust Company v. Banque International A Luxembourg, 172 AD2d 234, 567 NYS2d 731 [1st Dept., 1991] does not support that position.

Life Design further argues the fourth addendum is documentary evidence which conclusively establishes the validity of the document as a matter of law. However, that argument suffers from the same legal infirmity as the argument the allegations of the plaintiff are conclusory. Sufficient evidence has been demonstrated that the parties should engage in discovery to explore the plaintiff's allegations. That conclusion likewise undermines the argument the contract is documentary evidence. While it is true that out of court transactions such as contracts may constitute documentary evidence, that is only true if the contract is "essentially undeniable" (see, Fontanetta v. Doe, 73 AD3d 78, 898 NYS2d 569 [2d Dept., 2010]). However, when there is a dispute concerning the authenticity of the document in question then dismissal of the complaint is not warranted (Parekh v. Cain, 96 AD3d 872, 948 NYS2d 72 [2d Dept., 2012]).

Life Design further argues that if a written agreement unambiguously contradicts the allegations of a litigant's claims then such claims must fail even if there is extrinsic evidence of self serving affidavits to the contrary. However, 150 Broadway N.Y. Associates L.P. v. Bodner, 14 AD3d 1, 784 NYS2d 63 [1st Dept., 2004] cited by Life Design in Reply (page 3) concerns the impropriety of utilizing extrinsic evidence to create ambiguities where none exist on the face of the agreement. However, where documentary evidence is submitted which does not utterly refute

allegations of fraud then a motion to dismiss is improper (SV Vernon 43, LLC v. Malik, 138 AD3d 730, 30 NY3d 136 [2d Dept., 2016]).

Therefore, based on the foregoing, the motion seeking to dismiss the Complaint based upon the existence of the fourth addendum is denied.

Concerning service of process upon defendant MacGregor, service was effectuated upon him by service at 7610 Aura Loop, apartment 313, Raleigh, North Carolina pursuant to CPLR §308(4) which requires 'fixing and mailing' the summons to the address noted. The defendant argues the plaintiff's serving of the defendant by affixing the summons and complaint to that address was defective since it was not his actual place of business or dwelling or usual place of above. CPLR §308(4), commonly known as 'nail and mail' states service may be effectuated

"[B]y affixing the summons to the door of either the actual place of business, dwelling place, or usual place of abode within the state of the person to be served and by either mailing the summons to such person at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business."

Thus, the 'nail and mail' components of this method of service have separate requirements, the mailing component can be fulfilled by mailing to the defendant's last known residence, the nailing component, however, can only properly be completed when affixed to defendant's actual place of business, dwelling place, or usual place of abode (see, also, Feinstein v Bergner, 48 NY2d

234, 422 NYS2d 356 [1979], affirming the Appellate Division's finding that service of process pursuant to CPLR §304(8) did not conform to the requirements of the statute because only the actual dwelling place is sufficient for "nailing" purposes). In opposition, the plaintiff asserts that while the process server referred to that location as the 'last known residence' of the defendant it was in fact his actual residence. The plaintiff supports his contention the address served was the actual residence of MacGregor because on March 18, 2019, MacGregor sued Sprung in Superior Court in Wake County North Carolina and filed a verified complaint and a Civil Action Cover Sheet with an address of 7610 Aura Loop, apartment 313, Raleigh, North Carolina. MacGregor counters that the plaintiff "offers no basis for that assumption" the address listed on the North Carolina filing documents is either the actual place of business, dwelling place or usual place of abode and the address listed on those documents "only indicates that the address is in some way associated with Mr. MacGregor" (see, Reply Memorandum of Law, page 3). The Superior and District Court Rules of North Carolina (Rule 5(b) Form of Pleadings) state that "all papers filed in civil actions...shall include as the first page of the filing a cover sheet summarizing the critical elements of the filing in a format prescribed by the Administrative Office of the Courts" (id). Further, the North Carolina Superior Court, Wake County

Pleadings Complaint (2008 WL 74270952) Section D(1)(a) entitled Documents states that "all papers filed in civil actions...shall include as the first page of the filing, a cover sheet, summarizing the critical elements of the filing in a format prescribed by the Administrative Office of the Courts. NC R Superior and District Court Rules 5(b)" (id). That document, known as Form AOC-CV-751 revised January 2014 contains a space wherein the name and address of the plaintiff must be included. In that space MacGregor responded "Bannor Michael MacGregor 7610 Aura Loop, Apt. 313 Raleigh North Carolina 27617" (see, Civil Action Cover Sheet filed received by the Wake County Superior Court on March 18, 2019 submitted within Plaintiff's Opposition). Further, the first paragraph of the Verified Complaint in the North Carolina action states that "Plaintiff Bannor Michael MacGregor is a citizen and resident of Raleigh, Wake County, North Carolina. Plaintiff also regularly does business in Wake County, North Carolina" (see, Verified Complaint, *MacGregor v. Sprung*, ¶ 1). While the body of the Verified Complaint does not provide an address the Civil Action Cover Sheet does, as noted, list an address. The defendant MacGregor now argues that even though he indicated that he is a 'resident' of Wake County and provided only a single address in Wake County that address was not his legal residence for purposes of service of process but some address associated with MacGregor in some unknown way.

First, other than the memorandum of counsel, the defendant MacGregor does not dispute that address as his residence. This is curious since on July 23, 2019 MacGregor signed an affidavit wherein he disputed the alleged fraud associated with the fourth addendum but did not rebut service of process in any meaningful way. Moreover, the defendant has wholly failed to raise any question challenging the service upon that address as his residence. The assertion the address noted on the Civil Action Cover Sheet was not the residence of the defendant is conclusory and further fails to rebut the obvious presumption that the address listed there coupled with the concession he was a resident of Wake County without any explicit denial from the defendant himself leads to the inescapable conclusion service at that address was proper.

Furthermore, the process server satisfied the due diligence standard permitting nail and mail service. First, the process server stated the business address of MacGregor could not be ascertained. Next, the process server stated attempts at two other locations in Durham North Carolina were attempted. Finally, the process server noted three attempts were made at different times of the day, two in the morning and once in the afternoon on a Saturday when people are likely at home (see, Affidavit of Lindsey Oldham, dated August 13, 2019). In Deutsche Bank National Trust Company v. White, 110 AD3d 759, 972 NYS2d 664

[2d Dept., 2013] the court held proper service was effectuated pursuant to CPLR §308(4)where the "process server made three attempts to serve White at his home at different times and on different days, including a Saturday...Since there was no indication that White worked on Saturdays or that his workplace was readily ascertainable, 'the plaintiff was not required to attempt to serve the defendant at his workplace'" (id).

Therefore, based on the foregoing the motion to dismiss the complaint on the grounds of improper service is denied.

Turning to the individual causes of action, it is well settled that to succeed upon a claim of fraud it must be demonstrated there was a material misrepresentation of fact, made with knowledge of the falsity, the intent to induce reliance, reliance upon the misrepresentation and damages (Cruciata v. O'Donnell & Mclaughlin, Esqs, 149 AD3d 1034, 53 NYS3d 328 [2d Dept., 2017]). These elements must each be supported by factual allegations containing details constituting the wrong alleged (see, JPMorgan Chase Bank, N.A. v. Hall, 122 AD3d 576, 996 NYS2d 309 [2d Dept., 2014]).

The defendant MacGregor argues the fraud claim must be dismissed for two reasons. First, the defendant asserts the complaint fails to sufficiently allege MacGregor knew the statements made were false. Moreover, the complaint fails to allege the plaintiff reasonably relied upon those alleged

misrepresentations. Concerning the first basis seeking dismissal the defendant argues that "there is only one identifiable alleged misrepresentation: that LDSI 'has obtained a perpetual Master License for the American Territory to sub-license, co-manufacture, and/or sole manufacture electronic motors based upon Vastech's inverse magnetic motor ('IMM') patented and patent-pending technologies for the various electric vehicle markets'" (see, Memorandum in Support, page 11). The defendant asserts the Complaint merely concludes that "MacGregor's representation of material fact, as set forth above, was false and then known by MacGregor and LDSI to be false" (Complaint, ¶ 23). However, a review of the Complaint demonstrates that the fraud is specific, not conclusory, and if true, the standard for a motion to dismiss, evinces knowledge and intent to defraud on the part of the defendant. The Complaint further alleges that the above mentioned patented technologies was owned by a different company located in the United Kingdom and that MacGregor as the director of Vastech did not have authority to issue the master license to Life Design and in fact did not issue a master license to Life Design (see, Complaint, ¶¶ 24, 25, 28). Further, the Complaint alleges MacGregor represented Sprung would end up with a two percent ownership of Life Design, a promise that never materialized (see, Complaint, ¶ 30). Thus, the Complaint sufficiently alleges that MacGregor fraudulently induced the

plaintiff to invest in the venture, misrepresenting the viability of the investment, the value of the investment and the risks involved. In addition, the plaintiff has presented allegations the defendant not only misrepresented the investment opportunity but essentially took the plaintiff's money for his own purposes (see, Complaint, ¶ 65).

The defendant further argues there could have been no reasonable reliance on the part of the plaintiff because the plaintiff acknowledged he had a full opportunity to review all the investment proposals presented. The case of Ogunsanya v. Langmuir, 2008 WL 4426590 [E.D.N.Y. 2008] is instructive. In that case the plaintiff sold a trunk of old photographs and memorabilia without really knowing their true worth to the defendant for $2,000. The defendant feigned the true value of the contents but admitted later he knew they were worth approximately a million dollars. The defendant had promised the plaintiff that if the items were worth more than they both thought, he would give the plaintiff more money. When he refused the plaintiff sued alleging he was fraudulently induced by the defendant. The defendant sought to dismiss the lawsuit on the grounds there was no reliance since the plaintiff could have discovered the true value of the contents. The court rejected that argument noting that "in assessing whether reliance on allegedly fraudulent misrepresentations is reasonable or

justifiable, New York takes a contextual view, focusing on the level of sophistication of the parties, the relationship between them, and the information available at the time of the operative decision" (id). Thus, the plaintiff's reliance on the defendant's alleged misrepresentations could have been reasonable. Likewise, in this case, even though the plaintiff could have inquired into the nature of the investments, a pro forma acknowledgment of satisfaction does not foreclose the possibility of any justifiable reliance. Clearly, at this early juncture, the plaintiff has presented sufficient evidence to establish claims for fraud. While these allegations will have to be proved, further discovery and an eventual trial will sharpen the allegations.

It is well settled that to succeed upon a claim of breach of contract the plaintiff must establish the existence of a contract, the plaintiff's performance, the defendant's breach and resulting damages (Harris v. Seward Park Housing Corp., 79 AD3d 425, 913 NYS2d 161 [1st Dept., 2010]). Further, as explained in Gianelli v. RE/MAX of New York, 144 AD3d 861, 41 NYS3d 273 [2d Dept., 2016], "a breach of contract cause of action fails as a matter of law in the absence of any showing that a specific provision of the contract was breached" (id). The Complaint in this case adequately sets forth the terms upon which the alleged breach is based including the provision Sprung would be entitled

to two percent of the ownership of Life Design as well as other commitments. Therefore, the motion seeking to dismiss the breach of contract cause of action is denied.

It is well settled that a claim of unjust enrichment is not available when it duplicates or replaces a conventional contract or tort claim (see, Corsello v. Verizon New York Inc., 18 NY3d 777, 944 NYS2d 732 [2012]). As the court noted "unjust enrichment is not a catchall cause of action to be used when others fail" (id). The plaintiff does not dispute this but argues that unjust enrichment is available where there are allegations the contract has been induced by fraud (Pramer S.C.A. v. Abaplus International Corporation, 76 AD3d 89, 907 NYS2d 154 [1st Dept., 2010]). While that is true, the unjust enrichment claim and the money had claim are duplicative of the fraud claim (see, American Mayflower Life Insurance Company of New York v. Moskowitz, 17 AD3d 289, 794 NYS2d 32 [1st Dept., 2005]). Therefore, the motion seeking to dismiss the third cause of action for unjust enrichment and the fourth cause of action for money had is granted.

"As a general rule, rescission of a contract is permitted 'for such a breach as substantially defeats its purpose. It is not permitted for a slight, casual, or technical breach, but ... only for such as are material and willful, or, if not willful, so substantial and fundamental as to strongly tend to defeat the

object of the parties in making the contract'" (Kassab v. Kasab, 137 AD3d 1138, 27 NYS3d 680 [2d Dept., 2016]). Clearly, the Complaint alleges sufficient facts which, if true, would show that defendant's alleged breach of the contract substantially defeated the purpose of the contract. Consequently, the motion seeking to dismiss the rescission cause of action is denied.

Lastly, concerning the cause of action for a constructive trust, generally, a constructive trust may be imposed when property has been acquired under such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest therein (Plumitallo v. Hudson Atl. Land Co., 74 AD3d 1038, 903 NYS2d 127 [2d Dept., 2010]). It is well settled that in order to impose a constructive trust the following four elements must be proven. There must be a confidential or fiduciary relationship, a promise, a transfer in reliance of the promise and unjust enrichment (Sharp v. Kosmalski, 40 NY2d 119, 386 NYS2d 72 [1976]). These elements are not applied rigidly but flexibility is employed, especially to promote and satisfy the demands of justice (Sanxhaku v. Margetis, 151 AD3d 778, 56 NYS3d 238 [2d Dept., 2017]). Essentially, as expressed by Justice Cardozo in Beatty v. Guggenheim Exploration Co., 225 NY 380, 122 NE 378 [1919], "a constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the

INDEX NO. 504677/2019
RECEIVED NYSCEF: 10/08/2019

holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee" (id).

Concerning the first element, it is well settled that an investor does not maintain a fiduciary relationship and consequently cannot maintain a cause of action for a constructive trust (Gargano v. Morey, 165 AD3d 889, 86 NYS3d 595 [2d Dept., 2018]). Therefore, the motion seeking to dismiss that cause of action is granted.

Without opposition the motion seeking a default against defendant Jeffrey Katz is granted. The parties will be notified about a date to appear for an inquest.

So ordered.

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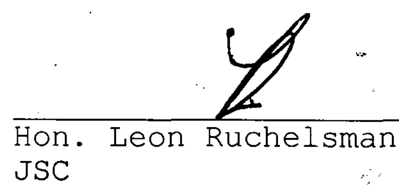

DATED: October 3, 2019
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC