

<b>Staffworks, Inc. v Sands</b>
2019 NY Slip Op 34462(U)
October 23, 2019
Supreme Court, Oneida County
Docket Number: Index No. EFCA2016-001886
Judge: Patrick F. MacRae
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STATE OF NEW YORK  
SUPREME COURT                      COUNTY OF ONEIDA

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**STAFFWORKS, INC.,**

Plaintiff,

Index No.: EFCA2016-001886

v.

RJI No.: 32-18-0025

**JEFFREY SANDS,**

Defendant.

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**APPEARANCES:**

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Attorney for Plaintiff

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**DECISION AND ORDER**

**MACRAE, P.F.**

Before the Court is defendant’s motion seeking summary judgment pursuant to CPLR 3212 and for sanctions, including attorney fees pursuant to 22 NYCRR §130-1.1; and plaintiff’s cross-motion to strike defendant’s answer, and to deny defendant’s motion for summary judgment and for sanctions.

NOW, on receiving and reading the Notice of Motion, dated May 20, 2019, by Terry J. Kirwan, Jr., Esq., attorney for the defendant, together with the Affirmation by Mr. Kirwan, dated May 14, 2019, and the Affidavit of Jeffrey Sands, sworn to the 15<sup>th</sup> day of May, 2019, and the Memorandum of Law by Mr. Kirwan, dated May 20, 2019, together with all exhibits submitted therewith; and the Notice of Cross-Motion, dated July 1, 2019 by Evan Rossi, Esq., of counsel to Rossi & Rossi, attorneys for the plaintiff, together with the Affirmation of Mr. Rossi, dated July 1, 2019, and the Affidavit of Anita Vitullo, sworn to the 2<sup>nd</sup> day of July, 2019, and the Memorandum of Law by Mr. Rossi, dated July 1, 2019, together with all exhibits submitted therewith; and the Reply Memorandum of Law by Mr. Kirwan, dated July 6, 2019; and after hearing Mr. Kirwan in support of defendant's motion and in opposition to plaintiff's cross-motion, and Mr. Rossi in opposition to defendant's motion and in support of plaintiff's cross-motion; and said motions having duly come on to be heard on the 9<sup>th</sup> day of July, 2019; and due deliberation being had thereon, the Decision and Order of the Court is as follows:

### THE COMPLAINT

Plaintiff's Complaint raises four causes of action: 1. actual fraud; 2. constructive fraud; 3. false pretenses, fraudulent scheme, civil conspiracy, corrupt and unfair practices; and 4. unjust enrichment. The precise factual framework for plaintiff's "actual fraud" claim is not entirely clear. While the overall tenor of the allegations in the Complaint seem to rely heavily on the history of interaction between the parties covering the defendant's involvement with two separate business entities (General Super Plating, or GSP, and VMR Electronics Corporation, or VMR), it is unclear whether plaintiff is stating a cause of action against defendant that relates to his activities in one or the other of these companies or both. As an example, plaintiff alleges in ¶ 21

that “Mr. Sands had always intended to string Staffworks along with empty promises to pay, while earning a salary, benefits and a profit until VMR could be sold off and the creditors were left with nothing.” *NYSCEF 1, emphasis added*. However, in ¶ 24 plaintiff claims that “Staffworks did detrimentally rely on the defendant’s assurances that *both* of these sizable bills referenced above would be paid,” and then in ¶ 25, states that “Mr. Sands was awarded significant compensation for the sales of *both GSP and VMR*, that was only achievable by intentionally misleading Staffworks that the bills would in fact be paid.” *Id., emphasis added*.

However, in the deposition of Anita Vitullo, a representative for plaintiff, she responded affirmatively to questions that confirmed the purpose of the action was to recover an amount due to plaintiff for temporary employees plaintiff provided to VMR, which is not a defendant in this action. *NYSCEF 108, p. 5*. Ms. Vitullo summed up the essence of this action in testifying that “the basis [for the lawsuit against defendant] was that the bill wasn’t paid at the company he represented and that he intentionally defrauded me at GSP and did so again in hiding at VMR.” *NYSCEF 108, p. 28*. Throughout her deposition, the testimony of Ms. Vitullo returned to this fundamental element. Specifically, she testified that GSP was a long-standing company in the Syracuse area and a customer of Staffworks; that at some point, GSP came under the control of defendant, at which time GSP stopped paying for services provided by Staffworks; that defendant later took control of VMR and, without informing Staffworks of defendant’s involvement, VMR began using Staffworks services, but failed to pay for those services. On the basis of these essential circumstances, plaintiff concluded that defendant deceived Staffworks by not disclosing his involvement with VMR for the purpose of securing services that he intended not to pay.

Before addressing the causes of action at issue, it is necessary to consider plaintiff’s

opposition to defendant's summary judgment motion. Neither plaintiff's representative (Ms. Vitullo) nor Mr. Rossi specifically address the separate causes of action. Plaintiff's Memorandum of Law, however, limits plaintiff's opposition to only the causes of action for fraud, unjust enrichment and an opposition to defendant's motion for sanctions. In foregoing opposition to defendant's motion on any other stated cause of action, plaintiff is deemed to have acquiesced to dismissal of those claims. Notwithstanding this, the Court will assess the remainder of the motion in view of the elements to which plaintiff has raised objection.

#### THE FRAUD CAUSES OF ACTION

Plaintiff's Complaint asserts causes of action for actual fraud (cause of action #1), constructive fraud (cause of action #2), and false pretenses, fraudulent scheme, civil conspiracy, corrupt and unfair practices (cause of action #3).

There are two primary factors the Court must consider in addressing defendant's motion to dismiss these causes of action. The first is whether the causes of action give sufficient factual detail as required by CPLR 3016(b), which requires that "where a cause of action . . . is based upon . . . fraud . . . the circumstances constituting the wrong shall be stated in detail." The detail called for in the statute "requires only that the misconduct complained of be set forth in sufficient detail to clearly inform defendant with respect to the incidents complained of and is not to be interpreted so strictly as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting a fraud." *Lanzi v. Brooks*, 43 NY2d 778, 780, *remititur amended*, 43 NY2d 947, *reargument denied*, 44 NY2d 733 (1978), *internal quotations and citations omitted*.

The second factor to consider is whether there are factual questions to be tried as to the

claims of fraud. “The elements of a cause of action to recover damages for fraud are (1) a misrepresentation or a material omission of fact which was false, (2) knowledge of its falsity, (3) an intent to induce reliance, (4) justifiable reliance by the plaintiff, and (5) damages.” *Swartz v. Swartz*, 145 AD3d 818, 823 (2<sup>nd</sup> Dept. 2016). “A duty to disclose may arise where there is a fiduciary or confidential relationship, or one party’s superior knowledge of essential facts renders nondisclosure inherently unfair.” *Barrett v. Freifeld*, 77 AD3d 600, 601-602 (2<sup>nd</sup> Dept. 2010); *cited by Hogan Willig, PLLC v. Kahn*, 145 AD3d 1619 (4<sup>th</sup> Dept. 2016); and *Ball v. Cook*, 2012 WL 4841735 (SDNY 2012).

With regard to the first cause of action, plaintiff alleges merely that defendant employed “deceitful practices” that caused injury to plaintiff. The cause of action does not specifically incorporate the “background” allegations in paragraphs preceding the stated causes of action. Whether that, in itself, is a deficiency has not been raised. However, even reading the background allegations into the first cause of action do not give a reasonable basis upon which to draw a conclusion as to what practices deceived plaintiff and caused it injury. Thus, even under a liberal reading of the wording of the first cause of action, it is clear that plaintiff has not met the requirements of CPLR 3016(b).

The Complaint clearly states that plaintiff entered into an arrangement in which it provided temporary employees to VMR Electronics, Inc. (VMR) and that over the period VMR accepted these employees it did not pay plaintiff for the cost of this service. Most significantly as to the actual fraud cause of action, plaintiff says it was unaware of defendant’s association with VMR. This admission is fatal to the element of this cause of action because it demonstrates only that plaintiff lacked information. It does not assert any facts that demonstrate reliance.

The same conclusion must be reached as to plaintiff's claim of constructive fraud in the second cause of action because it does not assert in any manner that it was aware of defendant's involvement in VMR. Plaintiff's claim that constructive fraud should lie under these circumstances because "a special fiduciary relationship as vendor and vendee" exists is inconsistent with well-established law that "an arms-length business relationship does not give rise to a fiduciary obligation and without an agreement providing for a relationship of trust, or special circumstances indicating the same, none can be inferred." *Apogee Handcraft, Inc. v. Verragio, Ltd.*, 155 AD3d 494 (1<sup>st</sup> Dept), *leave denied*, 31 NY3d 903 (2018), *internal citations and quotations omitted*.

Plaintiff's third cause of action stands on different ground, in part because plaintiff has conjoined concepts of false pretenses, fraudulent scheme, civil conspiracy and corrupt and unfair practices under the single factual theory that in "acting as VMR's de facto manager, Mr. Sands intentionally concealed his involvement with VMR from Staffworks in order to keep Staffworks from pulling its temporary employees from VMR" (*NYSCEF 1 at ¶ 31*) and the legal theory that his "failure to disclose his identity to Staffworks also constitutes fraud as Mr. Sands had an honest duty-bound obligation to disclose information that is material and germane." *NYSCEF 1 at ¶ 32*.

Unlike the fraud causes of action discussed above, plaintiff's theory here is, essentially, one of fraudulent concealment. The issue for the Court is whether the elements of a cause of action are stated, not whether it is correctly titled. "To sustain a cause of action alleging fraudulent concealment, the plaintiff must allege that the defendant had a duty to disclose the material information." *Swartz v. Swartz*, 145 AD3d at 823. "A duty to disclose may arise where

there is a fiduciary or confidential relationship, or one party's superior knowledge of essential facts renders nondisclosure inherently unfair." *Barrett v. Freifeld*, 77 AD3d 600, 601-602 (2<sup>nd</sup> Dept. 2010); *cited by Hogan Willig, PLLC v. Kahn*, 145 AD3d 1619 (4<sup>th</sup> Dept. 2016); and *Ball v. Cook*, 2012 WL 4841735 (SDNY 2012).

In the present matter, there is no question that there was no fiduciary relationship between plaintiff and defendant. However, plaintiff's allegation that defendant "intentionally concealed his involvement with VMR from Staffworks in order to keep Staffworks from pulling its temporary employees from VMR" fundamentally alleges that defendant was in possession of superior knowledge of essential and undisclosed facts that require a finder of fact to determine whether this was fair or unfair. Defendant has not come forward with evidence to demonstrate that this does not raise a triable question of fact that requires a trial. As such, defendant's motion to dismiss the third cause of action is denied.

#### UNJUST ENRICHMENT

Plaintiff's fourth cause of action is one that claims defendant was unjustly enriched. "A cause of action for unjust enrichment requires a showing that (1) the defendant was enriched, (2) at the expense of the plaintiff, and (3) that it would be inequitable to permit the defendant to retain that which is claimed by the plaintiff. . . . The essence of such a cause of action is that one party is in possession of money or property that rightly belongs to another." *Hogan Willig, PLLC v. Kahn*, 145 AD3d at 1622, *citing Hayward Baker, Inc. v. C.O. Falter Constr. Corp.*, 104 AD3d 1253, 1255 (4<sup>th</sup> Dept. 2013).

The factual basis for plaintiff's claim of unjust enrichment is "as a result of the foregoing allegations." *NYSCEF 1 at ¶ 33*. A review of the allegations contained in the Background

portion of the Complaint is devoid of any claim that defendant came into possession of any property belonging to the plaintiff. Further, to the extent that in its response to the motion, plaintiff claims that defendant was enriched by having been paid by VMR monies that rightfully should have been paid to Staffworks is not supported. Defendant fairly demonstrated that whatever payment made to defendant from the coffers of VMR was for services rendered. The allegation that VMR may have chosen between paying a creditor and paying staff is, at best, mere speculation. It is devoid of any factual evidence upon which to reach this conclusion, either directly or circumstantially. At best, the evidence is that this was a decision that fell to VMR. However, because it is not a defendant here and there is no evidence to show that defendant was responsible for making that decision on behalf of VMR, it cannot be concluded that the defendant, personally, has been enriched at the expense of the plaintiff. Therefore, plaintiff's fourth cause of action is dismissed.

Defendant's motion for sanctions is denied in light of the decision herein to deny defendant's dismissal of plaintiff's third cause of action.

With regard to plaintiff's cross-motion to strike defendant's answer for failing to respond to discovery demands and to submit to a deposition, the motion is denied. The documentation submitted demonstrates that although defendant did not respond to discovery demands as expected by plaintiff, responses were served. Furthermore, defendant submitted for a deposition at some time between the filing of the cross-motion and the return date, thus rendering moot that basis for the relief sought.

**WHEREFORE**, it is

**ORDERED**, that the motion of defendant Jeffrey Sands to dismiss the first cause of

action stated in the complaint of plaintiff Staffworks, Inc. is granted, and it is further

**ORDERED**, that the motion of defendant Jeffrey Sands to dismiss the second cause of action stated in the complaint of plaintiff Staffworks, Inc. is granted, and it is further

**ORDERED**, that the motion of defendant Jeffrey Sands to dismiss the third cause of action stated in the complaint of plaintiff Staffworks, Inc. is denied, and it is further

**ORDERED**, that the motion of defendant Jeffrey Sands to dismiss the fourth cause of action stated in the complaint of plaintiff Staffworks, Inc. is granted, and it is further

**ORDERED**, that the motion of defendant Jeffrey Sands for sanctions is denied, and it is further

**ORDERED**, that the cross-motion of plaintiff Staffworks, Inc., to strike the answer of defendant Jeffrey Sands is denied.

ENTER:

DATED: October 23, 2019.



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**HON. PATRICK F. MACRAE**  
**Justice of the Supreme Court**