Ibarrondo v Evans
2020 NY Slip Op 30051(U)
January 6, 2020
Supreme Court, New York County
Docket Number: 157378/2015
Judge: Andrea Masley

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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MARTA IBARRONDO,

Plaintiff,

- v -

LISE EVANS, J. MICHAEL EVANS, PHILANTHROPIC BLING LTD.

Defendants.

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INDEX NO. 157378/2015

MOTION DATE _____

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 125-1, 127-1, 132, 133, 134, 135, 136, 137, 138, 139, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 144-1, 145-1, 161

were read on this motion to/for AMEND CAPTION/PLEADINGS.

In motion sequence number 004, plaintiff Maria Ibarrondo moves pursuant to CPLR 3025 for leave to file an amended complaint at the close of discovery. (NYSCEF Doc. No. [NYSCEF] 120, Notice of Motion 004).

Ibarrondo initiated this action in 2015 against her alleged business partner, defendant Lise Evans (defendant) and her husband, defendant Michael Evans (Michael), alleging that they stole the business Philanthropic Bling (Bling), admittedly incorporated in October 2013 as a vehicle for Lise Evans to obtain an E-2 Visa. (NYSCEF 1, Complaint ¶¶ 1, 24, 25). In the proposed amended complaint, plaintiff adds that defendants also stole Bling's business opportunities and plaintiff's ideas, skills, time, efforts, and services. (NYSCEF 124, Proposed Amended Complaint ¶ 2).

Defendant and two nonparty friends sought to create a business to support defendant's immigration application. (NYSCEF 1, Complaint ¶ 3-5). "In order to apply for

an E-2 Visa the applicant must, among other things, invest in a commercial project with the objective of generating a profit and either own at least fifty percent of the enterprise or possess operational control through a managerial position or other corporate devices." (*Id.*, ¶ 26). They invited plaintiff, who has 23 years of advertising experience and is a contributor to the Huffington Post, to join them. (*Id.*, ¶ 30). Indeed, "[i]deas are Plaintiff's business. She gets paid [$1,500 per day] to conceive and execute her ideas." (*Id.*, ¶¶ 31, 35). The complaint further alleges that,

> "When [plaintiff] was asked to join the business, the idea was to manufacture jewelry and other accessories (such as phone covers, bags, t-shirts) with a philanthropic message. The first product was to be an "awareness bracelet". The name of the awareness bracelet was "SMART," an acronym for "STOP MY ALLERGY REACTION TODAY."

(*Id.*, ¶ 36). Plaintiff asserts that she "created a new idea which would become the sole focus of their business for the next year." (*Id.*, ¶ 37). This idea was

> "to create one iconic unisex bracelet that could easily be modified for different causes that together would create a movement. (The plan was to expand to other products after the bracelet launch.) Unlike other products which print the name of the charity (*e.g.*, "Livestrong") or a simple noun (*e.g.*, "Truth") or verb (*e.g.*, "Love"), Plaintiff's Idea was to choose a word or words that would stir an emotion that would lead someone to ask a question that would start a conversation that is focused on the solution and hopefully create a movement. Plaintiff's word is based on a feeling. Plaintiff's word is solution oriented. Plaintiff's word is both a conversation opener and an issue spotter. Each cause shares the same unisex bracelet design with the key word that ignites the campaign. The causes to start with were: Bullying, Gun Control, Domestic Violence, Environment, Haiti and Mental Illness." (*Id.*, ¶ 38).

In November 2013, by email, the four co-venturers[1] agreed to be equal partners of a for-profit corporation. (*Id.*, ¶¶ 32, 43). On November 26, 2014, the proposed co-venturers engaged an attorney to draft a shareholder agreement. (NYSCEF 124, Proposed Amended Complaint, ¶ 53). Since defendant filed her Visa application under Bling, which requires her to own at least 50%, the co-venturers decided to create a new entity, "CORDE," so that the four co-venturers could each maintain their 25% equity. (NYSCEF 1, Complaint, ¶ 54). Plaintiff admitted in the initial complaint that,

> "Lise Evans claimed to the other three that she needed to show a 51% ownership interest in whatever company appeared on her visa papers. Assaf, Farnos and Plaintiff were fine accommodating their friend's visa needs because that did not change the material element of the ownership structure - *i.e.,* that each of the four women owned 25% of the business that owned the bracelet. The notion would be that Lise Evans would hold her 25% of Philanthropic Bling through DALC of which Lise would own at least 51%. *See, e.g.*, Exhibit G. (In reality, DALC had changed its name to Philanthropic Bling and no longer existed as a separate entity. Not realizing this, however, this and other emails discussed the possibility of using DALC as a holding company."

(NYSCEF 1, Complaint ¶ 48). However,

> "At that December 15 meeting, Lise Evans disclaimed for the first time that the four women were equal partners in all respects. Instead, Michael Evans took over the meeting and, through Loeb, proposed that Plaintiff, Assaf and Farnos would be all employees (rather than owners) of the company and would receive the compensation that the Evanses deigned to give them, and that 40% of revenue from the sale of the bracelet would go to charity.

(*Id.* ¶ 60). Originally, plaintiff's complaint encompassed other claims, but in a decision dated May 24, 2016, Justice Oing dismissed the 6th cause of action for fraud; 7th cause of action for

[1] The court uses the term "co-venturers" without making any finding as to the actual relationship among the parties.

breach of fiduciary duty; 8th cause of action for aiding and abetting fraud and breach of fiduciary duty, all without prejudice; and the 9th cause of action for idea misappropriation;[2] 10th cause of action for unfair competition; and 11th cause of action for violation of Labor Law § 191. (NYSCEF 19, Oing, J. Decision). The request for punitive damages was also dismissed as Justice Oing viewed the case as "straight up compensatory damage" for breach of contract without the requisite moral turpitude. (*Id.*; NYSCEF 26, Tr. 63:26-64:2; 65:5-9). The action proceeded with the fifth cause of action for tortious interference intact and the breach of contract claims which were not challenged in the motion to dismiss. (NYSCEF 8, Notice of Motion 001).

Motion to Amend the Complaint

CPLR 3025 provides that "leave to amend shall be freely given" absent prejudice or surprise resulting from the delay. (*Fahey v Ontario Cty*, 44 NY2d 934, 935 [1978]). The motion will be denied where the proposed amendment is legally insufficient. (*NAB Constr. Corp. v Metro Transp. Auth*, 167 AD2d 301, 302 [1st Dept 1990]). To do otherwise would be wasteful of judicial resources." (*Id.*).

Fraud

Plaintiff's proposed sixth cause of action for fraud consists of her original allegations plus the following details:

> "Lise Evans also made these material representations (express and implied) to Plaintiff, Assaf and Farnos, in October-November 2013 and thereafter, that any records listing her as the sole owner of Philanthropic Bling were only for the purpose of her E-2 visa application, and that, once her visa is issued, those records would be formally changed and all the four women would be expressly recorded as equal owners of the Company. Those representations were false.

[2] It was dismissed as matter of law as plaintiff's "Idea" was not new or unique. (NYSCEF 19).

Once the E-2 visa was issued to her in February 2014, Lise Evans refused to honor her promises to give the other three women equal equity in Philanthropic Bling. Instead, after the visa was issued, in February-March 2014 and thereafter, Lise Evans made further material representations (express and implied) to Plaintiff, Assaf and Farnos that, even though she needed to remain at least a 50% owner of a business entity for the purposes of continued validity of her E-2 visa, that entity did not have to be the same entity that sold the bracelet, and the four women could still be equal partners in Philanthropic Bling, the company that sold the bracelet. Those representations were false because, unbeknownst to Plaintiff, Assaf and Farnos at the time, Lise's E-2 visa application was under Philanthropic Bling, so she had to maintain the majority ownership in that particular Company for the purposes of continued validity of her E-2 visa.

In September through December of 2014, Lise Evans also made further material representations (express and implied) to Plaintiff, Assaf and Farnos that, even though she needed to remain at least a 50% owner of Philanthropic Bling for the purposes of continued validity of her E-2 visa, that Company did not have to be the company that actually sold the bracelet, and the four women could still be equal partners in another company that actually sold the bracelet. Those representations were false as well. Once a proposed shareholder agreement for the new company under the name CORDE was prepared by Mr. Swetnick and circulated to the parties, Lise Evans refused to honor her promises and to formalize the agreement that would give each of the four women equal equity ownership.

Throughout the entire material time - that is, from October 2013 to December 2014 - Lise Evans continued making material representations to Plaintiff, Assaf and Farnos that, regardless of the formal corporate ownership structure, the four of them are partners with equal decision-making power in the actual business. In December 2014, Lise abruptly breached those promises when she took over the business together with her husband Michael, leaving the other three women with no decision-making power whatsoever.

> In essence, Lise made repeated implied representations to Plaintiff, Assaf and Farnos over a whole year that it was permissible to have her listed as the sole owner of the Company in her visa application while the actual operational structure of the Company would include all the four women as equal equity partners with equal decision-making authority. These representations were false, because such an inconsistency is not allowed under the applicable immigration laws."

(NYSCEF 124, Proposed Amended Complaint, ¶¶ 150-154.)

According to plaintiff, to summarize, defendant's alleged fraud in the initial complaint consisted of (1) that she represented to the U.S. government that the corporate structure of Bling was different from the way it was actually operated; and (2) she represented to her partners that she would formalize the equal equity partnership arrangement before the product launch, while never actually intending to go through with that because she knew it would interfere with her visa. (NYSCEF 121, Plaintiff's Memo of Law, at 9-10). The fraud claim is based on defendant's alleged misrepresentations to her co-venturers, not any alleged misrepresentation to the US government. Rather, defendant's conduct in connection with her immigration application serves as evidence of her state of mind while dealing with her partners. However, the amendment does not cure the deficiencies of the original complaint which prompted Justice Oing to dismiss the claim initially. (*Gurthartz v City of New York*, 84 AD2d 707, 708 [1st Dept 1981]). While more detailed as a result of discovery, the new allegations are no different than the initial allegations of fraud. There is no material new fact.

In addition, the new fraud claim remains impermissibly duplicative of the contract claim. A straight up contract claim cannot be transformed into a tort claim without a legal duty independent of the contract itself being violated. (*See Non-Linear Trading Co. v Braddis Assoc*, 243 AD2d 107,116 [1st Dept 1998]). "This legal duty must spring from circumstances

extraneous to, and not constituting elements of, the contract." (*Id.*). All of plaintiff's allegations flow from the same premise that defendant promised (1) that she would give the others equal shares once her visa was issued; (2) that there would be a second holding company; and (3) that the company on her visa did not need to be the same entity that actually sold the bracelets, but defendant knew those statements to be false because she did not intend to cooperate. A fraud claim must be dismissed "when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract." (*Manas v VMS Assoc., LLC* 53 AD3d 451, 453 [1st Dept 2008]).

Finally, plaintiff fails to allege all of the requisite elements of fraud: "a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury." (*FNF Touring LLC v Transform Am., Corp.*, 111 AD3d 401, 401 [1st Dept 2013]).

First, plaintiff fails to allege misrepresentations by defendant. The allegations show that the co-venturers were aware of the conflict between defendant's need to own 50% for the purposes of the visa application and the three remaining co-venturers' desire to each own 25%. (NYSCEF 124, Proposed Amended Complaint ¶¶ 152, 153; *see also* NYSCEF 128, Assaf Tr., 57:3-15). Plaintiff's allegations of defendant's "implied" misstatements inherently lack particularity. (NYSCEF 124, Proposed Amended Complaint, ¶ 154). Apparently, it was not defendant who stated in the numerous emails that they would share equal ownership if the attorneys confirmed that the proposed structure would comport with the Visa requirements. (NYSCEF 123, Emails 3/27/19).

Nor can defendant's failure to correct the emails constitute an actionable omission because scienter requires an actual intent "to deceive, manipulate, or defraud" at the time of

the alleged misrepresentation is made. (*Zutty v Rye Select Broad Mkt Prime Fund, L.P.*, 33 Misc 3d 1226(A) at *11 [Sup Ct, NY County 2011]). However, one non-party does not believe that defendant "started out trying to deceive us," while the other non-party denies being duped by defendant or anyone else. (NYSCEF 135, Assaf Tr., 308:3-5; NYSCEF 129, Farnos Tr., 253:4-6). Moreover, plaintiff's allegations of defendant's then-present intent to defraud are generalized allegations with no specificity. (*See e.g.* NYSCEF 124, Proposed Amended Complaint ¶156). An actionable omission also requires a fiduciary relationship which did not exist at the time. (*Aaron Ferer & Sons Ltd v Chase Manhattan Bank Nat'l Ass'n*, 731 F2d 112, 123 [2d Cir 1984]).

Plaintiff cannot allege reasonable reliance on defendant as to the immigration law questions. Nothing prevented plaintiff from seeking the advice of an immigration lawyer. Indeed, the plaintiff and the nonparties did consult an immigration lawyer. (NYSCEF 136, February 2014 - May 2015, emails with immigration attorney). Nothing stopped them from returning to that attorney or another regarding the idea of a holding company. (*Danann Realty Corp. v Harris*, 5 NY2d 317, 322 [1959]).

As to damages for fraud, plaintiff alleges lost business opportunities and the value of the work she performed. While plaintiff alleges that she is paid $1,500 per day (NYSCEF 124, Proposed Amended Complaint, ¶ 31), there is no allegation concerning the number of days she worked. Indeed, plaintiff admitted that as a creative person "we don't do that." (NYSCEF 137, plaintiff deposition, January 14, 2019, Tr. 59:4-62:2). Finally, as Justice Oing recognized when he initially dismissed the identical claim for fraud: "You can't have fraud if you disclose it." (NYSCEF 19, Oing, J. Decision Tr. 28:3-4). Therefore, plaintiff's motion to amend the complaint to reinstate her fraud claim is denied.

Aiding and Abetting Fraud Against Michael

Without the fraud claim, plaintiff's claim for aiding and abetting fraud against Michael Evans must also fall. (*Stanfield Offshore Leveraged Assets, Ltd. v Metropolitan Life Ins. Co.*, 64 AD3d 472, 476 [1st Dept 2009][the existence of an underlying fraud is one of the elements of a claim for aiding and abetting fraud]). Moreover, plaintiff's allegation that Michael was aware of his wife's lies seems to rest upon their marriage. (NYSCEF 124, Proposed Amended Complaint ¶179). This inference of actual knowledge is not sufficiently particularized to support a claim of aiding and abetting.

Tortious Interference with Prospective Contractual Relations against Michael

Plaintiff alleges that if there is no binding agreement between the co-venturers, then they would have entered such an agreement, but for Michael's interference. (NYSCEF 124, Proposed Amended Complaint, ¶ 146). For such a claim to survive, plaintiff must allege that Michael's conduct was a crime or independent tort or that he engaged in the offending conduct "for the sole purpose of inflicting intentional harm on plaintiffs." (*Men Women NY Model Mgmt., Inc. v Ford Models, Inc.*, 32 Misc 3d 1236(A) *6 [Sup Ct, NY County 2011]). Plaintiff alleges that defendant, not Michael, allegedly defrauded the U.S. government. (NYSCEF 124, Proposed Amended Complaint, ¶¶ 157, 161, 178, 186). While Michael's alleged bullying should not be countenanced, particularly when Bling was founded to counter bullying, it does not constitute an intendent tort. (NYSCEF 124, Proposed Amended Complaint, ¶ 58). Given plaintiff's repeated allegations that defendants' goal from the beginning was to get a visa, the court is compelled to find that plaintiff has failed to state a claim for tortious interference with prospective contractual relations. (*Id.*, ¶¶ 3, 5, 11, 24, 25, 27, 48, 50, 51, 54, 150, 151, 156, 157, 164).

Negligent Misrepresentation

Plaintiff asserts a new claim for negligent misrepresentation based on the following allegations:

> "Lise Evans owed Plaintiff, Assaf and Farnos fiduciary duties because they were business partners and joint [venturers] as well as friends, and shared a special relationship in which the three other women reposed special trust and confidence in Lise.
>
> As set forth above, Lise Evans made numerous false or misleading representations (express and implied) to Plaintiff, Assaf and Farnos, including without limitation those to the effect that: (a) all four of them would be equal partners in the company that sold the bracelet, Philanthropic Bling; (b) any records listing Lise as the sole owner of Philanthropic Bling were only for the purpose of her E-2 visa application, and once her visa was issued, those records would be formally changed and all the four women would be expressly recorded as equal owners of the Company; (c) the entity in which Lise needed to retain majority ownership for the purpose of continued validity of her E-2 visa did not need to be the same entity that had operational control over the business, and the four women could still be equal partners in Philanthropic Bling, the company that sold the bracelet; and (d) even though Lise needed to remain at least a 50% owner of Philanthropic Bling for the purposes of continued validity of her E-2 visa, that Company did not have to be the company that actually sold the bracelet, and the four women could still be equal partners in another company that actually sold the bracelet.
>
> Throughout the entire material time - that is, from October 2013 to December 2014 - Lise Evans continued making material representations to Plaintiff, Assaf and Farnos that, regardless of the formal corporate ownership structure, the four of them are partners with equal decision-making power in the actual business. In December 2014, Lise abruptly breached those promises when she took over the business together with her husband Michael, leaving the other three women with no decision-making power whatsoever.
>
> In essence, Lise made repeated implied

representations to Plaintiff, Assaf and Farnos over a whole year that it was permissible to have her listed as the sole owner of the Company in her visa application while the actual operational structure of the Company would include all the four women as equal equity partners with equal decision-making authority. These representations were false, because such an inconsistency is not allowed under the applicable immigration laws.

Lise Evans knew or should have known that Plaintiff, Assaf and Farnos were relying upon the fiduciary duty she owed them and upon her representations to them for serious purposes, including investment of their ideas, time, skills and efforts into the joint business.

Lise Evans' statements and omissions, alleged herein to be false or misleading, were material.

Lise Evans knew or should have known the statements and omissions alleged herein to be false or misleading were false or misleading and/or had no reasonable grounds to believe that they were true or not misleading.

As to the omissions, Lise Evans had a duty to disclose, and knowingly or negligently failed to disclose material facts to Plaintiff, Assaf and Farnos in order to induce them to act or fail to act as alleged herein, as they were not aware of these facts.

These misstatements and omissions were made with the intent to deceive and/or mislead Plaintiff, Assaf and Farnos, or with reckless disregard as to whether they would be deceived or misled, and with the intent to induce them to act or not act in reliance thereon.

Plaintiff, Assaf and Farnos relied on and were justified in relying on the statements by, and absence of statements from, Lise Evans.

Plaintiff, Assaf and Farnos would not have taken certain actions as alleged herein or forgone doing certain actions had it not been for the material misstatements and omissions.

As a result of these misrepresentations and omissions, Plaintiff, Assaf and Farnos have been damaged in an amount to be determined at trial.

> Assaf and Farnos have provided Plaintiff with assignments of their claims, specifically including any tort claims.
>
> In committing the negligent misrepresentations alleged herein, Lise Evans acted intentionally, with malice and wanton or reckless disregard for the rights of Plaintiff, Assaf and Farros."

(NYSCEF 124, Proposed Amended Complaint, ¶¶ 163-176). The elements of a claim for negligent misrepresentation are: "(1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information." (*MatlinPatterson ATA Holdings LLC v Fed. Express Corp.*, 87 AD3d 836, 840 [1st Dept 2011] citing *JAO Acquisition Corp. v. Stavitsky*, 8 N.Y.3d 144, 148 [2007]).

Here, Plaintiff fails to allege a special relationship existed between her and defendant. "A special relationship requires a closer degree of trust than an ordinary business relationship." (*Fleet Bank v Pine Knoll Corp.*, 290 AD2d 792, 795 [3d Dept 2002][internal quotation marks and citation omitted]). Moreover, a negligent misrepresentation claim is precluded by a contract claim unless the "legal duty violated is 'independent of that created by contract.'" (*Id.*).

Next, plaintiff argues that defendant had "superior knowledge, not readily available to the other[s]," concerning her specific visa requirements and application, and did nothing for many months to correct her partners' "mistaken knowledge" under which they were operating. Plaintiff asserts a relationship of trust arising from the co-venturers' continued work together for a year to bring their product to market even though they had not reduced their agreement to writing which they were on the verge of doing. Accordingly, "the existence of a special or privity-like relationship" cannot reasonably be disputed. However, plaintiff's reliance on *Grumman Allied Industries, Inc., v Rohr Industries, Inc.*, 748 F2d 729, 738-739 (2d Cir. 1984) for the proposition that a duty to disclose under New York law can be "triggered: first, where

one party possesses superior knowledge, not readily available to the other, and knows that the other is acting on the basis of mistaken knowledge" is misplaced. For the reasons discussed above, plaintiff has failed to allege that defendant had superior knowledge. Likewise, plaintiff cannot establish the requisite special duty when plaintiff was relying on an attorney. Even if defendant had such superior knowledge, it is not sufficient to bootstrap a special relationship for the purposes of negligent misrepresentation. (*JP Morgan Sec Inc v Adler*, 127 AD3d 506, 507 [1st Dept 2015]). Finally, plaintiff cannot escape her own failure to engage in due diligence in such a sophisticated commercial transaction. (*See Pine Street Assoc.*, supra).

Punitive Damages

Plaintiff's proposed amendment to reinstate punitive damages is denied for the same reasons that Justice Oing dismissed them. (NYSCEF 19, Oing, J. Decision).

Accordingly, it is

ORDERED, that plaintiff's motion to amend is denied.

Motion Seq. No. 04

1/10/20
DATE

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

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

☐ OTHER

☐ REFERENCE