

**Yakubov v Gaft**

2020 NY Slip Op 31191(U)

May 4, 2020

Supreme Court, Kings County

Docket Number: 503904/2014

Judge: Devin P. Cohen

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Supreme Court of the State of New York  
County of Kings

Index Number 503904/2014

Part 91

**DECISION/ORDER**

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

\_\_\_\_\_  
MICHAEL YAKUBOV AND ARTYEM YUSUPOV,

Plaintiffs,

against

MARK GAFT AND JUSTIN K. MARVUL,

Defendants.  
\_\_\_\_\_

**Papers**

<b>Numbered</b>	
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Order to Show Cause and Affidavits Annexed...	<u>2</u>
Answering Affidavits.....	<u>3</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>      </u>
Other .....	<u>      </u>

Upon review of the foregoing documents, defendant Mark Gaft’s motion for summary judgment is decided as follows:

**Factual and Procedural Background**

Plaintiffs bring this action against defendants for damages allegedly incurred as a result of investing in defendant’s fraudulent investment opportunity. In their complaint, plaintiffs allege that, in or around June 2010, defendant Gaft approached plaintiffs with an investment opportunity. The opportunity involved purchasing shares in a corporation, owned by defendant Marvul, that bought distressed property in New York City to be flipped for a profit. Plaintiffs allege that Gaft advised plaintiff Yakubov that plaintiffs would not need, and should not use, attorneys for this transaction.

Plaintiffs allege that, in August 2010, plaintiff Yakubov gave Gaft \$187,000, and plaintiff Yusupov gave Gaft \$155,000. Plaintiffs further allege that defendants collected money from others for a total amount of \$503,000.

Plaintiffs allege that, after several months, they asked Gaft about their investment, and Gaft referred them to Marvul as the person in control. Plaintiffs allege that, thereafter, Gaft advised them that the investment went “belly-up”. Plaintiffs also allege that they requested documents regarding the investment and were provided only two: (1) a promissory note, dated June 26, 2010, which states that Marvul borrowed \$700,000 from Gaft, with no interest and with a repayment schedule spanning ten years; and (2) an assignment of rights, wherein Marvul assigned to Gaft 5% of profits of Tenth Rail Incorporated (“Tenth Rail”), up to \$700,000, as payment for the loan by Gaft to Marvul. Plaintiffs provide copies of these documents. Plaintiffs allege that they searched for Tenth Rail and found no records for such an entity with the New York Department of State.

Additionally, plaintiffs allege that they have continued to follow up with Gaft about the investment, who has responded that he has no money to pay them, and that Gaft had even physically threatened them and other investors. Plaintiffs allege that Marvul repaid other investors by checks, but the checks were returned for insufficient funds. Plaintiffs provide copies of these checks.

Based on these allegations, plaintiffs assert claims for civil RICO, fraud and unjust enrichment. By order, dated September 21, 2015, the court (Schack, J.), dismissed the claim for civil RICO.

In his answer, Gaft largely denies plaintiffs’ allegations. Gaft also asserts a claim for intentional infliction of emotional distress against plaintiffs based on allegedly threatening text messages he believes originated from plaintiffs.

Gaft also asserts cross-claims against Marvul, in which he alleges that Marvul also approached him with an investment opportunity. Gaft alleges that he invested \$230,000 with Marvul. He further alleges that, months later, Marvul advised Gaft that the persons to whom Marvul gave the money had disappeared, and that Marvul refused to identify those persons or what the money was used for. Gaft alleges that Marvul promised to re-pay the money and, to that end, executed the promissory note and assignment of 5% of profit in Tenth Rail, a restaurant in Manhattan. Gaft alleges that he never received any payments and, that when he contacted the owner of Tenth Rail, the owner advised Gaft that Marvul had no ownership interest in the restaurant. Based on these allegations, Gaft asserts cross-claims against Marvul for fraud, breach of contract, unjust enrichment and indemnification.

### Analysis

The moving party on a motion for summary judgment bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).<sup>1</sup>

Defendant Gaft first argues that plaintiffs cannot prove fraud because there is no evidence plaintiffs paid money to Gaft or that there was any agreement between them. The elements of a cause of action sounding in fraud are a misrepresentation or a material omission of fact which

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<sup>1</sup> Plaintiffs argue that Gaft's motion is not timely. The court finds that the parties were addressing discovery matters following the filing of the note of issue. As such, there is good cause to allow Gaft's otherwise untimely motion (*Brill v City of New York*, 2 NY3d 648, 652 [2004]).

was false and known to be false by the 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 (*Deutsche Bank Natl. Trust Co. v Sinclair*, 68 AD3d 914, 916 [2d Dept 2009]).

Plaintiffs submit a sworn statement in the form of a verified complaint. In their complaint, plaintiffs allege that, in or around June 2010, defendant Gaft offered to allow plaintiffs to invest in a corporation, owned by defendant Marvul, that sought to flip distressed properties for profit. Plaintiffs further allege that, in August 2010, they gave Gaft a total of \$342,000. They allege that, when they asked about the results of their investment, Gaft told them that he had no information about their investment, that the investment went “belly-up”, and that Gaft has threatened them. In addition, plaintiffs provide copies of documents that relate to Gaft’s business relationship with Marvul, and copies of checks sent to other investors that, they claim, were returned for insufficient funds. Thus plaintiffs have submitted sworn statements and documents providing evidence to support their claims for fraud.

In opposition, Gaft submits a verified answer that denies plaintiffs’ allegations and asserts fraud claims against Marvul based on similar allegations. Gaft’s sworn allegations do not, by themselves, disprove plaintiffs’ sworn allegations. They merely raise issues of fact that must be resolved at trial.

Gaft also argues that plaintiffs have not provided sufficient information about the alleged investment opportunity, such as shares of stock and expected rate of return. However, the absence of this information also does not disprove plaintiffs’ allegations. At best, it may affect

the credibility of plaintiffs' claims. Matters of credibility cannot be resolved on summary judgment (*114 Woodbury Realty, LLC v 10 Bethpage Rd., LLC*, 178 AD3d 757 [2d Dept 2019]).<sup>2</sup>

Gaft also argues that plaintiffs could not have reasonably relied on Gaft's representations because, he claims, plaintiffs had the means to discover additional information about the investment opportunity. However, Gaft does not explain how plaintiffs could have uncovered additional information about the investment. Certainly, Gaft does not provide any additional information about the investment or what happened to the invested funds. Furthermore, Gaft himself claims he was defrauded by Marvul based on allegations similar to plaintiffs.

Gaft also argues that plaintiffs have not pled fraud with particularity in accordance with CPLR 3016(b). To plead fraud with the requisite particularity, plaintiffs must provide details about the alleged fraud, including specific dates (*Scott v Fields*, 92 AD3d 666, 668 [2d Dept 2012], citing *Moore v Liberty Power Corp., LLC*, 72 AD3d 660, 661 [2d Dept 2010]). The purpose of this requirement is to place the defendant on notice of the incidents complained of, not prevent otherwise valid causes of action where it may be impossible to state in detail the circumstances constituting a fraud (*Daly v Kochanowicz*, 67 AD3d 78, 90 [2d Dept 2009], citing *Caprer v Nussbaum*, 36 AD3d 176, 202 [2d Dept 2006]). In such situations, specifically where those circumstances are peculiarly within the knowledge of an adverse party, "the heightened pleading requirements of CPLR § 3016(b) may be met when the material facts alleged in the complaint, in light of the surrounding circumstances, 'are sufficient to permit a reasonable inference of the alleged conduct' including the adverse party's knowledge of, or participation in

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<sup>2</sup> Indeed, Gaft admits as much when he contends, in counsel's moving affirmation, that it "strains credulity" that plaintiffs would make such an investment without obtaining this information.

the fraudulent scheme” (*JP Morgan Chase Bank, N.A. v Hall*, 122 AD3d 576, 580 [2d Dept 2014], quoting *High Tides LLC v DeMichele*, 88 AD3d 954, 957 [2d Dept 2011]).

Plaintiffs provide specific details about what Gaft said to them about the investment opportunity and when he said it. They further allege specific details and dates about when they relied upon Gaft’s alleged misrepresentations. Such reliance took the form of payments made to Gaft. As plaintiffs allege, the actual results of the investment are unknown to them, and perhaps known only to Gaft and Marvul who, plaintiffs claim, have told plaintiffs nothing. Thus, plaintiffs have alleged fraud with the requisite particularity.

Gaft also asks this court to dismiss plaintiffs’ claims for unjust enrichment. To succeed on their claim for unjust enrichment, plaintiffs must prove that (1) defendant was enriched, (2) at plaintiffs’ expense, and (3) that it is against equity and good conscience to permit the defendant to retain the property (*Main Omni Realty Corp. v Matus*, 124 AD3d 604, 605 [2d Dept 2015]). Defendant’s receipt of some benefit, standing alone, is not sufficient to support an unjust enrichment claim (*Goel v Ramachandran*, 111 AD3d 783, 791 [2d Dept 2013]). There must have been a transaction between the parties that the court determines is unjust (*id.*).


Gaft argues that, because plaintiffs have not alleged a viable fraud claim, their claim for unjust enrichment must fail. First, I have found that plaintiffs have sufficiently alleged not only a fraud claim, but also an unjust enrichment claim. Second, and incidentally, Gaft references no legal support for the proposition that a failure to sufficiently allege fraud would require that an unjust enrichment claim based on the same allegations must also fail.

### **Conclusion**

For the foregoing reasons, defendant Gaft’s motion is denied.

This constitutes the order of the court.

May 4, 2020  
**DATE**

  
**DEVIN P. COHEN**  
Justice of the Supreme Court