SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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SH575 HOLDINGS LLC,

Plaintiff,

-against-

DECISION AND ORDER
Index No.: 651246/2019

Motion Seq. Nos.: 003-005

RELIABLE ABSTRACT CO., L.L.C., YAKOV DECKELBAUM a/k/a JACOB DECKELBAUM, RICHMOND STUYVESANT HOLDINGS, LLC, CARL CALLER, THE MARCAL GROUP LLC, MARK CALLER, JAYSUKHLAL DOMADIA a/k/a JAY DOMADIA a/k/a JAY SUKHLAL J. DOMADIA, ROBINSON BROG LEINWAND GREENE GENOVESE & GLUCK P.C., TISSA 16TH CORP., TISSA FUNDING, CORP., HOWARD HERSHKOVICH, PINCUS DAVID CARLEBACH, JOHN and JANE DOES 1-10, and ABC COMPANIES 1-10,

Defendants.

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O. PETER SHERWOOD, J.:

I. FACTS

According to the Amended Verified Complaint (Complaint, NYSCEF Doc. No. 48), plaintiff SH575 Holdings LLC ("Holdings") delivered $1million (the "Funds") to defendant attorney Pincus David Carlebach ("Carlebach") on March 10, 2017, for the purchase of vacant real property in Staten Island (the "Property"). The funds were placed in Carlebach's attorney escrow account. Those funds were subsequently dispersed to the defendants.

Defendant Yakov (a/k/a "Jacob") Deckelbaum ("Deckelbaum") is the principal of defendant Reliable Abstract Co., LLC. Defendant Carl Caller ("Caller") is a principal of defendant Richmond Stuyvesant Holdings, LLC ("RSH"). Defendant Mark Caller is a principal of both RSH and defendant The Marcal Group LLC ("Marcal"). Defendant Howard Hershkovich ("Hershkovich") is the principal of defendants Tissa 16 Corp and Tissa Funding Corp (together "Tissa").

Defendant Carlebach is currently incarcerated at a federal facility in New Jersey. He was a bankruptcy attorney, and filed a voluntary petition for his client, Liberty Towers Realty LLC

("Liberty Towers"), the owner of the Property. As part of the bankruptcy, Carlebach attempted to sell the Property. Plaintiff Holdings expressed interest in the Property.

On or about March 10, 2017, Holdings and Liberty Towers entered into an agreement for the sale of the Property (the "Agreement"). Holdings had $1 million wired from the account of its investor, Tryko Holdings LLC, into Carlebach's attorney escrow account pursuant to that Agreement. The Funds were to stay in the escrow account until the contract was completed or cancelled. If Holdings opted to cancel, the funds were to be immediately returned to Holdings.

On June 27, 2017, Holdings opted to cancel the Agreement and demanded return of the Funds. Carlebach failed to do so instead misappropriating $777,000 to himself and others.

Holdings was the last entity to transfer money into the escrow account before the fraudulent scheme was reported, claiming it to identify the funds. Holdings obtained account statements for the escrow account, which totaled almost $1.2 million after Holdings' Funds were deposited. No additional deposits were made, and the account statements showed a transfer of the (almost) $0.2 million to defendant Robinson Brog Leinwand Greene Genovese & Gluck (Robinson Brog), with a $5 thousand transfer to Carlebach, himself, leaving approximately $1million in the escrow account. Between March 17, 2017, and June 29, 2017, the following transfers were made from that account: 1) $1,000 to Robinson Brog; 2) $500,000 to Reliable Abstract Co.; and 3) $232,000 to defendant Jaysukhlal Domadia (Domadia). Robinson Brog subsequently transferred funds to Tissa. Plaintiffs believe Robinson Brog was aware of Carlebach's fraudulent actions.

Plaintiff asserts the following nineteen causes of action against twelve defendants and several unnamed individuals and companies as follows:

1) Conversion of $500,000 against Reliable Abstract and Deckelbaum;
2) Conversion of $500,000 against Richmond Suyvesant, Carl Caller, Mark Caller, and Marcal (claiming Reliable Abstract transferred some or all of the funds it converted to those defendants);
3) Conversion of $232,000 by Domadia and ABC Companies 1-10 (to which Domadia transferred funds);
4) Conversion against Robinson Brog and John/Jane Does 1-10;
5) Conversion against Tissa and Hershkovich;
6) Debtor and Creditor Law §§ 276 and 276-a against Reliable Abstract and Deckelbaum for the fraudulent conveyance of $500,000;

7) Debtor and Creditor Law §§ 276 and 276-a against Richmond Suyvesant, Carl Caller, Mark Caller, and Marcal for the fraudulent conveyance of $500,000;

8) Debtor and Creditor Law §§ 276 and 276-a against Domadia and ABC Companies for the fraudulent conveyance of $232,000;

9) Debtor and Creditor Law §§ 276 and 276-a against Robinson Brog and John/Jane Does for fraudulent conveyance;

10) Debtor and Creditor Law §§ 276 and 276-a against Tiss and Hershkovich for fraudulent conveyance;

11) Debtor and Creditor Law § 273 et seq against Reliable Abstract and Deckelbaum for the fraudulent conveyance of $500,000;

12) Debtor and Creditor Law § 273 et seq against Richmond Suyvesant, Carl Caller, Mark Caller, and Marcal for the fraudulent conveyance of $500,000;

13) Debtor and Creditor Law § 273 et seq against Domadia and ABC Companies for the fraudulent conveyance of $232,000;

14) Debtor and Creditor Law § 273 et seq against Robinson Brog and John/Jane Does for fraudulent conveyance;

15) Debtor and Creditor Law § 273 et seq against Tissa and Hershkovich for fraudulent conveyance;

16) Aiding and Abetting Conversion against all defendants except Carlebach;

17) Quasi Contract/Unjust Enrichment/ Money had and received against all defendants except Carlebach;

18) Negligence- against all defendants except Carlebach; and

19) Conversion and Fraudulent Conveyance against Carlebach.

Groups of defendants move separately to dismiss the amended complaint as indicated below and together seek to dismiss all claims except 2, 4, 7, 9, 12, 14, and 19.

- Motion 003- Domadia
- Motion 004- Tissa and Hershkovich
- Motion 005- Reliable Abstract and Deckelbaum

II. DISCUSSION

A. Standard

On a motion to dismiss a plaintiff's claim pursuant to CPLR § 3211 (a) (7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see, Campaign for Fiscal Equity v State,* 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.,* 46 NY2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I v Goldman, Sachs & Co.,* 5 NY3d 11, 19 [2005]). The court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see Guggenheimer v Ginzburg,* 43 NY2d 268, 275 [1977]; *Sokol v Leader,* 74 AD3d 1180 [2d Dept 2010]).

To succeed on a motion to dismiss pursuant to CPLR § 3211 (a) (1), the documentary evidence submitted that forms the basis of a defense must resolve all factual issues and definitively dispose of the plaintiff's claims (*see, 511 W. 232nd Owners Corp. v Jennifer Realty Co.,* 98 NY2d 144, 152 [2002]; *Blonder & Co., Inc. v Citibank, N.A.,* 28 AD3d 180, 182 [1st Dept 2006]). A motion to dismiss pursuant to CPLR § 3211 (a) (1) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*McCully v. Jersey Partners, Inc.,* 60 AD3d 562, 562 [1st Dept. 2009]). The facts as alleged in the complaint are regarded as true, and the plaintiff is afforded the benefit of every favorable inference (*see Leon v Martinez,* 84 NY2d 83, 87-88 [1994]). Allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration (*see e.g. Nisari v Ramjohn,* 85 AD3d 987, 989 [2nd Dept 2011]).

CPLR § 3211 (a) (1) does not explicitly define "documentary evidence." As used in this statutory provision, "'documentary evidence' is a 'fuzzy term', and what is documentary evidence for one purpose, might not be documentary evidence for another" (*Fontanetta v John Doe 1,* 73 AD3d 78, 84 [2nd Dept 2010]). "[T]o be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" (*id.* at 86, citing Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 3211:10, at 21-22). Typically, that means

"judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are 'essentially undeniable,'" (*id.* at 84-85).

B. Conversion Claims (1, 3, 5)

"The tort of conversion is established when one who owns and has a right to possession of personal property proves that the property is in the unauthorized possession of another who has acted to exclude the rights of the owner" (*Republic of Haiti v Duvalier*, 211 AD2d 379, 384 [1st Dept 1995]). The elements of conversion are (1) plaintiff's possessory right or interest in certain property and (2) defendant's dominion over the property or interference with it in derogation of plaintiff's rights (*Colavitov New York Organ Donor Network, Inc.,* 8 NY3d 43 [2006]; *see also Employers' Fire Ins. Co. v Cotton,* 245 NY 102 [1927]). A plaintiff need only allege and prove that the defendant interfered with plaintiff's right to possess the property. The defendant does not have to have taken the property or benefitted from it (*Hillcrest Homes, LLC v Albion Mobile Homes, Inc.*, 117 NYS2d 755 (4th Dept 2014). A conversion claim may not be maintained where damages are merely sought for a breach of contract (*see Sutton Park Dev. Trading Corp. v Guerin & Guerin*, 297 AD 2d 430, 432 [3d Dept 2002]).

Here, the escrow was made pursuant to the Agreement. That document is not attached to any of the papers in these motions. Plaintiff alleges "[c]ancelation pursuant to the purchase agreement required Carlebach to immediately return the $1,000,000 deposit to SH575 Holdings" (Complaint, ¶ 28). However, there is no contract or contract claim between plaintiff and the moving defendants who received the funds from the escrow account. Accordingly, claims against them are not shown to be duplicative of a contract claim.

"[W]hen a conversion claim is asserted with respect to money, the funds must be specifically identifiable and be subject to an obligation to be returned or to be otherwise treated in a particular manner" (*In re Clark*, 146 AD3d 495, 496 [1st Dept 2017], *lv to appeal denied*, 29 NY3d 907 [2017]). While the Funds were allegedly placed in the unsegregated attorney escrow account, plaintiff argues the Funds were still identifiable, since they made up the vast majority of the funds in that account and no additional funds were paid in after the Funds were disposed.

While none of the moving defendants are alleged to have been the initial actor in the conversion, they are alleged to have received funds from the escrow account which were identifiable as plaintiff's. "[A] person may be liable for conversion by conniving with another in

an act of conversion. . . . liability for conversion may therefore be established by evidence that a party received wrongfully taken funds, knowing them to have been wrongfully taken, and he or she is chargeable with culpable knowledge of the wrongful act (*see Revankar v Tzabar*, 16 Misc 3d 1127(A) [Sup Ct 2007] citing *Leve v. C. Itoh & Co. [America]*, 136 A.D.2d 477, 478 [1988]; 23 N.Y. Jur 2d, Conversion § 43). Here, the allegations of defendants' knowledge of Carlebach's wrongful actions are vague, conclusory and based solely on information and belief without an indication of the source of the information, and therefore are insufficient (*see Angel v Bank of Tokyo-Mitsubishi, Ltd.*, 39 AD3d 368, 370 [1st Dept 2007]).

A "longstanding line of authority recognizes that "one who comes lawfully into possession of property cannot be charged with conversion thereof until after a demand and refusal...." (*MacDonnell v Buffalo Loan, Trust and Safe Deposit Co.*, 193 NY 92, 101 [1908]). It is not disputed the moving defendants were due money from the escrow fund and were paid from the escrow fund. Plaintiff has not alleged it made a demand for the return of the Funds. Accordingly, the conversion claims against the moving defendants fail.

C. DCL §§ 276 and 276-a Claims - Fraudulent Conveyance (6, 8, 10)

DCL § 276 provides that "[e]very conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors." Section 276-a provides that "[i]n an action . . . to set aside a conveyance by a debtor, where such conveyance is found to have been made by the debtor and received by the transferee with actual intent, as distinguished from intent presumed in law, to hinder, delay or defraud either present or future creditors, in which action or special proceeding the creditor, . . . shall recover judgment, the justice or surrogate presiding at the trial shall fix the reasonable attorney's fees of the creditor, . . .and the creditor, . . . shall have judgment therefor against the debtor and the transferee who are defendants in addition to the other relief granted by the judgment."

Plaintiff acknowledges this claim is pled in the alternative to the conversion claim, in case the court finds the Funds ceased to belong to plaintiff when they were placed in the escrow account (003 Opp at 17). As that is not the determination of this court, these claims shall be dismissed.

D. DCL §§ 372, et sq. Claims -- Fraudulent Conveyance (11, 13, 15)

DCL § 372 provides "[e]very conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his

actual intent if the conveyance is made or the obligation is incurred without a fair consideration." Plaintiff does not deny moving defendants were owed money from the escrow account, and thus that there was a lack of financial consideration, but relies on an allegation of lack of good faith (*see* Complaint, paragraph 178). Section 273-a, not specifically named by defendant, notes that "[e]very conveyance made without fair consideration when the person making it is a defendant in an action for money damages or a judgment in such an action has been docketed against him, is fraudulent as to the plaintiff in that action without regard to the actual intent of the defendant if, after final judgment for the plaintiff, the defendant fails to satisfy the judgment." This is not alleged to be a conveyance without fair consideration, as moving defendants gave consideration and were owed funds from the escrow account. Nor is there a judgment against Carlebach at this point. As far as plaintiff relies on an allegation of the lack of good faith, or moving defendants' knowledge of Carlebach's actions or the lack of funds in the escrow account, those arguments fail, as discussed above, as they are insufficient to survive a motion to dismiss.

E. Aiding and Abetting Conversion (16)

"New York law permits a claim for aiding and abetting conversion where the plaintiff can prove (1) the existence of a violation committed by the primary (as opposed to the aiding and abetting) party; (2) 'knowledge' of this violation on the part of the aider and abettor; and (3) 'substantial assistance' by the aider and abettor in achievement of the violation" (*Dickinson v Igoni*, 76 AD3d 943, 945 [2d Dept 2010]; *Dangerfield v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 02-2561, 2006 WL 335357, at *5). This claim also fails, as plaintiff has failed to sufficiently allege knowledge, as discussed above. Moreover, plaintiff has not alleged substantial assistance, other than in conclusory fashion (*see* 005 Opp at 22-23).

F. Quasi Contract/Unjust Enrichment/ Money Had and Received (17)

"Unjust enrichment is a quasi contract theory of recovery, and 'is an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned'" (*Georgia Malone & Co., Inc. v Rieder*, 86 AD3d 406, 408 [1st Dept 2011], *affd*. 19 NY3d 511 [2012], quoting *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]). In order to plead a claim for unjust enrichment, the plaintiff must allege "that the other party was enriched, at plaintiff's expense, and that 'it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered'" (*Georgia Malone & Co.*, 86 AD3d at 408, quoting *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]).

"A cause of action for money had and received is also one of quasi-contract or of contract implied-in-law", *Board of Educ. of Cold Spring Harbor Cent. School Dist. v Rettaliata*, 78 NY2d 128 (1991); *Goel v Ramachandran*, 111 AD3d 783 (2d Dept 2013); *see Parsa v State*, 64 NY2d 143 (1984). Having money that rightfully belongs to another creates a debt, and wherever a debt exists without an express promise to pay, the law implies a promise, *Byxbie v Wood*, 24 NY 607 (1862); *Goel v Ramachandran, supra.* The elements of a cause of action for money had and received are (1) the defendant received money belonging to the plaintiff, (2) the defendant benefitted from receipt of the money, and (3) under principles of equity and good conscience, the defendant should not be permitted to keep the money *see Torrance Const., Inc. v Jaques*, 127 AD3d 1261 (3d Dept 2015); *Goel*, 111 AD3d 783; *see also Matter of Estate of Witbeck*, 245 AD2d 848 (3d Dept 1997). The action depends on equitable principles in the sense that broad considerations of right, justice and morality apply to it (*see Parsa*, 64 NY2d 143 [1984]; *Litvinoff, supra; Goel, supra*).

The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi-contract, such as a claim for money had and received, for events arising out of the same subject matter (*see Melcher v Apollo Medical Fund Management L.L.C.*, 105 AD3d 15 (1st Dept 2013); *One Step Up, Ltd. v Webster Business Credit Corp*., 87 AD3d 1 (1st Dept 2011). However, where there is a bona fide dispute as to the existence of a contract or the application of a contract in the dispute, a plaintiff may proceed on a theory of quasi-contract, such as a claim for money had and received, as well as breach of contract, and will not be required to elect his or her remedies (*see Goldman v Simon Property Group, Inc.*, 58 AD3d 208 (2d Dept 2008).

Plaintiff relies heavily on *Meisels v Schon Family Found.* (28 Misc 3d 1205(A) [Sup Ct, Kings Cty 2010]). However, the Court of Appeals has since clarified that "[a] plaintiff cannot succeed on an unjust enrichment claim unless it has a sufficiently close relationship with the other party. Although a plaintiff need not allege privity, it must assert a connection between the parties that is not too attenuated and which "could have caused reliance or inducement" to support the unjust enrichment claim (*see Georgia Malone,* 19 NY3d 511). Here, no relationship between plaintiff and moving defendants has been asserted, and the conclusory allegations about knowledge, made upon information and belief, are insufficient to withstand the motion to dismiss.

G. Negligence (18)

The elements of a claim for negligence are "first, the existence of a duty owing by the defendant to the plaintiff; second, defendant's failure to discharge that duty; third, injury to plaintiff proximately resulting from such failure" (*Peresluha v City of New York*, 60 AD2d 226, 230 [1st Dept 1977]). Plaintiffs contend that moving defendants had a duty which was breached because they took a consciously culpably action or failed to act (*see* 05 Opp at 27). As discussed above, plaintiff's allegations of moving defendants' knowledge fail to withstand the motion to dismiss, and plaintiff has failed to plead facts which support moving defendants' having a duty to plaintiff when they accepted money from the escrow fund to repay what they were owed.

III. CONCLUSION

For the reasons discussed above, the motions are due to be granted. Accordingly, it is hereby

ORDERED that motion sequence numbers 003, 004 and 005 are GRANTED and the amended complaint is hereby DISMISSED as against Jaysukhlal Domadia a/k/a Jay Domadia a/k/a Jay Sukhlal J. Domadia ("Domadia") and ABC Companies 1-10 (motion sequence number 003), Tissa 16th Corp., Tissa Funding Corp., and Howard Hershkovich (motion Sequence number 004) and Reliable Abstract Co., LLC., and Yakov Deckelbaum a/k/a Jacob Deckelbaum (together "Moving Defendants") (motion sequence number 005); and it is further

ORDERED that the claims against the other defendants, Richmond Stuyvesant Holdings, LLC, Carl Caller, Mark Caller, The Marcal Group LLC, Robinson Brog Leinwand Greene Genovese & Gluck P.C., Pincus David Carlebach and John and Jane Does (claims 2, 4, 7, 9, 12, 14 and 19) are hereby severed and shall continue; and it is further

ORDERED that the Clerk of the Court shall enter judgment against plaintiff SH575 Holdings LLC and in favor of Moving Defendants.

This constitutes the decision and order of the court.

DATED: April 15, 2020

E N T E R,

Hon. O. Peter Sherwood
O. PETER SHERWOOD J.S.C.