

Guo Wengui v Guo Baosheng
2020 NY Slip Op 31882(U)
June 16, 2020
Supreme Court, New York County
Docket Number: 151251/2019
Judge: David Benjamin Cohen
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAVID BENJAMIN COHEN

PART

IAS MOTION 58EFM

Justice

X

INDEX NO. 151251/2019

GUO WENGUI,

MOTION DATE 01/22/2020

Plaintiff,

MOTION SEQ. NO. 006

- v -

GUO BAOSHENG, YAN ZHAO, NING YE

**DECISION + ORDER ON
MOTION**

Defendant.

X

The following e-filed documents, listed by NYSCEF document number (Motion 006) 55, 60, 62
were read on this motion to/for DISMISS

Upon the foregoing documents, it is

The motion to dismiss is granted in part and denied in part. The Complaint lists six causes of action: (1) extortion and attempted extortion; (2) fraud; (3) conspiracy to commit fraud; (4) breach of contract; (5) breach of the duty of good faith and fair dealing; and (6) tortious interference with business relationships. Defendants move to dismiss pursuant to CPLR 3211(a)(7), for failure to state a cause of action.

When deciding a motion to dismiss pursuant to CPLR §3211, the court should give the pleading a "liberal construction, accept the facts alleged in the complaint to be true and afford the plaintiff the benefit of every possible favorable inference" (*Landon v. Kroll Laboratory Specialists, Inc.*, 22 NY3d 1, 5-6 [2013]; *Faison v. Lewis*, 25 NY3d 220 [2015]). However, if a complaint fails within its four corners to allege the necessary elements of a cause of action, the claim must be dismissed (*Andre Srirshak & Associates, P.C. v. Hewlett Packard & Co.*, 300 AD2d 608 [2d Dept. 2002]).

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The motion to dismiss the first cause of action is granted. With respect to a private cause

of action for extortion and attempted extortion, the First Department explicitly held:

The first cause of action for extortion and attempted extortion, alleging that defendant attempted to compel and compelled plaintiff to deliver money to him by threatening physical harm to plaintiff and her employees and a breach of their confidentiality agreement, was properly dismissed on the ground that extortion and attempted extortion are criminal offenses (*see* Penal Law § 155.05[2][e]; § 110.00) that do not imply a private right of action (*Niagara Mohawk Power Corp. v. Testone*, 272 A.D.2d 910, 911, 708 N.Y.S.2d 527 [2000]; *Crandall v. Bernard, Overton & Russell*, 133 A.D.2d 878, 879, 520 N.Y.S.2d 237 [1987], *lv. dismissed, lv. denied* 70 N.Y.2d 940, 524 N.Y.S.2d 672, 519 N.E.2d 618 [1988]). Moreover, although extortionate behavior, coercion and duress may be elements of a cause of action for tortious interference with contract or unjust enrichment, at common law there was never a private cause of action for extortion. Rather, extortion, as it has come to be understood today—obtaining of money by force or fear—was considered robbery to be punished criminally.

(*Minnelli v Soumayah*, 41 AD3d 388, 388-89 [1st Dept 2007] *lv dismissed* 9 NY3d 1028

[2008] *see also* *Niagara Mohawk Power Corp. v Testone*, 272 AD2d 910 [4th Dept 2000]

[*holding* no legislative intent to create a civil remedy for an attempt to extort]). Accordingly, as no cause of action exists for extortion and attempted extortion, this cause of action must be dismissed. Further, since plaintiff does not allege that he actually made any payment in furtherance of the extortion -- just that he set aside some money -- no extortion has occurred (at most he claims attempted extortion) (*see Minnelli* at 390).

The motion to dismiss the second cause of action for fraud is granted. The Complaint alleges that during the negotiations, prior to the parties entering into an agreement, defendants falsely represented that they could provide certain services in the future, knowing that such representations were false, in order to deceive plaintiff for the sole purpose of extorting and pilfering money from plaintiff. A cause of action for fraud must allege more than a breach of contract claim. When the allegation is that the defendant deceived plaintiff by not intending to

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perform under the contract, that claim is merely a breach of contract claim. (See *Deerfield Holdings Corp.*, 127 AD3d 493, 494 [1st Dept 2015] [“The court properly dismissed the fraud claim as duplicative of the breach of contract claim, as plaintiffs’ were alleging only that HMS misrepresented its intent to perform the contractual obligations at the time they were made.”]; *Arnon Ltd v Beierwaltes*, 125 AD3d 453 [1st Dept 2015] [defendants’ fraudulent inducement counterclaim was dismissed as duplicative of their breach of contract counterclaim, as plaintiff’s alleged misrepresentation -- that it had the capability and intent to immediately pay defendant -- was only an “insincere promise of future performance”]; *Forty Central Park South, Inc. v Anza*, 117 AD3d 523 [1st Dept. 2014] [“the complaint fails to state a cause of action for fraudulent inducement, since it essentially alleges that defendant did not intend to perform under the contract when he made the promissory statements, which gives rise only a breach of contract claim.”]). Here, the Complaint alleges that defendants made false representations about their ability to provide research on plaintiff’s enemies, in order to deceive them into entering into the service agreement. As plaintiff’s fraud claim is really a claim that defendants never intended to perform under the service agreement, it is merely a breach of contract claim, is duplicative, and must be dismissed.

Further, although fraudulent inducement claim will not be dismissed as duplicative of a breach of contract claim if plaintiff pleads “a breach of duty distinct from, or in addition to, the breach of contract” (*GoSmile, Inc. v Levine*, 81 AD3d 77, 81 [1st Dept 2010]), here, no separate duty was pled. In *GoSmile* the Court wrote: “[T]his Court, as well as the Court of Appeals, has held that a misrepresentation of present fact, unlike a misrepresentation of future intent to perform under the contract, is collateral to the contract, even though it may have induced the plaintiff to sign it, and therefore involves a separate breach of duty” (*id.* at 81, citing *Deerfield*

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Communications Corp. v Chesebrough-Ponds, Inc., 68 NY2d 954 [1986]). However, to the

extent that a fraud in the inducement claim does not involve a separate duty and essentially alleges that defendant did not intend to perform under the contract when he made the promissory statements, such complaint may be dismissed under 3211(a)(7) as it only gives rise to a breach of contract claim (*Forty Central Park South, Inc. v Anza*, 117 AD3d 523 [1st Dept 2014]). The key question is whether there was a misrepresentation of a future intent to perform or a misrepresentation of present fact that induced plaintiff to enter into the contract (*First Bank of Americas v Motor Car Funding, Inc.*, 257 AD2d 287 [1st Dept 1999]). If the former, the claim should be dismissed as redundant (*id.*). However, if a plaintiff alleges that it was induced to enter into a transaction because of misrepresented material current facts, the plaintiff has stated a claim even though the same circumstances would also give rise to a breach of contract claim (*id.*). Here, (aside from the Complaint and motion papers calling the claim regular fraud, and not fraudulent inducement) the Complaint does not allege any separate duty, does not allege any misrepresentation of present fact, and does it allege that defendants did anything other than make a misrepresentation of performance. As the breach of contract claim and fraud claim both arise out of the failed performance under the contract (as discussed below), the fraud claim is dismissed as duplicative.

The motion to dismiss the breach of contract claim is denied. Plaintiff has alleged that the parties entered into an agreement for services, that included a flat fee and a confidentiality provision. Although it is not clear whether plaintiff ever paid for the services, plaintiff has, at minimum, alleged that defendants breached the confidentiality portion of the agreement (see *Minnell*, at 389 [the court correctly determined that the complaint states a cause of action for breach of contract based on defendant's alleged violation of this agreement not to make such

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(unauthorized disclosures)). Accepting the facts alleged in the Complaint as true and affording

plaintiff the benefit of every possible favorable inference, the breach of contract cause of action is properly stated.

The fifth cause of action for breach of the implied covenant of good faith and fair dealing is also dismissed as duplicative. The Complaint alleges that the implied covenant was breached by the disclosure of the services agreement and by the failure to provide the research. These are the exact same premises that the breach of contract claim stands on and are thus, duplicative (*Art Capital Group, LLC v Carlyle Inv. Mgt. LLC*, 151 AD3d 604, 605 [1st Dept 2017])[the court also properly dismissed the implied covenant of good faith and fair dealing claim as duplicative. The allegations in the complaint were premised on the same conduct as the breach of contract claim and were “inextricably tied to the damages allegedly resulting from a breach of the contract”). Further, the covenant is the implied obligation of each promisor to exercise good faith are “any promises which a reasonable person in the position of the promisee would be justified in understanding were included” (*Rowe v. Great Atl. & Pac. Tea Co.*, 46 NY2d 62 [1978], quoting 5 Williston, Contracts § 1293, at 3682 [rev ed 1937]). This means that “neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract” (*Dalton v. Educational Testing Serv.*, 87 NY2d 384, 389 [1995]). Here, there are no allegations that defendants took any actions that were not allegedly contemplated by the contract. Nor are there any allegations that defendant did anything to destroy plaintiff’s ability to receive the fruits of the performed contract. Rather, the only claim is that defendants did not fulfill its obligations under the contract.

The tortious interference with business relations cause of action is also dismissed. Tortious interference with contract and business relations “requires the existence of a valid

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contract between the plaintiff and a third party, defendant's knowledge of that contract,

defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom" (*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 424 [1996]). Here, the entirety of the facts presented relating to this claim are that "prior to entering into the Agreement plaintiff had a business relationship with a third-party," that defendants knew about, and that after defendants spread rumors about plaintiff and made public the existence of the services agreement "plaintiff's business relationship was injured by precluding plaintiff from entering into other profitable business ventures." Other than a vague, conclusory and unspecific allegation relating to other parties, plaintiff has not stated any facts relating to this cause of action. Plaintiff has not provided any detail about the contract or opportunity it lost, it has not identified any third-party, and does not even state that it had entered into an actual agreement with a third-party. Thus, plaintiff has failed to state the first element of this cause of action.

Finally, the cause of action for conspiracy to commit fraud is dismissed. New York does not recognize an independent cause of action for conspiracy to commit fraud (*Hoeffner v Orrick, Herrington & Sutcliffe LLP*, 85 AD3d 457 [1st Dept 2011]). "While a plaintiff may allege, in a claim of fraud or other tort, that parties conspired, the conspiracy to commit a fraud or tort is not, of itself, a cause of action" (*see MBF Clearing Corp. v Shine*, 212 AD2d 478, 479 [1995], *citing Brackett v Griswold*, 112 NY 454 [1889]). Given that civil conspiracy is not an independent tort, it cannot have its own independent measure of damages; any damages attributable to plaintiff's conspiracy claim exists only *within* those damages that may be assessed for fraud" (*id.*). Rather, the "allegations in the complaint herein charging conspiracy are deemed part of the remaining causes of action to which they are relevant" (*Errant Gene Therapeutics*,

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~~U.S. v. Sloan-Kettering Inst. for Cancer Research, 17-1038-43, 474 [1st Dept 2019]). Here,~~

as no tort causes of action remain, and this action is a business/contract matter, the cause of action for civil conspiracy must fail. Accordingly, it is hereby

ORDERED that the motion to dismiss is granted to the extent that the first, second, third, fifth and sixth causes of action are dismissed and is otherwise denied.

6/16/2020

DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

APPLICATION:

GRANTED

DENIED

GRANTED IN PART

OTHER

CHECK IF APPROPRIATE:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE

DAVID BENJAMIN COHEN, J.S.C.

HON. DAVID B. COHEN
J.S.C.