

Salimi v Raffaele

2020 NY Slip Op 32749(U)

August 21, 2020

Supreme Court, New York County

Docket Number: 160287/2019

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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SAHBA SALIMI,

Index No. 160287/2019

Plaintiff

- against -

DECISION AND ORDER

FRANK RAFFAELLE,

Defendant

-----X

LUCY BILLINGS, J.S.C.:

Defendant moves to dismiss the complaint pursuant to C.P.L.R. § 3211(a)(7). For the reasons explained below, the court grants defendant's motion in part and denies his motion in part.

I. BACKGROUND FACTUAL ALLEGATIONS

Plaintiff and defendants are neighbors in a residential building at 144 East 84th Street, New York County. Aff. of Yana Rubin Ex. 1 (V. Compl.) ¶¶ 6-7. Both were investors and officers in nonparty restaurant Coffeed Corporation. Id. ¶¶ 8, 14-17. Their initially friendly relationship deteriorated after plaintiff made two investments in Coffeed Corporation in 2018, which he alleges were at defendant's instigation: the first for \$50,000.00 and the second for \$300,000.00. Id. ¶¶ 14-40. Plaintiff alleges that defendant misrepresented his position with Coffeed Corporation and the assets that Coffeed Corporation

owned, to induce plaintiff to make these investments. Id. In particular, plaintiff complains that, "in February 2017, Coffeed had transferred the license with the State of New York for operation of the Marine Dining Hall to a separate and unaffiliated company, 'Landing at Jones Beach LLC,'" controlled by defendant himself, not Coffeed Corporation, as defendant had misrepresented. Id. ¶ 34.

Plaintiff also alleges that, after defendant was removed as an officer and director of Coffeed Corporation in 2019, he sent several emails to the New York City Department of Parks and Recreation claiming that plaintiff had engaged in fraudulent business practices. Id. ¶¶ 41-48. Defendant's emails attempted to persuade the Department of Parks and Recreation that, because of plaintiff's unlawful conduct, Coffeed Corporation not be permitted to operate any restaurant concessions in areas controlled by the Department. Id. ¶¶ 44-48.

II. STANDARDS APPLICABLE TO PLAINTIFF'S CLAIMS

The complaint alleges claims for fraud, breach of a fiduciary duty, unjust enrichment, and defamation. Defendant seeks dismissal of plaintiff's claims only pursuant to C.P.L.R. § 3211(a)(7): "on the ground that . . . the pleading fails to state a cause of action."

The analysis applicable to a motion to dismiss plaintiff's claims on this ground is to accept plaintiff's allegations as

true, liberally construe them, and draw all reasonable inferences in his favor. JF Capital Advisors, LLC v. Lightstone Group, LLC, 25 N.Y.3d 759, 764 (2015); Miglino v. Bally Total Fitness of Greater N.Y., Inc., 20 N.Y.3d 342, 351 (2013); ABN AMRO Bank, N.V. v. MBIA Inc., 17 N.Y.3d 208, 227 (2011); Drug Policy Alliance v. New York City Tax Comm'n, 131 A.D.3d 815, 816 (1st Dep't 2015). The court will not give such consideration, however, to allegations that consist of only bare legal conclusions. Simkin v. Blank, 19 N.Y.3d 46, 52 (2012); David v. Hack, 97 A.D.3d 437, 438 (1st Dep't 2012). Dismissal is warranted if a claim fails to allege facts that fit within any cognizable legal theory. Faison v. Lewis, 25 N.Y.3d 220, 224 (2015); ABN AMRO Bank, N.V. v. MBIA Inc., 17 N.Y.3d at 227; Lawrence v. Graubard Miller, 11 N.Y.3d 588, 595 (2008); Nonnon v. City of New York, 9 N.Y.3d 825, 827 (2007). Although defendant may not rely on evidence outside the pleaded claim, plaintiff may rely on admissible evidence to supplement and remedy any defects in his complaint, Nonnon v. City of New York, 9 N.Y.3d at 827; Cron v. Hargro Fabrics, 91 N.Y.2d 362, 366 (1998); US Suite LLC v. Barata, Baratta & Aidala LLP, 171 A.D.3d 551, 551 (1st Dep't 2019); Ray v. Ray, 108 A.D.3d 449, 452 (1st Dep't 2013), because the question is whether he maintains a claim, not whether he has artfully articulated or correctly labeled it. Chanko v. American Broadcasting Cos., 27 N.Y.3d 46, 52 (2016).

A. Plaintiff's First Claim, for Fraud

A claim based on fraud "must allege misrepresentation or concealment of a material fact, falsity, scienter on the part of the wrongdoer, justifiable reliance and resulting injury." MP Cool Invs. Ltd. v. Forkosh, 142 A.D.3d 286, 290-91 (1st Dep't 2016). Where plaintiff is a sophisticated party, if the facts represented are about a subject not peculiarly within defendant's knowledge, and plaintiff has the means to know, by exercising ordinary intelligence, the truth or reality of the representation, he must use those means, or he may not complain that he was induced to enter the transaction by misrepresentations. ACA Fin. Guar. Corp. v. Goldman, Sachs & Co., 25 N.Y.3d 1043, 1044 (2015); MP Cool Invs. Ltd. v. Forkosh, 142 A.D.3d at 291. Plaintiff must set forth the circumstances constituting fraud in detail. C.P.L.R. § 3016(b); Epiphany Community Nursery Sch. v. Levey, 171 A.D.3d 1, 9 (1st Dep't 2019); MP Cool Invs. Ltd. v. Forkosh, 142 A.D.3d at 291.

Defendant maintains that plaintiff's fraud claim lacks the requisite specificity because the complaint merely recounts plaintiff's interpretation of unspecified communications between plaintiff and defendant and identifies no actual loss from the alleged fraud. To the contrary, the complaint specifies each alleged misrepresentation by defendant and the monetary damages that plaintiff incurred from his two investments in Coffeed

Corporation. For example,

50. Commencing in or about mid-April 2018 up to and including mid-July 2018, Defendant made representations of fact and stated to Plaintiff . . . that the license to operate the Marine Dining Hall at Jones Beach issued by the State of New York was an asset of Coffeed.

51. In reliance upon these representations Plaintiff provided Defendant with \$300,000.00 to be used to purchase shares in Coffeed.

52. Defendant's representations were false and fraudulent as Defendant knew that the license to operate the Marine Dining Hall at Jones Beach was an asset of a different corporation under his control.

53. Defendant made misrepresentations to Plaintiff about the purpose and use of Plaintiff's money.

54. Defendant made misrepresentations to Plaintiff about the true ownership interests of the Landing at Jones Beach.

Rubin Aff. Ex. 1 (V. Compl.) ¶¶ 50-54. Similarly, the complaint alleges that defendant induced plaintiff to invest \$50,000.00 in Coffeed Corporation for a contract to manage a restaurant at the Queens Museum by misrepresenting Coffeed's ownership of the restaurant and its average weekly revenue and concealing the misappropriation of its profits and its substantial debt. Id. ¶¶ 17-20.

C.P.L.R. § 3016(b) is satisfied when the alleged facts permit a "reasonable inference" of the claimed misconduct. Epiphany Community Nursery Sch. v. Levey, 171 A.D.3d at 9. When the facts of the alleged fraud are not plainly observable, they may be supplemented by the surrounding circumstances. The test

is simply whether plaintiff's allegations inform defendant of the acts about which plaintiff complains. Id.

The complaint plainly alleges that defendant misrepresented Coffeed Corporation's ownership of the Marine Dining Hall, which another entity controlled by defendant owned; misrepresented Coffeed Corporation's ownership of another restaurant and that restaurant's revenue; and made these misrepresentations to induce plaintiff to invest \$350,000.00 in Coffeed Corporation. In short, the complaint alleges that defendant misrepresented a corporation's revenue and assets to induce plaintiff to contract with the corporation and purchase corporate stock. The complaint supplies all the details. It names the corporation; identifies the times, places, parties to, and nature of the alleged deception; defendant's alleged motive; and the amount of damages that the deception caused plaintiff to incur.

Defendant does not explain what details are absent or confusing. Rather than finding any deficiencies in plaintiff's pleading, defendant impermissibly relies on facts outside the complaint: that plaintiff was offered unfettered access to Coffeed Corporation's records before he invested in the corporation, and therefore his reliance on defendant's misrepresentation was unjustifiable. Miglino v. Bally Total Fitness of Greater N.Y., Inc., 20 N.Y.3d at 351; Lawrence v. Graubard Miller, 11 N.Y.3d at 595; GEM Holdco, LLC v. Changing

World Tech., L.P., 127 A.D.3d 598, 599 (1st Dep't 2015); Lee v. Dow Jones & Co., Inc., 121 A.D.3d 548, 549 (1st Dep't 2014).

Such a conclusion would require a factual inquiry into plaintiff's access to the corporate records and his diligence in reviewing them. Even if the court accepted defendant's alleged offer of unfettered access to the corporation's records, defendant cites no support for the proposition that such an offer would negate plaintiff's allegations of justifiable reliance.

In sum, plaintiff's fraud claim meets C.P.L.R. § 3016(b)'s specificity requirements. Therefore the court denies defendant's motion to dismiss the complaint's first claim.

B. Plaintiff's Second Claim, for Breach of a Fiduciary Duty

The elements of a claim for breach of a fiduciary duty are (1) a fiduciary relationship, (2) defendant's misconduct, and (3) damages directly caused by defendant's misconduct. NRT N.Y., LLC v. Morin, 147 A.D.3d 589, 589 (1st Dep't 2017); Burry v. Madison Park Owner LLC, 84 A.D.3d 699, 699-700 (1st Dep't 2011). There may be a fiduciary relationship where one party reposes confidence in another and reasonably relies on the other's superior expertise or knowledge, but not in an arm's length business transaction involving sophisticated businesspersons. EBC I, Inc. v. Goldman, Sachs & Co., 5 N.Y.3d 11, 19 (2005); Waterscape Resort LLC v. McGovern, 107 A.D.3d 571, 571 (1st Dep't 2013).

Defendant maintains that he did not stand in a fiduciary relationship to plaintiff because they were sophisticated businessmen involved in an arm's length business transaction concerning investment in a corporation. Plaintiff, however, claims a close personal friendship with defendant and disputes that plaintiff himself was a sophisticated businessman involved in an arm's length transaction. Specifically, the complaint alleges that:

Defendant was initially a neighbor of Plaintiff. Over the course of at least the past ten years, they have been friends, and with their families socialized together. During the course of their friendship, Defendant falsely held himself out to Plaintiff as a successful businessman with an expertise in retail business.

Rubin Aff. Ex. 1 (V. Compl.) ¶ 15.

While the court may not assess the nature of the parties' relationship upon a motion to dismiss the complaint, the mere allegation of a friendship does not create a fiduciary duty. A complaint that "alleges only arm's length business transactions and no special circumstances that might give rise to a fiduciary relationship" does not plead a viable claim for breach of a fiduciary duty. Benzies v. Take-Two Interactive Software, Inc., 159 A.D.3d 629, 630-31 (1st Dep't 2018). See Sebastian Holdings, Inc. v. Deutsche Bank AG, 78 A.D.3d 446, 447 (1st Dep't 2010).

The complaint simply describes a growing, long-term friendship between the parties and does not allege any "special circumstances." Plaintiff's affidavit in opposition to

defendant's motion only supports this interpretation: "What began as a casual acquaintance became a friendship over the course of a few years." Aff. in Opp'n ¶ 3. "I looked at Frank as a close personal friend." Id. ¶ 7. Plaintiff's affidavit also acknowledges that plaintiff is an attorney and served on his co-operative apartment building's board of directors for six years, id. ¶¶ 3, 8, indicating he was a sophisticated businessman capable of understanding and protecting his own interests in an arm's length business transaction, despite his protestations to the contrary.

Because plaintiff's allegations do not describe a legally cognizable fiduciary relationship between the parties, plaintiff fails to state a viable claim for breach of a fiduciary duty. Therefore the court grants defendant's motion to dismiss the complaint's second claim.

C. Plaintiff's Third Claim, for Unjust Enrichment

To sustain a claim for unjust enrichment, plaintiff must show that (1) defendant was enriched, (2) at plaintiff's expense, and (3) it is against equity and good conscience to permit defendant to retain what plaintiff seeks to recover. Georgia Malone & Co., Inc. v. Reider, 19 N.Y.3d 511, 516 (2012); Mandarin Trading Ltd. v. Wildenstein, 16 N.Y.3d 173, 182 (2011); Schroeder v. Pinterest Inc., 133 A.D.3d 12, 26 (1st Dep't 2015). Defendant challenges plaintiff's showing of the first element of this

claim, because plaintiff invested in Coffeed Corporation only, and defendant received nothing from that transaction and thus was not unjustly enriched. To support this defense that defendant himself was not unjustly enriched, defendant in reply presents plaintiff's cancelled check for \$300,000.00 to Coffeed Corporation. Not only does defendant impermissibly present this documentary evidence for the first time in reply, Enjoy Realty Corp. v. Van Wagner Communications, LLC, 22 N.Y.3d 413, 422-23 (2013); Amtrust-NP SFR Venture, LLC v. Vazquez, 140 A.D.3d 541, 541-42 (1st Dep't 2016); Scafe v. Schindler El. Corp., 111 A.D.3d 556, 556 (1st Dep't 2013); Keneally v. 400 Fifth Realty LLC, 110 A.D.3d 624, 624 (1st Dep't 2013), but once again he relies on evidence outside the complaint for dismissal pursuant to C.P.L.R. § 3211(a)(7), failure to state a claim, not C.P.L.R. § 3211(a)(1), a defense based on documentary evidence.

Nevertheless, the complaint, even when supplemented by plaintiff's affidavit, alleges nothing more than the bare, conclusory elements of an unjust enrichment claim: that defendant was enriched at plaintiff's expense, without any evidentiary facts whatsoever. Mandarin Trading Ltd. v. Wildenstein, 16 N.Y.3d at 183. See Simkin v. Blank, 19 N.Y.3d at 52; David v. Hack, 97 A.D.3d at 438. His complaint acknowledges that his investments were in Coffeed Corporation. He never articulates how defendant himself benefitted from these

investments. Plaintiff does not allege that defendant misappropriated them for his personal purposes. Nor does defendant maintain that he needs disclosure to oppose defendant's motion to dismiss the unjust enrichment claim. C.P.L.R. § 3211(d).

The court must dismiss an unjust enrichment claim when plaintiff does not show, through allegations of evidentiary facts, that defendant personally was enriched or otherwise benefitted from plaintiff's transactions with Coffeed Corporation. Mandarin Trading Ltd. v. Wildenstein, 16 N.Y.3d at 183; Abacus Fed. Sav. Bank v. Lim, 75 A.D.3d 472, 473 (1st Dep't 2010). Moreover, the damages that plaintiff seeks to recover by which defendant allegedly was enriched are the same damages he seeks to recover based on defendant's alleged fraud, so that, at best, plaintiff's unjust enrichment claim duplicates his fraud claim. For all these reasons, the court grants defendant's motion to dismiss the complaint's third claim.

D. Plaintiff's Fourth Claim, for Defamation

The elements of a defamation claim are "a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se." Frechtman v. Gutterman, 115 A.D.3d 102, 104 (1st Dep't 2014); Dillon v. City of New York, 261 A.D.2d 34, 38

(1st Dep't 1999). Defamation per se includes statements (1) charging plaintiff with a serious crime and (2) tending to injure him in his business or profession, as alleged here. Liberman v. Gelstein, 80 N.Y.2d 429, 435 (1992); Nolan v. State of New York, 158 A.D.3d 186, 195 (1st Dep't 2018).

Defendant maintains that qualified privileges applicable to common interest and law enforcement communications protect the allegedly defamatory statements about which plaintiff complains. It is premature to determine whether either of these qualified privileges defeats plaintiff's defamation claims. To defeat a defamation claim based on a privilege, defendant must raise it as an affirmative defense and then move for summary judgment. A pre-answer motion to dismiss the complaint based on its failure to state a claim is not a vehicle to determine whether a privilege defeats the claim. Fletcher v. Dakota, Inc., 99 A.D.3d 43, 55-56 (1st Dep't 2012); Weiss v. Lowenberg, 95 A.D.3d 405, 406 (1st Dep't 2012); Colantonio v. Mercy Med. Ctr., 115 A.D.3d 902, 903 (2d Dep't 2014). While a motion to dismiss the complaint pursuant to C.P.L.R. § 3211(a)(1) may defeat a defamation claim based on documentary evidence that conclusively establishes a privilege, L.Y.E. Diamonds, Ltd. v. Gemological Inst. of Am., Inc., 169 A.D.3d 589, 589 (1st Dep't 2019), defendant did not select that vehicle.

Even were the court to consider documentary evidence in

determining whether to dismiss plaintiff's defamation claim, defendant presents none to support his defense to this claim. Nor may the court determine even from defendant's affidavit, without further exploration of evidence, whether each of the persons to whom defendant disseminated the alleged defamatory statements actually shared a common interest with him or carried out a law enforcement function. Since defendant presents no basis other than privilege to dismiss plaintiff's defamation claim, the court denies his motion to dismiss the complaint's fourth claim.

III. CONCLUSION

For the foregoing reasons, the court grants defendant's motion to dismiss the complaint to the extent of dismissing the complaint's second and third claims, for breach of a fiduciary duty and for unjust enrichment, and otherwise denies his motion. C.P.L.R. § 3211(1)(7). Defendant shall answer the complaint's remaining claims within 10 days after service of this order with notice of entry. C.P.L.R. § 3211(f). The parties shall convene for a Preliminary Conference September 17, 2020, at 11:00 a.m., via telephone, to be arranged by the court.

DATED: August 21, 2020



LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.