

McCook v Skervin

2020 NY Slip Op 34093(U)

December 8, 2020

Supreme Court, Kings County

Docket Number: 517372/19

Judge: Peter P. Sweeney

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, PART 73

Index No.: 517372/19
Motion Date: 9-28-20
Mot. Seq. No.: 1-2

-----X
VERONICA MCCOOK,

Plaintiff,

-against-

DECISION/ORDER

PAUL SKERVIN, MERRICK J. DAMMAR,
TERRENCE THEOPHILUS LAPIERRE

Defendants.

-----X

The following papers numbered 1 to 3 were read on these motions:
motion:

Papers:	Numbered:
Notice of Motion/Order to Show Cause	
Affidavits/Affirmations/Exhibits/Memo of Law.....	1
Notice of Cross-Motion/Order to Show Cause	
Affidavits/Affirmations/Exhibits/Memo of Law.....	2
Answering Affirmations/Affidavits/Exhibits/Memo of Law.....	3
Reply Affirmations/Affidavits/Exhibits/Memo of Law.....	
Other.....	

Upon the foregoing papers, the motions are decided as follows:

Defendant, PAUL SKERVIN, moves for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the complaint with prejudice. The plaintiff cross-moves for an order pursuant to CPLR 3212 granting her summary judgment.

The plaintiff, VERONICA MCCOOK, commenced this action alleging nine causes of action sounding in 1) RPAPL Article 15 2) Fraud 3) Aiding and Abetting Fraud 4) New York Civil Conspiracy 5) Conversion 6) Unjust Enrichment 7) Negligence 8) Gross Negligence and 9) New York Executive Law 135. That branch of the motion pursuant to CPLR 3211(a)(7) seeking to dismiss plaintiff’s second cause of action sounding fraud is **DENIED**. To properly plead a

fraud claim, a plaintiff must allege that “(1) the defendant made a representation or a material omission of fact which was false and the defendant knew to be false, (2) the misrepresentation was made for the purpose of inducing the plaintiff to rely upon it, (3) there was justifiable reliance on the misrepresentation or material omission, and (4) injury” (*McDonnell v. Bradley*, 109 AD3d 592, 593, quoting *Selechnik v. Law Off. of Howard R. Birnbach*, 82 AD3d 1077, 1078). Pursuant to CPLR 3016(b), where a cause of action is based on fraud, the “circumstances constituting the wrong” must be “stated in detail,” including “specific dates and items” (*Orchid Constr. Corp. v Gottbetter*, 89 AD3d 708, 710 [internal quotation marks omitted]; see *Doukas v Ballard*, 135 AD3d 896, 898).

“In considering a motion to dismiss for failure to state a cause of action ... the pleadings must be liberally construed ... The sole criterion is whether from [the complaint's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law’ ” (*Dinerman v. Jewish Bd. of Family & Children's Servs., Inc.*, 55 A.D.3d 530, 530–531, 865 N.Y.S.2d 133, quoting *Gershon v. Goldberg*, 30 A.D.3d 372, 373, 817 N.Y.S.2d 322 [internal quotation marks omitted]; see *Leon v. Martinez*, 84 N.Y.2d 83, 87–88, 614 N.Y.S.2d 972, 638 N.E.2d 511). Notwithstanding the above, it is well settled “a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint” (*Leon v. Martinez*, 84 N.Y.2d at 88, 614 N.Y.S.2d 972, 638 N.E.2d 511; *Selechnik v. Law Office of Howard R. Birnbach*, 82 A.D.3d 1077, 1078, 920 N.Y.S.2d 128, 130). Here, the affidavit submitted by the plaintiff in opposition to the motion, when considered with the allegations in the complaint, sufficiently allege all of the elements of a cause of action sounding in fraud.

With respect to defendant’s motion to dismiss plaintiff’s third-cause of action for aiding and abetting fraud, defendant correctly states that “[t]o recover for aiding and abetting fraud, the

plaintiff must plead the existence of an underlying fraud, knowledge of the fraud by the aider and abettor, and substantial assistance by the aider and abettor in the achievement of the fraud” (*Fox Paine & Co., LLC v Houston Cas. Co.*, 153 AD3d at 679; see *Swartz v Swartz*, 145 AD3d 818, 824; *Weinstein v CohnReznick, LLP*, 144 AD3d 1140, 1141; *Markowits v Friedman*, 144 AD3d at 996). Defendant contends that since the plaintiff did not sufficiently allege an underlying fraud, this cause of action must be dismissed. However, as stated above, when plaintiff’s affidavit is considered, plaintiff adequately alleged an underlying fraud.

Defendant’s contention that the fourth cause of action must also be dismissed because the plaintiff failed to adequately allege an underlying fraud it’s without merit for the same reasons.

That branch of defendant’s motion to dismiss the fifth cause of action to the extent it alleges conversion of real property is **GRANTED**. “The subject matter of a conversion cause of action “ ‘must constitute identifiable tangible personal property’ ; real property and interests in business opportunities will not suffice” (*C & B Enters. USA, LLC v. Koegel*, 136 AD3d 957, 958) [internal quotation marks citations omitted]; *accord Benn*, 82 AD3d at 550 [dismissing so much of the cause of action for conversion predicated upon the conversion of real property]; *see also Luong v. Ha The Luong*, 67 Misc. 3d 1210(A), 126 N.Y.S.3d 850).

That branch of defendant’s motion to dismiss the fifth cause of action to the extent it alleges conversion of personal property is **DENIED**. An action for conversion of money may be made out “where there is a specific, identifiable fund and an obligation to return or otherwise treat in a particular manner the specific fund in question” (*Manufacturers Hanover Trust Co. v. Chemical Bank*, 160 A.D.2d 113, 124, 559 N.Y.S.2d 704, *lv. denied* 77 N.Y.2d 803, 568 N.Y.S.2d 15, 569 N.E.2d 874). Plaintiff’s complaint and affidavit adequately allege a conversion

of money belonging to her.

Defendant's motion to dismiss plaintiff's sixth cause of action is premature as it has not been demonstrated as a matter of law that there is a binding agreement between the parties governing the claim or that defendant committed a recognized tort (see *Corsello v Verizon NY Inc.*, 18 NY3d 777, 791; *Allenby, LLC v Credit Suisse, AG*, 134 AD3d 577, 579, citing *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388).

That branch of defendant's motion seeking to dismiss plaintiff's seventh cause of action sounding in negligence is **DENIED**. The Court rejects defendant's contention that plaintiff did not allege a duty owed to her by the defendant. Plaintiff's complaint and affidavit, liberally construed, sufficiently allege that there was a fiduciary relationship between the plaintiff and the defendant thus giving rise to a duty of care owed by the defendant. A fiduciary relationship arises "between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation" (*EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19, 799 N.Y.S.2d 170, 832 N.E.2d 26 [2005] [internal quotation marks and citation omitted]). Put differently, "[a] fiduciary relation exists when confidence is reposed on one side and there is resulting superiority and influence on the other" (*AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co.*, 11 N.Y.3d 146, 158, 866 N.Y.S.2d 578, 896 N.E.2d 61 [2008] [internal quotation marks and citation omitted]). Ascertaining the existence of such a relationship inevitably requires a fact-specific inquiry (*Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 N.Y.3d 553, 561, 910 N.E.2d 976, 980). Here, the complaint and plaintiff's affidavit, liberally construed, sufficiently allege that there was a fiduciary relationship between the defendant and the plaintiff.

That branch of defendant's motion seeking to dismiss plaintiff's eighth cause of action sounding in gross negligence is **DENIED**. Contrary to defendant's contention, the complaint and plaintiff's affidavit sufficiently allege wrongdoings by the defendant evincing a reckless indifference to her the rights.

Finally, that branch of defendant's motion seeking to dismiss plaintiff's ninth cause of action pursuant to CPLR 3211(a)(1) is **DENIED**. Executive Law § 135 provides, in relevant part, that "[f]or any misconduct by a notary public in the performance of any of his powers such notary public shall be liable to the parties injured for all damages sustained by them" (*Chicago Tit. Ins. Co. v LaPierre*, 104 AD3d 720; see Executive Law § 135). 72. A motion to dismiss a complaint pursuant to CPLR 3211(a)(1) may only be granted if "documentary evidence utterly refutes [the] plaintiff's factual allegations, thereby conclusively establishing a defense as a matter of law" (*Whitebox Concentrated Convertible Arbitrage Partners, L.P. v Superior Well Servs., Inc.*, 20 NY3d 59, 63 [2012]). Here, contrary to defendant's contention, the documentary evidence defendant submitted in support of the motion, consisting of the deed and transfer documents, do not utterly refute plaintiff's claim of notary misconduct.

Plaintiff's cross-motion for summary judgment is denied. Pursuant to CPLR 3212(a), a party may move for summary judgment only after issue has been joined. Here, since the defendant has yet to serve an answer, plaintiff's motion is premature.

Accordingly, it is hereby

ORDRED that the motion and cross-motion are decided as indicated above.

This constitutes the decision and order of the Court.

Dated: December 8, 2020

PPS

PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020