

**Eze v Mangal**

2020 NY Slip Op 35230(U)

November 13, 2020

Supreme Court, Kings County

Docket Number: Index No. 521409/2019

Judge: Lillian Wan

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: PART 17

Index No.: 521409/2019  
Motion Date: 9-23-20  
Motion Seq. No. 01

-----X  
CHIDI EZE,

Plaintiff,

- against -

YOVENDRA MANGAL, JAI SOMWARU,  
TAMARA DEL CARMEN, J & JT HOLDING  
CORP., DEL CARMEN & MANGAL, P.C. and  
PRADEEP LAKHANLALL,

**DECISION AND ORDER**

Defendants.  
-----X

The following e-filed documents, listed by NYSCEF document number (Motion 01) 8-13, 17, 18 and 20 were read on this motion to dismiss.

Plaintiff commenced this action seeking to recover damages based on, *inter alia*, fraud, breach of fiduciary duty, tortious interference with contract, unjust enrichment and civil conspiracy. Plaintiff also asserts a cause of action against the moving defendant, Tamara Del Carmen (hereinafter Del Carmen), based on vicarious liability. Plaintiff seeks compensatory and punitive damages from all defendants, as well as specific performance. Defendant Del Carmen moves for an order, pursuant to CPLR §§ 3211(a)(1) and (a)(7), dismissing the complaint based on documentary evidence and for failure to state a cause of action. For the reasons set forth below, the defendant’s motion is denied.

This action arises out of legal services performed by the plaintiff, Chidi Eze, Esq., on behalf of defendants Jai Somwaru and Pradeep Lakhanlall (hereinafter Somwaru and Lakhanlall). Plaintiff is an attorney, and alleges that on or about June 10, 2014, he entered into a retainer agreement with defendant Lakhanlall to perform legal services on behalf of Lakhanlall and defendant Somwaru. The agreement called for the sum of \$110,000 to be held in escrow pending the completion of the litigation. On or about June 24, 2014, defendant Yovendra Mangal (hereinafter Mangal), a member of the defendant law firm, Del Carmen & Mangal, P.C., advised the plaintiff by letter on the firm’s letterhead, that the sum of \$110,000 had been deposited into the firm’s escrow account, and would be paid to the plaintiff upon completion of the legal work set forth in the retainer agreement. The defendant maintains that the law firm was a professional corporation that dissolved on October 6, 2016.

According to the plaintiff, after three years of extensive litigation that included appellate work, defendants Lakhanlall and Somwaru breached the retainer agreement. In December of 2017 the plaintiff contacted defendant Mangal to ascertain the availability of the escrow funds

for payment of his legal fee. Mr. Mangal denied holding any escrow funds on plaintiff's behalf for legal services rendered to Lakhanlall and Somwaru.

Del Carmen argues that the complaint fails to state a viable claim based on fraud because it does not specify that the defendant made any misrepresentation to the plaintiff regarding the escrow funds at issue, and that the allegations of fraud do not comply with the specificity requirements of CPLR § 3016(b). The defendant asserts that plaintiff also fails to state a cause of action against her based on a breach of fiduciary duty because plaintiff has not alleged any misconduct or act of Del Carmen that caused him damage. The defendant contends that the cause of action for tortious interference with contract must also fail because the complaint does not allege that the defendant knew of a contract between plaintiff and a third party, and that the defendant intentionally procured the breach of said contract by the third party without justification. Likewise, the defendant claims that the complaint does not properly state a cause of action for unjust enrichment because it does not allege that Del Carmen was the recipient of any money or benefit at the expense of the plaintiff. The defendant argues that the cause of action based on civil conspiracy is not viable because New York law does not recognize the independent tort of civil conspiracy.

Lastly, Del Carmen seeks dismissal of the vicarious liability claim. The defendant contends that under New York Business Corporation Law § 1505 (hereinafter BCL), a shareholder of a professional corporation cannot be held vicariously liable for the acts of another shareholder, and can only be held liable for an act committed by either the shareholder or an individual under the shareholder's direct supervision or control. The defendant argues that the complaint does not allege that Del Carmen had any involvement in the underlying legal matter, made any representation to plaintiff, or had any supervision or control over Mangal. The defendant also claims that the complaint does not distinguish between the various defendants in pleading all causes of action, and therefore fails to state any viable claim against her.

In support of the motion, the defendant submits the law firm's 2014 monthly escrow statements which show that \$110,000 was never deposited into its escrow account as claimed by Mangal in the June 24, 2014 letter sent to the plaintiff. Defendant also submits a computer printout from the website of the New York State Department of State, Division of Corporations, as evidence that the firm of Del Carmen & Mangal, P.C. dissolved on October 6, 2016. The printout lists Mangal as the Chief Executive Officer of the firm. Defendant Del Carmen is not listed as an officer of the corporation.

In opposition, the plaintiff submits the escrow letter of June 24, 2014, written on the law firm's letterhead and signed by Mangal. The letter states,

[p]lease be advised that \$110,000 is currently being held in

escrow for Mr. Somwaru and said monies would be made available for you or paid to your [sic] upon completing the work pursuant to the agreement entered into in June 10, 2014 between yourself and Pradeep Lakhanlall or his attorney in fact with regards to the premises...

The plaintiff argues that Mangal, as principal and Chief Executive Officer of the corporation, had apparent authority to bind it and its shareholders by representing that the funds were being held in escrow for the plaintiff's legal fee, and that he reasonably relied upon Mangal's appearance of authority to his detriment. The plaintiff contends that even if BCL § 1505 is controlling, the defendant's motion should be denied at this early stage in the proceedings because a question of fact exists whether Mangal was under Del Carmen's direct supervision or control when the wrongful acts were committed by Mangal.

The plaintiff further claims that the causes of action for fraud, breach of fiduciary duty and tortious interference with contract were plead with sufficient specificity to state a proper claim. According to the plaintiff, the civil conspiracy cause of action properly accompanies other causes of action in the complaint, and stands or falls with the underlying tort claims. The complaint alleges that Del Carmen is jointly and severally liable to plaintiff as a shareholder of the law firm.

A party seeking dismissal pursuant to CPLR § 3211(a)(1) on the ground that its defense is founded upon documentary evidence has the burden of submitting documentary evidence that resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim. *Mazur Bros. Realty, LLC v State of New York*, 59 AD3d 401 (2d Dept 2009); *Epifani v Johnson*, 65 AD3d 224 (2d Dept 2009); *see also Leon v Martinez*, 84 NY2d 83 (1994). A motion to dismiss based on CPLR § 3211(a)(1) may be granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law. *Porat v Rybina*, 177 AD3d 632 (2d Dept 2019); *see also Phillips v Taco Bell Corp.*, 152 AD3d 806 (2d Dept 2017); *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314 (2002). However, not all printed materials constitute documentary evidence under CPLR § 3211(a)(1). *See Fontanetta v John Doe 1*, 73 AD3d 78 (2d Dept 2010). In order to be considered documentary, the evidence must be "unambiguous and of undisputed authenticity" and "essentially unassailable." *Torah v Dell Equity, LLC*, 90 AD3d 746, 746-747 (2d Dept 2011) (internal quotation marks omitted); *see also Yue Fung USA Enterprises, Inc. v Novelty Crystal Corp.*, 105 AD3d 840 (2d Dept 2013).

Materials that clearly qualify as "documentary evidence" include "documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable." *J.P. Morgan Chase Bank, N.A. v Klein*, 178 AD3d 788,

790 (2d Dept 2019) (internal quotation marks omitted); *see also Sands Point Partners Private Client Group v Fidelity Natl. Tit. Ins. Co.*, 99 AD3d 982 (2d Dept 2012).

In considering a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7), a court “must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” *Lubonty v U.S. Bank N.A.*, 159 AD3d 962, 963 (2d Dept 2018) (internal quotation marks omitted); *Nonnon v City of New York*, 9 NY3d 825 (2007). The motion must be denied “unless it has been shown that a material fact claimed by the [plaintiff] is not a fact at all and unless it can be said that no significant dispute exists regarding it.” *Porat* at 634 (internal quotation marks omitted).

To properly plead a cause of action for fraud the plaintiff must allege that (1) the defendant made a misrepresentation of fact, (2) the defendant had knowledge of the misrepresentation, (3) the misrepresentation was made in order to induce the plaintiff’s reliance, (4) plaintiff’s justifiable reliance, and (5) the plaintiff was injured by the reliance. *Vermont Mut. Ins. Co. v McCabe & Mack, LLP*, 105 AD3d 837 (2d Dept 2013). A cause of action sounding in breach of fiduciary duty requires that the plaintiff allege: (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant’s misconduct. *Swartz v Swartz*, 145 AD3d 818 (2d Dept 2016) (internal quotation marks omitted). A claim based on a breach of fiduciary duty must be pleaded with particularity under CPLR § 3016(b). *Id.*

In order to maintain a cause of action alleging tortious interference with contract the plaintiff must allege: (1) the existence of a valid contract between the plaintiff and a third party, (2) the defendant had knowledge of the contract, (3) the defendant intentionally obtained the third party’s breach of that contract, and (4) damages. *Chung v Wang*, 79 AD3d 693 (2d Dept 2010). The plaintiff’s cause of action for unjust enrichment requires the following elements: “1) the defendant was enriched, 2) at the plaintiff’s expense, and 3) it is against equity and good conscience to permit the defendant to retain what is sought to be recovered.” *GFRE, Inc. v U.S. Bank, N.A.*, 130 AD3d 569, 570 (2d Dept 2015) (internal quotation marks omitted).

The plaintiff also alleges a cause of action for civil conspiracy. Although New York does not recognize civil conspiracy to commit a tort as an independent cause of action, it may nonetheless be cognizable if the plaintiff pleads the existence of a conspiracy in order to connect the actions of the defendants with an underlying tort, and establish that their actions were part of a common scheme. *See Swartz*. “The plaintiff must allege a cognizable tort, coupled with an agreement between the conspirators regarding the tort, and an overt action in furtherance of the agreement.” *Id.* at 825-826 (internal quotation marks omitted).

In the instant case, the defendant has not met her *prima facie* burden demonstrating entitlement to dismissal of the complaint pursuant to CPLR § 3211(a)(1). The defendant has failed to submit documentary evidence that is unambiguous, and resolves all factual issues as a matter of law. The firm's 2014 escrow statements only show that the disputed funds were never deposited into the escrow account, contrary to Mangal's representations to the plaintiff in the June 24, 2014 letter. Similarly, the printout from the New York State Department of State Corporations Division does not refute the factual issues, but merely establishes that the professional corporation dissolved on October 6, 2016, two years after the escrow letter was sent to the plaintiff, and that Mangal was the Chief Executive Officer of the firm.

Likewise, construing the plaintiff's pleadings liberally, affording the plaintiff the benefit of every possible favorable inference, and accepting all facts as alleged in the complaint to be true, the defendant has not established that the complaint should be dismissed pursuant to CPLR § 3211(a)(7). The defendant has failed to submit evidence sufficient to show that the facts as alleged in the complaint do not fit within any cognizable legal theory. *See Lubonty* at 963; *see also Phillips* at 808. The plaintiff has set forth the elements of the first cause of action based on fraud with the requisite particularity required by CPLR § 3016(b). Moreover, the defendant does not refute the plaintiff's argument that Mangal had apparent authority with respect to the representations made to the plaintiff in the escrow letter. A principal-agent relationship may be established by evidence of the "consent of one person to allow another to act on his or her behalf and subject to his or her control, and consent by the other so to act... The agent is a party who acts on behalf of the principal with the latter's express, implied, or apparent authority." *Time Warner City Cable v Adelphi Univ.*, 27 AD3d 551, 552 (2d Dept 2006). The plaintiff has alleged a viable cause of action for fraud, and the issues of fact as to the existence and scope of the agency are properly left to the jury.

Furthermore, the plaintiff has set forth a cognizable cause of action for the third cause of action for breach of fiduciary duty, as it is well-settled that an escrow agent has a contractual duty to follow the escrow agreement and "becomes a trustee of anyone with a beneficial interest in the trust." *Takayama v Schaefer*, 240 AD2d 21, 25 (2d Dept 1998). The escrow statements clearly indicate that the escrow account was maintained by the firm, including Del Carmen who was an alleged shareholder of the firm. Contrary to the defendant's contentions, the breach of fiduciary claim properly alleges that Del Carmen breached her fiduciary duty with respect to the escrow account, and particularizes the breach of said duty. Plaintiff has also set forth cognizable claims based on the fourth cause of action for tortious interference with contract and the fifth cause of action for unjust enrichment by Del Carmen, as he has plead all the necessary elements. The sixth cause of action for civil conspiracy is proper because, as plaintiff points out, it is not asserted as an independent cause of action but rather it is connected with cognizable torts in the complaint, and alleges that the conspirators were in agreement, and the overt action in furtherance of the agreement included drafting and mailing the escrow letter to the plaintiff.

Finally, the plaintiff has a cognizable cause of action based on vicarious liability by Del Carmen for the wrongful acts of Mangal. Contrary to the defendant's conclusory assertions, based on the record before the Court it cannot be determined whether Del Carmen was a shareholder or a partner in the firm, or whether Mangal was under Del Carmen's direct supervision and/or control with respect to the acts of alleged wrongdoing. As such, the plaintiff's ninth cause of action for vicarious liability should not be dismissed.

The defendant's remaining contentions are without merit.

Accordingly, it is hereby

**ORDERED**, that the defendant's motion to dismiss is DENIED in its entirety.

This constitutes the decision and order of the Court.

Dated: November 13, 2020



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Hon. Lillian Wan, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated 4/20/20.