

Rabinowitz v Grosso
2020 NY Slip Op 35331(U)
December 9, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 604949/2020
Judge: Carmen Victoria St. George
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SUPREME COURT – STATE OF NEW YORK
TRIAL TERM, PART 56 SUFFOLK COUNTY

PRESENT:

Hon. Carmen Victoria St. George
Justice of the Supreme Court

x

JEROME RABINOWITZ,

Index No.
604949/2020

Plaintiff,

Motion Seq:
001 MG

-against-

Decision/Order

SALVATORE GROSSO and AVNET ELECTRONICS,
CORP.,

Defendants.

x

The following electronically filed papers were read upon this motion:

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Defendants move this Court for an Order dismissing the complaint because plaintiff has failed to plead with particularity (*CPLR* §§ 3013, 3016), failed to state a claim upon which relief can be granted (*CPLR* § 3211 [a][7]), and because any claims are barred by the applicable statutes of limitations (*CPLR* § 3211 [a][5]). Plaintiff opposes the requested relief.

Based upon a review of the submitted papers, it appears that plaintiff seeks to recover monetary damages from defendants based upon what plaintiff claims was defendant's Grosso's false testimony against him during a federal criminal investigation and trial that resulted in plaintiff's 2012 felony conviction for defrauding the United States Department of Defense, a prison sentence of 48 months, and restitution and forfeiture totaling in excess of \$800,000.00.¹

Having read the complaint filed in this action, the Court notes that the first and only cause of action enumerated therein is for breach of contract. The summons, on the other hand,

¹ United States of America v. Jerome Rabinowitz, No. 12-4492, on appeal from the United States District Court for the Southern District of Ohio.

states that “[t]his action is for fraud.” The complaint is not verified by plaintiff or plaintiff’s counsel. The content of the complaint is, at its core, an expression of plaintiff’s displeasure with Salvatore Grosso’s participation in the federal criminal action against plaintiff mixed with claims that Grosso provided “false and/or misleading testimony regarding Plaintiff to satisfy the Government’s investigation,” and a narrative concerning plaintiff’s own private investigation of Grosso. Plaintiff acknowledges that he was released from his sentence of incarceration on or about January 2016. The complaint implies that plaintiff did not discover Grosso’s false testimony until February 2018, and that his “recent” motion for a new trial in federal court was denied “on the grounds that according to the Federal Rules of Criminal Procedure, Plaintiff’s time to file such a motion ran within one (1) year of the date of his conviction, regardless of the timeliness of his discovery of same.”

It appears that plaintiff’s appeal of his federal conviction was denied by the United States Court of Appeals for the Sixth Circuit by Opinion filed with the Clerk on February 11, 2014.

This action was not commenced until March 16, 2020. Defendants were granted an extension of time to answer or move; therefore this motion is timely (*CPLR §§ 3211 [a][5], 3211 [e]*).

Lack of Particularity- General Pleading Requirements

Here, the complaint names two defendants, Grosso and Avnet Electronics, Corp. (Avnet); yet the claim(s) against Avnet are not able to be discerned with any specificity, and the complaint’s reference to a “letter” about which Mr. Grosso denied knowledge at the federal criminal trial is not specified.

CPLR § 3013 requires that, “[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense.”

Moreover, in an action where there are multiple defendants, each defendant is entitled to notice of the material elements of each cause of action, specified as to the precise tortious conduct charged to a particular defendant (*Aetna Casualty & Surety Co. v. Merchants Mutual Insurance Co.*, 84 AD2d 736 [1st Dept 1981]; *Parsons Construction, Inc. v. WIFI Construction LLC*, 2020 NY Slip Op 32490 [U] [Sup Ct Queens County 2020]).

The allegation that Avnet “may have instructed or otherwise influenced Defendant Grosso, an employee at the time, to provide false and/or misleading testimony. . .” and the allegation that, “[a]s a result of Defendant Avnet’s influence. . .Plaintiff was wrongly convicted. . .” are not only impermissibly vague, but they also fail to specify the precise tortious conduct attributed to each of the named defendants.

Failure to State a Cause of Action-Breach of Contract and/or Fraud

When deciding a motion to dismiss pursuant to CPLR § 3211(a)(7), the court must afford the complaint a liberal construction, accepting all facts as alleged in the complaint to be true, and according the plaintiffs the benefit of every favorable inference (*see Marcantonio v Picozzi III*,

70 AD3d 655 [2d Dept 2010]). The sole criterion on a motion to dismiss is “whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cognizable action at law a motion for dismissal will fail” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; see also *Miglino v. Bally Total Fitness of Greater New York, Inc.*, 20 NY3d, 342, 351 [2013]; *Leon v Martinez*, 84 NY2d 83, 87-88, [1994]; *Sokol v Leader*, 74 AD3d 1180, 1180-1181 [2d Dept 2010]; *Gershon v Goldberg*, 30 AD3d 372, 373 [2d Dept 2006]). “Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss” (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

Generally, to state a cause of action sounding in breach of contract, a plaintiff must allege “the existence of a contract, the plaintiff’s performance under the contract, the defendant’s breach of that contract, and resulting damages” (*JP Morgan Chase v. J.H. Electric of New York, Inc.*, 69 AD3d 802, 803 [2d Dept 2010]; *Furia v. Furia*, 116 AD2d 694 [2d Dept 1986]), and identify the provision(s) of the contract that were breached (*Canzona v. Atanasio*, 118 AD3d 837 [2d Dept 2014]).

In the subject complaint, there is a complete failure to allege any contractual relationship between plaintiff and either defendant that has purportedly resulted in the claimed wrongdoing, aside from a vague description of plaintiff’s business dealings between J&W Technologies (a non-party to this action) and Great Lakes Sales & Associates (another non-party) whereby “Defendant/Appellant” would purchase the parts and forward them to a specialized packaging/shipping company” (Complaint, ¶ 6). It is unknown if “Defendant/Appellant” refers to one, both, or neither of the named defendants in this action. Also, the complaint fails to allege any terms of a contract that were allegedly breached. Accordingly, the complaint fails to state a cause of action for breach of contract.

As to the fraud claim, plaintiff must show: (1) a material misrepresentation of a fact; (2) knowledge of its falsity; (3) an intent to induce reliance; (4) justifiable reliance by the plaintiff; and (5) damages. (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]; *Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 488 [2007]).

Pursuant to CPLR § 3016(b), the circumstances constituting the alleged fraud must be “stated in detail” by plaintiff. Although “unassailable proof” at the pleading stage is not required, basic facts to establish the elements of the cause of action must be alleged. (*Eurycleia Partners, LP, supra* at 559, citing *Pludeman v Northern Leasing Systems, Inc.*, 10 NY3d 486 [2008]).

Here, even assuming that the allegation that Grosso testified falsely is true, the complaint fails to plead who, if anyone, justifiably relied upon the misrepresentation to their detriment. Common sense dictates that plaintiff did not rely upon Grosso’s alleged misrepresentation at the federal criminal trial; therefore, plaintiff has failed to plead a basic requirement to state a cause of action for fraud.

Additionally, the “facts” pled in the complaint as they relate to a cause of action for fraud are set forth as matters of opinion, feeling and equivocation. For example, the complaint states that, “[w]hile Defendant Grosso did not admit to lying under oath during his trial testimony, the

private investigator *strongly felt* that Defendant Grosso was untruthful in his denials” (emphasis added). The complaint continues, stating that, “[i]t was *surmised* by the private investigation that Defendant Avnet *may have* instructed or otherwise influenced Defendant Grosso. . . to provide false and/or misleading testimony. . .” (emphasis added).

Accordingly, not only has the plaintiff failed to satisfy the heightened pleading standard required by CPLR § 3016 (b), but plaintiff has failed to assert acts or omissions with respect to either of the named defendants, warranting dismissal of a cause of action sounding in fraud.

Statutes of Limitations

Inasmuch as it appears that the first, and only, cause of action denominated in the complaint as a breach of contract may have been a typographical error since the body of complaint sounds in fraud rather than alleging any breach of contract, the applicable statute of limitations is found in CPLR § 213(8).

CPLR § 213 (8) provides that the time in which to commence an action for fraud “shall be the greater of six years from the date the cause of action accrued or two years from the time the plaintiff . . . discovered the fraud, or could with reasonable diligence have discovered it.”

In this case, the complaint itself and the affidavit of Francisco Campos submitted herewith, establish that the alleged cause of action for fraud (Grosso’s alleged false denial at the criminal trial that he had given plaintiff a letter at issue therein) accrued in 2012, when Grosso allegedly testified falsely against plaintiff at the federal criminal trial. Thus, the six-year period of limitation is of no assistance to plaintiff, having expired in 2018.

Even calculating the period of limitations from the claimed discovery of the fraud, plaintiff’s claim is still time-barred. The Campos affidavit concerning this issue is sworn to on February 23, 2017, and was submitted in support of plaintiff’s appeal of his criminal conviction. Accordingly, two years from February 23, 2017 would have expired on or about February 22 or 23, 2019. The complaint in this action identified by Suffolk County Index No. 604949/2020 was commenced by filing in NYSCEF on March 16, 2020; therefore, it is time-barred.

Plaintiff claims that the action was commenced in or about May 19, 2019. The Court sees no evidence supporting that claim, but even crediting such a claim, the action for fraud is still time-barred. As such, providing the plaintiff an opportunity to amend his complaint would be futile.

This Court has determined that plaintiff has failed to state a claim for breach of contract. Plaintiff’s opposition fails to rescue this cause of action from dismissal with broad claims like “[p]laintiff entered into numerous contracts with Defendant Avnet during the course of operating his business. A contract existed between Defendant Avnet and plaintiff. . .” and vague claims that “the failure of some of those parts” purchased from Avnet was a breach of a warranty. The statements as to failure of parts is not even asserted in the complaint. Furthermore, these vague claims are made in counsel’s affirmation in opposition without any reference to a date or time. In any event, since plaintiff was tried in federal court based in part on these underlying dealings

with the named defendants in this action, the purported contract(s) must have existed and allegedly been breached prior to 2012. Accordingly, any cause of action for breach of contract is also time-barred, since more than six years have expired prior to the commencement of this action (*CPLR § 213 (2)*).

Based upon all of these reasons, the defendants' motion to dismiss the complaint is granted in its entirety.

The foregoing constitutes the Decision and Order of this Court.

Dated: December 9, 2020
Riverhead, NY


CARMEN VICTORIA ST. GEORGE, J.S.C.

FINAL DISPOSITION ☒ NON-FINAL DISPOSITION ☐