

Liebermann v Zagelbaum
2021 NY Slip Op 30203(U)
January 20, 2021
Supreme Court, Kings County
Docket Number: 523537/19
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8
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JOHN LIEBERMANN a/k/a ABE KNOBLOCH, and
ALTER KESSLER,

Plaintiffs, Decision and order

- against -

Index No. 523537/19

YECHIEL ZAGELBAUM, WILLIAMSBURG PEDIATRICS,
P.C., and LAYLA TOV PEDIATRICS, P.C.,
jointly, severally, and/or individually,
Defendants,

January 20, 2021

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PRESENT: HON. LEON RUCHELSMAN

The defendants have moved seeking to dismiss the complaint pursuant to CPLR §3211 on the grounds it fails to state any cause of action. The plaintiffs oppose the motion. Papers were submitted by all the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

According to the complaint, in 2012 the plaintiffs entered into an agreement with the defendant Dr. Zagelbaum wherein Dr. Zagelbaum agreed to provide medical services and act as medical director at three medical facilities managed by the plaintiffs all located in Kings County. The agreement further provided that the plaintiffs would be paid management fees by the defendant. The complaint alleges that Dr. Zagelbaum failed to appear at the facilities as contracted and that in February 2014 terminated the agreement. Specifically, the complaint asserts that Dr. Zagelbaum was too busy performing medical work at other locations and ignored his duties at these facilities. The complaint

further alleges Dr. Zagelbaum owes the plaintiffs over two million dollars. The complaint asserts four causes of action, namely breach of contract, conversion, fraud and unjust enrichment. Dr. Zagelbaum has now moved seeking to dismiss the complaint on the grounds it fails to state any claim.

Conclusions of Law

"[A] motion to dismiss made pursuant to CPLR §3211[a][7] will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law" (see, AG Capital Funding Partners, LP v. State St. Bank and Trust Co., 5 NY3d 582, 808 NYS2d 573 [2005]). Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR 3211 motion to dismiss (see, EBC I, Inc. v. Goldman Sachs & Co., 5 NY3d 11, 799 NYS2d 170 [2005]).

It is well settled that to succeed upon a claim of breach of contract the plaintiff must establish the existence of a contract, the plaintiff's performance, the defendant's breach and resulting damages (Harris v. Seward Park Housing Corp., 79 AD3d 425, 913 NYS2d 161 [1st Dept., 2010]). Further, as explained in Gianelli v. RE/MAX of New York, 144 AD3d 861, 41 NYS3d 273 [2d

Dept., 2016], "a breach of contract cause of action fails as a matter of law in the absence of any showing that a specific provision of the contract was breached" (id). The complaint in this case merely states the "defendants entered into an agreement with Plaintiffs for the operation of urgent care medical facilities, and induced Plaintiffs time and investment therein upon such agreement, in the promise of paying management fees and interest on moneys loaned and/or invested in the facilities by the Plaintiffs. Notwithstanding the foregoing, Defendants did not in fact provide the agreed-upon management fees and interest on loans and/or funding for the urgent care facilities that were the subject of the agreement" (see, Complaint, ¶¶32, 33). However, the complaint does not describe the actual provisions of the contract allegedly breached. Thus, the complaint merely asserts conclusory allegations without specifying the provisions of the agreement that were breached (see, Barker v. Time Warner Cable Inc., 83 AD3d 650, 923 NYS2d 118 [2d Dept., 2011]). Therefore, the motion seeking to dismiss the breach of contract claim is granted.

Turning to the conversion claim, it is well settled that to establish a claim for conversion the party must show the legal right to an identifiable item or items and that the other party has exercised unauthorized control and ownership over the items (Fiorenti v. Central Emergency Physicians, PLLC, 305 AD2d 453,

762 NYS2d 402 [2d Dept., 2003]). As the Court of Appeals explained "a conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession...Two key elements of conversion are (1) plaintiff's possessory right or interest in the property...and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights" (see, Colavito v. New York Organ Donor Network Inc., 8 NY3d 43, 827 NYS2d 96 [2006]). Therefore, where a defendant "interfered with plaintiff's right to possess the property" (Hillcrest Homes, LLC v. Albion Mobile Homes, Inc., 117 AD3d 1434, 984 NYS2d 755 [4th Dept., 2014]) a conversion has occurred.

Even if the allegations of the complaint adequately state a claim for conversion, there is no dispute the conversion claim accrued when the taking occurred (Sporn v. MCA Records, 58 NY2d 482, 462 NYS2d 413 [1983]). Thus, the alleged taking occurred in February 2014. Conversion claims have a three year statute of limitations (Harlem Capital Center LLC v. Rosen & Gordon LLC, 145 AD3d 579, 44 NYS3d 36 [1st Dept., 2016]). Therefore, this claim is barred by the statute of limitations and consequently the motion seeking to dismiss this claim is granted.

Turning to the claim of fraud, it is well settled that to succeed upon a claim of fraud it must be demonstrated there was a

material misrepresentation of fact, made with knowledge of the falsity, the intent to induce reliance, reliance upon the misrepresentation and damages (Cruciata v. O'Donnell & Mclaughlin, Esqs, 149 AD3d 1034, 53 NYS3d 328 [2d Dept., 2017]). These elements must each be supported by factual allegations containing details constituting the wrong alleged (see, JPMorgan Chase Bank, N.A. v. Hall, 122 AD3d 576, 996 NYS2d 309 [2d Dept., 2014]). Thus, fraud must be pled with a heightened degree of specificity and detail (Minico Insurance Agency LLC, v. AJP Contracting Corp., 166 AD3d 605, 88 NYS3d 64 [2d Dept., 2018]).

In this case the complaint merely alleges that Dr. Zagelbaum "induced Plaintiffs into investing in the business plan under the assurance that the aforementioned compensation in the form of management fees and repayment of monies loaned in the funding of the facilities, plus interest thereon, would form the basis of the business agreement between the parties" (complaint, ¶43). However, that is not fraud because that is not a misrepresentation of any fact. That statement merely asserts that Dr. Zagelbaum promised to implement the compensation plan that was ultimately implemented. The complaint further alleges the defendants "falsely represented to Plaintiffs that the aforementioned business model was in place" (complaint, ¶44). However, that allegation is conclusory and does not satisfy the strict pleading requirement of fraud (see, Lakeville Pace Mechanical Inc., v. Elmar Realty Corp., 276 AD2d

673, 714 NYS2d 338 [2d Dept., 2000]). Specifically, concerning that allegation the complaint does not demonstrate the time and place of defendants misrepresentation (Orchid Construction Corp., v. Gottbetter, 89 AD3d 708, 932 NYS2d 100 [2d Dept., 2011]). Further, the complaint fails to specify the exact misrepresentations allegedly made by any of the defendants. Rather, the complaint merely alleges a generalized intent on the part of the defendants to lie about the compensation plan in place. Without specific misrepresentations the complaint fails to satisfy the strict pleading requirements of CPLR §3106(b) (High Tides LLC v. DeMichele, 88 AD3d 954, 931 NYS2d 377 [2d Dept., 2011]). Therefore, the motion seeking to dismiss the fraud claim is granted.

Lastly, it is well settled that a claim of unjust enrichment is not available when it duplicates or replaces a conventional contract or tort claim (see, Corsello v. Verizon New York Inc., 18 NY3d 777, 944 NYS2d 732 [2012]). As the court noted "unjust enrichment is not a catchall cause of action to be used when others fail" (id). Thus, unjust enrichment is usually reserved for cases where though the defendant committed no wrongdoing has received money to which he or she is not entitled (Corsello, supra). As the court explained in Corsello, "plaintiffs allege that Verizon committed actionable wrongs, by trespassing on or taking their property, and by deceiving them into thinking they were not

entitled to compensation. To the extent that these claims succeed, the unjust enrichment claim is duplicative; if plaintiffs' other claims are defective, an unjust enrichment claim cannot remedy the defects. The unjust enrichment claim should be dismissed" (id).


Likewise, unjust enrichment is unavailable if there a valid contract between the parties (Linares v. Richards, 2009 WL 2386083 [S.D.N.Y. 2009]). Consequently, the motion seeking to dismiss the claim of unjust enrichment is granted.

Thus, based on the foregoing the motion seeking to dismiss the entire complaint is granted. Any request for sanctions or attorney's fees is denied.

So ordered.

ENTER:

DATED: January 20, 2021
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC