

Bargain Me Online LLC v Ofek
2021 NY Slip Op 31058(U)
April 2, 2021
Supreme Court, New York County
Docket Number: 655810/2020
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 14

Justice

-----X

INDEX NO. 655810/2020

BARGAIN ME ONLINE LLC,

Plaintiff,

MOTION DATE 03/16/2021

MOTION SEQ. NO. 002

- v -

YONI OFEK, also known as YONATHAN AFAK, ELLY D.
TENDLER STRATEGIC AND LEGAL SERVICES
PLLC, ELLY TENDLER

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52

were read on this motion to/for DISMISSAL.

The motion to dismiss by defendants Elly D. Tandler Strategies and Legal Services PLLC and Elly Tandler (“Movants”) to dismiss is granted in part and denied in part.

Background

Plaintiff asserts that it entered into an agreement with defendant Ofek for the sale of 500,000 cloth robes. It alleges that Ofek told it to transfer \$400,000 to Movants into their escrow account. Plaintiff says it wired \$50,000 to Movants on May 5, 2020 and the remaining \$350,000 on the following day. However, the agreement fell through when, according to plaintiff, defendant Ofek failed to book a flight to send the goods from Turkey to the United States.

Plaintiff says that Ofek refunded the purchase price less \$77,000 and was told that the money was withheld to pay for the cost of reserving space on a chartered flight. Plaintiff disputes that a flight was ever reserved and demands a full refund of the remaining money. Plaintiff then

explains that it tried to contact Ofek about a full refund but Ofek stopped responding to plaintiff's emails and letters. Plaintiff alleges that it reached out to Movants but was initially told that they had not received any funds from plaintiff. After plaintiff sent Movants a copy of the wire transfers demonstrating it had forwarded money to Movants, Movants claimed not to know about any agreement between plaintiff and Ofek. Ultimately, Movants refused to return any money to plaintiff. Plaintiff commenced this case and alleges thirteen causes of action, including 11 against Movants.

Movants seek to dismiss all of the causes of action alleged against it. They emphasize that they had no relationship with plaintiff and plaintiff's complaint fails to state a cognizable theory of recovery against them.

Discussion

“It is settled that a motion for dismissal pursuant to CPLR 3211(a)(7) must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law. The pleading is to be liberally construed. The court must accept the facts alleged in the pleading as true and accord the opponent of the motion, here defendants, the benefit of every possible favorable inference to determine only whether the facts as alleged fit within any cognizable legal theory” (*Siegmund Strauss, Inc. v East 149th Street Realty Corp.*, 104 AD3d 401, 403, 960 NYS2d 404 [1st Dept 2013] [internal quotations and citations omitted]).

Breach of Contract

Movants claim that the breach of contract claim must be dismissed because it never entered into an agreement with plaintiff—they point out that the agreement was between Ofek

and plaintiff. Plaintiff contends that an escrow agreement was created—it sent the money to Movants in connection with the agreement with Ofek.

“To prove the existence of an escrow agreement, it must be shown that there is (a) an agreement regarding the subject matter and delivery of the [funds], (b) a third-party depository, (c) delivery of the [funds] to a third party conditioned upon the performance of some act or the occurrence of some event, and (d) relinquishment by [the grantor or depositor]” (*Brassell v Harbourview Abstract, Inc.*, 163 AD3d 908, 910, 82 NYS3d 483 [2d Dept 2018] [internal quotations and citations omitted]). That is exactly what plaintiff alleges here—plaintiff sent the money to Movants’ escrow account (a third party) conditioned on the sending the robes from Turkey. When the robes never arrived and Ofek canceled the agreement, plaintiff insists that it should have gotten the money back from Movants.

At this stage of the litigation, the Court is unable to dismiss this cause of action. Discovery may shed more light on the nature of the agreement with Ofek and whether an escrow agreement was actually created but it would be premature to dismiss this claim on the papers here.

Conversion

“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” (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50, 827 NYS2d 96 [2006] [citations omitted]).

Movants insist that they cannot convert funds that were converted by Ofek. They point out that the complaint alleges that *Ofek* returned the money less \$77,000. Movants also argue that this claim is duplicative of the breach of contract claim. In opposition, plaintiff maintains that Movants had a duty of loyalty to both plaintiff and Ofek to return the money once the agreement was cancelled by Ofek.

The Court denies this branch of the motion. Plaintiff alleges that the money (the remaining \$77,000) belongs to it and that it paid the money to Movants. This states a valid cause of action for conversion. Movants do not claim in opposition that they no longer have the money in their escrow account or that Ofek took the money; instead they moved to dismiss solely based on plaintiff's failure to state a cause of action. Plaintiff has clearly stated a cause of action for conversion.

The Court also observes that the conversion cause of action is not duplicative of the breach of contract cause of action because plaintiff is entitled to plead in the alternative and plaintiff need not select one legal theory at the start of a litigation. Moreover, Movants assert that there was no valid contract between them and plaintiff and so conversion is an alternative, not duplicative, theory to breach of contract.

Constructive Fraud

Movants seek dismissal of the constructive fraud claim alleged against them on the ground that it did not owe a duty to plaintiff that could support this cause of action. Plaintiff asserts that Movants violated the trust and confidence of plaintiff when they failed to return the remaining money held in the escrow account.

The Court grants this branch of the motion. "The elements of a cause of action to recover for constructive fraud are the same as those to recover for actual fraud with the crucial exception

that the element of scienter upon the part of the defendant, his [or her] knowledge of the falsity of his representation, is dropped ... and is replaced by a requirement that the plaintiff prove the existence of a fiduciary or confidential relationship warranting the trusting party to repose his [or her] confidence in the defendant and therefore to relax the care and vigilance he [or she] would ordinarily exercise in the circumstances” (*Levin v Kitsis*, 82 AD3d 1051, 1054, 920 NYS2d 131 [2d Dept 2011] [internal quotations and citations omitted]).

Here, the allegations for this cause of action do not evidence that Movants made any false representations that caused injury to plaintiff. The damages to plaintiff allegedly arose out of Movants’ failure to return the \$77,000 after the agreement with Ofek fell through. Nothing in that factual scenario demonstrates a misrepresentation that plaintiff relied upon to its detriment. Rather, plaintiff simply wants the money back and believes that Movants are holding the money (since it sent the money to Movants).

Civil Conspiracy

“Although New York does not recognize an independent cause of action for civil conspiracy, allegations of civil conspiracy are permitted to connect the actions of separate defendants with an otherwise actionable tort. To establish a claim of civil conspiracy, the plaintiff must demonstrate the primary tort, plus the following four elements: an agreement between two or more parties; an overt act in furtherance of the agreement; the parties' intentional participation in the furtherance of a plan or purpose; and resulting damage or injury” (*Cohen Bros. Realty Corp. v Mapes*, 181 AD3d 401, 404, 119 NYS3d 478 [1st Dept 2020] [internal quotations and citations omitted]).

The Court dismisses this cause of action. The complaint does not provide sufficient detail about the elements of this cause of action; plaintiff only claims that the defendants agreed

to perpetrate a fraud. But, as explained above, the Court does not find that plaintiff established a cause of action for fraud. This is not a case where plaintiff alleges it was duped into entering the agreement with Ofek who then vanished. The only issue in this case is whether plaintiff is entitled to a full refund and whether Movants should be required to pay the damages (assuming that plaintiff is successful).

Good Faith and Fair Dealing

“Implicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance. Encompassed within the implied obligation of each promisor to exercise good faith are any promises which a reasonable person in the position of the promisee would be justified in understanding were included. This embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract” (*Dalton v Educ. Testing Serv.*, 87 NY2d 384, 389, 639 NYS2d 977 [1995] [internal quotations and citations omitted]).

The Court denies this branch of the motion to dismiss. Plaintiff alleges that it did not get a full refund—the fruits of the contract—because Movants did not release money that plaintiff had wired to be held in escrow. If plaintiff’s allegations are true—that the agreement was cancelled and it is entitled to a full refund—then it might be able to recover against Movants based on the implied covenant of good faith and fair dealing. Discovery will reveal more about Movants’ conduct in responding to the demand for a full refund and their role in accepting the payment into their escrow account.

Implied Contract

The Court denies the branch of the motion to dismiss the cause of action for implied contract. Plaintiff is entitled to plead this cause of action in the alternative.

Money Had and Received

The Court also declines to dismiss this cause of action. Plaintiff pled that Movants retained money that it was not entitled to possess in light of the failed agreement with Ofek.

Promissory Estoppel

“In order to prevail on a theory of promissory estoppel, a party must establish (1) a promise that is sufficiently clear and unambiguous; (2) reasonable reliance on the promise by a party; and (3) injury caused by the reliance” (*Condor Funding, LLC v 176 Broadway Owners Corp.*, 147 AD3d 409, 411, 46 NYS3d 99 [1st Dept 2017] [internal quotations and citations omitted]).

The Court dismisses this cause of action. The allegations in the complaint do not provide sufficient detail as to how Movants are liable under this cause of action. Plaintiff did not plead what promise Movants made or that it relied upon Movants when wiring the money for the cloth robes. Plaintiff appears to have conflated the actions of Ofek and Movants in this cause of action.

Quasi Contract

The Court declines to dismiss this cause of action. As stated above, plaintiff can pursue alternative theories of recovery based on quasi-contract claims.

Breach of Fiduciary Duty

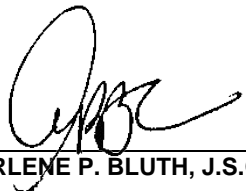
“The elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct. A cause of action sounding in breach of fiduciary duty must be pleaded with the particularity required by CPLR 3016 (b)” (*Stortini v Pollis*, 138 AD3d 977, 978-79, 31 NYS3d 90 [2d Dept 2016] [internal quotations and citations omitted]).

The Court denies this branch of the motion because the allegations contend the money was wired by plaintiff to Movants' escrow account. The whole purpose of an escrow account is to keep the money safe. Because the Court has no idea what happened to the money and plaintiff alleges that Movants held the money in escrow, it is entirely premature to dismiss this cause of action.

Accordingly, it is hereby

ORDERED that the motion by Movants to dismiss the complaint is granted only to the extent that the constructive fraud, civil conspiracy, and promissory estoppel claims are severed and dismissed against Movants and denied as to the remaining branches of the motion, and Movants are directed to answer pursuant to the CPLR.

Already Scheduled remote conference: April 22, 2021 at 9:30 a.m.

4/2/2021 DATE					 ARLENE P. BLUTH, J.S.C.
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>
					REFERENCE