

**Hutcherson v HVCA, INC.**

2021 NY Slip Op 33288(U)

May 25, 2021

Supreme Court, Nassau County

Docket Number: Index No. 611653/2018

Judge: David P. Sullivan

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK

PRESENT: HON. DAVID P. SULLIVAN,  
*Supreme Court Justice.*

-----X  
STEPHON HUTCHERSON,

Plaintiff,

-against-

HVCA, INC., BASSER KAUFMAN, INC., HOME  
GOODS and THE TJX COMPANIES, INC.,

Defendants.

-----X  
HVCA, INC. and BASSER KAUFMAN, INC.,

Third-Party Plaintiff,

-against-

MARC ELEFANT, PETER KALKANIS, DR. SADY  
RIBEIRO, SELECT CHIROPRACTIC & PHYSICAL  
THERAPY, PLLC, SELECT REHABILITATION, ALL  
COUNTY, LLC, NY SURGERY CENTER QUEENS,  
RYAN RAINFORD, KERRY GORDON, BRYAN  
DUNCAN, ADRIAN ALEXANDER, GOLDEN PEAR  
FUNDING OPCO, LLC and JASON KRANTZ,

Third-Party Defendants.

-----X

The following papers having been read on this motion:

Notice of Motion (Third-Party Defendant Elefant).....	1
Opposition (Defendants/Third-Party Plaintiffs HVCA and Kaufman).....	2
Notice of Motion (Third-Party Defendants Golden Pear and Krantz).....	3
Opposition (Defendants/Third-Party Plaintiffs HVCA and Kaufman).....	4

Third-Party Defendant Elefant moves this Court for an order, pursuant to CPLR §3211(a)(7), to dismiss the third-party complaint as asserted against him. Third-Party Defendants Golden Pear and Krantz have also cross-moved for the same relief. Defendants/Third-Party Plaintiffs HVCA and Kaufman have opposed both motions, and neither movant has submitted reply papers. Based upon the following, both motions are hereby granted in full and the third-party complaint is hereby dismissed against Third-Party Defendant Elefant and Third-Party Defendants Golden Pear and Krantz forthwith.

The within action was commenced by Plaintiff on or about September 16, 2015, alleging a trip and fall took place in the parking lot owned and operated by Defendants/Third-Party Plaintiffs HVCA and Kaufman on or about March 8, 2015. The matter was originally commenced in Supreme Court, Queens County, but was transferred to Supreme Court, Nassau County, following a motion decided on or about May 31, 2018. After discovery was completed in August 2019, a note of issue was filed, followed soon after by a summary judgment motion by Defendants/Third-Party Plaintiffs HVCA and Kaufman. In a decision and order dated July 9, 2020, Hon. Jack L. Libert, J.S.C., denied the summary judgment motion.

On July 23, 2020, Defendants/Third-Party Plaintiffs HVCA and Kaufman filed a third-party summons and complaint, asserting causes of action, not sounding in contribution or indemnification, but of fraud and civil RICO. None of the Third-Party Defendants named in the third-party complaint had been parties to the action from its inception; however, of note, former counsel for Plaintiff, who had been relieved as counsel via a consent to change of attorney in October 2018, was named as a Third-Party Defendant. Additionally, none of the Third-Party Defendants have answered the third-party complaint to date; instead, Third-Party Defendant Elefant and Third-Party Defendants Golden Pear and Krantz have moved to have the third-party

complaint dismissed against them, respectively. It should also be noted that Defendants/Third-Party Plaintiffs HVAC and Kaufman have filed a notice of discontinuance as to Third-Party Defendant Select Rehabilitation and have executed three stipulations of discontinuance as to Third-Party Defendants Select Chiropractic, NY Surgery, and Alexander.

Pursuant to CPLR §3211(a)(7), a party may move for judgment dismissing one or more causes of action asserted against him on the ground that the pleading fails to state a cause of action. When reviewing such a motion, the court must afford the pleading a liberal construction, accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. Reznick v. Bluegreen Resorts Mgmt., Inc., 154 AD3d 891, 62 NYS3d 460 (2<sup>nd</sup> Dept., 2017). Connolly v. Long Island Power Authority, 30 NY3d 719, 70 NYS3d 909 (2018). At the same time, the defendant bears the burden of establishing that the complaint fails to state a viable cause of action. Connolly v. Long Island Power Authority, 30 NY3d 719, 70 NYS3d 909 (2018). Thus, 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. Clarke v. Laidlaw Transit, Inc., 125 AD3d 920, 5 NYS3d 138 (2<sup>nd</sup> Dept., 2015).

Fraud requires a showing of material misrepresentation of an existing fact, made with knowledge of the falsity, an intent to induce reliance thereon, justifiable reliance upon misrepresentation, and damages. Introna v. Huntington Learning, 78 AD3d 896, 911 NYS2d 442 (2<sup>nd</sup> Dept., 2010). Allegations of fraud that are bare and conclusory or do not rise to level of fraud fail to state a proper cause of action. Genovese v. State Farm, 106 AD3d 866, 965 NYS2d 577 (2<sup>nd</sup> Dept., 2013). A fraud cause of action must be interposed within the greater of six years

from the date the cause of action accrued and the complainant was damaged by the alleged misconduct or two years from the time the complainant discovered, or with reasonable diligence could have discovered, the fraud. House of Spices (India), Inc., v. SMJ Services, Inc., 103 AD3d 848, 960 NYS2d 443 (2<sup>nd</sup> Dept., 2013).

To state a cause of action for damages based on a civil RICO violation, a plaintiff must plead the defendant's violation of 18 USC §1962, an injury to the plaintiff's business or property, and that the defendant's violation of the statute caused the plaintiff's injury. Dempster v. Liotti, 86 AD3d 169, 924 NYS2d 484 (2<sup>nd</sup> Dept., 2011). The factual allegations used to support a civil RICO claim must be pled with the requisite particularity. Grafstein v. Schwartz, 78 AD3d 772, 910 NYS2d 180 (2<sup>nd</sup> Dept., 2010).

In the instant case, a liberal reading of the third-party complaint leads this Court to conclude that neither the fraud claim nor the civil RICO claim have been pled with the necessary specificity to satisfy CPLR §3016. Defendants/Third-Party Plaintiffs HVCA and Kaufman premise their complaint upon the testimony of Third-Party Defendant Kalkanis during a federal criminal action against Third-Party Defendants Duncan, Rainford, and an unnamed non-party herein from May 2019, during which Third-Party Defendant Kalkanis testified to his participation in a personal injury scheme. This testimony, while detailed as to the participants, the functioning of the scheme, and the time frame that this took place, this transcript is silent as to the parking lot owned and operated by Defendants/Third-Party Plaintiffs HVCA and Kaufman and the subject accident involving Plaintiff Hutcherson. Furthermore, the third-party complaint itself does not expound in sufficient detail whatsoever any alleged scheme involving the named Third-Party Defendants and Plaintiff and is insufficient to support either a claim of common law fraud or civil RICO.

In addition to the foregoing, it cannot be overlooked the timing of the filing by Defendants/Third-Party Defendants HVCA and Kaufman, doing so within days of the denial of their summary judgment motion. The Court can only speculate as to whether or not this was done as a delay tactic to a resolution on the merits of the underlying action. However, the fraud claim appears to be untimely, since it was filed more than two years after the alleged scheme was testified to in a federal criminal proceeding by Third-Party Defendant Kalkanis and Defendants/Third-Party Plaintiffs HVCA and Kaufman could have learned of any alleged fraud with reasonable diligence. See House of Spices at 849, 446.

Therefore, given the presentation before this Court, both motions to dismiss the third-party complaint are hereby granted in their entirety and the third-party complaint is hereby dismissed against Third-Party Defendants Elefant, Golden Pear, and Krantz, forthwith.

Third-Party Defendant Elefant shall file and serve a copy of the within order with notice of entry upon all parties to the action within thirty (30) days from the date of this order. Thereafter, subject to the discretion of the Justice there presiding, Plaintiff and Defendants HVCA and Kaufman shall appear in the DCM Trial Part of Supreme Court, Nassau County, on October 5, 2021.

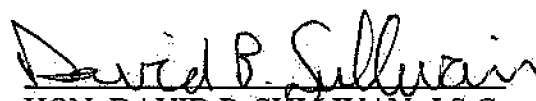
Finally, in light of the stipulation of discontinuance as to Defendants Home Goods and TJX, dated April 24, 2020, the notice of discontinuance as to Third-Party Defendant Select Rehabilitation, dated November 10, 2020, the stipulation of discontinuance as to Third-Party Defendant Select Chiropractic, dated October 30, 2020, the stipulation of discontinuance as to Third-Party Defendant NY Surgery, dated January 6, 2021, the stipulation of discontinuance as to Third-Party Defendant Alexander, dated, February 11, 2021, and the foregoing, the caption is hereby amended to read as follows: "STEPHON HUTCHERSON, Plaintiff, against HVCA,

INC. and BASSER KAUFMAN, INC., Defendants. HVCA, INC. and BASSER KAUFMAN, INC., Third-Party Plaintiffs, against PETER KALKANIS, DR. SADY RIBEIRO, ALL COUNTY, LLC, RYAN RAINFORD, KERRY GORDON, and BRYAN DUNCAN, Third-Party Defendants.”

This hereby constitutes the decision and order of this Court.

Dated: May 25, 2021  
Mineola, N. Y. 11501

ENTER

  
HON. DAVID P. SULLIVAN, J.S.C.

**ENTERED**

**Jun 10 2021**

NASSAU COUNTY  
COUNTY CLERK'S OFFICE