

Paladino v Wolfsohn
2021 NY Slip Op 33644(U)
May 21, 2021
Supreme Court, Rockland County
Docket Number: Index No. 031497/2020
Judge: Thomas P. Zugibe
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To commence the statutory period for appeals as of right under CPLR § 5513(a), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
ROCKLAND COUNTY

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MARY THERESA PALADINO,

Index: 031497/2020

Plaintiff,

-against-

DECISION & ORDER

FRANCESCA WOLFSOHN,

Defendant.

-----X
Zugibe, J.

Upon consideration of all papers related to motion sequence two (NYSCEF 27-41), the Defendant’s motion for summary judgement is granted in part and denied in part, unopposed.

Summary Judgment Standard

The Court notes that the remedy of summary judgment is a drastic one and it should only be granted when it is clear no triable issue of material fact exists. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Andre v. Pomeroy*, 35 N.Y.2d 361, 362 N.Y.S.2d 131 (1974). On a motion for summary judgment, the proponent “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.” *Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 852, 487 N.Y.S.2d 316, 317 (1985); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980). Once such a showing has been made, the burden of proof shifts such that an opponent to a motion for summary judgment must demonstrate the existence of a genuine triable issue of fact. *Alvarez*, supra. As summary judgment is the procedural equivalent of a trial,

if there is any doubt as to the existence of a triable issue of fact, or where a material issue of fact is even “arguable”, the motion must be denied. *Phillips v. Kantok & Co.*, 31 N.Y.2d 307,338 N.Y.S.2d 882 (1982).

Breach of Fiduciary Duty

The first cause of action is for Breach of Fiduciary Duty. "In order to establish a breach of fiduciary duty, a plaintiff must prove the existence of a fiduciary relationship, misconduct by the defendant, and damages that were directly caused by the defendant's misconduct. *Kurtzman v. Bergstol*, 40 A.D.3d 588,590 (2d Dep't 2007). The Plaintiff gave the defendant an investment, to a private equity group called “Bionomical”, in the amount of \$249,500. The material distributed by F. Wolfson claimed Bionomical "will offer a zero coupon insured municipal bond, guaranteeing repayment of a client's initial investment” and "matching private investors with existing private environmentally friendly companies”. This literature was attached to the moving papers. The Defendant has refused to return any of the investment funds. Therefore, summary judgment is granted as to the first cause of action.

Fraud

The second cause of action regards fraud. Within the Second Department, there is a four-prong test for establishing fraud as a matter of law.

[T]he plaintiff must establish (1) that the defendant made material representations that were false, (2) that the defendant knew the representations were false and made them with the intent to deceive the plaintiff, (3) that the plaintiff justifiably relied on the defendant's representations, and (4) that the plaintiff was injured as a result of the defendant's representations. *Giurdanella v Giurdanella*, 226 A.D.2d 342, 343(2d Dep’t 1996); *Laurel Ridge, LLC v. A. Alfredo Nurseries, Inc.*, 286 A.D.2d 710 (2d Dep’t 2001); *Cash v. Titan Fin. Servs., Inc.*, 58 A.D.3d 785, 788 (2d Dep’t 2009); *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 (2011); *Pasternack v. Lab'y Corp. of Am. Holdings*, 27 N.Y.3d 817, 827, 59 N.E.3d 485 (2016).

The Plaintiff does not submit any proof regarding the intent to deceive the Defendants. Therefore, summary judgment as to the second cause of action is denied.

Conversion

The Courts apply a two prong test in determining whether a conversion cause of action has been established. “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 N.Y.3d 43, 50, 860 N.E.2d 713, 717 (2006). *Pappas v. Tzolis*, 20 N.Y.3d 228, 234, 982 N.E.2d 576, 580 (2012); *Komolov v. Segal*, 144 A.D.3d 487, 488 (1d Dep’t 2016); *Reeves v. Giannotta*, 130 A.D.3d 1444, 1445 (4d Dep’t 2015). Applying the facts as described in the paragraph regarding breach, summary judgment is granted as to the third cause of action.

Monies Had and Received

The essential elements of a cause of action for money had and received are (1) the defendant received money belonging to the plaintiff, (2) the defendant benefitted from receipt of the money, and (3) under principles of equity and good conscience, the defendant should not be permitted to keep the money. *Goel v. Ramachandran*, 111 A.D.3d 783, 790, 975 N.Y.S.2d 428, 436 (2d Dep’t 2013). Applying the facts as described in the paragraph regarding breach, summary judgment is granted as to the third cause of action.

Accounting

“Thus, claims for an accounting accrue when there is either an open repudiation of the fiduciary’s obligation or a judicial settlement of the fiduciary’s account. The fiduciary must demonstrate complete repudiation of its duties as a fiduciary” *Inc. Vill. of Muttontown v. Ryba*,

121 A.D.3d 757, 759, 994 N.Y.S.2d 166 (2d Dep't 2014). Applying the facts as described in the paragraph regarding breach, summary judgment is granted as to the third cause of action.

Therefore, it is ORDERED that the Defendant shall pay to the Plaintiff \$249,500 and render a complete accounting of the subject funds.

Dated: May 21, 2021

New City, New York

ENTER


THOMAS F. ZUGIBE
J.S.C.