

**City of Long Beach v Agostisi**

2021 NY Slip Op 33802(U)

July 26, 2021

Supreme Court, Suffolk County

Docket Number: Index No. 002684/2020

Judge: Joseph A. Santorelli

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**ORIGINAL**

SHORT FORM ORDER

INDEX No. 002684/2020  
CAL No. \_\_\_\_\_

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 10 - SUFFOLK COUNTY

**PRESENT:**

Hon. JOSEPH A. SANTORELLI  
Justice of the Supreme Court

MOTION DATE 12-14-2020  
SUBMIT DATE 6-28-2021  
Mot. Seq. # 01 - MD

-----X

CITY OF LONG BEACH,

Plaintiff,

- against -

ROBERT AGOSTISI,

Defendant.  
-----X

**INGERMAN SMITH, L.L.P.**  
*Attorneys for Plaintiff*  
150 Motor Parkway, Suite 400  
Hauppauge, New York 11788

**LEEDS BROWN LAW, P.C.**  
*Attorneys for Defendant*  
One Old Country Road  
Carle Place, New York 11514

Upon the following papers numbered 1 to 167 read on this motion to dismiss; Notice of Motion/ Order to Show Cause and supporting papers 1-48; ~~Notice of Cross Motion and supporting papers~~; Answering Affidavits and supporting papers 49-129; Replying Affidavits and supporting papers 130-167; Other   ; (and after hearing counsel in support and opposed to the motion) it is,

By motion dated December 14, 2020, the defendant moves for an order pursuant to CPLR 3211(a)(1), (a)(7) or in the alternative CPLR 3211(c) dismissing the complaint. The plaintiff opposes the motion in all respects.

The plaintiff City of Long Beach, (hereinafter the City), has commenced this action against the defendant, (the former Corporation Counsel and Acting City Manager for the City), seeking to recover money damages for breach of fiduciary duty, breach of duty of loyalty, fraud, conspiracy to commit fraud, constructive fraud, conversion and misappropriation of funds, unjust enrichment and money had and received. In addition, the City seeks to impose a constructive trust and an accounting of all monies and property allegedly taken by the defendant during the years 2006 through 2019. The City alleges, in brief, that the defendant took advantage of his position of trust and authority and misappropriated public funds for his own benefit.

To succeed on a motion to dismiss pursuant to CPLR 3211(a) for failure to state a cause of action, the court must determine whether, accepting as true the factual averments of the complaint and granting plaintiff every favorable inference which may be drawn from the pleading, plaintiff can succeed upon any reasonable view of the facts stated (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 754 NE2d 184, 729 NYS2d 425 [2001]; *see also*

*City of Long Beach v Agostisi*

Index # 002684/2020

Page 2

*Fowler, Rodriguez, Kingsmill, Flint, Gray & Chalos LLP v Island Prop., LLC*, 307 AD2d 953, 763 NYS2d 481 [2d Dept 2003], *Bartlett v Konner*, 228 AD2d 532, 644 NYS2d 550 [2d Dept 1996]). If the pleading states a cause of action and if, from its four corners, factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, a motion for dismissal will fail (*see Wayne S. v County of Nassau Dept. of Social Services*, 83 AD2d 628, 441 NYS2d 536 [2d Dept 1981]). The documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim (*see Estate of Menon v Menon*, 303 AD2d 622, 756 NYS2d 639 [2d Dept 2003], citing *Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 NE2d 511, *Roth v Goldman*, 254 AD2d 405, 406, 679 NYS2d 92).

In the context of a CPLR 3211 motion to dismiss, the Court must take the factual allegations of the complaint as true, consider the affidavits submitted on the motion only for the limited purpose of determining whether the plaintiff has stated a claim, and in the absence of proof that an alleged material fact is untrue or beyond significant dispute, the Court must not dismiss the complaint (*Wall Street Assocs. v Brodsky*, 257 AD2d 526, 684 NYS2d 244 [1<sup>st</sup> Dept 1999], citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 634-636). In making a determination whether the complaint sets forth a cognizable claim, evidentiary material may be considered to “remedy defects in the complaint” (*see Dana v Shopping Time Corp.*, 76 AD3d 992, 908 NYS2d 114 [2d Dept 2010], quoting *Rovello v Orofino Realty Co.*, *supra* at 40 NY2d at 636).

Further, a motion to dismiss a complaint pursuant to CPLR 3211(a)(1) may be granted only where the documentary evidence proffered utterly refutes the complaint's factual allegations, thereby conclusively establishing a defense as a matter of law (*see, generally, Goshen v Mutual Life Ins. Co. Of N.Y.*, 98 NY2d 314 326; *Leon v Martinez, supra*).

Preliminarily the Court concludes that the “documentary evidence” submitted by the defendant does not “utterly refute” the allegations set forth in any of the causes of action in the complaint or “conclusively establish[ ] a defense as a matter of law “. Therefore the defendant's motion to dismiss the complaint pursuant to CPLR 3211(a)(1) is in all respects denied.

The Court has reviewed the causes of action in the complaint in accordance with the law governing motions to dismiss pursuant to CPLR 3211(a)(7) and decides the motion as follows:

**THE FIRST CAUSE OF ACTION:**  
**BREACH OF FIDUCIARY DUTY/DUTY OF LOYALTY**

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'

*City of Long Beach v Agostisi*

Index # 002684/2020

Page 3

(*Litvinoff v Wright*, 150 A.D.3d 714; *see, Smallwood v Lupoli*, 107 A.D.3d 782, 784)

(*Celauro v 4C Foods Corp.*, 187 A.D.3d 836, 837 [2d Dept. 2020]).

The defendant has proffered various arguments in support of his contention that the City has not pled and cannot prove any of the aforesaid elements as related to his execution of an agreement and a supplemental agreement with the former City Manager. The defendant further claims that this cause of action has not been pled with the requisite degree of particularity.

In opposition the City argues that:

- (1) a fiduciary relationship existed between the City and the defendant;
- (2) there was misconduct by the defendant; and
- (3) the City incurred damages as a result of the misconduct.

The Court concludes that, accepting as true the factual averments of the complaint and granting the plaintiff every favorable inference which may be drawn from the pleading, the City has pled a cause of action cognizable at law against the defendant for breach of fiduciary duty. Therefore the defendant's motion to dismiss the first cause of action is denied.

#### **THE SECOND CAUSE OF ACTION: FRAUD**

In *Eurycleia Partner, LP v Seward & Kissel, LLP*, 12 N.Y.3d 553, the Court of Appeals addressed the pleading requirements of a fraud cause of action stating:

The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages (*see Ross v Louise Wise Servs., Inc.*, 8 N.Y.3d 478, 488, 836 N.Y.S.2d 509, 868 N.E.2d 189 [2007]; *Lama Holding Co. v Smith Barney*, 88 N.Y.2d 413, 421, 646 N.Y.S.2d 76, 668 N.E.2d 1370 [1996]). A claim rooted in fraud must be pleaded with the requisite particularity under CPLR 3016(b).

We recently explored the pleading requirements of CPLR 3016(b) in *Pludeman v Northern Leasing Sys., Inc.*, 10 N.Y.3d 486, 860 N.Y.S.2d 422, 890 N.E.2d 184 [2008]. In that case, we noted that the purpose underlying the statute is to inform a defendant of the complained-of incidents. We cautioned that the statute "should not be so strictly interpreted

*City of Long Beach v Agostisi*

Index # 002684/2020

Page 4

as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting a fraud” (*id at 491, 860 N.Y.S.2d 422, 890 N.E.2d 184* [internal quotation marks and citation omitted]). Although there is certainly no requirement of “unassailable proof” at the pleading stage, the complaint must “allege the basic facts to establish the elements of the cause of action” (*id. at 492, 860 N.Y.S.2d 422, 890 N.E.2d 184*). We therefore held that CPLR 3016(b) is satisfied when the facts suffice to permit a “reasonable inference” of the alleged misconduct (*id.*). And, “in certain cases, less than plainly observable facts may be supplemented by the circumstances surrounding the alleged fraud” (*id at 493, 860 N.Y.S.2d 422, 890 N.E.2d 184*).

The defendant urges that the fraud cause of action should be dismissed because the City has not pled the elements with the requisite particularity. More specifically, the defendant argues that:

- (1) there was no material misrepresentation of fact;
- (2) the City has not pled and cannot prove a known falsity;
- and
- (3) the City cannot establish the inducement and justifiable reliance elements of the fraud cause of action.

In opposition, the City contends that the fraud cause of action has been satisfactorily pled with sufficient particularity.

The Court concludes that, accepting as true the factual averments of the complaint and granting the plaintiff every favorable inference which may be drawn from the pleading, the City has pled a cause of action cognizable at law against the defendant for fraud. Therefore, the defendant’s motion to dismiss the second cause of action is denied.

**THE THIRD CAUSE OF ACTION:**  
**CONSPIRACY TO COMMIT FRAUD**

New York does not recognize civil conspiracy to commit a tort as an independent cause of action (*see, Alexander & Alexander of N.Y. v Fritzen*, 68 N.Y.2d 968, 969, 510 N.Y.S.2d 546, 503 N.E.2d 102; *Brackett v Griswold*, 112 N.Y. 454, 466-467, 20 N.E. 376; *Blanco v Polanco*, 116 A.D.3d 892, 895-896, 986 N.Y.S.2d 151; *Dickinson v Igoni*, 76 A.D.3d 943, 945, 908 N.Y.S.2d 85). However, a plaintiff

*City of Long Beach v Agostisi*

Index # 002684/2020

Page 5

may plead the existence of a conspiracy in order to connect the actions of the individual defendants with an actionable, underlying tort, and establish that those actions were part of a common scheme (see, *Alexander & Alexander of N.Y. v Fritzen*, 68 N.Y.2d at 969, 510 N.Y.S.2d 546, 503 N.E.2d 102; *Blanco v Polanco*, 116 A.D.3d at 896, 986 N.Y.S.2d 151). Under New York law, “[i]n order to properly plead a cause of action to recover damages for civil conspiracy, the plaintiff must allege a cognizable tort, coupled with an agreement between the conspirators regarding the tort, and an overt action in furtherance of the agreement” (*Perez v Lopez*, 97 A.D.3d 558, 560, 948 N.Y.S.2d 312; see, *1766-68 Assoc., LP v City of New York*, 91 A.D.3d 519, 520, 937 N.Y.S.2d 33; *Abacus Fed. Sav. Bank v Lim*, 75 A.D.3d 472, 474, 905 N.Y.S.2d 585).

(*McSpedon v Levine*, 158 A.D.3d 618, 621 [2d dept. 2018]).

Here, since the motion to dismiss the fraud cause of action was denied and the cause of action remains viable, the Court concludes that, accepting as true the factual averments of the complaint and granting the plaintiff every favorable inference which may be drawn from the pleading, the City has pled a cause of action cognizable at law against the defendant for conspiracy to commit fraud. Therefore the defendant’s motion to dismiss the third cause of action is denied.

#### THE FOURTH CAUSE OF ACTION: CONSTRUCTIVE FRAUD

“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” (*Brown v Lockwood*, 76 A.D.2d 721, 731, 432 N.Y.S.2d 186; see *Leone v Sabbatino*, 235 A.D.2d 460, 461, 652 N.Y.S.2d 628; *DelVecchio v Nassau County*, 118 A.D.2d 615, 617-618, 499 N.Y.S.2d 765).

(*Levin v Kitsis*, 82 A.D.3d 1051, 1054 [2d Dept 2011]).

*City of Long Beach v Agostisi*

Index # 002684/2020

Page 6

A fiduciary relationship arises “between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation” (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19, 799 N.Y.S.2d 170, 832 N.E.2d 26 [2005] [internal quotation marks and citation omitted]). Put differently, “[a] fiduciary relation exists when confidence is reposed on one side and there is resulting superiority and influence on the other” (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 11 N.Y.3d 146, 158, 866 N.Y.S.2d 578, 896 N.E.2d 61 [2008] [internal quotation marks and citation omitted]). Ascertaining the existence of such a relationship inevitably requires a fact-specific inquiry.

(*Eurycleia Partners LP v Seward & Kissel, LLP, supra* at p. 561).

Here, the City has alleged facts demonstrating that a fiduciary relationship existed between the City and the defendant.

The Court concludes that, accepting as true the factual averments of the complaint and granting the plaintiff every favorable inference which may be drawn from the pleading, the City has pled a cause of action cognizable at law against the defendant for constructive fraud. Therefore, the defendant’s motion to dismiss the fourth cause of action is denied.

#### **THE FIFTH CAUSE OF ACTION: 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” (*C & B Enters. USA, LLC v Koegel*, 136 A.D.3d 957, 958 [2016] [internal quotation marks omitted]; see *Colavito v New York Organ Donor Network, Inc.*, 8 N.Y.3d 43, 49-50 [2006]). “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 right” (*Colavito v New York Organ Donor Network, Inc.*, 8 N.Y.3d at 50 [citations omitted]). “Money, if specifically identifiable, may be the subject of a conversion action” (*Simpson & Simpson, PLLC v Lippes Mathias Wexler Friedman LLP*, 130 A.D.3d 1543, 1544-1545 [2015] [internal quotation marks omitted]; see *East Schodack Fire Co., Inc. v Milkewicz*, 140 A.D.3d 1255, 1256 [2016];

*City of Long Beach v Agostisi*

Index # 002684/2020

Page 7

*Hoffman v Unterberg*, 9 A.D.3d 386, 388 [2004]; *Peters Griffin Woodward, Inc. v WCSC, Inc.*, 88 A.D.2d 883, 884 [1982]; *Independence Discount Corp. v Bressner*, 47 A.D.2d 756, 757 [1975]). “[C]onversion occurs when funds designated for a particular purpose are used for an unauthorized purpose” (*East Schodack Fire Co., Inc. v Milkewicz*, 140 A.D.3d at 1256, quoting *Lemle v Lemle*, 92 A.D.3d 494, 497 [2012]; see, *Hoffman v Unterberg*, 9 A.D.3d at 388; *Meese v Miller*, 79 A.D.2d 237, 243 [1981]).

(*Petrone v Davidoff Hutcher & Citron, LLP*, 150 A.D.3d 776 [2d Dept. 2017]).

In support of the motion to dismiss, the defendant claims:

- (1) his agreements with the City were valid and enforceable thereby precluding a claim of conversion;
- (2) the City cannot show ownership over his payout insofar as separation pay is a protected property right for employees and in this case a contractual right as well;
- (3) the City does not allege that the money he received was sequestered or was otherwise identifiable;
- (4) the City acknowledges that he attempted to return the monies at issue but the City declined to accept the funds.

In opposition, the City disputes the arguments proffered by the defendant and contends that the conversion cause of action should not be dismissed.

The Court concludes that, accepting as true the factual averments of the complaint and granting the plaintiff every favorable inference which may be drawn from the pleading, the City has pled a cause of action cognizable at law against the defendant for conversion. Therefore the defendant’s motion to dismiss the fifth cause of action is denied.

#### **THE SIXTH CAUSE OF ACTION: UNJUST ENRICHMENT**

“To state a cause of action to recover damages for unjust enrichment, a plaintiff must allege that (1) the other party was enriched, (2) at {the plaintiff’s} expense and (3) that it is against equity and good conscience to permit {the other party} to retain what is sought to be recovered” (*AHA Sales, Inc. v Creative Bath Prods., Inc.*, 58 A.D.3d 6, 19, 867 N.Y.S.2d 169 [internal quotation marks omitted]; see *Paramount Film Distrib. Corp. v State of New York*, 30 N.Y.2d 415, 421, 334 N.Y.S.2d 388, 285 N.E.2d 695, cert.

*City of Long Beach v Agostisi*

Index # 002684/2020

Page 8

*denied* 414 U.S. 829, 94 S.Ct. 57, 38 L.Ed.2d 64; *Cruz v McAneney*, 31 A.D.3d 54, 59, 816 N.Y.S.2d 486). “The essence of unjust enrichment is that one party has received money or a benefit at the expense of another” (*Goldman v Simon Prop. Group, Inc.*, 58 A.D.3d 208, 220, 869 N.Y.S.2d 125, quoting *City of Syracuse v R.A.C. Holding*, 258 A.D.2d 905, 906, 685 N.Y.S.2d 381).

(*Levin v Kitsis, supra* at pp. 1052-1053).

The defendant contends that:

- (1) the City has not alleged nor can they prove any of the necessary elements;
- (2) a claim of unjust enrichment is foreclosed by the existence of a valid and enforceable contract;
- (3) it cannot be “unjust” for him to receive a payout for accruals he earned and saved;
- (4) the City cannot prove that the payout was at its expense since the City would have lost the value of the accruals had he used the time; and
- (5) a claim for unjust enrichment is equitable in nature and where, as here, money damages would provide a remedy at law such equitable relief is unavailable.

In opposition the City argues that by virtue of his “illegal agreements” with the City Manager the defendant was wrongfully enriched of funds thereby interfering with its right to use such funds. Further, the defendant’s contract was void *ab initio* and, therefore, since there was no enforceable contract the City can seek damages for unjust enrichment.

The Court concludes that, accepting as true the factual averments of the complaint and granting the plaintiff every favorable inference which may be drawn from the pleading, the City has pled a cause of action cognizable at law against the defendant for unjust enrichment. Therefore the defendant’s motion to dismiss the sixth cause of action is denied.

#### **THE SEVENTH CAUSE OF ACTION: MONEY 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

*City of Long Beach v Agostisi*  
Index # 002684/2020  
Page 9

money” (*Goel v Ramachandran*, 111 A.D.3d 783, 790 [2013]; see *Matter of Witbeck*, 245 A.D.2d 848, 850 [1997]).

(*Lebovits v Bassman*, 120 A.D.3d 1198, 1199 [2d Dept. 2014]).

The Court concludes that, accepting as true the factual averments of the complaint and granting the plaintiff every favorable inference which may be drawn from the pleading, the City has pled a cause of action cognizable at law against the defendant for money had and received. Therefore the defendant’s motion to dismiss the seventh cause of action is denied.

#### **THE EIGHTH CAUSE OF ACTION: CONSTRUCTIVE TRUST**

Generally, a constructive trust may be appropriate in situations “[w]hen property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest” (*Sharp v Kosmalski*, 40 N.Y.2d 119, 121 [1976] quoting *Beatty v Guggenheim Exploration Co.*, 225 N.Y. 380, 386 [1919]; see *Igneri v Igneri*, 125 A.D.3d at 814). The elements for the imposition of a constructive trust are (1) a confidential or fiduciary relationship, (2) a promise, (3) a trust in reliance on that promise, and (4) unjust enrichment (see *Sharp v Kosmalski*, 40 N.Y.2d at 121; *Henning v Henning*, 103 A.D.3d 778, 780 [2013]; *Marini v Lombardo*, 79 A.D.3d 932, 933 [2010]).

(*Silberstang v Biderman-Gross*, 134 A.D.3d 693, 694-695 [2d Dept. 2015]).

In support of his request that this cause of action be dismissed the defendant reiterates his arguments that the City has not established that a remedy at law is inadequate and that the City has not established a fiduciary relationship between himself and the City.

The Court again rejects these arguments and concludes that, accepting as true the factual averments of the complaint and granting the plaintiff every favorable inference which may be drawn from the pleading, the City has pled a cause of action cognizable at law against the defendant for constructive trust. Therefore the defendant’s motion to dismiss the eighth cause of action is denied.

#### **THE NINTH CAUSE OF ACTION: AN ACCOUNTING**

“The right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in

*City of Long Beach v Agostisi*

Index # 002684/2020

Page 10

which the party seeking the accounting has an interest”  
(*Lawrence v Kennedy*, 95 A.D.3d 955, 958, 944 N.Y.S.2d  
577, quoting *Palazzo v Palazzo*, 121 A.D.2d 261, 265, 503  
N.Y.S.2d 381).

(*Dee v Rakower*, 112 A.D.3d 204, 214 [2d Dept. 2013]).

Here the City has satisfactorily alleged the existence of a fiduciary relationship and a breach of the duty imposed by that relationship with respect to monies paid by the City to the defendant.

Therefore, the Court concludes that, accepting as true the factual averments of the complaint and granting the plaintiff every favorable inference which may be drawn from the pleading, the City has pled a cause of action cognizable at law against the defendant for an accounting. Therefore the defendant's motion to dismiss the ninth cause of action is denied.

The defendant's remaining contentions, to the extent not specifically addressed herein, have been considered and found to be unavailing.


**ORDERED** that a copy of this order shall be served by the plaintiff on the defendant's attorney by regular mail within twenty (20) days of the date of this order; and it is further

**ORDERED** that the defendant shall serve his answer within twenty (20) days from service of a copy of this order; and it is further

**ORDERED** that a preliminary conference is hereby scheduled to be held on **Thursday, September 23, 2021 at 10:00 a.m.**, in the DCM courtroom 338 of the Hon. Alan D. Oshrin Supreme Court Building, One Court Street, Riverhead, New York. Counsel for the respective parties in this action are directed to appear at that time.

The foregoing shall constitute the decision and order of this Court.

Dated: July 26, 2021

  
\_\_\_\_\_  
HON. JOSEPH A. SANTORELLI  
J.S.C.

\_\_\_ FINAL DISPOSITION \_\_\_  NON-FINAL DISPOSITION