

Mohammed v Rehman
2021 NY Slip Op 34344(U)
January 8, 2021
Supreme Court, Rockland County
Docket Number: Index No. 036055/2019
Judge: Robert M. Berliner
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SUPREME COURT : STATE OF NEW YORK
COUNTY OF ROCKLAND
HON. ROBERT M. BERLINER, J.S.C.

To commence the statutory
time period for appeals as of
right (CPLR 5513 [a]), you
are advised to serve a copy
of this order, with notice of
entry, upon all parties.

-----X
MAJID MOHAMMED

Plaintiff,

DECISION AND ORDER

-against-

ALTAF REHMAN, AMIR REHMAN, and
ROCKLAND WHOLESALE &
DISTRIBUTORS, INC.,

Index No.: 036055/2019

Motion Sequences #2 and #4

Defendants.

-----X

AMIR REHMAN and ROCKLAND
WHOLESALE & DISTRIBUTORS, INC.

Third-Party Plaintiffs,

-against-

AZAM MOHAMMED, FARHANA AZAM,
AND ROBERT G. DEL GROSSO, and NAFESA
FARID,

Defendants.

-----X

The following papers, numbered 1 to 6, were read on Third-Party Defendants Azam
Mohammed's and Farhana Azam's motion to dismiss the Third-Party Complaint and Third-Party
Plaintiffs Amir Rehman and Rockland Wholesale & Distributors, Inc.'s motion for leave to file
an amended Third-Party Complaint:

Notice of Motion/Affirmation in Support/Exhibits(A-J)..... 1-2
Notice of Cross-Motion/Affirmation in Opposition to Motion and in Support of Cross-
Motion/Memorandum of Law/Exhibits(1-2) 3-5
Affirmation in Further Support of Motion to Dismiss and in

Opposition to Cross-Motion6

Upon the foregoing papers, it is ORDERED that these motions are disposed of as follows:

This proceeding arises out of alleged monies owed from a loan and the settlement of a prior lawsuit pending in the Superior Court of the State of New Jersey, Bergen County (“Bergen County Action”). On November 25, 2019, Plaintiff Majid Mohammed filed his Complaint against Defendants Altaf Rehman, Amir Rehman, and Rockland Wholesale & Distributors, Inc. (“RWD”) alleging that from October 2009 through September 2012, he personally loaned various sums of money to RWD, which he demanded re-payment and Defendants failed to do so. Amir Rehman is currently the sole owner of RWD. On October 25, 2019, Defendants Altaf Rehman, Amir Rehman, and RWD submitted an Answer.

On January 22, 2020, Amir Rehman and RWD filed a Third-Party Complaint against Third-Party Defendants Azam Mohammed, Farhana Azam, Robert Del Grosso, and Nafesa Farid, as well as a counterclaim against Plaintiff Majid Mohammed. Therein, they allege the following: In the Bergen County Action, Azam Rehman and RWD filed a complaint against Azam Mohammed and Farhana Azam for corporate and personal tax fraud, self-dealing, and shareholder oppression of their ownership and operation of RWD. In response to that action, Azam Mohammed and Farhana Azam filed an answer and asserted counterclaims for monies allegedly owed to Azam Mohammed that he loaned to RWD. In the Bergen County Action, Azam Mohammed and Farhana Azam provided checks allegedly evidencing the loans Azam Mohammed personally issued to RWD. Azam Mohammed appeared for a deposition in connection with the Bergen County Action. There, Azam Mohammed made a sworn statement that Third-Party Defendants Majid Mohammed and Nafesa Farid each personally loaned money to him, which he then utilized to personally loan money to RWD. Amir Rehman alleges that based upon the checks provided and Azam Mohammed’s sworn testimony, he entered into a Settlement Agreement for the Bergen County Action, in which Amir Rehman made substantial payments to Azam Mohammed and Farina Azam, and in exchange, Azam Mohammed and Farhana transferred their interest in RWD to him. Amir Rehman alleges that Majid Mohammed’s Complaint now seeks money owed for those same loans that Azam Mohammed testified was

made by him, but now Majid Mohammed claims he personally made those loans to RWD. Amir Rehman and RWD allege that Azam Mohammed intentionally made a false statement with intent to induce Amir Rehman to rely on in order to get him to sign the Settlement Agreement, which he would not otherwise have agreed to. They also allege that Majid Mohammed, Farhana Azam, Robert Del Grosso, and Nafesa Farid participated in this fraudulent scheme. Specifically, Majid Mohammed and Nafesa Farid have filed their own respective lawsuits in this Court for payment of the same loans that Azam Mohammed claimed he personally made to RWD. They also allege that Azam Mohammed directed Robert Del Grosso, long-time attorney for Azam Mohamed and Farhana Azam, to file complaints on behalf of Majid Mohammed and Nafesa Farid for their respective claims. The Third-Party Complaint alleges fraud and civil conspiracy against all Third-Party Defendants, and violation of Judiciary Law § 487 against Del Grosso only.

On February 28, 2020, Azam Mohammed and Farhana Azam filed their Third-Party Answer to the instant Third-Party Complaint, and Nafesa Farid filed her own Third-Party Answer as well. Simultaneously, Robert Del Grosso filed a motion to dismiss the Third-Party Complaint as against him. On July 13, 2020, this Court granted Del Grosso's application, dismissing him as a Third-Party Defendant. On July 22, 2020, this Court held a preliminary conference setting a discovery schedule. On August 24, 2020, Azam Mohammed and Farhana Azam filed this motion to dismiss the Third-Party Complaint as against them. In opposition, Amir Rehman and RWD filed the cross-motion to file an amended Third-Party Complaint. The Court first addresses the latter.

I. Third-Party Plaintiff's Cross-Motion for Leave to File an Amended Third-Party Complaint

Amir Rehman and RWD's Proposed Amended Third-Party Complaint alleges the following causes of actions: (1) fraud against Azam Mohammed; (2) damages for joint participation in a fraudulent scheme against Majid Mohammed, Azam Mohammed, Farhana Azam, Robert Del Grosso, and Nafesa Farid; (3) intentional infliction of emotional distress against Azam Mohammed; (4) a prima facie tort claim against Majid Mohammed, Azam

Mohammed, Farhana Azam, Robert Del Grosso, and Nafesa Farid; and (5) violation of the New York Judiciary Law § 487 against Robert Del Grosso.¹

In opposition, Third-Party Defendants Azam Mohammed and Farhana Azam oppose this application by alleging that the Proposed Amended Third-Party Complaint is based on the same set of facts and transactions as the original Third-Party Complaint and that allowing them to amend would be prejudicial. Azam Mohammed and Farhana Azam emphasize that the July 22, 2020 preliminary conference gave a “blueprint” to Third-Party Plaintiffs of the issues within their complaint and they could have sought leave to amend the Third-Party Complaint at that time, rather than in opposition to a motion to dismiss less than two months thereafter. They further allege that the Proposed Amended Third-Party Complaint is palpably devoid of merit as to the causes of action for intentional infliction of emotional distress and prima facie tort. First, the Court addresses Azam Mohammed and Farhana Azam’s allegation that granting leave to file the Amended Third-Party Complaint would be prejudicial.

A. Whether Third-Party Defendants Demonstrated Surprise or Prejudice of the Proposed Amended Third-Party Complaint

“Leave to amend a pleading should be freely given (see CPLR 3025[b]), provided the amendment is not palpably insufficient, does not prejudice or surprise the opposing party, and is not patently devoid of merit.” *Douglas Elliman, LLC v Bergere*, 98 AD3d 642 [2d Dept 2012][internal citations and quotations omitted]. Furthermore, it is within the Court’s “broad discretion” whether to grant leave to amend. *Tarek Youssef Hassan Saleh v 5th Ave. Kings Fruit & Vegetables Corp.*, 92 AD3d 749, 750 [2d Dept 2012]. “The defendants cannot legitimately claim surprise or prejudice, where the proposed amendments were premised upon the same facts, transactions or occurrences alleged in the original complaint.” *Janssen v Incorporated Vil. of Rockville Ctr.*, 59 AD3d 15, 27-28 [2d Dept 2008][internal citations omitted].

Here, the Court finds that Third-Party Defendants Azam Mohammed and Farhana Azam failed to meet their burden that there is prejudice or surprise to warrant denial of Third-Party

¹ The allegations against Robert Del Grosso therein are restated solely for the purpose of preserving them pending Amir Rehman and RWD’s appeal of this Court’s Decision and Order dated July 13, 2020, dismissing him as a Third-Party Defendant.

Plaintiffs' motion for leave to amend their Third-Party Complaint. Indeed, their counsel admits that the Proposed Amended Third-Party Complaint is based on the same set of facts and transactions and that the parties are still in the early stages of discovery. The Court is unpersuaded by their counsel's conclusory allegations that they will bear the costs of this amended complaint or that they would be prejudiced because the Third-Party Plaintiffs received a "blueprint" of the issues to help amend their complaint during the preliminary conference. Next, the Court examines whether the Proposed Amended Third-Party Complaint is palpably insufficient or patently devoid of merit for each of the causes of action alleged, starting with the cause of action for fraud against Azam Mohammed.

B. Whether the Cause of Action Sounding in Fraud is Palpably Insufficient or Devoid of Merit

To plead a cause of action for fraud, a plaintiff must allege "a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury." *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421 [1996][internal citations omitted]; *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011]. "It is well settled that a claim for fraud cannot be predicated upon allegations which relate solely to a breach of contract and to promises of future expectations unless the promises were made with the intent not to fulfill them." *Affiliated Credit Adjustors, Inc. v Carlucci & Legum*, 139 AD2d 611, 613 [2d Dept 1988][internal citations omitted].

Here, Amir Rehman and RWD allege that Azam Mohammed made a false statement of fact at his deposition regarding the loans he personally made to RWD, which he knew to be false, and made for the purpose of inducing Amir Rehman to rely on it, and that Amir Rehman justifiably relied on it in agreeing to enter into the Settlement Agreement. Further, they allege that they are now injured by this false statement because Majid Mohammed now seeks repayment of the allegedly same loans that Azam Mohammed testified that he personally made to RWD. Accordingly, the Court finds that the Third-Party Plaintiffs' claim for fraud against Azam Mohammed is not palpably insufficient or devoid of merit. Next, the Court reviews the cause of action sounding in damages for civil conspiracy to commit fraud.

C. Whether the Cause of Action Sounding in Damages for Civil Conspiracy to Commit Fraud is Palpably Insufficient or Devoid of Merit

“Although an independent cause of action for civil conspiracy is not recognized in this State, a plaintiff 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.” *Litras v Litras*, 254 AD2d 395, 396 [2d Dept 1998]. “Therefore, under New York law, in 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.” *Faulkner v City of Yonkers*, 105 AD3d 899, 900-901 [2d Dept 2013][internal citations and quotation marks omitted].

Here, the Third-Party Complaint alleges that all the Third-Party Defendants, Azam Mohammed, Farhana Azam, and Nafesa Farid, as well as Plaintiff Majid Mohammed, actively agreed and participated in Azam Mohammed’s fraudulent scheme to induce Amir Rehman and RWD to repay the loans to him and then bear the cost of litigating the frivolous lawsuits before this Court. It alleges that Majid Mohammed and Nafesa Farid agreed to file these lawsuits to seek repayment of loans from Amir Rehman and RWD, the same loans that were already repaid to Azam Mohammed pursuant to the Settlement Agreement in the Bergen County Action. Although New York does not recognize a claim for civil conspiracy, Amir Rehman and RWD alleges a cognizable tort of fraud, the agreement between the co-conspirators regarding the fraud, and overt actions in furtherance of said agreement. As such, the Third-Party Complaint alleges a cause of action to recover damages for civil conspiracy. *See Perez v Lopez*, 97 AD3d 558, 560 [2d Dept 2012]. Therefore, the Court finds that the cause of action to recover damages for civil conspiracy to commit fraud is not palpably insufficient or patently devoid of merit. Next, the Court reviews the cause of action for intentional infliction of emotional distress.

D. Whether the Cause of Action Sounding in Intentional Infliction of Emotional Distress is Palpably Insufficient or Devoid of Merit

“The elements of intentional infliction of emotional distress are (1) extreme and outrageous conduct; (2) the intent to cause, or the disregard of a substantial likelihood of

causing, severe emotional distress; (3) causation; and (4) severe emotional distress.” *Klein v Metropolitan Child Servs., Inc.*, 100 AD3d 708, 710 [2d Dept 2012][internal citations omitted].

Here, the Amended Third-Party Complaint alleges that Azam Mohammed’s fraudulently acted wantonly, maliciously, and willfully with the intention of harassing, annoying, and inflicting in severe emotional distress and injury to Amir. This was not alleged in the original Third-Party Complaint. The Court finds that the alleged improper conduct was not so outrageous or extreme as to support a cause of action for intentional infliction of emotional distress. *See Video Voice, Inc. v Local T.V., Inc.*, 156 AD3d 848, 850 [2d Dept 2017]. The insufficiency of and lack of merit of these allegations are clear and free from doubt. As such, the Court denies the portion of the Amended Third-Party Complaint asserting a cause of action for intentional infliction of emotional distress. Lastly, the Court addresses the cause of action for prima facie tort.

A. Whether the Cause of Action Sounding in Prima Facie Tort is Palpably Insufficient or Devoid of Merit

“The requisite elements for a cause of action sounding in prima facie tort include (1) intentional infliction of harm, (2) resulting in special damages, (3) without excuse or justification, (4) by an act or series of acts which are otherwise legal.” *Diorio v Ossining Union Free School Dist.*, 96 AD3d 710 [2d Dept 2012]. “A critical element of the cause of action is that plaintiff suffered specific and measurable loss, which requires an allegation of special damages.” *Freihofer v Hearst Corp.*, 65 NY2d 135, 143 [1985]; *see Dorce v Gluck*, 140 AD3d 1111 [2d Dept 2016].

Amir Rehman and RWD also seeks to include a prima facie tort cause of action in the Proposed Amended Third-Party Complaint, alleging that the fraudulent actions of the Third-Party Defendants and Plaintiff Majid Mohammed caused actual harm to them. However, they fail to allege special damages beyond physical, psychological, or financial demands of defending the lawsuits. *See Del Vecchio v Nelson*, 300 AD2d 277, 278 [2d Dept 2002]. Similar to the allegation for of intentional infliction of emotional distress, the insufficiency of these allegations is clear and free from doubt warranting denial of amending the Third-Party Complaint to include a cause of action for prima facie tort.

Accordingly, because the Court grants Third-Party Plaintiffs' cross-motion for leave to file their Amended Third-Party Complaint, Third-Party Defendants Azam Mohammed's and Farhana Azam's motion to dismiss the Third-Party Complaint is denied as moot.

Based upon the foregoing, it is

ORDERED that Amir Rehman and Rockland Wholesale & Distributors, Inc.'s motion to file an Amended Third-Party Complaint is granted to the extent that it shall include the causes of action sounding in fraud and damages for civil conspiracy; and it is further

ORDERED that Third-Party Defendants Azam Mohammed's and Farhana Azam's motion to dismiss is denied in its entirety; and it is further

ORDERED that the Amended Third-Party Complaint, attached as Exhibit 1 of its Affirmation (NYSCEF Doc. No. 68), is deemed served, subject to the determinations herein, as of the date herein; and it is further

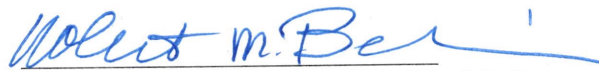
ORDERED that Third-Party Defendants file and serve an Answer in response to the Amended Third-Party Complaint within thirty (30) days of the date herein.

The parties are hereby reminded of a pre-trial conference on **January 14, 2021 at 9:30 am.**

The foregoing constitutes the Decision and Order of the Court.

Dated: New City, New York
January 8, 2021

ENTER


HON. ROBERT M. BERLINER, J.S.C.

To:

Counsel of record via NYSCEF