

Airmont Assoc., LLC v Monaco & Monaco, LLP

2022 NY Slip Op 30250(U)

January 13, 2022

Supreme Court, New York County

Docket Number: Index No. 654858-2017

Judge: Sabrina B. Kraus

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 57

_____X
AIRMONT ASSOCIATES, LLC

Plaintiff,

-against-

DECISION & ORDER

Index No.: 654858-2017

MONACO & MONACO, LLP and MARC MUELLER
As administrator of the estate and of the Goods, chattels
and credits which were of Theresa Guss

Motion Seq No.4

Defendants

-and-

LAW BUCKS, LLC.,

Nominal Defendant

_____X

Hon. Sabrina B. Kraus

*The following e-filed documents, listed by NYSCEF document number were read on this motion:
119,120,121,122,123,124,125,126,127,131,132,133,134 and 135.*

BACKGROUND

Plaintiff commenced this action seeking to enforce a contingency agreement pursuant to which moneys were advanced to Theresa Guss (Guss) in exchange for an interest in the outcome of a personal injury action she had pending . Plaintiff is an assignee of the contingency agreement and defendants are the attorneys that represented Guss in the personal injury action, and her estate.¹

¹ Guss passed away January 18, 2018 after the commencement of this action and her estate was subsequently substituted as a defendant herein.

PROCEDURAL HISTORY

Plaintiff commenced this action pursuant to CPLR § 3213 by filing a motion for summary judgment in lieu of complaint in July 2017.

Defendants appeared by counsel and cross-moved for an order consolidating this action with a pending action in Kings County and seeking a change of venue.

In March 2018, the court (Reed, J) issued an order staying the action pursuant to CPLR § 1015 because Guss passed away. In October 2018, Justice Reed issued an order substituting in the estate and lifting the stay.

On January 17, 2019, the court (Kelly, J) issued a decision denying the motion for summary judgment and the cross-motion for change of venue and consolidation.

Plaintiff served and filed a complaint in November 2021 asserting six causes of action: breach of contract, breach of the covenant of good faith and fair dealing, unjust enrichment, conversion, tortious interference with contract, and aiding and abetting conversion

THE PENDING MOTION

On January 7, 2022, defendants moved for an order pursuant to CPLR § 3211(a)(1) and (7) dismissing the complaint. On January 10, 2022, the motion was marked fully briefed and submitted.

ALLEGED FACTS

On November 5, 2005, Guss was injured while exiting a taxicab in Brooklyn, New York. Guss commenced an action to sue for damages. In 2006, Guss entered into an agreement with PIF Portfolio Acquisition I, LLC d/b/a MFL Case Funding (Case Funding), pursuant to which

she obtained \$2750.00 in funds and agreed that repayment would be made out of any proceeds received from the litigation.

A trial was had in Kings County in June 2013 and a verdict was rendered in favor of Guss in the amount of \$2,798,500.00 of which \$2,025,600.00, was for future medical costs. In February 2017, the Appellate Division reduced future medical cost award to \$681,600.00. In March 2017, the case settled for \$2,100,000.00 with a reduction of the Medicaid lien to \$137,426.00.

In February 2017, Case Funding contacted Guss' counsel and claimed a lien in the amount of \$2,838,487.65 for the loan at issue in this action, as well as a prior loan of \$1500.00. On May 2017, Guss' counsel was notified by Case Funding that it was assigning its rights to Plaintiff. This litigation followed.

DISCUSSION

CPLR § 3211(a)(1) provides for dismissal of a cause of action based on documentary evidence. A motion to dismiss under CPLR § 3211(a)(1) may be granted only where the documentary evidence utterly refutes the plaintiff's factual allegations, conclusively establishing a defense as a matter of law (*Goshen v Mut. Life Ins. Co. of New York*, 98 N.Y.2d 314 [2002]).

Documents that have traditionally qualified for evidentiary consideration under CPLR § 3211(a)(1) are those which are unambiguous, of undeniable authenticity, and reflect content that is essentially undeniable (*VXI Lux Holdco S.A.R.L. v SIC Holdings, Inc., LLC*, 171 AD 3d 189 [1st Dept. 2019]). Documents that have been found to qualify as documentary evidence include contracts (*Magee-Boyle v Reliastar Life Ins. Co. of New York*, 173 AD 3d 1157 [2d Dept. June 26, 2019]).

In determining a motion to dismiss under CPLR §3211(a)(7), “the court must afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss [*EBC I, Inc. v Goldman Sachs & Co* 5 NY3d 11, 19 (2005)].”

“Although on a motion to dismiss plaintiffs’ allegations are presumed to be true and accorded every favorable inference, conclusory allegations—claims consisting of bare legal conclusions with no factual specificity—are insufficient to survive a motion to dismiss [*Godfrey v. Spano*, 13 N.Y.3d 358, 373 (2009)].” The assumption of truth applies only to factual allegations and not to legal conclusions (*U.S. ex rel. Panarello v. Kaplan Early Learning Co.*, No. 11-CV-353S, 2014 WL 1315367, at 3 (W.D.N.Y. Mar. 31, 2014).

Defendants allege that the complaint fails to state a cause of action because the contract is unenforceable and a violation of usury and Champerty statutes. Defendants argue that at the time plaintiff purchased the rights all risk had been removed, because the case had been settled, and that the lack of risk triggers the Usury and Champerty statutes as to the assignment in favor of plaintiff.

The motion to dismiss is granted without opposition as to the fourth and sixth causes of action sounding in conversion

As of the date the motion papers were submitted, it is undisputed that the City of New York had not released the settlement funds to defendants. Indeed, the City of New York has filed an affirmation stating it has not released the settlement funds to defendants and will not do so while the issue of the liens are outstanding. Based on the foregoing, plaintiffs do not submit

opposition opposing that portion of the motion which seeks dismissal of fourth and sixth causes of action sounding in conversion. 2

The causes of action sounding in conversion are dismissed as it is undisputed that defendants are not in possession of the funds.

The Cause of Action for Unjust Enrichment Is Also Subject to Dismissal as the Settlement Funds Have Not to Date Been Paid out to Defendants

Following the same logic that the parties essentially agreed to in terms of the conversion causes of action, the cause of action for unjust enrichment is also subject to dismissal. As it is undisputed that neither Guss, nor her estate, have received any proceeds from the litigation, there has been no unjust enrichment.

Based on the foregoing, the cause of action for unjust enrichment is also dismissed.

The Balance of the Motion to Dismiss Is Denied

As noted above, in order to prevail on their 3211 motion, defendants must either establish that a document utterly refutes plaintiff's claims [CPLR § 3211(a)(1)] or that assuming all of the allegations of the complaint are true the complaint fails to state a cause of action [CPLR § 3211(a)(7)].

Yet the motion papers do not address the elements of the causes of action asserted and whether there are sufficient allegation instead, defendants argue that the contract is unenforceable as a matter of law.

2 Plaintiff does indicate it wishes to condition the dismissal on defendants' agreement that if the City release the funds while this action is pending, defendant will hold the funds in escrow pending resolution of this action. However, the court is not conditioning dismissal of these cause of action on any such agreement, but rather agrees that given that the funds are not in defendants possession, no cause of action for conversion is stated.

There is appellate case law holding that these type of contracts are valid and enforceable (*Cash4Cases Inc., v Brunetti* 167 AD3d 448). However, defendants argue that specific facts in this case, namely that at the time plaintiff purchased the rights under the contract, the case had been settled and the risk of collecting was eliminated, rendered the contract usurious and/or champertous.

This is not a failure to state a cause of action argument. If one reads the allegations of the complaint and assumes them to be true a cause of action has been stated.

What the Court of Appeals has consistently said is that evidence in an affidavit used by a defendant to attack the sufficiency of a pleading “will seldom if ever warrant the relief [the defendant] seeks *unless [such evidence] establish[es] conclusively that plaintiff has no cause of action*” (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976] [emphasis added]; *see also Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]).

A CPLR 3211 (a) (7) motion may be used by a defendant to test the facial sufficiency of a pleading in two different ways. On the one hand, the motion may be used to dispose of an action in which the plaintiff has not stated a claim cognizable at law. On the other hand, the motion may be used to dispose of an action in which the plaintiff identified a cognizable cause of action but failed to assert a material allegation necessary to support the cause of action

Basis Yield Alpha Fund (Master) v. Goldman Sachs Grp., Inc., 115 A.D.3d 128, 134 (2014).

Plaintiff’s complaint herein does state a claim cognizable at law, and, with the exception of the causes of action that have been dismissed, does include all necessary allegations to set forth a cause of action.

As such the balance of the motion to dismiss is denied.

CONCLUSION

Wherefore it is hereby

ORDERED that defendant’s motion to dismiss is granted to the extent of dismissing the

third, fourth and sixth causes of action; and it is further

ORDERED that the balance of the relief sought by defendants is denied; and it is further
ORDERED that defendants serve a copy of this decision with notice of entry on all
parties; and it is further

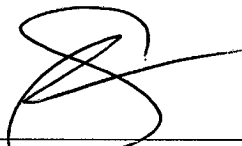
ORDERED that defendants must serve and file their answer with 20 days of service with
notice of entry; and it is further

ORDERED that parties appear for a virtual preliminary conference on March 8, 2022 at
11 am.; and it is further

ORDERED that service of this order upon the County Clerk and the Clerk of the General
Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on
Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-
Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of the court.

Dated: January 13, 2022



Hon. Sabrina B. Kraus
AJSC

