

Melgar v Rower

2022 NY Slip Op 30508(U)

February 9, 2022

Supreme Court, New York County

Docket Number: Index No. 151023/2019

Judge: Verna L. Saunders

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. VERNA L. SAUNDERS, JSC PART 36

Justice

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INDEX NO. 151023/2019

ALFREDO MELGAR, Plaintiff,

MOTION SEQ. NO. 001

- v -

ALEXANDER S. C. ROWER, ALSO KNOWN AS "SANDY ROWER", INDIVIDUALLY AND IN THE FOLLOWING CAPACITIES: AS THE CHAIRMAN AND PRESIDENT OF THE CALDER FOUNDATION; AS A CO-EXECUTOR OF THE ESTATE OF ALEXANDER CALDER, DECEASED; AND AS A CO-TRUSTEE OF THE TRUST UNDER ARTICLE 4, PART b, OF THE LAST WILL AND TESTAMENT OF ALEXANDER CALDER, DECEASED; THE CALDER FOUNDATION, THE TRUST UNDER ARTICLE 4, PART b, OF THE WILL OF ALEXANDER CALDER, DECEASED; AND THE ESTATE OF ALEXANDER CALDER, DECEASED.

AMENDED DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 36, 37, 38, 42, 43, 44, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61

were read on this motion to/for DISMISSAL

In this action seeking compensatory and punitive damages based on fraud (first cause of action); conversion (second cause of action); and replevin (third cause of action), defendants move, pre-answer, to dismiss the verified complaint on several grounds (NYSCEF Doc. Nos. 15-30, 47-61, moving papers and reply), which plaintiff opposes (NYSCEF Doc. Nos. 36-41, papers in opposition).

The salient facts of this case as alleged in the complaint are as follows. Prior to his death on November 11, 1976, Alexander Calder ("Calder"), a renowned artist, allegedly gifted to plaintiff thirty-one (31) drawings, which plaintiff retained in his possession until July 15, 2014 when, pursuant to a consignment agreement with Chowaiki & Co. ("gallery"), plaintiff delivered said drawings to non-party Ezra Chowaiki ("Chowaiki")¹ for sale ("consignment agreement") (NYSCEF Doc. No. 5, Exhibit C, consignment agreement). Plaintiff alleges that the drawings were neither sold during the consignment period (July 15, 2014 through December 31, 2014) nor returned to plaintiff by January 15, 2015 as set forth in the agreement.

¹ Plaintiff asserts that Chowaiki, who was later accused of defrauding several other individuals and indicted on federal charges for fraud, "is not a party defendant at this time in this action for several reasons including that he is incarcerated and the belief that he is judgment proof." (NYSCEF Doc. No. 2 ¶ 6).

By letter dated September 22, 2014, Aaron Richard Golub, Esq., on behalf of the Calder estate, informed Chowaiki that the Calder estate was the owner of the subject artwork; that plaintiff had no ownership, title, right or interest whatsoever in any of the drawings; that Chowaiki was in wrongful possession of them; and he demanded the return of the items. The letter specified that, “[u]ntil such time as this matter is resolved, under no circumstances whatsoever shall you and/or the [g]allery, or any entity or individual acting on your or the [g]allery’s behalf, permit any or all of the [drawings] to be delivered to any third party whatsoever, including, with specificity, [plaintiff].” Chowaiki was instructed to agree to maintain the *status quo* by signing the letter and delivering it to Golub’s office by September 23, 2014. Golub threatened to “hold the Gallery and [Chowaiki] personally liable for all, damages, costs, and expenses in the event that any of the 31 Calder Works [were] delivered to a third-party or otherwise removed from the gallery’s premises without [his] or [his] client’s written consent.” (NYSCEF Doc. No. 6, Exhibit D, *Golub’s letter*). Plaintiff was unaware of the letter for several years and he cannot confirm whether Chowaiki signed and returned the letter. According to plaintiff, the Golub letter was designed as an improper means to intimidate Chowaiki into not selling or transferring the drawings and not returning them to plaintiff. This is evidenced by defendants’ failure to specify their basis for claiming he had no title to the drawings, as well as, their failure to explain why no claim had been made by the Calder estate for the drawings for over three decades.

On October 18, 2015, after Chowaiki failed to find a buyer for the artwork, plaintiff and Chowaiki executed a subsequent agreement, a purchase agreement for the sale of the drawings to Chowaiki in the sum of \$1 million dollars (“purchase agreement”) (NYSCEF Doc. No. 8, Exhibit F, *purchase agreement*).² Plaintiff asserts that the purchase price was to be paid in equal installments of \$250,000.00 due on January 30, 2016; March 30, 2016; May 30, 2016, and July 30, 2016; that the transfer of title of the drawings would occur only after the seller received all four installment payments; and that Chowaiki never paid any sum of money. Plaintiff contends that, upon information and belief, Chowaiki’s execution of the purchase agreement was fraudulent insofar as he never intended to perform said agreement and, instead, sought only to maintain possession or control of the drawings to finalize a transaction with one of the Calder entities and/or Alexander S. C. Rower also known as Sandy Rower (“Rower”), the grandson of Calder.

On or about November 18, 2015, Chowaiki allegedly transferred, in exchange for four gouaches, the 31 drawings to Rower, who allegedly acted on behalf of himself and (a) the Estate of Alexander Calder, deceased, of which he was and is, upon information and belief, a co-executor; (b) the trust formed under article 4(b) of the last will and testament of Calder of which he was and is, upon information and belief, one of the co-trustees; and (c) The Calder Foundation — a nonprofit 501(c)(3) founded in 1987 dedicated to collecting, exhibiting, preserving and interpreting the art and archives of Calder — of which he is chairman and president. According to plaintiff, “[s]ome or all of the Calder Entities and Sandy Rower conspired with Chowaiki to conceal this transfer of possession from the [p]laintiff for approximately two years until [p]laintiff finally learned of it through the efforts of a private investigator.”

² The purchase agreement is originally in Spanish, but plaintiff submits what he refers to as an “informal translation” of the document.

The complaint further states: “[a]t various times, both before and after Chowaiki had transferred possession of the 31 [d]rawings to Chowaiki, Sandy Rower, Chowaiki and plaintiff met in an effort to negotiate a sale of the [d]rawings to the Calder Entities. There were also other communications between them. In all of these communications, [plaintiff] insisted that the [d]rawings be returned to him.” At Chowaiki’s request and as part of those negotiations, on or about March 30, 2016, plaintiff submitted applications to the Calder Foundation to register the drawings, but the Calder foundation took no action with respect to said applications.

Plaintiff asserts a claim of fraud against defendants, premised predominantly on Golub’s letter to Chowaiki, which he claims were false and a fraudulent means of gaining possession of the drawings. Plaintiff claims that when Rower obtained the drawings he knew or should have known that Chowaiki did not have authority to transfer possession of the artwork. Plaintiff also asserts that, during their meetings, Rower concealed from him the fact that defendants had already obtained possession of the drawings. Plaintiff maintains that he was damaged in the amount of at least \$1 million dollars, plus interest, and that defendants were also liable for conversion and replevin. (NYSCEF Doc. No. 2, *verified complaint*).

Defendants now move for relief, pursuant to CPLR 3211(a)(1), (7), (10); 1001 and/or 1003; 3016(b); 2101(b); as well as, several sections of the Uniform Commercial Code (“UCC”). (NYSCEF Doc. No. 15, *notice of motion*). In their memorandum of law, defendants contend, among other things, that plaintiff fails to allege the five elements of fraud. They also argue that plaintiff’s allegation that defendants concealed their transaction of possession of the subject artwork is an insufficient basis to establish fraud since silence alone cannot constitute an actionable claim; that plaintiff fails to plead the existence of any relationship with defendants that would give rise to a duty; that, inasmuch as plaintiff’s fraud claim is premised on Chowaiki’s purported breach of his contractual obligations, no fraud claim lies; and that plaintiff fails to plead any special damages beyond what would be recoverable under a breach of contract theory. (NYSCEF Doc. No. 30, *point I, memorandum of law*).

Defendants also seek dismissal of the verified complaint based on plaintiff’s failure to join Chowaiki as a necessary party, stating that the relief sought here may adversely affect Chowaiki’s rights and liabilities. (NYSCEF Doc. No. 30, *point II*).

Defendants maintain that plaintiff’s allegations of conspiracy do not constitute a separate cause of action and stand or fall with the underlying tort. The allegations of conspiracy, to wit, that defendants induced Chowaiki to breach the purchase agreement fails to state a cause of action for fraud because conspiracy requires the agreement between two or more persons, and one cannot have any agreement to breach one’s own contractual obligations.

Addressing the second and third causes of action for conversion and replevin, defendants aver that plaintiff fails to and cannot allege New York’s unique “demand and refusal,” which requires that a plaintiff, prior to pleading a conversion or replevin cause of action, make a demand to the defendant to return the alleged converted property and show that said defendant has refused to return the property. Defendants also maintain that plaintiff improperly disguises a claim for breach of contract as one for conversion/replevin. Additionally, defendants maintain

that, pursuant to several sections of the UCC, including §§ 2-401(1); 1-201(9); 9-320, they are buyers in the ordinary course of business because (i) the exchange/sale of the drawings for the four (4) Calder Gouaches was not “obviously below market”; (ii) the Chowaiki/defendants contract agreement did not differ from previous transactions; (iii) there is no evidence that Chowaiki was having financial difficulties at the time of their transaction or, even if he was, that defendants were aware of them; and (iv) defendants had no reason to doubt that Chowaiki was fully authorized to sell the drawings. They further assert that, under UCC 2-403, “the entrustment doctrine,” Chowaiki transferred to them good and unencumbered title to the drawings. (NYSCEF Doc. No. 30, *point IV and V*).

Lastly, defendants note that Exhibits A, F and H to the verified complaint should be rejected and not considered by this court insofar as they are in a foreign language and plaintiff fails to annex certified translations as required by CPLR 2101(b). (NYSCEF Doc. No. 30, *point VI*).

In opposition to the motion, plaintiff argues, *inter alia*, that the complaint sufficiently describes the actionable conduct of defendants constituting fraud and that, since the details of said conduct are peculiarly within the knowledge of said defendants, the court should not dismiss his fraud claims but, rather, allow for the details pertaining to Rower’s interactions with Chowaiki to surface during discovery. Plaintiff also asserts that “the gravamen of plaintiff’s complaint is that defendants were guilty of several species of fraud other than fraudulent misrepresentations”, including that they “aided and abetted Chowaiki in violating the fiduciary obligations which he owed to plaintiff.” He cites defendants’ alleged acts of misconduct as follows: “the demand in the Golub letter that Chowaiki not transfer the [d]rawings, especially to not return them to [plaintiff]; the claim asserted in the Golub letter that [plaintiff] had no lawful interest in the [d]rawings and the innuendo that his title derived from theft; the actual delivery of the [d]rawings by Chowaiki to the [d]efendants; the concealment of these events from [plaintiff]; the acceptance of the delivery of the [d]rawings by the [d]efendants and their retention; the execution of a document purporting to constitute an exchange of artwork; the assertion of a claim by Rower that the [d]efendants were and now are the owner of the [d]rawings; the delivery of four gouaches to Chowaiki, allegedly as consideration for the [d]rawings; the refusal of the Calder Foundation to register the [d]rawings based on [plaintiff’s] applications; the failure to advise [plaintiff] that they had possession of the [d]rawings; the claim of the [d]efendants that they had become the owner of the [d]rawings; and the failure to oversee that the payment of the ‘consideration’ for the [d]rawings was made to [plaintiff] and not Chowaiki.”

Plaintiff represents that the complaint states a cause of action for fraudulent concealment under the “special facts” doctrine. He avers that a “holistic” reading of the complaint allows for this court to find viable causes of action based on larceny by trick or device; common law fraud; fraudulent concealment; conversion, or, that because of the special facts or circumstances, the relationship between Rower and plaintiff transformed their relationship into a fiduciary one or one in which Rower had a duty to disclose to plaintiff the facts concealed. Additionally, plaintiff maintains that, while the UCC’s merchant entrustment rules may be raised as an affirmative defense or in support of a motion for summary judgment, it is improperly raised in the context of a pre-answer motion to dismiss. Thus, plaintiff urges this court to disregard defendants’ conclusory assertion that defendants are buyers in the ordinary course of business. Furthermore,

although demands were made for the return of the drawings, plaintiff insists that a “demand and refusal” was not necessary here since the drawings were obtained unlawfully.

As to the argument that this court should grant dismissal based on plaintiff’s failure to add a necessary party, plaintiff argues that Chowaiki is judgment proof and that he seeks no claim as against him. Moreover, Chowaiki and the defendants are joint tortfeasors and, as such, the failure to add a joint tortfeasor does not warrant dismissal of the action. Plaintiff further claims that non-joinder of an indispensable party is a remedy of last resort and should not be granted here. (NYSCEF Doc. No. 37, *memorandum of law in opposition*).

Plaintiff also attaches newly filed exhibits that have been translated and certified. (NYSCEF Doc. Nos. 39-40).

In reply, defendants argue that plaintiff has failed to articulate the facts that he believes will be uncovered during discovery and, thus, same amounts to speculation. The claims of fraud, which plaintiff intends to salvage by proffering a new fraud theory – that defendants committed “fraudulent acts other than misrepresentations”, are based on nothing more than second or third-hand rumors of alleged misconduct. They further claim that plaintiff’s new allegations of “fraudulent acts” are not actionable; that no fiduciary relationship existed between plaintiff and defendants; and that if defendants are, as plaintiff alleges, bad faith possessors, its claim premised on replevin and conversion are therefore time-barred. Defendants maintain that the newly attached exhibits to the verified complaint, aimed at replacing the original exhibits annexed to the pleadings, should be rejected insofar as they were filed after the motion to dismiss. Assuming plaintiff may remedy the defective exhibits in opposition to the instant motion, defendants argue that the newly attached exhibits fail to comply with the requirements of CPLR 2101(b) insofar as plaintiff fails to attach an affidavit from the translator. (NYSCEF Doc. No. 61, *memorandum in reply*).

“On review of a pre-answer motion to dismiss a complaint for failure to state a cause of action (CPLR 3211[a][7]), the court must accept all of the allegations in the complaint as true, and, drawing all inferences from those allegations in the light most favorable to the plaintiff, determine whether a cognizable cause of action can be discerned therein, not whether one has been properly stated.” (*MatlinPatterson ATA Holdings LLC v Federal Express Corp.*, 87 AD3d 836, 839 [1st Dept 2011] [citations omitted].)

Turning first to the fraud cause of action, it is well-settled that, “[t]o make a *prima facie* claim of fraud, a complaint must allege misrepresentation or concealment of a material fact, falsity, scienter on the part of the wrongdoer, justifiable reliance and resulting injury.” (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 135 [1st Dept 2014], citing *Dembeck v 220 Cent. Park S., LLC*, 33 AD3d 491, 492 [1st Dept 2006].) Generally, “[a]bsent a duty to speak, nondisclosure does not ordinarily constitute fraud.” (*Jolly King Rest. V Hershey Chan Realty*, 214 AD2d 422, 422 [1st Dept 1995]; see also *Oppenheimer & Co., Inc. v Oppenheim, Appel, Dixon & Co.*, 173 AD2d 203, 204-205 [1st Dept 1991].) However, “[e]ven in the absence of any affirmative misrepresentation or any fiduciary obligation, a party may be liable for nondisclosure where it has special knowledge or information not attainable by plaintiff,

or when it has made a misleading partial disclosure.” (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d at 135).

“To state a claim for fraudulent concealment, a plaintiff must allege that the defendant had a duty to disclose material information and failed to do so, that the omission was intentional so as to defraud or mislead the plaintiff, that the plaintiff relied on the omission and that the plaintiff suffered damages.” (*Gottbetter v Crone Kline Rinde, LLP*, 162 AD3d 579, 580 [1st Dept 2018].)

“In order to plead properly a claim for aiding and abetting fraud, the complaint must allege: (1) the existence of an underlying fraud; (2) knowledge of this fraud on the part of the aider and abettor; and (3) substantial assistance by the aider and abettor in achievement of the fraud.” (*Stanfield Offshore Leveraged Assets, Ltd. v Metro. Life Ins. Co.*, 64 AD3d 472, 476 [1st Dept 2009] [internal quotation marks and citations omitted].) “[A]ctual knowledge of the fraud may be averred generally” and “[s]ubstantial assistance exists where (1) a defendant affirmatively assists, helps conceal, or by virtue of failing to act when required to do so enables the fraud to proceed, and (2) the actions of the aider/abettor proximately caused the harm on which the primary liability is predicated.” (*Stanfield Offshore Leveraged Assets, Ltd. v Metro. Life Ins. Co.*, 64 AD3d 472 at 476 [internal quotation marks and citations omitted].)

After a review of the relevant statutes and case law, the motion is decided as follows.

As an initial matter, plaintiff fails to plead facts sufficient to maintain a claim of fraud against defendants insofar as its cause of action lacks the requisite specificity of CPLR 3016(b) and is premised on nothing more than conjectures that defendants conspired with Cowaiiki to defraud plaintiff. (*Knowles v New York*, 176 NY 430 [1903] [“The mere general allegations of fraud or conspiracy are of no value as stating a cause of action”].) Moreover, plaintiff’s assertion that discovery will uncover acts by defendants denoting their scheme to deceive plaintiff is too speculative to warrant denial of the motion as to the fraud claim. (see *Orix Credit Alliance, Inc. v R.E. Hable Co.*, 256 AD2d 114, 116 [1st Dept 1998].)

To the extent plaintiff argues that the verified complaint sets forth sufficient facts for a fraudulent concealment claim, this argument is wholly rejected. Plaintiff fails to assert that defendants owed plaintiff an affirmative duty to disclose the transfer of the subject drawings and he has failed to allege that plaintiff justifiably relied on said omission to his detriment. Furthermore, plaintiff’s argument that the pleadings assert, as an alternative, a claim for aiding and abetting fraud also lacks merit. Case law is clear that where, as here, “liability for fraud is to be extended beyond the principal actors, to those who, although not participants in the fraudulent scheme, are said to have aided in and encouraged its commission, it is especially important that the command of CPLR 3016(b) be strictly adhered to. This is because the alleged aider and abettor, by hypothesis, has not made any fraudulent misrepresentation and should not be called to account for the intentional tort of another unless the circumstances of his connection therewith can be alleged in detail from the outset.” (*Natl. Westminster Bank USA v Weksel*, 124 AD2d 144, 149 [1st Dept 1987].) For reasons already discussed, including plaintiff’s failure to plead specific facts showing that Chowaiki and defendants were aware of a fraud and/or orchestrated a

scheme to defraud plaintiff, the argument is unavailing and unsupported by the pleadings. Therefore, that branch of the motion seeking dismissal of the fraud claim is granted.

Notwithstanding the foregoing, the balance of the motion is denied. “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.” (*Reif v Nagy*, 175 AD3d 107, 120 [1st Dept 2019] [internal quotation marks and citations omitted].) “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.” (*Reif v Nagy*, 175 AD3d at 120 [internal quotation marks, brackets and citations omitted].)

“To state a cause of action for replevin, a plaintiff must establish a superior possessory right to property in a defendant’s possession.” (*Reif v Nagy*, 175 AD3d at 120; see *Pivar v Graduate School of Figurative Art of N.Y. Academy of Art*, 290 AD2d 212, 213 [1st Dept 2002].) Moreover, “[t]he rule in this State is that a cause of action for replevin against the good-faith purchaser of a stolen chattel accrues when the true owner makes demand for return of the chattel and the person in possession of the chattel refuses to return it.” (*McGough v Leslie*, 65 AD3d 895 [1st Dept 2009].)

Here, while this court notes defendants’ position that, applying the commercial rules, Chowaiki transferred to them good and unencumbered title to the drawings and that they are buyers in the ordinary course of business, and relatedly, that a demand and refusal was thus required, said determination cannot be made at this early stage in the litigation based on the instant record before the court insofar as this is a fact-specific inquiry beyond the parameters of this pre-answer motion to dismiss. Goub’s letter and allegations of meetings before and after defendants acquired the artwork suggest that defendants were at least aware that plaintiff had a potential interest in the drawings; thus, viewing the pleadings in the light most favorable to the plaintiff and drawing all reasonable inferences therefrom, defendants have failed, at this juncture, to establish entitlement to dismissal of the conversion and replevin causes of action.

Moreover, while it is not lost on this court defendants’ contention that plaintiff attempts to circumvent the potential avenues available to him for relief against Chowaiki for his breach of contract, this court rejects defendants’ contention that the existence of the purchase agreement between plaintiff and Chowaiki warrants dismissal of plaintiff’s conversion/replevin causes of action on the ground that plaintiff seeks the same damages he could potentially seek against Chowaiki under a breach of contract claim. Certainly, an action for conversion cannot be maintained where damages are merely being sought for breach of contract (see *Peters Griffin Woodward, Inc. v WCSC, Inc.*, 88 AD2d 883, 884 [1st Dept 1982]); conversely, there is no assertion of a contract between defendants and plaintiff such that dismissal of said claims are precluded by a breach of contract claim. Thus, those branches of the motion seeking dismissal of the conversion and replevin causes of action are denied.

Lastly, CPLR 2101(b) provides that “[e]ach paper served or filed shall be in the English language which, where practicable, shall be of ordinary usage. Where an affidavit or exhibit annexed to a paper served or filed is in a foreign language, it shall be accompanied by an English

translation and an affidavit by the translator stating his qualifications and that the translation is accurate.” This court notes that plaintiff re-filed translated and certified copies of the exhibits challenged by defendants; however, plaintiff fails to include the affidavit of the translator as required by CPLR 2101. Accordingly, plaintiff shall submit the affidavit of the translator within thirty (30) days after service of this order or risk the striking of the same. All remaining arguments have been considered by this court and are either without merit or need not be addressed given the findings above. It is hereby

ORDERED that defendants’ motion is granted only to the extent that plaintiff’s cause of action for fraud (first cause of action) is dismissed and is otherwise denied; and it is further

ORDERED that plaintiff shall file an affidavit by the translator of the foreign language exhibits in accordance with CPLR 2101(b) within thirty (30) days after this decision and order is uploaded to NYSCEF; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiff shall serve a copy of this decision and order upon defendants, after which time defendants shall have fifteen (15) days to interpose an answer; and it is further

ORDERED that the parties are directed to appear for a remote preliminary conference on May 4, 2022, details which shall be provided by the court no later than May 2, 2022.

This constitutes the decision and order of this court.

February 9, 2022


HON. VERNA L. SAUNDERS, JSC

CHECK ONE:

CASE DISPOSED
GRANTED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: