

<b>Vashovsky v Zablocki</b>
2022 NY Slip Op 30861(U)
March 15, 2022
Supreme Court, Kings County
Docket Number: Index No. 507373/21
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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CHANA VASHOVSKY, individually and  
derivatively on behalf of  
HUDSON VALLEY NY HOLDINGS LLC,  
Plaintiffs,

Decision and Order

-against-

Index No. 507373/21

YOSEF ZABLOCKI and NATIONAL JEWISH  
CONVENTION CENTER,  
Defendants,

And

March 15, 2022

HUDSON VALLEY NY HOLDINGS LLC,  
Nominal Defendant,  
-----x

YOSEF ZABLOCKI and NATIONAL JEWISH  
CONVENTION CENTER,  
Counterclaim Plaintiffs,

-against-

CHANA VASHOVSKY and EPHRAIM VASHOVSKY,  
Counterclaim-Defendants,  
-----x

PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved pursuant to CPLR §3025 seeking to amend the complaint to add causes of action for fraud, RICO, reformation of contract and rescission of contract. The plaintiff has also moved seeking sanctions against the defendants. The defendants have moved seeking partial summary judgement and for sanctions. The motions have been opposed respectively. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

As recorded in a prior order, according to the amended verified complaint on April 8, 2019 the plaintiff Chana Vashovsky formed an entity called HVNY which purchased the Hudson Valley Resort, a hotel located in Ulster County in New York State. An agreement was reached with defendant Yosef Zablocki whereby he was given a fifty percent interest in HVNY and became the managing member in exchange for an initial investment of \$500,000. Disputes arose between the parties concerning the running of the business. Essentially each party has accused the other of mismanagement, failing to contribute necessary capital and diversion of funds. The plaintiff has now moved seeking to amend the complaint and assert additional causes of action. Motions for sanctions and for summary judgement have also been filed.

#### Conclusions of Law

It is well settled that a request to amend a pleading shall be freely given unless the proposed amendment would unfairly prejudice or surprise the opposing party, or is palpably insufficient or patently devoid of merit (Adduci v. 1829 Park Place LLC, 176 AD3d 658, 107 NYS3d 690 [2d Dept., 2019]). The decision whether to grant such leave is within the court's sound discretion and such determination will not lightly be set aside (Ravnikar v. Skyline Credit-Ride Inc., 79 AD3d 1118, 913 NYS2d 339 [2d Dept., 2010]). Therefore, when exercising that

discretion the court should consider whether the party seeking the amendment was aware of the facts upon which the request is based and whether a reasonable excuse for any delay has been presented and whether any prejudice will result (Cohen v. Ho, 38 AD3d 705, 833 NYS2d 542 [2d Dept., 2007]).

Turning to the RICO claim, to succeed on a RICO claim, the moving party must demonstrate three elements: (1) a violation of the RICO statute, 18 U.S.C. §1962; (2) an injury to business or property; and (3) the injury was caused by the violation of section 1962 (Spool v. World Child Int'l Adoption Agency, 520 F.3d 178 [2d. Cir. 2008]). Under 18 U.S.C. §1962(c) it is unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. Racketeering activity is defined as any activity included within 18 USC §1961(1). That statute includes within racketeering activity "wire fraud" (id).

However, in addition, to establishing racketeering, the plaintiff must demonstrate the defendants engaged in an enterprise. A RICO enterprise is "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal

entity" (see, 18 USC §1961(4)). Thus, the 'enterprise' must be an entity "separate and apart from the pattern of activity in which it engages" (United States v. Turkette, 452 US 576, 101 S.Ct 2524 [1981]). Thus, in Goldfine v. Sichenzia, 118 F.Supp2d 392 [S.D.N.Y. 2002] the court held that "in a fraud-based RICO claim, if the sole purpose of the alleged enterprise is to perpetuate the alleged fraud, there can be no enterprise for RICO purposes" (id). This does not conflict with Second Circuit precedent concerning the definition of an enterprise which does not really address the narrow issue raised here, namely that the sole purpose of the enterprise is to perpetrate the fraud (see, Pavlov v. Bank of New York Co., Inc., 25 Fed. Appx. 70 [2d Cir. 2002], cf., Sands Harbor Marina Corp., v. Wells Fargo Insurance Services of Oregon Inc., 2013 WL 12368689 [E.D.N.Y. 2013]).

In this case the plaintiff alleges the enterprise, specifically, the hotel, was utilized to defraud the plaintiffs. Thus, the plaintiff's allege the defendant's participation in the company was done for the sole purpose of defrauding plaintiffs. "This singular purpose fails to create a distinct racketeering enterprise" (see, Daskal v. Tyrnauer, 37 Mic3d 1214(A), 961 NYS2d 357 [Supreme Court Kings County 2012]). The complaint does not allege the enterprise served a purpose other than to engage in the alleged fraud (Goldfine, supra). Indeed, the proposed Amended Complaint asserts that "the RICO Defendants...acquired

and maintained, directly and indirectly, an interest in and control of, Hudson Valley Holdings LLC (a RICO "enterprise" within the meaning of 18 U.S.C. § 1961[4]), which enterprise was engaged in, and the activities of which affect, interstate commerce. All in violation of 18 U.S.C. § 1962 (b) and 1964(c)" (see, Proposed Amended Complaint, ¶157). The Amended Complaint further asserts the defendants diverted business opportunities and revenue from the corporation, manipulated the affairs of the corporation and engaged in wire fraud while maintaining an interest in the corporation (see, Amended Complaint, ¶158-162). Further, the Amended Complaint alleges that the defendants "engaged in financial transactions knowing that the property involved in such transactions represented the "proceeds of unlawful activity"...and with the intent to promote the carrying on of specified unlawful activity, and further, for the purpose of disguising the nature, source, location, ownership or control of such proceeds" (Amended Complaint ¶163).

Thus, according to the Amended Complaint the entire enterprise existed merely to defraud the plaintiffs. Upon those representations the plaintiff has failed to demonstrate the existence of an enterprise. Consequently, the motion seeking to amend the complaint to add a RICO cause of action is denied. Likewise, the motion seeking to amend the complaint to add a count alleging a conspiracy to engage in RICO is likewise denied.

Turning to the amended cause of action alleging fraud, it is well settled that to succeed upon a claim of fraud it must be demonstrated there was a material misrepresentation of fact, made with knowledge of the falsity, the intent to induce reliance, reliance upon the misrepresentation and damages (Cruciata v. O'Donnell & Mclaughlin, Esqs, 149 AD3d 1034, 53 NYS3d 328 [2d Dept., 2017]). These elements must each be supported by factual allegations containing details constituting the wrong alleged (see, JPMorgan Chase Bank, N.A. v. Hall, 122 AD3d 576, 996 NYS2d 309 [2d Dept., 2014]). Thus, pursuant to CPLR §3016(b) to plead fraud, the complaint must "sufficiently detail the alleged conduct" and contain facts that "are sufficient to permit a reasonable inference of the alleged conduct" (Pludeman v. Northern Leasing Systems Inc., 10 NY3d 486, 860 NYS2d 422 [2010]). In the proposed Amended Complaint in this case there are absolutely no facts supporting allegations of fraud. The allegations merely contain conclusions that fraud was committed without explaining, with the detail required, how such fraud occurred. The proposed amendment asserts the defendant represented he was experienced in managing hotels but upon information and belief was not experienced at all. Thus, a complaint that alleges fraud "absent specific and detailed allegations establishing a material misrepresentation of fact, knowledge of falsity or reckless disregard for the truth,

scienter, justifiable reliance, and damages proximately caused thereby, is insufficient to state a cause of action for fraud" (Old Republic National Title Insurance Company v. Cardinal Abstract Corp., 14 AD3d 678, 790 NYS2d 143 [2d Dept., 2005]). The alleged fraud also consists of an allegation that "Zablocki fraudulently convinced Vashovsky to allegedly dilute her membership interest in HVNY by allowing HVNY to accept the First Loan from NJCC, which included the Equity Provision" (see, Proposed Amended Complaint, ¶259). However, that allegation equally fails to describe how the fraud took place, what was said, the context of the statements and how they even constituted misrepresentations. Therefore, the motion seeking to amend the complaint to add a fraud claim is denied.

Turning to the request to amend and add a claim of contract rescission, "as a general rule, rescission of a contract is permitted 'for such a breach as substantially defeats its purpose. It is not permitted for a slight, casual, or technical breach, but ... only for such as are material and willful, or, if not willful, so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract'" (Kassab v. Kasab, 137 AD3d 1138, 27 NYS3d 680 [2d Dept., 2016]). In this case, the proposed amendment adequately demonstrates a breach of contract between the parties that is significant and serious. Further, discovery will sharpen the issues, however, at

this juncture the claim has merit. Therefore, the motion seeking to amend the complaint to add a claim for rescission is granted.

Turning to the motion seeking to add a claim for reformation of the contract, in Snell v. Atlantic Fire and Marine Insurance Company, 98 US 85, 8 Otto 85, 25 L.Ed. 52 [1878] the Supreme Court held that where an insurance "contract from which, by mistake, material stipulations have been omitted, whereby the true intent and meaning of the parties are not fully or accurately expressed" then reformation of the contract is appropriate. To hold otherwise, the court explained, would allow the "insurance company to obtain an unconscionable advantage, through a mistake, for which its agents were chiefly responsible" (id). A mutual mistake exists where both parties "share the same erroneous belief and their acts do not in fact accomplish their mutual intent" (Healy v. Rich Products Corp., 981 F.2d 68 [2d. Cir. 1992]). Thus, to succeed upon a claim for reformation of a written agreement upon the grounds of mutual mistake, the party seeking reformation must establish, by clear and convincing evidence "the agreement does not accurately express the parties' intentions or previous oral agreement" (313-315 West 125<sup>th</sup> Street LLC v. Arch Specialty Insurance Company, 138 AD3d 601, 30 NYS3d 74 [1<sup>st</sup> Dept., 2016]).

In this case the amended complaint alleges the defendant's lack of experience. While that was considered insufficient to

allege fraud it surely informs of the intent of the parties and the expectations of the plaintiff. Further, the proposed amendment asserts the defendant failed to provide the requisite capital contributions that were agreed to by the parties undermining the entire basis upon which the agreement was based. Again, while discovery will narrow these issues and either support their veracity or expose their inadequacies, at this juncture the allegation has merit and the motion seeking to amend the complaint to add a claim for contract rescission is granted.

Turning to the defendant's motion seeking partial summary judgement, the defendant alleges there are no questions of fact the plaintiff failed to pay his share of an initial contribution required under the operating agreement. However, evidence has been submitted demonstrating the plaintiff's provided far more than an initial investment raising significant questions of fact which cannot be determined on a motion for summary judgement. Therefore, the motion seeking partial summary judgement is denied.

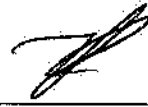
Concerning the motions seeking sanctions, each side has accused the other of all sorts of improprieties. As noted in a separate order a receiver has been appointed which will reduce, if not eliminate, any of the ongoing allegations of waste, mismanagement and siphoning funds. Therefore, the motions seeking sanctions are denied at this time and may be renewed upon

the completion of all discovery.

So ordered.

ENTER:

DATED: March 15, 2022  
Brooklyn N.Y.



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Hon. Leon Ruchelsman  
JSC