Popescu v Austin
2022 NY Slip Op 31275(U)
April 11, 2022
Supreme Court, New York County
Docket Number: Index No. 652845/2021
Judge: Verna L. Saunders

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. 652845/2021

GEORGE POPESCU,

Plaintiff,

MOTION SEQ. NO. 001; 002

- v -

HUGH AUSTIN, BRANDON AUSTIN, and C2 LLC,

Defendants.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 19, 20, 21, 22, 23, 26

were read on this motion to/for **EXTEND TIME**.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 11, 12, 13, 14, 15, 16, 17, 18, 24, 25, 27

were read on this motion to/for **DISMISSAL**.

On April 29, 2021, plaintiff commenced this action by summons with notice alleging "breach of contract, fraud in the inducement and fraud arising from the [d]efendants having induced the [p]laintiff to deliver Tether cryptocurrency on or about February 24, 2021 in the agreed USD value of $24,400.00 to [d]efendants' designated cryptocurrency wallet and [d]efendants failing to pay, per the agreement, $24,400.00 US Dollars to [p]laintiff via wire transfer." (NYSCEF Doc. No. 1, *summons with notice*).

On May 31, 2021, defendant C2, LLC (sued herein as C2 LLC) ("C2") filed a notice of appearance and demanded a copy of the complaint (NSYCE Doc. No. 5, *notice of appearance and demand*). Plaintiff filed the complaint on June 22, 2021, asserting claims based on breach of contract (first cause of action), fraud/unjust enrichment (second cause of action) and conversion (third cause of action). Plaintiff alleged that, in or about mid-February 2021, defendants entered into a transaction for the exchange of $10,000.00 USDT (a cryptocurrency called "Tether") coins. According to their arrangement, within twenty-four (24) hours of the transmittal by plaintiff of the USDT to the designated cryptocurrency wallet, a wire transfer was initiated to plaintiff by C2 in the sum of $9,500.00. Plaintiff further claimed that discussions among the parties ensued regarding a continuation of these types of transactions. On February 24, 2021, plaintiff allegedly transferred a further installment of USDT to defendants' designated cryptocurrency wallet for the agreed price of $24,000.00. Despite due demand, defendants never paid plaintiff. According to plaintiff, the parties negotiated the terms of their contract through WhatsApp messaging exchanges. He further claimed that C2 participated in the plan or scheme to defraud him as evidenced by its participation in the "immediately-preceding, successful cryptocurrency transaction between the [p]laintiff and [d]efendants which set the stage for the

instant, larger transaction being commenced, for which [d]efendants did not remit payment." (NYSCEF Doc. No. 1, *complaint*).

On June 30, 2021, C2 rejected the complaint, on the basis that it was untimely and failed to comply with the requirements set forth in CPLR 3012(b). (NYSCEF Doc. No. 7, *notice of rejection*).

Plaintiff now moves, pursuant to CPLR 3012 and 2004, for an order extending its time to serve the complaint from June 20, 2021 to June 22, 2021 and compelling defendants to accept the same (NYSCEF Doc. No. 8, *notice of motion-Seq. 001*). C2 opposes plaintiff's motion and also moves, pursuant to CPLR 3012(b), 3013, 3016(b), 3211(a)(5), and 3211(a)(7), dismissing the complaint against it with prejudice. (NYSCEF Doc. No. 11, *notice of motion*) (motion sequence 002). Plaintiff opposes this application.

Both motions are hereby consolidated for disposition.

As an initial matter, insofar as the delay in filing the subject complaint was minimal, the court, in its discretion, grants plaintiff's motion to extend his time to file the late complaint and deem it timely served, *nunc pro tunc* (See CPLR 2004). Thus, this court shall address the merits of the complaint.

Turning to the motion to dismiss, C2 submits the affidavit of Charles Constant ("Constant"), the executive officer of C2, who affirms that C2 assists private clients in facilitating certain types of financial transactions. Constant asserts that, on February 22, 2021, defendant Brandon Austin contacted him to transfer funds to plaintiff. Defendants Brandon Austin and Hug Austin then sent to C2 $9,500.00 worth of the digital currency of Bitcoin. Subsequently, C2 sent plaintiff $9,500.00 via wire transfer. Constant affirms that this isolated transaction was the only interaction or involvement it ever had with or concerning plaintiff. He further argues that the February 22, 2021, transaction is unrelated to the alleged transaction at issue in this lawsuit. (NYSCEF Doc. No. 12, *Constant's affidavit*).

By memorandum of law, C2 argues that dismissal is warranted on several grounds. First, C2 contends that plaintiff's failure to serve the complaint within twenty (20) days as required by CPLR 3012(b) warrants dismissal. It also maintains that the complaint should be dismissed on the additional ground that plaintiff fails to state a cause of action for any of its claims. To the extent WhatsApp messages may constitute a contract for purposes of this litigation, C2 argues that the WhatsApp messages alleged in the complaint reference only its co-defendants. Thus, there was no contractual obligation between C2 and plaintiff such that a breach of contract claim can be sustained against it. Moreover, plaintiff also fails to state a cause of action for fraud insofar as he fails to plead this claim with any specificity. The unjust enrichment and conversion claims must also be dismissed, argues C2, since it was not involved, neither directly nor indirectly, with the transaction alleged in the complaint. (NSYCEF Doc. No. 18, *memorandum of law*).

By affirmation in opposition to the motion, plaintiff argues that, should the court grant his request to extend its time for service of the complaint, C2's contention based on CPLR 3012(b) is moot. He further argues that the commission of a fraud is sufficiently pleaded, inasmuch as he

"articulates the historical course of conduct, certain . . . explicit misleading statements made by the co-[d]efendants who are alleged co-conspirators with [C2], and are to be taken, in totality, in a light favorable to [p]laintiff." He further argues that discovery will either bolster the allegations against C2 or potentially exculpate said defendant. According to plaintiff, the fact that there may not have been a contract or "formalized" relationship between C2 and its co-defendants does not foreclose allegations that they participated jointly in a fraudulent plan, scheme or scam. He maintains that the prior financial transaction involving C2, suggests that C2 may have been the mechanism by which the fraud was completed or, at the very least, an agency relationship, supporting his claim for fraud or conversion. (NYSCEF Doc. No. 24, *Brutten's affirmation in opposition*).

In reply, C2 argues, *inter alia*, that the legal arguments advanced by plaintiff's counsel by affirmation, instead of by a memorandum of law, should be disregarded as defective. C2 further argues that plaintiff's opposition relies on speculation that does not pass muster to defeat its motion to dismiss and that this action amounts to a fishing expedition. Moreover, C2 reiterates that the complaint fails to set forth sufficient facts to sustain any of the causes of action. (NYSCEF Doc. Nos. 26, *affirmation in reply*; 27, *memorandum of law in reply*).

It is well-settled that, on a pre-answer motion to dismiss, a court must take as true the allegations of the complaint and give the plaintiff the benefit of every favorable inference that may be drawn from the complaint or from submissions in opposition to the motion. (See *Graziano v County of Albany*, 3 NY3d 475, 481 [2004]; *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002].) However, "[a]lthough 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 NY3d 358 [2009], citing *Caniglia v Chicago Tribune-N.Y. News Syndicate*, 204 AD2d 233, 233-234 [1st Dept 1994].)

Here, C2's motion is granted. Although plaintiff maintains that the WhatsApp messages between plaintiff and the Austin defendants constitute a binding agreement between the parties that give rise to a breach of contract claim, plaintiff does not dispute that C2 was not part of said exchange. Thus, this court finds that C2 has established its entitlement to dismissal of the breach of contract claim as against this defendant. (See *OneBeacon Am. Ins. Co. v Colgate-Palmolive Co.*, 123 AD3d 222 [1st Dept 2014]; *Aces Mech. Corp. v Cohen Bros. Realty & Constr. Corp.*, 136 AD2d 503, 504 [1st Dept 1988] [finding "no basis for holding the . . . defendant liable for the breach of a contract to which it was not a party"].) Moreover, not only does the fraud claim lack the requisite specificity required by CPLR 3016(b), but plaintiff's causes of action based on fraud, unjust enrichment and conversion are premised entirely on bare allegations that C2 was involved in a scheme to defraud plaintiff and that C2 participated in the February 23, 2021 transaction giving rise to this litigation. He relies on nothing more than mere speculation and conjectures that, because C2 participated in a prior transaction with plaintiff — which plaintiff concedes was successful — this leads to the reasonable inference that C2 also participated in the transaction on February 23, 2021. Insofar as plaintiff fails to allege facts to support these assertions, the claims for fraud, conversion and unjust enrichment must be dismissed. All other arguments have been considered and are either without merit or need not be addressed given the findings above. Accordingly, it is hereby

ORDERED that plaintiff's motion to deem its late complaint timely served, *nun pro tunc*, is granted (Mot. Seq. 001); and it is further

ORDERED that the motion of defendant C2 LLC (Mot. Seq. 002) is granted to the extent that all claims asserted against it are hereby dismissed; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for C2 LLC shall serve a copy of this decision and order, with notice of entry, upon defendants.

This constitutes the decision and order of this court.

April 11, 2022

HON. VERNA L. SAUNDERS, JSC

CHECK ONE:	[ ]	**CASE DISPOSED**		[X]	**NON-FINAL DISPOSITION**		
	[X]	**GRANTED**	[ ] **DENIED**	[ ]	**GRANTED IN PART**	[ ]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**