

<b>Vashovsky v Zablocki</b>
2022 NY Slip Op 32925(U)
August 25, 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

August 25, 2022

HUDSON VALLEY NY HOLDINGS LLC,

Nominal Defendant,

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YOSEF ZABLOCKI and NATIONAL JEWISH  
CONVENTION CENTER,

Counterclaim Plaintiffs,

-against-

CHANA VASHOVSKY and EPHRAIM VASHOVSKY,

Counterclaim-Defendants,

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PRESENT: HON. LEON RUCHELSMAN

The defendants have moved pursuant to CPLR §3211 seeking to dismiss the thirteenth and sixteenth causes of action of the plaintiff's second amended complaint. The defendants have also moved seeking the removal of any mention of RICO within the second amended complaint. Papers were submitted by the parties and arguments held and after reviewing all the arguments this court now makes the following determination.

The facts and litigation history has been adequately recorded in prior orders and need not be repeated here.

In an order dated March 15, 2022 the court denied the plaintiff's request to amend the complaint to assert a cause of

action for fraud. In a subsequent order dated May 9, 2022 the court denied a request to reargue that determination holding the allegations presented failed to adequately assert any claims of fraud. The defendants have now moved seeking to dismiss the thirteenth cause of action alleging fraudulent inducement and the sixteenth cause of action alleging the fraudulent transfer of assets.

To state a claim for fraudulent misrepresentation the plaintiff must establish a misrepresentation of fact that was false when made for the purpose of inducing another to rely upon it and they justifiably relied upon it to their detriment (Mandarin Trading Ltd., v. Wildenstein, 16 NY3d 173, 919 NYS2d 465 [2011]). Thus, the misrepresentation must concern a present fact, not a future promise (see, Scialdone v. Stepping Stones Associates L.P., 148 AD3d 953, 50 NYS2d 413 [2d Dept., 2017]). Therefore, misrepresentations made before the formation of a contract which induce a party to enter into the contract can support claims for fraudulent misrepresentation (Cohen v. Koenig, 25 F3d 1168 [2d Cir. 1994]). The second amended verified complaint asserts that "Zablocki represented to Plaintiff that he had experience successfully running hotels and investment properties and turning a profit" and that "Zablocki further represented that he had relationships with businesses who book hotels for clients needing facilities, including rooms and

banquet halls for large groups, and he had the ability to run HVR" (see, Second Amended Verified Complaint, ¶¶30, 31). These representations specifically relate to allegations they induced the plaintiff to enter into a partnership in the first place. They are thus distinct from allegations related to the fraudulent performance of the contract once the partnership had already been formed (see, Reiser Inc., v. Roberts Real Estate, 292 AD2d 726, 739 NYS2d 753 [3<sup>rd</sup> Dept., 2002]). This allegation is not a reiteration of the previously barred fraud claims. Therefore, the motion seeking to dismiss the thirteenth count is denied.

The sixteenth count alleges that funds the plaintiff contributed were utilized by defendant for his personal account and other businesses he owns and essentially diverted the funds infused by the plaintiff to capitalize the hotel.

However, where a claim to recover damages for fraud "is premised upon alleged breach of contractual duties and the supporting allegations do not concern misrepresentations which are collateral or extraneous to the terms of the parties' agreement, a cause of action sounding in fraud does not lie" (McKernin v. Fanny Farmer Candy Shops Inc., 176 AD2d 233, 574 NYS2d 58, [2<sup>nd</sup> Dept., 1991]). The defendants seek to dismiss this fraud claim on the grounds the fraud is the same as the breach of contract claims. The plaintiff opposes that contention arguing the breach of contract claim is not duplicative of this

particular fraud claim since this fraud claim "deals with Defendants' actions post breach, namely the hiding of HVNY's money in Zablocki's sham non-profit NJCC. The illegal shifting of money is not the breach of contract, rather it is the steps that Defendants are taking to hide their loot after they breached the contract" (see, Memorandum of Law in Opposition, page 17). A comparison of the respective claims is therefore necessary. The breach of contract claim (eight cause of action) alleges that the defendant "breached this Agreement by entering into contracts requiring HVNY to spend more than \$20,000 without Washovsky's consent and by transferring HVNY funds in excess of \$20,000 to Zablocki's personal accounts or to the accounts of entities controlled by Zablocki, including NJCC, who have no relation to HVNY or HVR" (see, Second Amended Verified Complaint, ¶ 225). To be sure, if true, the defendant's transfer of HVR funds to private accounts would constitute a breach of contract. The fraud claim alleges essentially the same conduct, namely that Zablocki stole HVR funds for his own personal endeavors. Thus, the distinction drawn by the plaintiff that the fraudulent transfer of assets occurred after the breach and is thus different than a breach of contract does not withstand analysis. This is especially true where the alleged breaches were continuous and ongoing and each allegation of misuse of funds by the defendant constitutes another breach of contract. The

plaintiff further argues that the two claims are distinct because they seek to remedy "different species of damages" (Memorandum of Law in Opposition, page 17). It is true the fraudulent inducement claim seeks damages for lost opportunities and that is different than the breach of contract claim. However, the fraudulent transfer of assets is no different than the breach of contract claim. Moreover, it is true that a misrepresentation of a material fact that is collateral to the contract which induces the other party to enter into the contract is sufficient to sustain an action of fraud and is distinct from the breach of contract claim (Selinger Enterprises Inc., v. Cassuto, 50 AD3d 766, 860 NYS2d 533 [2d Dept., 2008]). However, where the misrepresentation refers only to the intent or ability to perform under the contract then such misrepresentation is duplicative of the breach of contract claim (see, Gorman v. Fowkes, 97 AD3d 726, 949 NYS2d 96 [2d Dept., 2012]). Generally, for a fraud claim to be collateral to a breach of contract claim the misrepresentation must consist of a present fact that is unrelated to the precise terms of the contract itself. Thus, in American Media Inc., v. Bainbridge & Knight Laboratories LLC, 135 AD3d 477, 22 NYS3d 437 [1<sup>st</sup> Dept., 2016] the plaintiff sued defendant for advertisements it placed in various periodicals without receiving payment pursuant to the contract. The court held misrepresentations made by the defendant were not duplicative of the breach of contract

claim. Specifically, the principal of the defendant made statements that he loaned the defendant sufficient funds to cover the advertising expenses thereby inducing the plaintiff to enter into the contract. The court noted those misrepresentations were collateral since they were misrepresentations of present facts, namely that the defendant had sufficient funds. Further, these misrepresentations were collateral to the actual terms of the contract which involved placing advertising in plaintiff's periodicals (see, also, Deerfield Communications Corp., v. Chesebrough Ponds Inc., 68 NY2d 954, 510 NYS2d 88 [1986]). Thus, the critical distinction whether a fraud claim is distinct from a breach of contract claim rests upon the following criteria. The first is whether the misrepresentation concerns a future intent to perform or whether the statement misrepresents present facts (see, Wylie Inc., v. ITT Corp., 130 AD3d 438, 13 NYS3d 375 [1<sup>st</sup> Dept., 2015]). If the misrepresentation concerns present facts it will generally be considered collateral. If the misrepresentation concerns a future intent to perform then it is generally duplicative of a breach of contract claim. This does not mean to imply a fraud claim regarding future conduct can never be distinct from a breach of contract claim. It surely can where the promise is collateral to the contract. (see, Fairway Prime Estate Management LLC v. First American International Bank, 99 AD3d 554, 952 NYS2d 524 [1<sup>st</sup> Dept., 2012]). Moreover, even if

the misrepresentation concerns a present statement of facts, those facts must touch a matter that is not the subject of the contract. Therefore, if the promise or misrepresentations "concerned the performance of the contract itself, the fraud claim is subject to dismissal as duplicative of the claim for breach of contract" (HSH Nordbank AG v. UBS AG, 95 AD3d 185, 941 NYS2d 59 [1<sup>st</sup> Dept., 2012]).

In this case, the transfer of assets claim alleges that Zablocki misappropriated HVR's funds for his own personal use. That allegation does not include a matter not already subject to the contract, namely misusing HVR funds. Therefore, the fraudulent transfer of assets claim is duplicative of the breach of contract claim and consequently the motion seeking to dismiss the sixteenth cause of action is granted.

Turning to the motion to strike portions of the complaint, CPLR §3024(b) provides that a party may move to strike any scandalous or prejudicial material that has been unnecessarily inserted in a pleading. If the allegations are relevant to a cause of action then such material will not be stricken (New York City Health and Hospitals Corporation v. Barnabas Community Health Plan, 22 AD3d 391, 802 NYS2d 363 [1<sup>st</sup> Dept., 2005]). Thus, "relevancy is the measuring rod" whether such material, allegedly scandalous or prejudicial is properly placed in a pleading (Siegel, New York Practice, §230 [5<sup>th</sup> Ed., 2011]). The

specific paragraphs of the second amended verified complaint which are the subject of the motion, namely paragraphs 155 through 169 all concern the RICO cause of action the court held could not be pled. The plaintiff argues the language is relevant regarding "defendants continued pillaging of the hotel, as they relate solely to Zablocki's actions in furtherance of the operation of the hotel" (Memorandum in Opposition, page 13). Thus, where the information sought to be struck from the complaint relates to other viable causes of action the motion should be denied (Hirsch v. Stellar Management, 148 AD3d 588, 50 NYS3d 68 [1<sup>st</sup> Dept., 2017]). An examination of the RICO paragraphs reveal they do not help support any of the remaining causes of action at all. First, the remaining causes of action do not require the transmission of communications via interstate commerce (see, Second Amended Verified Complaint, ¶¶ 159, 161). More importantly, the uniqueness of the RICO statute and the particular pleading requirements it demands, namely the existence of the proceeds of unlawful activity, a pattern of racketeering activity, an "enterprise" and closed and open ended communities do not thereby support the traditional causes of action contained here such as breach of contract and breach of a fiduciary duty. Thus, the specific allegations required of RICO is inappropriate when considering the other causes of action and the facts alleged in the RICO paragraphs do not help to support the other causes of

action (see, Bankers Trust Co., v. Rhoades, 859 F2d. 1096 [2d Cir. 1988] "rather than simply providing a new avenue of redress for wrongs cognizable at common law or prohibited by statute, congress's main goal was to eradicate organized crime...To reach this goal, RICO takes a unique approach; it looks for a "pattern" of illegal acts—each of which, standing alone, may injure a plaintiff—and then views them together as a single violation. As a result, there may be encompassed within a single RICO violation injuries, both multiple and independent, that occur over a broad span of time"). The viable causes of action do not require such precise and inimitable pleadings. Therefore, the motion seeking to strike paragraphs 155-169 of the second amended verified complaint is granted.

So ordered.

ENTER:

DATED: August 25, 2022  
Brooklyn N.Y.



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Hon. Leon Ruchelsman  
JSC