

S&P 350 Inc. v VK Dental Group Inc.

2022 NY Slip Op 33847(U)

October 28, 2022

Supreme Court, Kings County

Docket Number: Index No. 504198/2020

Judge: Leon Ruchelsman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS ; CIVIL TERM: COMMERCIAL PART 8

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S&P 350 INC. AND TENDER TOUCH PHYSICAL
THERAPY, PLLC,

Plaintiff, Decision and order

- against -

Index No. 504198/2020

VK DENTAL GROUP INC.,

Defendant, October 28, 2022

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PRESENT: HON. LEON RUCHELSMAN

The defendant has moved seeking to dismiss the complaint. The plaintiff has cross-moved seeking an extension of time. The motions have been opposed respectively. Papers have been submitted by the parties and after reviewing all the arguments this court now makes the following determination.

On March 8, 2017 the plaintiff entered into a sublease agreement with non-party MetroTech Smile Dental P.C., to lease the second floor of 350 Fulton Street in Kings County. On April 19, 2018 MetroTech Smile sold and assigned their interests to the defendant VK Dental P.C. Disagreements arose between the tenant and the new landlord and the plaintiff commenced an action seeking various reliefs. An order to show cause was signed prohibiting the defendant from taking any eviction actions against the plaintiff and the matter was adjourned to March 31, 2020. The COVID-19 pandemic and ensuing court shutdown postponed the return date and indeed no date was ever re-scheduled. On November 19, 2021 the defendant surrendered the premises to the landlord and no longer has any interest in the property.

The defendant now moves seeking to dismiss the action on the grounds the plaintiff failed to seek a default judgement within one year pursuant to CPLR §3215. Further, the defendant seeks to dismiss the complaint on the grounds the complaint fails to allege any causes of action. The plaintiff has cross-moved seeking an extension of time in which to seek a default judgement.

Conclusions of Law

It is well settled that upon a motion to dismiss the court must determine, accepting the allegations of the complaint as true, whether the party can succeed upon any reasonable view of those facts (Strujan v. Kaufman & Kahn, LLP, 168 AD3d 1114, 93 NYS3d 334 [2d Dept., 2019]). Further, all the allegations in the complaint are deemed true and all reasonable inferences may be drawn in favor of the plaintiff (Weiss v. Lowenberg, 95 AD3d 405, 944 NYS2d 27 [1st Dept., 2012]). Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR §3211 motion to dismiss (see, Moskowitz v. Masliansky, 198 AD3d 637, 155 NYS3d 414 [2021]).

Notwithstanding the delay caused by the COVID-19 pandemic and the failure of either party to reach out to the court to

resume the progression of the case, an examination of the Verified Complaint reveals it fails to allege any cause of action.

The first cause of action alleges conversion, diversion and misappropriation. The crux of this allegation is contained in one paragraph of the Verified Complaint wherein it states that "at all times hereinafter mentioned, the Defendant engaged in conversion and embezzlement of Plaintiffs' funds for their own personal use, by holding themselves out to be the Plaintiffs and exercised unauthorized dominion and control over the property of Plaintiff" (see, Verified Complaint, ¶6 [NYSCEF Doc. No. 6]). The Verified Complaint does not describe the "funds" that were embezzled, how the conversion or embezzlement took place and how the defendants held themselves out as plaintiff. Moreover, the Verified Complaint does not describe or explain in any manner how the defendant exercised dominion and control over plaintiff's property. Thus, without any factual assertions of specific wrongdoing no such allegation is proper (see, Eklund v. Pinkey, 27 AD3d 878, 810 NYS2d 547 [3rd Dept., 2006]). Therefore, since this allegation is conclusory and fails to describe, in any manner, the nature of the claim, the motion seeking to dismiss this cause of action is granted.

The second cause of action alleges a breach of the covenant of good faith and fair dealing. It is well settled that cause of

action is premised upon parties to a contract exercising good faith while performing the terms of an agreement (Van Valkenburgh Nooger & Neville v. Hayden Publishing Co., 30 NY2d 34, 330 NYS2d 329 [1972]). The crux of this allegation is contained in one paragraph of the Verified Complaint wherein it states that "the Defendant breached this implied covenant of good faith and fair dealing by actions such as embezzling company funds, acting in their own self-interest to the detriment of Plaintiffs" (see, Verified Complaint, ¶11 [NYSCEF Doc. No. 6]). Again, the Verified Complaint does not describe, in any manner, how any embezzlement took place and how the defendant acted in its own self interest. Without an elementary understanding of the facts giving rise to this cause of action no such cause of action is proper. Therefore, the motion seeking to dismiss this claim is granted.

The third cause of action alleges 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])). The Verified Complaint merely states that "defendant's misconduct with the Plaintiffs' checking account amounts to fraud" and that "defendant's material misrepresentations with respect to their right to use Plaintiffs' account amounts to fraud" ((see, Verified Complaint, ¶¶14, 15 [NYSCEF Doc. No. 6])). That is far short of the necessary detail required to allege fraud. Indeed, those allegations are conclusory and could not possibly support a fraud cause of action. Therefore, the motion seeking to dismiss this cause of action is granted.


The last cause of action is unjust enrichment. The elements of a cause of action to recover for unjust enrichment are that "(1) the defendant was enriched, (2) at the plaintiff's expense, and (3) that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered" (see, GFRE, Inc., v. U.S. Bank, N.A., 130 AD3d 569, 13 NYS3d 452 [2d Dept., 2015])). Thus, "the essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered" (see, Paramount Film Distributing Corp., 30 NY2d 415, 344 NYS2d 388 [1972])). The Verified Complaint merely states that "defendant, misappropriated Plaintiffs' company funds and converted them for personal expenses" and "defendant remains in possession of account information and key assets belonging to Plaintiffs, even though the Plaintiffs never

authorized same" (see, Verified Complaint, ¶¶19, 20 [NYSCEF Doc. No. 6]). The Verified Complaint does not explain the nature of any misappropriation, the nature of the "company funds", what was misappropriated and the nature of any account information or key assets in defendant's possession. The vague and conclusory nature of facts fails to adequately support the allegation. Consequently, the motion seeking to dismiss the fourth cause of action is granted. Therefore, based on the foregoing the motion seeking to dismiss the lawsuit is granted. The cross-motion is now denied as moot.

So ordered.

ENTER:

DATED: October 28, 2022
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC