

555 Fabrication & Design, Inc. v Kovtunenکو

2022 NY Slip Op 34289(U)

December 6, 2022

Supreme Court, Kings County

Docket Number: Index No. 505981/2021

Judge: Ingrid Joseph

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At an I.A.S. Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 6th day of December, 2022.

P R E S E N T : HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X
555 FABRICATION & DESIGN, INC. and
SHAUN SAMUEL,

Index No.:505981/2021

Plaintiffs,
-against-

ANNA KOVTUNENKO,

Defendant.

-----X	
<u>The following e-filed papers read herein:</u>	<u>NYSCEF #:</u>
Notice of Motion/Cross Motion	
Affidavits/Affirmations, Exhibits Annexed	<u>37 - 50</u>
Answer/Opposing Affidavits (Affirmations)	<u>52 - 60</u>
Reply Papers	<u>61</u>

In this matter, defendant, Anna Kovtunenکو ("defendant") moves by notice of motion (Motion Seq. 2) to dismiss the causes of action asserted by plaintiffs, 555 Fabrication & Design Inc. ("555 Fabrication") and Shuan Samuel ("Samuel") (collectively, "plaintiffs") pursuant to CPLR § 3211 (a)(1) and (a)(7) based upon documentary evidence and for failure to state a cause of action, respectively. Upon dismissing the action, defendant seeks an award consisting of the costs and legal fees incurred to defend against this action.

Plaintiffs commenced this matter by the filing of a Summons with Notice on March 12, 2021, wherein the nature of the of the instant matter is indicated as breach of

Motion #2

fiduciary duty, tortious interference with contractual relations, defamation and slander.

The relief sought is described in the Summons as:

“[M]onetary damages for the sum of \$150,000.00. The claims arise out of a failure to consummate a sale transaction, due to Defendant’s actions in blocking the sale. Defendant caused Plaintiffs to construe a Power of Attorney as empowering Defendant to frustrate the sale, and Defendant did in fact frustrate said sale of business over Plaintiffs’ objections. But for Defendant’s actions, the sale would have been completed at a sale price of no less than \$50,000.00, with a price as high as \$75,000.00, and Plaintiffs would not have incurred unnecessary operational and overhead costs, including but not limited to rent for the commercial lease, in the amount of \$75,000.00.”

In the Verified Complaint, filed on November 17, 2021, plaintiffs assert two causes of action: Breach of Fiduciary Duty and Tortious Interference with Prospective Economic Advantage. In the pleading, Shaun Samuel claims to have formed 555 Fabrication in August 2015 to provide design and fabrication services for projects involving millwork, furniture, theatrical sets and trade show booths. Samuel and the defendant were romantically involved when he first identified a commercial space from which he could operate 555 Fabrication. On August 13, 2015, Samuel, as the managing member of 555 Fabrication, entered into a lease agreement with 745 Gates LP to lease the commercial space, located at 275 Marcus Garvey Boulevard (“the space”). The defendant, Anna Kovtunenکو, also executed a “Good Guy Guaranty” (“guaranty”) in favor of 745 Gates LP in order for Samuel to qualify for the space.

The parties executed an irrevocable power of attorney (“POA”) contemporaneous with the signing of the lease agreement and guaranty, which would remain in effect for the duration of the lease. The POA authorized the defendant to address matters related to 555 Fabrication’s lease, including claims and litigation, tax matters, real estate, banking, and insurance transactions.

In the First Cause of Action, entitled “Breach of Fiduciary Duty,” the plaintiffs assert that the defendant used her romantic relationship with Samuel, with assistance from her brother who is an attorney, to induce Samuel into signing the POA. Plaintiffs assert that the defendant abused that trust and acted without regard to 555 Fabrication, and Samuel’s individual interest, by causing Samuel to believe that she had power to block the sale of 555 Fabrication, after Samuel had begun entertaining the idea. Plaintiffs also allege that the defendant placed her interests in controlling Samuel, and their romantic relationship, ahead of her fiduciary duty to act in a manner that was in the best interest of 555 Fabrication.

In the Second Cause of Action, entitled “Tortious Interference with Prospective Economic Advantage,” Samuel asserts that he was negotiating with a third-party to sell certain of his interests in 555 Fabrication. Samuel alleges that discussions were sufficiently advanced, such that an agreement had been reached, or almost reached, as to all material terms of the sale, including a minimum purchase price of \$50,000, release of the POA, transfer of the commercial lease, and transfer of the good guy guaranty. Samuel further asserts that the defendant had knowledge of the agreement and without justification, intentionally interfered with the agreement, which caused the parties not to consummate the transaction. Plaintiffs pray for damages, including punitive damages, of at least \$150,000 on their Second Cause of Action.

Defendant, in support of her motion to dismiss, contends that plaintiffs failed to adequately allege fiduciary misconduct for a limited POA and cannot show any damages in support of the First Cause of Action for breach of her fiduciary duty. Defendant argues that the conduct alleged in the Second Cause of Action does not constitute tortious conduct as a matter of law, since the phrase in the complaint, “sufficiently advanced discussions” does not constitute economic hardship. Defendant reasons that plaintiffs’ claims are based upon a “lost business opportunity” that was an impossibility on March

16, 2018, when plaintiffs allege the defendant breached her fiduciary duty and tortiously interfered with a prospective economic advantage. Defendant posits that a string of text messages conclusively establish that she could not have obstructed the sale of 555 Fabrication, because there was no buyer on March 16, 2018. Defendant argues that the lease agreement and rent ledger for 555 Fabrication also establish that an assignment could not have taken place, because any such assignment required approval from the landlord, which 555 Fabrication was unable to procure due to its default of the lease and also, because use of the premises as an event space was an illegal and expressly prohibited use under the lease.

On a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211(a)(7), the standard is whether the pleading states a cause of action” and, “[i]n considering such a motion, the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Gross v Capital One, N.A.*, 204 AD3d 761 [2d Dept 2002] citing *Sokol v. Leader*, 74 AD3d 1180, 1180–1181 [2d Dept 2010]). 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 (*EBC I, Inc. v. Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

Here, the court finds that Samuel has failed to state a cause of action for breach of fiduciary duty by the defendant against him. The POA designates the defendant as the agent of 555, not the plaintiff. Consequently, the defendant owed no fiduciary duty to plaintiff. On the other hand, the court finds that 555 Fabrication’s claim against the defendant for breach of fiduciary duty as a general matter fits within a cognizable claim under the law, because the defendant owed 555 Fabrication a fiduciary duty pursuant to authority as power of attorney. 555 Fabrication claims that the defendant used her

authority to frustrate Samuel's efforts to sell 555 Fabrication, which included assignment of the lease. The alleged misconduct also applies to the defendant's alleged use of the POA as leverage to control Samuel in the parties' romantic relationship to the detriment of 555 Fabrication.

The plaintiffs' tortious interference with a prospective economic advantage claim is based on plaintiffs' contention that 555 Fabrication was poised to be sold to a third-party but for the defendant's interference with the deal. The court, upon consideration, finds that the plaintiffs failed to set forth the intentional and wrongful acts, or omissions, attributable to the defendant that directly effected such sale. Moreover, the complaint is silent as to the impact, if any, the defendant's alleged conduct had on the prospective buyer. There is no allegation that the prospective third-party buyer even agreed to purchase 555 Fabrication, or that conditions precedent to the sale of 555 Fabrication with a lease transference were satisfied in order to consummate the deal. The text message excerpt from the prospective buyer stating that a purchase price of \$50,000 was "reasonable" is insufficient to survive dismissal for failure to state a cause of action, even when Samuel is afforded the benefit of every possible favorable inference. Thus, the court finds that plaintiffs' complaint is devoid of any allegations that the defendant actually interfered with Samuel's business relationship with the alleged prospective buyer in an unlawful or improper manner, or any manner whatever.

The defendant has also failed to establish that dismissal is warranted based upon documentary evidence. The defendant's motion is without a scintilla of evidence that utterly refutes, and conclusively establishes a defense to the plaintiffs' remaining claim for breach of fiduciary duty (*Goshen v Mutual Life Ins. Co.*, 38 NY2d 314 [2002]). The material submitted, consisting of rent ledgers and email messages, do not utterly refute or conclusively establish a defense to the claim.

Lastly, the court finds that the defendant failed meet her burden of establishing entitlement to the recovery of the costs and attorneys fees she has incurred in the defense of this action. It well settled that generally, in the absence of an agreement, contract, or statute, a party involved in litigation is responsible for all legal fees and costs incurred in the defense or prosecution of the action and cannot recover the same from an opposing party (*Chapel v Mitchell*, 84 NY2d 345, 3448 [1994]; *Hooper Associates, Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 491 [1989]; *A.G. Ship Maintenance Corp. v Lezak*, 69 NY2d 1, 5 [1986]).

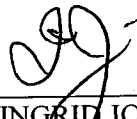
Here, defendant's counsel failed to address the issue of costs and counsel fees in his affirmation in support of the motion. Moreover, there is no evidence that the parties agreed to indemnify the other for any costs or counsels that may be incurred in the event of litigation. The court further notes that there is no evidence of a contract-based, or statutory provision that provides for the recovery of costs and counsel fees. Consequently, that branch of the defendant's motion is denied.

Accordingly, it is hereby

ORDERED, that the defendant's motion (Motion Seq. 2) is granted solely to the extent that plaintiff's First Cause of Action for breach of fiduciary duty, as it relates to Shaun Samuel, and Second Cause of Action for Tortious Interference with Prospective Economic Advantage, are dismissed.

This constitutes the decision and order of the court.

ENTER,


HON. INGRID JOSEPH, J.S.C.
Hon. Ingrid Joseph
Supreme Court Justice