

Dar v SAJ Transp. Northeast LLC

2023 NY Slip Op 32181(U)

June 26, 2023

Supreme Court, New York County

Docket Number: Index No. 650707/2022

Judge: Louis L. Nock

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LOUIS L. NOCK PART 38M

Justice

-----X

ZAHIDAH DAR,

Plaintiff,

- v -

SAJ TRANSPORTATION NORTHEAST LLC, JAFFAR LLC
(NY), JAFFAR LLC (NJ), NYSPEED LLC, JAFFAR NAQVI,
ALI NAQVI, ELMURAS EMIL, NAJAM UD DIN,

Defendants.

-----X

JAFFAR NAQVI,

Third-Party Plaintiff,

-against-

SALMAN DAR,

Third-Party Defendant.

-----X

INDEX NO. 650707/2022
MOTION DATE 01/02/2023,
01/25/2023,
02/10/2023
MOTION SEQ. NO. 004 005 006

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595468/2022

The following e-filed documents, listed by NYSCEF document numbers (Motion 004) 64, 65, 66, 67, 68, 69, 70, 71, 72, 75, 76, 77, 81, 82, 83, and 97

were read on this motion to DISMISS.

The following e-filed documents, listed by NYSCEF document numbers (Motion 005) 78, 79, 80, 84, 85, 86, 87, and 88

were read on this motion to QUASH SUBPOENA, FIX CONDITIONS.

The following e-filed documents, listed by NYSCEF document numbers (Motion 006) 89, 90, 91, 92, 93, 94, 95, and 96

were read on this motion to QUASH SUBPOENA, FIX CONDITIONS.

Upon the foregoing documents, the motion by plaintiff Zahidah Dar (“plaintiff”) and third-party defendant Salman Dar (“Salman”) to dismiss the second,¹ fourth, fifth, and sixth

¹ The notice of motion erroneously refers to the first counterclaim for breach of fiduciary duty, but the briefing refers specifically to the second counterclaim for breach of contract.

counterclaims against plaintiff, and the entire third-party complaint against Salman, and defendants' cross-motion to amend the third-party complaint (Mot. Seq. No. 004), and defendants' motions to quash subpoenas issued to TD Bank, N.A. (Mot. Seq. No. 005), and JP Morgan Chase, N.A. (Mot. Seq. No. 006), are hereby consolidated for disposition in accordance with the following memorandum. The court assumes familiarity with the facts and circumstances of this case as set forth in its prior decision and order dated May 17, 2022 (NYSCEF Doc. No. 30).

Motion to Dismiss (Mot. Seq. No. 004)

In their answer, defendants allege counterclaims for breach of fiduciary duty (first counterclaim), breach of contract (second counterclaim), breach of the covenant of good faith and fair dealing (third counterclaim), unjust enrichment (fourth counterclaim), fraud (fifth counterclaim), and misrepresentation (sixth counterclaim). Plaintiff is not presently moving to dismiss the counterclaims for breach of fiduciary duty and of the covenant of good faith and fair dealing.

A breach of contract requires allegations of “the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages” (*Harris v Seward Park Housing Corp.*, 79 AD3d 425 [1st Dept 2010]). Here, defendants allege that plaintiff, a member of defendant SAJ Transportation Northeast LLC (“SAJ”), breached the SAJ operating agreement in various respects, including by inappropriately drawing down SAJ's letter of credit with TD Bank, N.A., and making allegedly inappropriate withdrawals from SAJ's bank account. Plaintiff addresses this branch of her motion solely to the allegation regarding the line of credit, and thus concedes that the breach of contract counterclaim is at least partially well-pleaded. With respect to the draw on the line of credit, plaintiff argues that as a member of SAJ,

she was permitted to draw on the line of credit pursuant to the line of credit agreement, and in any case, she settled with TD Bank, N.A., and is thus protected from any claims by defendants regarding the line of credit. However, as defendants point out, the breach complained of is not of the line of credit agreement, but of the operating agreement, which as defendants allege required plaintiff to fairly manage SAJ, and limited the amount of money plaintiff could receive from SAJ (answer with counterclaims, NYSCEF Doc. No. 62, ¶¶ 51, 66-68). Similarly, General Obligations Law § 15-108[b], cited by plaintiff, which provides that a release given to one tortfeasor by an injured party bars claims for contribution against the settling tortfeasor, is unavailing. The statute does not apply to claims for breach of contract (*Bauman v Garfinkle*, 235 AD2d 245 [1st Dept 1997]), and, in any case, the settlement agreement between plaintiff and TD Bank, N.A., makes no mention of the SAJ operating agreement and releases no claims thereunder (*see Structural Processing Corp. v Farboil Co.*, 234 AD2d 284, 284 [2d Dept 1996] [“The plaintiff averred that the release in this case was prepared in the context of the settlement of a prior action with respect to construction projects of Trump Plaza and Carlyle Towers. The defendant failed to establish that the release was intended to bar recovery in the present action with respect to a construction project of a McDonalds Restaurant”]).

The fourth counterclaim for unjust enrichment arises out of the same facts and circumstances as the claim for breach of contract, and therefore must be dismissed as duplicative (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]). Contrary to defendants’ argument, neither party has questioned the existence of the operating agreement or its validity, and therefore unjust enrichment may not be pled in tandem with the claim for breach of contract (*id.* at 388 [“A ‘quasi contract’ only applies in the absence of an express agreement”]). Finally, the fifth and sixth counterclaims for fraud and misrepresentation must be dismissed because

defendants fail to allege a misrepresentation of then-present fact. A claim for fraud does not lie where a party is alleged to have entered a contract with no intention of performing it (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995]). “A claim for fraudulent inducement of contract can be predicated upon an insincere promise of future performance only where the alleged false promise is *collateral* to the contract the parties executed; if the promise 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, 206 [1st Dept 2012] [emphasis in original]).

Turning to the third-party complaint against Salman, defendant/third-party plaintiff Jaffar Naqvi (“Naqvi”) asserts seven claims for breach of fiduciary duty and one claim for aiding and abetting breach of fiduciary duty against Salman, styled as the fourth through twelfth counterclaims of Naqvi’s separate answer and third-party complaint. Each claim represents a different assertion of dereliction of duty as a member of SAJ, waste of SAJ’s assets, misappropriation of funds, or assistance in plaintiff’s asserted breaches. As Naqvi alleges, however, Salman gave up his membership interest in SAJ in 2015, and any fiduciary duty owed to Naqvi ceased at that time. The events underlying Naqvi’s claims against Salman all took place after he transferred his interest in SAJ to plaintiff, and therefore no claim for breach of fiduciary duty exists based on those facts (*Jones v Voskresenskaya*, 125 AD3d 532, 533 [1st Dept 2015] [“Breach of fiduciary duty requires (1) the existence of a fiduciary duty owed by the defendant; (2) a breach of that duty; and (3) resulting damages”]). As to the claim for aiding and abetting plaintiff’s breach of her fiduciary duties, such claims must be pled with particularity pursuant to CPLR 3016(b) (*Schroeder v Pinterest Inc.*, 133 AD3d 12 [1st Dept 2015]). Naqvi’s

conclusory allegations are insufficient. For the foregoing reasons, the third-party complaint must be dismissed against Salman.

Cross-Motion to Amend (Mot. Seq. No. 004)

Naqvi cross-moves to amend his third-party complaint by including additional allegations against Salman, a new cause of action against Salman, and two new third-party defendants.

“Leave shall be freely given upon such terms as may be just” (CPLR 3025[b]). “A party opposing leave to amend must overcome a heavy presumption of validity in favor of permitting amendment” (*McGhee v Odell*, 96 AD3d 449, 450 [1st Dept 2012] [internal quotation marks and citation omitted]). Absent undue delay, prejudice, or surprise, and provided the proposed amendment arises from the same transactions and occurrences as the original complaint, the motion should be granted (*Fellner v Morimoto*, 52 AD3d 352, 353 [1st Dept 2008]). However, a court must first examine the merits of the proposed amendment (*Pier 59 Studios, L.P. v. Chelsea Piers, L.P.*, 40 AD3d 363, 365-66 [1st Dept 2007]). Leave to amend should be denied if “the proposed amendment is palpably insufficient or patently devoid of merit” (*Yong Soon Oh v Hua Jin*, 124 AD3d 639, 640 [2d Dept 2015]).

The proposed amended third-party complaint alleges nine causes of action, the first six solely against Salman: breach of contract (first cause of action), breach of fiduciary duty (second cause of action), breach of the covenant of good faith and fair dealing (third cause of action), unjust enrichment (fourth cause of action), fraud (fifth cause of action), misrepresentation (sixth cause of action), conversion against Salman and proposed additional defendants Asad and Amaan Dar (seventh cause of action), aiding and abetting breach of fiduciary duty against all three third-party defendants (eighth cause of action), and aiding and abetting fraud against all three third-party defendants.

Plaintiff and Salman, in opposing the cross-motion, do not successfully raise any surprise or prejudice, and the proposed amendment clearly arises from the same transactions and occurrences of the original complaint. Instead, plaintiff and Salman challenge the sufficiency of the claims alleged in the proposed third-party complaint. Accordingly, the court will evaluate them in turn.

In support of his claim against Salman for breach of contract, Naqvi alleges that, after transferring his interest in SAJ to plaintiff, Salman entered into an agreement with Naqvi “that despite the transfer of ownership, the *status quo* would remain, with Salman Dar continuing as the ‘working partner’ or manager of SAJ, in charge of SAJ’s day-to-day operations” (amended third-party complaint, NYSCEF Doc. No. 77, ¶ 21). Naqvi further alleges that Salman breached this oral agreement when he “continued to make unauthorized withdrawals from SAJ under false pretenses and to take excessive draws, and totally neglected his management duties” (*id.*, ¶ 67). For the purposes of the motion, these allegations are sufficient to make out a claim for breach of contract. Plaintiff and Salman argue that the purported oral agreement cannot supersede the SAJ operating agreement, but as all parties agree, Salman was no longer a member of SAJ at the time the oral agreement was allegedly made, and thus they fail to establish what conflict, if any, exists between the operating agreement and the alleged oral agreement. Moreover, and contrary to the opposition to the motion, the amended third-party complaint adequately alleges consideration for this agreement (*id.*, ¶¶ 65-66).

The second cause of action for breach of fiduciary duty, third cause of action for breach of the covenant of good faith and fair dealing, and fourth cause of action for unjust enrichment arise from the same facts and seek the same damages as the claim for breach of contract, and therefore must be dismissed as duplicative (*e.g.*, *Ullmann-Schneider v Lacher & Lovell-Taylor*,

P.C., 121 AD3d 415 [1st Dept 2014]; *Soni v Pryor*, 102 AD3d 856 [2d Dept 2013]). The fifth cause of action for fraud and sixth cause of action for misrepresentation suffer from the same flaws as the fraud and misrepresentation counterclaims dismissed above against plaintiff. Moreover, allegations of fraud must include who spoke, what they said, and the date on which they said it (*E1 Entertainment U.S. LP v. Real Talk Entertainment, Inc.*, 85 AD3d 561, 562 [1st Dept 2011]). These allegations are lacking in the amended third-party complaint.

The seventh cause of action for conversion asserts that the money which Salman allegedly misappropriated from SAJ was used to, among other things, purchase a house in New Brunswick, New Jersey, which was then transferred to proposed third-party defendants Asad and Amaan Dar for \$10.00. Conversion is the “unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights” (*State v Seventh Regiment Fund, Inc.*, 98 NY2d 249, 259 [2002]). When a conversion claim is based solely on the same facts giving rise to an alleged breach of contract claim, it should be dismissed as duplicative (*Richbell Information Services, Inc. v. Jupiter Partners, LP*, 309 AD2d 288, 306 [1st Dept 2003]). As to Salman, this claim is duplicative of the breach of contract claim. As to Asad and Amaan Dar, neither of them are exercising ownership over Naqvi’s property, as the misappropriated funds belonged to SAJ.

Finally, the aiding and abetting causes of action must also be dismissed. As with the original claim for aiding and abetting breach of fiduciary duty, the amended claim is not plead with sufficient particularity. The claim for aiding and abetting fraud fails due to Naqvi’s failure to allege an underlying claim for fraud (*Oster v Kirschner*, 77 AD3d 51, 55 [1st Dept 2010] [“A plaintiff alleging an aiding-and-abetting fraud claim must allege the existence of the underlying fraud”]).

Quash Subpoenas (Mot. Seq. Nos. 005, 006)

“A motion to quash is limited in scope, challenging only the validity of the subpoena or the jurisdiction of the issuing authority” (*Santangelo v People*, 38 NY2d 536, 539 [1976]). “An application to quash a subpoena should be granted only where the futility of the process to uncover anything legitimate is inevitable or obvious or where the information sought is utterly irrelevant to any proper inquiry” (*Technology Multi Sources, S.A. v Stack Global Holdings, Inc.*, 44 AD3d 931, 932 [2d Dept 2007] [internal quotation marks and citations omitted]). Here, defendants do not challenge the propriety of the information sought, but instead raise a variety of procedural challenges to the subpoenas. First, defendants claim that the notice of the circumstances or reasons disclosure is sought from the nonparty banks is insufficient. As plaintiff points out, only the nonparties who are the targets of the subpoenas may challenge the sufficiency of the required notice (*Velez v Hunts Point Multi-Serv. Ctr., Inc.*, 29 AD3d 104, 111-12 [1st Dept 2006]). Neither bank has objected to the subpoena or moved to quash it. Defendants’ challenge to service of the subpoenas also fails, as affidavits of service, regular on their faces, indicate proper service of the subpoenas upon the banks (NYSCEF Doc. Nos. 86, 93). Service was effectuated pursuant to CPLR 311(a)(1), which does not require the proof of service to be filed to the docket at the time service was made, obviating defendants’ claim that such proof should have been filed prior to the motions to quash. Finally, defendants seek a protective order staying enforcement of the subpoenas pending decision on the instant motions to quash and the motion to dismiss. As the motions are being decided herein, defendants have not established entitlement to a protective order going forward.

Accordingly, it is hereby

ORDERED that the motion to dismiss (Mot. Seq. No. 004) is granted, and the second, fourth, fifth, and sixth counterclaims against plaintiff, and the third-party complaint against third-party defendant Salman Dar are severed and dismissed; and it is further

ORDERED that defendant/third-party plaintiff Jaffar Naqvi's cross-motion for leave to amend the third-party complaint is granted to the extent that leave is granted, in part, as follows: leave is granted to amend the first third-party cause of action as set forth in the proposed amended complaint in the form annexed to the moving papers, by Jaffar Naqvi against Salman Dar only, but leave is otherwise denied with respect to the proposed second through ninth third-party causes of action; and it is further

ORDERED that, within 20 days from the date of filing hereof, defendant/third-party plaintiff Jaffar Naqvi shall serve a copy of this order with notice of entry and the amended third-party complaint in conformity herewith; and it is further

ORDERED that the third-party defendant Salman Dar shall answer the amended complaint or otherwise respond thereto within 20 days from the date of said service; and it is further

ORDERED that the motions to quash subpoenas issued to TD Bank, N.A. (Mot. Seq. No. 005), and JP Morgan Chase, N.A. (Mot. Seq. No. 006), are denied; and it is further

ORDERED that counsel are directed to appear for the previously scheduled status conference on September 6, 2023, at 10:00 AM in Room 1166, 111 Centre Street.

This constitutes the decision and order of the court.

Louis L. Nock

6/26/2023

DATE

LOUIS L. NOCK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE