

Longfellow v Barney

2023 NY Slip Op 34263(U)

November 29, 2023

Supreme Court, New York County

Docket Number: Index No. 154068/2023

Judge: Dakota D. Ramseur

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

PRESENT: HON. DAKOTA D. RAMSEUR **PART** **34M**

Justice

-----X

LUKE E LONGFELLOW

Plaintiff,

- v -

TYLER L BARNEY,

Defendant.

-----X

INDEX NO. 154068/2023

MOTION DATE N/A

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27

were read on this motion to/for DISMISS.

In May 2023, plaintiff Luke Longfellow commenced this action against his former business partner, defendant Tyler Barney, to recover damages arising out of the dissolution of their joint business Lucky Star & Co. In this motion sequence (001), defendant seeks to dismiss the entire complaint pursuant to CPLR 3211 (a) (4) on grounds that a prior action—*Barney v Longfellow*, NYSCEF index no. CV-008649-22/NY—is currently pending in New York City Civil Court. In addition, he moves to dismiss plaintiff’s fraud claim pursuant to CPLR 3211 (a) (1) and (a) (7) on grounds that, respectively, documentary evidence provides a complete defense as a matter of law and plaintiff failed to adequately plead the cause of action. As to plaintiff’s intentional infliction of emotional distress, defendant moves to dismiss under CPLR 3211 (a) (5), contending the cause of action is time-barred, and under CPLR 3211 (a) (7) for failing to plead the requisite outrageous conduct. Plaintiff opposes each branch of the motion but, should the Court be inclined to grant any part thereof, moves pursuant to CPLR 3025 to amend the complaint to rectify any deficiencies. For the following reasons, both parties’ motions are granted in part.

BACKGROUND

In late 2021, plaintiff and defendant were in a personal relationship and decided to start Lucky Star & Company LLC together (hereinafter, “Lucky Star”). They incorporated the business in New Mexico on December 2, 2021, with a principal place of business located at defendant’s home address in New York City. (NYSCEF doc. no. 4, articles of incorporation.) Each owned a fifty percent interest in the company and contributed \$10,000 in upfront capital. (NYSCEF doc. no. 5, operating agreement.) In January 2022, they sought to open a business checking account with Wells Fargo for Lucky Star. As part of the process, they each signed a document entitled “Authorization for Information and Certificate of Authority.” (NYSCEF doc. no. 6, Wells Fargo authorizations.) In April 2022, Wells Fargo notified them that they had lost the original documents, and, according to defendant, they were forced to “renew” their

application for a business checking account. Though the April 2022 reauthorization documents contain both parties' electronic signatures (NYSCEF doc. no. 7, April 2022 authorizations), plaintiff alleges that defendant opened the Wells Fargo checking account without his knowledge or consent. (See NYSCEF doc. no. 1 at ¶ 20, original complaint; NYSCEF doc. no. 21 at ¶ 25, amended complaint [“Defendant used Mr. Longfellow’s social security and other personal information, and forged his signature on an application, to set up the Wells Fargo Checking Account”]; NYSCEF doc. no. 22 at ¶ 5, plaintiff aff. in opposition [“I do not recall ever seeing the April 2022 Wells Fargo account application...I do not recognize the electronic signature...I did not sign the April 2022 Wells Fargo account application, nor did I give Defendant permission to sign it on my behalf.”]) In addition, plaintiff alleges that defendant (1) opened an American Express Platinum Credit Card in his name without his knowledge and spent approximately \$9,000 between April and July 2022 (NYSCEF doc. no. 1 at ¶ 15; NYSCEF doc. no. 21 at ¶ 21-22), and (2) sent plaintiff a letter wherein he sought to extort \$12,521.19 by impersonating the law firm of Rosenbaum & Taylor, P.C.¹ (NYSCEF doc. no. 1 at ¶ 23; NYSCEF doc. no. 21 at ¶ 28.)

Around this same time, in April 2022, the parties ended their personal relationship and, whether formally or not, dissolved the business. In June 2022, defendant commenced his New York Civil Court case against plaintiff, seeking reimbursement for fifty percent of the approximately \$26,000 in expenses he accrued in attempting to build their business. Thereafter, plaintiff commenced the instant action for fraud and intentional infliction of emotional distress. As described above, defendant seeks to dismiss the complaint in its entirety pursuant to CPLR 3211 (a) (4), the fraud cause of action pursuant to (a) (1) and (a) (7), and the intentional infliction of emotional distress cause of action pursuant to (a) (5) and (a) (7). The Court takes each branch of the motion in turn.

DISCUSSION

Dismissal Pursuant to CPLR 3211 (a) (4)

Under CPLR 3211 (a) (4), courts have broad discretion in determining whether dismissal is warranted where “there is another action pending between the same parties for the same cause of action.” (See CPLR 3211 [a] [4]; *Jadron v 10 Leonard St., LLC*, 124 AD3d 842, 843 [2d Dept 2015]; *Morgulas v J. Yudell Realty, Inc.*, 161 AD2d 211, 212 [1st Dept 1990].) In determining whether two actions are between the same parties for the same claims, the actions need not present the same precise legal theories. Rather, dismissal may be warranted where there is a substantial identity of parties, the two actions are sufficiently similar, and the relief sought is substantially the same. (*Feldman v Harari*, 183 AD3d 629, 630-631 [2d Dept 2020].) “The critical element is whether both suits arise out of the same subject matter or series of alleged wrongs.” (*Id.*)

In applying these principles and exercising its broad discretion, the Court finds dismissal under CPLR 3211 (a) (4) unwarranted. Though the claims presented here and in defendant’s civil suit broadly relate to their personal relationship and joint business venture together, it is clear that this is the extent to which the claims are similar. In the New York Civil Court action,

¹ As neither party has attached the letter defendant sent, the Court has not seen its contents.

defendant seeks to recoup fifty percent of the financial outlays he individually made to build the business; in essence, his action is premised on enforcing the parties' operating agreement that formed Lucky Star as a jointly owned limited liability company. By contrast, plaintiff's fraud claim is premised on defendant opening and using a Wells Fargo checking account and an American Express credit card in his name without his knowledge or consent. The fraud claim, then, arises from conduct separate and apart from duties and obligations imposed on the parties by the operating agreement.

Likewise, plaintiff's intentional infliction of emotional distress cause of action only tangentially relates to the parties' business arrangements. Though connected to the agreement in the sense that defendant may have improperly attempted to recoup funds he spent for the business, the gravamen of the claim is the method defendant used—allegedly misrepresenting himself as a lawyer and extorting funds—and the emotional distress such conduct caused. In other words, neither of plaintiff's two claims arise out of the same series of alleged wrongs as defendant's claims. That the two actions are distinct is further demonstrated in that each seeks different relief: while defendant seeks approximately \$13,000 of the \$26,000 he spent, plaintiff seeks damages arising from the debt plaintiff put on a card in his name and the alleged emotional distress caused by defendant's conduct. Accordingly, because the two actions concern “wrongs of a different nature committed at different times and different damages” (*see Feldman*, 183 AD3d at 631), the Court denies defendant's motion to dismiss on this basis.

Dismissal of Fraud Claim Pursuant to CPLR 3211 (a) (1)

On a motion to dismiss under CPLR 3211 (a) (1), courts may grant relief only where the “documentary evidence” is of such nature and quality—“unambiguous, authentic, and undeniable”—that it utterly refutes plaintiff's factual allegation, thereby conclusively establishing a defense as a matter of law. (*See Phillips v Taco Bell Corp.*, 152 AD3d 806, 806-807 [2d Dept 2017]; *VXI Lux Holdco S.A.R.L v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019] [“A paper will qualify as ‘documentary evidence’ if... (1) it is ‘unambiguous,’ (2) it is of ‘undisputed authenticity,’ and (3) its contents are ‘essentially undeniable’”].) As the First Department explained, the documentary evidence must “definitely dispose of the plaintiff's claim.” (*Art & Fashion Group Corp. v CyclopsProd., Inc.* 120 AD3d 436, 438 [1st Dept 2014].) While documents reflecting out-of-court transactions such as contracts, mortgages, and deeds are considered prototypical examples of “documentary evidence” because their contents clearly meet the three above-described criteria (*see Prott v Lewin & Baglio, LLP*, 150 AD3d 908 [2017]), in certain circumstances, communications between parties in emails and text messages may qualify as documentary evidence. (*Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 432-433 [1st Dept 2014]; *Langer v Dadabhoy*, 44 AD3d 425, 426 [1st Dept 2007]; *Art & Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014].) In each of the above-cited cases, the First Department has stressed that, as with all such evidence, email and text communications may be considered “documentary” only where they meet the “essentially undeniable” test.

Here, the only issue is whether several text messages sent by defendant are essentially undeniable and conclusively refute plaintiff's allegations—in paragraphs 3 and 15 of his original complaint and 20 and 21 of his amended complaint—that defendant used his personal

information without his knowledge and consent to secure an American Express credit card and Wells Fargo account.

With respect to the American Express card, defendant's CPLR 3211 (a) (1) argument rests upon the text he sent on April 20, 2022, wherein he stated:

“GUESS WHAT?!!!! I told you that I would try to get us the AMEX platinum card for our business like over a month ago, and I just got an email today that our Lucky Stars & Co application was approved through my AMEX Platinum relationship. I don't know what you want me to do about that, but maybe this is a sign...and it might be a good way for us to manage current expenses.” (NYSCEF doc. no. 9, text messages.)

However, the content of the text message reveals defendant sent the message *after* he had already obtained approval for the credit card; the text does not establish—in undeniable terms—that, when he was applying, defendant received plaintiff's consent to use his personal information to obtain said credit card. Accordingly, the text message does not utterly refute plaintiff's factual allegations and, as such, cannot be considered documentary evidence within the meaning of CPLR 3211 (a) (1).

As to the Wells Fargo account, defendant sent a text message dated April 8, 2022, informing plaintiff that Wells Fargo had sent him a “docusign to do” and that defendant later responded, “Yeah I was just on the phone with them I took care of it.” (NYSCEF doc. no. 24, text messages.) While the Court acknowledges that the conversation is certainly strong evidence indicating that plaintiff signed the authorization as defendant contends (especially since April 8, 2022, is the same date that appears next to plaintiff's e-signature on the authorization form), the text messages do not conclusively demonstrate that it was, in fact, plaintiff who signed the form. In this context, if the Court were to accept the text conversation as proof that plaintiff signed the document, it would be ignoring the fact that plaintiff explicitly denies doing so (NYSCEF doc. no. 21 at ¶25, NYSCEF doc. no. 22 at ¶ 5 [c]) and forgoing its obligation on a motion to dismiss “to accept the complaint's factual allegations as true [and] accord to plaintiff the benefit of every possible favorable inference.” (*Amsterdam Hospitality Group*, 120 AD3d 431 at 433.) Accordingly, defendant is not entitled to dismissal of plaintiff's fraud claim under CPLR 3211 (a) (1).

Dismissal of Fraud and Intentional Infliction Claims Pursuant to CPLR 3211 (a) (7)

On a motion to dismiss for failure to state a cause of action under CPLR 3211 (a) (7), courts afford the pleadings a liberal construction, accept the facts as alleged in the complaint as true, and give the plaintiff the benefit of every possible favorable inference. (*Leon v Martinez*, 84 NY2d 83, 87 [1994]; *JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015].) A court's inquiry is limited to assessing the legal sufficiency of the plaintiff's pleadings; accordingly, its only function is to determine whether, from facts alleged and inferences drawn therefrom, plaintiff has stated the elements of a cognizable cause of action. (*JF Capital Advisors*, 25 NY3d at 764; *Skill Games, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003].)

To plead a fraud cause of action here, plaintiff must allege that defendant made a representation of material fact, the falsity of the representation, defendant's knowledge of its falsity, and justifiable reliance resulting in injury. (*Ambac Assu. Corp. v Countrywide Home Loans, Inc.*, 151 AD3d 83, 85 [1st Dept 2017].)

Defendant makes two arguments for why plaintiff has failed to adequately plead a cognizable claim for fraud. The first is premised on the distinction between making false statements to plaintiff versus third parties. According to him, plaintiff has not alleged that defendant made a false statement towards *him* that was then justifiably relied upon; instead, he contends, the only false representations alleged were made to Wells Fargo and American Express in applying for the business account and credit card. (NYSCEF doc. no. 13 at 6, def. memo of law.) Defendant correctly argues that, if this were the case, the Court would be required to grant dismissal. (*See Pasternack v Laboratory Corp. of Am. Holdings*, 27 NY3d 817, 829 [2016] [holding that third-party reliance on a misrepresentation that then causes damage to plaintiff is not enough to make out a cause of action for fraud; instead, it reiterated "this Court has stated on a number of occasions that a fraud claim requires *the plaintiff* to have relied upon a misrepresentation by a defendant to his or her detriment."].)

However, in his amended complaint, plaintiff states that "Defendant made representations to Plaintiff regarding Defendant's plan to further their business's operations, and the steps Defendant would take in that regard. To that end, Defendant would request Plaintiff's personal information and told him it was for purposes of establishing various elements of their business. Plaintiff relied on Defendant's representations that he would use [the] personal information only to validly further their business purpose." (NYSCEF doc. no. 21 at ¶ 34; *see also id.* at ¶ 5.) This allegation sufficiently alleges a misrepresentation made toward plaintiff and not solely to third parties. Accordingly, since plaintiff's proposed amended complaint has cured any potential defect in the original complaint, dismissal is not warranted on this ground. (*See LCVAWCP-Doe v Collins*, 218 AD3d 557, 558 [2d Dept 2023]; *Benjamin v 270 Malcolm X Dev., Inc.*, 214 AD3d 762, 764 [2d Dept 2023].)

Defendant's second argument for dismissal under CPLR 3211 (a) (7) is that plaintiff has failed to plead his fraud cause of action with particularity as required by CPLR 3016 (b). (*See* NYSCEF doc. no. 2, notice of motion; CPLR 3016 ["where a cause of action... is based upon misrepresentation [or] fraud... the circumstances constituting the wrong shall be stated in detail."]) Though the Court recognizes that the complaint does not contain an abundance of details regarding the misrepresentations defendant made to him—details that, through depositions and discovery, will need to be supplemented—plaintiff nonetheless describes the nature of the misrepresentation, i.e., that defendant deceived plaintiff into giving over his personal information, its approximate timing, and when defendant used his information to open the credit cards and checking account. Accordingly, the Court finds that plaintiff has plead the "the circumstances constituting the wrong" with sufficient particularity to defeat the motion to dismiss.

To properly plead an intentional infliction of emotional distress, plaintiff must allege (1) extreme and outrageous conduct, (2) an intent to cause, or disregard of a substantial probability

of causing, severe emotional distress, (3) a causal connection between the conduct and injury, and (4) severe emotional distress. (*Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46, 56 [2016]; *Cohn-Frankel v United Synagogue of Conservative Judaism*, 246 AD2d 332, 332 [1st Dept 1998]) In *Chanko*, the Court of Appeals described the level of conduct necessary to satisfy the outrageousness element as one that is “so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” (*Id.*, citing *Howell v New York Post Co.*, 81 NY2d 115, 121 [1993] [explaining the “price of flexibility in redressing utterly reprehensible behavior” is that the “requirements of the [tort] are rigorous and difficult to satisfy.”]) As defendant argues, the allegation that he sent a letter impersonating a law firm in an attempt to extort money from him, even in conjunction with plaintiff’s conclusory allegations of harassment, simply does not rise to this level of conduct. Plaintiff’s citation to *Mitchell v Giambruno* (35 AD3d 1040, 1041 [1st Dept 2006]) is inapposite as the conduct there—two years of “what can only be characterized as a relentless campaign of lewd comments and intimidation” culminating in the construction of two mock graves facing Mitchell’s home—is, by degrees, more outrageous than anything alleged of defendant. Likewise with *Petty v Law Off. Of Robert P Santoriella, P.C.* (200 AD3d 621, 622 [1st Dept 2021]), where defendant, abusing his position of power and the attorney-client relationship, “respond[ed] to plaintiff’s attempt to obtain legal representation relating to a prior sexual assault by sexually harassing her.” Since plaintiff’s allegations do not rise, as a matter of law, to the level necessary to satisfy the outrageousness element of this cause of action, the Court finds dismissal appropriate. To the extent that plaintiff moves for dismissal pursuant to the one-year statute of limitations for such a cause of action, the Court finds such arguments moot.

Since motions to amend pleadings pursuant to CPLR 3025 “shall be freely given upon terms as may be just” (*see* CPLR 3025; *Kimso Apts., LLC v Gandhi*, 24 NY3d 403, 411 [2014]), the Court grants plaintiff’s motion. It should be noted that the proposed amended complaint plaintiff attached to his motion set forth additional facts related only to his cause of action for fraud. As such, nothing in the amended complaint alters the Court’s holding as to the propriety of dismissing his intentional infliction of emotional distress.

Lastly, defendant is not entitled to an award of costs and attorney’s fees associated with bringing the instant motion. Although the Court declines to address whether plaintiff’s intentional infliction of emotional distress was brought after the cause of action’s one-year statute of limitations period, it is abundantly clear from the parties’ moving papers that plaintiff has a good-faith argument for why his intentional infliction of emotion distress claim was timely brought. As such, plaintiff’s conduct does not meet the frivolous standard articulated by CPLR 8303-a.

Accordingly, for the foregoing reasons, it is hereby

ORDERED that the branches of defendant Tyler Barney’s motion for dismissal pursuant to CPLR 3211 (a) (1) and (a) (4) are denied, the branch pursuant to CPLR 3211 (a) (7) is denied as to plaintiff Luke Longfellow’s cause of action for fraud but granted as to plaintiff’s cause of action for intentional infliction of emotional distress, and the branch pursuant to CPLR 3211 (a) (5) to dismiss plaintiff’s intentional infliction of emotional distress is deemed moot; and it is further

ORDERED that plaintiff’s motion for leave to amend the complaint pursuant to CPLR 3025 is granted in part, as follows: leave is granted as to plaintiff’s cause of action for fraud in the proposed form annexed to the plaintiff’s moving papers, and shall be deemed served upon defendant upon plaintiff counsel’s service of a copy of this order along with notice of entry thereof; leave is otherwise denied as to plaintiff’s cause of action for intentional infliction of emotional distress; and it is further

ORDERED that defendant 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 parties shall appear at 60 Centre Street, Courtroom 341, New York, New York, on January 16, 2024, at 9:30 a.m. for a preliminary conference with the Court; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order, along with notice of entry, on all parties within twenty (20) days of entry.

This constitutes the Decision and Order of the Court.

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DAKOTA D. RAMSEUR, J.S.C.

11/29/2023

DATE

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