

Umoh v Zunz

2023 NY Slip Op 34899(U)

March 8, 2023

Supreme Court, Kings County

Docket Number: Index No. 510391/21

Judge: Carolyn E. Wade

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At an IAS Term, Part 84 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Brooklyn, New York on the 8th day of March, 2023.

PRESENT:

HON. CAROLYN E. WADE,

Justice

-----X

NKEREUWEM UMOH,

Plaintiff,

Index No. 510391/21

-against-

DECISION and ORDER

EMMANUEL ZUNZ, VERGE RECORDS
INTERNATIONAL, INC., VERGE RECORDS, LLC,
ONERPM, LLC, ONERPM STUDIOS, LLC,

Mot. Seq. No. 1

Defendants.

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Recitation, as required by CPLR § 2219 (a), of the electronic papers considered in the review of the joint motion of defendants Emmanuel Zunz, Verge Records International, Inc., Verge Records, LLC, OneRPM, LLC, and OneRPM Studios, LLC to dismiss the amended complaint as against them:

Notice of Motion, Affirmation, and Exhibits Annexed.....	<u>7-8</u>
Opposing Affidavit, Memorandum of Law, and Exhibits Annexed.....	<u>17-27</u>
Reply Memorandum of Law.....	<u>28</u>

Upon the foregoing papers and after oral argument, the pre-answer motion of defendants Emmanuel Zunz, Verge Records International, Inc., Verge Records, LLC, OneRPM, LLC, and OneRPM Studios, LLC (collectively, "Defendants") to dismiss the amended complaint of plaintiff Nkereuwem Umoh ("Plaintiff"), dated August 31, 2021

(the “complaint”),¹ as amplified by Plaintiff’s affidavit, dated October 19, 2022 (“Plaintiff’s affidavit”),² pursuant to CPLR § 3211 (a) (5) and (7), is decided as follows:

Facts and Allegations

Plaintiff alleges that in 2008 he bought from defendant Emmanuel Zunz (“Zunz”) a 1% equity interest in one or more of the following defendants Verge Records International, Inc., Verge Records, LLC, OneRPM, LLC, OneRPM Studios, LLC, and/or their predecessors and successors (collectively, the “Zunz entities”), for the sum of \$15,000.³ In 2009, Plaintiff was offered (but he declined) an additional 4% equity interest in the Zunz entities in exchange for an additional payment of \$5,000.⁴

Thereafter, Plaintiff “[o]ver the years . . . has been wishing and praying for his investment to multiply greatly, while keeping a close eye on the activities of [the Zunz entities], and occasionally getting in contact with Zunz to inquire about the progress of the venture. However[,] Zunz continued to make it difficult for [P]laintiff to reach him and [the Zunz entities].”⁵ Eventually, in January 2021 (or approximately 13 years after his investment in 2008), Plaintiff contacted Zunz through the LinkedIn online community.⁶ In February 2021 and again in April 2021, Plaintiff and Zunz allegedly met in person to

¹ The complaint, though styled as “verified,” is not verified by either plaintiff or his counsel (NYSCEF Doc No. 19).

² Plaintiff’s affidavit is e-filed under NYSCEF Doc No. 18.

³ Complaint, ¶¶ 17, 20, 22-25, 38, 40; Plaintiff’s affidavit, ¶¶ 2-6.

⁴ Plaintiff’s affidavit, ¶ 4. *See also* Zunz’s email to Plaintiff, dated November 10, 2009, timed at 11:20 a.m. (NYSCEF Doc No. 20); Zunz’s email to Plaintiff, dated November 17, 2009, timed at 6:18 a.m. (NYSCEF Doc No. 23), both annexed as exhibits to Plaintiff’s affidavit.

⁵ Complaint, ¶ 18.

⁶ Plaintiff’s affidavit, ¶ 8.

discuss the status of his investment in the Zunz entities.⁷ During the April 2021 meeting, Zunz allegedly wanted Plaintiff to agree to reduce his 1% equity interest in the Zunz entities to a mere 0.25% equity interest because, according to Zunz, the original Zunz entities in which Plaintiff had invested failed in 2009 (that is shortly after Plaintiff's refusal in 2009 to provide an additional investment to Zunz).⁸

On May 3, 2021, Plaintiff commenced this action, raising two principal claims sounding in breach of contract and fraud,⁹ as well as further raising (as relevant herein) eight ancillary claims sounding in tortious interference with contract, conspiracy to defraud, breach of fiduciary duty, conversion, New York Debtor & Creditor Law, unjust enrichment, New York General Business Law (deceptive business practices), and promissory estoppel (collectively, the "ancillary claims").¹⁰ Plaintiff seeks declaratory relief (*i.e.*, a declaration that he owns at least a 1% equity interest in the Zunz entities), a "forensic accounting" of the Zunz entities, monetary damages (*i.e.*, that he be made "whole for all earnings he would have received but for [D]efendants' unlawful conduct"), "compensatory damages for pain and suffering," and finally punitive damages.¹¹ In lieu of an answer, Defendants moved to dismiss the amended complaint on the grounds of statute of limitations and failure to state a cause of action, pursuant to CPLR 3211 (a) (5) and (7),

⁷ Plaintiff's affidavit, ¶ 8.

⁸ Complaint, ¶ 26; Plaintiff's affidavit, ¶ 10.

⁹ Complaint, First and Third Causes of Action.

¹⁰ Complaint, Second, Fourth through Tenth Causes of Action. Plaintiff has withdrawn his remaining cause of action for breach of covenant of good faith and fair dealing in his Eleventh Cause of Action. *See* Plaintiff's Memorandum of Law in Opposition, at 15, § 9.

¹¹ Complaint, Prayer for Relief.

respectively. Plaintiff opposed by way of his affidavit with exhibits annexed. After oral argument held on November 9, 2022, the Court reserved decision on the instant motion.

Discussion

In the interest of brevity, the Court addresses those grounds for dismissal which are crucial to the determination of Defendants' motion; namely: (1) the statute of limitations pursuant to CPLR 3211 (a) (5) with respect to Plaintiff's breach of contract and fraud claims; and (2) failure to state a cause of action pursuant to CPLR 3211 (a) (7) with respect to Plaintiff's ancillary claims. Each of Plaintiff's claims (or groups of claims) are addressed ad seriatim.

1. Statute of Limitations (CPLR 3211 [a] [5])

Breach of Contract Claim

A breach of contract cause of action is governed by a six-year statute of limitations (see CPLR 213 [2]). The statute of limitations begins to run when the cause of action accrues (CPLR 203 [a]), and this occurs "when all of the facts necessary to the cause of action have occurred so that the party would be entitled to obtain relief in court" (*Hahn Auto. Warehouse, Inc. v American Zurich Ins. Co.*, 18 NY3d 765, 770 [2012] [internal quotation marks omitted]). "A breach of contract cause of action accrues at the time of the breach, even though the injured party may not know of the existence of the wrong or injury" (*Sternberg v Continuum Health Partners, Inc.*, 186 AD3d 1554, 1557 [2d Dept 2020] [emphasis added]; see also *Ely-Cruikshank Co., Inc. v Bank of Montreal*, 81 NY2d 399,

403 [1993]). The timing of the breach (rather than when a plaintiff allegedly sustained damages arising therefrom) starts the accrual of the limitations period for the breach of contract claim (*see St. George Hotel Assoc. v Shurkin*, 12 AD3d 359, 360 [2d Dept 2004]).

Although the accrual date may be difficult to state with precision from the allegations of the amended complaint (as amplified by Plaintiff's affidavit), Defendants have demonstrated *prima facie* that Zunz's failure to respond to Plaintiff's inquiries occurred – and Plaintiff's breach of contract claim; therefore, accrued – a reasonable time after his refusal in 2009 to advance an additional \$5,000 to Zunz, and that such accrual occurred many years beyond the six-year limitations period applicable to this breach of contract action which was commenced in 2021 (*see Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 104 [1st Dept 2009], *lv denied* 15 NY3d 703 [2010]; *see also Hahn Auto. Warehouse*, 18 NY3d at 770-771). In opposition, Plaintiff failed to raise a triable issue of material fact. Contrary to his contention, Plaintiff's meetings with Zunz in February-April 2021 did not restart the limitations period (*see Taggart v State Farm Mut. Auto. Ins. Co.*, 272 AD2d 222 [1st Dept 2000]).¹² Indeed, to hold otherwise would allow Plaintiff to extend the statute of limitations indefinitely “by simply failing to make a demand” for return on his investment within a reasonable period thereafter (*Town of Brookhaven v MIC Prop. & Cas. Ins. Corp.*, 245 AD2d 365, 365 [2d Dept 1997], *lv denied*

¹² Further, Zunz's LinkedIn messages to Plaintiff (as reproduced in an exhibit to his affidavit at NYSCEF Doc No. 25) do not meet the requirements of General Obligations Law § 17-101 which provides, in relevant part, that an acknowledgment or promise contained in a writing signed by the party to be charged thereby is the only competent evidence of a new or continuing contract whereby to take an action out of the operation of the provisions of limitations of time for commencing actions under the civil practice law and rules.”

92 NY2d 806 [1998]). Accordingly, Plaintiff's breach of contract claim is time-barred pursuant to CPLR 3211 (a) (5).

Fraud Claim

"A cause of action alleging fraud must be commenced within six years after the date on which the cause of action accrued or within two years after the time the plaintiff could have discovered the fraud with reasonable diligence," whichever is later (*see* CPLR 213 [8]; *Espie v Murphy*, 35 AD3d 346, 347 [2d Dept 2006]). "The burden of establishing that the fraud could not have been discovered before the two-year period prior to the commencement of the action rests on the plaintiff, who seeks the benefit of the exception" (*Lefkowitz v Appelbaum*, 258 AD2d 563, 563 [2d Dept 1999]). Inasmuch as Plaintiff, by his own admission, was "keeping a close eye on the activities of [the Zunz entities], and [was] occasionally getting in contact with Zunz to inquire about *the [general] progress of the venture,*"¹³ it is clear that he failed to reasonably inquire regarding *his specific status as an investor in the venture*, although he had received no distributions from (or any tax forms with respect to) the venture. It follows that the plaintiff has failed to raise a triable issue of material fact that he could not have discovered the particulars surrounding the allegedly fraudulent conduct on the part of Zunz and the other Defendants within two years following his refusal in 2009 to advance an additional \$5,000 to Zunz as an additional equity investment (*see Shannon v Gordon*, 249 AD2d 291, 292 [2d Dept 1998], *lv denied*

¹³ Complaint, ¶ 18 (emphasis added).

92 NY2d 819 [1999]). Thus, Plaintiff's fraud claim is also time-barred pursuant to CPLR 3211 (a) (5).¹⁴

2. Failure to State a Cause of Action (CPLR 3211 [a] [7])

As noted, Plaintiff further alleged a host of ancillary claims sounding in: (1) tortious interference with contract; (2) conspiracy to defraud; (3) breach of fiduciary duty; (4) conversion; (5) New York Debtor & Creditor Law; (5) unjust enrichment; (6) New York General Business Law (deceptive business practices); and (7) promissory estoppel. All such claims, however denominated, are based on the same allegations, seek the same damages as the time-barred breach of contract and fraud claims, and fail to assert an independent wrong. Accordingly, all such ancillary claims are dismissed as duplicative of the breach of contract and fraud claims (*see Gym Door Repairs, Inc. v Astoria Gen. Contr. Corp.*, 144 AD3d 1093, 1096 [2d Dept 2016]; *Ullmann-Schneider v Lacher & Lovell-Taylor, P.C.*, 121 AD3d 415, 416 [1st Dept 2014]; *Edem v Grandbelle Intl., Inc.*, 118 AD3d 848, 849 [2d Dept 2014]; *Chowaikei & Co. Fine Art Ltd. v Lacher*, 115 AD3d 600 [1st Dept 2014]; *Woss, LLC v 218 Eckford, LLC*, 102 AD3d 860, 862 [2d Dept 2013]; *Hylan Elec. Contr., Inc. v MasTec N. Am., Inc.*, 74 AD3d 1148, 1150 [2d Dept 2010]).

¹⁴ Further, "a cause of action to recover damages for fraud will not arise when the only fraud charged relates to a breach of contract" (*Mastropieri v Solmar Const. Co., Inc.*, 159 AD2d 698, 700 [2d Dept 1990]). "[A] cause of action alleging breach of contract may not be converted to one for fraud merely with an allegation that the contracting party did not intend to meet its contractual obligations" (*Refreshment Mgt. Servs. Corp. v Complete Off. Supply Warehouse Corp.*, 89 AD3d 913, 914 [2d Dept 2011]). Here, Plaintiff's fraud claim merely alleges (in ¶ 33 of the complaint) that Defendants "never intended to make any returns to plaintiff for his investment" when he purchased his 1% equity interest in the Zunz entities. Therefore, the only fraud charged relates to Defendants' alleged breach of contract (*see New York Univ. v Cont. Ins. Co.*, 87 NY2d 308, 318 [1995]; *Shear Enters., LLC v Cohen*, 189 AD3d 423, 424-425 [1st Dept 2020]; *Weinstein v Natalie Weinstein Design Assoc., Inc.*, 86 AD3d 641, 642-643 [2d Dept 2011]).

The parties' remaining arguments either are without merit or need not be reached in light of the foregoing determination.

Conclusion

Based on the foregoing and after oral argument, it is hereby

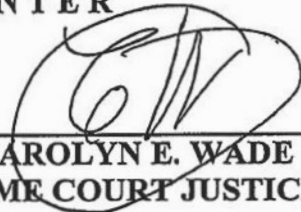
ORDERED that Defendants' motion is **GRANTED**, and all of Plaintiff's claims, as pleaded in his amended complaint, are **DISMISSED** without costs or disbursements; and it is further

ORDERED that, as the result of the rulings made herein, the amended complaint is **DISMISSED** in its entirety; and it is further

ORDERED that Defendants' counsel is directed to electronically serve a copy of this Decision and Order with notice of entry on Plaintiff's counsel and to electronically file an affidavit of said service with the Kings County Clerk.

This constitutes the Decision and Order of the Court.

ENTER



HON. CAROLYN E. WADE
SUPREME COURT JUSTICE

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