

Dar v SAJ Transp. Northeast LLC

2024 NY Slip Op 30881(U)

March 15, 2024

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, and NAJAM UD DIN,

Defendants.

-----X

JAFFAR NAQVI and ALI NAQVI,

Third-Party Plaintiffs,

-against-

SALMAN DAR,

Third-Party Defendant.

-----X

SAJ TRANSPORTATION NORTHEAST LLC,

Second Third-Party Plaintiff,

-against-

ZAHIDAH DAR, SALMAN DAR, ASAD DAR, and AMAAN
DAR,

Second Third-Party Defendants.

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INDEX NO. 650707/2022

08/18/2023,

08/16/2023,

MOTION DATE 09/06/2023

MOTION SEQ. NO. 007 008 009

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595468/2022

Second Third-Party
Index No. 595720/2023

The following e-filed documents, listed by NYSCEF document numbers (Motion 007) 121, 122, 123, 125, 126, 127, and 128

were read on this motion to QUASH SUBPOENA, FIX CONDITIONS

The following e-filed documents, listed by NYSCEF document numbers (Motion 008) 112, 113, 114, 115, 116, 117, 118, 119, 120, 144, 145, 146, 147, 148, and 168

were read on this motion to DISMISS

The following e-filed documents, listed by NYSCEF document numbers (Motion 009) 133, 134, 135, 136, 137, 138, 140, 141, 142, 143, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 169, and 170

were read on this motion to

DISMISS

LOUIS L. NOCK, J.S.C.

Upon the foregoing documents, defendant/third-party plaintiff Jaffar Naqvi (“Naqvi”) and defendant/second third-party plaintiff SAJ Transportation Northeast LLC’s (“SAJ”) motion to quash subpoenas issued by plaintiff to nonparties JP Morgan Chase, NA, and Van Cott Ebrahimi P.C. (Mot. Seq. No. 007); plaintiff/second third-party defendant Zahidah Dar’s (“plaintiff” or “Zahidah”) motion to dismiss the second third-party complaint and for discovery related relief (Mot. Seq. No. 008); and defendants’ motion to dismiss the complaint (Mot. Seq. No. 009), are consolidated for disposition in accordance with the following memorandum decision. The court assumes familiarity with the facts and circumstances of this case as set forth in its prior decisions dated May 17, 2022, and June 26, 2023 (NYSCEF Doc. Nos. 30, 101).

Quash Subpoenas (Mot. Seq. No. 007)

“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]). The burden of establishing that a subpoena seeks protected material lies with the party asserting privilege or other grounds for a protective order (*Markel v Pure Power Boot Camp, Inc.*, 171 AD3d 28, 31 [1st Dept 2019]).

Naqvi and SAJ state that the subpoenas should be quashed on the grounds of insufficient notice and improper service. As the court has previously stated, 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]).¹ Neither of the entities subpoenaed has objected to the subpoena or moved to quash it. As to whether the subpoenas were properly served, Naqvi and SAJ moved to quash the subpoenas before plaintiff had yet served them and challenged the propriety of service before it was even made. At minimum then, this argument was premature when made. In any case, movants fail to provide any authority for the proposition that a party not targeted by a subpoena may raise an argument related to its service on another party.

Naqvi and SAJ also claim that the subpoenas are essentially a fishing expedition. In this regard, they argue that a subpoena may not be used to ascertain the existence of evidence, but must instead seek specific identifiable documents. Further, they claim that the information sought is irrelevant. However, the subpoenas are narrowly crafted so as to seek specific identifiable documents (subpoenas, NYSCEF Doc. No. 123), which documents bear on plaintiff's claim that she was improperly forced out of SAJ, that defendants had embezzled money from SAJ, and that SAJ's assets were dissipated in order to rob plaintiff of her share of the company. Naqvi and SAJ attempt to creatively interpret the wording of the subpoenas to imply that plaintiff is fishing for evidence it does not know exists, but the court is satisfied upon its review that the subpoenas are properly crafted. Accordingly, the motion to quash is denied.

¹ Naqvi and SAJ's alternative interpretation of *Velez* is unpersuasive.

Finally, defendants seek a protective order staying enforcement of the subpoenas pending decision on the instant motion to quash and the motions to dismiss. As the motions are being decided herein, defendants have not established entitlement to a protective order going forward.

Dismissal of the Second Third-Party Complaint (Mot. Seq. No. 008)

SAJ's third-party complaint alleges nine causes of action: breach of contract against plaintiff and second third-party defendant Salman Dar ("Salman"); breach of fiduciary duty against plaintiff and Salman; breach of the covenant of good faith and fair dealing against plaintiff and Salman; unjust enrichment against plaintiff and Salman; fraud against plaintiff and Salman; misrepresentation against plaintiff and Salman; conversion against plaintiff, Salman, and their children, second third-party defendants Asad ("Asad") and Amaan Dar ("Amaan"); aiding and abetting breach of fiduciary duty against the Dars; and aiding and abetting fraud against the Dars.

As an initial matter the court notes that the facts alleged in the second third-party complaint are functionally identical to those alleged in Naqvi's third-party complaint (NYSCEF Doc. No. 37), counterclaims to the amended complaint (NYSCEF Doc. No. 62), his proposed amended third-party complaint (NYSCEF Doc. No. 77), and the amended third-party complaint (NYSCEF Doc. No. 106) filed following the court's decision on Naqvi's cross-motion to amend (Mot. Seq. No. 004). The only substantive difference is that SAJ, rather than Naqvi, is now the party asserting the claims. In its prior decision and order on the motion to dismiss the counterclaims and third-party complaint and the cross-motion to amend the third-party complaint, the court noted several pleading deficiencies in the proposed amended third-party causes of action. In replicating those claims herein, SAJ has not cured those deficiencies, and has introduced some new ones as well, as set forth below.

The claim for breach of contract asserts that plaintiff and Salman had contractual agreements with SAJ regarding Salman's management thereof, the transfer of his share to plaintiff, and the draws on SAJ's funds available to both plaintiff and Salman. These claims arise, respectively, from an alleged oral agreement between Salman and Naqvi, and the SAJ operating agreement. The court has already found that, at the preliminary stage, Naqvi has adequately alleged a counterclaim for breach of the operating agreement against plaintiff, and a third-party cause of action against Salman for breach of the oral agreement (decision and order dated June 26, 2023, NYSCEF Doc. No. 101 at 2-3, 6). The second third-party complaint does not allege any separate contract between SAJ and plaintiff, Salman, or both of them together. Accordingly, this claim must be denied.

As the court held previously, 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*, 121 AD3d 415 [1st Dept 2014]; *Soni v Pryor*, 102 AD3d 856 [2d Dept 2013]). The allegations have not materially been changed. Moreover, as was previously established, Salman gave up his membership interest in SAJ in 2015, and any fiduciary duty owed to SAJ ceased at that time. The events underlying SAJ'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"]).

The fifth and sixth causes of action for fraud and misrepresentation are also insufficiently plead for a number of reasons. SAJ fails 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]). SAJ’s additional allegation that plaintiff and Salman intended to abscond with SAJ’s funds concern plaintiff and Salman’s performance of the relevant contracts, and therefore do not resuscitate the prior allegation in support of these claims. 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 second third-party complaint.

The conversion claim alleges that the funds plaintiff and Salman absconded with from SAJ was used to, among other things, purchase a house in New Brunswick, New Jersey, which was then transferred to Asad and Amaan for \$10.00. As to plaintiff and Salman, this claim is duplicative of the breach of contract claim and must be dismissed (*Richbell Information Services, Inc. v. Jupiter Partners, LP*, 309 AD2d 288, 306 [1st Dept 2003]). As to Asad and Amaan, they argue that the claim is time-barred. A claim for conversion is subject to a three-year statute of limitations, and accrues from the moment of wrongful possession against a bad faith possessor (*Swain v Brown*, 135 AD3d 629, 631 [1st Dept 2016]). Here, SAJ alleges that the funds used to

purchase the house were initially deposited into an account held in the name of plaintiff and Asad on December 23, 2019 (second third-party complaint, NYSCEF Doc. No. 111, ¶ 52). Amaan is never alleged, except in conclusory fashion, to have obtained authority over the funds, and it is the funds that are the subject of the conversion, rather than the house. In calculating the appropriate time for the expiration of the statute of limitations, the court must allow for the Governor's Executive Order tolling the time to file or serve in civil cases, dated March 20, 2020 (9 NYCRR 8.202.8). That toll continued until it expired as of November 4, 2020 (9 NYCRR 8.202.72). The statute began to run against Asad on December 23, 2019, and was tolled as of March 20, 2020, a total of 88 days. The statute began to run again on November 4, 2020. Adding the remaining 1,007 days, the statute expired on August 8, 2023, five days after the filing of the second third-party complaint. Accordingly, the claim is timely interposed as to Asad.

Nevertheless, the claim must be dismissed. An essential element of a claim for conversion is that "someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else" (*Petrone v Davidoff Hutcher & Citron, LLP*, 150 AD3d 776, 777 [2d Dept 2017]). SAJ fails to allege any intentional conduct by either Asad or Amaan with respect to monies allegedly embezzled from SAJ by plaintiff and Salman. Indeed, as previously noted the complaint alleges nothing with respect to Amaan and alleges only that Asad was a joint account holder with plaintiff of the account where monies allegedly taken from SAJ were deposited.

Finally, the claims for aiding and abetting breach of fiduciary duty and fraud must be dismissed, as the underlying tort claims have been dismissed (*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"]).

Dismissal of the Complaint (Mot. Seq. No. 009)

The notice of motion does not clearly state the statutory basis for defendants' motion.

Defendants assert in their reply papers that this is intended to be a motion to dismiss, and expressly disavow that this is a motion for summary judgment (Held reply affirmation, NYSCEF Doc. No. 149 at 4-5). Thus, the motion is one to dismiss for failure to state a cause of action, specifically, because the operating agreement and Naqvi's later agreement with Salman are alleged to have been for an illegal purpose. Defendants' assertion that there is a basis for such a motion independent of CPLR 3211(a)(7) is unsupported by case law or statutory authority.

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction” (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). “[The court] accept[s] the facts as alleged in the complaint as true, accord[ing] plaintiff the benefit of every possible favorable inference, and determin[ing] only whether the facts as alleged fit within any cognizable legal theory” (*id.* at 87-88). Ambiguous allegations must be resolved in plaintiff's favor (*JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015]). “The motion must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [internal citations omitted]). “[W]here ... the allegations consist of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, they are not entitled to such consideration” (*Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1st Dept 1994]).

Here, defendants do not argue that the complaint fails to state any of the causes of action set forth therein. Defendants even concede that the contracts at issue are “facially legal” (Held reply affirmation, NYSCEF Doc. No. 149, ¶ 30). Rather, defendants contend that because

Salman was actively working for SAJ after transferring his shares to plaintiff, Salman was in fact committing social security disability fraud by hiding such fact from the Social Security Administration (“SSA”). Further, that plaintiff, as Salman’s wife, must have known about and been an active participant in the fraud. It follows, defendants argue, that the court should not enforce the contracts because “a party to an illegal contract can not[sic] resort to a court of law for help in obtaining its enforcement” (*Valenza v Emmelle Coutier, Inc.*, 288 AD2d 114 [1st Dept 2001]). This argument relies on a number of suppositions: first, that the work Salman was doing was such that he could not have been receiving social security benefits at the time; second, that Salman knew he was doing so; third, that Salman structured the operating agreement and his later agreement with Naqvi in such a way as to hide any income he received; and fourth, that plaintiff was a knowing and active participant in the entire process. The record before the court on these issues is hotly disputed. The issues of fact raised by defendants’ argument cannot be resolved on a motion to dismiss (*e.g. Correa v Orient-Express Hotels, Inc.*, 84 AD3d 651 [1st Dept 2011] [“Further, defendant’s argument relies upon a factual issue, whether it controlled 21 Club, Inc. and thus constituted its alter ego, which cannot be determined on this pre-answer motion to dismiss”]). Defendants’ invocation of the defense of *in pari delicto* fails no better (*Chemical Bank v Stahl*, 237 AD2d 231, 232 [1st Dept 1997] [holding denial of motion to dismiss based on unclean hands and *in pari delicto* was proper given issues of fact]).

Accordingly, it is hereby

ORDERED that the motion to quash subpoenas (Mot. Seq. No. 007) issued to nonparties JP Morgan Chase, NA, and Van Cott Ebrahimi P.C.(NYSCEF Doc. No. 123) is denied; and it is further

ORDERED that the motion by second third-party defendants Zahidah, Salman, Asad, and Amaan Dar to dismiss the second third-party complaint (Mot. Seq. No. 008) is granted; and it is further

ORDERED that the second third-party complaint is severed and dismissed; and it is further

ORDERED that the motion by defendants SAJ Transportation Northeast LLC, Jaffar LLC (NY), Jaffar LLC (NJ), NYSpeed LLC, Jaffar Naqvi, Ali Naqvi, Emuras Emil, and Najum Ud Din to dismiss the complaint (Mot. Seq. No. 009) is denied; and it is further

ORDERED that the parties shall appear for a status conference in Room 1166, 111 Centre Street, New York, New York on April 3, 2024 at 10:00 AM.

This constitutes the decision and order of the court.

ENTER:

Louis L. Nock

<u>3/15/2024</u>					<u>LOUIS L. NOCK, J.S.C.</u>
DATE					
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
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