

Murphy v PHG Funding LLC

2024 NY Slip Op 31473(U)

April 12, 2024

Supreme Court, New York County

Docket Number: Index No. 656158/2021

Judge: Margaret A. Chan

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

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KEVIN MURPHY, Plaintiff, - v - PHG FUNDING LLC, PFIFEBRIDGE INC., JOHN P. THOMAS, TODD C. JORN, and STEVEN NIGRO Defendants.	<table border="0"> <tr> <td style="width: 30%;">INDEX NO.</td> <td style="border-bottom: 1px solid black;">656158/2021</td> </tr> <tr> <td></td> <td style="text-align: center;">08/24/2023, 10/24/2023, 10/26/2023</td> </tr> <tr> <td>MOTION DATE</td> <td style="border-bottom: 1px solid black;">10/26/2023</td> </tr> <tr> <td></td> <td style="text-align: center;">MS 003 MS 004 MS 005</td> </tr> <tr> <td>MOTION SEQ. NO.</td> <td style="border-bottom: 1px solid black;">MS 005</td> </tr> </table>	INDEX NO.	656158/2021		08/24/2023, 10/24/2023, 10/26/2023	MOTION DATE	10/26/2023		MS 003 MS 004 MS 005	MOTION SEQ. NO.	MS 005
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**DECISION + ORDER ON
 MOTION**

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HON. MARGARET A. CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88
 were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 004) 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 106, 108
 were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 005) 104
 were read on this motion to/for DISMISS

In this action arising from defendants' failure to pay pursuant to a decade-old settlement agreement, plaintiff Kevin Murphy moves to dismiss the counterclaims of defendants PHG Funding LLC, Pfi febridge, Inc., John P. Thomas, and Todd C. Jorn (together defendants) (MS 003). Crossclaim defendant Steven Nigro¹ and third-party defendant TAG Financial Institutions Group LLC (TAG) (together "the Nigro Defendants") similarly move to dismiss the crossclaims and third-party claim against them (MS 004, MS 005).² Defendants oppose. For the reasons below, the motions are granted in their entirety.

¹ Defendant/Crossclaim defendant Steven Nigro's status as a defendant in the main action is currently in flux: plaintiff submitted a notice of discontinuance against Nigro only (NYSCEF # 37, Notice of Discontinuance), but that document was returned for correction, and the other defendants oppose the discontinuance (see NYSCEF # 43).

² While administratively there are three motions here, in reality, there are only two due to several clerical errors. The Nigro Defendants initially filed their brief, affidavit, and exhibits as part of the 656158/2021 MURPHY, KEVIN vs. PHG FUNDING LLC ET AL
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Background

The original factual background is recounted in this court's order on the prior motion to dismiss (NYSCEF # 44, MS 001). Following that decision, defendants filed an answer asserting counterclaims, crossclaims, and third-party claims (NYSCEF # 61, Answer and Counter/Cross/Third Party Complaint).

In support of the counterclaims, defendants allege that in 2012, they signed a settlement agreement with plaintiff ("the Amended Note") that assigned him the "Tiger Capital Asset," a "portfolio" of life insurance policies (NYSCEF # 61 at 6:1-5).³ As part of that settlement, the parties formed third-party defendant Phoenix Asset Recovery Services LLC ("PARS")⁴ to "facilitate the transfer of the collateral" to plaintiff (*id.* at 6:6). Plaintiff was appointed manager of the company (*id.* at 6:7). Defendants allege that plaintiff's entire case is misguided because he already settled all outstanding amounts in 2016 via an agreement and with a "substantial payment" from Nigro, *i.e.*, \$1,218,209.00 stemming from the Tiger Capital Asset ("the alleged 2016 settlement") (*id.* at 7:10-12). Defendants further allege upon information and belief that plaintiff avoided federal tax liability for that payment by "utilize[ing] the framework of PARS to wrongfully ascribe federal tax liability to Defendants" (*id.* at 7:13-15). Defendants raise three counterclaims: breach of contract of the Amended Note, a related Guarantee Agreement, and the PARS LLC Agreement; unjust enrichment "resulting from [plaintiff's] initial investment" in 2007; and breach of fiduciary duty (*id.* at 8:17 - 9:31).

In support of the crossclaim and third-party complaint, defendants allege that defendants Thomas and Jorn, together with crossclaim defendant Nigro, used their company Hudson to sell plaintiff the portfolio in 2007 that later led to the dispute and eventual 2012 settlement (*id.* at 10:1-5). The three became members of PARS to pay back plaintiff and caused plaintiff to recover "more than \$1,218,209.00 in addition to additional collateral that Murphy liquidated" (*id.* at 10: 6-8). Defendants reassert that plaintiff's case is misguided because he settled all claims with Nigro on behalf of defendants in 2016 with the Tiger Capital Asset (*id.* at 10:9 - 11:11). However, defendants also accuse Nigro of "conspiring" with plaintiff to extract more money from defendants by "wrongfully . . . tak[ing] individual credit

motion to dismiss the *counter* claims (MS003; *see* NYSCEF #s 75-88). The next day, they correctly filed a motion to dismiss the *cross* claims and refiled their documents in support of that motion (MS004; *see* NYSCEF # 89, Notice of Motion; NYSCEF #s 90-103). Two days later, they filed *another* notice of motion purporting to amend their original notice (*see* NYSCEF # 104, Amended Notice of Motion). For whatever reason, this amended notice, despite being clearly marked as an amendment and as part of the same motion sequence, was instead treated as a new motion by NYSCEF and assigned motion sequence number "MS 005." As a result, there is no briefing associated with MS 005 on the docket, because that "motion" was never meant to exist. To relieve the confusion, the court will consider MS 004 and MS 005 as a single motion and decide both here.

³ Defendants re-start the paragraph numbering in each section of the answer/crossclaims/counterclaims, so all citations are to page number and paragraph number similar to a transcript.

⁴ PARS has not filed any motion to dismiss.

for the proceeds of the Tiger Capital Asset,” the implication being that the alleged 2016 settlement did not cover defendants (*id.* at 11:12-16, 12:19). Defendants also incorporate defendant Jorn’s affidavit from the prior motion to dismiss (NYSCEF # 106, Def. Response, at 2). The PARS Operating Agreement attached to that affidavit states that the “income stream generated by the Tiger Capital Asset will be deemed to be the capital contribution of Nigro” (NYSCEF # 31, PARS LLC Agreement, at Background ¶ [c], ¶ 7.1 [b] [iii]).⁵ Finally, defendants allege that Nigro held himself out as the tax matters partner for PARS and demanded payment from defendants for services from Citrin Cooperman & Company LLP, even though defendants never retained that company or benefitted from its services (NYSCEF # 61 at 11:17 – 12:18).

Defendants raise three cross-claims against Nigro: breach of contract of the Amended Note, the Guarantee Agreement, and the PARS LLC Agreement generally; breach of fiduciary duty based on duties owed from “his prior affiliation with Hudson, PHG Funding LLC and Pfi febridge Inc” and under the three aforementioned contracts; and common law indemnification for Nigro’s failure to “confirm[] that any further claimed debt of Defendants was thereby extinguished” (*id.* at 12:20 – 13:34).

Defendants also raise a claim for contractual indemnification against third-party defendants PARS and TAG because, allegedly, the PARS LLC Agreement allows indemnification between members (*id.* at 14:1-3). Defendants further allege that they received 2021 Schedule K-1 Statements for PARS with the message that the statements were “c/o Tag Financial Institutions Group LLC” (*id.* at 15:4). Defendants allege “upon information and belief” that “TAG now operates and/or controls PARS” (*id.* at 15:6). Defendants allege contractual indemnification on that basis.

Plaintiff individually moves to dismiss the counterclaims, while Nigro and TAG together move to dismiss the crossclaims and third-party complaint.

Legal Standards

On a motion to dismiss pursuant to CPLR 3211 (a)(7), 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 into any cognizable legal theory” (*Siegmund Strauss, Inc. v E. 149th Realty Corp.*, 104 AD3d 401, 403 [1st Dept 2013]). Significantly, “whether a plaintiff...can ultimately establish its allegations is not taken into consideration in determining a motion to dismiss” (*Phillips S. Beach LLC v ZC Specialty Ins. Co.*, 55 AD3d 493, 497 [1st Dept 2008], *lv denied* 12 NY3d 713 [2009])

⁵ The court relies on this version of the PARS LLC Agreement because it is the only one submitted with all required signatures (*see* NYSCEF # 31 at 31-33).

At the same time, “[i]n those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence, they are not presumed to be true or accorded every favorable inference” (*Morgenthau & Latham v Bank of New York Company, Inc.*, 305 AD2d 74, 78 [1st Dept 2003] [internal citation and quotation omitted]). However, dismissal based on documentary evidence under 3211(a)(1) may result “only when it has been shown that a material fact as claimed by the pleader is not a fact at all and no significant dispute exists regarding it” (*Acquista v New York Life Ins. Co.*, 285 AD2d 73, 76 [1st Dept 2001]), quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). Moreover, “affidavits, which do no more than assert the inaccuracy of plaintiffs’ allegations, may not be considered, in the context of a motion to dismiss, for the purpose of determining whether there is evidentiary support for the complaint ... and do not otherwise conclusively establish a defense to the asserted claims as a matter of law” (*Tsimerman v Janoff*, 40 AD3d 242, 242 [1st Dept 2007]).

Discussion

As a threshold matter, all of defendants’ claims are dismissed because they are conclusorily pled. There are few if any factual allegations anywhere in defendants’ counterclaims, and those that are present do not link to the causes of action in any obvious way. The causes of action sections state bare legal requirements without any specificity or factual backing. Overall, even under the low requirements of notice pleading, defendants’ allegations fail to put any party on notice of the claims against them. There are also individual reasons for granting both motions.

MS003: Motion to Dismiss Counterclaims

Initially, plaintiff argues that the Guaranty Provision of the Amended Note single-handedly defeats all of defendants’ counterclaims. It is not immediately clear whether the counterclaims fit into this provision or what effect it should have. Regardless, all the counterclaims fail for their own reasons.

Breach of Contract

Defendants allege that plaintiff “breached and continued to breach the Amended Note, the Guarantee Agreement, and the PARS Operating Agreement” (NYSCEF # 61, page 8 ¶ 19). Defendants further allege that plaintiff “breached the PARS Operating Agreement by [1] seeking to ascribe federal tax liability to Jorn and Thomas in violation of the specific terms of that Agreement” and [2] accepting Nigro’s \$1,218,209.00 payment but then “continuing to seek to recover claimed default interest after the settlement amount was paid in full” (NYSCEF # 71 at 7).

These allegations fail to state a claim for breach of contract. Defendants make no allegations about the Guarantee Agreement whatsoever. As for the tax

liability allegations, they are vague, conclusory, and general, with no allegations of how the tax was improperly put on defendants or avoided by plaintiff, or how those acts are in any way a breach of contract. Moreover, while defendants allege that the tax avoidance violate “specific terms of the Agreement,” they only quote one term: Paragraph 3.11 of the Operating Agreement, which as alleged merely creates an unspecified “duty of care” on plaintiff’s part (*see* NYSCEF # 61, page 6 ¶ 7). How that “duty of care” affects tax liability is unsubstantiated and unexplained. Given that defendants filed the PARS LLC Agreement in support of their earlier motion to dismiss and also quote from that Agreement throughout, it is especially odd for them not to point to at least some specific term in the Agreement.

The allegations relating to the \$1,218,209.00 payment also do not create a cause of action. For one thing, defendants have not clearly paid the settlement “in full” as alleged, because the Amended Note makes very clear that at the time of signing defendants owed \$1,228,307.00 — about \$100,000 more than what they paid (NYSCEF # 64, Amended Note, at page 1, ¶ II.C). Moreover, continuing to seek default payments does not appear to violate any of the three listed contracts. At best, it violates a *fourth* contract—the alleged 2016 settlement between plaintiff and Nigro. However, that settlement may not even exist given that the PARS LLC Agreement expressly states that the Tiger Capital Payment is Nigro’s capital contribution to PARS (NYSCEF # 31 at Background ¶ [c], ¶ 7.1 [b] [iii]). But regardless of the settlement’s existence, defendants do not allege that they were parties to it and in fact allege in their brief in support of their crossclaims that they were *not* (*see* NYSCEF # 106 at 9 [basis of common law indemnification claim is “Nigro’s failure to *obtain releases for all parties* in connection with the transfer of the Tiger Capital Payment revenue stream”]).

Defendants lastly argue that the breach claim should survive because “defendants have not yet been permitted to proceed with the depositions of Nigro and Murphy to fully understand the breaches that have occurred between 2016 and 2021” (NYSCEF # 71 at 7). In other words, defendants themselves do not know how plaintiff breached. Defendants are not permitted to go on a fishing expedition to find claims. Thus, the breach of contract counterclaim is dismissed.

Unjust Enrichment

Defendants’ unjust enrichment claim likewise fails. In addition to being conclusorily pled as mentioned at the outset, also, the reason for this claim is unclear. Defendants could be complaining about one of two things, either of which does not make a claim; the unjust enrichment claim is dismissed.

Breach of Fiduciary Duty

“To state a claim for breach of fiduciary duty, plaintiff must allege that (1) defendant owed them a fiduciary duty, (2) defendant committed misconduct, and (3)

they suffered damages caused by that misconduct” (*New York Mar. & Gen. Ins. Co. v Wesco Ins. Co.*, 213 AD3d 461, 462 [1st Dept 2023]). Furthermore, “a cause of action sounding in breach of fiduciary duty must be pleaded with particularity” (*id.*).

Even with the most liberal construction, defendants’ fiduciary duty counterclaim fails because defendants did not plead any non-conclusory damages. Defendants merely alleged that they “have incurred harm and damages in an amount to be proven at trial due to Murphy’s breaches of the fiduciary duty” (NYSCEF # 61 at 9 ¶ 31). This does not suffice to support a cause of action.

Defendants also failed to plead the other elements with the required degree of particularity. There is no clear allegation of the source of the fiduciary duty, what that duty encompasses, or even how that duty was breached. As for misconduct, defendants argue that the breach was in “misus[ing] the LLC framework to ascribe federal tax liability to Jorn and Thomas for funds that he received on their behalf” (NYSCEF # 78 at 9), but much about that sentence makes no sense. Plaintiff would have received that money on his own behalf, not theirs. And as already discussed, the tax allegations are vague, conclusory, and general, containing no specifics about how the tax liability was avoided or how that breaches the duty. This counterclaim is dismissed.

Therefore, plaintiff’s motion to dismiss is granted in its entirety.

MS 004 & 005: Motion to Dismiss Crossclaims and Third Party Complaint

Breach of Contract

Defendants’ only argument in their briefs is that Nigro breached one of three contracts by “transferring the funds related to the Tiger Capital Payment to [plaintiff] for [Nigro’s] own exclusive benefit” (NYSCEF # 106 at 7). Yet as shown in the PARS LLC Agreement, this actually *followed* the contract—the LLC Agreement expressly states that the Tiger Capital Payment shall be considered Nigro’s capital contribution (NYSCEF # 31 at Background ¶ [c], ¶ 7.1 [b] [iii]). Because defendants make no other argument for breach of contract, this claim must fail.

Breach of Fiduciary Duty

Defendants’ fiduciary duty crossclaim fails for the same reasons as their fiduciary duty counterclaim. While the allegations differ slightly between the cross and counterclaims, defendants consistently fail to allege the source of the fiduciary duty, what that duty encompasses, what act specifically breached it, and non-conclusory damages. This claim is dismissed.

Common Law Indemnification

“In order to recover on a claim for common law indemnification, ‘the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident for which the indemnitee was held liable to the injured party by virtue of some obligation imposed by law’” (*Blank Rome, LLP v Parrish*, 92 AD3d 444, 445 [1st Dept 2012])

Here, defendants claim common law indemnification because Nigro “failed to obtain releases for all parties in connection with the transfer of the Tiger Capital Payment revenue stream” (NYSCEF # 106 at 9). This claim also fails. The cross-complaint did not make any allegations about releases that Nigro should have or failed to obtain. Moreover, there is nothing in the record showing Nigro was under a duty to obtain any such releases. As repeatedly explained, the copy of the PARS LLC Agreement provided by defendants shows that the Tiger Capital Asset is Nigro’s capital contribution to PARS (NYSCEF # 31 at Background ¶ [c], ¶ 7.1 [b] [iii]). Defendants cannot claim Nigro committed a wrong by claiming credit for a payment that they all contractually agreed was his to claim.

Finally, as Nigro points out, defendants did not allege that their liability has been caused solely by Nigro’s acts. As explained above, defendants admit that they have paid \$1,218,209.00, which is less than the \$1,228,307.42 (plus interest) owed under the Amended Note (NYSCEF # 64 at 1). The common law indemnification claim thus fails.

Contractual Indemnification

Finally, defendants allege that they are entitled to contractual indemnification from TAG. Their only allegations in support are that (a) the PARS LLC Agreement provides for some amount of contractual indemnification between members, and (b) PARS’s latest tax forms were delivered to the defendants “c/o TAG.” However, contractual indemnification by definition requires contractual privity, and a piece of mail does not contractual privity make. TAG is not alleged to be a member of PARS or to have ever signed a single agreement with the defendants. Indeed, the documents do not show TAG to be in any way contractually involved with any of the events at issue in this case. Therefore, the contractual indemnification claim is dismissed.

Conclusion

For the foregoing reasons, it is

ORDERED that the motion by plaintiff Kevin Murphy to dismiss the counterclaims of defendants PHG Funding LLC, Pfffebridge, Inc., John P. Thomas,


and Todd C. Jorn (MS 003) is granted, and the counterclaims are dismissed; and it is further

ORDERED that the motions by crossclaim defendant Steven Nigro and third-party defendant TAG Financial Institutions Group LLC to dismiss the crossclaims of defendants PHG Funding LLC, Pfifebridge, Inc., John P. Thomas, and Todd C. Jorn (MS 004 & MS 005) are granted in their entirety; and it is further

ORDERED that third party defendant TAG Financial Institutions Group LLC shall be removed from the caption; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment dismissing the counterclaims in favor of plaintiff Kevin Murphy, dismissing the crossclaims in favor of crossclaim defendant Steven Nigro, and dismissing the third-party claim in favor of defendant TAG Financial Institutions Group LLC; and it is further

ORDERED that plaintiff Kevin Murphy, cross-defendant Steven Nigro, and third-party defendant TAG Financial Institutions Group LLC shall serve a copy of this Decision and Order with notice of entry on the Clerk of the Court in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page and on the court's website at the address www.nycourts.gov/supctmanh).

<u>04/12/2024</u> DATE	 MARGARET CHAN, J.S.C.			
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
			<input type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	REFERENCE
			<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT