Paradigm Staffing, LLC v Dial Doc Now Med. Group, P.C.
2024 NY Slip Op 35438(U)
April 1, 2024
Supreme Court, Queens County
Docket Number: Index No. 705457/2023
Judge: Anna Culley
This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ANNA CULLEY IA Part 27
Justice

--X

PARADIGM STAFFING, LLC,

Plaintiff,

-against-

DIAL DOC NOW MEDICAL GROUP, P.C., DR. JEFFREY WEINBERG, and CARYN WEINBERG,

Defendants.

--X

DIAL DOC NOW MEDICAL GROUP, P.C., DR. JEFFREY WEINBERG, and CARYN WEINBERG,

Third-Party Plaintiffs

-against-

KRYSTAL MCKENNA and ROSS HERMAN,

Third-Party Defendants.

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Index Number 705457/2023

Motion Dates November 28, 2023
March 5, 2024

Mot Seq. No. 1 & 2

The following numbered papers read on these motions: (1) the motion by the defendants, pursuant to CPLR 3211 (a) (1) and (a) (7), to dismiss the plaintiff's second, third, fourth, fifth, and sixth causes of action; and (2) the separate motion by third-party defendant Krystal McKenna, pursuant to CPLR 3211 (a) (4) and (a) (7), to dismiss the third-party complaint insofar as asserted against her.

	Papers Numbered
Seq #1	
Notice of Motion - Affidavits - Exhibits	EF 11-22
Answering Affidavits - Exhibits	EF 24-29
Reply Affidavits....................................	EF 30

Seq #2

Notice of Motion - Affidavits - Exhibits	EF 35-39
Answering Affidavits - Exhibits	EF 40-49
Reply Affidavits...	EF 50

Upon the foregoing papers, it is ordered that the motions are consolidated for the purpose of a single order and are determined as follows:

The plaintiff commenced this action against the defendants/third-party plaintiffs (the defendants) in March 2023. The complaint alleges that the defendant/third-party plaintiff Dr. Jeffrey Weinberg (Jeffrey) is the sole owner of the defendant/third-party plaintiff Dial Doc Now Medical Group, P.C. (DDN) and that the plaintiff entered into a Staffing Services Agreement (the staffing agreement) with DDN in January 2022. Under the terms of the staffing agreement, the plaintiff was to provide staffing, equipment, and supplies required to perform mobile COVID-19 tests to DDN at a rate of $225 per hour. The plaintiff alleges that it provided services to DDN pursuant to the staffing agreement between January 2022 and October 2022 and that DDN promptly paid each of the plaintiff's monthly invoices during this period. However, the plaintiff alleges that the November 2022 invoice was not paid in a timely fashion. Rather, the plaintiff alleges that in December 2022, DDN's attorneys explained that DDN was managing certain issues with paying the plaintiff's invoice and requested that the plaintiff continue providing services to DDN pursuant to the staffing agreement. The plaintiff alleges that it complied with this request as a sign of good faith, and that the November 2022 invoice was paid in January 2023.

However, the plaintiff further alleges that the parties met in January 2023 and that Jeffrey and the defendant/third-party plaintiff Caryn Weinberg (Caryn) made material misrepresentations to the plaintiff at this meeting. Specifically, the plaintiff alleges that Jeffrey and Caryn (the Weinbergs) assured the plaintiff that, although it remained outstanding, the December 2022 invoice would be paid and that if the plaintiff continued to provide its services to DDN, DDN would continue to pay the plaintiff pursuant to the staffing agreement. According to the plaintiff, it relied on these representations and provided services to DDN through February 2023. Nevertheless, the plaintiff alleges that DDN did not pay the December 2022, January 2023, and February 2023 invoices. This being the case, the plaintiff alleges that despite the assurances made at the January 2023 meeting, the defendants did not intend to make any further payments to the plaintiff at that time.

The plaintiff further alleges that in February 2023, it was informed that DDN would not be paying any further invoices. The complaint notes that the staffing agreement was signed by third-party defendant Krystal McKenna but alleges that in February 2023, the defendants challenged the validity of the staffing agreement by asserting that McKenna did not have the authority to enter into agreements on behalf of DDN. Because payments under the agreement had been made for nearly a year, the plaintiff alleges that the defendants' assertion concerning McKenna's capacity was a deceptive tactic made for the sole purpose of avoiding payments under the staffing agreement. Thus, the plaintiff alleges that it is owed $1,419,997.50 from the unpaid invoices. The complaint asserts a cause of action for breach of contract against DDN, causes of action for fraudulent inducement, unjust enrichment, and fraudulent conveyance against all defendants, and causes of action for breach oral contract and promissory estoppel against the Weinbergs.

The defendants answered the complaint and subsequently commenced a third-party action against, among others, McKenna. The third-party complaint alleges, among other things, that McKenna falsely held herself out as DDN's Chief Operating Officer and that although she lacked the authority or approval to do so, she executed the staffing agreement on behalf of DDN. To this end, the third-party complaint further alleges that McKenna actively concealed the staffing agreement's existence, and that Jeffrey did not become aware of it until December 2022. The third-party complaint asserts, among other claims, causes of action for breach of fiduciary duty, common-law indemnification, contribution, and tortious interference with contract against McKenna.

The defendants' motion to dismiss

Prior to filing the third-party complaint, the defendants moved to dismiss the second through sixth causes of action in the complaint. In support of their motion, the defendants submit, among other things, the pleadings, the staffing agreement, several invoices sent to DDN by the plaintiff, and certain letters between counsel for the parties. Based on these submissions, the defendants assert that the allegations in the complaint are based on the staffing agreement, and the only parties to this agreement are the plaintiff and DDN. The defendants assert that the documentary evidence demonstrates that all six causes of action arise directly from the staffing agreement, and thus, the complaint should be dismissed insofar as asserted against the Weinbergs because they are not parties to the agreement. Insofar as the second, third, and fourth causes of action are asserted against DDN, the defendants argue that they are subject to dismissal because they are insufficiently pleaded and are duplicative of the breach of contract claim.

In opposition, the plaintiff asserts that the branch of the defendants' which seeks dismissal pursuant to CPLR 3211 (a) (1) is untimely because it was filed after the defendants served their answer. Thus, the plaintiff contends that the motion should be treated as one for summary judgment. In any event, the plaintiff argues that its fraudulent inducement claim is not duplicative of the breach of contract claim because it is based on the defendants' representations made in January 2023 which caused the plaintiff to continue its business relationship with DDN. The plaintiff further asserts that the unjust enrichment claim is pleaded in the alternative and is therefore not duplicative. With respect to the fraudulent conveyance claim, the plaintiff contends that this claim is sufficiently pleaded pursuant to Debtor and Creditor Law § 276. The plaintiff also argues that, like the claim for fraudulent inducement, the claims for breach of oral contract and promissory estoppel against the Weinbergs are based on their representations from the January 2023 meeting, and thus, are not duplicative.

CPLR 3211 (a) (1)

A motion pursuant to CPLR 3211 (a) (1) may be granted only where the documentary evidence utterly refutes the factual allegations in a complaint and conclusively establishes a defense as a matter of law (*see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Cavaliere v 1515 Broadway Fee Owner, LLC*, 150 AD3d 1190, 1191 [2d Dept 2017]). For evidence to qualify as "documentary evidence" for the purposes of a motion pursuant to CPLR 3211 (a) (1), it must be unambiguous, authentic, and undeniable (*see Fontanetta v John Doe 1*, 73 AD3d 78, 84-86 [2d Dept 2010]). To this end, documentary evidence includes "judicial records and documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable" (*Phillips v Taco Bell Corp.*, 152 AD3d 806, 807 [2d Dept 2017]).

To the extent that the plaintiff argues that this branch of the defendants' motion is untimely, the court disagrees. In their answer, the defendants asserted an affirmative defense predicated on documentary evidence, thus preserving their claim for a subsequent motion pursuant to CPLR 3211 (a) (1) (*see Blair & Evans LLP v Rizzo*, 211 AD3d 454, 454-455 [1st Dept 2022]; *cf. Masada Universal Corp. v Goodman Sys. Co.*, 121 AD2d 518, 518-519 [2d Dept 1986]).

In any event, the court notes that on this branch of the defendants' motion, the staffing agreement is the only submission which constitutes documentary evidence. The invoices, letters, and discovery responses submitted by the defendants are not documentary evidence because their contents can be controverted by other evidence (*see MJ Lilly Assoc., LLC v Ovis Creative, LLC*, 221 AD3d 815, 816 [2d Dept 2023]; *Bonavita v Government Empls. Ins. Co.*, 185 AD3d 892, 893-894 [2d Dept 2020]). In any event, the staffing agreement, standing alone, fails to utterly refute the factual allegations in the complaint or conclusively establish a defense as a matter of law.

This branch of the defendants' motion is therefore denied.

<u>CPLR 3211 (a) (7)</u>

"On a motion pursuant to CPLR 3211 (a) (7) to dismiss a complaint for failure to state a cause of action, the court must accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Pacific W., Inc. v E & A Restoration, Inc.*, 178 AD3d 834, 835 [2d Dept 2019]; *see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). "Where evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one, and unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate" (*Rabos v R&R Bagels & Bakery, Inc.*, 100 AD3d 849, 851-852 [2d Dept 2012]; *see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

In opposition to a motion to dismiss for failure to state a claim, a plaintiff may submit affidavits to remedy defects in the complaint and preserve claims which, while inartfully pleaded, are potentially meritorious (*see Cron v Hargro Fabrics*, 91 NY2d 362, 366 [1998]). "The test of the sufficiency of a pleading is whether it gives sufficient notice of the transaction, occurrences, or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from its averments" (*V. Groppa Pools, Inc. v Massello*, 106 AD3d 722, 723 [2d Dept 2013] [internal citations and quotation marks omitted]). "Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a prediscovery CPLR 3211 motion to dismiss" (*Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38 [2d Dept 2006]; *see EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

Disqualification of plaintiff's counsel

As an initial matter, to the extent that the defendants assert that plaintiff's counsel should be disqualified due to a purported conflict of interest, the defendants did not set forth this requested relief in their notice of motion (*see* CPLR 2214 [a]). Therefore, their contentions on this point shall not be considered.

The claims against Caryn

The defendants are entitled to dismissal of the complaint insofar as asserted against Caryn. The complaint explicitly alleges that Jeffrey is the sole member of DDN, and the complaint is devoid of allegations that Caryn is a director, officer, or employee of DDN. Thus, the complaint fails to allege any basis to impose liability on Caryn aside from her status as Jeffrey's spouse. This is insufficient to establish a basis for liability against Caryn.

The fraudulent inducement claim against DDN and Jeffrey

The defendants are not entitled to dismissal of this claim insofar as asserted against DDN and Jeffrey. "[A] cause of action premised upon fraud cannot lie where it is based on the same allegations as the breach of contract claim" (*Fromowitz v W. Park Assoc., Inc.*, 106 AD3d 950, 951 [2d Dept 2013] [internal quotation marks omitted]). "Where, however, it is alleged that the defendant made misrepresentations of present facts that were collateral to the contract and served as an inducement to enter into the contract, a cause of action alleging fraudulent inducement is not duplicative of a breach of contract cause of action" (*Did-it.com, LLC v Halo Group, Inc.*, 174 AD3d 682, 683 [2d Dept 2019]). Here, the complaint specifically alleges that at the January 2023 meeting, the defendants promised to pay the December 2022 invoice, that DDN would continue to pay the plaintiff pursuant to the staffing agreement if the plaintiff continued to provide services pursuant to the staffing agreement, and that these representations were false because the defendants did not intend on making any further payments under the staffing agreement. The complaint further alleges that these misrepresentations were made to induce the plaintiff to continue providing services under the staffing agreement, and that the plaintiff relied on these misrepresentations by continuing to provide services to DDN through February 15, 2023. Contrary to the defendants' contention, these allegations demonstrate that the fraudulent inducement claim does not emanate from the staffing agreement. While "inducement to enter into the contract" has not been alleged here, the Second Department has held that, under similar facts, a fraud claim was not duplicative of a breach of contract claim (*see Emby Hosiery Corp. v Tawil*, 196 AD3d 462 [2d Dept 2021]).

This branch of the defendants' motion is therefore denied.

The unjust enrichment, breach of oral contract, and promissory estoppel claims

"An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim" (*Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 790 [2012]). Here, the plaintiff, in its opposition papers, asserts that its unjust enrichment claim is not based on the staffing agreement, but rather, is predicated on the promises made by DDN and Jeffrey at the January 2023 meeting. Critically, however, this argument renders the unjust enrichment claim duplicative of the fraudulent inducement claim (*see Philip S. Schwartzman, Inc. v Pliskin, Rubano, Baum & Vitulli*, 215 AD3d 699, 702 [2d Dept 2023]). Similarly, because the breach of oral contract and promissory estoppel claims are based on the same facts as the fraudulent inducement claim and effectively seek identical damages, they are duplicative (*see Toobian v Toobian*, 209 AD3d 907, 910 [2d Dept 2022]; *Michael Davis Constr., Inc. v 129 Parsonage Lane, LLC*, 194 AD3d 805, 807-808 [2d Dept 2021]; *Did-it.com, LLC*, 174 AD3d at 683). The defendants are therefore entitled to dismissal of these claims.

The fraudulent conveyance claim against DDN and Jeffrey

The defendants are entitled to dismissal of this claim insofar as asserted against DDN and Jeffrey, as this claim is not pleaded with the requisite specificity (*see* CPLR 3016 [b]; *Zanani v Meisels*, 78 AD3d 823, 825 [2d Dept 2010]). A cause of action for fraudulent conveyance can be predicated on one of several provisions of the Debtor and Creditor Law, each with its own distinct elements (*see* Debtor and Creditor Law §§ 273, 274, 275, 276, 278; *ABN AMRO Bank, N.V. v MBIA, Inc.*, 17 NY3d 208, 228 [2011]; *Commodity Futures Trading Commn. v Walsh*, 17 NY3d 162, 174-175 [2011]; *Stout St. Fund I, L.P. v Halifax Group, LLC*, 148 AD3d 744, 747-748 [2d Dept 2017]). Here, however, the plaintiff does not specify the alleged statutory violation. Rather, the complaint merely alleges conclusory claims, made upon information and belief, that DDN has become or will soon become insolvent, that Jeffrey and Caryn have either begun to wind up DDN's operations or intend to do so, and that Jeffrey and Caryn transferred an unspecified sum of money from DDN's bank accounts.

The plaintiff's argument in opposition is insufficient to address this deficiency. Although the plaintiff asserts that its claim is sufficiently pleaded under Debtor and Creditor Law § 276, the court disagrees. The allegations constituting this claim were made upon information and belief but did not identify the source of the information, and the plaintiff did not submit an affidavit or other evidence to remedy this defect (*see Carlyle, LLC v Quik Park 1633 Garage LLC*, 160 AD3d 476, 477 [1st Dept 2018]).

McKenna's motion to dismiss

In lieu of an answer, McKenna moves to dismiss the third-party complaint pursuant to CPLR 3211 (a) (4) and (a) (7). In support of her motion, McKenna submits the third-party complaint in this action and the third-party complaint filed in a separate action, *All in Won Med-Bill & IT LLC v Dial Doc Now Medical Group, P.C. and Dr. Jeffrey Weinberg*, which is pending in Supreme Court, Rockland County under index No. 030066/2023 (the Rockland County action). Based on these submissions, McKenna argues, among other things, that the third-party complaint is subject to dismissal because the claims are duplicative of the claims asserted against McKenna in the Rockland County action. In opposition, the defendants assert, among other things, that the two actions are not duplicative because the Rockland County action involves different parties and the scope of the allegations against McKenna are broader than those asserted in the third-party complaint here.

"Pursuant to CPLR 3211 (a) (4), a court has broad discretion in determining whether an action should be dismissed based upon another pending action where there is a substantial identity of the parties, the two actions are sufficiently similar, and the relief sought is substantially the same" (*Cooper v Thao*, 162 AD3d 980, 981 [2d Dept 2018] [internal quotation marks omitted]). "[W]hile a complete identity of parties is not a necessity for dismissal under CPLR 3211 (a) (4), there must be a 'substantial' identity of parties, 'which generally is present when at least one plaintiff and one defendant is common in each action' " (*Jaber v Elayyan*, 168 AD3d 693, 694 [2d Dept 2019] [citations omitted], quoting *Morgulas v Yudell Realty*, 161 AD2d 211, 213 [1st Dept 1990]). "The critical element is that both suits arise out of the same subject matter or series of alleged wrongs" (*Cherico, Cherico & Assoc. v Midollo*, 67 AD3d 622, 622 [2009] [internal quotation marks omitted]).

Here, the third-party complaint in this action is duplicative of the third-party complaint interposed in the Rockland County action (*see* CPLR 3211 [a] [4]; *Sokoloff v Schor*, 175 AD3d 568, 569 [2d Dept 2019]; *Seneca Specialty Ins. Co. v T.B.D. Capital, LLC*, 143 AD3d 971, 972 [2d Dept 2016]). Although the defendants contend otherwise, a complete identity of parties and claims is not required for dismissal pursuant to CPLR 3211 (a) (4) (*see Jaber*, 168 AD3d at 694). In any event, a review of the filings in both actions reveals that each third-party complaint is predicated on McKenna's purported conduct with respect to the staffing agreement. In addition, the defendants' claims for breach of fiduciary duty, faithless servant, breach of the covenant of good faith and fair dealing, tortious interference with contract, and an accounting against McKenna in this action are also asserted by DDN and Jeffrey against McKenna in the Rockland County action.

Accordingly, it is

ORDERED that the branch of the defendants' motion to dismiss the complaint insofar as asserted against the defendant Caryn Weinberg is granted; and it is further,

ORDERED that the branch of the defendants' motion to dismiss the causes of action for unjust enrichment, fraudulent conveyance, breach of oral contract, and promissory estoppel insofar as asserted against the defendant Dr. Jeffrey Weinberg is granted; and it is further,

ORDERED that the branch of the defendants' motion to dismiss the causes of action for unjust enrichment and fraudulent conveyance insofar as asserted against DDN is granted; and it is further,

ORDERED that McKenna's separate motion to dismiss the third-party complaint insofar as asserted against her is granted; and it is further,

ORDERED that all other relief not expressly granted herein is denied.

Movant is not relieved from the applicable provisions of CPLR 2220 and 202.5-b (h) (2) of the Uniform Rules of Supreme and County Courts insofar as it relates to service and notice of entry of the filed document upon all other parties to the action/proceeding, whether accomplished by mailing or electronic means, whichever may be appropriate dependent upon the filing status of the party.

The foregoing constitutes the decision and order of this court.

ANNA CULLEY, J.S.C.

Dated: April 1, 2024

FILED
4/4/2024
COUNTY CLERK
QUEENS COUNTY