Raistone Purch. LLC-Series XXXVII v Ocampo
2025 NY Slip Op 31183(U)
April 4, 2025
Supreme Court, New York County
Docket Number: Index No. 654931/2024
Judge: Joel M. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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RAISTONE PURCHASING LLC-SERIES XXXVII,

Plaintiff,

- v -

GUSTAVO ANDRES PATINO OCAMPO, JOSE ANUAR MILLAN ABADIA, CECILIA SIERRA MORAN, REPAPERS CORPORATION

Defendants.

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INDEX NO. 654931/2024

MOTION DATE 11/07/2024

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 19, 20, 21

were read on this motion to DISMISS.

This case arises from a Receivables Purchase Agreement ("RPA") entered into between Plaintiff Raistone Purchasing, LLC-Series XXXVII ("Raistone" or "Plaintiff") and non-party Comercializadora de Papeles y Cartones Surpapel S.A. ("Comercializadora"). Plaintiff alleges that Defendants Gustavo Andres Patino Ocampo ("Patino"), Jose Anuar Millan Abadia ("Millan"), Cecilia Sierra Moran ("Moran") (collectively, the "Individual Defendants") and Repapers Corporation ("Repapers," together with the Individual Defendants, "Defendants") defrauded Plaintiff, using Comercializadora, damaging them in an amount in excess of $17,000,000.00.

The instant motion seeks to dismiss the complaint as to Patino (*see* NYSCEF 1). For the reasons set forth below, the motion is denied.

BACKGROUND

I. Factual Background

According to the factual allegations in the Complaint (NYSCEF 1 ["Compl."]), which are assumed to be true for purposes of this motion, in or around June 2020, Jason Rosenthal, then-president of non-parties Barnett Corporation and its affiliate Barnett Forest LLC (collectively, "Barnett"), contacted Plaintiff to arrange a supply chain financing program (Compl. ¶35). Rosenthal represented that Barnett was a global seller of paper products and provided a list of its suppliers, including Comercializadora, which purportedly sold Barnett $110 million in paper supplies annually (Compl. ¶¶35, 38). Plaintiff later reached out to Comercializadora through Karen Grey, whom Rosenthal identified as its contact person. Ms. Gray was later revealed to be an assistant to Patino (Compl. ¶¶39, 40).

On September 17, 2020, Plaintiff provided Comercializadora with details about the financing program and a proposed Receivables Purchase Agreement ("RPA"), emphasizing that participation was only for verified Barnett suppliers (Compl. ¶¶41–44). The following day, at Patino's direction, Grey submitted Comercializadora's banking information for payments, and shortly after, Millan executed the RPA with Patino's and Moran's approval (Compl. ¶¶45–46, 49–50). Plaintiff alleges that these representations were false, as Comercializadora was not actually a supplier to Barnett but instead is a holding company with no paper supply operations (Compl. ¶113).

Relying on the agreement, Plaintiff purchased receivables from Comercializadora (Compl. ¶81). Raistone entered into a separate agreement with Barnett entitled "Supply Chain Finance Customer Agreement" dated September 17, 2020 ("SCFC Agreement") (Compl. ¶55). After Plaintiff issued payments to Comercializadora, Barnett failed to satisfy its payment

obligations under the SCFC Agreement (Compl. ¶¶94–95). Plaintiff sent multiple default and repurchase notices to Comercializadora, which were received by Patino (Compl. ¶¶96–99). According to Plaintiff, Comercializadora did not respond to these notices or repurchase the outstanding receivables as required under the terms of the RPA (Compl. ¶101).

Further investigation allegedly revealed that Patino, along with the other defendants, directed the transfer of funds from Comercializadora to other entities, including Repapers Corporation, which Patino owned (Compl. ¶¶116–20, 122–28, 130). The principal amount owed to Plaintiff by Comercializadora is $13,317,490.14 and the interest on this sum was approximately $4,567,470.73, as of September 19, 2024 (Compl. ¶¶107–08).

II. Procedural Background

Plaintiff filed the Complaint on September 19, 2024 (Compl.). The Complaint contains six causes of action against Defendants: (1) fraud, (2) fraudulent inducement, (3) aiding and abetting, (4) civil conspiracy to commit fraud, (5) unjust enrichment, and (6) conversion (Compl. ¶¶143–61, 162–79, 180–85, 186–90, 191–96, 197–205). Patino now moves to dismiss those claims as asserted against him for non-joinder, duplication, and failure to state a claim.

Previously, Plaintiff had filed a Complaint on December 1, 2022, in the Southern District of New York against Comercializadora, captioned *Raistone Purchasing LLC-Series XXXVII v. Comercializadora de Papeles y Cartones Surpapel S.A.*, Case No. 22-cv-10221 [SDNY 2022] (the "Federal Action"), containing two causes of action against Comercializadora: (1) breach of contract and (2) contractual indemnification (*see* NYSCEF 10).

On February 4, 2025, the Federal Court granted summary judgment in favor of Plaintiff (*see Raistone Purchasing LLC-Series XXXVII v Comercializadora de Papeles y Cartones Surpapel S.A.*, 2025 WL 388400 [SDNY 2025] [NYSCEF 21] [the "Summary Judgment

Order"]). The Federal Court found that Plaintiff had demonstrated that Comercializadora breached the RPA by falsely representing "that Eligible Receivables existed when they did not and by failing to repurchase the outstanding receivables" (*id.* at *6). The Federal Court held that the "the bulk of Comercializadora's representations and warranties false when made" because, among other reasons, "Barnett never sold goods to Comercializadora," and awarded Plaintiff $13,317,490.14 plus interest, and attorney's fees (*id.* at *7).

Prior to the hearing on the motion to dismiss, the Court requested that the parties address the effect, if any, of the Summary Judgment Order in the Federal Action on this motion (NYSCEF 18). The parties filed letter responses at NYSCEF 19-21. Patino primarily argued that the Summary Judgment Order was *res judicata* and barred Plaintiff's claims against him in this action. Plaintiff took the position that the Summary Judgment Order supports Raistone's claims and causes of action against Patino. Oral argument was heard on March 4, 2025.

DISCUSSION

I. Res Judicata

Patino argues that the Summary Judgment Order in the Federal Action (NYSCEF 10) precludes his claim in this Court under the doctrine of res judicata (*see* NYSCEF 19). This argument is unavailing, at least at this time. Res judicata bars an action if "(1) the previous action involved an adjudication on the merits; (2) the previous action involved the plaintiffs or those in privity with them; (3) the claims asserted…were, or could have been, raised in the prior action" (*Monahan v NY City Dep't of Corr.*, 214 F3d 275, 285 [2d Cir 2000]). However, adjudication occurs when "a claim between the parties has been previously 'brought to a final conclusion'" (*see City of New York v Welsbach Elec. Corp.*, 9 NY3d 124, 127 [2007], quoting *Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 347 [1999]). Since the Federal court has

not renedered a final non-appealable judgment, res judicata does not bar Plaintiff's claims. If and when a final non-appealable judgment is entered in the Federal Action, the parties may submit full briefing on the issue of whether and to what extent Patino has a viable res judicata defense despite the fact that he was not a party in the Federal Action and the Federal Court's ruling favored Plaintiff.

II. Non-Joinder

Under CPLR 3211(a)(10), an action may be dismissed for failure to join a necessary party. It is the moving party's burden to establish either that complete relief cannot be accorded between the parties without the nonparty, or that the nonparty might be inequitably affected by a judgment in this action (*Signature Bank v Faibish*, 142 AD3d 1069, 1070 [2d Dept 2016]; CPLR 1001[a]). Here, Patino claims that Barnett is a necessary party.

Patino fails to demonstrate that the claims against him cannot be fully adjudicated without Barnett's involvement, or that its absence creates a risk of an inequitable outcome. Raistone's claims against Patino arise from Patino's allegedly fraudulent misrepresentations to induce Raistone to send Comercializadora millions of dollars, not Barnett's compliance or non-compliance with the SCFC (Plaintiff's separate agreement with Barnett). Nor has Patino demonstrated that Barnett will be impacted by a decision that Patino defrauded Raistone, which would not require a finding with respect to *Barnett's* independent obligations under the SCFC.[1]

[1] To the extent Barnett is potentially jointly and severally liable as an unnamed member of Patino's purported conspiracy, Raistone is under no requirement to sue all of those who participate in a conspiracy (*Eagle Spring Water Co. v Webb & Knapp, Inc.*, 236 NYS2d 266, 274 [Sup Ct, NY County 1962]; *Super Hoof, Inc. v Blancato*, 85 CIV. 1371 (RLC), 1985 WL 3393, at *1 [SDNY 1985]).

Separately, because Barnett cannot be joined as a party because it is in bankruptcy (*Signature Bank*, 142 AD3d at 1070), any further analysis would fall under the second half of CPLR 1001[b], which addresses when joinder is excused because the Court can only obtain jurisdiction over by party by consent or appearance. Because the Court does not find that Barnett is a necessary party, however, there is no need to address CPLR 1001(b).

III. Failure to State a Cause of Action

On a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a viable claim, 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 within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). A motion to dismiss pursuant to CPLR 3211(a)(1) should be "granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mut. Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]).

a. Fraud and Fraudulent Inducement

Patino's motion to dismiss the first and second cause of action for fraud and fraudulent inducement is denied. CPLR 3016(b) requires that causes of action based on misrepresentation or fraud must state in detail the related circumstances, such as "the content of the allegedly false representations, the fraudulent intent with which these representations were made, or any injury suffered as a proximate result of the fraudulent representations" (*see Masada Universal Corp. v Goodman Sys. Co.*, 121 AD2d 518, 519 [2d Dept 1986]).

Here, Plaintiff asserts specific instances of allegedly fraudulent conduct by Patino (*see* Compl. at ¶46 [alleging that Patino directed his assistant to provide bank account information to Plaintiff]; Compl. at ¶113 [alleging that Patino knew Comercializadora had never been a

manufacturer or supplier of paper]; Compl. at ¶¶117, 134 [alleging that Patino participated in discussions with Barnett on where to send Plaintiff's payments]). Additionally, Plaintiff sufficiently alleges that Patino exercised decision-making authority for Comercializadora (Compl. at ¶16). While Plaintiff's Complaint does contain some grouping to show that all the Individual Defendants took the same action, there are also numerous instances of Patino's individual actions (*see, e.g.*, Compl. at ¶¶ 46, 50, 57, 78, 80, 82, 113, 116–117, 121, 130, 132).

Nor are the fraud claims against Patino duplicative of the breach of contract claims brought in the Federal Action. Fraud claims are not duplicative of breach of contract claims when they involve misrepresentations that induced reliance and were distinct from the contractual obligations (*see Kosowsky v Willard Mtn., Inc.*, 90 AD3d 1127, 1129 [3d Dept 2011]). Although there, to be sure, overlapping factual allegations and claimed damages, "'a corporate officer may be held personally liable for committing fraud on the corporation's behalf'" (*3P-733, LLC v Tawan Davis*, 187 AD3d 626, 627 [1st Dept 2020] [citations omitted]; *First Bank of Americas v Motor Car Funding, Inc.*, 257 AD2d 287, 294 [1st Dept 1999] [same]). The Complaint asserts that Patino instructed his assistant, Ms. Grey, to provide bank account details to Plaintiff, and that in responding to Raistone and providing the information Raistone requested, Patino, along with the other Individual Defendants, represented to Raistone, and caused Comercializadora to represent to Raistone, that Comercializadora was a supplier of paper and paper-related goods to Barnett (Compl. ¶¶46, 47). These alleged misrepresentations are independent of Comercializadora's contractual obligations, and Plaintiff has sufficiently alleged that it relied on them to its detriment.

While the First Department has cautioned that "an insincere promise to perform a contractual obligation may not be used to expand potential liability for 'conduct essentially

constituting a breach of contract to persons and entities not in contractual privity with the plaintiff'" (*3P-733, LLC*, 187 AD3d at 627 [citations omitted]), on a motion to dismiss, the Court finds that Plaintiff has adequately alleged fraud and fraudulent inducement claims against Patino that are not duplicative of the breach of contract claim in the Federal Action.

b. Aiding and Abetting Fraud

Patino's motion to dismiss the third cause of action is denied. To establish liability for aiding and abetting fraud under New York law, parties must show "(1) the existence of a fraud; (2) the defendant's knowledge of the fraud; and (3) that the defendant provided substantial assistance to advance the fraud's commission" (*see Krys v Pigott*, 749 F3d 117, 127 [2d Cir 2014]). Plaintiff has sufficiently pled the existence of the fraud by pointing to Patino's deposition testimony that "Comercializadora is not and has never been a manufacturer or supplier of paper or paper-related products" (*see* Compl. at ¶113). Comercializadora's bank records also show the payments made by Plaintiff were sent to various holding companies owned by the Individual Defendants and Barnett (*see* Compl. at ¶¶118–120, 122–130). Further, the Complaint alleges specific conduct and representations of Patino that, if true, indicate knowledge and substantial assistance of the fraud (*see* Compl. at ¶¶46, 50, 80, 82, 97, 99, 113, 116–117, 121, 130, 134–135).

c. Civil Conspiracy to Commit Fraud

Patino's motion to dismiss the sixth cause of action is denied. "[A] plaintiff may plead the existence of a conspiracy in order to connect the actions of the individual defendants with an actionable, underlying tort, and establish that those actions were part of a common scheme" (*see McSpedon v Levine*, 158 AD3d 618, 621 [2d Dept 2018]). Plaintiff has sufficiently pled the existence of a conspiracy to defraud by pointing to the various actions taken by the Individual

Defendants that induced Plaintiff to enter into the agreement (Compl. at ¶¶46, 50, 51, 97, 99). Plaintiff also sufficiently pled that these representations established a scheme to defraud Plaintiff in which Patino participated (Compl. at ¶¶77, 113–114, 116–130).

d. Unjust Enrichment

Patino's motion to dismiss the fifth cause of action is denied. "It is well established that to successfully plead unjust enrichment '[a] plaintiff must allege 'that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered'" (Philips Intern. Investments, LLC v Pektor, 117 AD3d 1, 7 [1st Dept 2014] [citations omitted]). Raistone alleges that Patino received funds sent by Raistone to Comercializadora, either directly or though his ownership of Repapers (Compl. ¶¶8, 90-1, 116-131). While Patino argues that his connection with Raistone is "too attenuated" to support an unjust enrichment claim, this argument is unpersuasive. According to the allegations, Patino is a principal of Comercializadora, he controlled the bank accounts, and used his position to send funds to himself, the other Defendants, and Barnett, personally benefited from the money that Defendants took from Raistone by fraud (*see Philips*, 117 AD3d at 7 [rejecting argument that parties were "too attenuated" where defendants actively participated in and were knowledgeable regarding the alleged scheme]).

To extent Patino also argues that the two contracts here preclude Plaintiff from recovering in quasi-contract, this argument fails as Patino is not a party to the RPA. Therefore, the unjust enrichment claim is not duplicative.

e. Conversion

Patino's motion to dismiss the fifth cause of action is denied. "A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal

property belonging to someone else, interfering with that person's right of possession" (*see Colavito v New York Organ Donor Network*, 8 NY3d 43, 49–50 [2006]). "Two key elements of conversion are (1) plaintiff's possessory right or interest in the property and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights" (*id.* [citations omitted]). The Complaint sufficiently pleads that Plaintiff has a possessory interest over the funds it transferred to Comercializadora, and that Patino retained control over that money by transferring it to himself (Compl. at ¶¶119–120, 122–123, 128).

Additionally, this claim is not time-barred. Conversion claims are subject to a three-year limitations period that begins from the date of conversion (*see Vigilant Ins. Co. of Am. v Hous. Auth. of City of El Paso, Tex.*, 87 N2d 36, 44–45 [1995]). Defendant argues that the date of conversion was May 13, 2021, the last day Plaintiff purchased receivables. However, "where possession is originally lawful, a conversion does not occur until the owner makes a demand for the return of the property and the person in possession of the property refuses to return it" (*see Matter of Rausman*, 50 AD3d 909, 909 [2d Dept 2008]). Here, the Plaintiff made a demand for their full payment of $17,167,490.64 on October 18, 2023 (Compl. at ¶98). While the Defendants did not respond, Patino and Millan acknowledged that they received that response (Compl. at ¶¶99–100). Since the Complaint was filed within three years of that date, on September 19, 2024, this cause of action is timely.

Accordingly, it is

ORDERED that the motion to dismiss the Complaint as alleged against Patino is **DENIED**; it is further

ORDERED that Patino shall file an Answer to the Complaint within twenty-one (21) days of the date of this Order; it is further

ORDERED that the parties appear for a preliminary conference on **May 20, 2025, at 10:00 a.m.**, with the parties circulating dial-in information to chambers at SFC-Part3@nycourts.gov in advance of the conference;[2] and it is further

ORDERED that the parties upload a copy of the transcript of the proceedings to NYSCEF upon receipt.

This constitutes the Decision and Order of the Court.

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4/4/2025
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:		**CASE DISPOSED**		[X]	**NON-FINAL DISPOSITION**		
	[ ]	**GRANTED**	[X] **DENIED**	[ ]	**GRANTED IN PART**	[ ]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**

[2] If the parties agree on a proposed preliminary conference order in advance of the conference date (consistent with the guidelines in the Part 3 model preliminary conference order, available online at https://www.nycourts.gov/LegacyPDFS/courts/comdiv/NY/PDFs/Part3-Preliminary-Conference-Order.pdf), they may file the proposed order and email a courtesy copy to chambers with a request to so-order in lieu of holding the conference.