

Sir Partners, LLC v Tolentino
2016 NY Slip Op 31655(U)
August 24, 2016
Supreme Court, Kings County
Docket Number: 507563/2015
Judge: Sylvia G. Ash
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At an IAS Term, Com 11 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 24th of August 2016.

P R E S E N T:

HON. SYLVIA G. ASH,
Justice.

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SIR PARTNERS, LLC and IRA ROSENBLUM,

Plaintiff,

Decision / Order

- against -

Index No. 507563/2015

THOMAS TOLENTINO and PLANET WASTE SERVICES, INC.,

Defendants.

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The following papers numbered 1 to 4 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____

_____ 1
_____ 2
_____ 3

Defendants, Thomas Tolentino and Planet Services, Inc. (individually, "Tolentino" and "Planet"), move pursuant to CPLR §§ 3211(a)(5) and (7), to dismiss Plaintiffs, SIR Partners LLC's and Ira Rosenblum's (individually "SIR" and "Rosenblum") complaint in its entirety. Plaintiffs oppose. For the reasons set forth below, Defendants' motion is GRANTED in part and DENIED in part.

Background

A business relationship gone awry precipitated this action. Rosenblum is the owner of SIR, an investment business. Tolentino is the owner of Planet, a waste service business. Raymond J. Rizzo, a non-party to the action, owns Rizzo Environmental Services Corp., also a waste service business. According to Plaintiffs, on or about October 2010, Rosenblum, Tolentino and Rizzo agreed to create a waste service business together.

Some of the terms that the parties purportedly agreed to are as follows: (a) each would own one-third of the new business; (b) Tolentino and Rizzo would manage the new business's affairs; (c) Tolentino would serve as chief executive officer; (d) Tolentino and Rizzo would receive annual salaries of \$260,000 for their efforts; and (e) Plaintiffs would invest \$750,000 in the new business. After signing the joint venture agreement, Plaintiffs claim that they transferred \$750,000 to Defendants. Instead of adhering to the terms of the agreement, Plaintiffs maintain that Defendants created their own separate business. Further, Plaintiffs claim that Defendants have failed to provide them equity in the new business or any other benefits for their investment.

Plaintiffs allege that they sought to recover the \$750,000 from Defendants after it became apparent that they were misled in the lead up to their investment. Specifically, Plaintiffs claim that Tolentino's false representations induced them to invest in the new business. In 2014, Plaintiffs claim that Defendants agreed to pay back the supposed misbegotten \$750,000 in installments, with the first payment due on May 1, 2015. Plaintiff claims that Defendants indicated as much in various email exchanges. However, Defendants allegedly failed to follow-through on that promise. In commencing this action, Plaintiffs seek to recover against Defendants under several causes of action. Plaintiffs allege breach of contract claims for Defendants' failure to adhere to the joint venture agreement and for failing to pay back the \$750,000 as agreed upon. Further, Plaintiffs allege claims in fraud, negligent misrepresentation, breach of fiduciary duty, conversion, unjust enrichment, and breach of implied covenant of good faith and fair dealing. Lastly, Plaintiffs seek punitive damages.

Defendants now move to dismiss Plaintiffs' complaint in its entirety. Defendants argue that Plaintiffs' breach of contract claim, rooted in the joint venture agreement, is insufficiently pled. According to Defendants, Plaintiffs fail to identify the specific terms of the joint venture agreement that were breached. Next, Defendants argue that Plaintiffs' breach of contract claim, rooted in Defendants' alleged failure to pay back the \$750,000, runs afoul of the statute of frauds. Further, Defendants argue that Plaintiffs have not pled their fraud claim with sufficient particularity. That Plaintiffs' negligent misrepresentation, breach of fiduciary and conversion claims are time barred by their respective three-year limitations period. And that Plaintiffs' claims are duplicative. Lastly, Defendants maintain that Plaintiffs are not entitled to punitive damages.

Plaintiffs oppose, arguing that they have sufficiently pled breach of contract based on Defendants' failure to perform their duties under the joint venture agreement. Next, Plaintiffs argue that Defendants breached the supposed agreement to pay back the \$750,000. Further, Plaintiffs argue that they have sufficiently pled fraud. Plaintiffs point to the allegation that Defendants' misrepresentations induced them to invest \$750,000 in the new business. Additionally, Plaintiffs maintain that Defendants' negligent misrepresentation and breach of fiduciary duty claims fall within the six-year limitations period for claims based in fraud. That their conversion claim satisfies the three-year limitations period because it accrued when Defendants refused to repay the \$750,000 as agreed upon in 2014. Lastly, Plaintiffs argue that Defendants' conduct was sufficiently willful and wanton to warrant punitive damages.

Discussion

When assessing the adequacy of a complaint on a motion to dismiss pursuant to CPLR §3211(a) (7), a court must afford the pleadings a liberal construction, accept the allegations of the complaint as true, and provide the plaintiff "the benefit of every possible favorable inference" (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Whether a plaintiff can ultimately prove its allegations is not part of the calculus in determining a motion to dismiss (*id.*) 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 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]). Based on the above principles, the Court will consider the validity of the contested claims in turn.

First, the elements of a cause of action to recover damages for breach of contract are: (1) the existence of a contract, (2) the plaintiff's performance under the contract, (3) the defendant's breach of the contract, and (4) resulting damages (*see JP Morgan Chase v J.H. Elec. of N.Y., Inc.*, 69 AD3d 802, 803 [2d Dept 2010]). Here, Plaintiffs allege that the parties entered into a contract to create a business. Plaintiffs maintains that Defendant breached that contract by failing to perform their enumerated duties. Further, Plaintiffs allege that Defendants contractually agreed to pay back \$750,000, but failed to do so. Based on those allegations, Plaintiffs have sufficiently pled causes of action for breach of contract. Therefore, Defendants' motion to dismiss that part of Plaintiffs' complaint is DENIED.

Second, the elements of a cause of action alleging fraud are "representation of a material existing fact, falsity, scienter, deception and injury" (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995]). A fraud claim does not lie where the only fraud alleged arises from the breach of a contract (*see Tiffany at Westbury Condominium v Marelli Dev. Corp.*, 40 AD3d 1073, 1076-1077 [2d Dept 2007]). However, "a misrepresentation of material fact, that serves as an inducement for the contract, is sufficient to sustain a cause of action alleging fraud" (*see WIT Holding Corp. v Klein*, 282 AD2d 527, 528 [2d Dept 2001]). Here, Plaintiffs sufficiently alleged a fraud claim because Plaintiffs assert that Defendants misled and induced them into investing \$750,000 in the new business. Therefore, Defendants' motion to dismiss that part of Plaintiffs' complaint is DENIED.

Third, to establish a breach of fiduciary duty claim, a plaintiff must prove the existence of a fiduciary relationship, misconduct by the defendant, and damages that were directly caused by the defendant's misconduct (*Kurtzman v Bergstol*, 40 AD3d 588, 590 [2d Dept 2007]). Further, where an allegation of fraud is essential to a breach of fiduciary duty claim, the six-year statute of limitation period of CPLR §213 (8) is applicable" (*see IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 139 [2009]). Here, Plaintiffs allege that Tolentino, as President of the new business, breached its fiduciary duty in connection with the parties' agreement. Further, Plaintiffs' claim falls within the six-year limitations period of CPLR §213 because it is rooted in fraud. Therefore, Defendants' motion to dismiss that part of Plaintiffs' complaint is DENIED.

Fourth, establishing a negligent misrepresentation claim requires a plaintiff to allege "(1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect [or withheld]; and (3) reasonable reliance on the information [or omission]" (*see Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 174, 180 [2011]). Further, a negligent misrepresentation claim based in fraud has a six-year statute of limitations period (*see Fandy Corp. v Lung-Fong Chen*, 262 AD2d 352, 353 [2d Dept 1999]). Here, Plaintiffs allege that the parties had a special relationship, in that they agreed to start a business together. Further, Plaintiffs claims that Defendants' misrepresentations induced them to invest \$750,000 in the new business. Based on the allegations in the complaint, Plaintiffs have sufficiently asserted a negligent misrepresentation claim. Therefore, Defendants' motion to dismiss that part of Plaintiffs' complaint is DENIED.

Fifth, conversion is any unauthorized exercise of dominion or control over property by one who is not the owner of the property which interferes with and is in defiance of a superior possessory right of another in the property (*see AMF Inc. v Algo Dists.*, 48 AD2d 352 [2d Dept 1975]). The statute of limitation for a conversion action is three years (*see Gold Sun Shipping v Ionian Transp.*, 245 AD2d 420 [2d Dept 1997]). Here, Plaintiffs' allege that Defendants exercised unauthorized control over the \$750,000 in May 1, 2015. As Plaintiffs' conversion claims falls within the three-year limitations period, Defendants' motion to dismiss that part of Plaintiffs' complaint is DENIED.

Sixth, the existence of a valid and enforceable contract governing a particular subject matter generally precludes recovery in quasi contract (*see Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382, 388 [1987]). However, where there is a bona fide dispute as to the existence of a contract or the application of a contract in the dispute in issue, a plaintiff may proceed upon a theory of quasi contract as well as breach of contract, and will not be required to elect his or her remedies (*see Hochman v LaRea*, 14 AD3d 653, 654-655 [2d Dept 2005]). Here, Defendants dispute the existence of the contracts and by extension the validity of Plaintiffs' breach of contract claims. Therefore, Defendants' motion to dismiss that part of Plaintiffs' complaint is DENIED.

Eighth, a cause of action to recover damages for breach of implied covenant of good faith and fair dealing cannot be maintained where the alleged breach is "intrinsically tied to the damages allegedly resulting from a breach of the contract" (*Deer Park Enters., LLC v Ail Sys., Inc.*, 57 AD3d 711 [2d Dept 2008]). Here, the conduct and injury alleged in Plaintiffs' breach of contract claims are identical to those asserted in Plaintiffs' breach of implied covenant of good faith and fair dealing claim. As such, Defendants' motion to dismiss that part of Plaintiffs' complaint is GRANTED.

Lastly, punitive damages are normally not available for mere breach of contract since "their purpose is not to remedy private wrongs, but to vindicate public rights" (*Rocanova v Equitable Life Assur. Socy.*, 83 NY2d 603, 613 [1994]). However, where the wrong complained of evinces a "high degree of moral turpitude" or is "actuated by evil and reprehensible motives", and

demonstrates "such wanton dishonesty as to imply a criminal indifference to civil obligations" punitive damages are recoverable if the conduct was "aimed at the public generally" (*Suffolk Sports Ctr. v Belli Constr. Corp.*, 212 AD2d 241, 246 [2d Dept 1995]). Based on the facts of this case, Plaintiffs' allegations against Defendants do not warrant the imposition of punitive damages. Therefore, Defendants' motion to dismiss that part of Plaintiffs' complaint is GRANTED.

Accordingly, Defendant's motion to dismiss is GRANTED in part and DENIED in part.

This constitutes the Decision and Order of the Court.

ENTER,



A handwritten signature in black ink, appearing to read 'SASH', is written over a horizontal line.

Sylvia G. Ash, J.S.C.

HON. SYLVIA G. ASH, JSC