

Pattison College v New York Inst. of Tech.

2012 NY Slip Op 30332(U)

February 6, 2012

Supreme Court, Nassau County

Docket Number: 600941/11

Judge: Stephen A. Bucaria

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ORIGINAL

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

PATTISON COLLEGE,

Plaintiff,

-against-

NEW YORK INSTITUTE OF TECHNOLOGY,

Defendant.

TRIAL/IAS, PART 1
NASSAU COUNTY

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MOTION DATE: Dec. 9, 2011
Motion Sequence # 001

The following papers read on this motion:

- Notice of Motion..... X
- Memorandum of Law..... XX
- Reply Memorandum of Law..... X

Motion by the attorneys for the defendant New York Institute of Technology (NYIT) for an order pursuant to CPLR 32121(a)(1) and (7) dismissing the complaint by the plaintiff Pattison College (P.C.) Is **granted** in part and **denied** in part.

The following allegations are set forth in the complaint: Plaintiff P.C. is a for-profit organization which operates and manages professional and cooperative educational programs in Vancouver, Canada. (¶ 1). The defendant NYIT operates professional and education programs and is located in Old Westbury, New York. The plaintiff and defendant arranged for a program by which students could attend both schools. Specifically, primarily foreign students could attend Pattison College along with programs at NYIT and ultimately receive a degree from NYIT. (¶ 3). Plaintiff and defendant executed a contract on or about September 1, 2005. The contract provided for a cooperative endeavor between the parties,

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whereby students could attend programs mutually arranged by both plaintiff and defendant. (¶ 5). The contract provided for defendant to make certain payments and distributions, part of which was to distribute monies received from students. Defendant has failed to provide accountings, statements and other information by which the defendant's obligation could be calculated (¶ 8). Defendant executed a supplement statement of terms, amendment, modification, or addendum to the original agreement in or about June, 2007. (¶ 9). On or about February 18, 2008, defendant provided a letter purporting to terminate the agreement and the parties relationship. (¶ 10). Although the defendant purported to terminate the parties relationship and any agreements, in practice, it continued the existing programs. (¶ 13). During the following years, and from 2007 to 2011, defendant obtained monies from new and existing students for programs in Vancouver, Canada where plaintiff was located. (¶ 14). To the extent it believed there were some legitimate concerns about plaintiff's work and performance, it would not have utilized the same persons, facilities, employees, and other things plaintiff provided. Instead, it would have created a new program using its own personnel, property, employees, and other things. Its purported termination was a device to utilize plaintiff's property without continuing to pay for it. (¶ 15). Defendant has failed to make required distributions under the original agreement and amendment, and to provide accurate information and accountings. (¶ 17). Plaintiff has made due demand both orally and in writing for distribution of the monies due it and appropriate accounting. (¶ 18).

The First and Second Causes of Action alleges breach of contract. The Third Cause of Action seeks an accounting and a constructive trust. The Fourth Cause of Action, although styled "Deception," seeks "complete and correct information along with appropriate distributions." The Fifth Cause of Action, although styled "breach of good faith and fair dealing," also seeks "complete and correct information along with appropriate distributions." The Sixth Cause of Action sounds in *quantum meruit*.

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must accept as true, the facts "alleged in the complaint and submissions in opposition to the motion, and accord plaintiffs the benefit of every possible favorable inference," determining only "whether the facts as alleged fit within any cognizable legal theory" (*Sokoloff v Harriman Estates Development Corp.*, 96 NY2d 409, 414; *see People ex rel. Cuomo v Conventry First LLC*, 13 NY3d 108; *Polonetsky v Better Homes Depot*, 97 NY2d 46, 54; *Leon v Martinez*, 84 NY2d 83, 88; *Feldman v Finkelstein & Partners, LLP*, 76 AD3d 703). Notably, on a motion to dismiss, the plaintiff is not obligated to demonstrate evidentiary facts to support the allegations contained in the complaint (*see, Stuart Realty Co. v Rye Country Store, Inc.*, 296 AD2d 455; *Paulsen v Paulsen*, 148 AD2d 685, 686; *Palmisano v Modernismo Pub.*,

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98 AD2d 953, 954, and “[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss” (*EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 19; *International Oil Field Supply Services Corp. v Fadeyi*, 35 AD3d 372. “In assessing a motion under CPLR 3211(a)(7), a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint,” and if the court does so, “the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one” (*Leon v Martinez, supra*; see also *Uzzle v Nunzie Court Homeowners Ass’n, Inc.*, 55 AD3d 723).

Moreover, “[t]o succeed on a motion to dismiss pursuant to CPLR 3211(a)(1), the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim” (*Manfro v McGivney*, 11 AD3d 662; *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326; *Jorjill Holding Ltd. v Greico Associates, Inc.*, 6 AD3d 500; see, *Arnav Industries, Inc. Retirement Trust v Brown, Raysman, Millstein, Felter and Steiner, L.L.P.*, 96 NY2d 300, 303.

The complaint adequately alleges claims for breach of contract of the original September 1, 2005 Agreement and the Supplemental Term Sheet that refers to the September 1, 2005 Agreement. These documents do not establish conclusively a defense to the complaint as a matter of law. The application to dismiss the First and Second Causes of Action is **denied**.

In the Third Cause of Action the plaintiff seeks a constructive trust. A constructive trust requires (1) a confidential or fiduciary relationship; (2) a promise express or implied; (3) a transfer in reliance thereon; and (4) unjust enrichment (*Sharp v Kosmalski*, 40 NY2d 119). CPLR 3016(b) requires, when pleading a cause of action for breach of fiduciary duty or trust, that the “circumstances constituting the wrong shall be stated in detail.” A pleading asserting a breach of fiduciary duty will be dismissed unless it contains a detailed and particularized factual basis supporting each essential element of the claim. *Precision Concepts, Inc. v Bonsanti*, 172 NY2d 737, 737-38 (dismissing plaintiff’s claims for breach of fiduciary duty due to “allegations [that] are, for the most part, conclusory in nature.) The particularity requirements of “CPLR 3016(subd. [b]) impose a more stringent standard of pleading than the generally applicable ‘notice of transaction’ rule CPLR 3013, and complaints based on . . . breach of trust which fail in whole or in part to meet this special test of factual pleading have consistently been dismissed” (*Williams v Upjohn Health Care Servs., Inc.*, 119 AD2d 817, 819 [citations omitted]). The complaint alleges the defendant

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utilized the lease, premises, personnel, services and other aspects or the programs plaintiff provided to obtain monies from new and serve existing students. (¶ 11). Information about these things and the items themselves were confidential and proprietary and represented plaintiff's intellectual property. Defendant had acquired its information about them through the parties relationship. (¶ 12). The plaintiff's allegations of the existence of a confidential or fiduciary relationship between the parties is pled with sufficient specificity to satisfy the requirements of CPLR 3016. The motion to dismiss the Third Cause of Action seeking a constructive trust is **denied**.

The Fourth Cause of Action is for "Deception." There is no such cause of action in New York for Deception. To the extent plaintiff means "fraud," the complaint fails to allege any of the elements of fraud with particularity as required by CPLR 3016(b). Moreover, the "Deception" claim is the same as the breach of contract claims. The Fourth Cause of Action is **dismissed** without prejudice.

In the Fifth Cause of Action, the plaintiff alleges a breach of good faith and fair dealing with regard to the contract in that defendant secured the benefits of the contract; obtaining goods and services provided by the plaintiff under the agreement, while providing incomplete, misleading and incorrect accounting, distribution statements and other data. This is redundant since a breach of an implied covenant of good faith and fair dealing is intrinsically tied to the damages allegedly resulting from breach of contract. *Canstar v J.A. Jones Const. Co.*, 212 AD3d 452. The Fifth Cause of Action is **dismissed**.

Parties are permitted under New York law to plead causes of action in the alternative and even to plead causes of action that conflict with one another. CPLR 3014; *Cohn v Lionel Corp.*, 21 NY2d 559. A party may proceed on both a breach of contract and quasi-contract theories where there is a *bona fide* dispute as to the existence of a contract. In the within action there is a sharp dispute as to the existence of a valid contract in the first instance, and whether there was a breach of a contract, if one is found to have been controlling. The motion to dismiss the Sixth Cause of Action sounding in *quantum meruit* is **denied**.

The Fourth and Fifth Causes of Action are **dismissed**.

Defendant shall submit an answer within 30 days of the date of this order.

A Preliminary Conference has been scheduled for April 2, 2012 at 9:30 a.m. in

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Chambers of the undersigned. Please be advised that counsel appearing for the Preliminary Conference **shall** be fully versed in the factual background and their client's schedule for the purpose of setting **firm** deposition dates.

This decision is the order of the Court.

Dated **FEB 06 2012**


J.S.C.

ENTERED

FEB 08 2012

NASSAU COUNTY
COUNTY CLERK'S OFFICE