

Latimore v Fuller

2012 NY Slip Op 31656(U)

June 18, 2012

Supreme Court, New York County

Docket Number: 109456/11

Judge: Donna M. Mills

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT : DONNA M. MILLS
Justice

PART 58

WHITTEN LATIMORE, SONYA

Plaintiff,

-against-

FULLER, KIM E., et al.,

Defendants.

INDEX NO. 109456/11

MOTION DATE _____

MOTION SEQ. NO. 002

MOTION CAL NO. _____

The following papers, numbered 1 to _____ were read on this motion for _____.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits - Exhibits... 1

Answering Affidavits - Exhibits 2

Replying Affidavits 3

CROSS-MOTION: _____ YES NO

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM OF DECISION

FILED

JUN 21 2012

Dated: 6/18/12

NEW YORK COUNTY CLERK'S OFFICE
Donna M. Mills
DONNA M. MILLS, J.S.C.

Check one: _____ FINAL DISPOSITION

1 NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

-----X
SONYA WHITTEN LATIMORE,

Plaintiff,

-against-

Index No.

KIM E. FULLER, MIATTA HAJ SMITH, THE SMITH
HAJ GROUP, BEN SILVERMAN and ELMA KIM,

109456/11

Defendants.

-----X
DONNA MILLS, J. :

Defendants Miatta Haj Smith and the Smith Haj Group (the moving defendants) move for dismissal of the complaint.

This is an action alleging causes of action in fraud, breach of contract, breach of fiduciary duty, conversion, unjust enrichment and tortious contractual interference. Plaintiff alleges that sometime in February 2004, she spoke to defendant Kim E. Fuller (Fuller), who is a partner in a promotional company, McCreary & Fuller, about an idea for a television program which involved dieting, hoping that Fuller would be interested. Plaintiff alleges that she was able to contact Fuller through Miatta Haj Smith.

On October 18, 2007, plaintiff commenced an action for federal copyright infringement against NBC Universal, Inc. d/b/a Universal Television Distribution (NBC), McCreary & Fuller, and Fuller, individually and as a partner of McCreary & Fuller, in Federal District Court, Southern District of New York (the Federal Action). Essentially, plaintiff alleged that the NBC program, The Biggest Loser, was based on a treatment she had provided to Fuller. At a pre-trial deposition, plaintiff testified that she spoke to Fuller about the treatment, but claimed not to know any subsequent actions made by him concerning the treatment. At his pre-trial deposition,

Fuller testified that he did not follow up with plaintiff and did not give her a contract or speak to her until after the commencement of the Federal Action.

After the depositions, NBC moved for dismissal through summary judgment. The Federal District Court granted the motion, based upon the testimony of Fuller and Miatta Haj Smith, who denied communicating to NBC prior to the suit's commencement. Plaintiff asserts that the testimony and sworn affidavits from these individuals that formed the basis for NBC's motion are fraudulent.

In this complaint, plaintiff alleges that defendants have resorted to fraud during the Federal Action and that this, among other claims, forms the substance of this action.

The moving defendants move for dismissal of all the causes in the complaint on the following grounds: lack of jurisdiction based on defective service of process, statute of limitations, res judicata and collateral estoppel.

The moving defendants contend that Smith Haj Group, a corporation, was improperly served, pursuant to CPLR 311 (a) (1). The moving defendants argues that service upon a corporation is usually served by delivering the summons to either a director, a designated agent, a managing agent or a cashier. The moving defendants argue that the summons was left with a clerk who buzzed the server in the door. The clerk was, according to the moving defendants, an improper party.

The moving defendants assert that the statute of limitations allows 20 days to serve a complaint after demand has been made (CPLR 3012 [b]). Plaintiff allegedly failed to serve a complaint within the 20 day period. In addition, the moving defendants seek dismissal of each cause of action as time-barred.

As for collateral estoppel and res judicata, the moving defendants contend that the

Federal District Court's granting of NBC's summary judgment motion, which was based, in part, on the evidence provided by Miatta Haj Smith, was a decision based on the merits and has an effect on the present action. The moving defendants state that plaintiff has no evidence that Miatta Haj Smith committed fraud and that she should be precluded from raising issues that should have been asserted in Federal Action.

In opposing this motion, plaintiff states that the Federal Action is ongoing, and she is moving to vacate the summary judgment order. She claims that the granted motion is based on perjured testimony and that this constitutes "newly discovered evidence." It is her contention that defendant Smith made misrepresentations in the Federal Action about not speaking to representatives of NBC in relation to plaintiff's treatment.

Plaintiff addresses the grounds for dismissal, beginning with service on the Smith Haj Group. She provides an affidavit from process server Arnold McKinley. This affidavit provides that at the time of the service, December 12, 2011, at 4:17 P.M., a summons was delivered to Edna Sarr, a receptionist, who claimed that she could accept service for the Smith Haj Group. Plaintiff also annexes the cover page of the Web site of the New York Beacon newspaper, which is published by the Smith Haj Group. The page indicates that Sarr is listed as an office manager. Plaintiff is willing to submit this issue to a referee for a traverse hearing, if necessary.

Miatta Haj Smith, who claimed that she served her notice of appearance on December 21, 2011, was allegedly served by plaintiff on January 17, 2012. Plaintiff states that this service was timely in accordance with CPLR 3012 (b) and 2103 (b) (2), which adds five days to serve a responsive pleading if served by mail. Plaintiff avers that she had twenty-five days to serve her complaint.

Plaintiff argues that all the claims asserted in the complaint are timely. Specifically, she

claims that the statute of limitations for the fraud claim, which is alleged to run up to two years from the date of discovery, not six years, is applicable.

Plaintiff contends that neither collateral estoppel nor res judicata applies here. The federal judgment was based on copyright law, which is not a claim in this case. Also, the moving defendants are not parties in the Federal Action. Plaintiff asserts that none of the issues raised in this case was fully litigated in the Federal Action, which chose not to exercise supplemental jurisdiction over the state law claims. Plaintiff states that the fraud alleged in this action was not a factor in the federal action, at least not until plaintiff moved for vacatur of the summary judgment order, and plaintiff claims that she has not had a fair and full opportunity to present a cause of action in fraud.

In a reply affirmation, the moving defendants assert, for the first time, that the complaint should be dismissed because plaintiff has failed to make out a specific cause of action in fraud against defendant Miatta Haj Smith. The moving defendants also argue that whatever communications were actually made to NBC, there is insufficient proof of the intention to deceive. Finally, the moving defendants contend that there is no actual newly discovered evidence of fraud, as claimed by plaintiff. This, in effect, allegedly would undermine the two-year statute of limitations, as it would not be applicable in this case.

In reviewing the complaint, the court finds that some of the claims are not brought against the moving defendants. The breach of contract and breach of fiduciary duty claims are brought against Fuller, who is not moving for dismissal. The moving defendants are being sued for fraud, conversion and unjust enrichment.

The first matter to be considered is the service of process with respect to Smith Haj Group. Whereas the moving defendants contend that an inappropriate employee received

plaintiff's summons, plaintiff argues that an authorized employee, a receptionist and manager, received the summons. Plaintiff has provided proof of service and an affidavit from her process server. "The process server's affidavit, which stated that the corporate defendant was previously served by delivering a copy of the summons and complaint to its 'managing/designated agent' and provided a description of that person, constituted prima facie evidence of proper service." *McIntyre v Emanuel Church of God in Christ*, 37 AD3d 562 (2d Dept 2007); see *Bankers Trust Co. of Cal. v Tsoukas*, 303 AD2d 343, 343-344 (2d Dept 2003). The moving defendants, in their reply papers, have chosen not to dispute or question this evidence. The court finds the service of the summons to be valid. The court also finds that plaintiff was timely in the service of the complaint.

The court will consider the dismissal of the causes of action. The moving defendants moved to dismiss the fraud claim on a statute of limitations ground. Subsequently, the moving defendants have sought to dismiss the fraud claim due to failure to state a cause of action pursuant to CPLR 3211 (a) (7).

A motion to dismiss a claim under CPLR 3211 (a) (7) will fail if "from its four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law." *Tenzen, Greenblatt, Fallow & Kaplan v Ellenberg*, 199 AD2d 45, 45 (1st Dept 1993).

"To make a prima facie claim of fraud, the complaint must allege misrepresentation or concealment of a material fact, falsity, scienter on the part of the wrongdoer, justifiable reliance and resulting injury." *Dembeck v 220 Central Park South LLC*, 33 AD3d 491, 492 (1st Dept 2006), citing *Small v Lorillard Tobacco Co.*, 94 NY2d 43, 57 (1999).

The claim against Smith is based on an alleged misrepresentation that was made in the federal court, that she did not communicate with agents of NBC about plaintiff's treatment for a

television series. However, nowhere in the complaint is it alleged that there was any misrepresentation made to plaintiff at any time. In effect, there is no actionable fraud. With no misrepresentation, there is no reliance and no resulting injury or damages. Nor is there any allegation of a concealment of a material fact. Plaintiff cannot allege fraud based on anything said at the trial. The closest claim that has been alleged would constitute perjury, but that would not be actionable here.

The claim brought against the Smith Flaj Group shall be dismissed, as there is nothing alleged in the complaint which would connect it with the fraud allegedly made by the other defendants in this suit.

The timeliness of the conversion claim, raised by the moving defendants, but not addressed in the opposition papers, will also be considered. Conversion is subject to the three-year statute, and runs from the time of the conversion, except where a demand is necessary as a condition precedent to commence an action, such as a wrongful withholding of possession. Then, the statute commences when the right to make a demand is complete. *See Berman v Goldsmith*, 141 AD2d 487 (2d Dept 1988); CPLR 206 (a).

The complaint alleges that defendants converted plaintiff's intellectual property in 2004. Since there is no indication in the complaint of any situation where a demand would be necessary before a conversion could be claimed, the statute for this claim has run out and the claim shall be dismissed as untimely.

The unjust enrichment is also untimely, as it was brought after the expiration of the six-year statute of limitations. *See Coombs v Jervier*, 74 AD3d 724 (2d Dept 2010). The statute would have accrued upon the occurrence of the wrongful act giving rise to a duty of restitution, which was alleged to be in 2004. *Id.*; CPLR 213 (1).

The court need not address the argument based on the statute of limitations for fraud. The doctrines of res judicata and collateral estoppel need not be discussed as the causes of action have been dismissed on other grounds brought by the moving defendants.

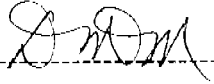
Accordingly, it is

ORDERED that the motion of defendants Miatta Haj Smith and Smith Haj Group to dismiss the complaint as to them herein is granted, and the complaint is dismissed in its entirety as against said defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court; it is further

ORDERED that the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the action is severed and continued against the remaining defendants.

DATED: 6 / 18 / 12

ENTER:


J.S.C.
DONNA M. MILLS, J.S.C.