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SHORT FORM ORDER

COPY

INDEX
NO.: 31230-11

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Hon. Elizabeth Hazlitt Emerson

MOTION DATE: 2-7-12; 4-10-12
SUBMITTED: 4-12-12
MOTION NO.: 002-MOT D
003-MG

KNOCKOUT VENDING WORLDWIDE, LLC, NEIL MATE and KATHERINE MATE,

Plaintiffs,

-against-

GRODSKY CAPORRINO & KAUFMAN CPA'S, P.C., a/k/a GRODSKY CAPORRINO & KAUFMAN, P.C., WILLIAM J. KAUFMAN, KNOCKOUT VENDING, LLC, CHRISTOPHER CHIARENZA, VINCENT T. GEBBIA, C.V. WORLDWIDE ENTERPRISES, INC., MR. CASH BUYER, INC., VTG REALTY CONSTRUCTION, LLC, BURNS RUSSO, TAMIGI & REARDON, LLP, and ANTHONY RUSSO,

Defendants.

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KNOCKOUT VENDING, LLC, CHRISTOPHER CHIARENZA, VINCENT T. GEBBIA, C.V. WORLDWIDE ENTERPRISES, INC., MR. CASH BUYER, INC., and VTG REALTY CONSTRUCTION, LLC
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Upon the following papers numbered 1-38 read on these motions to dismiss the complaint ; Notice of Motion and supporting papers 1-10, 11-14; 37 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 15-28, 29-32 ; Replying Affidavits and supporting papers 33-34, 35-36 ; Other Kaufman Defendants' memo of law 38 ; it is,

ORDERED that the motion (002) by defendants Knockout Vending, LLC, Christopher Chiarenza, Vincent T. Gebbia, C.V. Worldwide Enterprises, Inc., Mr. Cash Buyer, Inc., and VTG Realty Construction, LLC for an order pursuant to CPLR 3211 (a) (1), (7) dismissing the complaint as asserted against them is granted to the extent that the fourth and seventh causes of action are dismissed; and it is further

ENTERED 002 003

ORDERED that the motion (002) is otherwise denied; and it is further

ORDERED that the motion (003) by defendants Grodsky Caporrino & Kaufman, P.C. and

William J. Kaufman for an order pursuant to CPLR 3211 (a) (7) dismissing the second cause of action as asserted against them is granted; and it is further

ORDERED that defendants are directed to serve and file their respective answers pursuant to CPLR 3211 (f); and it is further

ORDERED that the parties are directed to appear at a conference with the undersigned for the purpose of conducting a preliminary conference on October 24, 2012 at 9:45 a.m.; and it is further

ORDERED that counsel for the Chiarenza defendants are directed to serve a copy of this order with notice of entry upon counsel for all parties pursuant to CPLR 2103(b)(2) or (3) within twenty (20) days of the date hereof and thereafter file the affidavit of service with the Clerk of the Court.

In this action, the plaintiffs, Knockout Vending Worldwide, LLC, Neil Mate, and Catherine Mate (hereinafter "the plaintiffs") seek to recover damages for alleged fraud, malpractice and breach of fiduciary duty by the defendants. The record reveals that in or about October, 2009, the plaintiffs intended to purchase a business and informed the defendant William J. Kaufman, their personal accountant, that they wished to purchase the defendant Knockout Vending, LLC, which was allegedly a vending machine business. The plaintiffs requested that the defendant Kaufman and his accounting firm, defendant Grodsky Capporino & Kaufman, PC (hereinafter referred to collectively as "the Kaufman defendants"), perform due diligence regarding the purchase of the business. The Kaufman defendants obtained information from the defendants Christopher Chiarenza and Vincent T. Gebbia, who were allegedly members of the defendant Knockout Vending, LLC. After reviewing the information, the defendant Kaufman allegedly approved the purchase of defendant Knockout Vending, LLC and notified the plaintiffs. The record further reveals that on or about December 22, 2009, the plaintiffs formed their own corporation, called Knockout Vending Worldwide, LLC, to enter into the purchase transaction with defendant Knockout Vending, LLC. On that day, the plaintiff Knockout Vending Worldwide executed and entered into an Asset Purchase Agreement to purchase the defendant Knockout Vending LLC's assets for a sum of $995,000.00. The plaintiffs Neil Mate and Catherine Mate personally loaned the plaintiff Knockout Vending Worldwide a sum of $750,000.00. In addition, Neil Mate and Catherine Mate personally executed a promissory note to the defendant Knockout Vending LLC as payee holder of the note for the remaining $245,000.00 of the purchase price. By written assignment dated December 22, 2009, the defendant Knockout Vending, LLC, as assignor, assigned the promissory note to the defendant C.V. Worldwide Enterprises, Inc., as assignee. In or about August, 2011, the defendant C.V. Worldwide Enterprises, Inc., as assignor, assigned the promissory note to defendants Mr. Cash Buyer, Inc. and VTG Realty Construction, LLC, as assignees.

After the closing, the plaintiffs allegedly discovered that the defendant Knockout Vending LLC's annual net profit was much lower than they were led to believe prior to the execution of the Purchase Agreement. The plaintiffs also learned that the defendant Knockout Vending, LLC sold approximately 150 machines at a price below fair market value for the purpose of artificially inflating sales numbers to make the business appear to be more attractive for purchase. The plaintiffs allege that neither defendant Kaufman nor Anthony Russo, Esq., the plaintiffs' attorney, and their respective firms discovered these facts prior to the closing. In addition, the plaintiffs

learned that the defendant Knockout Vending LLC's sales were actually sales of business opportunities, also known as "Biz Opps,"and were not sales of vending machines and vending routes. Unbeknownst to the plaintiffs, these Biz Opps came under the regulation of the Federal Trade Commission ("FTC"), which fined the plaintiffs for noncompliance of rules that the defendant Knockout Vending, LLC allegedly ignored. After allegedly investing an additional $175,000.00 into the business and paying the fines to the FTC, the plaintiffs commenced the instant action to recover damages.

Procedurally, the Court's computerized record reveals that the action was commenced by the filing of a summons and complaint on October 27, 2011. Subsequently, on December 16, 2011, a supplemental summons and amended complaint were filed. Issue has not yet been joined.

The amended complaint alleges in the first cause of action that the Kaufman defendants were negligent in failing to apply the skill and care required under applicable accounting standards and principles when performing due diligence and advising the plaintiffs regarding the value of the defendant Knockout Vending, LLC and the purchase transaction involving the defendant Knockout Vending, LLC. In the second cause of action it is alleged that the Kaufman defendants breached a fiduciary duty to the plaintiffs by approving the purchase of the defendant Knockout Vending, LLC. In the third cause of action it is alleged that defendants Chiarenza, Gebbia and Knockout Vending, LLC (hereinafter, "the Chiarenza defendants") perpetrated a fraud by providing books and records which did not accurately reflect their current financial condition and annual adjusted net profit. In the fourth cause of action it is alleged that the Chiarenza defendants negligently misrepresented to the plaintiffs their financial information which they knew was false, causing the plaintiffs to reasonably rely upon the information, and damages. In the fifth cause of action, it is alleged that the Chiarenza defendants and the defendant C.V. Worldwide Enterprises, Inc were unjustly enriched. In the sixth cause of action it is alleged that the plaintiffs' attorneys, defendants Burns, Russo, Tamigi & Reardon, LLP and Anthony Russo breached their duty to exercise the ordinary and reasonable skill and knowledge commonly possessed by a member of the legal profession in the course of their representation of the plaintiffs. In the seventh cause of action it is alleged that the plaintiffs are entitled to an order and judgment rescinding the Purchase Agreement requiring the defendants Chiarenza, Gebbia, C.V. Worldwide Enterprises, Inc., and Knockout Vending, LLC to disgorge all sums paid by the plaintiffs under the promissory note, Purchase Agreement and vacating the promissory note and all other agreements related to the Purchase Agreement.

The Chiarenza defendants and the defendants C.V. Worldwide Enterprises, Inc., Mr. Cash Buyer, Inc., and VTG Realty Construction, LLC now move to dismiss the third, fourth, fifth, and seventh causes of action pursuant to CPLR 3211 (a) (1), and (7), and for summary judgment pursuant to CPLR 3213 in favor of defendants Mr. Cash Buyer, Inc. and VTG Realty Construction, LLC, as assignees. Procedurally, at a conference held on June 6, 2012, counsel for defendants Mr. Cash Buyer, Inc. and VTG Realty Construction, LLC, agreed to withdraw the motion for summary judgment pursuant to CPLR 3213 without prejudice.

The Kaufman defendants move for an order dismissing the second cause of action pursuant to CPLR 3211 (a) (7).

Turning to that branch of the Chiarenza defendants' motion to dismiss pursuant to CPLR 3211 (a) (1), where a defendant moves to dismiss an action asserting the existence of a defense founded upon documentary evidence, the documentary evidence "must be such that it resolves all

factual issues as a matter of law, and conclusively disposes of the plaintiffs' claim" (**Trade Source, Inc. v Westchester Wood Works, Inc.**, 290 AD2d 437; **Berger v Temple Beth-El of Great Neck**, 303 AD2d 346). In support of the motion, the defendants submit, *inter alia*, copies of the purchase agreement, bill of sale, promissory note, security agreement, personal guaranty, and two assignments. Such submissions do not resolve all issues of fact in that the promissory note provides in paragraph 12.3 that "the seller agrees to indemnify and hold buyer harmless from and against any and all actions, suits, proceedings, demands, assessments, costs, losses, liabilities, damages or expenses, including reasonable attorneys' fees, arising out of or in connection with * * * (iv) any misrepresentation or fraud of the seller under this agreement." Inasmuch as the plaintiffs are alleging, *inter alia*, that the Chiarenza defendants fraudulently and negligently misrepresented the nature of the business that was sold to the plaintiffs, the submissions, therefore, do not conclusively dispose of the plaintiffs' claim. Therefore, the branch of the motion seeking to dismiss the third, fourth, fifth and seventh causes of action pursuant to CPLR 3211 (a) (1) is denied.

Turning to that branch of the Chiarenza defendants' motion to dismiss the third, fourth, fifth, and seventh causes of action pursuant to CPLR 3211 (a) (7), "in considering a motion to dismiss a pleading for failure to state a cause of action, the court must accept the allegations of 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" (CPLR 3211 [a] [7]; **Munger v Board of Educ. of the Garrison Union Free School Dist.**, 85 AD3d 747; *accord* **Leon v Martinez**, 84 NY2d 83). If the court can determine that the plaintiffs are entitled to relief on any view of the facts stated, its inquiry is complete and the complaint must be declared legally sufficient (**Symbol Tech., Inc. v Deloitte & Touche, LLP**, 69 AD3d 191, 193-195). Whether the plaintiffs can ultimately establish its allegations is not part of the determination (**Sokol v Leader**, 74 AD3d 1180).

Here, the Court finds that the plaintiffs have adequately alleged a third cause of action for fraud. A cause of action alleging fraud does not lie where the only fraud claimed relates to a breach of contract (*see* **Tiffany at Westbury Condominium by Its Bd. of Mgrs. v Marelli Dev. Corp.**, 40 AD3d 1073, 1076; **Rocchio v Biondi**, 40 AD3d 615; **Mendelovitz v Cohen**, 37 AD3d 670). "A present intent to deceive must be alleged and a mere misrepresentation of an intention to perform under the contract is insufficient to allege fraud. Conversely, a misrepresentation of a material fact, which is collateral to the contract and serves as an inducement for the contract is sufficient to sustain a cause of action alleging fraud" (**Sellinger Enters, Inc. v Cassuto**, 50 AD3d 766, *quoting* **WIT Holding Corp. v Klein**, 282 AD2d 527). The plaintiffs allege that the Chiarenza defendants misrepresented material facts related to the nature of the business and the profits as an inducement for the contract. The plaintiffs contend that these statements were false, the Chiarenza defendants knew they were false and the plaintiff relied on these statements in entering into the agreement. Thus, the allegations are sufficient to state a cause of action for fraudulent inducement (*see* **Fresh Direct, LLC v Blue Martini Software, Inc.**, 7 AD3d 487). The Chiarenza defendants contend that any reliance by the plaintiffs was not justified based upon their performance of due diligence. However, the allegations in the complaint must be accepted as true on a motion to dismiss (*see* **Sokoloff v Harriman Estates Dev. Corp.**, 96 NY2d 409, 414; **Leon v Martinez**, *supra*), and a determination of whether the plaintiffs' reliance was reasonable requires an examination of factual issues which is not proper on a CPLR 3211 motion. Accordingly, the Chiarenza defendants' motion is denied with respect to the third cause of action.

Turning to the fourth cause of action, according the plaintiffs the benefit of every possible favorable inference, and accepting the allegations of the complaint as true, the plaintiffs have failed to state a claim for negligent misrepresentation. A claim for negligent misrepresentation can only stand in the presence of a special relationship of trust or confidence, distinct from or independent of the parties' contract, which creates a duty for one party to impart correct information to the other (**Atkins Nutritionals, Inc. v Earnst & Young**, 301 AD2d 547, 548; **WIT Holding Corp. v Klein**, *supra*). Here, there was no special relationship between the plaintiffs and the defendants independent of their contract. The record reveals that their relationship was nothing more than an arms-length business relationship. Accordingly, the fourth cause of action as asserted as against the Chiarenza defendants is dismissed.

Turning to the fifth cause of action, the Court finds that the plaintiffs have sufficiently alleged a cause of action for unjust enrichment. To prevail on a claim of unjust enrichment, the plaintiffs must establish that the defendants benefitted at the plaintiffs' expense and that equity and good conscience require restitution (*see* **Whitman Realty Group v Galano**, 41 AD3d 590 [2d Dept 2007]; **Citibank, N.A. v Walker**, 12 AD3d 480 [2d Dept 2004]). Here, the complaint alleges that the plaintiffs paid more than the fair market value of the defendant Knockout Vending, LLC, and, as a result, the Chiarenza defendants were unjustly enriched at the plaintiffs' expense. In light of the foregoing, and upon review of the complaint, it is determined that the facts alleged in the complaint fit a cognizable legal theory sounding in unjust enrichment. Accordingly, the Chiarenza defendants' motion is denied with respect to the fifth cause of action.

Turning to the seventh cause of action, according the plaintiffs the benefit of every possible favorable inference, and accepting the allegations of the complaint as true, the plaintiffs have failed to state a claim for rescission of the purchase agreement. The equitable remedy of rescission may be invoked only when there is lacking a complete and adequate remedy at law and when the status quo may be substantially restored (**Marshall v Alaliewie**, 304 AD2d 1026, 1027; **Sokolow, Dunaud, Mercadier & Carreras v Lacher**, 299 AD2d 64, 71). The complaint alleges that the plaintiffs were and may be subject to continuing obligations and requirements to comply with the FTC's franchise and business opportunity rules which were not known to the plaintiffs at the time of the closing, and there is no adequate remedy at law. However, the third and fifth causes of action seek money damages, and it would be impracticable to restore the status quo. Accordingly, the seventh cause of action is dismissed. In sum, the Chiarenza defendants' motion to dismiss the complaint is granted with respect to the fourth and seventh causes of action.

Turning to the motion by the Kaufman defendants to dismiss the second cause of action, according the plaintiffs the benefit of every possible favorable inference as a general rule, the plaintiffs have failed to state a second cause of action alleging a breach of fiduciary duty. The Court notes that the plaintiffs have alleged a cause of action for accounting malpractice. The existence of negligence claims, however, does not create a fiduciary relationship between the Kaufman defendants and the plaintiffs (**Friedman v Anderson**, 23 AD3d 163). In general, there is no fiduciary relationship between an accountant and his client (**DG Liquidation, Inc. v Anchin, Block & Anchin**, 300 AD2d 70). "A conventional business relationship, without more, does not become a fiduciary relationship by mere allegation" (**Friedman v Anderson**, supra at 166, **Oursler v Women's Interart Center, Inc.**, 170 AD2d 407, 408). Here, the complaint alleges that the Kaufman defendants were the plaintiffs' personal accountants, and that the plaintiffs placed confidence in the Kaufman defendants' advice and opinions as professional accountants, consultants and advisors. However, while providing financial advice may be within the scope of an

accountant's duties, and so within the definition of a conventional business relationship, the standard that plaintiffs must meet to sustain a cause of action for breach of fiduciary duty has not been met (**Staffenberg v Fairfield Pagma Assoc., L.P.**, 2012 NY AppDiv LEXIS 3423, citing **Friedman v Anderson**, *supra* at 166; *cf.* **Lavin v Kaufman, Greenhut, Lebowitz & Forman**, 226 AD2d 107). Accordingly, the Kaufman defendants' motion to dismiss the second cause of action is granted.

In sum, the Kaufman defendants' motion to dismiss the second cause of action as asserted against them is granted. In addition, the Chiarenza defendants' motion to dismiss the complaint as asserted against them is granted to the extent that fourth and seventh causes of action are dismissed.

HON. ELIZABETH HAZLITT EMERSON

DATED: July 11, 2012

J. S.C.