

**Carnegie Assoc., Ltd. v United National Funding,
LLC**

2012 NY Slip Op 33354(U)

July 12, 2012

Supreme Court, New York County

Docket Number: 603113/09

Judge: Barbara R. Kapnick

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

PRESENT: **BARBARA R. KAPNICK**

PART 39

Justice

Index Number : 603113/2009

CARNEGIE ASSOCIATES LTD

vs.

UNITED NATIONAL FUNDING LLC

SEQUENCE NUMBER : 003

DISMISS ACTION

INDEX NO. 603113/09

MOTION DATE _____

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

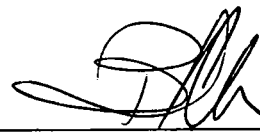
Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *and cross-motion*
are decided in accordance with
the accompanying memorandum decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 7/12/12



BARBARA R. KAPNICK J.S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39

-----x
CARNEGIE ASSOCIATES, LTD.,

Plaintiff,

- against -

UNITED NATIONAL FUNDING, LLC,
PHILIP NEUMAN, GEORGIA MERKEL,
ERIC MILLER and CRUMP GROUP, INC.,

Defendants.

-----x
BARBARA R. KAPNICK, J.:

DECISION/ORDER

Index No.: 603113/09
Motion Seq. Nos. 003
and 004

Motion sequence numbers 003 and 004 are consolidated for disposition.

In motion sequence number 003, defendants Crump Life Insurance Services, Inc. s/h/a Crump Group, Inc. ("Crump") and Eric Miller ("Miller") move, pursuant to CPLR 3211 (a) (7), to dismiss the Amended Complaint as asserted against them. Plaintiff cross-moves, pursuant to CPLR 3025 (b), for leave to file a Second Amended Complaint to include all the defendants in its claim for common-law fraud.¹

¹ The cross-motion fails to include a proposed Second Amended Complaint, and merely provides the last three pages of the proposed amendment, stating that plaintiff does not seek to change any of the preceding pages. Although this is procedurally incorrect pursuant to the newly-amended CPLR 3025(b), in order to promote judicial economy, the Court will address the cross-motion as though a complete proposed Second Amended Complaint had been attached.

In motion sequence number 004, defendants United National Funding LLC ("UNF"), Philip Neuman ("Neuman") and Georgia Merkel ("Merkel") (collectively, the "UNF defendants") move, pursuant to CPLR 3211 (a) (7), to dismiss the Amended Complaint as asserted against them, except for the cause of action for breach of contract as to defendant UNF, and for sanctions to be imposed, pursuant to 22 NYCRR 130-1.1, against plaintiff and its counsel for frivolous conduct.

BACKGROUND

Plaintiff and UNF are insurance facilitators in the business of finding clients for whom they put together life insurance applications which are then submitted to insurance carriers. Crump is a broker general agent ("BGA"), who acts as an intermediary between the facilitators and the carriers.

On July 13, 2006, plaintiff and UNF entered into a letter agreement to split commissions on applications for policies that they agreed to submit jointly to carriers, with plaintiff receiving 60% of the commissions, including renewals, and UNF receiving 40%. This agreement was signed by Neuman on behalf of UNF and by Sherwood Schwartz on behalf of plaintiff. The Complaint alleges that, because of an ongoing relationship between UNF and Crump, UNF insisted that Crump be selected as the BGA for these applications,

authorizing Crump to acknowledge new business, but Crump was not directed to pay commissions according to the terms of the contract between plaintiff and UNF.² By email dated July 17, 2006, Neuman sent a copy of the contract to Miller, who was then Crump's President, among others.

Ultimately, five such policies were placed, and the insurance carriers paid the commissions to Crump. Plaintiff claims that Crump was to turn those commissions over to plaintiff and UNF; however, when these five policies were submitted to the carriers, Merkel, a UNF employee, was listed as the only broker for the applications.

In the Complaint, plaintiff alleges that Neuman told plaintiff that Merkel had to appear on the applications as the broker in order to appease the funder of the policies, a Connecticut-based hedge fund, which statement plaintiff contends Neuman knew was false. Amended Complaint, ¶¶ 47-50. Plaintiff alleges that Crump processed these applications and sent them through the mail.

Pursuant to the submitted applications, Crump allegedly turned 100% of the commissions over to UNF as the sole listed broker for

² The original agreement was to have BISYS Group, Inc. ("BISYS") act as the BGA, BISYS being Crump's predecessor in interest. The Amended Complaint refers to BISYS, but the Court will refer herein at all times to Crump as the BGA.

the insurance applications. UNF allegedly failed to turn over plaintiff's 60% share of the commissions, and plaintiff now seeks to enforce the terms of its agreement with UNF against all the defendants.

In the Amended Complaint, plaintiff asserts five causes of action: (1) violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 USC § 1962 (c), as against all the defendants; (2) violation of section (d) of RICO, as against all the defendants; (3) breach of contract as against UNF and Crump; (4) conversion, as against Neuman, Merkel and Miller; and (5) fraud, as against the UNF defendants.

The Amended Complaint alleges that all the defendants conspired to defraud plaintiff out of the full commissions it was rightfully owed under the terms of its agreement with UNF. Plaintiff alleges that the defendants' course of conduct with respect to the withholding of the commissions constitutes a pattern of criminal conduct rising to the level of racketeering. To substantiate its RICO allegations, plaintiff points to three items that it claims constitute mail fraud: (1) the applications for insurance that indicate Merkel as the sole broker that were sent to Crump; (2) four applications for insurance that were sent to one carrier; and (3) the fifth application for insurance that was sent

to a different carrier. In addition, plaintiff alleges that, upon information and belief, the defendants used the telephone in furtherance of their fraudulent scheme. Amended Complaint, ¶¶ 107-108. Plaintiff also claims that Neuman and Crump have similarly defrauded others, based on a July 9, 2007 deposition of Neuman in an unrelated matter in which Neuman testified that he has placed other policy applications through Crump in the past for which he may owe money. *Id.*, ¶¶ 71-77, 110.

ARGUMENTS

Crump and Miller argue that the Amended Complaint should be dismissed as against them because plaintiff has failed to state a claim based on a violation of the RICO statute; they were not parties to the contract between plaintiff and UNF and so cannot have breached that agreement; and plaintiff never had control or possession of the commissions, thereby negating any possibility of conversion on the part of Miller. Crump and Miller also argue that plaintiff has not alleged a cause of action based on fraud as against them.

Plaintiff maintains that the allegations in the Amended Complaint are sufficient to withstand dismissal with respect to its causes of action based on alleged violations of RICO. Plaintiff states that Crump and Miller's wire and mail communications

indicate "the likelihood of future criminal activity ... in refusing to provide [plaintiff] with the renewal commissions it is due." Plaintiff's Memo of Law at 3, fn 2.

Plaintiff also argues that it need not meet the higher pleading standards of CPLR 3016 (b) when the circumstances surrounding the alleged fraud are within the knowledge of the party against whom the fraud is claimed. Thus, plaintiff claims that it has sufficiently pled fraud so as to maintain its causes of action asserted as against Crump and Miller for RICO violations. Further, plaintiff asserts that simply using the mail in furtherance of a fraudulent scheme is sufficient for a claim of mail fraud to support a cause of action for a violation of RICO.

With respect to the breach of contract claim, plaintiff asserts that Crump was a party to the contract because, by acting as the BGA, it received a commission of 15%.

Lastly, plaintiff claims ownership of the withheld commissions, which funds are specifically identifiable, making out a claim for conversion.

It is noted that plaintiff's only argument in support of its cross-motion for leave to amend the Amended Complaint to include

Crump and Miller in its cause of action for fraud consists of the following:

Absent prejudice, amendments to complaints should be freely given. Carnegie respectfully requests that this Court allow an amendment of the Amended Complaint to assert a claim for fraud against Crump and Miller. Carnegie is pleading no new facts, and [sic] simply attempting to add parties to a previously stated cause of action.

Plaintiff's Memo of Law at 16.

In reply, Crump and Miller contend that the 15% commission that Crump receives is the industry standard that Crump would receive for its services regardless of the contract between plaintiff and UNF. Therefore, Crump argues that it in no way specifically benefitted from the agreement, and cannot be held liable for a breach of that contract.

In opposition to plaintiff's cross-motion, Crump and Miller maintain that plaintiff has failed to allege any facts that support a cause of action for fraud as against them. Crump and Miller assert that the Complaint relies on one telephone call between Neuman, Miller and Kevin Daly, plaintiff's Managing Partner, which confirmed that plaintiff would receive 60% of the commissions. However, the Amended Complaint fails to specify what, if anything,

Miller said during this telephone call. Amended Complaint, ¶¶ 62-69. Moreover, the only allegation of fraud on the part of Crump is based on the statements from Miller and Neuman made during some phone calls in August 2006 that plaintiff's complaints regarding the commissions would be handled internally. Amended Complaint ¶¶ 93-99. It is Crump and Miller's contention that none of this establishes the necessary particularity and specificity needed to maintain a cause of action for fraud, including the element of justifiable reliance, and thus the cross-motion should be denied. Further, Crump and Miller argue that the fraud cause of action is duplicative of the breach of contract claim.

In reply, plaintiff contends that its cause of action for fraud is stated with sufficient particularity and that it is not duplicative of its breach of contract claim.

In motion sequence number 004, the UNF defendants assert that they incorporate and adopt all the arguments espoused by Crump and Miller in motion sequence number 003, and plaintiff's cross-motion and memorandum of law in opposition apply to both motions. The UNF defendants do not move to dismiss the third cause of action for breach of contract asserted against UNF.

DISCUSSION

Initially, the Court will address plaintiff's cross-motion for leave to amend the Amended Complaint to include Crump and Miller in its fifth cause of action for common-law fraud, because that determination affects the motions to dismiss.

CPLR 3025 (b) provides that

[a] party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances.

As the Court held in *Seidman v Industrial Recycling Props., Inc.*, 83 AD3d 1040, 1040-1041 (2d Dept 2011):

Leave to amend a pleading pursuant to CPLR 3025 (b) should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit, or unless prejudice or surprise to the opposing party results directly from the delay in seeking leave to amend.

In order to state a cause of action for fraud, the person claiming injury must allege

'a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to

rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury' [citation omitted].

Mandarin Trading Ltd. v Wildenstein, 16 NY3d 173, 178 (2011); see also *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 (1996).

Neither the Amended Complaint nor the portion of the proposed Second Amended Complaint submitted with the cross-motion, contains any words that Miller, on his own behalf or on behalf of Crump, stated that were either misrepresentations or omissions that he knew to be false. Plaintiff merely makes a conclusory assertion that the words and actions attributed to Neuman are attributable to Miller, and, hence, to Crump as well. However, Crump and Miller cannot be held liable for the purported misrepresentations of Neuman. *Ehrlich v Froelich*, 72 AD3d 1010 (2d Dept 2010).

As stated by the Court in *Friedman v Anderson*, 23 AD3d 163, 166 (1st Dept 2005):

'[A] mere recitation of the elements of fraud is insufficient to state a cause of action.' Furthermore, a plaintiff seeking to recover for fraud and misrepresentation is required 'to set forth specific and detailed factual allegations that the defendant personally participated in, or had knowledge of any alleged fraud.' (internal citations omitted).

Moreover, plaintiff's reliance on *Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486 (2008), is misplaced, because, as the recipient of the alleged misrepresentations, plaintiff would have been aware of all of the particular facts and alleged misrepresentations that needed to be alleged to satisfy the requirements of CPLR 3016 (b).

In addition, the substance of plaintiff's allegations of fraud with respect to Crump and Miller is that they fraudulently represented that plaintiff would be paid its commissions, which is nothing more than an allegation of a future intent to breach a contract, for which a cause of action for fraud will not lie. *Hylan Electrical Contracting, Inc. v MasTec North America, Inc.*, 74 AD3d 1148, 1149 (2d Dept 2010); *WIT Holding Corp. v Klein*, 282 AD2d 527 (2d Dept 2001).

Therefore, based on the foregoing, plaintiff's cross-motion seeking leave to amend the Complaint to add Crump and Miller to its cause of action for common-law fraud is denied.

Motion Seq. No. 003

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction . . . We 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 . . . In assessing a motion under 3211(a)(7), . . . a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one.

Leon v Martinez, 84 NY2d 83, 87-88 (1994) (internal citations and quotation marks omitted). Allegations consisting of bare legal conclusions, with no factual specificity, however, "are insufficient to survive a motion to dismiss." *Godfrey v Spano*, 13 NY 3d 358, 375 (2009); see also *Caniglia v Chicago Tribune-N.Y. News Syndicate*, 204 AD2d 233, 233-34 (1st Dept 1994).

RICO Claims

18 USC §§ 1962 (c) and (d) (RICO) provide that:

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

It is well established that state courts have concurrent jurisdiction with federal courts to hear civil RICO claims.

Tafflin v Levitt, 493 US 455 (1990); *Simpson Elec. Corp. v Leucadia, Inc.*, 72 NY2d 450 (1988).

The elements of civil RICO are: "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity [citation omitted]." *Podraza v Carriero*, 212 AD2d 331, 335 (4th Dept 1995), lv dismiss 86 NY2d 885 (1995). The definition of "racketeering activity" includes any one of a number of predicate offenses, including wire and mail fraud. 18 USC § 1961 (1). In order to establish a "pattern," there must be at least two acts of racketeering activity within a 10-year period. 18 USC § 1961 (5); *Simpson Elec. Corp. v Leucadia*, 72 NY2d at 461.

In the case at bar, plaintiff's allegations of a continuing pattern of racketeering activity and multiple use of the wires and mails to perpetrate a fraud all concern a breach of the contract between plaintiff and UNF. According to plaintiff, the defendants, acting as an association-in-fact as defined in 18 USC § 1961 (4), conspired to assist UNF to avoid its contractual obligation to split both initial and renewal commissions with plaintiff in violation of 18 USC § 1962 (d). The mail and wire fraud allegations concern the transmission of the insurance applications indicating Merkel as the sole broker to the insurance carriers. The pattern of racketeering alleged involves a statement from Neuman, during a

deposition in an unrelated matter, that UNF *might* owe commissions to other brokers. “[T]o allege a pattern of racketeering activity, a party ‘must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity’ [internal citation omitted].” *New York Mtge. Servicing Corp. v Dake*, 179 AD2d 1007, 1008 (4th Dept 1992).

In the instant matter, plaintiff has failed to state a RICO cause of action. The specific acts complained of constitute no more than a breach of contract between plaintiff and UNF. To allow a civil RICO cause of action against every individual or entity who allegedly breaches two or more commercial contracts would take the concept of “racketeering” to absurd extremes. Accordingly, the first and second causes of action asserted as against Crump and Miller are dismissed.

Breach of Contract

“The elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff, the defendant’s failure to perform, and resulting damage (citation omitted).” *Flomenbaum v New York Univ.*, 71 AD3d 80, 91 (1st Dept 2009), *aff’d* 14 NY3d 901 (2010). In the instant matter, Crump was not a party to the contract, and thus cannot be held liable for its

alleged breach. See *Kopelowitz & Co., Inc. v Mann*, 83 AD3d 793, 797 (2d Dept 2011); *Dember Construction Corp. v Staten Island Mall*, 56 AD2d 768, 769 (1st Dept 1977). This is true, even if Crump may have derived some benefit from the contract between plaintiff and UNF, such as the 15% industry standard commission alleged by plaintiff. *St. Louis W., Inc. v Pickard*, 26 Misc 3d 77 (App Term, 1st Dept 2010).

Consequently, the third cause of action asserted as against Crump for breach of contract is dismissed.

Conversion

Similarly, plaintiff's fourth cause of action for conversion asserted as against defendant Miller must be dismissed.

To establish a cause of action in conversion 'the plaintiff must show legal ownership or an immediate superior right of possession to a specific identifiable thing and must show that the defendant exercised an unauthorized dominion over the thing in question ... to the exclusion of the plaintiff's rights' (internal citation omitted).

Castaldi v 39 Winfield Associates, 30 AD3d 458, 458 (2d Dept 2006).

Whereas "[m]oney, if specifically identifiable, may be the subject of a conversion action, ... an action for conversion cannot

be validly maintained where damages are merely being sought for breach of contract [internal citations omitted]." *Peters Griffin Woodward, Inc. v WCSC Inc.*, 88 AD2d 883, 883 (1st Dept 1982) (plaintiff never had ownership, possession or control of the commissions it alleged were wrongfully delivered to a third party).

In essence, plaintiff is alleging a contractual right to payment, for which its conversion action will not lie. *Castaldi v 39 Winfield Associates, supra*.

Based on the foregoing, Crump and Miller's motion to dismiss the Complaint as against them is granted.

Motion Seq. No. 004

The first and second causes of action in the Amended Complaint, as alleged against the UNF defendants, alleging violations of RICO, are dismissed for the reasons stated above.

The fourth cause of action for conversion asserted as against Neuman and Merkel is also dismissed for the reasons previously noted, i.e., that plaintiff is merely seeking damages for breach of contract and had no legal ownership or possession of the commissions.

The fifth cause of action for fraud as against the UNF defendants is similarly dismissed. Although, in this instance,

plaintiff has pled the specific statements made by Neuman, those statements merely amount to an allegation that the UNF defendants intended to breach the contract. The mere assertion that the contracting parties did not intend to meet their contractual obligations does not convert a cause of action for breach of contract into one for fraud. *767 Third Ave. LLC v Greble & Finger, LLP*, 8 AD3d 75, 76 (1st Dept 2004); *Modell's N.Y. v Noodle Kidoodle*, 242 AD2d 248, 249 (1st Dept 1997); see also *Trenga Realty v Tiseo*, 117 AD2d 951 (3d Dept 1986) (a corporate officer's statement that commissions owed will be paid does not constitute fraud, but is, essentially, an action grounded in contract).

Therefore, based on the foregoing, the UNF defendants' motion is granted and the first, second, fourth and fifth causes of action asserted as against them are dismissed.

That portion of the UNF defendants' motion seeking the imposition of sanctions against plaintiff and its counsel is denied in the exercise of this Court's discretion. 22 NYCRR 130-1.1.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the motion of defendants Crump Group, Inc. and Eric Miller to dismiss the Complaint asserted as against them

(motion sequence number 003) is granted and plaintiff's cross-motion to include all the defendants in its claim for common-law fraud is denied, and the Amended Complaint is dismissed as against said defendants, with prejudice and without costs or disbursements, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the motion of defendants United National Funding, LLC, Philip Neuman and Georgia Merkel (motion sequence number 004) to dismiss the first, second, fourth and fifth causes of action asserted as against them is granted; and it is further

ORDERED that the Complaint is dismissed in its entirety as against defendants Philip Neuman and Georgia Merkel, with prejudice and without costs and disbursements, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the third cause of action is severed and continued against the only remaining defendant, UNF; and it is further

ORDERED that defendant UNF is directed to serve an Answer to the third cause of action contained in the Amended Complaint within 20 days of service of a copy of this Decision/Order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in IA Part 39, 60 Centre Street, Room 208 on September 5, 2012 at 9:30 a.m.

This constitutes the decision and order of this Court.

Dated: July 12, 2012



BARBARA R. KAPNICK
J.S.C.

BARBARA R. KAPNICK
J.S.C.