

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

RENE HEREDIA,
Plaintiff,
v.
INTUITIVE SURGICAL, INC.,
Defendant.

Case No. [5:15-cv-02662-EJD](#)
**ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT**
Re: Dkt. No. 35

I. INTRODUCTION

Plaintiff Rene Heredia ("Dr. Heredia") is a Bolivian doctor who contracted to purchase a surgical device known as the da Vinci system (the "Device"). The Device is made by Defendant Intuitive Surgical, Inc.'s ("Intuitive"). The sales transaction was never completed and Dr. Heredia received a partial refund of the payments he made for the Device. Dr. Heredia filed the instant action to recover the balance of his payments, which totals \$850,000. Presently before the Court is Intuitive's motion for summary judgment. The motion was heard on April 26, 2018. For the reasons set forth below, Intuitive's motion is granted.

II. BACKGROUND

Dr. Heredia is a urologist and surgeon practicing in Santa Cruz, Bolivia. Dr. Heredia learned of the Device while attending a medical conference. Intuitive's representatives told Dr. Heredia that he would need to purchase the Device "through Intuitive's agent and exclusive distributor for Bolivia, DeLeC Cientifica Argentina SA ('DeLeC [Argentina])." Heredia Decl., ¶2. The president of DeLeC Argentina, Carlos Lecour ("Lecour"), visited Dr. Heredia's clinic in

1 Bolivia and gave a presentation and provided marketing and performance literature about the
2 Device to Dr. Heredia. Id., ¶3. The literature identified DeLeC Argentina as the exclusive
3 distributor for Intuitive in Argentina, Uruguay, Paraguay and Colombia. Dkt. 88-2, p. 16. In one
4 document Lecour is identified as the "Presidente" of both DeLeC Argentina and another entity,
5 DeLeC Cientifica Uruguay SA ("DeLeC Uruguay"). Id.

6 Dr. Heredia agreed to structure the purchase of the Device through Trimedical Bolivia
7 ("Trimedical"), as Intuitive and Lecour directed. Heredia Decl., ¶4. In July of 2012, Dr. Heredia
8 entered into a Purchase and Sale Agreement for the Device with Trimedical.¹ Dkt. 82-3. Dr.
9 Heredia made a few installment payments to Trimedical. In 2013, however, Dr. Heredia learned
10 that Trimedical "had misappropriated" his funds. Heredia Decl., ¶4. Dr. Heredia ceased making
11 payments and initiated legal action in three separate courts to recover the funds he had paid for the
12 Device. Dr. Heredia pursued legal action against Trimedical in Bolivia; (2) against DeLeC
13 Argentina and Lecour in Florida; and (3) against Intuitive in this district.

14 A. Dr. Heredia's Proceedings in Bolivia

15 On February 4, 2014, Dr. Heredia initiated criminal proceedings through the Bolivian
16 Public Prosecutor against Trimedical's officers, accusing them of the crime of "aggravated
17 swindling" pursuant to Bolivian Criminal Code section 335. Dkt. 82-3 (Cashman Decl. Ex. 1 at
18 §3.1). The Bolivian authorities investigated the claims and ultimately determined that there was no
19 basis to conclude that any crime had been committed. See id.

20 Dr. Heredia and Trimedical subsequently sued one another over their contractual dispute
21 and Dr. Heredia's role in prompting the criminal proceedings. The parties ultimately executed a
22 settlement agreement. Dkt. 82-3. The settlement agreement, which has been translated from
23 Spanish to English, includes the following recitals:

24 2.1 On June 10, 2012, the parties executed a Purchase and Sale Agreement of
25 Medical Equipment for Surgical Assistance (new), in the freely agreed upon amount of

26 ¹ The Court previously took judicial notice of the Trimedical sales agreement when ruling
27 on Intuitive's motion to dismiss, and does so again.

1 USD 2,744,000, which, pursuant to the provisions agreed upon in the Agreement, were
2 to be paid by the Buyer (the PHYSICIAN) in advance[], in cash.

3 2.2. Of the total agreed upon price, as per Clause 3 of the Master Agreement,
4 PHYSICIAN paid in installments to TRIMEDICAL the amount of USD 2,096,000 (two
5 million ninety six United States dollars), leaving an outstanding balance to date of USD
6 648,000 (six hundred forty eight thousand United States dollars).

7 2.3. Between the months of August 2012 and April 2013, TRIMEDICAL used the
8 installment payments made by Physician (Dr. René Heredia Heredia) to make four
9 deposits in favor of a provider named DELEC S.A., as installment payments for the
10 purchase of the Medical Equipment described above, which amounted to USD 850,000
11 (eight hundred fifty thousand United States dollars).

12 2.4 The Master Agreement established that the payment for the purchase of the medical
13 equipment was to be made in cash, however, the PHYSICIAN (Buyer) only paid
14 (in installments) the amount of USD 2,096,000 (two million ninety six thousand United
15 States dollars), since the PHYSICIAN himself decided not to continue with the purchase
16 of the equipment by exclusively professional and investment-related reasons, since the
17 equipment was, as stated by the Physician/Buyer, no longer economically profitable for
18 his professional projects.

19 2.5 On November 11, 2013, at the request of Dr. René Heredia Heredia,
20 TRIMEDICAL refunded USD 250,000 (two hundred fifty thousand United States dollars),
21 in favor of the Physician (Dr. René Heredia Heredia). On February 13, 2014, at the
22 request of Dr. René Heredia Heredia, TRIMEDICAL refunded USD 300,000 (three
23 hundred fifty thousand [sic] United States dollars), in favor of the Physician (Dr. René
24 Heredia Heredia), since the latter decided not to purchase the medical equipment,
25 adding up to a total amount of USD 550,000 (five hundred fifty thousand United States
26 dollars).

27 2.6 The money deposited to DELEC S.A. of USD 850,000 is being currently withheld
28 by said provider, since the decision not to purchase the medical equipment described in
Clause 2 of the Master Agreement has raised a difference of opinions between
Trimedical and the Physician. This fact is acknowledged and accepted by both parties.

2.7 To date, the partial amount submitted by the Physician to TRIMEDICAL, the latter
only holds USD 696,000 (six hundred ninety six thousand United States dollars), due to
the fact that the amount of USD 550,000 (five hundred fifty thousand United States
dollars) was reimbursed to the Physician (refer to section 2.5) and the amount of USD
850,000 (eight hundred fifty thousand United States dollars) are held by provider DELEC
S.A. (refer to sections 2.3 and 2.6).

* * *

4.2.2 Money held by DELEC S.A. The PHYSICIAN agrees and acknowledges that due
to his failure and subsequent decision not to purchase the equipment subject matter of the
Master Agreement, provider DELEC S.A. has withheld the partial payment made by
TRIMEDICAL (Refer to sections 2.3 and 2.6).

Dkt. 82-3, pp. 2-3, 4.² Notably, wire transfers produced in the Bolivian proceedings show that the

² Dr. Heredia contends that the settlement agreement is unauthenticated and therefore should not

1 \$850,000 at issue in the present lawsuit was paid to DeLeC Uruguay—not DeLeC Argentina.
2 Dkt. 82-3, pp .23-26 (Cashman Decl. Ex. 4).³

3 B. Dr. Heredia's Florida Lawsuit

4 In the Florida action, Dr. Heredia named DeLeC Argentina and Lecour as defendants and
5 asserted claims for conversion, breach of contract and fraud arising out of the same acts as alleged
6 here. Dkt. 82-3, pp. 39-49 (Cashman Decl. Ex. 5). DeLeC Argentina and Lecour moved to
7 dismiss the complaint. Lecour submitted a sworn declaration in support of the motion stating that
8 neither Lecour nor DeLeC Argentina ever entered into an agreement with Dr. Heredia; that neither
9 Lecour nor DeLeC Argentina ever received any money from Dr. Heredia; that Trimedical
10 purchased the Device from DeLeC Uruguay; that DeLeC Uruguay is separate and distinct from
11 DeLeC Argentina; and that Lecour is not an officer of DeLeC Uruguay. Id. (Ex. 6 ¶¶21-25).⁴

12 C. Proceedings In This Court

13 Dr. Heredia initiated this suit in 2015, asserting claims for both direct and vicarious
14 liability based on the alleged conduct of DeLeC Argentina. The Court dismissed the complaint
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17 be considered in ruling on Intuitive's summary judgment motion. Dkt. 88 (Dr. Heredia's
18 Opposition, pp. 4-5). Dr. Heredia's argument is unpersuasive. To satisfy the requirement of
19 authentication, Federal Rule of Evidence 901 requires the proponent to produce evidence
20 sufficient to support a finding that the item is what the proponent claims it is. Dr. Heredia's
21 counsel provided the settlement agreement to Intuitive's counsel in response to a request for copies
22 of all documents and pleadings associated with Dr. Heredia's legal proceedings in Bolivia. Dkt.
23 82-2 (Cashman Decl., ¶2). Moreover, Dr. Heredia has not contended that the agreement is not
24 authentic.

25 ³ Dr. Heredia contends that the evidence of wire transfers to DeLeC Uruguay is unauthenticated
26 and should not be considered. Here, Intuitive's counsel represents that Dr. Heredia's counsel gave
27 the evidence to Intuitive's office in response to Intuitive's request for copies of all documents and
28 pleadings associated with Dr. Heredia's legal proceedings in Florida. Dkt. 82-2, p. 2 (Cashman
Decl., ¶5). Accompanying the evidence of wire transfers is a translated copy of a letter from
Bladimir Pantoja G. to the Specialized Prosecutor assigned to the criminal case in Bolivia, stating
that he is submitting the evidence in compliance with the Bolivia court's order. Dkt. 82-3.
Bladimir Pantoja G. signed the settlement agreement on behalf of Trimedical. The declaration of
Intuitive's counsel, the letter and the settlement agreement are sufficient to authenticate the wire
transfers.

⁴ Dr. Heredia contends that the Court should disregard Lecour's declaration because it contains at
least one falsehood--that Lecour is not an officer of DeLeC Uruguay. Dr. Heredia's objection to
Lecour's declaration is overruled. The Court's function on a summary judgment motion is not to
make credibility determinations. See T.W. Elec. Serv., Inc. V. Pacific Elec. Contractors Ass'n,
809 F.2d 626, 630 (9th Cir. 1987).

1 with leave to amend and Dr. Heredia filed an amended complaint ("FAC") (Dkt. 32) which alleges
2 that Intuitive is vicariously liable for fraud and conversion committed by DeLeC Argentina.
3 Intuitive answered and filed a third party complaint against DeLeC Argentina, DeLeC Uruguay
4 and Trimedical for declaratory relief, equitable indemnity and contribution.

5 III. STANDARDS

6 A motion for summary judgment or partial summary judgment should be granted if "there
7 is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of
8 law." Fed. R. Civ. P. 56(a); Addisu v. Fred Meyer, Inc., 198 F.3d 1130, 1134 (9th Cir. 2000). The
9 moving party bears the initial burden of informing the court of the basis for the motion and
10 identifying the portions of the pleadings, depositions, answers to interrogatories, admissions, or
11 affidavits that demonstrate the absence of a triable issue of material fact. Celotex Corp. v. Catrett,
12 477 U.S. 317, 323 (1986). If the issue is one on which the nonmoving party must bear the burden
13 of proof at trial, the moving party need only point out an absence of evidence supporting the
14 claim; it does not need to disprove its opponent's claim. Id. at 325.

15 If the moving party meets the initial burden, the burden then shifts to the non-moving party
16 to go beyond the pleadings and designate specific materials in the record to show that there is a
17 genuinely disputed fact. Fed. R. Civ. P. 56(c); Celotex Corp., 477 U.S. at 324. A "genuine issue"
18 for trial exists if the non-moving party presents evidence from which a reasonable jury, viewing
19 the evidence in the light most favorable to that party, could resolve the material issue in his or her
20 favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986).

21 The court must draw all reasonable inferences in favor of the party against whom summary
22 judgment is sought. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).
23 However, the mere suggestion that facts are in controversy, as well as conclusory or speculative
24 testimony in affidavits and moving papers, is not sufficient to defeat summary judgment. Id.
25 ("When the moving party has carried its burden under Rule 56(c), its opponent must do more than
26 simply show that there is some metaphysical doubt as to the material facts."); Thornhill Publ'g Co.
27 v. GTE Corp., 594 F.2d 730, 738 (9th Cir. 1979). Instead, the non-moving party must come

1 forward with admissible evidence to satisfy the burden. Fed. R. Civ. P. 56(c).

2 "If the nonmoving party fails to produce enough evidence to create a genuine issue of
3 material fact, the moving party wins the motion for summary judgment." Nissan Fire & Marine
4 Ins. Co. v. Fritz Cos., Inc., 210 F.3d 1099, 1103 (9th Cir. 2000). "But if the nonmoving party
5 produces enough evidence to create a genuine issue of material fact, the nonmoving party defeats
6 the motion." Id.

7 III. DISCUSSION

8 A. Conversion

9 Dr. Heredia alleges that Intuitive converted the \$850,000 at issue. Conversion is the
10 "wrongful exercise of dominion over the property of another." Welco Elecs., Inc. v. Mora, 223
11 Cal.App.4th 202, 208 (2014). To state a claim for conversion under California law, a plaintiff
12 must plead the following elements: "(1) the plaintiff's ownership or right to possession of the
13 property; (2) the defendant's conversion by a wrongful act or disposition of property rights; and (3)
14 damages." Id. For the first element, the plaintiff must establish a legal right to "immediate
15 possession" of the funds or property at issue. In re Baily, 197 F.3d 997, 1000 (9th Cir. 1999); see
16 also Farmers Ins. Exchange v. Zerlin, 53 Cal.App.4th, 452 (1997). For the second element, while
17 "[i]t is not necessary that there be a manual taking of the property," the plaintiff must show "an
18 assumption of control or ownership over the property, or that the alleged converter has applied the
19 property to his own use." Messerall v. Fulwider, 199 Cal. App. 3d 1324, 1329 (1988).

20 As to the first element of conversion, Dr. Heredia has not presented sufficient evidence to
21 raise a triable issue of fact regarding the right to immediate possession of the \$850,000. Dr.
22 Heredia's contract with Trimedical does not contain any provisions regarding refunds.
23 Furthermore, the settlement agreement negates any right to immediate possession of the \$850,000.
24 According to the recitals in the settlement agreement, the \$850,000 is being "withheld" because
25 "the decision not to purchase the [Device] has raised a difference of opinions between Trimedical
26 and the Physician. This fact is acknowledged and accepted by both parties." Dkt. 82-3, pp. 2-3.
27 The settlement agreement also recites that the funds are being withheld because of Dr. Heredia's

1 "failure and subsequent decision not to purchase" the Device. Dkt. 82-3, p. 4. In the absence of a
2 contractual right to a refund and the express acknowledgments in the settlement agreement, a
3 reasonable jury could not find that Dr. Heredia has a legal right to immediate possession to the
4 \$850,000.

5 Dr. Heredia has also failed to present sufficient evidence to raise a triable issue as to the
6 second element of conversion. There is no evidence that DeLeC Argentina converted the
7 \$850,000 by a wrongful act. Dr. Heredia contracted with Trimedical, and Trimedical in turn
8 contracted with DeLeC Uruguay for the purchase of the Device. Trimedical transferred Dr.
9 Heredia's payments for the Device to DeLeC Uruguay (and not DeLeC Argentina) pursuant to the
10 terms of the parties' subcontract. Thus, DeLeC Uruguay received Dr. Heredia's payments pursuant
11 to contract and not through any wrongful act. Nor can the continued retention of the funds be
12 characterized as a wrongful act in light of the recitals in the settlement agreement. Moreover,
13 there is no evidence that DeLeC Argentina had any role in, much less directed or otherwise caused
14 DeLeC Uruguay to retain the funds. Lecour's alleged involvement in both DeLeC Argentina and
15 DeLeC Uruguay, without more, is insufficient to establish conversion of the funds by a wrongful
16 act.

17 Despite the recitals in the settlement agreement, Dr. Heredia denies having "a 'change of
18 heart' that caused him to 'back out' of his agreement to purchase the Device." Dkt. 88 (Dr.
19 Heredia's Opposition, p. 3). Dr. Heredia explains that prior to learning about the alleged
20 misappropriation, he had every intention of completing the purchase. Heredia Decl., ¶8. Dr.
21 Heredia contends that Trimedical breached the agreement, which "led to litigation and delays
22 lasting over a year and a half, thereby dramatically changing the economics of any new deal to
23 purchase the [Device]." *Id.* Dr. Heredia also contends that prior to executing the settlement,
24 DeLeC Argentina and Lecour told him that DeLeC Argentina would return the \$850,000 once it
25 received approval from Trimedical. Heredia Decl., ¶6. 2.6. The rationale and reasonableness of
26 Dr. Heredia's conduct, however, are not relevant. To defeat Intuitive's summary judgment motion,
27 Dr. Heredia must raise a triable issue as to each of the three elements of conversion, which he has

1 not done. Dr. Heredia's acknowledgment in the settlement agreement --that he chose to
2 discontinue with the purchase of the Device, which raised a difference of opinions --is dispositive
3 for the reasons discussed above. Intuitive is entitled to summary judgment on the conversion
4 claim.

5 B. Fraud

6 Dr. Heredia asserts several fraud-based claims, the substance of which is that DeLeC
7 Argentina never intended to honor Dr. Heredia's agreement with Trimedical to purchase the
8 Device but secretly intended to misappropriate any funds it received toward the purchase. He
9 seeks to hold Intuitive vicariously liable for the conduct of DeLeC Argentina.

10 The elements of fraudulent misrepresentation in California are: (1) a misrepresentation; (2)
11 knowledge of falsity; (3) intent to defraud or to induce reliance; (4) justifiable reliance; and (5)
12 resulting damage. Engalla v. Permanente Med. Group, Inc., 15 Cal. 4th 951, 974 (1997). The
13 elements of negligent misrepresentation are similar except that a plaintiff need not show that the
14 defendant knew of the falsity of the statement, but rather that the defendant lacked reasonable
15 ground for believing the statement to be true. McReynolds v. HSBC Bank USA, No. 5:11-cv-
16 05245 EJD, 2012 U.S. Dist. LEXIS 165219, at *6, 2012 WL 5868945 (N.D. Cal. Nov. 19, 2012).
17 "The required elements for fraudulent concealment are (1) concealment or suppression of a
18 material fact; (2) by a defendant with a duty to disclose the fact to the plaintiff; (3) the defendant
19 intended to defraud the plaintiff by intentionally concealing or suppressing the fact; (4) the
20 plaintiff was unaware of the fact and would not have acted as he or she did if he or she had known
21 of the concealed or suppressed fact; and (5) plaintiff sustained damage as a result of the
22 concealment or suppression of the fact." Graham v. Bank of Am., N.A., 226 Cal. App. 4th 594,
23 606 (2014).

24 Here, there is no evidence that DeLeC Argentina intended to defraud or to induce reliance
25 at the time the alleged misstatement was made. There is also no evidence that DeLeC Argentina
26 made a negligent misrepresentation. Fraud cannot be inferred from the fact that DeLeC Argentina
27 did not deliver the Device because Dr. Heredia decided not to continue with the purchase of the

1 Device. Nor can fraud be inferred from the fact that DeLeC Uruguay retains the funds at issue.
2 As discussed previously, Dr. Heredia acknowledged in the settlement agreement the funds at issue
3 are being withheld "due to his failure and subsequent decision not to purchase the equipment."
4 Dkt. 82-3, p. 2.

5 Furthermore, there is no evidence that DeLeC Argentina's alleged fraud caused damages.
6 Once again, the settlement agreement makes clear that Dr. Heredia chose to discontinue with the
7 purchase. In response, Dr. Heredia contends that there is a triable issue of fact as to whether he
8 breached the purchase agreement by discontinuing the payments. Whether Dr. Heredia breached
9 the contract is irrelevant, however. That he chose to discontinue with the purchase of the Device
10 precludes a finding that DeLeC Argentina's alleged fraud caused damages. Intuitive is entitled to
11 summary judgment on the fraud claim.

12 C. Dr. Heredia's Request for Discovery

13 Dr. Heredia requests that the Court defer ruling on the summary judgment pursuant to Rule
14 56(d), Fed.R.Civ.P., so that he may investigate the relationship between DeLeC Argentina and
15 DeLeC Uruguay. Dr. Heredia's FAC, however, does not include any allegations to support a
16 theory of liability based upon piercing the corporate veil. Furthermore, to obtain postponement of
17 a summary judgment motion, a party must show the following: facts indicating a likelihood that
18 controverting evidence exists as to a material fact; specific reasons why such evidence was not
19 discovered or obtained earlier; the steps or procedures by which the opposing party proposes to
20 obtain such evidence; and an explanation of how those facts will suffice to defeat the summary
21 judgment motion. Tatum v. City & County of San Francisco, 441 F.3d 1090, 1101 (9th Cir.
22 2006). Dr. Heredia has not made the requisite showings. In particular, Dr. Heredia has not shown
23 that he has been diligent in pursuing the discovery he now seeks. Dr. Heredia's Rule 56(d) request
24 is denied.

25 IV. CONCLUSION

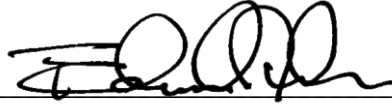
26 For the reasons set forth above, Intuitive's motion for summary judgment is GRANTED.
27 No later than May 18, 2018, Intuitive shall file and serve an updated status conference statement

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setting forth the status of its proceedings against the third party defendants.

IT IS SO ORDERED.

Dated: May 1, 2018



EDWARD J. DAVILA
United States District Judge