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SHORT FORM ORDER

INDEX No. 22425-11

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 45 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 11/18/11
ADJ. DATES 12/9/11
Mot. Seq. # 002 - MG Case Disp.
Settle Judgment
CDISP Y X N ___

CHRISTOPHER CANZONA, Plaintiff, -against- CHARLES ATANASIO and MARY ATANASIO, Defendants.	DiGIROLOMO & ASSOC., PC Attys. For Plaintiff 595 Stewart Ave. Garden City, NY 11530 MORVILLO, ABRAMOWITZ, ET ALS Attys. For Defendants 565 Fifth Ave. New York, NY 10017

Upon the following papers numbered 1 to 10 read on this motion to dismiss ; Notice of Motion/Order to Show Cause and supporting papers 1 - 3 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 4-6 ; Replying Affidavits and supporting papers ; Other 7-8 (memorandum); 9-10 (memorandum) ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the defendants' request for oral argument of this motion is considered under 22 NYCRR202.8 and is denied; and it is further

ORDERED that this motion (#002) by the defendants for dismissal of the plaintiff's amended complaint in this action for recovery of damages under theories of contract, implied contract and tort law is considered under CPLR 3211(a) and is granted.

The plaintiff commenced this action to recover monies allegedly due him from the defendants as a result of the plaintiff's payment of various expenses incurred in connection with the ownership of a yacht and a home on Dune Road in Westhampton, New York. The facts set forth the plaintiff's amended complaint include those detailed below.

In January of 2000, the plaintiff became employed by a corporation owned in part by defendant, Charles Atanasio, who is the brother of the plaintiff's wife. While employed by the corporation, the plaintiff earned monies in wages in excess of $5,000,000.00 dollars which he separated into two accounts. "The first account was personal and the second was Loan Agreement" (*see* ¶ 4 of Amended Complaint). The plaintiff's employment with the defendant's company ended on August 10, 2008.

Prior to November of 1999, the plaintiff owned a 37 foot boat. In November of 1999, the plaintiff traded that boat in for $135,000.00 which was used as the down payment on the purchase a 48 foot boat which cost $625,000.00. The plaintiff admits that defendant Charles Atanasio was the owner of a 50% interest in this new boat. Commencing in the year 2001 and continuing through August of 2008, the plaintiff allegedly paid 10% of Loan Agreement account, namely $339,823.24, to defray the cost of owning and using this new boat.

The plaintiff asserts that during the same seven and one-half year time period described above, he also paid some $3,058409.16 towards the cost of maintaining real property located on Dune Road in Westhampton, New York. At the time of its purchase by the defendants and the plaintiff and his wife in January of 2001 at cost of 750,000, the property was unimproved. By August of 2001, the property was improved with a house.

The plaintiff alleges that during the seven and half year period, during which he was making these payments, "the Defendants had made several representations at various times to the plaintiff that monies over the seven (7) years expended by the plaintiff to support the defendants' property at 747 Dune Road, West Hampton New York and the 2000 forty-eight (48) foot Sea Ray Boat would be repaid to the plaintiff" (*see* ¶16 of the Amended Complaint).

In or about April of 2006, the plaintiff and his wife decided to sell their interests in the Dune Road property to the defendants. It was then that the plaintiff and defendants "agreed that the plaintiff would for one (1) year absorb and pay all expenditures for the property located at 747 Dune Road, West Hampton, New York as per Loan Agreement and for the 2000 forty eight foot Sea Ray boat" (*see* ¶ 11a of the Amended Complaint).

The record reflects that the sale of the plaintiff's interest (and that of his wife) in the Dune Road house closed in November of 2006 and that the defendants paid some $838,000.00 to purchase such interests. The record further reflects that the defendant continued to pay certain of the costs associated with the Dune Road house and the 2000 Sea Ray boat through August of 2008, notwithstanding that he was allegedly obligated to pay said amounts for a period of only one year following the sale of his interest to the defendants under the terms of the agreement described in paragraph 11a of the amended complaint. Without alleging that the defendants agreed to reimburse the plaintiff for the $3,398,232.40 in total expenses associated with the house and boat paid from January of 2001 through August of 2008, the plaintiff alleges that he received the sum of $500,000.00 from the defendants during a thirteenth month period commencing on September 1, 2008 and ending on February 1, 2009. While the plaintiff alleges that after February of 2009, the defendants stopped making payments and broke off all communications with the plaintiff, defendant Charles Atanasio is alleged

to have thereafter promised that, upon the sale of Atanasio's home in Dix Hills, the plaintiff would be paid the remaining amount of unreimbursed expenditures, namely, the sum of 2,898,234.40 (*see* ¶¶37-45 of the Amended Complaint).

The plaintiff's amended complaint sets forth five causes of action. In his First cause of action the plaintiff demands money damages from the defendants by reason of their purported engagement in acts of civil conspiracy. In the Second cause of action, the defendants are charged with conversion of the plaintiff's funds. The Third cause of action charges the defendants with breach of a contract allegedly entered into in January of 2000. The remaining causes of action charge the defendants with constructive fraud and unjust enrichment.

By the instant motion, the defendants seek dismissal of the plaintiff's amended complaint pursuant to CPLR 3211(a)(1); (a)(5) and/or (a)(7). For the reasons stated, the motion is granted.

On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the pleading is to be afforded a liberal construction (*see* CPLR 3026; ***EBC I, Inc. v Goldman, Sachs & Co.***, 5 NY3d 11, 19, 799 NYS2d 170 [2005]; ***Leon v Martinez***, 84 NY2d 83, 87–88, 614 NYS2d 972 [1994]), and the court must accord the plaintiff "the benefit of every possible favorable inference," accept the facts alleged in the complaint as true, and "determine only whether the facts as alleged fit within any cognizable legal theory" (*Id.*, at 84 NY2d 87–88). In making such determination, the court must consider whether the complaint contains factual allegations as to each of the material elements of any cognizable claim and whether such allegations satisfy any express, specificity requirements imposed upon the pleading of a particular claim by applicable statutes or rules (*see* ***East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.***, 66 AD3d 122, 884 NYS2d 94 [2d Dept 2009]). Evidentiary material submitted by the plaintiff may be considered by the court for purposes of remedying the defects in the complaint (*see* ***Berman v Christ Apostolic Church Intern. Miracle***, 87 AD3d 1094, 931 NYS2d 74 [2 Dept 2011]).

It is well established that the essential elements of a cause of action to recover damages for breach of contract are as follows: the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages (*see* ***Elisa Dreier Reporting Corp. v Global NAPs Networks,*** 84 AD3d 122, 921 NYS2d 329 [2d Dept 2011]; ***JP Morgan Chase v J.H. Elec. of N.Y., Inc.***, 69 AD3d 802, 893 NYS2d 237 [2d Dept 2010]; ***Palmetto Partners, L.P. v AJW Qualified Partners***, 83 AD3d3d 804, 921 NYS2d 260 [2d Dept 2011]). An enforceable contract requires mutual assent to its essential terms and conditions. If an agreement is not reasonably certain or specific in its material terms, there can be no legally enforceable contract (*see* ***Matter of 166 Mamaroneck Ave. Corp. v 151 E. Post Rd. Corp.***, 78 NY2d 88, 91, 571 NYS2d 686[1991]; ***Edelman v Poster***, 72 AD3d 182, 894 N.Y.S.2d 398 [1st Dept 2010]; ***Mellen & Jayne, Inc. v AIM Promotions, Inc.***, 33 AD3d 676, 823 NYS2d 99 [2006]). Moreover, because a contract is not breached until the time set for performance has expired (*see* ***Palmetto Partners, L.P. v AJW Qualified Partners.***, 83 AD3d at 806, *supra*), the pleader must identify the provisions of the contract that were allegedly breached in order to state a claim for damages for breach (*see* ***Barker v Time Warner Cable, Inc.***, 83 AD3d 750, 923 NYS2d 118 [2d Dept 2011]; ***Peters v Accurate Bldg. Inspectors Div. of Ubell***, 29 AD3d 972, 815 NYS2d 484 [2d Dept 2006]). Allegations that are vague, conclusory, and indefinite as to the alleged breach

of one or more provisions of the agreement are insufficient as a matter of law *(see* ***Island Surgical Supply Co. v Allstate Ins. Co.***, 32 AD3d 824, 820 NYS2d 854 [2d Dept 2006]).

Here, the gravamen of the plaintiff's claims against the defendants rests upon the existence and the defendants' breach of a "Loan Agreement", "representations" or "Agreement" entered into "by the parties regarding the plaintiffs' earned wages, and various expenditures regarding real property located at 747 Dune Road, West Hampton[s] New York and the 2000 forty-eight (48) foot Sea Ray boat"(see ¶¶ 4; 16; 32-34). However, the material terms of any such agreement are not alleged. Only in paragraph 16 of the amended complaint does the plaintiff allege that "the defendants made several representations at various times that all monies over the (7) year expended by the plaintiff to continuously support the defendants' property at 747 Dune Road West Hampton, New York, and the 2000 forty-eight (48) foot Sea Ray boat would be re-paid to the plaintiff as per the Loan Agreement". Neither the dates of origin of such agreements and representations nor the material terms thereof are alleged.

Upon its review of the complaint and after affording the allegations set forth therein a most liberal view, the court finds that the complaint fails to state a claim for breach of contract against either of the defendants. The complaint fails to identify the material terms of any agreement by which the defendants agreed to repay or otherwise reimburse the plaintiff for the expenditures paid by him with respect to property owned jointly by the defendants and the plaintiff at all times relevant or, in the case of the house, for a significant portion of such relevant times. Instead, the only agreement ascertainable from the complaint is the plaintiff's promise to continue to "absorb" and to "pay" the expenditures he had been making with respect to both the house and the boat since the year 2001, for the year following the 2006 sale of his ownership interest the real property located at Dune Road.

The court further finds that any attempt by the plaintiff to establish the existence of an agreement on the part of the defendants to re-pay or reimburse the plaintiff all of the monies he paid to maintain the house and the boat by resort to the doctrine of part performance is unavailing. The doctrine of part performance, where applicable, provides a claimant seeking to enforce an oral agreement with a defense to an adversary's claim that the agreement is unenforceable under the Statute of Frauds writing requirements for contracts affecting real property that is set forth in GOL §5-703 (*see* ***Messner Vetere Berger McNamee Schmetterer Euro RSCG, Inc. v Aegis Group Plc.***, 93 NY2d 229, 689 NYS2d 674 [1999]). The doctrine of part performance has no other application, not even to contracts for which writings are required by GOL §5-701, and its is not available to salvage a breach of contract claim not subject to GOL §5-703 (*Id.*, at 234, n.1; *see also* ***Valentino v Davis***, 270 AD2d 635, 703 NYS2d 609 [3d Dept. 2000]). To succeed in defeating the applicable statute of limitations defense provided by GOL §5-703, the acts of part performance relied upon must have been undertaken by the *claimant* and they must be unequivocally referable to oral agreement and explainable only with reference thereto (*see* ***Anostario v Vicinanzo***, 59 NY2d 662, 463 NYS2d 409 [1993]; ***745 Nostrand Retail Ltd. v 745 Jeffco Corp.***, 50 AD3d 768, 854 NYS2d 773 [2d Dept 2008]).

Assuming, without so finding, that the loan agreement or other agreement referred to in the plaintiff's complaint, to the extent it relates to the house on Dune Road, falls within the contemplation of GOL §5-703, the plaintiff failed to plead the elements of an enforceable oral contract for reimbursement under the doctrine

of part performance. The plaintiff's payment of expenditures associated with the house and boat over the course of the seven year period described is not unequivocally referable to any prior oral loan or other agreement with the defendants. The payments totaling $500,000.00 made by defendant, Charles Atanasio, during the thirteenth month period commencing in January of 2008 and ending in February of 2009, do not constitute part performance as these payments do not constitute action by the claimant. In any event, the $500,000.00 in payments are not unequivocally referable to any prior oral loan or other agreement between the parties. The defendants are thus entitled to a dismissal of the plaintiff's Third cause of action sounding in breach of contract.

The remaining claims asserted in the plaintiff's complaint are also subject to dismissal for legal insufficiency. Claims for damages predicated upon engagement in a civil conspiracy are not cognizable in New York (*see* ***Dune Deck Owners Corp. v Liggett***, 85 AD3d 1093, 927 NYS2d 125 [2d Dept 2011]). The plaintiff's First cause of action is thus dismissed pursuant to CPLR 3211(a)(7). Also insufficient is the plaintiff's Second cause of action sounding in conversion of funds (*see* ***Zendler Const. Co., Inc. v First Adjustment Group, Inc.***, 59 AD3d 439, 873 NYS2d 134 [2d Dept 2009]). The plaintiff's Fourth cause of action sounding in constructive fraud is not pled with the requisite specificity imposed upon such claims by CPLR 3013 and merely restates the plaintiff's breach of contract claim (*see* ***Schenkman v New York Coll. of Health Professionals***, 29 AD3d 671, 672, 815 NYS2d 159 [2d Dept 2006]). In addition, the failure to plead the existence of fiduciary relationships between the plaintiff and the defendants is fatal to the Fifth cause of action sounding in constructive trust (***see Refreshment Mgt. Serv., Corp. v Complete***, 89 AD3d 913, ____ NYS2d___, 2011 WL 5579055 [2d Dept 2011]).

In view of the foregoing, the instant motion (#002) by the defendants for an order dismissing the plaintiff's amended complaint is granted and said complaint is hereby dismissed..

Settle judgment upon a copy of this order.

DATED: 12/20/11

THOMAS F. WHELAN, J.S.C.