

Gold v Kanter

2011 NY Slip Op 33532(U)

December 23, 2011

Sup Ct, Nassau County

Docket Number: 006674-11

Judge: Vito M. DeStefano

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SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,
Justice

TRIAL/IAS, PART 19
NASSAU COUNTY

DEBRA GOLD,

Plaintiff,

-against-

**MATTHEW KANTER, an individual, and
COSMO HOLDINGS LLC, a limited liability
corporation,**

Defendants.

Decision and Order

**MOTION SUBMITTED:
September 23, 2011
MOTION SEQUENCE:01
INDEX NO. 006674-11**

The following papers and the attachments and exhibits thereto have been read on this motion:

Notice of Motion	1
Affirmation in Opposition	2
Affirmation in Reply	3

In an action, *inter alia*, to recover damages for breach of fiduciary duty, breach of contract, fraud, misrepresentation, and conversion, Defendants Matthew Kanter ("Kanter") and Cosmo Holdings LLC ("Cosmo") (collectively referred to as "Defendants") move for an order pursuant to CPLR 3211(a)(7) dismissing the complaint and disqualifying Robert Gold, Esq. from representing the Plaintiff Debra Gold ("Debra").¹

For the reasons that follow, the Defendants' motion is granted in part and denied in part. It is noted that the branch of Defendants' motion seeking disqualification was withdrawn given

¹ Robert Gold is the father of the Plaintiff, Debra Gold.

Debra's consent to change attorney and retention of new counsel in the instant action (Affirmation in Reply at ¶ 3; Ex. "U" to Opposition).

In April 2007, Kanter and Debra formed Cosmo for the purpose of investing in other companies (Ex. "A" at ¶ 6). Pursuant to Cosmo's operating agreement, both Kanter and Debra were members of Cosmo, with net profits/losses allocated to the members on a 75% (Kanter) and 25% (Debra) basis (Ex. "I" to Motion at Article 3.1). Cosmo's operating agreement listed Debra as a manager and Kanter as a manager and chief executive manager (Ex. "I" to Motion).

On April 15, 2011, Debra was notified that a meeting of the members was to be held on May 6, 2011, the purpose of which was to "discuss the general business of [Cosmo] and to hold a vote concerning the appointment of managers to [Cosmo]" (Ex. "B" to Motion).² On May 4, 2011, Robert Gold requested, on behalf of Debra, that a new notice be sent, permitting attendance and voting by proxy due to Debra's "significant health issues" (Ex. "C" to Motion).³

On May 5, 2011, Debra commenced this action asserting claims of breach of fiduciary duty, constructive trust, fraud, negligent misrepresentation, negligence, misappropriation/conversion of funds, breach of contract, intentional infliction of emotional distress, and prima facie tort (Ex. "A" to Motion). More specifically, the complaint alleges that: in 2009, Kanter removed her as a signatory to the Cosmo bank account, despite the fact that they were equal managing members; in 2010, Kanter failed to distribute any of Cosmo's income to her but, rather, made all distributions to himself (despite Debra's 25% interest); Kanter refused to provide her with copies of the 2009 and 2010 tax returns or copies of the 2010 and 2011 bank statements; and that Kanter has continuously and intentionally caused her stress and worry, thereby "jeopardizing her health and life expectancy" (Ex. "A" to Motion at ¶¶ 9-13).

² The letter was written Bryan Lewis of Lewis Johs Avallone Aviles, LLP ("Lewis Johs") and at the direction of Kanter (Ex. "B" to Motion).

³ The meeting occurred on May 6, 2011, one day after Debra commenced the instant action. On the morning of the meeting, Robert Gold was sent an e-mail indicating that Kanter had "no objection" to him "appearing for Ms. Gold as her proxy at the member's meeting" and to "bring a proxy authorization to the meeting" (Ex. "D" to Motion). Present at the meeting were Kanter (via telephone), two attorneys from Lewis Johs (one of whom had a proxy for Kanter), and Robert Gold. Importantly, Robert Gold did not have a proxy for Debra (Ex. "E" to Motion). Despite Robert Gold's objections, the voting of managers took place. Kanter was voted in as a manager. Although Debra was nominated for a manager position, the vote was defeated by a majority of membership interest and she was removed as manager. Also at the May 6 meeting, Cosmo's 2010 bank statements were provided to Robert Gold. All present at the meeting were advised that Cosmo's 2010 tax returns were on extension (Ex. "E" to Motion).

The Defendants thereafter filed the instant motion to dismiss the complaint pursuant to CPLR 3211(a)(7). On a motion pursuant to CPLR 3211(a)(7), the court must determine whether the Plaintiff has a legally cognizable cause of action and not whether the action had been properly plead (*Well v Yeshiva Rambam*, 300 AD2d 580 [2d Dept 2002]). The complaint must be liberally construed and the Plaintiff must be given the benefit of every favorable inference (*Tiffany General Holding Corp. v Speno, Goldberg, Steingart & Penn*, 278 AD2d 306 [2d Dept 2000]). The court must also accept as true the facts alleged in the complaint and any factual submissions made in opposition to the motion. If, from the facts alleged in the complaint and the inferences which can be drawn from the submissions in opposition, the court determines that the Plaintiff has a cognizable cause of action, the motion must be denied. Notwithstanding the liberal reading of the complaint, legal conclusions and facts contradicted on the record are not entitled to the presumption of truth (*In re Loukoumi, Inc.*, 285 AD2d 595 [2d Dept 2001]).

At bar, dismissal of the complaint, insofar as asserted against Cosmo, is warranted. While Cosmo is a named defendant, the complaint does not contain any allegations of wrongdoing on the part of Cosmo nor does it assert any causes of action against Cosmo (*see Harris v Adejumo*, 36 AD3d 855 [2d Dept 2007]).

Regarding defendant Kanter, the breach of contract cause of action (seventh cause of action) insofar as asserted against him, alleges that Kanter breached the operating agreement by: failing to provide Debra with her 25% share of the Cosmo profits; failing to distribute available funds as they were received; and removing Debra as a signatory on the Cosmo bank account, thereby depriving her of her management rights (Ex. "A" to Motion at ¶¶ 43-44).

The Defendants' motion papers do not set forth any particularized arguments or legal basis as to why the breach of contract cause of action fails to state a cause of action. Therefore, dismissal of the breach of contract action is not warranted (*Cottone v Selective Surfaces, Inc.*, 68 AD3d 1038 [2d Dept 2009]). In addition, the complaint provides sufficient notice of the occurrences to be proven and the requisite elements to sustain a breach of contract claim (*see JP Morgan Chase v J.H. Electric of New York, Inc.*, 69 AD3d 802 [2d Dept 2010]).

Nevertheless, it is also well settled that a breach of contract claim does not give rise to a separate cause of action in tort unless the defendant breached a legal duty that is separate and apart from any purported contractual obligations (*Hylan Electrical Contracting, Inc., v Mastec North America, Inc.*, 74 AD3d 1148 [2d Dept 2010]; *Old Republic National Title Insurance Co. v Cardinal Abstract Corp.*, 14 AD3d 678 [2d Dept 2005]). Here, the causes of action asserting

breach of fiduciary duty,⁴ negligence,⁵ and negligent misrepresentation⁶ are dismissed as duplicative of the breach of contract claim insofar as they do not assert claims unrelated to breach of the operating agreement.

The third cause of action asserted in the complaint alleges that Kanter defrauded Debra through material misrepresentation insofar as representing that he would not “do anything to hurt” her (Ex. “A” at ¶ 25). This fraud claim is not pled with the requisite particularity sufficient to defeat a motion to dismiss (CPLR 3016[b]). With respect to the remaining fraud allegations,⁷ they are each related to a breach of the operating agreement and, as such, are duplicative (*Hylan Electrical Contracting, Inc., v Mastec North America, Inc.*, 74 AD3d at 1149, *supra*; *Breco Environmental Contractors v Town of Smithtown*, 307 AD3d 330 [2d Dept 2003]).

A constructive trust may be imposed when property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest. The imposition of a constructive trust requires: a confidential or fiduciary relationship; a promise; a transfer in reliance on that promise; and unjust enrichment (*Watson v Pascal*, 65 AD3d 1333 [2d Dept 2009]). Here, Debra failed to allege a necessary component for the imposition of a constructive trust, to wit, a transfer of funds or other valuable property by her in reliance on an alleged promise made by Kanter and, as such, the second cause of action must be dismissed (*Halliwell v Gordon*, 61 AD3d 932 [2d Dept 2009]).

⁴ The breach of fiduciary duty cause of action asserted that Kanter did not comply with Article 3.2, Article 4.2, and Article 4.6 of the operating agreement and “failed to provide” Debra with all documents she was legally entitled to as a Cosmo Managing Member and LLC Member” (Ex. “A” at ¶¶ 16-19).

⁵ The fifth cause of action alleging negligence on the part of Kanter specifically asserts that Kanter breached his duty of good faith by engaging in the “unauthorized distributions of funds” and “breached the Cosmo Operating Agreement” (Ex. “A” at ¶¶ 37-38).

⁶ The allegations of negligent misrepresentation asserted in the fourth cause of action of the complaint are: 1) Kanter represented that he was managing the affairs of Cosmo “competently and acting in the best interest” of Debra, despite the fact that he had every intention of misappropriating the receipts due her; and 2) that Kanter represented that he would provide Debra with the 2009 and 2010 Cosmo tax returns and 2010 and 2011 bank statements despite having no intention of doing so (Ex. “A” at ¶¶ 31-32).

⁷ The other allegations of fraud asserted in the complaint are: 1) Kanter represented that he was managing the affairs of Cosmo “competently and acting in the best interest” of Debra, despite the fact that he had every intention of misappropriating the receipts due Debra; and 2) that Kanter represented that he would provide Debra with the 2009 and 2010 Cosmo tax returns and 2010 and 2011 bank statements despite having no intention of doing so (Ex. “A” at ¶¶ 25-26).

The cause of action asserting an intentional infliction of emotional distress must also be dismissed because the actions complained of “do not rise to the level of conduct which is ‘so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community’” (*Skarren v Household Finance Corp.*, 296 AD2d 488 [2d Dept 2002]; *Rohrlich v Consolidated Bus Transit, Inc.*, 15 AD3d 561 [2d Dept 2005] [citations omitted]). Additionally, Debra has failed to allege sufficient facts to sustain a cause of action under the theory of prima facie tort where there are no allegations in the complaint that Kanter’s “sole motivation was ‘disinterested malevolence’” (*Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 333 [1983]; *Bell v Slepakoff*, 224 AD2d 567 [2d Dept 1996]).

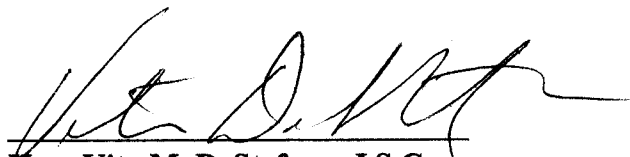
The sixth cause of action asserted in the complaint—misappropriation/conversion, alleges that Kanter: “misappropriated Cosmo funds by paying himself funds that he was not entitled to” and refused to “pay to Gold the unauthorized distributions that he made to himself”; and that the “distributions have not been in accord with the desire of a majority of the Managing Members of Cosmo” (Ex. “A” to Motion at ¶ 40). A claim for conversion cannot be predicated on a breach of contract (*Hamlet at Willow Creek Development Co., LLC v Northeast Land Development Corp.*, 64 AD3d 85 [2d Dept 2009]; *MBL Life Assurance Corp. v 555 Realty Co.*, 240 AD2d 375 [2d Dept 1997]). Accordingly, because Debra failed to set forth any allegations demonstrating a wrong independent from the contract claim, the Defendants are entitled to dismissal of the sixth cause of action.

Based on the foregoing, it is hereby ordered that: the complaint is dismissed insofar as asserted against Defendant Cosmo Holdings LLC; the first, second, third, fourth, fifth, sixth, eighth and ninth causes of action are dismissed insofar as asserted against Kanter; the branch of the motion seeking dismissal of the seventh cause of action insofar as asserted against Kanter is denied.

A Preliminary Conference has been scheduled for January 17, 2012, at 9:30 A.M. in the Preliminary Conference Part.

This constitutes the decision and order of the court.

Dated: December 23, 2011


Hon. Vito M. DeStefano, J.S.C.