

Hofer v Pollack

2013 NY Slip Op 32119(U)

August 30, 2013

Sup Ct, New York County

Docket Number: 650679/13

Judge: Eileen Rakower

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. EILEEN A. RAKOWER

Index Number : 650679/2013
HOFER, PAUL
vs
POLLACK, MICHAEL
Sequence Number : 001
DISMISS

PART 15

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). file
Replying Affidavits _____ | No(s). 0

Upon the foregoing papers, it is ordered that this motion is

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

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

Dated: 8/30/13



HON. EILEEN A. RAKOWER, J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X

PAUL HOFER

Plaintiff,

- against -

MICHAEL POLLACK, LEE BURNS, MARK MORGAN,
BRETT HUDSON, JOSE DELEMOS, BLACK FOREST
FILM GROUP, KERRY, KERRY & POLLACK, LLC
and JOHN DOE(s) (parties in connection with the firm
"Freedom for Joe" as successor(s)-in-interest),

Defendants.

-----X

HON. EILEEN A. RAKOWER, J.S.C.

Index No.
650679/13

**DECISION
and ORDER**

Mot. Seq. 001

Plaintiff Paul Hofer ("Plaintiff") commenced this action seeking to recover damages on an unpaid Promissory Note for a loan that Plaintiff made for pre-production costs for a screenplay titled "Freedom for Joe" which was being co-produced by defendant Lee Burns' ("Burns") company Awareness Films and a company named Kerry, Kimmel & Pollack, LLP ("KKP").

Plaintiff's Complaint asserts the following claims against defendants: fraudulent inducement, fraud, conversion, unjust enrichment, breach of contract, breach of fiduciary duty/constructive trust, and prima facie tort.

Defendant Burns now moves to dismiss the Complaint pursuant to CPLR §3211(a)(8) for lack of jurisdiction and (a)(7). Burns contends that this Court lacks jurisdiction over him because he has no contacts with the State of New York, does not transact any business in the State of New York, and did not commit any purposeful acts within the State of New York. Burns alleges that even if he is subject to jurisdiction of this Court, Plaintiff's Complaint must be dismissed as it fails to state a claim against Burns.

Plaintiff opposes. Plaintiff contends that Burns is subject to personal jurisdiction in New York because he transacted business in New York in connection with the underlying causes of action. Plaintiff alleges that Burns induced him to enter into the subject loan, the funds were paid by Plaintiff to a New York lawyer and were deposited into an account in a New York bank to be used for Burns' movie project, and Burns exercised dominion and control over the New York funds and made withdrawals from the New York account.

As alleged in the Complaint, Plaintiff is resident of the State of California. Burns is alleged to be "an individual who is and was a resident of California and New York and actively conducted business in both California and New York during the relevant time periods." KKP is alleged to be "an entity made up of individuals (including some of the named individual defendants) actively conducting business in both California and New York with an office address in New York at 445 Park Avenue (9th floor), New York, NY 10022 and in California at 8383 Wilshire Blvd., (Suite 355), Beverly Hills, CA, 90210" "established solely for the purpose of fraudulently inducing plaintiff Hofer to pay his monies into the entity so that the individual named defendants could loot the monies from the entity for themselves."

As further alleged in the Complaint, on or about July 26, 2011, Plaintiff was contacted via email by Burns. Burns requested that Plaintiff make a loan for the pre-production costs for a screenplay titled "Freedom for Joe" which was being co-produced by Burns' company Awareness Films and another company named KKP. In reliance on financial and other information that Burns sent concerning KKP, Plaintiff alleges that he agreed to make the loan.

Plaintiff further alleges that Burns then put Plaintiff in contact with defendant Michael Pollack by phone for further negotiations and on or about July 26, 2011, Curtis Sobel, Esq., a lawyer based in New York, acting on behalf of defendants, provided to Plaintiff a proposed Promissory Note for his review. Plaintiff requested certain changes, which Sobel agreed to incorporate. On or about August 1, 2011, Sobel emailed Plaintiff a Promissory Note with a principal amount of \$250,000 and premium payment of 20% due "upon funding of the Production Budget" or October 1, 2011, whichever occurred first, for a total of \$300,000 due and payable to Plaintiff no later than October 1, 2011. The promissory note, attached to the complaint, states that "Payor shall use the principal amount of this Note for exclusively for [sic] preproduction/production expenses on the Awareness Entertainment/Kerry, Kimmel

and Pollack co-produced feature film, currently entitled 'Freedom for Joe'."

Plaintiff further alleges that on or about August 1, 2011, Plaintiff received wiring instructions from Sobel instructing Plaintiff to wire \$250,000 directly to his client trust account and advising him that Burns would be a signatory on the account. Plaintiff thereafter wired the \$250,000 loan funds directly to Sobel's client trust account at "Sobel & Schleier, LLC." On or about October 3, 2011, Plaintiff executed a Promissory Note Extension Agreement, which provided an additional \$375,000 in "pari pasu" in the "Freedom for Joe" project payable with the original Promissory Note, all due on February 1, 2012. The extension is also attached to the complaint.

The Complaint alleges that KKP did not make payment on February 1, 2012 based on insufficient funds and that an accounting provided by Sobel showed that his trust account that had contained Plaintiff's loan proceeds had been emptied. Sobel explained that about \$50,000 was paid to Burns, and no other details were provided. To date, Plaintiff alleges that no payment has been made on the Note.

As for the basis of jurisdiction, the Complaint alleges that, "Upon information and belief, each of the defendants, acting alone and in conspiracy and partnership with the other defendants, is subject to jurisdiction in New York since defendants purposely availed themselves of the privilege of doing business in New York." The Complaint further alleges that "[u]pon information and belief, each of the defendants, acting alone and in conspiracy and partnership with the other defendants, transacted substantial business in the City and State of New York by, *inter alia*, (i) conducting operations out of offices located at 445 Park Avenue (9th flr), New York, NY 10022, and (ii) depositing into, withdrawing from, or otherwise operating and benefitting from the operation of a bank account based at The First National Bank of Long Island . . . , which bank is located in New York."

CPLR §3211(a)(8) states:

. . . A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(8) the court has not jurisdiction of the person of the defendant . . .

CPLR 302(a)(1) provides that a court may exercise personal jurisdiction over

a non-domiciliary who, in person or through an agent, “transacts any business within the state or contracts anywhere to supply goods or services in the state,” provided that the cause of action arises out of the transaction of business (*Lebel v. Tello*, 272 A.D.2d 103, 707 N.Y.S.2d 426 [1st Dept. 2000]). To determine the existence of jurisdiction under section 302(a)(1), a court must decide (1) whether the defendant “transacts any business” in New York, and, if so, (2) whether this cause of action “aris[es] from” such business transaction (*see Best Van Lines, Inc. v. Walker*, 490 F.3d 239 [2d Cir. 2007]).

As for the first part of the standard, courts look to “the totality of defendant’s activities within the forum” (*Deutsche Bank*, 7 N.Y.3d 65, 818 N.Y.S.2d 164, 850 N.E.2d 1140) to determine whether a defendant has transacted business in such a way that constitutes “purposeful activity,” defined as “some act by which the defendant purposefully avails [himself] of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws” (*McKee Electric Co. Inc. v. Rauland-Borg Corp.*, 20 N.Y.2d 377, 382 [1967], quoting *Handon v. Denckla*, 357 U.S. 235, 253 [1958]; accord *Fischbarg v. Doucet*, 9 N.Y.3d 375, 380 [2007]).

As for the second part of the standard, “[a] suit will be deemed to *have arisen out of* a party’s activities in New York if there is an articulable nexus, or a substantial relationship, between the claim asserted and the actions that occurred in New York” (*Henderson v. INS*, 157 F.3d 106, 123 [2d Cir.1998]).

CPLR §302(a)(2) provides jurisdiction over a non-domiciliary who “commits a tortious act within the state.” CPLR §302(a)(3) provides jurisdiction over a non-domiciliary who “commits a tortious act without the state causing injury to person or property within the state . . . if he: (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or (ii) expects or reasonably expect the act to have consequences in the state and derives substantial revenue of interstate or international commerce . . .”

Plaintiff has made a prima facie showing that Burns is subject to the personal jurisdiction of this Court and that Burns transacted business in New York based on his allegations that Burns fraudulently induced Plaintiff to loan funds for his “Freedom for Joe” project, that Plaintiff thereafter negotiated the loan with Sobel, a

New York lawyer allegedly acting as a representative of Defendants including Burns' and wired those funds to Sobel which were deposited into a New York bank account, that Burns had control over those funds and made unauthorized withdrawals from that New York bank account.

Turning to Burns' motion to dismiss based on failure to state a claim, CPLR §3211 provides in relevant part:

(a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(7) the pleading fails to state a cause of action

In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true.. and determine simply whether the facts alleged fit within any cognizable legal theory." (*People v. Sturm, Ruger & Co., Inc.*, 309 A.D.2d 91, 108 [1st Dept 2003](internal citations omitted)(see CPLR §3211[a][7]).

The first cause of action of the Complaint alleges fraudulent inducement and the second cause of action is for fraud. In order to sustain a cause of action for fraudulent inducement, plaintiffs must show "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." (*Shea v. Hambros PLC*, 244 A.D.2d 39, 46 [1st Dep't 1998](citations omitted). Fraud requires pleading a material misrepresentation, defendant's knowledge of its falsity and intent to induce reliance, plaintiff's justifiable reliance, and damages. (*Eurycleia Partners, L.P. v. Seward & Kissel, LLP*, 12 N.Y.3d 553, 559 [2009]). Here, the Complaint alleges that Burns made false misrepresentations concerning the Project and loan transaction which Plaintiff relied upon to his detriment upon making the loan and suffered resulting damages. Plaintiff claims that, despite continual updates regarding the progress of the project, the project never materialized and that it was removed from the production website. The four corners of the Complaint, with all of the allegations taken as true, therefore make out a claim for fraudulent inducement and fraud as against Burns.

The third cause of action of the Complaint is conversion and the fourth is unjust enrichment. “A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person’s right of possession.” *Colavito v. New York Organ Donor Network, Inc.*, 8 N.Y.3d 43, 49-50 (N.Y. 2006). To prevail on a claim for unjust enrichment, the “plaintiff must show that the other party was enriched, at plaintiff’s expense, and that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered.” (*Georgia Malone & Co., Inc. v. Rieder*, 86 A.D.3d 406 [1st Dept. 2011]). Based on the allegations set forth in the Complaint that Burns misappropriated Plaintiff’s funds, a claim for conversion and unjust enrichment stands.

The fifth cause of action of the Complaint is 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.” (*Flomenbaum v New York Univ.*, 2009 NY Slip Op 8975, *9 [1st Dept. 2009]). Burns contends that Plaintiff’s breach of contract claim fails as against Burns because the Complaint does not allege that he is a party to the Promissory Note or Promissory Extension Agreement. In opposition, Plaintiff states that whether Burns is held individually liable on these contracts will depend upon whether KKP was merely an alter ego for Defendants including Burns. Plaintiff further contends that there were also side agreements formed by and between Burns and Plaintiff which were intertwined with the promissory notes, which are confirmed by emails by and between the parties.

The sixth cause of action of the Complaint is breach of Fiduciary Claim/Constructive trust. A fiduciary relationship “exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation” (*EBC I, Inc. v. Goldman Sachs & Co.*, 5 N.Y.3d 11, 19 (2005), quoting *Restatement [Second] of Torts* § 874, Comment a). “Such a relationship, necessarily fact-specific, is grounded in a higher level of trust than normally present in the marketplace between those involved in arm’s length business transactions.” (*Id.*). “A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.” (*Simonds v. Simonds*, 45 N.Y.2d 233, 241 [1978]). A complaint seeking imposition of a constructive trust

must allege "four elements...(1) a confidential or fiduciary relationship, (2) a promise, express or implied, (3) a transfer in reliance thereon, and (4) unjust enrichment." *Panetta v. Kelly*, 17 A.D. 2d 163, 166 [1st Dept 2005], *lv dismissed* 5 N.Y.3d 782 [2005].

Plaintiffs' Complaint fails to state a claim for fiduciary claim/constructive trust as against Burns, because the allegations, even if true, do not establish a fiduciary relationship. Plaintiff alleges that Burns created a fiduciary relationship by inducing Plaintiff to place trust in Burns' superior knowledge and expertise in the area of the film business, and by inducing Plaintiff to loan \$250,000 for Burns. These facts, even if true, do not establish a fiduciary relationship between Plaintiff and Burns, as opposed to an arms length business transaction.

The seventh cause of action of the Complaint is prima facie tort. To properly plead prima facie tort, a plaintiff must allege that the tortfeasor acted maliciously, inflicted intentional harm by a legal action, and that plaintiff suffered special damages. *See Curiano v. Suozzi*, 63 N.Y. 2d 113 [1984]). The claim of "[p]rima facie tort is designed to provide a remedy for intentional and malicious actions that cause harm and for which no traditional tort provides a remedy." *Id.* Accepting the allegations as true, the four corners of the Complaint state a claim for prima facie tort.

Wherefore it is hereby

ORDERED that defendant Lee Burns' motion to dismiss based on lack of personal jurisdiction is denied; and it is further

ORDERED that defendant Lee Burns' motion to dismiss for failure to state a claim is granted to the extent that the sixth cause of action for breach of fiduciary duty is dismissed.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: 8/30/13



 EILEEN A. RAKOWER, J.S.C.