SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3

JASON LAMENDOLA,

Plaintiff,

against

JOHN P. PIAZZA, DAVID C. ABRAMS, SUSAN PIAZZA, STATEN ISLAND CHIROPRACTIC & PHYSICAL THERAPY, PLLC and BELVEDERE PROPERTIES, LLC,

Defendants.

Calendar Nos.: 1666-001
2019-002

Index No.: 150219/13

DECISION
HON. JOSEPH J. MALTESE

The following papers numbered 1 to 5 were fully submitted on the 19th of July, 2013:

	Pages Numbered
Notice of Motion to Dismiss by Defendants John P. Piazza, Susan Piazza, Staten Island Chiropractic & Physical Therapy, PLLC and Belvedere Properties, LLC, with Supporting Papers, Exhibits and Memorandum of Law (dated May 15, 2013)	1
Notice of Cross Motion to Dismiss by Defendant David C. Abrams, with Exhibit (dated June 14, 2013)	2
Affidavit in Opposition by Plaintiff, with Supporting Papers, Exhibits and Memorandum of Law (dated July 5, 2013)	3
Reply Affirmation by Defendants John P. Piazza, Susan Piazza, Staten Island Chiropractic & Physical Therapy, PLLC and Belvedere Properties, LLC, (dated July 17, 2013)	4
Reply Affirmation by Defendant David C. Abrams (dated July 17, 2013)	5

Upon the foregoing papers, the motion and cross motion to dismiss are decided as follows.

This is an action to recover damages for, inter alia, breach of contract, breach of fiduciary duty and common-law fraud. According to the complaint, plaintiff maintains that he was fraudulently

induced to enter into an agreement pursuant to which he invested over $400,000 in exchange for a purported 30% membership interest in the defendant entity, currently known as Staten Island Chiropractic & Physical Therapy, PLLC (hereinafter "Staten Island Therapy").[1] Plaintiff further alleges that he was fraudulently induced to loan the practice an additional $150,000 for business operating expenses, which were purportedly used for the personal expenses of its co-owners, defendants John P. Piazza (hereinafter "Piazza") and David C. Abrams (hereinafter "Abrams"). Despite his investments and subsequent loan, plaintiff claims that he has been denied membership in Staten Island Therapy, any equity interest therein and/or any share of the profits.

To the extent relevant, plaintiff is a licensed physical therapist; defendants Piazza and Abrams are licensed chiropractors. The business is or was located on property leased from defendant Belvedere Properties, LLC (hereinafter "Belvedere"), a company owned by Piazza and his wife, defendant Susan Piazza. The latter was also the office manager of Staten Island Therapy.

As alleged in the complaint, Piazza approached plaintiff about joining the practice in April of 2011. This purportedly was not his first approach, as it is alleged that Piazza had made numerous prior representations to plaintiff about joining the firm, including, inter alia, the offer of a 20% ownership interest, a percentage of incoming rents and deals, and a share of the revenue, along with the authority to supervise and direct all physical therapy performed at the practice (*see* Complaint, para 35). It is further alleged that both Piazza and Abrams induced plaintiff to "immediately finance and start extensive renovations of the [leased premises] while they finalized the terms of [plaintiff's] investment pursuant to [a so-called] First Agreement" (id. at 36). Plaintiff claims that in reliance on "Piazza and Abram's [sic] representation that the deal was done", he began funding all building renovations "[i]n or about September 2011" (id. at 37). Also in September of 2011, Piazza allegedly

[1]The subject entity was known as "Staten Island Chiropractic Associates, PLLC" until July 5, 2012, when the company name was amended to "Staten Island Chiropractic & Physical Therapy, PLLC" (*see* Plaintiff's Exhibit 9").

proposed that plaintiff enter into an amended agreement pursuant to which "Piazza would buy out [Abrams] thereby acquiring 100% [of Staten Island Therapy]. Piazza would then sell a thirty percent interest... [to plaintiff] for the cost of renovations, estimated at Four hundred thousand dollars, an investment already funded and underway with Plaintiff's financing of Building renovations" (id. at 41). After the renovations were completed in March of 2012, it is further alleged that plaintiff acceded to Piazza's request to loan the practice an additional $150,000, as it "was in desperate need of operating funds" (id. at 45).

On May 24, 2012, defendant Abrams was purportedly bought out of the practice in exchange for a promissory note from Staten Island Therapy in the amount of $793,360 (id. at 54). Soon thereafter, plaintiff and Piazza executed a Membership Interest Purchase Agreement dated June 12, 2012, which provided for the sale of a 30% interest in Staten Island Therapy to plaintiff for (1) the $400,000 spent on renovations and (2) his assumption of the obligations under the promissory note issued to Abrams (id. at 57; *see* Plaintiff's Exhibit "8"). Then, in November of 2012, Piazza allegedly prepared and presented to plaintiff a draft operating agreement which granted Piazza "unlimited and unfettered power over the management and finances of Staten Island Therapy without any minority protections". This draft was rejected by plaintiff and never executed (id. at 73-74). It is plaintiff's contention that the foregoing draft operating agreement was part of defendants' scheme to defraud and "cheat him out of his rightful share of the equity ownership and profits of Staten Island Therapy" (id. at 75). It is also alleged that defendant Susan Piazza "refused to acknowledge or account for any collections on plaintiff's billings recovered by Staten Island Therapy" (id. at 79). Finally, in a letter dated December 17, 2012, Piazza purported to sever all professional ties with plaintiff (id. at 80; *see* Plaintiff's Exhibit "11"). In relevant part, plaintiff claims that the purchase agreement was never consummated, and that he was never made a member of Staten Island Therapy (id. at 81). Plaintiff also alleges that the practice has and continues to unlawfully bill for physical therapy services using his license (id. at 31, 33).

Based on of the foregoing allegations, plaintiff commenced this action asserting 15 causes of action against the defendants, sounding in breach of contract, breach of implied warranty of good faith and fair dealing, constructive trust, promissory estoppel, unjust enrichment, breach of fiduciary duty, fraudulent inducement, an accounting, common-law fraud, aiding and abetting a common-law fraud, negligent misrepresentation, violation of General Business Law §§349, 350, mutual mistake, and quantum meruit.

Presently before the Court is a motion by defendants John P. Piazza, Susan Piazza, Staten Island Therapy, and Belvedere (hereafter the "Piazza defendants") to dismiss the complaint with the exception of the breach of contract cause of action pursuant to CPLR 3211(a)(7). Defendant Abrams has cross-moved to dismiss the complaint as against him in its entirety on the same grounds.[2]

When a party moves to dismiss a complaint pursuant to CPLR 3211(a)(7), the operative standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action (*see Vermont Mut Ins Co v. McCabe & Mack, LLP*, 105 AD3d 837, 839 [2nd Dept 2013]). In considering such a motion, the court must accept the facts alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the allegations fit within any cognizable legal theory (id. at 839). Whether or not a plaintiff can ultimately prevail upon the merits is not part of the calculus (id.).

The elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct (*see Faith Assembly v. Titledge of NY Abstract, LLC*, 106 AD3d 47, 61-62 [2nd Dept 2013]). A fiduciary relationship exists between two persons when one of

[2] Except where otherwise specified, the term "defendants" shall hereinafter be understood as referring to both the moving and cross-moving defendants.

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 (id. at 62). Such a relationship may exist where one party reposes confidence in another and reasonably relies on the other's superior expertise or knowledge. Thus, an arms-length business relationship does not give rise to a fiduciary obligation, the core of which is a relationship based on a higher level of trust than that normally found in the marketplace (id.). Moreover, a cause of action for breach of fiduciary duty is required to be pleaded with the particularity required under CPLR 3016(b) (id.).

Here, the complaint alleges in conclusory fashion that defendants owed plaintiff a fiduciary duty. However, no facts have been alleged with any particularity from which it could be concluded that (1) these defendants had any duty to act or give advice for the benefit of plaintiff, or (2) any relationship of trust existed between them which would give rise to a fiduciary obligation on the part of any defendant. Accordingly, in the absence of any allegations sufficient to sustain a fiduciary relationship, the complaint fails to state a cause of action for an accounting, negligent misrepresentation and the imposition of a constructive trust, as well (*see Mosbacher v. JP Morgan Chase Bank, NA*, __AD3d__, 2013 NY Slip Op 5619 [2nd Dept]; *DiTolla v. Doral Dental IPA of NY, LLC*, 100 AD3d 586, 587 [2nd Dept 2012]; *Baer v. Complete Off Supply Warehouse Corp*, 89 AD3d 877, 878 [2nd Dept 2011]; *High Tides, LLC v. DeMichele*, 88 AD3d 954, 959-960 [2nd Dept 2011]; *East End Labs, Inc. v. Sawaya*, 79 AD3d 1095, 1096-1097 [2nd Dept 2010]).

Also required to be pleaded with specificity under CPLR 3016(b) is a cause of action alleging fraud (*see Brualdi v. IBERIA, Lineas Aereas de Espana, SA*, 79 AD3d 959, 960-961 [2nd Dept 2010]). To properly plead such a cause of action, the plaintiff must allege that (1) the defendant made a false representation of material fact, (2) with knowledge of its falsity, (3) in order to induce plaintiff's reliance, and (4) on which plaintiff justifiably relied, (5) to his detriment (*see Vermont Mut Ins Co v. McCabe & Mack, LLP*, 105 AD3d at 839).

At a minimum, the plaintiff in this case has failed to plead with specificity defendants' misrepresentation of either a material fact or scienter. To the contrary, the complaint was devoid of any factual allegations from which it may be inferred that the defendants made any representation concerning a material fact which was false and known to be such at the time it was made, or that defendants' misrepresentations were made with the specific purpose of inducing plaintiff to rely upon them (*see Brualdi v. IBERIA, Lineas Aereas de Espana*, *SA*, 79 AD3d at 961). Here, although the complaint alleges that defendants misrepresented, inter alia, plaintiff's admission to membership in the practice, the documents annexed to his opposition papers demonstrate that defendants had, in fact, submitted to the State's "Division of Corporations State Records", a certificate of amendment adding plaintiff as a licensed professional to the membership of Staten Island Therapy (*see* Plaintiff's Exhibit "9"). Also demonstrably erroneous is plaintiff's claim that defendants misrepresented to him that they "would clear all debts and obligations prior to his admittance as a member" (*see* Complaint, para 41). The Membership Interest Purchase Agreement executed by plaintiff and defendant Piazza which is annexed to plaintiff's opposition papers provides that plaintiff as "[p]urchaser agrees to assume in his capacity as a member of the company certain existing liability, including... the obligations set forth in that certain promissory note dated May 24, 2012" (i.e. the note that was used to buy out defendant Abrams' interest in the practice) (*see* Plaintiff's Exhibit "8", p 2).[3] Alternatively, the Court notes that a cause of action to recover damages for fraud will not lie where, as here, the only claim of fraud relates to an alleged breach of contract (*see Rocchio v. Biondi*, 40 AD3d 615, 617 [2nd Dept 2007]; *see also V. Groppa Pools, Inc. v. Massello,* 106 AD3d 722, 723 [2nd Dept 2013]). Finally, plaintiff's conclusory allegations of fraud are wholly insufficient to satisfy the pleading requirements of CPLR 3016(b) (*see High Tides, LLC v. DeMichele*, 88 AD3d at 957-959).

[3] It is well established that when evidentiary material is considered on a motion to dismiss, the criterion becomes whether the proponent of the pleadings has a cause of action, not whether one is stated. Moreover, under such circumstances, a motion to dismiss pursuant to CPLR 3211(a)(7) can be granted when (1) it has been shown that a material fact alleged in the complaint is not a fact at all, and (2) there is no significant dispute regarding it (*see Guggenheimer v. Ginzburg,* 43 NY2d 268, 275 [1977]; *Cucco v. Chabau Café Corp*, 99 AD3d 965 [2nd Dept 2012]; *Bokhour v. GTI Retail Holdings, Inc*., 94 AD3d 682 [2nd Dept 2012]).

Since the complaint fails to adequately allege a cause of action in fraud, the related claims for aiding and abetting a fraud and fraudulent inducement must also be dismissed (id. at 960-961). So, too, must the cause of action alleging breach of the covenant of good faith and fair dealing, which is duplicative of the cause of action alleging breach of contract (*see Baer v. Complete Off Supply Warehouse Corp*, 89 AD3d at 878).

With regard to plaintiff's claims under General Business Law §§349 and 350, the Court finds that the subject contractual dispute is unique to the parties and does not fall within the ambit of the statute (*see Yellow Book Sales & Distrib Co, Inc v. Hillside Van Lines, Inc*., 98 AD3d 663, 665 [2nd Dept 2012]). Accordingly, those branches of defendants' motion and cross motion must be granted.

Similarly, that aspect of the respective motions which seek the dismissal of plaintiff's demand for punitive damages must also be granted, as the allegations in the complaint concerning the breach of contract relates solely to the remediation of a private wrong (*see Guido v. Orange Regional Med Ctr*, 102 AD3d 828, 832 [2nd Dept 2013]).

However, the Court finds that the following causes of action have been adequately pleaded against the Piazza defendants to withstand dismissal: (1) quantum meruit (*see Zere Real Estate Servs, Inc. v. Parr Gen Contr Co, Inc*, 102 AD3d 770, 772 [2nd Dept 2013]); (2) promissory estoppel (*see Last Time Beverage Corp v. F&V Distrib Co, LLC*, 98 AD3d 947, 952 [2nd Dept 2012]; *NGR, LLC v. General Elec Co*, 24 AD3d 425 [2nd Dept 2005]); (3) unjust enrichment[4] (*cf. Smith v. Chase*

[4] It is well settled that an unjust enrichment claim must be dismissed where there is no dispute as to the validity and enforceability of the contract governing the dispute (*see Kosowsky v. Willard Mtn, Inc*, 90 AD3d 1127, 1131 [3rd Dept 2011]). However, where, as here, a disagreement exists as to whether the scope of an existing contract covers the disagreement between the parties, a litigant will not be required to elect his or her remedies, and may also proceed on a quasi contract theory of liability (id.). Thus, while the Membership Interest Purchase Agreement at bar was executed by both plaintiff and Piazza, the parties disagreed on the terms of the Operating Agreement, which was never executed. Accordingly, plaintiff should be allowed to proceed upon his unjust enrichment claim against the Piazza defendants.

Manhattan Bank, USA, 293 AD2d 598, 600 [2nd Dept 2002]); and (4) mutual mistake[5] (*see Simkin v. Blank*, 19 NY3d 46, 52-53 [2012]). As previously indicated, the Piazza defendants do not challenge the sufficiency of plaintiff's cause of action for breach of contract.

Turning to the cross motion to dismiss of defendant Abrams, he attests, inter alia, that he "never entered into any written contracts or agreements with the Plaintiff concerning the chiropractic business" (*see* Affidavit of David C. Abrams, D.C.). A meritorious cause of action for breach of contract requires a plaintiff to establish, inter alia, the formation of a contract between the him-or herself and the party-defendant (*see Brualdi v. IBERIA, Lineas Aereas de Espana*, *SA*, 79 AD3d at 960). At bar, plaintiff has submitted only a brief email exchange between himself and defendant Abrams (*see* Plaintiff's Exhibit "5") which the Court finds fails to contain the necessary elements of a contract. Neither are his factual allegations against this defendant legally sufficient to sustain any of the remaining causes of action against him. Thus, the complaint as against defendant Abrams must be dismissed in its entirety[6] (*cf. Cucco v. Chabau Café Corp*, 99 AD3d 965 [2nd Dept 2012]; *Bokhour v. GTI Retail Holdings, Inc*., 94 AD3d 682 [2nd Dept 2012]).

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[5] In order to successfully plead "mutual mistake", the mistake must exist at the time the contract is entered into and must be both mutual and substantial (*see Simkin v. Blank*, 19 NY3d at 52). The mistake must also be so material that it goes to the very foundation of the agreement, i.e., vitally affect the basis on which the parties have contracted (id.). Thus, properly understood, the premise underlying the doctrine of mutual mistake is reserved only for those exceptional situations in which, e.g., the agreement as expressed does not in some material respect represent a meeting of the minds of the parties (id. at 52-53). Here, it is alleged that during the early negotiations, plaintiff understood that he was to have authority to supervise all physical therapy activities and enjoy the minority protection that comes with owning 30% of the practice. It is further alleged that it was not until after the purchase agreement was executed and money changed hands that Piazza proposed a draft operating agreement indicating otherwise. Accordingly, plaintiff should be allowed to proceed upon his claim of mutual mistake against the Piazza defendants.

[6] Plaintiff's cause of action for unjust enrichment against defendant Abrams would appear to relate to his purported misuse of the $150,000 "loaned" to the practice at Piazza's sole request. However, this transaction is alleged to have occurred at or about the same time that Abrams exited the practice (*see infra* p. 3).

Accordingly, it is hereby:

ORDERED that so much of the motion of defendants John P. Piazza, Susan Piazza, Staten Island Chiropractic & Physical Therapy, PLLC and Belvedere Properties, LLC as to dismiss the complaint against them is granted with respect to the causes of action for breach of implied warranty of good faith and fair dealing, constructive trust, breach of fiduciary duty, fraudulent inducement, an accounting, common-law fraud, aiding and abetting a common-law fraud, negligent misrepresentation, and violation of General Business Law §§349, 350; and it is further

ORDERED that each of these causes of action and any related cross claims as against the above defendants are hereby severed and dismissed; and it is further

ORDERED that the balance of their motion is denied; and it is further

ORDERED that the cross motion to dismiss the complaint as against defendant David C. Abrams is granted in its entirety and the action and any cross claims as against said defendant are hereby severed and dismissed; it is further

ORDERED that the Clerk enter judgment accordingly.

ENTER,

Dated: September 19, 2013

Joseph J. Maltese
Justice of the Supreme Court