Arnon Ltd (IOM) v Beierwaltes
2013 NY Slip Op 32737(U)
October 24, 2013
Sup Ct, New York County
Docket Number: 650371/2013
Judge: Marcy S. Friedman

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARCY S. FRIEDMAN Justice PART 60

ARNON LTD (IOM)

-against-

WILLIAM BEIERWALTES, LYNDA BEIERWALTES, PHOENIX ANCIENT ART, S.A., HICHAM ABOUTAAM, ALEXANDER GHERARDI

INDEX NO. 650371/2013

MOTION DATE

MOTION SEQ. NO. 002

The following papers, numbered 1 to _____ were read on this motion to/for dismiss third, fourth and fifth counterclaims.

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

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

It is ordered that this motion is decided in accordance with the accompanying decision/order dated October 24, 2013.

Dated: October 24, 2013

MARCY S. FRIEDMAN, J.S.C.

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

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 60

PRESENT: HON. MARCY S. FRIEDMAN, J.S.C.

ARNON LTD (IOM),

Plaintiff,

- against -

WILLIAM BEIERWALTES, LYNDA BEIERWALTES, PHOENIX ANCIENT ART, S.A., HICHAM ABOUTAAM, ALEXANDER GHERARDI,

Defendants.

Index No.: 650371/2013
Motion Seq. 002

DECISION/ORDER

This is a breach of contract action based on defendants' alleged wrongful refusal to sell an ancient Greek statue – a Kore – to plaintiff. Plaintiff now moves, pursuant to CPLR 3211(a)(7), to dismiss defendants' third, fourth, and fifth counterclaims.

It is well settled that on a motion to dismiss pursuant to CPLR 3211(a)(7), "the pleading is to be afforded a liberal construction (see, CPLR 3026). [The court must] accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (Leon v Martinez, 84 NY2d 83, 87-88 [1994]. See 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144 [2002].) However, "the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts." (Robinson v Robinson, 303 AD2d 234, 235 [1st Dept 2003]; see also Water St. Leasehold LLC v Deloitte & Touche LLP, 19 AD3d 183 [1st Dept 2005], lv

denied 6 NY3d 706 [2006].)

Third Counterclaim

Defendants' third counterclaim for defamation alleges that plaintiff defamed defendants by making statements "to the effect that Defendants lack the ability to convey good title to the Sculpture and that Defendants do not deal fairly and are otherwise unworthy of trust." (Answer, ¶ 36.) Plaintiff moves to dismiss this counterclaim on the ground that it is not pleaded with the particularity required by CPLR 3016. In response, defendants proffer the affidavit of defendant Hicham Aboutaam which states: "In or around early March of this year, Sofer [plaintiff's principal] spoke to Ahmad Saeedi, an antiquities dealer with whom I am acquainted and Phoenix has a business relationship . . . and told him 'Hicham is not honorable in his dealing' and 'Hicham planned this purchase and cancelation [sic] and this whole legal case to annoy me and ruin my reputation in the art world.' These statements were – and are – false." (Aboutaam Aff., ¶ 12.)

An affidavit may be used in opposition to a CPLR 3211 (a)(7) motion to dismiss to cure defects in a pleading. (See Rovello v Orofino Realty Co. Inc., 40 NY2d 633 [1976].) The initial pleading lacked the particularity required by CPLR 3016 (a) for a defamation claim, as it merely paraphrased the defamatory statement in such a manner that "the actual words were not evident from the face of the complaint." (Manas v VMS Assocs., LLC, 53 AD3d 451, 455 [1st Dept 2008].) The initial pleading was also deficient because it failed to "allege the time, place and manner of the false statement and specify to whom it was made." (Dillon v City of New York, 261 AD2d 34, 38 [1st Dept 1999].)

Aboutaam's affidavit does not disclose the basis for his information that Sofer made the

alleged statements to Saeedi. Even assuming that the affidavit is nevertheless sufficient to preserve the pleading, the third counterclaim does not state a cognizable cause of action for defamation.

It is well settled that "expressions of an opinion 'false or not, libelous or not, are constitutionally protected and may not be the subject of private damage actions.'" (Steinhilber v Alphonse, 68 NY2d 283, 286 [1986], quoting Rinaldi v Holt, Rinehart & Winston, 42 NY2d 369, 380, cert denied 434 US 969.) It is further settled that whether a statement expresses fact or opinion is a question of law for the court. (Id. at 290.) The determination as to whether a statement is fact or opinion must be based on "what the average person hearing or reading the communication would take it to mean." (Id.) Thus, "[t]he dispositive inquiry . . . is whether a reasonable [listener] could have concluded that [the statements were] conveying facts about the plaintiff." (Gross v New York Times Co., 82 NY2d 146, 152 [1993], quoting 600 W. 115th St. Corp. v Von Gutfeld, 80 NY2d 130, 139 [1992].) The inquiry generally entails an examination of "(1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal readers or listeners that what is being read or heard is likely to be opinion, not fact." (Gross, 82 NY2d at 153 [internal quotation marks and citations omitted]. Accord Guerrero v Carva, 10 AD3d 105, 111-112 [1st Dept 2004].) The court must examine "the content of the whole communication as well as its tone and apparent purpose." (Steinhilber, 68 NY2d at 293. Accord Immuno AG v Moor-Jankowski, 77 NY2d 235, 254 [1991], cert denied 500 US 954.)

Further, "in determining whether a particular communication is actionable, [the courts] continue to recognize and utilize the important distinction between a statement of opinion that implies a basis in facts which are not disclosed to the reader or listener, and a statement of opinion that is accompanied by a recitation of the facts on which it is based." (Gross, 82 NY2d at 153 [internal citations omitted].) The latter are ordinarily not actionable because "a proferred hypothesis that is offered after a full recitation of the facts on which it is based is readily understood by the audience as conjecture." (Id. at 154.) The Court of Appeals "has cautioned, however, that 'sifting through a communication for the purpose of isolating and identifying assertions of fact' should not be the central inquiry [internal citation omitted]. Instead, courts 'should look to the over-all context in which the assertions were made and determine on that basis 'whether the reasonable reader would have believed that the challenged statements were conveying facts about the libel plaintiff.'" (Guerrero, 10 AD3d at 112 [quoting Immuno AG, 77 NY2d at 254].)

Applying these standards, the court holds that the alleged statements to Saeedi are non-actionable opinion. They were made by an aggrieved client of a business to another client of the business about a legal dispute – a context that indicated that they were statements of opinion. Moreover, the factual basis for the statement that Hichaam was not honorable in his dealings – namely, that Hichaam planned the dispute to ruin plaintiff's reputation – was disclosed. The third counterclaim will accordingly be dismissed.

Fourth Counterclaim

The fourth counterclaim alleges that "[b]y reason of the aforesaid interference Defendants have sustained damages, including . . . the cost of demonstrating the falsehood of the aforesaid

statements." Defendants clarify in their opposing brief that this cause of action is for tortious interference with prospective economic relations.

It is well settled that "the degree of protection" available to a plaintiff for tortious interference with contract "is defined by the nature of the plaintiff's enforceable legal rights. Thus, where there is an existing, enforceable contract and a defendant's deliberate interference results in a breach of that contract, a plaintiff may recover damages for tortious interference with contractual relations even if the defendant was engaged in lawful behavior. Where there has been no breach of an existing contract, but only interference with prospective contract rights, however, plaintiff must show more culpable conduct on the part of the defendant." (NBT Bancorp Inc. v Fleet/Norstar Fin. Group., Inc., 87 NY2d 614, 621 [1996] [internal citations omitted], citing Guard-Life Corp. v Parker Hardware Mfg. Corp., 50 NY2d 183, 193-194 [1980].) Moreover, damages for interference with prospective relations may be awarded only where "a defendant engages in conduct for the sole purpose of inflicting intentional harm on plaintiffs" or where the means employed by the one interfering were "wrongful." (Carvel Corp. v Noonan, 3 NY3d 182, 190-191 [2004] [internal quotation marks and citations omitted].) "'Wrongful means' include physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure; they do not, however, include persuasion alone although it is knowingly directed at interference with the contract." (Id. at 191, quoting Guard-Life Corp., 50 NY2d at 191, summarizing Restatement [Second] of Torts, § 768.)

Defendants' tortious interference counterclaim is not maintainable based on plaintiff's alleged defamatory statements, as the defamation cause of action has not withstood dismissal. Nor can the cause of action be maintained based on wrongful prosecution of this action. Under

New York law, "conduct constituting tortious interference with business relations is, by definition, conduct directed not at the plaintiff [in the tortious interference action] . . . , but at the party with which the plaintiff has or seeks to have a relationship." (Carvel Corp., 3 NY3d at 192.) Thus, while civil suits and threats thereof constitute improper means if they are "frivolous" (Pagliaccio v Holborn Corp., 289 AD2d 85 [1st Dept 2001]), defendants cite no authority that a tortious interference claim may be predicated on a civil suit against the tortious interference plaintiff itself, as opposed to the customers or third parties with which the tortious interference plaintiff wishes to have a relationship. (See id.) The fourth counterclaim will accordingly be dismissed.

Fifth Counterclaim

The fifth counterclaim is for fraudulent inducement. It alleges that plaintiff falsely represented "that it was capable of, and intended to, timely pay for the Sculpture," in order to induce defendants "to forego opportunities to sell the Sculpture to trustworthy and creditworthy customers. . . ." (Answer, ¶¶ 43, 45.)

"A claim for fraudulent inducement of contract can be predicated upon an insincere promise of future performance only where the alleged false promise is collateral to the contract the parties executed; if the promise concerned the performance of the contract itself, the fraud claim is subject to dismissal as duplicative of the claim for breach of contract." (HSH Nordbank AG v UBS AG, 95 AD3d 185, 206 [1st Dept 2012] [emphasis in original]; see Manas, 53 AD3d at 454. See generally Deerfield Communications Corp. v Chesebrough-Ponds, Inc., 68 NY2d 954, 956 [1986].) A "misrepresentation of future intent," as opposed to a "misrepresentation of present fact," is not sustainable as a cause of action separate from breach of contract. (HSH Nordbank

AG, 95 AD3d at 207 [internal quotation marks and citation omitted].) The Appellate Division of this Department has accordingly dismissed fraudulent conveyance claims based on the allegation that a defendant induced the plaintiff to provide services by falsely promising to compensate the plaintiff. (Cole, Schotz, Meisel, Forman & Leonard, P.A., 972 NYS2d 21 [1st Dept 2013]; Manas, 53 AD3d at 454.) Here, similarly, the fifth counterclaim is based on nothing more than an allegation that plaintiff "was not sincere when it promised to perform under the contract" (id. at 453), and must accordingly be dismissed.

It is accordingly hereby ORDERED that plaintiff's motion to dismiss is accordingly granted to the extent of dismissing defendants' third, fourth, and fifth counterclaims.

Dated: New York, New York
October 24, 2013

MARCY S. FRIEDMAN, J.S.C.