

**Pen and Pencil Publ., Inc. v Lembeck**

2014 NY Slip Op 30482(U)

February 28, 2014

Sup Ct, New York County

Docket Number: 154063/13

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 19

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PEN AND PENCIL PUBLICATIONS, INC.,  
SMART GUIDE PUBLICATIONS, INC. and  
PHILIP SELDON,

Plaintiff,

Index Number: 154063/13  
Submission Date: 10/30/13

**DECISION and ORDER**

- against -

HARRIET LEMBECK,

Defendant.

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For Plaintiffs:  
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For Defendant:  
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Papers considered in review of the defendant's motion to dismiss (motion seq. no. 001):

- Notice of Motion . . . . . 1
- Opposition . . . . . 2
- Aff in Reply . . . . . 3

**HON. SALIANN SCARPULLA, J.:**

In this action arising from an alleged breach of a publishing contract, defendant Harriet Lembeck (“Lembeck”) moves: (a) to strike the amended complaint on the grounds that the pleading does not contain the required signature in accordance with 22 NYCRR 130-1.1a(a); and (b) to dismiss the amended complaint, with prejudice, pursuant to CPLR § 3211(a)(1).

This action is related to another pending action before the Court concerning an alleged breach of a contract that Lembeck entered into, in 2010, with Smart Guide Publications, Inc. (“SGP”) to author a wine book titled “The Smart Guide To Deciphering

A Wine Label” (“The Smart Guide”) (herein referred to as “the contract”). *See Seldon v. Lembeck*, New York Supreme Court, New York County, Index No. 651547/13.

In the complaint, plaintiffs assert six causes of action against Lembeck sounding in breach of contract, negligence, and fraud. In the first and second causes of action, SGP alleges that Lembeck breached the contract by failing to submit a manuscript in final form by June 1, 2011, and by delivering a manuscript in December 2012 that failed to adequately describe how to understand a wine label.

SGP further alleges, in the third cause of action, that Lembeck acted negligently when she did not timely submit a manuscript in final form and submitted a late manuscript that failed to describe how to understand a wine label. In the fourth cause of action, SGP asserts that Lembeck fraudulently induced it to enter into the contract by misrepresenting that she would deliver a manuscript as required by the contract.

In the fifth and sixth causes of action, plaintiffs Pen and Pencil Publications, Inc. (“Pen and Pencil”) and Philip Seldon (“Seldon”) allege that Lembeck breached the contract by failing to revise her manuscript. Plaintiffs allege that SGP assigned its rights under the contract to Pen and Pencil on March 4, 2013, and that Pen and Pencil subsequently assigned its contractual rights to Seldon on March 28, 2013.

In the current motion, Lembeck argues that the amended complaint should be dismissed because: (1) the complaint was not signed in accordance with 22 NYCRR 130-1.1a(a) and that this defect was not promptly corrected; and (2) Seldon has admitted to all

facts material to Lembeck's defense of fraud in the inducement of the contract. Lembeck argues that she was fraudulently induced into entering the contract with SGP because it was never disclosed to her that Seldon controlled SGP.

In opposition, plaintiffs argue that Lembeck fails to establish her defense of fraud in the inducement. Plaintiffs argue that it did not fraudulently induce Lembeck into entering into the contract because SGP is controlled by its vice president, Cathy Barker, and not by Seldon as Lembeck claims.

### **Discussion**

"On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction." *Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994). In those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence, they are not presumed to be true or accorded every favorable inference, and the criterion becomes whether the proponent of the pleading has a cause of action, not whether he has stated one. *Ark Bryant Park Corp. v. Bryant Park Restoration Corp.*, 285 A.D.2d 143, 150 (1st Dep't 2001) (internal quotations omitted).

Under CPLR § 3211(a)(1), a dismissal is "warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Leon*, 84 N.Y.2d at 88.

Here, Lembeck moves to dismiss the amended complaint based on her defense that she was fraudulently induced into entering into the contract. Lembeck argues that SGP failed to disclose Seldon's control of SGP, in order to induce Lembeck into entering into the contract. To establish her defense, Lembeck claims that Seldon admitted in the complaint that he never disclosed his involvement with SGP until December 2012, and that prior to that time, Lembeck was unaware of Seldon's involvement with SGP.

To prove fraud in the inducement, the defendant must establish that plaintiff made misrepresentations in order to induce her into entering the contract. *Mariani v. Dyer*, 193 A.D.2d 456, 457 (1st Dep't 1993). I find here that Lembeck failed to conclusively establish her defense of fraud in the inducement. Contrary to Lembeck's assertion, Seldon never stated in the complaint that he failed to disclose his involvement with SGP. In fact, plaintiffs submitted evidence to support their claim that Seldon never controlled SGP when the contract was formed in 2010, and thus, no misrepresentations were made. SGP's vice president, Cathy Barker, stated in her affidavit that she controls SGP, not Seldon, and that she appointed Seldon as Wine and Food Editor of SGP in 2012. Barker further stated that Seldon is not an officer, director, or control person of SGP.

While Lembeck fails to establish her defense as a matter of law, I grant Lembeck's motion to dismiss the third, fourth, fifth, and sixth causes of action.<sup>1</sup> In the third cause of

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<sup>1</sup> The Court notes that Lembeck moved to dismiss the complaint under CPLR § 3211(a)(1). In exercising "the court's power to dismiss an action *sua sponte*, based on the facial lack of merits of a pleading," I dismiss the third, fourth, and fifth causes of action. *Myung Chun v. North American Mortgage Co.*, 285 A.D.2d 42, 45 (1st Dep't 2001).

action, SGP alleges that Lembeck acted negligently when she did not timely submit a manuscript, and then submitted a late manuscript that failed to describe how to understand a wine label. I dismiss this third cause of action because it is duplicative of the first and second causes of action for breach of contract. SGP does not allege that Lembeck violated any legal duties independent of her duties under the contract, and therefore the negligence claim is duplicative and must be dismissed. *Clark-Fitzpatrick, Inc. v. Long Island R. Co.*, 70 N.Y.2d 382, 390 (1987).

SGP asserts, in the fourth cause of action, that Lembeck fraudulently induced it to enter into the contract by misrepresenting that she would deliver a manuscript as required by the contract. Although SGP properly pleads a misrepresentation of fact collateral to the terms of the contract, SGP fails to allege any damages that are not recoverable under its breach of contract claims. *Manas v. VMS Associates, LLC*, 53 A.D.3d 451, 453-54 (1st Dep't 2008); *Teachers Ins. Annuity Assn. of Am. v. Cohen's Fashion Opt. of 485 Lexington Ave., Inc.*, 45 A.D.3d 317, 319 (1st Dep't 2007). Therefore, the fourth cause of action for fraudulent inducement is dismissed.

Pen and Pencil assert, in the fifth cause of action, that Lembeck breached the contract by failing to revise her manuscript. I find that this claim must be dismissed because SGP's contractual rights could not be assigned to Pen and Pencil. The contract between SGP and Lembeck was an agreement for personal services, and therefore the

purported assignment to Pen and Pencil is invalid. *Eisner Computer Solutions v. Gluckstern*, 293 A.D.2d 289, 289 (1st Dep't 2002).

In the sixth cause of action, Seldon alleges that Lembeck breached the contract by failing to revise her manuscript. Here, Seldon seeks to litigate an identical claim that has already been raised in a related action before the Court (*Seldon v. Lembeck*, Index No. 651547/13), and therefore this cause of action is dismissed pursuant to CPLR § 3211(a)(4). *Friedman v. 16 Madison Square Housing Corp.*, 113 A.D.3d 557, 557 (1st Dep't 2014) (affirming court's *sua sponte* dismissal because another action is pending between the same parties for the same cause of action).

For the above stated reasons, I grant Lembeck's motion to dismiss the amended complaint as to the third, fourth, fifth, and sixth causes of action.

In accordance with the foregoing, it is

ORDERED that defendant Harriet Lembeck's motion to dismiss the amended complaint is granted with respect to the third, fourth, fifth, and sixth causes of action, and otherwise denied as to the first and second causes of action; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: New York, New York  
February 26, 2014

ENTER:



Saliann Scarpulla, J.S.C.

**HON. SALIANN SCARPULLA**