Berland v Chi
2015 NY Slip Op 30227(U)
February 9, 2015
Supreme Court, Suffolk County
Docket Number: 09-24635
Judge: Joseph Farneti

[* 1]

SHORT FORM ORDER

INDEX No. 09-24635
CAL No. 14-01288OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 7-28-14
ADJ. DATE 11-20-14
Mot. Seq. # 001 - MG; CASEDISP

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SANFORD N. BERLAND, SUSAN A. BERLAND and ALEXANDER BERLAND (a minor) by SANFORD N. BERLAND,

Plaintiffs,

- against -

CHARLES CHI, MYRA REYES-CHI, CHI'S MARTIAL ARTS, INC., CHI'S MARTIAL ARTS OF LINDENHURST, JOHN and JANE DOES NOS 1-100 HOLDING INTERESTS IN CHI'S MARTIAL ARTS, INC. and CHI'S MARTIAL ARTS OF LINDENHURST,

Defendants.

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Upon the following papers numbered 1 to 13 read on this motion to dismiss; Notice of Motion/ Order to Show Cause and supporting papers 1-6; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 7-10; Replying Affidavits and supporting papers 11-13; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants for an Order, pursuant to CPLR 3211 (1) and (7), granting dismissal of the complaint against them is granted, and the branch of the motion which seeks costs and attorney's fees is denied.

This is an action by plaintiffs to recover for alleged economic loss, personal injuries, breach of contract, and statutory damages sustained as a result of defendants' alleged conduct. Defendants now move to dismiss the complaint pursuant to CPLR 3211(a) (1) and (7). In support of the motion they submit, *inter alia*, their attorney's affirmation, the pleadings, and the affidavit of the defendant Myra Reyes-Chi. sworn to on November 18, 2014. In opposition to this motion, the plaintiffs submit, *inter*

alia, their attorney's affirmation, the affidavit of the plaintiff Susan A. Berland, sworn to on August 27, 2014, the affidavit of Suzy Mauceri, sworn to on August 26, 2014 and a copy of a contract dated October 7, 2006.

The complaint alleges that in or about the year 1997 plaintiff Susan A. Berland and Sanford N. Berland (the "Berlands") enrolled their son Alexander Berland ("Alexander") in a karate school then known as VIP Karate ("karate school") located at 1959 Deer Park Avenue in Deer Park, New York. Thereafter, Alexander continued and advanced as a student at the karate school for a number of years and received a first degree black belt in 2006. On October 6, 2006, the Berlands entered into a 24-month agreement for Alexander at the karate school, which plaintiffs allege was for Alexander to receive instruction and progression in the school's "Junior Masters" program leading to a second degree black belt. The contract was to run until October 7, 2008. In or about March of 2007, the karate school was acquired by defendant Charles Chi and renamed "Chi's Martial Arts of Deer Park." Included in the sale was the assignment of the contract for Alexander's training. It is alleged that defendant Chi represented to the Berlands that the school would continue to operate as it had previously, that he personally would be teaching the black belt lessons, and that Alexander would be eligible to receive his second degree black belt within or by the date of the conclusion of the contract. The complaint further alleges that defendants had no intention of permitting Alexander to achieve his second degree black belt within the agreed upon schedule and that Charles Chi did not teach any of the classes attended by Alexander. It is alleged that in or about August 2007, defendant Chi informed the Berlands that the first degree black belt earned by Alexander was worthless, as were those held by the instructors at the school and that Alexander's contract would have to be extended well past the one year remaining if he wished to test for his second degree black belt. Alexander, at the time, was enrolled in a black belt class beginning in September of 2007. In or around August 2007, the Berlands were informed that Alexander would, in fact, be permitted to test for his second degree black belt prior to the expiration of the contract. The black belt test, which also included a written test, was held on September 27, 2008. It is alleged that defendant Chi could not communicate the results until he had formally scored the test , but that "he looked good and had done fine." It is further alleged that an unnamed school instructor later informed them that Alexander had passed the testing and that a second degree black belt was waiting for him but that he would not be able to attend the ceremony at which others who had passed the test would receive their black belts. Plaintiffs allege that other students who had performed less well on the test and were less qualified than Alexander received black belts. Plaintiffs made a number of complaints about Alexander not receiving his black belt. Defendant Chi thereafter informed them that Alexander was several points short of passing the test and he could not find a sufficient number of points on Alexander's written test to allow him to pass the test.

It is noted at the outset that the defendants have sought to exclude the affidavits of plaintiff Susan A. Berland and that of Suzy Mauceri on the ground that both were notarized by plaintiff Sanford N. Berland. A notary may not act in a matter where he or she is a party or is directly and pecuniarily interested in the transaction (*see* ***Brodsky v Board of Managers of Dag Hammarskjold Tower Condominium***, 1 Misc 3d 591, 765 NYS2d 227 [Sup Ct, NY County 2003]; ***Sumkin v Hammonds***, 177 Misc 2d 1006, 677 NYS2d 734 [Dist Ct, Nassau County 1998]). Therefore, the affidavit of Suzy Mauceri is inadmissible. However, there appears to be no impediment to a party notarizing another

party's affidavit (*see* ***Siani v Clark***, 23 Misc 3d 1123[A], 886 NYS2d 69 [Sup Ct, Albany County 2009]). The affidavit of plaintiff Susan A. Berland will, accordingly, be considered by the Court.

Pursuant to CPLR 3211 (a) (7), pleadings shall be liberally construed, the facts as alleged accepted as true, and every possible favorable inference given to plaintiffs (***Pacific Carlton Development Corp. v 752 Pacific, LLC***, 62 AD3d 677, 878 NYS2d 421 [2d Dept 2009]; ***Gjonlekaj v Sot***, 308 AD2d 471, 764 NYS2d 278 [2d Dept 2003]; ***Leon v Martinez***, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]). On such a motion, the Court is limited to examining the pleading to determine whether it states a cause of action (***Scoyni v Chabowski***, 72 AD3d 792, 898 NYS2d 482 [2d Dept 2010]; ***Guggenheimer v Ginzburg***, 43 NY2d 268, 401 NYS2d 182 [1977]). On such a motion, the Court's sole inquiry is whether the facts alleged in the complaint fit within any cognizable legal theory, not whether there is evidentiary support for the complaint (***Leon v Martinez***, *supra*; ***Ofman v Katz***, 89 AD3d 909, 933 NYS2d 101 [2d Dept 2011]; ***International Oil Field Supply Services Corp. v Fadeyi***, 35 AD3d 372, 825 NYS2d 730 [2d Dept 2006]. Upon a motion to dismiss, such motion will not be granted unless the moving papers conclusively establish that no cause of action exists (***AGS Marine Insurance Company v Scottsdale Insurance Company***, 102 AD3d 899, 958 NYS2d 753 [2d Dept 2013]; ***Chan Ming v Chui Pak Hoi et al***, 163 AD2d 268, 558 NYS2d 546 [1st Dept 1990]). "Whether a plaintiff can ultimately establish [his or her] allegations is not part of the calculus in determining a motion to dismiss" (***EBC I, Inc. v Goldman, Sachs & Co.***, 5 NY3d 11, 19, 799NYS2d 170 [2005]; *see* ***Rovello v Orofino Realty Co.***, 40 NY2d 633, 635-636, 389 NYS2d 314 [1976]). However, conclusory allegations, which fail to adequately allege the material elements of a cause of action, will not withstand a motion to dismiss (***Peterec-Tolino v Harap***, 68 AD3d 1083, 1084 [2d Dept 2009]). Allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not entitled to such consideration (***Mark Hampton, Inc.v Bergreen***, 173 AD2d 220, 570 NYS2d 799 [1st Dept 1991], lv. denied 80 NY2d 788, 587 NYS2d 284, [1992]).

The complaint attempts to set forth five causes of action: *prima facie* tort; intentional misrepresentation; pursuant to General Business Law § 626; pursuant to General Business Law § 621, and unjust enrichment.

"*Prima facie* tort" is the infliction of intentional harm, resulting in damages, without excuse or justification, by an act or series of acts which would otherwise be lawful (***Howard v Block***, 90 AD2d 455, 454 NYS2d 718 [1st Dept 1982]). There is no recovery in *prima facie* tort unless malevolence is the sole motive for defendant's otherwise lawful act or unless defendant acts from "disinterested malevolence," by which is meant that the act which will make a lawful act unlawful must be a malicious one unmixed with any other and exclusively directed to injury and damage of another (***Burns Jackson Miller Summit & Spitzer v Lindner***, 59 NY2d 314, 464 NYS2d 712 [1983]). Plaintiffs must also allege special damages that are specific and measurable (*see* ***Howard v Block***, *supra*; ***Wehringer v Helmsley–Spear, Inc.***, 91 AD2d 585, 586, 457 NYS2d 78 [1st Dept 1982], *affd.* 59 NY2d 688, 463 NYS2d 417 [1983]; *see also* ***Bohn v 176 W. 87th St. Owners Corp.***, 106 AD3d 598, 966 NYS2d 42 [1st Dept 2013]). This cause of action must be dismissed because the complaint contains only a conclusory claim of malice and no special damages are pleaded.

It is well-settled that "[a] claim for negligent misrepresentation requires the plaintiff to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information" (***J.A.O. Acquisition Corp. v Stavitsky***, 8 NY3d 144, 148, 831 NYS2d 364 [2007]). To state a claim for fraudulent misrepresentation, a plaintiff must allege "a 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" ***Mandarin Trading Ltd. v Wildenstein***, 16 NY3d 173, 179, 919 NYS2d 465 [2011]; ***Lama Holding Co. v Smith Barney***, 88 NY2d 413, 421, 646 NYS2d 76 [1996]). It is noted at the outset that the allegations contained in the complaint as to the terms of the contract with the karate school are at variance with the actual contract submitted by plaintiffs. Plaintiffs allege that, under the terms of the contract, Alexander was to receive instruction and progression in the school's "Junior Masters" program leading to second degree black belt. Under the terms of the contract, Alexander was enrolled in the black belt course for a period of 24 months and the school was obligated "to furnish me (Alexander) with competent instruction and suitable facilities for teaching lessons." It continues to state that "[a]ll class sessions are supervised by personnel trained in the procedures and traditions of the martial arts." A second degree black belt is mentioned nowhere in the agreement. Plaintiffs allege that defendant Chi represented to the Berlands that he would continue to operate the school as it had previously, that he personally would be teaching the black belt lessons (which is not required by the contract), and that Alexander would be eligible to receive his second degree black belt within or by the date of the conclusion of the contract. In fact, no claim is made that the school did not continue to operate as before, and Alexander was, in fact, eligible to receive a black belt, but failed to pass the test in the judgment of defendant Charles Chi. No second degree black belt was promised. As to defendant Chi's purported failure to teach Alexander's classes, this supposed failure continued as Alexander continued to receive instruction, under the terms of the contract, for more than a year without complaint from the plaintiffs, who continued to make payments and made no attempt to cancel the contract. Thus, plaintiffs can make no claim that they were injured by any misrepresentation of the defendant (*see* ***Sokoloff v Town Sport's International, Inc.***, 6 AD3d 185, 778 NYS2d 9 [1st Dept 2004]). It is further claimed that defendant Chi stated that Alexander's contract would have to be extended well past the one year remaining on the contract if he wished to test for his second degree black belt, while, in fact, he was allowed to test for the second degree black belt prior to the expiration of the contact. Thus, other than conclusory statements and claims contradicted by the written contract, the complaint does not contain factual allegations sufficient to support a claim of negligent misrepresentation, and this cause of action must be dismissed.

Based on the same facts as set forth above, plaintiffs' respective claims for treble damages under Sections 626, 628 (1) and 621 of the General Business Law must also be dismissed since no facts have been pleaded to establish any deceptive practice on the part of the defendants, upon which the plaintiffs relied, which resulted in any damages to the plaintiff herein. Therefore, these causes of action must also be dismissed. No promise was ever made in the contract, the terms of which are mistated in the complaint, or otherwise that plaintiff Alexander was guaranteed a second degree black belt.

The Court now turns to the plaintiffs' last alleged cause of action. In order to recover damages for unjust enrichment, a plaintiff must show that: (1) the other party was enriched; (2) at the plaintiff's expense; and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered (*see* ***Mandarin Trading Ltd. v Wildenstein***, 16 NY3d 173, 182, 919 NYS2d 465 [2011]). According to the complaint, plaintiff Alexander received training in the black belt course, as promised in the contract, to the point where plaintiffs believed he was the best in the class, however disappointed that they are that he failed the black belt test. Thus, Alexander received the training plaintiffs bargained for and, therefore, the complaint fails to state a cause of action for unjust enrichment.

In light of the foregoing, the defendants' motion to dismiss is granted. However, the Court finds insufficient grounds to grant that portion of the motion which seeks costs and attorney's fees. Therefore, that branch of the motion is denied.

Dated: February 9, 2015

Hon. Joseph Farneti
Acting Justice of the Supreme Court

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION