

Sivan v Mizrahi

2015 NY Slip Op 31350(U)

July 22, 2015

Supreme Court, New York County

Docket Number: 111150/2009

Judge: Anil C. Singh

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

-----X
AVI SIVAN and PREM RAMCHANDANI,

Plaintiffs,

-against-

EMIL MIZRAHI, EITAN MIZRAHI and STEVEN
BLOOM,

Defendants.
-----X

DECISION AND ORDER

Index No. 111150/2009

HON. ANIL C. SINGH, J.:

This action arises out of defendants alleged conduct towards plaintiffs in the course of defendants' efforts to seek repayment of three advances to entities controlled by plaintiffs. Plaintiffs maintain three causes of action against the defendants, and defendants' have answered with six counterclaims. The court now considers three motions for summary judgment seeking dismissal of the claims and counterclaims.

Pertinent Background

On three occasions in 2006, Emil Mizrahi (Mizrahi) advanced a total of \$875,000 to entities controlled by Avi Sivan (Sivan) and Prem Ramchandani (Ramchandani). First, in January 2006, Mizrahi advanced \$400,000 to APA International LLC to fund an investment in a weight-loss product called Diet Coffee. Then, in April 2006, Mizrahi advanced \$250,000 to IGIA, Inc. pursuant to a product financing agreement. Lastly, in July 2006, Mizrahi advanced \$225,000 to ATARGNY, Inc. as a bridge loan. The advances were each made by checks drawn on the account of ENE, Ltd., a wholly-owned entity of Mizrahi.

Plaintiffs allege that Mizrahi, while assisted by his brother Eitan Mizrahi, began in

2008 to demand that Sivan repay the advances. Plaintiffs allege that Mizrahi's demands escalated into threats of murder and bodily injury against themselves and their families. In addition, Sivan alleges that Mizrahi engaged in a smear campaign that damaged Sivan's business holdings and ability to raise funds. Sivan holds three claims against Mizrahi for (i) defamation, (ii) intentional infliction of emotional distress, and (iii) assault.¹ Ramchandani, who is Sivan's business associate, also joins in the cause of action asserting infliction of emotional distress.²

In their answer, defendants deny the allegations and respond that Sivan fraudulently induced Mizrahi to make the advances with false representations and promises, converted the funds that were advanced for Sivan's own personal use, and made criminal accusations against Mizrahi that led to Mizrahi's false arrest by the police in 2009. Mizrahi holds five counterclaims against Sivan for (i) fraud, (ii) unjust enrichment, (iii) conversion, (iv) false arrest, and (v) breach of contract. Mizrahi also holds a sixth counterclaim against Ramchandani for aiding and abetting Sivan's alleged fraud.

Three motions for summary judgment are now pending before the court. In motion sequence 004, Mizrahi and his brother seek dismissal of plaintiffs' claims for defamation, intentional infliction of emotional distress, and assault. In motion sequence 005, Sivan seeks dismissal of Mizrahi's counterclaims for fraud, unjust enrichment, conversion, and breach of contract.³ In motion sequence 003, Ramchandani seeks dismissal of Mizrahi's

¹ Plaintiffs have withdrawn claims for *prima facie* tort and fraud.

² Ramchandani alleges defamation and assault in the complaint as well, but does not address the insufficiencies of these claims in his opposing papers and accompanying affidavits. As such, Ramchandani has apparently conceded defendants' argument in support of summary judgment, and his causes of action with respect to defamation and assault claims are dismissed. (*see Weldon v. Rivera*, 301 A.D.2d 934, 935 [3rd Dep't 2003])

³ Sivan has not sought summary judgment as to Mizrahi's fourth counterclaim for false arrest.

counterclaim for aiding and abetting fraud.

Standard of Review

Summary judgment dismissing a cause of action “is appropriate when there is no question of fact requiring resolution by the trier of fact. When there is no issue of fact to be resolved, the matter can be determined by the court as a question of law.” (*Van Alstine v Padula*, 228 A.D.2d 909, 910 [3rd Dep’t 1996]; citing *Zuckerman v City of New York*, 49 N.Y.2d 557, 562 [1980]) Initially, the moving party bears the burden of demonstrating a *prima facie* entitlement to judgment as a matter of law by demonstrating the absence of any material issue of fact. (*Ayotte v Gervasio*, 81 N.Y.2d 1062, 1063 [1993]) Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 N.Y.2d 557, 562 [1980], and cases cited therein) However, “mere conclusions, expressions of hope[,] or unsubstantiated allegations or assertions are insufficient” to defeat summary judgment. (*Zuckerman v City of New York*, 49 N.Y.2d 557, 562 [1980])

Motion Sequence 004 by Emil Mizrahi and Eitan Mizrahi

Defamation against Mizrahi

The plaintiffs’ cause of action for defamation alleges that Mizrahi made slanderous statements on multiple occasions to people in Sivan’s personal and business communities. Mizrahi unequivocally denies having made any of the alleged defamatory statements.

Mizrahi argues that the evidence submitted by Sivan to support his accusations of defamation constitutes hearsay, and is insufficient to raise a triable issue of fact that can prevent summary judgment. In addition, Mizrahi argues that Sivan’s allegations are too

vague to sustain a defamation claim because the pleadings lack certain particulars, such as to who the statements were allegedly made, when the statements were made, or the precise content of the statements. In opposition, Sivan maintains that the pleadings are sufficiently detailed and are supported by sufficient evidence.

Mizrahi's unequivocal denial of making the subject statements establishes a *prima facie* showing of a lack of the requisite publication of the defamatory statements. (*see Garcia v Puccio*, 62 A.D.3d 598, 598 [1st Dep't 2009]). As a result, the burden of proof as to whether the allegedly defamatory statements were published shifts to the plaintiff. To overcome this burden, Sivan must demonstrate by admissible evidence the existence of a factual issue that requires a trial, and non-hearsay evidence alone will not satisfy this requirement. (*Zuckerman v City of New York*, 49 N.Y.2d 557, 562 [1980])

As evidence, Sivan has submitted affidavits sworn by himself and his wife. The statements relating to defamation in the affidavit of Sivan amount to out-of-court statements by third parties who told Sivan about Mizrahi's defamatory statements and are hearsay. Such inadmissible evidence cannot be considered by the court as proof to contradict Mizrahi's unequivocal denial of having made the contested statements.⁴ The affidavit of Sivan's wife provides a non-hearsay statement – specifically, that Mizrahi told Sivan's wife in November 2008 that her husband is a “fraud and a thief”. This statement appears, based on the structure in which it is attested to in the affidavit, to be supported by

⁴ While a court is not entirely precluded from considering inadmissible evidence in determining whether an issue of fact exists that would overcome a motion for summary judgment, a trial is generally unnecessary if it appears that all proof supporting a claim will be excludable at trial. (*see Phillips v Kantor*, 31 N.Y.2d 307, 314 [1972]) Furthermore, inadmissible hearsay by itself is insufficient to defeat a motion for summary judgment unless considered together with admissible evidence. (*see Arnold v New York City Housing Authority*, 296 A.D.2d 355, 356 [1st Dep't 2002]) In the instant case, although afforded ample opportunity to submit non-hearsay evidence, Sivan has not done so.

the personal knowledge of Sivan's wife, and may be considered by the court as non-hearsay evidence that opposes Sivan's summary judgment motion.

Whether the particular words allegedly uttered by Mizrahi to Sivan's wife can properly be considered slanderous presents a legal question to be resolved by the court. (*see Aronson v Wiersma*, 65 N.Y.2d 592, 593 [1985]) Reflection on the Second Department's analysis in *Klein v McGauley*, (29 A.D.2d 418 [2nd Dep't 1968]), is particularly instructive in making this determination. In *Klein*, the court ruled that slanderous statements which result only in the victim being held up to ridicule and contempt are never actionable in a defamation suit without proof of special damages, except when (i) the slanderous statements insinuate that an indictable crime has been committed or (ii) the statements cause injury to the defamed person's business or trade. (*Klein v McGauley*, 29 A.D.2d 418, 421 [2nd Dep't 1968]). In the present case, the fact that the contested statement was made to a family member does not necessarily insulate Mizrahi from liability, but it does provide a basis for rejecting the notion of damages in connection with the defamatory statement. (*see, e.g., 60 Minute Man, Ltd. v Kossman*, 161 A.D.2d 574, 576 [2nd Dep't 1990]) Nowhere in the record does Sivan indicate that the statement made specifically to his wife caused injury to his business or trade. The mere charge of being a "fraud" or "thief" also does not amount to slander *per se*, without further refinement or reference to a specific act.⁵ (*Klein v McGauley*, 29 A.D.2d 418, 422 [2nd Dep't 1968]), [holding that to accuse another of being a "crook" is not slanderous *per se*, without further particulars.] The court is unwilling to sustain Sivan's claim on the allegation that Mizrahi accused him of being a

⁵ The court acknowledges that certain allegations contained within the complaint may constitute an assault upon Mr. Sivan's standing within his business community and profession. However, the court is not able to consider such allegations absent non-hearsay evidence supporting them.

“fraud and a thief[,]” and defendants’ motion for summary judgment as to the claim for defamation is granted.

Intentional Infliction of Emotional Distress against Mizrahi

The plaintiffs’ cause of action for the intentional infliction of emotional distress alleges that Mizrahi committed conduct that caused both Sivan and Ramchandani to suffer humiliation, fear for the personal safety of themselves and their families, and severe emotional distress. Mizrahi unequivocally denies having engaged in such behavior.

Regardless of whether the alleged conduct occurred, Mizrahi argues that the allegations in the complaint are insufficient, as a matter of law, to sustain a cause of action for infliction of emotional distress. Mizrahi relies in his argument on *Slatkin v. Lancer Litho Packaging Corp.*, (33 A.D.3d 421 [1st Dep’t 2006]), in which the First Department ruled that behavior arguably analogous to the conduct alleged in the instant case was not so outrageous as to be utterly intolerable, and could not support a claim for infliction of emotional distress.

The plaintiffs counter that *Slatkin* is inapposite to the present case because that case involved threats of arrest and criminal prosecution, whereas the present case involves a campaign of violent threats of murder and bodily injury to the plaintiffs and their families. The plaintiffs suggest that Mizrahi’s alleged conduct in the present case is more akin to the behavior that was evaluated by the Fourth Department in *Cavallaro v Pozzi*, (28 A.D.3d 1075 [4th Dep’t, 2006]). The court in *Cavallaro* held that a “defendant engaged in a constant campaign of harassment and intimidation, which included threatening to kill plaintiff and his children,” was sufficient to sustain a claim for intentional infliction of emotional distress.⁶ *Cavallaro v Pozzi*, (28 A.D.3d 1075, 1078 [4th Dep’t, 2006]) The

⁶ Plaintiffs also direct the court to *Bunker v Testa*, (234 A.D.2d 1004 [4th Dep’t 1996]), in which the Fourth Department refused to dismiss a cause of action alleging intentional infliction of emotional

conduct alleged by Sivan is more analogous to the conduct in *Cavallaro*, and the court finds Mizrahi's allegations to be sufficient to sustain the claim for the intentional infliction of emotional distress.

Mizrahi also contends that claims alleging severe emotional distress must be supported by medical evidence. The plaintiffs counter that while medical evidence may be relevant to certain claims, it is not required where the conduct that allegedly inflicted the emotional distress is sufficiently extreme and outrageous on its face.

To prevent summary judgment of the claim, "the alleged conduct that caused the claimed emotional turmoil must exceed the bounds of decency so as to be utterly intolerable in a civilized society." (*Bement v N.Y.P. Holdings*, 307 A.D.2d 86, 92 [1st Dep't 2003]) When the pleadings and evidence suggest conduct that "is extreme enough, that fact tends to prove severe distress[, and m]edical testimony is not ordinarily required to demonstrate either the severity of the distress or its cause." (*Hughes v Pacienza*, 2012 NY Slip Op 50599(U) [Sup Ct Kings Cty 2012], *internal quotations omitted*) Certainly, in this case, plaintiffs' allegations, which are supported by sworn affidavits that allege threats of bodily harm to the plaintiffs and their families, supply sufficient evidence of conduct that could conceivably inflict severe emotional distress on the plaintiffs. Another reason for denying summary judgment is that whether such behavior may be said to be so outrageous to exceed all reasonable bounds of decency, or so severe that no reasonable person would be expected to endure it, is a factual question within the providence of the trier of fact. (*Halio v Lurie*, 15 A.D.2d 62, 68 [2nd Dep't 1961]) Plaintiffs' allegations are sufficient to

distress. The conduct alleged in the present case appears to be even more severe than the conduct alleged in *Bunker*.

sustain their claim, and defendants' motion for summary judgment as to the intentional infliction of emotional distress is denied.

Assault against Mizrahi and Eitan Mizrahi

The plaintiffs' cause of action for assault alleges that Mizrahi and his brother, Eitan Mizrahi⁷, engaged in threatening acts that were willful and malicious and that were intended to frighten Sivan and his family. The defendants unequivocally deny having engaged in such behavior.

Regardless of whether the alleged conduct occurred, the defendants argue that the allegations in the complaint do not constitute an assault because no physical conduct is alleged that placed the plaintiffs in imminent apprehension of harmful contact. The plaintiffs counter that the defendants have misconstrued the requirement for physical *conduct* with that of physical *contact*.

A civil assault is an intentional attempt to do injury or commit a battery upon the person of another. (*Schloendorff v The Society of New York Hospital*, 105 NE 92 [1914]) To sustain a claim for assault, there must be proof of physical conduct placing the plaintiff in imminent apprehension of harmful contact. (*Holtz v Wildenstein & Co., Inc.*, 261 AD 2d 336, 336 [1st Dep't 1999]) Threats, standing alone, do not constitute an assault. (*Carroll v New York Property Insurance Underwriting Association*, 88 AD 2d 527, 527 [1st Dep't 1982])

⁷ The complaint alleges that "[i]n July 2008, Mizrahi's brother, Aaron Mizrahi, threatened the safety of Sivan." Aaron Mizrahi is not a party to this action, and the record makes no other mention of Aaron. However, Eitan Mizrahi is a defendant in this suit, and plaintiffs' moving papers are rife with allegations against Eitan that are similar to those attributed to Aaron in the complaint. The court surmises that the insertion of "Aaron" into the complaint is undoubtedly a typographical error, and the court will consider the merits of the Complaint as if "Eitan" were transposed for "Aaron".

The complaint is replete with allegations that the defendants on numerous occasions exhibited “conduct that place[d] [Sivan] in imminent apprehension of harmful contact.” Further, the accompanying affidavits of Sivan provide non-hearsay evidence that support his pleadings and which detail specific and repeated threats of murder and bodily injury to Sivan and his family. For example, Sivan affirms that, “in or about November 2007...Mizrahi became belligerent and threatening, and stated: ‘If you do not personally pay me my money, I am going to break your legs.’” Although such “words, without some menacing gesture or act accompanying them, ordinarily will not be sufficient to state a cause of action alleging assault,” (*Gould v Rempel*, 99 AD 3d 759, 760 [2nd Dep’t 2012]), “an assault action may be sustained where there is evidence to suggest a grievous affront or threat to the person of the plaintiff.” (*Di Gilio v William J Burns Int’l Detective Agency, Inc.*, 46 AD 2d 650, 650 [2nd Dep’t 1974]) In light of the sworn affidavits submitted by Sivan alleging conduct committed by the defendants that can be characterized as grievous or resulting in the imminent apprehension of harmful contact, it is clear that triable issues of fact exist. The court denies defendants’ motion for summary judgment as to plaintiffs’ claim for assault.

Motion Sequence 005 by Avi Sivan

Fraud against Sivan

Mizrahi’s counterclaim for fraud alleges that Sivan knowingly and intentionally made two sets of false representations when he solicited and induced Mizrahi to advance a total of \$875,000 on three separate occasions to entities controlled by Sivan. Firstly, Mizrahi alleges “Sivan falsely represented and promised that he would” return Mizrahi’s \$875,000 “upon demand.” Secondly, Mizrahi alleges that the initial advance of \$400,000 was

intended to fund an investment in Diet Coffee, which “Sivan falsely represented was a product approved for use as a weight loss product, when, upon information and belief, Sivan knew that the product could not achieve weight loss.”

The court notes that New York case law generally does not allow a tort claim sounding in fraud that is founded on representations duplicative with the representations underlying a contract claim. (*see, e.g., Deerfield Communications Corp. v Chesebrough-Ponds, Inc.*, 68 N.Y.2d 954 [1986]; *Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 N.Y.2d 382 [1987]) The First Department has repeatedly dismissed duplicative fraud claims that are based on future expectation (e.g., a promise of repayment) where the fraud cause of action adds no new allegation to the contract claim. (*see Gotham Boxing, Inc. v Finkel*, 2008 NY Slip Op 50020(U) [Sup Ct New York Cty 2008], *citing Richbell Info. Servs., Inc. v Jupiter Partners, L.P.*, 309 AD2d 288, 305 [1st Dep’t 2003]) The first set of representations on which Mizrahi bases his fraud counterclaim are merely a restatement of the contractual obligations asserted in his breach of contract counterclaim, and summary judgment is granted insofar as the counterclaim is based on these representations.

In any event, the fraud counterclaim can be maintained, at least in part, insofar as it is based on the second set of representations concerning the efficacy of Diet Coffee. Where a plaintiff alleges misrepresentations of present facts, rather than merely of future intent, that were collateral to the contract and which induced the allegedly defrauded party to enter into the contract, a fraudulent inducement claim is not duplicative of a breach of contract claim (*see W.I.T. Holding Corp. v Klein*, 282 A.D.2d 527, 528 [2nd Dep’t 2001]) As partial support for his fraud counterclaim, Mizrahi asserts he relied upon Sivan’s representations regarding the efficacy of the Diet Coffee product when he was induced by Sivan to make

the first advance. The issue of whether Sivan actually and knowingly made the false representations that are alleged by Mizrahi will be for the trier of facts to determine. Sivan's motion for summary judgment is denied as to the fraud counterclaim insofar as the counterclaim relies on the second set of representations.

Unjust Enrichment and Conversion against Sivan

Mizrahi's counterclaims for unjust enrichment and for conversion allege that Sivan used the funds advanced by Mizrahi for purposes other than those intended.

As with causes of action sounding in fraud, it is generally impermissible to seek damages in an action sounding in unjust enrichment or conversion, where the underlying facts or occurrences arise out of the same subject matter as a breach of contract claim. (see *Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 N.Y.2d 382, 390 [1987]; see also *Sutton Park Dev. Corp, Trading Co. v. Guerin & Guerin Agency, Inc.*, 297 A.D.2d 430, 432 [2nd Dep't, 1999])⁸ Mizrahi's unjust enrichment and conversion counterclaims are both based solely on Sivan's failure to return Mizrahi's advances upon demand, which is essentially the same subject matter that underlies the contract counterclaim. For example, Mizrahi alleges that Sivan was unjustly enriched "as a result of Sivan's failure to return the funds on demand". Further, in support of his conversion counterclaim, Mizrahi asserts that Sivan "diverted the money...to the exclusion of Mizrahi's rights." Given the similarities between these assertions and the contract counterclaim, Mizrahi's unjust enrichment and conversion

⁸ Furthermore, a quasi-contract claim, such as for unjust enrichment, can only be maintained in the absence of a valid, enforceable contract, "the existence of which is undisputed, and the scope of which clearly covers the dispute between the parties." (see *Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 N.Y.2d 382 [1987]) Since Mr. Mizrahi has implicitly conceded the existence and validity of an oral contract as a consequence of asserting his contract counterclaim, summary judgment can also be granted.

counterclaims cannot be maintained as separate causes of action from Mizrahi's contract counterclaim, and summary judgment as to these counterclaims is granted.

Breach of Contract against Sivan

Mizrahi's counterclaim for breach of contract alleges that Sivan breached his agreements with Mizrahi by refusing to repay the advances upon demand to Mizrahi.

With respect to repayment of the initial advance of \$400,000, Sivan asserts the defense of accord and satisfaction. It is undisputed by the parties that, in connection with this initial advance, Mizrahi was issued "a share certificate for 4,000,000 shares of Diet Coffee" in March 2006, which Sivan purchased using "Mizrahi's initial \$400,000 cash transfer." Sivan contends that Mizrahi's receipt and acceptance of these shares, and Mizrahi's subsequent exercise of control over these shares by exchanging them for new shares which Mizrahi later sold for \$165,000, manifests a *de facto* accord and satisfaction. Mizrahi counters that he never agreed to accept the shares as full repayment, but rather Mizrahi "received the certificates based upon his understanding that Sivan was going to repay him in full."

An accord and satisfaction is effected when the parties enter into a new contract wherein they agree that "a stipulated performance will be accepted, in the future, in lieu of an existing claim." (*Denburg v Parker Chapin*, 82 N.Y.2d 375, 383 [1993]) That is, an accord and satisfaction requires a "dispute as to the amount due and knowing acceptance by the creditor of a lesser amount." (*Con Ed v Jet Asphalt Corp.*, 132 A.D.2d 296, 303 [1st Dep't 1987]) Inasmuch as an accord and satisfaction constitutes a contract, it must be shown that the parties set forth the essential elements thereof and had a meeting of the minds to resolve the disputed claim. (*Sorrye v Kennedy*, 267 A.D.2d 587, 590 [3rd Dep't

1999]) In the instant case, there is no allegation by Sivan that that a dispute existed as to the amount due. Sivan has also failed to present evidence that would support Mizrahi's acceptance of a lesser or substitute payment in lieu of the whole amount due. Mizrahi's acceptance of the shares of Diet Coffee does not, in and of itself, confirm his agreement to any accord.

With respect to repayment of the second advance for \$250,000 and the third advance for \$225,000, Sivan asserts that Mizrahi's claim against Sivan is barred by Mizrahi's judicial admissions that the advances were loans to separate entities. Mizrahi concedes in his pleadings and motion papers that the second and third advances were drawn on checks made payable to IGIA, Inc. and ATARGNY, Inc., and not to an account held personally by Sivan. Mizrahi contends that Sivan is not shielded from liability despite that fact that the funds were transferred to the separate entities because the intention of the parties was for the advances to be loans to Sivan, who promised to ensure repayment while directing the checks be made payable to the separate entities.

New York's statute of frauds provides that a "special promise to answer for the debt, default or miscarriage of another" may not be enforced unless it is in writing. (General Obligations Law, § 5-701, subd a, par 2) Under the arrangement professed by Sivan, the advances were loans to IGIA, Inc. and ATARGNY Inc., and any claim against Sivan for repayment would be unenforceable since no promise for repayment was put in writing. There are situations in which no writing is required, however, such as where the promisor has become, in the intention of the parties, a primarily liable principal debtor. (*Martin Roofing v. Goldstein*, 60 N.Y.2d 262, 265 [1983]) Mizrahi contends that the parties did intend for Sivan to be the principal debtor, even though the advances were drawn on checks

made payable to separate entities. The divergence between the parties' standpoints regarding the arrangement provides a material issue of fact to be resolved at trial, and summary judgment as to the contract counterclaim is denied.

Motion Sequence 003 by Prem Ramchandani

Aiding and Abetting Fraud against Ramchandani

Mizrahi's counterclaim against Ramchandani for aiding and abetting fraud asserts that Ramchandani assisted Sivan in defrauding Mizrahi by pitching Diet Coffee with lies and false reassurances that Sivan would repay the advances.

As discussed above, the court has granted Sivan's motion for summary judgment as to Mizrahi's fraud counterclaim insofar as the claim is based on Sivan's allegedly false representations to repay Mizrahi, but has denied summary judgment insofar as the counterclaim is based on representations regarding the efficacy of Diet Coffee. Since the existence of a fraud is essential to whether a claim for aiding and abetting a fraud can be maintained, the court then does not reach whether Ramchandani could be liable based on the first set of representations. The court will only consider whether summary judgment of the fraud claim can be prevented to the extent that Ramchandani is alleged to have pitched Diet Coffee to Mizrahi with lies.

Mizrahi alleges that Ramchandani accompanied Sivan to meetings to convince Mizrahi to advance the initial \$400,000 for Diet Coffee. Mizrahi also notes as relevant to implicating Ramchandani in the alleged fraud that Ramchandani participated in the settlement negotiations between Mizrahi and Sivan regarding repayment of the advances, and that Ramchandani's attorney was involved in matters related to Diet Coffee's signing of a stipulation with the Federal Trade Commission. Rather than dispute Mizrahi's

allegations, Ramchandani contends that Mizrahi's failure to allege any of the advances were made to Ramchandani precludes a claim for aiding and abetting a fraud against Ramchandani. Whether funds were advanced to Ramchandani is irrelevant to the counterclaim at bar for aiding and abetting a fraud. Rather, to sustain his claim, Mizrahi needs to plead (i) the existence of a fraud, (ii) Ramchandani's knowledge of the fraud, and (iii) Ramchandani's substantial assistance to the fraud (*see Harbinger Capital Partners Master Fund I, Ltd. v Wachovia Capital Markets, LLC*, 27 Misc 3d 1236(A), 2010 NY Slip Op 51046(U) [Sup Ct New York Cty 2010]) Mizrahi has provided allegations that fulfill these elements, and it will be for a trier of facts to determine the truth of such allegations. Ramchandani's motion for summary judgment as to aiding and abetting fraud is denied. Accordingly it is,

ORDERED that that defendants' motion for summary judgment seeking dismissal of plaintiffs' cause of action sounding in defamation is granted.

ORDERED that that defendants' motion for summary judgment seeking dismissal of plaintiffs' cause of action sounding in the intentional infliction of emotional distress is denied.

ORDERED that defendants' motion for summary judgment seeking dismissal of Sivan's cause of action sounding in assault is denied, but summary judgment seeking dismissal of Ramchandani's cause of action sounding in assault is granted.

ORDERED that Sivan's motion for summary judgment as to Mizrahi's counterclaim sounding in fraud is

- (i) granted insofar as it is based on Sivan's promises of repayment to Mizrahi
and

(ii) denied insofar as it is based on allegations that Sivan knowingly made false representations about the efficacy of Diet Coffee.


ORDERED that Sivan's motion for summary judgment as to Mizrahi's counterclaim sounding in unjust enrichment is granted.

ORDERED that Sivan's motion for summary judgment as to Mizrahi's counterclaim sounding in conversion is granted.

ORDERED that Sivan's motion for summary judgment as to Mizrahi's counterclaim sounding in breach of contract is denied.

ORDERED that Ramchandani's motion for summary judgment as to Mizrahi's counterclaim sounding in aiding and abetting fraud is denied.

Date: July 22, 2015
New York, New York



Anil C. Singh