

Continental Capital Group, LLC v Lazar Bldrs., LLC
2015 NY Slip Op 31525(U)
August 13, 2015
Supreme Court, Kings County
Docket Number: 507817/2014
Judge: Carolyn E. Demarest
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At an IAS Term, Com 1 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 13th day of August, 2015.

PRESENT:

HON. CAROLYN E. DEMAREST, JSC.

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CONTINENTAL CAPITAL GROUP, LLC
AND WOLF LANDAU,

Plaintiff(s),

-against-

LAZAR BUILDERS, LLC and LAZAR
OSTREICHER a/k/a MORDECHAI
ELAZER OSTREICHER

Defendant(s).

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LAZAR OSTREICHER a/k/a MORDECHAI
ELAZER OSTREICHER,

Defendant-Third Party Plaintiff,

-against-

AARON ROSENFELD,

Third-Party Defendant.

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NYSCEF:

Amended Complaint Exhibit A-F
Amended Answer to the Amended Complaint
Notice of Motion to Dismiss
Affirmation In Support Exhibit A-G
Affidavit in Opposition and In Support Exhibit C-K, O
Affirmation In Opposition and In Reply
Reply Affidavit in Further Opposition and In Support
Memorandum of Law in Support of Motion

DECISION
AND
ORDER

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In this action by plaintiffs Continental Capital Group, LLC (“CCG”) and Wolf Landau (“Landau”) (collectively plaintiffs) against defendants Lazar Builders, LLC (“LB”) and Lazar Ostreicher a/k/a Mordechai Elazer Ostreicher (“Ostreicher”) (collectively defendants), plaintiffs move for an Order pursuant to CPLR 3211 dismissing Ostreicher’s counterclaims for fraud, conversion, unjust enrichment, declaratory judgment, and civil RICO. Ostreicher cross-moves to amend his Answer pursuant to CPLR 3025(b). In their moving papers, and at oral argument, defendants withdrew their civil RICO counterclaim.

BACKGROUND

In the Amended Complaint, plaintiffs allege the following: On or about August 10, 2006, LB obtained a loan from CCG in the sum of \$600,000 for the purchase of 98-108 Badger Avenue, Newark, New Jersey, Essex County (“the Badger Avenue Properties”). Ostreicher personally guaranteed the loan. Ostreicher executed documents entitled “Mortgage Note” (“Note”), “Assignment of Leases and Rents,” “Mortgage,” “Guaranty of Obligations of Borrower” (“Guaranty”), and “Borrower’s and Guarantor’s Certification And Agreement” (collectively the loan documents). LB did not repay the loan on the August 10, 2007, maturity date. Demand was made that LB and Ostreicher satisfy their obligations under the loan documents, but LB and Ostreicher failed to pay the balance of the \$600,000 that was owed to plaintiffs.

On September 9, 2009, Ostreicher and Landau signed an Isska Contract (“Isska”).¹ The Isska created a new contract between Landau and Ostreicher for the unpaid balance of the \$600,000 that Ostreicher originally owed Landau. Pursuant to the Isska, with reference to the Badger Avenue Properties and the \$600,000 debt, all previous commitments of Ostreicher to Landau were rescinded. Payment of \$93,000 was made upon execution, and an additional \$50,000 payment was made on December 31, 2009. After these payments were made, total payments against the \$600,000 debt were to have equaled \$350,000, leaving a balance of \$250,000 due three years from the execution of the Isska, on September 9, 2012. Ostreicher did not pay the \$250,000, on September 9, 2012. Plaintiffs allege Ostreicher tendered an additional payment of \$25,000 under the Isska on February 5, 2013.

In Affirmation in Support of Motion to Dismiss ¶ 8, plaintiffs allege that twenty-nine (29) check payments, dated between March 1, 2007 and February 5, 2013, and totaling \$303,000, were made by, or on behalf of, defendants, to plaintiffs under the loan. In Exhibit G to that Affirmation, plaintiffs attach copies of the fronts of these checks. In Ostreicher's Affidavit in Opposition and in Support of Cross-Motion ¶¶ 57-62 and 78-90 Ostreicher denies signing a number of checks, but admits signing checks totaling \$198,000.

¹ A translated copy of the Isska is attached as Exhibit D to Affirmation In Support of Motion to Dismiss. “A ‘hetter isska’ is a religious documents [sic] designed to characterize a loan transaction as a ‘venture’ so as to avoid the biblical prohibition against the taking of interest” (*In re Stephen Douglas, Ltd*, 174 BR 16, Footnote 3 [EDNY 1994] citing *Barclays Discount Bank, Ltd v Levy*, 743 F2d 722, 724 [9th Cir 1984]).

Ostreicher, in the proposed Amended Answer to the Amended Complaint contests that he signed the loan documents, that he owes anything pursuant to the loan documents or the Isska, and that he has paid plaintiffs anything under the Isska. In his third party complaint, Ostreicher alleges that Rosenfeld prepared the loan documents, forged Ostreicher's name on the loan documents, then provided them to plaintiffs. Upon the transfer of loaned funds to LB, Rosenfeld took the proceeds of the loan. The Badger Avenue Properties were then transferred out of LB, by Rosenfeld, into entities he solely controlled. Ostreicher contacted Rosenfeld, after plaintiffs demanded payment, and was informed by Rosenfeld that there was a loan and that Ostreicher's name appeared on the paperwork. Ostreicher contends that he believed Rosenfeld's assurances that Ostreicher had some obligation under the loan and that, prior to signing the Isska, he made several payments for Rosenfeld so that Rosenfeld had time to generate funds. Plaintiffs never sought to foreclose upon the Badger Avenue Properties. Rosenfeld allegedly conceded liability for the loan.² Ostreicher contends plaintiffs insisted he sign the Isska which rescinded the earlier agreements. Ostreicher acknowledges that he signed the Isska, and that he made payments, but claims that when a final payment was made, Landau allegedly agreed to return all the amounts paid if Ostreicher was not responsible for the loan. Later

² In Ostreicher's Affidavit in Opposition to Motion and In Support of Cross-Motion ¶ 67-8 and Exhibit L, Ostreicher alleges that on May 26, 2013, Rosenfeld wrote a document wherein he stated that, "I borrowed from Mr. Wolf Landau, and only I was in contact with him, and due to a technical reason Mr. Elazar Ostreicher signed the loan agreements; however I was definitely a fifty percent partner."

Landau allegedly “acknowledged to Ostreicher and others that the obligations were not Ostreicher’s but that plaintiffs would still pursue Ostreicher, who had the ability to pay” (Third-Party Complaint ¶ 121).

In Ostreicher's Affidavit in Opposition and in Support of Cross-Motion ¶ 86-90, Ostreicher states that, in February of 2013, Landau signed a document wherein Landau agreed to recognize that Ostreicher disputed Landau’s claims. Attached to his Affidavit In Opposition and In Support of Cross-Motion, Exhibit O is a single page marked at the top “redacted.” Beneath the word “redacted” is a copy of a check for \$15,000 from Blue Circle Group, LLC. The pay to the order line is left blank. Under this check is written: “Recivd \$10,000 cash + \$15,000 CHF # 284 I agree that in the event A . . . Rosnfeld took the loan. [Ostreicher] owes me nating [sic]. If its found that [Ostreicher] did nat [sic] undertake personal gurenty [sic] I owe [Ostreicher] what he gave me and for UTA per my direction.” Beneath this writing is a signature. In Landau's Affirmation In Opposition to Cross-Motion and in Reply ¶ 20, Landau denied that he signed this document, stating that he only signed a document that stated something along the lines of “I received the sum of \$10,000 in cash plus a check in the sum of \$15,000.” Landau claims that someone else wrote in any additional language.

DISCUSSION

Plaintiffs have moved to dismiss Ostreicher’s counterclaims for fraud, conversion, unjust enrichment, declaratory judgment, and civil RICO. Ostreicher withdrew his fifth counterclaim for civil RICO, but otherwise opposed plaintiffs’ motion and cross-moved to amend his Answer pursuant to CPLR 3025(b). The amendment seeks to replace the

counterclaim for fraud with a counterclaim for “fraud/aiding and abetting fraud,” and the counterclaim for civil RICO with a counterclaim for conspiracy to commit fraud.

I. Defendant Ostreicher’s Cross-Motion to Amend His Answer

Ostreicher cross-moved pursuant to CPLR 3025(b) to amend his answer. “In the absence of prejudice or surprise to the opposing party, leave to amend a pleading should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit” (*Lucido v Mancuso*, 49 AD3d 220, 227 [2d Dept 2008], appeal withdrawn 12 NY3d 804, 813 [2009] quoting *Trataros Constr, Inc v New York City Hous Auth*, 34 AD3d 451, 452–453 [2d Dept 2006]). “This means that, in the case, for example, of a motion for leave to amend a [pleading] by adding a new cause of action, the motion for leave to amend will be denied, in the absence of prejudice or surprise, only if the new cause of action would not withstand a motion to dismiss under CPLR 3211(a)(7)” (*id.* at 225).

Rosenfeld has not opposed the motion to amend. Plaintiffs only oppose the motion to amend insofar as it seeks to replace the counterclaim for fraud with a counterclaim for “fraud/aiding and abetting fraud,” and introduces a counterclaim for conspiracy to commit fraud.

II. Plaintiffs' Motion to Dismiss

Plaintiffs seek to apply their motion to dismiss the counterclaims in the Answer to the counterclaims in the proposed Amended Answer. The proposed amendments are addressed to the merits, and do not make a significant change in the nature of the action as the Answer has always alleged plaintiffs' and Rosenfeld's fraud. Plaintiffs continued to pursue their motion after Ostreicher cross-moved to amend the Answer. Accordingly, plaintiffs' motion to dismiss will be addressed to the proposed Amended Answer (*See Livadiotakis v Tzitzikalakis*, 302 AD2d 369, 369 [2d Dept 2003]; *Sage Realty Corp v Proskauer Rose*, 251 AD2d 35, 38 [1st Dept 1998]; *Sholom & Zuckerbrot Realty Corp v Coldwell Banker Commercial Group*, 138 Misc 2d 799, 801 [Sup Ct, Queens County 1988]).

Plaintiffs move for an Order under CPLR 3211(a)(7), dismissing the Amended Answer's counterclaims for "fraud/aiding and abetting fraud," conversion, unjust enrichment, declaratory judgment, and conspiracy to commit fraud; under CPLR 3016(b), dismissing the counterclaim for "fraud/aiding and abetting fraud" due to Ostreicher's failure to plead "fraud/aiding and abetting fraud" with particularity; and under CPLR 214, dismissing the counterclaim for conversion as barred by the Statute of Limitations. Plaintiffs do not oppose defendants' proposed counterclaim for money had and received.

Upon a motion to dismiss under CPLR 3211(a)(7), courts merely look to "the adequacy of the pleadings" (*Davis v Boenheim*, 24 NY3d 262, 268 [2014] quoting *State of*

New York v Barclays Bank of NY, 151 AD2d 19, 21 [3d Dept 1989]). Courts “accept the facts as alleged in the complaint as true, accord [the pleading party] 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, 87-8 [1994]).

A. “Fraud/Aiding and Abetting Fraud”

In the Amended Answer, Ostreicher titles a counterclaim “fraud/aiding and abetting fraud.” Fraud and aiding and abetting fraud are two separate causes of action. “The elements of common-law fraud are a representation of a material fact, falsity, scienter, reliance, and injury” (*Kline v Taukpoint Realty Corp*, 302 AD2d 433, 433 [2d Dept 2003]). “A [party] alleging an aiding-and-abetting fraud claim must allege the existence of the underlying fraud, actual knowledge, and substantial assistance” (*Goel v Ramachandran*, 111 AD3d 783, 792 [2d Dept 2013] quoting *Oster v Kirschner*, 77 AD3d 51, 55 [1st Dept 2010]). Although “[i]t is enough . . . that a pleader state the facts making out a cause of action, and it matters not whether he [or she] gives a name to the cause of action at all or even that he [or she] gives it a wrong name” (*Johnson v Verona Oil, Inc*, 36 AD3d 991, 993 [3rd Dept 2007]), pursuant to CPLR 3013, “[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions of occurrences, intended to be proved and the material elements of each cause of action or defense.” Moreover, pursuant to CPLR 3014, “separate causes of action or defenses shall be separately stated and numbered and may be

stated regardless of consistency.” Additionally, “CPLR 3016(b) provides that where a cause of action or defense is based upon fraud, ‘the circumstances constituting the wrong shall be stated in detail’” (*Pludeman v Northern Leasing Systems, Inc*, 10 NY3d 486, 491 [2008]). However, “CPLR 3016(b) should not be so strictly interpreted ‘as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting a fraud’” (*id. quoting Lanzi v Brooks*, 43 NY2d 778, 780 [1977]).

Ostreicher’s first counterclaim, and first third-party cause of action, are plead in a fashion that does not give either plaintiffs or Rosenfeld adequate notice of whether Ostreicher is alleging that the plaintiffs committed fraud, Rosenfeld committed fraud, or both. Similarly, the first counterclaim, and first third party cause of action, do not give adequate notice as to whether Ostreicher is alleging that Rosenfeld aided and abetted plaintiffs’ fraud, plaintiffs aided and abetted Rosenfeld’s fraud, or both. Therefore, the first counterclaim, and first third party cause of action, for “fraud/aiding and abetting fraud” are both dismissed with leave for plaintiffs to replead within 30 days of the date hereof in accordance with the requirements of CPLR 3013, 3014 and 3016.

B. Conversion

Plaintiffs move pursuant to CPLR 3211(a)(7) to dismiss the counterclaim for conversion. Conversion is the “unauthorized assumption and exercise of the right of ownership over [something] belonging to another to the exclusion of the owner’s rights”

(*Peters Griffin Woodward, Inc v WCSC, Inc*, 88 AD2d 883, 883 [1st Dept 1982]).

Conversion of money requires “a specific identifiable fund and an obligation to return or otherwise treat in a particular manner the specific fund in question” (*Manufacturers Hanover Trust Co v Chemical Bank*, 160 AD2d 113, 125 [1st Dept 1990]). The money must be “specifically identifiable and segregated” (*id.* at 125). If “the allegedly converted money is incapable of being ‘described or identified in the same manner as a specific chattel[,]’ it is not the proper subject of a conversion action” (*9310 Third Ave Assocs v Schaffer Food Serv Co*, 210 AD2d 207, 208 [2d Dept 1994] *quoting* 23 NY Jur 2d, Conversion, § 12 at 218). “[M]oney that has been paid into a business entity’s general account, and commingled with the business entity’s other funds, is generally not considered to be specifically identifiable for purposes of a conversion claim” (*D’Amour v Ohrenstein & Brown*, 17 Misc. 3d 1130(A), 13 [Sup Ct, New York County [2007] *citing e.g. Auguston v Spry*, 282 AD2d 489, 491 [2d Dept 2001] (“The [pleading parties] cause of action alleging conversion must fail because he alleges that his money was to be commingled into the corporation’s capital. As commingled money, his money was incapable of being converted”))).

Ostreicher only alleges that he made payments to plaintiffs, not that said payments were made into a specifically identified bank account. It can be inferred from Ostreicher’s allegation that these payments entered into CCG’s general account as there is no

allegation that these payments were not commingled with CCG's other funds. Therefore plaintiffs' motion to dismiss is granted as to the counterclaim for conversion.

Plaintiffs move, pursuant to CPLR 214, to dismiss the counterclaim for conversion as not brought within the statute of limitations, however this need not be addressed as Ostreicher's counterclaim for conversion is dismissed on other grounds.

C. Unjust Enrichment

Plaintiffs move pursuant to CPLR 3211(a)(7) to dismiss the counterclaim for unjust enrichment. “[T]he theory of unjust enrichment lies as a quasi-contract claim’ and contemplates an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties” (*Georgia Malone & Co, Inc v Rieder*, 19 NY3d 511, 516 [2012] quoting *IDT Corp v Morgan Stanley Dean Witter & Co*, 12 NY3d 132, 142, [2009]). “Thus, in order to adequately plead such a claim, the plaintiff must allege ‘that (1) the other party was enriched, (2) at that party’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’” (*id.* at 516 quoting *Mandarin Trading Ltd v Wildenstein*, 16 NY3d 173, 182 [2011]). “An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim” (*Corsello v Verizon New York, Inc*, 18 NY3d 777, 790 [2012]; see also *Whitman Realty Group, Inc v Galano*, 41 AD3d 590, 593 [2d Dept 2007] (“Recovery for unjust enrichment is barred by a valid and enforceable contract”)).

It can be inferred from the pleadings that Ostreicher is bringing an alternative claim for unjust enrichment against the plaintiffs that would not duplicate other claims. Ostreicher is alleging that equity and good conscience would not permit plaintiffs to retain the funds delivered to them were it proven that there is no valid and enforceable agreement between Ostreicher and plaintiffs, and plaintiffs did not commit fraud, or aid and abet Rosenfeld's fraud. Ostreicher alleges that plaintiffs received money from Ostreicher at Ostreicher's expense as a result of Rosenfeld's fraud. As such, Ostreicher has stated a cause of action for unjust enrichment. Therefore plaintiffs' motion to dismiss is denied as to the counterclaim for unjust enrichment.

E. Declaratory Judgment

Ostreicher seeks a declaratory judgment declaring that: "(i) [Ostreicher] did not execute the loan documents, (ii) [Ostreicher] received no benefit from any funds purportedly advanced by plaintiff; and (iii) the *Isska* document is unenforceable." Plaintiffs move pursuant to CPLR 3211(a)(7) to dismiss Ostreicher's counterclaim for a declaratory judgment on the grounds that Ostreicher ratified the loan documents and the *Isska* by failing at any time to object to plaintiffs' conduct, by making payments to plaintiffs or to individuals to whom plaintiffs directed payment, and by signing the *Isska*, which Ostreicher does not deny.

"A ratification of the unauthorized act of an agent or of a stranger who claims to act as such, if it exists, must be found in the intention of the principal, either express or

implied” (*Mott v Scholes*, 147 AD 82, 84-5 [2d Dept 1911] quoting *Merritt v Bissell*, 155 NY 396, 400-1 [1898]; see also *In re Vargas Realty Enterprises, Inc*, 440 BR 224, 235 [SDNY 2010] (“Ratification is the express or implied adoption, i.e., recognition and approval, of the unauthorized acts of another. . . . A principal may ratify even those unauthorized acts deemed to be fraudulent”); *In re Levy* 69 AD3d 630, 632 [2d Dept 2010]). However, “[t]he act of ratification, whether express or implied, must be performed with full knowledge of the material facts relating to the transaction, and the assent must be clearly established and may not be inferred from doubtful or equivocal acts or language” (*Lipman v Vebeliunas*, 39 AD3d 488, 490 [2d Dept 2007]; see also *Braddock v Braddock*, 60 AD3d 84, 94 [1st Dept 2009] (“[A]n act ratifying a contract after the discovery of fraud in the inducement may defeat the right to challenge that contract”); *Mott*, 147 AD at 86; *Vargas* 440 BR at 235).

Assuming, without deciding, that Ostreicher’s allegations are true, as the court must, it is not clear that Ostreicher came to know all of plaintiffs’ and Rosenfeld’s material conduct, particularly their allegedly fraudulent conduct, prior to making payments and signing the Isska. Moreover, Ostreicher alleges that the loan documents were never signed by him, and that all of the payments, and the signing of the Isska, were fraudulently induced. Ostreicher claims many payments were made on Rosenfeld’s behalf, and that Landau signed a document that expressly recognized that all of the payments were disputed prior to making a final payment. Given that there are significant

factual disputes unresolved, it is not proper to dismiss Ostreicher's cause of action for declaratory judgment at this time on the grounds that Ostreicher ratified the loan documents and the Isska. Therefore, Ostreicher's motion to dismiss is denied as to the counterclaim for declaratory judgment.

F. Conspiracy to Commit Fraud

In his Amended Answer, Ostreicher asserts a counterclaim for conspiracy to commit fraud. A "cause of action to recover damages for conspiracy to commit fraud must be dismissed since 'a mere conspiracy to commit a fraud is never of itself a cause of action'" (*Crispino v Greenpoint Mortg Corp*, 2 AD3d 478, 480 [2d Dept 2003], quoting *Brackett v Griswold*, 112 NY 454, 467 [1889]). As such, Ostreicher's motion to dismiss is granted as to the counterclaim for conspiracy to commit fraud.

CONCLUSION

The motion to amend the Answer is granted. The first counterclaim and third party cause of action for "fraud/aiding and abetting fraud" are dismissed without prejudice with leave to replead within 30 days of the date hereof in accordance with CPLR 3013, 3014, and 3016. Plaintiffs' motion to dismiss is granted as to the second and fifth counterclaims and is otherwise denied.

Enter,

