

**Sater v Kriss**

2017 NY Slip Op 31841(U)

September 1, 2017

Supreme Court, New York County

Docket Number: 654533/2016

Judge: Erika M. Edwards

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

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

FELIX SATER, in his individual capacity and as  
Assignee of JOSHUA BERNSTEIN,

Plaintiff,

-against-

JODY KRISS, FREDERICK OBERLANDER and  
RICHARD LERNER,

Defendants.

Index No.: 654533/2016

DECISION/ORDER

Motion Sequence 001

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion and Affidavits/Affirmations/ Memos of Law annexed	1
Opposition Affidavits/Affirmations and Memo of Law annexed	2
Reply Affidavits/Affirmations/Memos of Law annexed	3

*ERIKA M. EDWARDS, J.S.C.:*

Plaintiff Felix Sater (“Plaintiff”), in his individual capacity and as assignee of Joshua Bernstein (“Bernstein”), brought this action against Defendants Jody Kriss (“Kriss”), Frederick Oberlander (“Oberlander”) and Richard Lerner (“Lerner”) (collectively, “Defendants”) for claims primarily based on fraud. Sater, Bernstein and Kriss worked for Bayrock Group, LLC (“Bayrock”) and Oberlander and Lerner were Kriss’ previous attorneys on several matters. This lawsuit is one of many lawsuits filed by these parties and others in what has resulted in many years of contentious and vexatious litigation in multiple state and federal courts. Multiple cases remain pending.

Defendant Kriss now moves to dismiss Plaintiff’s amended complaint against him, pursuant to CPLR 3211(a)(5) and (a)(7), because it is time barred and fails to state a cause of action. For the reasons set forth herein, the court grants Defendant Kriss’ motion to dismiss to the extent that Plaintiff’s amended complaint is dismissed as against Defendant Kriss.

Plaintiff alleges in substance in his amended complaint that pursuant to the terms of a written settlement agreement, dated September 19, 2011, in an action between Plaintiff and Bernstein, Bernstein agreed to assign all causes of action to obtain documents belonging to Plaintiff from any third party if that party refuses to return the documents within fifteen calendar days of Bernstein’s demand. Plaintiff’s amended complaint alleges that by letter, dated January

6, 2012, Bernstein demanded that Oberlander return the documents and Oberlander failed to do so. As such, Plaintiff argues that he has the authority to bring these claims against Defendants on Bernstein's behalf.

Plaintiff further alleges that Defendants Kriss and Oberlander made fraudulent misrepresentations and omissions to Bernstein to fraudulently induce Bernstein to retain Oberlander to represent him at no cost in a Westchester County case that Bernstein filed against Bayrock for wages owed in exchange for Bernstein providing Oberlander and Kriss with access to a hard drive and documents that Bernstein stole from Bayrock. The hard drive contained confidential, privileged and court-sealed documents regarding Plaintiff's prior felony conviction and decade-long cooperation with federal authorities against organized crime individuals. At that time, Kriss had a pending lawsuit against Bayrock in Delaware and Oberlander represented Kriss in that matter. Plaintiff further alleges that Oberlander never intended to represent Bernstein, but that Kriss and Oberlander only used Bernstein to obtain the information on the hard drive and conduct discovery to assist them with Kriss' Delaware case. Plaintiff further alleges that Oberlander failed to properly represent Bernstein, that he only deposed one Bayrock executive and only did so to obtain information favorable to Kriss which was contrary to Bernstein's interests. Because of Oberlander's and Kriss' actions, Bernstein lost his case without recovering any money.

Additionally, Plaintiff alleged that Defendants improperly and unlawfully used and disclosed this sensitive information by including it in a publicly-filed complaint and disseminated it to an attorney who represented a person affiliated with organized crime which resulted in Plaintiff being assaulted by that attorney's client. Plaintiff also claims damages for Oberlander's breach of contract and breach of fiduciary duty and claims against Lerner.

More specifically, Plaintiff's amended complaint alleged eleven causes of action in 133 paragraphs, but only his Fourth, Sixth and Seventh Causes of Action regarding common law fraud, fraudulent inducement and aiding and abetting fraud pertain to Kriss. Plaintiff brought all three of these claims against Kriss solely in Plaintiff's capacity as Bernstein's assignee.

Plaintiff's Fourth Cause of Action for common law fraud alleges in substance that Kriss personally arranged for Oberlander to represent Bernstein in his Westchester County case in return for access to the hard drive for the purposes of obtaining the confidential information and taking discovery of the Bayrock executive to assist him with his Delaware case. Kriss knew that Oberlander had no intent to represent Bernstein and that Oberlander acted as Kriss' agent, during the course and scope of such agency, and with the permission and ratification of Kriss.

Plaintiff's Sixth Cause of Action seeks compensatory damages for Kriss' fraudulent inducement and alleges in substance that Kriss knowingly represented to and concealed from Bernstein material facts with the intent to induce Bernstein to sign Oberlander's retainer agreement, to permit them to have access to the documents and information on the hard drive and that Bernstein reasonably relied on Kriss' misrepresentations and omissions in deciding to retain Oberlander and to give him access to the hard drive.

Plaintiff's Seventh Cause of Action for aiding and abetting fraud alleges in substance that Kriss aided and abetted Oberlander's fraudulent misrepresentations to Bernstein and

concealment from Bernstein of material facts with the intent to induce Bernstein to retain Oberlander on his Westchester case and to obtain the documents and information on the hard drive. Plaintiff further alleges that Kriss aided and abetted this deception and fraud by providing assistance to Oberlander, by putting Bernstein in contact with Oberlander and suggesting that Bernstein share the documents and hard drive with them. It was foreseeable to Kriss at the time he assisted Oberlander that Bernstein would rely on these misrepresentations and omissions and that he would be harmed as a result and that Kriss' substantial assistance was the proximate cause of Bernstein's damages for providing them with the documents.

Plaintiff's prayers for relief at the end of his amended complaint were not specific to any cause of action or Defendant and included requests for equitable relief for an order directing Defendants to return to Plaintiff the files and documents obtained from Bernstein that remain in their possession and a preliminary and permanent injunction enjoining and restraining Defendants from further use, disclosure or dissemination of the documents and files, as well as compensatory and punitive damages, attorney's fees, costs, expenses, interest and other relief.

Defendant Kriss argues in substance that all three claims against him must be dismissed because they fail to state a cause of action and are barred by the six-year statute of limitations for fraud-based claims or two years from its discovery. Kriss argues that Plaintiff failed to demonstrate that Bernstein assigned to him the rights to these claims because the assignment only gave Plaintiff the authority to sue to obtain the documents and not to recover monetary damages for fraud. Kriss argues that Plaintiff only included details of injuries and damages related to him individually and not as Bernstein's assignee and that he did not request the documents to be returned. Additionally, Plaintiff alleged that he learned that Oberlander obtained the documents by fraud, which does not allege Bernstein's knowledge.

Kriss further argues that the assignment only permits Plaintiff to sue a third party who refuses to return the documents within fifteen days of Bernstein's demands. Plaintiff only alleged that Bernstein sent a demand to Oberlander for Oberlander to return the documents and he never sent a demand to Kriss. Kriss also argues that, even if the fraud claims fall within the scope of Plaintiff's assignment, then Plaintiff failed to prove that the assignment was valid because he failed to annex a copy of the written assignment to his amended complaint. Plaintiff contends that there are questions as to whether the assignment included "all causes of action" related to the return of the documents, since Plaintiff's amended complaint specifically excluded this term from the quotation marks. Therefore, it appears that Plaintiff's counsel simply added that language to the alleged assignment. Kriss also argues that Plaintiff's request for the return of the documents is moot, since Kriss already returned everything in his possession in compliance with a court order on a previous matter.

Plaintiff counters and argues that Bernstein's demand on Oberlander included Kriss because Oberlander was Kriss' attorney and acted as Kriss' agent. Additionally, Plaintiff argues that the claims fall within Plaintiff's assignment because the scope of the assignment was broad and included all causes of action and Plaintiff requested the return of the documents in his prayers for relief.

In the alternative, Kriss argues that the causes of action are time barred because the allegations in Plaintiff's amended complaint indicate that the cause of action arose on March 1,

2010, when Oberlander met with Bernstein and obtained the hard drive and documents. The initial complaint in this action was filed on August 27, 2016, which is beyond the six-year statute of limitations. Plaintiff argues that the statute of limitations did not begin to run until Bernstein suffered damages, which was not until October, 2010, when Bernstein was served with Plaintiff's complaint regarding Plaintiff's injuries for Bernstein's disclosure of the hard drive to Oberlander and Kriss. Alternatively, Plaintiff contends that Kriss is equitably estopped from asserting a statute of limitations defense because of his own deceptive and fraudulent conduct by falsely claiming that he returned the documents when he retained possession.

When considering Defendants' motion to dismiss for failure to state a cause of action, pursuant to CPLR 3211(a)(7), the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). A court may freely consider affidavits submitted by a plaintiff to remedy any defects in the complaint, but the court should not consider whether the plaintiff has simply stated a cause of action, but rather whether the plaintiff actually has one (*Amaro v Gani Realty Corp.*, 60 AD3d 491, 492 [1<sup>st</sup> Dept 2009]). Normally, a court should not be concerned with the ultimate merits of the case (*Anguita v Koch*, 179 AD2d 454, 457 [1<sup>st</sup> Dept 1992]). However, these considerations do not apply to allegations consisting of bare legal conclusions as well as factual claims which are flatly contradicted by documentary evidence (*Simkin v Blank*, 19 NY3d 46, 52 [2012]).

On a motion to dismiss a cause of action pursuant to CPLR 3211(a)(5) because it is time barred by the applicable statute of limitations, a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired and the court must take all allegations in the complaint as true and resolve all inferences in favor of the plaintiff (*Benn v Benn*, 82 AD3d 548, 548 [1<sup>st</sup> Dept 2011] [internal quotation and citation omitted]). Then, the burden shifts to the plaintiff to establish that the statute of limitations should have been tolled or that the defendant should have been estopped from asserting a statute of limitations defense (*see Putter v North Shore Univ. Hosp.*, 7 NY3d 548, 552-553 [2006]; *Zumpano v Quinn*, 6 NY3d 666, 673 [2006]).

After accepting the facts alleged in Plaintiff's amended complaint as true and according Plaintiff the benefit of every possible inference, the court determines that Plaintiff failed to sufficiently plead any cause of action related to Kriss and that each cause of action is time barred. The court finds that Plaintiff failed to properly allege that he had the authority and standing to bring these claims against Kriss on Bernstein's behalf pursuant to the terms of the written assignment. The court agrees with Kriss that these fraud claims as alleged fall outside of the scope of such purported assignment and that Plaintiff failed to demonstrate that Bernstein demanded Kriss to return the documents, which is a condition precedent to bringing an action. Plaintiff failed to allege that Bernstein sent the demand to Oberlander in his capacity as Kriss' attorney or that he even mentioned Kriss in the demand. Plaintiff failed to request an order for the return of the documents, declaratory judgment, or request for an injunction in any of his causes of action related to Kriss. Since there are numerous causes of action which apply to certain Defendants, Plaintiff cannot simply mention such relief in a combined list of requested relief at the end of his amended complaint without properly alleging the elements of such relief in a cause of action. Additionally, Plaintiff's fraud allegations are conclusory, without the

required specificity and he failed to set forth any of the elements required to obtain a preliminary or permanent injunction, nor declaratory relief. As such, all three causes of action against Kriss fail to state a claim for which relief may be granted.

Furthermore, the court determines that all three claims are barred by the six-year statute of limitations and that Bernstein's claims arose on February 28, 2010, or March 1, 2010, when Oberlander obtained the hard drive and when the retainer agreement was executed. This is clearly more than six years prior to the filing of the initial complaint in this action. Additionally, there is no question that Bernstein knew of the allegations which formed the basis of the fraud claims during his Westchester case, at least as far back as March, 2010, during the deposition when he claimed that Oberlander never intended to represent him and that he did not have his best interests in mind. Also, the court is not persuaded by Plaintiff's claims that Kriss should be equitably estopped from asserting a statute of limitations defense because of his fraud in failing to disclose that he possessed the documents and other deceptive conduct. Plaintiff's allegations in his causes of action against Kriss pertain to Kriss' conduct and Plaintiff's damages related to Kriss fraudulently obtaining the documents and do not mention him fraudulently retaining them.

Additionally, the court agrees with Kriss that Plaintiff's request for the return of the documents appears to be moot as Kriss alleges that he and his prior attorneys returned the documents in response to previous court orders and Plaintiff fails to effectively challenge these assertions. Finally, the court denies Plaintiff's alternative request for leave to file a second amended complaint and any additional requests for relief by either party.

As such, it is hereby

**ORDERED** that Defendant Jody Kriss' motion to dismiss Plaintiff Felix Sater's amended complaint against him, including the Fourth, Sixth and Seventh Causes of Action, regarding common law fraud, fraudulent inducement and aiding and abetting fraud, is **GRANTED** to the extent that these claims are dismissed, Plaintiff's amended complaint is dismissed in its entirety as against Defendant Jody Kriss only, with prejudice and without costs, and the Clerk is directed to enter judgment accordingly in favor of Defendant Jody Kriss; and it is further

**ORDERED** that the action is severed and continued against the remaining defendants; and it is further

**ORDERED** that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

**ORDERED** that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 148), who are directed to mark the court's records to reflect the change in the caption herein.

Date: September 1, 2017

  
HON. ERIKA M. EDWARDS