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| Oppedisano v D' Agostino |
| 2018 NY Slip Op 31368(U) |
| March 16, 2018 |
| Supreme Court, Queens County |
| Docket Number: 3277/2016 |
| Judge: Jr., Rudolph E. Greco |
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or

Short Form Order

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

IAS Part 32

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MAURIZIO OPPEDISANO, DISANO TRUCKING
INC., FLUSHING AIRPORT HOLDINGS, LLC and
OTHER JOHN AND JANE DOE PLAINTIFFS,

Index No. 3277/2016

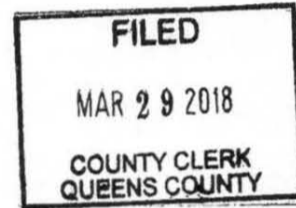
Motion Date: December 7, 2017
Motion Seq. No's: 5 & 6
Motion Cal. No's: 127 & 128

Plaintiff,

- against -

HEATHER D'AGOSTINO, ANTHONY D'AGOSTINO,
MARIE BORQUE, JP MORGAN CHASE BANK,
N.A., FIRST CENTRAL SAVINGS BANK and
OTHER JOHN AND JANE DOE DEFENDANTS,

Defendant.



-----X
The following papers numbered 1 to 17 were read on defendant Marie Borque and
Anthony D'Agostino's separate motions to dismiss the complaint pursuant to CPLR 3211(a)(7),
et. seq.

| | Papers <u>Numbered</u> |
|---|---------------------------|
| Notice of Motion, Affirmation, Exhibits, Memo of Law (<i>seq. 5</i>)..... | 1-5 ¹ |
| Affirmation in Opposition, Exhibits..... | 6-7 |
| Reply Affirmation, Exhibits..... | 8-9 |
| Notice of Motion, Affirmation, Exhibits, Memo of Law (<i>seq. 6</i>)..... | 10-13 |
| Affirmation in Opposition, Exhibits..... | 14-15 |
| Reply Affirmation, Exhibits..... | 16-17 |

This Court's previous order scheduling the instant motions for conference/hearing dated
January 11, 2018 (J. Greco), is hereby vacated *sua sponte* and upon the foregoing papers, as well
as oral arguments, the following is this Court's decision on same:

Reference is made to the court's prior (thirteen page) Order in this action entered on
October 2, 2017 (J. Greco) for a more complete recitation of the facts underlying same. That
Order addressed defendant JP Morgan Chase's motion to dismiss and cross-motion by plaintiffs

¹The court notes that both motions were marked "fully submitted no opposition" on the final return date
however, after discussion with counsel for all appearing parties opposition was accepted and considered on both
motions.

to amend the complaint. The motion was granted and the cross-motion denied, (*see Short Form Order*, Oct. 2, 2017, J. Greco). The court now has in front of it defendants Marie Borque (“Borque”) and Anthony D’Agostino’s (“Anthony”) motions to dismiss plaintiffs’ complaint on similar grounds.

As to Borque, her name is specifically mentioned in the body of the complaint on only one occasion as follows: “Defendants’ Heather D’Agostino [“Heather”], Anthony D’Agostino, Marie Borque and other defendants conspired to commit all acts named above.” As to Anthony, his name is mentioned as indicated above and in connection with the second cause of action for repayment of loans wherein it states: “ Defendant Heather D’Agostino and defendant Anthony D’Agostino did not repay the loans.”² The remainder of the complaint is in the form of a group pleading, meaning that it alleges ten causes of action against “all defendants”. Those ten causes of action are: 1) fraud and misrepresentation; 2) repayment of loans; 3) unjust enrichment; 4) quantum meruit; 5) fraudulent inducement; 6) punitive damages; 7) intentional misrepresentation and fraud; 8) conversion; 9) civil RICO liability; and 10) negligence. The court takes each defendant and each cause of action below first reiterating the standard on a motion to dismiss pursuant to CPLR 3211(a)(7).

“[T]he standard is whether the pleading [from its four corners] states a cause of action, i.e. whether “factual allegations are discerned which taken together manifest a cause of action cognizable at law” (*Morad v Morad*, 27 AD3d 626, 627 [2006], *see also EBCI, Inc. v Goldman Sachs & Co.*, 5 NY3d 11 [2005], *Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314 [2002], *Holmes v Gary Goldberg & Co., Inc.*, 40 AD3d 1033 [2007]). “[T]he pleading is to be afforded a liberal construction [*see* CPLR §3026], and the plaintiff’s allegations are accepted to be true and accorded the benefit of every possible favorable inference”, (*Granada Condo. III Assn. v Palomino*, 78 AD3d 996 [2nd Dept. 2010]; *see also Leon v Martinez*, 84 NY2d 83, 87-88 [1994], *Dee v Rakower*, 112 AD3d 204, 208 [2nd Dept. 2013], *Sokol v Leader*, 74 AD3d at 1181, *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). However, “bare legal conclusions and factual claims that are flatly contradicted by the record are not presumed to be true” (*Parola, Gross & Marino, P.C. v Susskind*, 43 AD3d 1020, 1021-22 [2nd Dept. 2007] *citing Morone v Morone*, 50 NY2d 481 [1980]; *see also Kupersminth Winged Foot Golf Club Inc.*, 38 AD3d 847 [2nd Dept. 2007], *Meyer v Guinta*, 262 AD2d 463 [2nd Dept. 1999]), and dismissal is warranted in the face of conclusory and speculative allegations, (*see Hashmi v Messiha*, 65 AD3d 1193, 1195 [2nd Dept. 2009].)

A. Claims Based on Fraud: 1st, 5th and 7th Causes of Action

In an action for fraud, plaintiff must set forth that defendant made a representation of a material fact, that the representation was false, that it was defendant’s intention to deceive

²Elsewhere in the complaint it is specifically alleged that Heather D’Agostino borrowed \$8,000.00 from the plaintiff Maurizio Oppendisano and Disano Trucking Inc. and later informed them that she would not be able to pay them back. Also, without detail, that from the period between 2009 thru 2015 these plaintiffs made a series of additional loans to both Heather and Anthony. Again, there is no detail as to the dates, amounts or terms of these loans.

plaintiff, that plaintiff justifiably relied on the misrepresentation in embarking on a course of conduct, and that plaintiff was injured as a result of its reliance thereon, (*see Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 488 [2007]). Stated another way, the elements of fraud that plaintiff must allege are representation of a material fact, falsity, scienter, reasonable reliance and injury, (*see Channel Master Corp. v Aluminum Ltd. Sales, Inc.*, 4 NY2d 403, 407 [1958]; *see also Brown v Lockwood*, 76 AD2d 721, 730 [2nd Dept. 1980]). Further, these allegations must be presented with specificity, particularity and in detail, (*see CPLR §3016[b]*; *see also Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011], *Moore v Liberty Power Corp., LLC*, 72 AD3d 954, 958 [2nd Dept. 2010]). As indicated above plaintiffs offer a group pleading that is also wholly devoid of any particulars as to the events underlying this action. As to Borque and Anthony it is simply stated that they “conspired to commit all acts named above.” The acts are presented in a general fashion with little to no specifics. To illustrate this point with an example, plaintiffs’ complaint contains the statement, “defendants misrepresented to the plaintiffs in several ways” without detailing any of those misrepresentations or linking them to Anthony or Borque. As such the elements of fraud are not presented as required³.

B. Repayment of Loan Claim, 2nd Cause of Action

Presumably this claim is one for breach of contract which requires the showing of a contract between the parties, breach of that contract, i.e. plaintiff’s performance and Anthony, or Borque’s failure to perform, and damages resulting from breach, (*see generally Dee v Rakower*, 112 AD3d 204, 208-09 [2nd Dept. 2013]). The sole allegation under this claim is that “Heather and Anthony did not repay the loan.” First, there is no allegation imputing Borque and second, earlier in the complaint it is alleged that Heather borrowed money from plaintiffs and agreed to pay it back. Likewise, Anthony is not imputed into this agreement which, the court notes seems to be a verbal agreement in violation of the statute of frauds, (*see generally General Obligations Law §5-701*). While it also stated later in the complaint that between 2009 through 2015 plaintiffs made a series of additional loans to Heather and Anthony, this statement is insufficient to satisfy the elements indicated above.

C. Unjust Enrichment and Quantum Meruit, 3rd and 4th Causes of Action

Unjust enrichment and quantum meruit are both quasi-contractual claims recognizing the equity in making an aggrieved party whole in the absence of an express contract. To recover for unjust enrichment a party must show that “the other party was enriched and that party’s expense and that it is against equity and good conscience to permit the other party to retain what is sought to be recovered” (*see Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012] *quoting Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]; *see also AHA Sales, Inc. v Creative Bath Products, Inc.*, 58 AD3d 6, 19 [2nd Dept. 2008]). Similarly, the elements of a claim of quantum meruit are “(1) performance of services in good faith, (2) acceptance of services by the person to whom they are rendered, (3) expectation of compensation therefor, and (4) reasonable value of the services rendered” (*Evans-Freke v Showcase Contracting Corp.*, 85 AD3d 961, 962 [2nd Dept. 2011], *see also AHA Sales, Inc. supra*). Plaintiffs claims as to these

³Plaintiffs’ opposition to both motions will be addressed later in the decision.

causes of action are that “defendants were unjustly enriched” and “plaintiffs should receive quantum meruit”. There are no allegations in the complaint that Anthony or Borque were enriched at plaintiffs’ expense, or that services were provided to or performed by them in relation to plaintiffs. Aside from those conclusory statements there are no other statements that speak to the elements of these claims.

D. Punitive Damages, 6th Cause of Action

A claim for punitive damages requires a showing of egregious conduct as the relief is meant to vindicate public rights, (*see generally Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, 613-614 [1994]). These damages are generally not recoverable in ordinary breach of contract actions, (*id*), and there is nothing to support that this action is anything other than an ordinary breach of contract claim. Even more so, there are no allegations of a breach of contract claim as against Anthony and Borque, (*see above*).

E. Conversion, 8th Cause of Action

“Conversion is the ‘unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner’s rights’” (*Vigilant Ins. Co. of Am. v Housing Auth. of City of El Paso, Tx.*, 87 NY2d 36, 44 [1995] *quoting Employers’ Fire Ins. Co. v Cotten*, 245 NY 102, 105 [1927]). As to this claim, plaintiffs simply assert that “defendants are liable on the theory of conversion.” Plaintiffs are only seeking monetary damages and accordingly, fail to allege that Anthony or Borque exercised control or ownership over plaintiffs’ goods.

F. RICO Liability, 9th Cause of Action

The court references its previous Order entered October 2, 2017 and incorporates the findings therein as applicable to both Anthony and Borque.

G. Negligence, 10th Cause of Action

It is well settled that the elements of a negligence claim are a duty owed by defendant to plaintiff, a breach of that duty and injuries causally related to the breach. Like so much of this complaint this claim is utterly wanton. There are no assertions that either Anthony or Borque owed a duty to plaintiffs, or breached that duty for that matter.

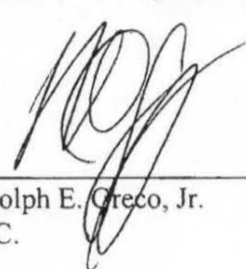
Plaintiffs did offer opposition to both motions that, although not timely submitted, was considered. The conclusions of both affirmations are substantially similar and summed up as follows: Neither Borque, nor Anthony offered an excuse for their default and both have failed to acknowledge the existence of a proposed amended verified complaint in this matter. Also, the entirety of the opposition appears to be based on that amended complaint in that plaintiffs state “defendants arguments that plaintiffs have failed to state a cause of action are negated by plaintiffs’ amended verified complaint.” First, the argument relative to Borque and Anthony’s default is entirely disingenuous and a complete distortion. Although they were in default of appearing in this action plaintiffs’ counsel by stipulation agreed to essentially waive that default and extended their time to answer. Second and equally distorted is plaintiffs reliance on an

amended complaint since by virtue of a prior Order of this court leave to amend was denied, (*see Short Form Order*, October 2, 2017). Accordingly, the only pleading the court can consider is that originally dated March 27, 2016 which, it was considered in connection with the present motions.

In light of the above, defendants Marie Borque and Anthony D'Agostino's motions to dismiss are granted.

A copy of this order with notice of entry shall be served on all parties within twenty (20) days of the date of entry hereof.

Dated: March 16, 2018



Rudolph E. Greco, Jr.
J.S.C.

FILED
MAR 29 2018
COUNTY CLERK
QUEENS COUNTY