Shehata v Those Awesome Guys SRL
2018 NY Slip Op 32590(U)
October 10, 2018
Supreme Court, New York County
Docket Number: 652444/2018
Judge: Andrew Borrok

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
Part 57

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OMAR SHEHATA

Plaintiff(s) **Index no. 652444/2018**

-against-

DECISION/ORDER

THOSE AWESOME GUYS SRL AND NICOLAE BERBECE **Motion Sequence No. 1 and 2**

Defendant(s)

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Recitation, as required by CPLR § 2219(a), of the papers considered on the review of this motion to dismiss pursuant to CPLR § 3211(a)(7)

PAPERS	NUMBERED
Notice of Motion and Affidavits and Exhibits Annexed	1
Answering Affidavits and Exhibits Annexed	2
Replying Affidavits and Exhibits Annexed	
Sur-Reply Affidavits	

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

Those Awesome Guys SRL, a Romanian company whose office is located at Strada Sapte Drumuri 11, Bucuresti 032647 Romania (**TAG**) and Nicolae Berbece, an individual residing in Romania (TAG and Mr. Berbece, hereinafter, collectively the **Defendants**) (i) First Motion to Dismiss (hereinafter defined) is denied as moot and (ii) Second Motion to Dismiss (hereinafter defined) is granted only to the extent that the Second (Fraudulent Inducement), Third (Unjust Enrichment), Fourth (Conversion), Fifth (NY GBL §349), Sixth (Unfair Competition), Seventh (Mistake), and Eighth (Unconscionability)[1] Causes of Action are dismissed for the reasons set forth below.

[1] For the avoidance of doubt, this is mislabeled in Mr. Shehata's Amended Complaint as the ninth cause of action. Rescission is also labeled as the ninth cause of action. In other words, the Amended Complaint does not contain a

The Relevant Facts and Circumstances

Mr. Berbece and Omar Shehata met on "Newgrounds" – an entertainment website message board – when Mr. Berbece posted that he was looking for someone to collaborate with on the creation and development of a video game, and Mr. Shehata responded to Mr. Berbece's post and agreed to work with him.[2]

Since then, Messrs. Berbece and Shehata have worked on a number of video game projects together, including Concerned Joe (2011), Tiny Timmy (2012), Big Bill (2012) and Vrunk Dultures (2013). In each such project, according to Mr. Shehata, they split the revenues on a 50/50 basis and formed TAG.[3]

In June, 2012, the team began working on a bigger desktop version of Concerned Joe, or Concerned Joe 2, which later became known as "Move or Die" (hereinafter, **Move or Die**).[4]

Pursuant to a certain Intellectual Property Assignment Agreement, dated January 7, 2015 (the **Assignment**), by and between TAG and Mr. Shehata, Mr. Shehata assigned all of his right, title and interest in Move or Die for "good and valuable consideration" to TAG.

Although (i) Move or Die is alleged to have made approximately $11 million in revenue since it was commercially released in 2015, (ii) Mr. Berbece has on a number of occasions credited Mr. Shehata as his "co-developer" of Move or Die, and (iii) the success of the Berbece-Shehata partnership has realized press attention,[5] Mr. Shehata has not been paid $.01 in respect of his interest in Move or Die.[6]

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cause of action identified as the eighth cause of action and instead includes two different "causes of action" identified as the ninth cause of action. For the purposes of this decision and order, the "cause of action" labeled "unconscionability" will be discussed as the eighth cause of action and the separate "cause of action" labeled "rescission" will be discussed as the ninth cause of action. To be clear, with respect to both of these "causes of action", Mr. Shehata requests rescission of the Assignment.

[2] Amended Complaint ¶ 5.

[3] Amended Complaint ¶¶ 6-7. According to Mr. Shehata, Concerned Joe, by way of example, realized approximately $15,000 in sales which they split.

[4] Amended Complaint ¶ 8.

[5] Amended Complaint ¶ 14 citing a March 13, 2013 interview during which Mr. Berbece allegedly stated "[w]e complete each other") and Two Kids Made My Favorite Game at GDC: Concerned Joe, Rus McLaughlin March 29, 3013 at https://venturebeat.come/2013/03/29/two-kids-made-my-favorite -game-at-gdc-concerned joe/).

[6] Amended Complaint ¶ 11.

By Verified Complaint (the **Initial Complaint**), dated May 8, 2018, Mr. Shehata brought this action alleging (i) breach of contract, (ii) fraudulent inducement, (iii) unjust enrichment, and (iv) conversion.

By Notice of Motion in Lieu of Answer (the **First Motion to Dismiss**),[7] dated July 14, 2018, the Defendants moved to dismiss the Initial Complaint pursuant to CPLR § 3211(a)(7).

In response to the Defendant's First Motion to Dismiss, and pursuant to CPLR §3225(a), Mr. Shehata served and filed an Amended Verified Complaint (the **Amended Complaint**), dated August 1, 2018. Pursuant to the Amended Complaint, Mr. Shehata alleged (i) breach of contract, (ii) fraudulent inducement, (iii) unjust enrichment, (iv) conversion, (v) unlawful deceptive acts and practices pursuant to New York General Business Law § 349, (vi) unfair competition, (vii) mistake, (viii) unconscionability[8] and (ix) rescission[9].

Inasmuch as Mr. Shehata properly filed the Amended Complaint which Amended Complaint replaces the Initial Complaint, the First Motion to Dismiss is denied as moot.

The Defendants have moved to dismiss (the **Second Motion to Dismiss**) the first eight causes of action of the Amended Complaint pursuant to CPLR § 3211(a)(7) and have asked the Court in their Memorandum of Law to impose sanctions on Mr. Shehata.

In considering a motion to dismiss, the Court must "accept the facts as alleged in the complaint as true, accord the plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." The moving party must establish that the non-moving party has failed to present a viable cause of action, or that the cause of action alleged does not apply to the facts stated in the Amended Complaint. *Nonnon v. City of New York*, 9 N.Y.3d 825, 827, 842 N.Y.S.2d 756, 874 N.E.2d; see *Leon v. Martinez*, 84 N.Y.2d 83, 87–88, 614 N.Y.S.2d 972, 638 N.E.2d 511; see *Wieder v. Skala*, 80 NY 2d 628, 633.

(i) Breach of Contract (First Cause of Action)

The elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and damage. *Flomenbaum v. New York Univ.*, 71 AD. 3d 80, 91 (1st Dep't 2009). If a

[7] Filed as Motion Sequence No. 1.
[8] *See fn.1.*
[9] This is also labeled as the ninth cause of action in the Amended Complaint. *See fn. 1.*

contract term is ambiguous, prior dealings between the parties are admissible to determine the intent in interpreting the contract. *Kenneth D. Laub & Co., Inc. v. 101 Park Ave. Associates*, 162 A.D.2d 294, 556 N.Y.S.2d 881, 882 (1st Dep't 1990); see also *Intercargo Ins. Co. v. M/V "Neptune Jade"*, 1996 WL 325616, *2 (S.D. N.Y. 1996); *New Moon Shipping Co., Ltd. v. MAN B & W Diesel AG*, 121 F.3d 24, 31, 1998 A.M.C. 603 (2d Cir. 1997) (citing Restatement Second, Contracts § 223); *K.K.D. Imports, Inc. v. Karl Heinz Dietrich GmbH & Co. Intern. Spedition*, 36 F. Supp. 2d 200, 202 (S.D.N.Y. 1999).

The agreement at issue is the Assignment which provides that Mr. Shehata assigned his rights in Move or Die for "good and valuable consideration".

In their moving papers, the Defendants argue that Mr. Shehata has not properly alleged breach of contract. To be clear, the Defendants do not dispute that a contract in fact exists. Rather, the Defendants dispute the intended definition of the term "good and valuable consideration" and otherwise argue that Mr, Shehata has received exactly what he bargained for. More specifically, the Defendants argue that "just and fair compensation" meant that Mr. Shehata would be credited as a co-developer of Move or Die, released from further obligation to the game's development and otherwise free to attend college. The Defendants further argue that Mr. Shehata has in fact received credit as (and can continue to claim that he was) a developer of Move or Die, and he was permitted to go to college. *Ipso facto*, the Defendants argue, there has been no breach.

According to Mr. Shehata, when he signed the Assignment and based on his prior dealings with Mr. Berbece, Mr. Shehata understood "good and valuable consideration" to mean 50% of the revenue[10] of Move or Die which he has not been paid.

It is beyond cavil that "good and valuable consideration" is ambiguous.[11] Taking all of the allegations as true and giving the Plaintiff every possible favorable inference, the Defendants have failed to establish that Mr. Shehata has not presented a viable breach of contract claim. Accordingly, the Defendants' motion to dismiss this cause of action must be denied.

(ii) Fraudulent Inducement (Second Cause of Action)

The prima facie case for fraudulent inducement is (1) a misrepresentation or omission of material fact, (2) which the defendant knew to be false, (3) which the

[10] Amended Complaint ¶11.; Omar Shehata Affidavit,.¶7.
[11] Amended Complaint ¶11, ¶19, ¶20.

defendant made with the intention of inducing reliance. (4) upon which the plaintiff reasonably relied and (5) which caused injury to the plaintiff. *Choquette v. Motor Info. Sys.*, N0. 15-CV-9338 (V BC), 2017 US Dist. LEXIS 121353, at *10 (S.D.N.Y. Aug. 2, 2017). In New York, distinction is made between promises of future action made with an intention of not being performed, and false statements of present fact made to induce a party to enter into a contract. *Hirsch v. Columbia Univ.*, 293 Supp. 2d 372, 380 (S.D.N.Y. 2003). It is well established that an action for fraud cannot be sustained if the alleged fraud is that the defendant never intended to fulfill its express contractual obligations. *Astroworks, Inc. v. Astroexhibit, Inc.* 257 F. Supp. 2d 609, 616 (S.D.N.Y. 2003). Put another way, under New York law, a plaintiff cannot assert a breach of contract claim and a fraud claim grounded in the same underlying events. *Hirsch v. Columbia Univ.*, 293 Supp. 2d 372, 380 (S.D.N.Y. 2003); *Great Earth Int'l Franchising Corp. v. Milks Dev.*, 311 F. Supp. 2d 419, 425 (S.D.N.Y. 2004). This is exactly what Mr. Shehata pleads -- i.e., that the Defendants promised him "just compensation" to sign over his rights to Move or Die which the Defendants never intended to honor. Accordingly, the allegations simply do not make out a claim for fraudulent inducement and this cause of action is dismissed.

(iii) Unjust Enrichment (Third Cause of Action)

A claim for unjust enrichment cannot be plead where there is a valid contract as the facts on which the claim is based. *Curtis Properties Corp. v. Greif Companies*, 236 Ad2d 237, 239 (1st Dept' 1997); *Brown v. Brown*, 12 AD3d 176, 176 (1st Dep't 2004). Mr. Shehata has a valid breach of contract claim. Accordingly, his claim for unjust enrichment is dismissed.

(iv) Conversion Claim (Fourth 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. *State v. Seventh Regiment Fund*, 98 N.Y. 2d 249, 259 (2002). In support of its motion to dismiss, the Defendants rely on *Leser v. Karenkooper.com*, 18 Misc.3d 1119(A) (2008), 856 N.Y.S.2d 498 (Table), 2008 WL 192099, 2008 N.Y. Slip Op. 50135(U). In *Leser*, Jean Walton Leser d/ba The Luxury Portal, an online store which sold pre-owned luxury handbags and accessories claimed that KarenKopper.com, another website which sold luxury goods, sought to destroy her business by (i) making false allegations about her and her business and (ii) "saying and doing things" while using her name, photo and email address on the internet including a pornographic website in order to cast her in a negative and false light.

Among other things, Ms. Leser sued for conversion. For the avoidance of doubt, Ms. Leser argued that the unauthorized use of images from her website as well as her trade name constituted a conversion of her property. The court disagreed and dismissed the conversion claim. Based on *Leser*, the Defendants argue that the conversion claim must be dismissed because the misappropriation of intellectual property is not sufficient to support the claim of conversion. This is however a simplification and overstatement of the *Leser* holding. *See, e.g.*, Astroworks, Inc. v. Astroexhibit, Inc. and Greg Zsidisin, 257 F.Supp.2d 609 (S.D.N.Y. 2003). The holding of *Leser* is that that nothing was done to deprive Ms. Leser of her ownership in her property – a necessary element of conversion. Significantly, the *Leser* court held:

> A defendant who 'does not exclude the owner from the exercise from the exercise of his rights' is not liable for conversion. State of New York v. Seventh Regiment Fund, Inc. 98 NY2d 249, 259 (2002).

This is simply not *Leser*. However, Mr. Shehata's claim for conversion is nonetheless untenable. Pursuant to the Assignment, the rights in Move or Die belong to TAG. Although Mr. Shehata argues in his opposition papers, that the Assignment should be voided, for among other reasons, because it is unconscionable or based on mistake, and that the use of Move or Die is therefore not properly authorized, there simply are no credible allegations that Mr. Shehata did not voluntarily assign his rights in Move or Die. The credible allegations set forth in the Amended Complaint are premised on the claim that Mr. Shehata wasn't paid "good and valuable consideration" which, based on prior dealings, meant 50% of the revenue.

(v) Unlawful Deceptive Acts and Practices (New York General Business Law § 349) Claim (Fifth Cause of Action)

The elements of a claim based on a violation of New York General Business Law § 349 are: (i) a deceptive consumer-oriented act or practice which is misleading in a material respect and (ii) injury resulting from such act. *Stutman v. Chemical Bank*, 95 NY2d 24, 29, 731 N.E.2d 608, 709 N.Y.S.2d 892 (2000). An act is deceptive if is likely to mislead a reasonable consumer acting reasonably under the circumstances. *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, 85 NY2d 20, 26, 647 N.E.2d 741, 623 N.Y.S.2d 529).

The Fifth cause of action must be dismissed because there simply are no allegations that the Defendants acts were deceptively "consumer-oriented." The dispute in front of the court is a purely private dispute between TAG, Mr. Shehata and Mr. Berbece. Accordingly, the claim for unlawful deceptive acts and practices (New York General Business Law § 349) is dismissed.

(vi) Unfair Competition Claim (Sixth Cause of Action)

The claim of unfair competition requires bad faith misappropriation of the skills, expenditures and labor of another. *Camelot Assocs. Corp. v. Camelot Design & Dev.*, 298 A.D.2d 799, 800 (3d Dep't 2002); *LoPresti v. Mass. Mut. Life Ins. Co.*, 30 A.D.3d 474, 476 (2d Dep't 2006); *Saratoga Vichy Spring Co. v. Lehman*, 625 F.2d 1037, 1044 (2d Cir. 1980); *Bonilla v. H&M Hennes & Mauritz L.P.*, No. 12 Civ. 6919(LAK)(MHD), 2014 WL 12661621 at *18 (S.D.N.Y. Apr. 16, 2014) (dismissing claim for unfair competition); *Miller v. Walters*, 46 Misc. 3d 417,426 (Sup. Ct. N.Y. Cty. 2014) (citing *Ruder & Finn Inc. v. Seaboard Sur. Co.*, 52 N.Y.2d 663, 671 (1981)); *Big Vision Private Ltd. V. E.I. du Pont de Nemours & Co.*, 610 F. App'x 69, 70 (2d Cir. 2015) (citing *Telecom Int'l Am., Ltd. V. AT&T Corp.*, 280 F.3d 175, 197 (2d Cir. 2001)); *LoPresti v. Mass. Mut. Life Ins. Co.*, 30 A.D.3d 474, 476 (2d Dep't 2006); *Camelot Assocs. Corp. v. Camelot Design & Dev.*, 298 A.D.2d 799, 800 (3d Dep't 2002); *LoPresti v. Mass. Mut. Life Ins. Co.*, 30 A.D.3d 474, 476 (2d Dep't 2006); *Saratoga Vichy Spring Co. v. Lehman*, 625 F.2d 1037, 1044 (2d Cir. 1980). The Amended Complaint fails to sufficiently plead that TAG or Mr. Berbece misappropriated the skills of Mr. Shehata. The gravamen of the Amended Complaint is that Mr. Shehata and Mr. Berbece worked together on Move or Die, they agreed that Mr. Shehata would be compensated for his interest in the game and that he has been paid nothing.

(vii) Mistake (Seventh Cause of Action)

A cause of action for mistake must contain legally sufficient allegations of fraud, misrepresentation of a material fact, falsity, scienter, deception duress, or similar inequitable conduct plead with specificity and particularity. *Barclay Arms, Inc. v. Barclay Arms Assoc.*, 74 NY2d 644 (Ct. of Appeals 1989).

Mr. Shehata alleges that he did not understand the Assignment as a 19 year old Egyptian national and that based on their friendship and close partnership, he made a mistake in trusting that Mr. Berbece would adequately protect his interests.[12]

[12] Amended Complaint ¶ 53 and ¶56.

Although this may have been a mistake, it simply does not constitute legal mistake supporting rescission. Therefore, this cause of action is dismissed.

(viii) Unconscionability (Eighth Cause of Action)

A contract is considered unconscionable when it is so grossly unreasonable as to be unenforceable because of an absence of meaningful choice on the part of one of the parties together with the contract terms which are unreasonably favorable to the other party. *US Bank N.A. v. Davis-Clarke*, 2014 N.Y. Misc. LEXIS 5261, 2014 Slip Op 33142 (U) (Sup. Ct, Queens County 2014), citing *King v. Fox*, 7 NY3d 181, 191, 851 N.E.2d 1184, 818 N.Y.S.2d 833 (2006). Mr. Shehata argues that the Assignment is unconscionable and void because at the time of its execution he was not represented by counsel, and as a 19 year old Egyptian National did not understand the terms of the Assignment. The problem with Mr. Shehata's argument however is that Mr. Shehata and Mr. Berbece were of similar age at the time of the Assignment (i.e., 19 and approximately 21[13]) and there simply are no credible allegations of asymmetrical bargaining power or contract terms which are unreasonably favorable to either party. Again, Mr. Shehata's claim here is that Mr. Shehata voluntarily assigned his rights in Move or Die for what he understand to be 50% of the revenues in accordance with their prior dealings. Accordingly, this cause of action is also dismissed.

Finally, the Defendants request that the Court impose sanctions is denied. There simply is no evidence of frivolous or improper conduct.

Accordingly, it is hereby ordered that (i) the Defendants' First Motion to dismiss pursuant to CPLR § 3211(a)(7 is denied as moot and (ii) the Defendants' Second Motion to Dismiss pursuant to CPLR § 3211(a)(7) is granted only to the extent that the Second (Fraudulent Inducement), Third (Unjust Enrichment), Fourth (Conversion), Fifth (NY GBL §349), Sixth (Unfair Competition), Seventh (Mistake), and Eight (Unconscionability) are dismissed for the reasons set forth below.

[13] Exhibit A to Affidavit, dated September 13, 2018, of Mr. Shehata.

The Defendants are directed to file an Answer to the Amended Complaint within 20 days of this Order and a Pre-Trial Conference is scheduled for October 24, 2018.

Dated: October 10, 2018

Hon. Andrew Borrok, J.S.C.