

**Vice Inc. v Stapp**

2018 NY Slip Op 33401(U)

November 7, 2018

Supreme Court, Richmond County

Docket Number: 150319/2018

Judge: Jr., Orlando Marrazzo

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND

-----X  
VICE INC.,

*Plaintiff,*

- against -

SCOTT STAPP,

*Defendant.*  
-----X

DCM PART 21

Present:  
Hon. Orlando Marrazzo, Jr.

DECISION and ORDER

Index No. 150319/2018  
Motion No. 2779 - 001

The following papers numbered 1 to 5 were fully submitted on the 11<sup>th</sup> day of September, 2018.

Papers Numbered

Defendant’s Notice of Motion to Dismiss the Complaint pursuant to CPLR 3211(a)(1) and (a)(7), with Supporting Papers (dated June 21, 2018).....	1
Defendant’s Memorandum of Law in Support of Motion to Dismiss (dated June 21, 2018).....	2
Plaintiff’s Affidavit in Opposition to Motion to Dismiss (dated August 28, 2018).....	3
Plaintiff’s Memorandum of Law in Opposition to Motion (dated August 28, 2018).....	4
Defendant’s Reply Memorandum of Law (dated September 10, 2018).....	5

Upon the foregoing papers, defendant's motion (Sequence No. 001) to dismiss the complaint pursuant to CPLR 3211(a)(1) and (a)(7) is granted, in part, and denied, in part, in accordance with the following.

### BACKGROUND

Defendant Scott Stapp is a highly successful rock music singer who achieved fame as the lead vocalist for the musical group "Creed", and as a solo act. To the extent that his notoriety is relevant to this action, the albums his band released sold in excess of 50 million copies worldwide, and have been certified as "Platinum" and "Gold" by the Recording Industry Association of America. Stapp's singles have reached "Number One" on the Billboard Mainstream Rock Chart. Plaintiff Vice, Inc. (hereinafter, "Vice") owns and operates a music recording and performing group named Art of Anarchy (hereinafter, "AOA").

On September 29, 2015, the parties executed a written agreement entitled "Art of Anarchy Band Agreement" whereby Vice engaged Stapp as a member of AOA, to provide his "unique, innovative and personal services" to the band. This action arises out of Stapp's alleged breach of the agreement by, *inter alia*, failing to participate in live performances, still photography, video productions and publicity programs, including radio interviews. More particularly, Vice claims, *inter alia*, that Stapp (1) refused to participate in social media promotional efforts such as the filming and recording of a live performance video and a music video in support of AOA's second LP; and (2) he "secretly" negotiated a headlining role as a solo act (*i.e.*, without the participation of the other AOA band members) on a musical tour called "Make America Rock Again" (the "2017 MARA Tour"), for which AOA had been in negotiations to perform. Allegedly, Stapp's actions and omissions resulted in the termination of AOA's record contract with a unit of Sony Music, thereby hindering the band's success and causing Vice to suffer severe financial consequences.

According to plaintiff, Stapp's bad faith conduct gave rise to the causes of action asserted in the complaint, *i.e.*, for theft of corporate business opportunities (the "First"), breach of fiduciary duty (the "Second"), breach of contract (the "Third"), conversion (the "Fourth"), unjust enrichment (the "Fifth"), to impose a constructive trust (the "Sixth"), and for the repayment of an alleged \$200,000.00 loan (the "Seventh").

Presently before the Court, is defendant Stapp's motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (a)(7).

**DEFENDANT STAPP'S MOTION TO DISMISS  
PURSUANT TO CPLR 3211(a)(7) FOR FAILURE  
TO STATE A CAUSE OF ACTION**

In considering a motion to dismiss for failure to state a cause of action (CPLR 3211[a][7]), the complaint is to be afforded a liberal construction, the allegations are to be accepted as true, and the pleadings viewed in the light most favorable to plaintiff (*see* CPLR 3026; *Leon v Martinez*, 84 NY2d 83 [1994]; *Doria v Masucci*, 230 AD2d 764, 765 [2d Dept 1996], *lv denied* 89 NY2d 811). In any such inquiry, the sole criterion is whether "from [the complaint's] four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *see Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 570-571 [2005]); *Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner*, 96 NY2d 300, 303 [2001]). Moreover, the Court may freely consider affidavits submitted by plaintiff to remedy defects in the complaint, at which point the criterion becomes whether the pleader has a cause of action, not whether one has been stated (*Leon v Martinez*, 84 NY2d at 88; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976]).

Turning to plaintiff's claim for breach of fiduciary duty, such a cause of action must be pleaded with particularity under CPLR 3016(b) (*see Saul v Cahan*, 153 AD3d 947, 948-949 [2d Dept 2017]). A fiduciary relationship arises when one is "under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation" (*Oddo Asset Mgt. v Barclays Bank PLC*, 19 NY3d 584, 592-593 [2016]; *Saul v Cahan*, 153 AD3d at 949). It is grounded in a higher level of trust than normally present in a conventional business relationship (*see Saul v Cahan*, 153 AD3d at 949).

In the matter at bar, the complaint fails to sufficiently plead the existence of a fiduciary relationship between Vice and Stapp (*id* at 949). In particular, plaintiff failed to allege "special circumstances" that transformed the parties' business relationship into a fiduciary one, "such as control by one party of the other for the good of the other" (*Saul v Cahan*, 153 AD3d at 949 [citation omitted]). Moreover, inasmuch as the cause of action asserted against Stapp for breach of fiduciary duty is duplicative of the breach of contract claim, *i.e.*, both are based on the same facts and seek essentially identical damages, the dismissal of the Second cause of action for breach of fiduciary duty is warranted at this stage of the proceedings (*see Gawrych v Astoria Federal Savings and Loan*, 148 AD3d 681, 684 [2d Dept 2017]; *Mawere v Landau*, 130 AD3d 986, 990 [2d Dept 2015]; *Canzona v Atanasio*, 118 AD3d 841, 843 [2d Dept 2014]).

"[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" (*Cortazar v Tomasino*, 150 AD3d 668, 669-670 [2d Dept 2017], citing *Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511 516 [2012]). Thus, "[t]he existence of a valid and enforceable contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter" (*Goldman v Metropolitan Life Ins.*

Co., 5 NY3d at 572, citing *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]; *Hoeg Corp. v Peebles Corp.*, 153 AD3d 607, 609 [2d Dept 2017]). Consonant with the foregoing, and accepting the factual averments in the complaint as true, plaintiff failed to state a viable cause of action to recover damages for unjust enrichment because the complaint alleges the existence of a contract between the parties governing the subject matter of the action (*see Cortazar v Tomasino*, 150 AD3d at 670; *see Goldman v Metropolitan Life Ins. Co.*, 5 NY3d at 572; *Gym Door Repairs, Inc. v Astoria Gen. Contr. Corp.*, 144 AD3d 1093, 1096-1097 [2d Dept 2016]).

Somewhat similarly, “[a]lthough a contracting party may be charged with a separate tort liability arising from a breach of a duty distinct from, or in addition to the breach of contract, a cause of action alleging conversion cannot be predicated on a mere breach of contract” (*Gym Door Repairs, Inc. v Astoria Gen. Contr. Corp.*, 144 AD3d at 1096 [internal citations and quotations marks omitted]; *see Greater Bright Light Home Care Servs, Inc. v Jeffries-El*, 151 AD3d 818, 824 [2d Dept 2017]; *Weinstein v Natalie Weinstein Design Assoc., Inc.*, 86 AD3d 641, 642 [2d Dept 2016]). Vice maintains that Scott failed to repay a \$200,000.00 “loan”, which constitutes a claim for breach of contract (*id.*). Accordingly, the Fourth cause of action for conversion must be dismissed (*see Greater Bright Light Home Care Servs, Inc. v Jeffries-El*, 151 AD3d at 824).

“To obtain the remedy of a constructive trust, a party is generally required to establish four elements, by clear and convincing evidence: (1) a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance thereon, and (4) unjust enrichment flowing from the breach of the promise” (*Sanzhaku v Margetis*, 151 AD3d 778, 779 [2d Dept 2017]; *see Sharp v Kosmalski*, 40 NY2d 119, 121 [1976]; *Kaprov v Stalinsky*, 145 ad3D 869, 870 [2D Dept 2016]; *Diaz v Diaz*, 130 AD3d 560, 561 [2d Dept 2015]). Accepting the facts pleaded as true, the Court finds that plaintiff failed to sufficiently allege the existence of a confidential or fiduciary relationship

between the parties (*see Mawere v Landau*, 130 AD3d at 989). Moreover, the required element of a “transfer” by plaintiff to defendant in reliance upon the alleged “promise” is clearly lacking here. As such, plaintiff’s ixth cause of action which is to impose a constructive trust must be dismissed pursuant to CPLR 3211(a)(7).

With regard to the remaining causes of action for theft of corporate business opportunities (the “First”), breach of contract (the “Third”), and for the repayment of an alleged \$200,000.00 loan (the “Seventh”), defendant has failed to demonstrate that “a material fact as claimed by the pleader to be one is not a fact at all,” and that “no significant dispute exists regarding it” (*Guggenheimer v Ginsburg*, 43 NY2d at 275). As such, Stapp is not entitled to dismissal of the forgoing causes of action.

**DEFENDANT STAPP’S MOTION TO DISMISS  
PURSUANT TO CPLR 3211(a)(1)**

In order to prevail on a motion to dismiss pursuant to CPLR 3211(a)(1), the movant is required to demonstrate that “the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *see Goldman v Metropolitan Life Ins. Co.*, 5 NY3d at 571; *Jahan v U.S. Bank N.A.*, 127 AD3d 926, 927 [2d Dept 2015]). In the absence of same, the motion will be denied.

In support of the branch of Stapp’s motion which is to dismiss the complaint pursuant to CPLR 3211(a)(1), he maintains that his defense is founded upon irrefutable documentary evidence. In particular, Stapp relies on the parties’ Band Agreement dated September 29, 2015, which provides, in pertinent part: “[t]he services of each band member under the Agreement [is considered] non-exclusive and part-time...each band member [has] the right to perform similar services to other musical groups and to engage in other business.” Additionally, pursuant to the

Agreement, the “Relationship” between Vice and its band members “[does] not constitute a partnership or joint venture”. To the contrary, each band member was considered an “independent contractor, and not an employee of Vice”. Based on the foregoing provisions, Stapp contends that any alleged “potential business opportunity” he may have pursued for his own benefit was within the purview of his contractual agreement with Vice. According to Stapp, this undisputed documentary evidence resolves the seminal factual issues, and definitively disposes of plaintiff’s claims for theft of business opportunities and breach of contract.

The Court finds that the purported documentary evidence defendant submits is legally insufficient to utterly refute plaintiff’s factual allegations, and conclusively establish a defense as a matter of law (*see Goldman v Metropolitan Life Ins. Co.*, 5 NY3d at 571; *Gawrych v Astoria Federal Savings and Loan*, 148 AD3d 681, 682 [2d Dept 2017]; *Raach v SLSJET Mgt. Corp.*, 134 AD3d 792, 794 [2d 2015]). Although Stapp correctly points out that his services under the Agreement were “non-exclusive and part-time”, the Agreement further provides that each band member’s right to perform similar services to other musical groups and to engage in other business is conditioned upon “full and timely performance of *all* the obligations under the Agreement” (Band Agreement, par. “3”), including, *e.g.*, recording sessions, live performances, still photography and videos, publicity and promotion. Notably, defendant agreed to appear and perform for AOA in all areas of the entertainment field at such times and places designated by Vice, “subject to...*reasonable, previously scheduled* obligations” (Band Agreement par. “2”). The provisions Stapp relies on must be considered in the context of the Agreement’s other pertinent terms. As such, the contractual agreement between the parties does not eliminate all material issues of fact as to whether or not Stapp “diligently, competently, timely and to the best of his ability,



experience and talent, perform[ed] all of the services required” of him as a band member of AOA (Band Agreement, par. “2”).

Defendant submits certain email communications between himself and the various individuals involved in AOA’s business of performing, recording, filming videos, publicity and promotion. He maintains that the emails utterly refute plaintiff’s factual allegations of breach of contract and theft of AOA’s business opportunities. Stapp further submits correspondence from Vice pertaining to his membership in the band for which he was paid the sum of \$200,000.00 as “signing bonus.” The letter indicates that the bonus was not an “advance...recoupable out of [future] payments to [him] pursuant to the Band Agreement.” It further provides that the signing bonus shall be returnable in the event of a material breach of the Band Agreement. According to Stapp, this documentary evidence conclusively disproves plaintiff’s claim for the repayment of an alleged \$200,00.00 loan given to him by Vice.

Relative to the foregoing, “[i]n order for evidence to qualify as documentary, it must be unambiguous, authentic, and undeniable” (*Gawrych v Astoria Federal Savings and Loan*, 148 AD3d at 682-683). Letters, emails, correspondence and affidavits fail to meet the requirements for documentary evidence within the meaning of the rule (*see Gawrych v Astoria Federal Savings and Loan*, 148 AD3d at 682; *25-01 Newkirk Ave., LLC v Everest Natl. Ins. Co.*, 127 AD3d 850, 851 [2d Dept 2015]; *Attias v Costiera*, 120 AD3d at 1283 [2d Dept 2014]). Here, the emails and the letter dated September 16, 2015 simply do not meet the requirements for documentary evidence (*see Phillips v Taco Bell Corp.*, 152 AD3d 806, 807 [2d Dept 2017]; *Prott v Lewin & Baglio, LLP*, 150 AD3d 908, 909-910 [2d Dept 2017]). They are not “essentially undeniable” and do not support the motion “standing on their own” (*see Amsterdam Hospitality Group, LLC v Marshall-Alan Ass., Inc.*, 120 AD3d 431, 432-433 [2d Dept 2014]; David D.

Siegel, Practice Commentaries, McKinney's Cons Laws of N.Y., Book 7B, CPLR C3211:10 at 2).

As such, defendant's reliance on these documents is unavailing (*see Gawrych v Astoria Federal Savings and Loan*, 148 AD3d at 682; *Amsterdam Hospitality Group, LLC v Marshall-Alan Ass., Inc.*, 120 AD3d at 432-433).

Accordingly, Stapp has failed to meet his burden pursuant to CPLR 3211(a)(1). The documentary evidence relied on by this defendant fails to disprove plaintiff's factual allegations, and/or conclusively establish a defense to the asserted claims as a matter of law (*see Goldman v Metropolitan Life Ins. Co.*, 5 NY3d at 571; *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d at 326). Rather, the Court finds that the documents serve to raise material questions of fact. As such, dismissal of this action pursuant to CPLR 3211(a)(1) is unwarranted at this stage of the proceedings.

Accordingly, it is

ORDERED, that the branch of defendant's motion which is to dismiss the complaint pursuant to CPLR 3211(a)(7) is granted as to the Second cause of action (breach of fiduciary duty), the Fourth cause of action (conversion), the Fifth cause of action (unjust enrichment), and the sixth cause of action (to impose a constructive trust), and those causes of action are hereby severed from the complaint and dismissed; and it is further

ORDERED, that the motion to dismiss the complaint pursuant to CPLR 3211(a)(7) is denied as to the first cause of action (theft of corporate business opportunity), the third cause of action (breach of contract), and the seventh cause of action (the failure to repay a \$200,000.00 loan); and it is further

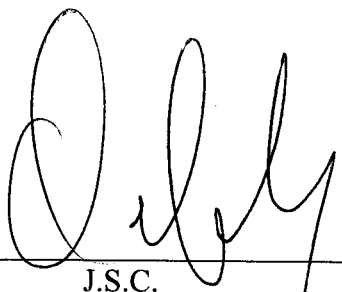
ORDERED, the branch of defendant's motion which is to dismiss the complaint pursuant to CPLR 3211(a)(1) is denied in its entirety; and it is further

ORDERED, that the Clerk mark his records accordingly; and it is further

ORDERED, that the parties appear for a preliminary conference on Dec 18, 2018

at 9:30 a.m., in DCM Part 21, Room 430 at 26 Central Avenue, Staten Island, New York.

ENTER,



J.S.C.

Hon. Orlando Marrazzo, Jr.  
Acting Supreme Court Justice

Dated:

11/17/18