SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42
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JAMES SILVERMAN,

Plaintiff

Index No.654719/2016

v

DECISION AND ORDER

STEVEN ROSENBAUM, MAGNIFY MEDIA, LLC, and WAYWIRE, INC.,

Defendant.

MOT SEQ 001, 002, 003

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NANCY M. BANNON, J.:

I. INTRODUCTION

In this action seeking, inter alia, damages for breach of contract, fraudulent inducement, unjust enrichment, and promissory estoppel, the plaintiff moves for sanctions pursuant to 22 NYCRR 130-1.1 as against the defendants Steven Rosenbaum and Magnify Media, LLC (Magnify), and Aaron Pierce, Esq., the former attorney representing Rosenbaum and Magnify (SEQ 001, SEQ 002). Rosenbaum and Magnify move pursuant to CPLR 3211(a)(7) to dismiss the complaint for failure to state a cause of action (SEQ 003). The motions for sanctions are denied without prejudice, and the motion to dismiss is granted in part.

II. BACKGROUND

The plaintiff avers, in the amended complaint, that in 2008, he answered an advertisement placed by Rosenbaum, a well-known filmmaker, author, and journalist, seeking a cameraman for a film project. The project was to document the construction of the World Trade Center Memorial for a long-term documentary project entitled "Building the Memorial" (the film). The plaintiff states that he began filming at the construction site and interviewing senior staff at the 9/11 Memorial Museum (the Museum) at Rosenbaum's direction.

The plaintiff alleges that Rosenbaum falsely represented to him that Rosenbaum had exclusive access to Museum staff and people involved in the creation of the Museum, that he had negotiated exclusive rights to fully produce and distribute the film, that he planned for the film to be screened at festivals and win awards, that he would produce and deliver the film in connection with the Museum's official public opening, and that the film would be made available for purchase in the Museum gift shop.

In May 2010, the plaintiff and Magnify entered into a written Deferred Payment and Profit Sharing Agreement (the Agreement), pursuant to which the plaintiff agreed to continue to film the construction of the World Trade Center in exchange for $400.00 per full day's work, and $250.00 per half day's work.

The plaintiff agreed to defer his payments until the defendants raised funds necessary to complete the film, upon the condition that the plaintiff would be the first paid from those funds. The plaintiff would also be entitled, pursuant to the Agreement, to 7% of the film's net profits. The plaintiff continued to film until May 2012. However, he avers that the defendants used the footage he created for purposes other than making the film, and that the defendants did not secure or even attempt to secure any funding for the film. For example, the plaintiff states that the defendants used the footage in connection with an iPad application and a "TED Talk" given by Rosenbaum. Moreover, the Museum has been open for several years, but the defendants have yet to secure any funding for the film. This action ensued.

By order dated August 24, 2017, the parties were referred to mandatory mediation in the Alternative Dispute Resolution Program of the Commercial Division. The order warned the parties that failure to comply may subject the offender to sanctions. On November 29, 2017, the parties were notified by the court's Alternative Dispute Office to schedule and participate in an initial mediation session. The notice stated that the "parties must cooperate with one another and the neutral in regard to scheduling; the Rules provide that failure to do so may subject the offending counsel to sanctions imposed by the Justice assigned to this case."

After the appointment of a neutral and the parties' agreement on a date, the plaintiff reserved rooms for the mediation. Two days later, the defendants' former counsel, Aaron Pierce, Esq., sent an email to the plaintiff stating that "we have decided that it is not in my clients' interests to further approach mediation." Pierce admits to cancelling the mandatory mediation less than one month before it was scheduled to take place. Pierce states that the plaintiff's failure to provide "workable discovery" in advance of the mediation was the "primary reason" that the defendants were "forced to cancel the mediation." Specifically, Pierce avers that the plaintiff did not provide time card records for the film project or his tax returns between 2007 and 2012.

The parties have participated in a number of discovery-related status conferences since the defendants' failure to comply with the mandatory mediation order. At a status conference on June 14, 2018, the defendants' prior counsel arrived over an hour late. The court further notes that at the same conference, prior counsel failed to provide any excuse for non-compliance with the court's prior discovery directives.

III. DISCUSSION

A. Motion to Dismiss

On a motion to dismiss for failing to state a cause of action under CPLR 3211(a)(7), the pleading is to be afforded a liberal construction and the court should accept as true the facts alleged in the complaint, accord the pleading the benefit of every reasonable inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory. See Hurrell-Harring v State of New York, 15 NY3d 8 (2010); Leon v Martinez, 84 NY2d 83 (1994).

The defendants assert that the plaintiff's first, third, fourth, and fifth causes of action sounding in fraudulent inducement, promissory estoppel, unjust enrichment, and breach of the implied covenant of good faith and fair dealing, respectively, are inadequately plead because they are duplicative of the plaintiff's second cause of action seeking to recover for breach of contract. "It is a well established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated." Dormitory Authority v Samson Construction Co., 30 NY3d 704 (2018) (citation omitted); see Brown v Brown, 12 AD3d 176 (1st Dept. 2004). However, the Court of Appeals has recognized that "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." North Shore Bottling Co. v Schmidt &

Sons, 22 NY2d 171 (1968); see also Sommer v Federal Signal Corp., 79 NY2d 540 (1992).

As to the plaintiff's second cause of action, sounding in breach of contract, the defendants aver that the plaintiff has not plead a breach of the Agreement because the requirements triggering compensation for the plaintiff were not met, and because the defendants fulfilled their obligations under the Agreement by making sufficient efforts to secure financing for the film.

1. Fraudulent Inducement

A cause of action seeking damages for fraudulent inducement is duplicative of a breach of contract claim when it is predicated on an alleged expression of a future expectation or intent to perform. See Pate v BNY Mellon-Alcentra Mezzanine III, LP, 163 AD3d 429 (1st Dept. 2018). However, a misrepresentation of present facts is collateral to the contract, even though it may have induced the plaintiff the sign it, and therefore involves a separate breach of duty. Gosmile, Inc. v Levine, 81 AD3d 77 (1st Dept. 2010).

The plaintiff claims that he was induced to enter into the Agreement based on Rosenbaum's representations that the defendants had exclusive access to Museum staff and people involved with the creation of the Museum, that Rosenbaum had negotiated exclusive rights to fully produce and distribute the

film in exchange for his library of film content, that Rosenbaum planned for the film to be at festivals and win awards, that Rosenbaum planned to produce and deliver the film in connection with the Museum's public opening, and that the film would be made available for purchase of the Museum gift shop. The final three statements are expressions of future intent rather than misrepresentations of present fact, and thus do not support a separate claim for fraudulent inducement. As to the prior statements, to the extent that the plaintiff alleges that he justifiably relied on Rosenbaum's representations that he had exclusive access to certain persons affiliated with the Museum and that he had exclusive rights to the production and distribution of the film, that those representations were false when made, that they were made with the purpose of inducing the plaintiff the enter the Agreement, and that the plaintiff sustained damages as a consequence of such false representations, the plaintiff's cause of action sounding in fraudulent inducement survives. See Shugrue v Stahl, 117 AD3d 527 (1st Dept. 2014); Gosmile, Inc. v Levine, supra.

The plaintiff's additional contention that he was induced to enter the Agreement by "false material representations that the defendants would secure funding and produce" the film, however, is plainly duplicative of the plaintiff's cause of action

sounding in breach of contract, as it is predicated on the same promise made in the written Agreement.

2. Promissory Estoppel

"[W]here there is an express contract no recovery can be had on a theory of implied contract." SAA-A v Morgan Stanley Dean Witter & Co., 281 AD2d 201, 203 (1st Dept. 2001). A claim for promissory estoppel is barred by the alleged existence of a contract. ID Beauty S.A.S. v Coty Inc., 164 AD3d 1186 (1st Dept. 2018); Susman v Commerzbank Capital Markets Corp., 95 AD3d 589 (1st Dept. 2012).

The plaintiff states that he has adequately plead promissory estoppel because he relied on the promises, memorialized in the Agreement, that the defendants would attempt to obtain funding for the film and would compensate him when their efforts were successful. Since the entire substance of the plaintiff's promissory estoppel claim is within the scope of his breach of contract claim, the promissory estoppel claim is disallowed as duplicative.

3. Unjust Enrichment

As previously stated, parties generally may not recover upon a quasi-contractual theory where they have a valid, enforceable contract that governs the same subject matter as the quasi-contractual claim. See Clark-Fitzpatrick, Inc. v Long Island Rail Road Co., 70 NY2d 382 (1987); Ellis v Abbey & Ellis, 294

AD2d 168 (1st Dept. 2002); Cooper, Bamundo, Hecht & Longworth, LLP v Kuczinski, 14 AD3d 644 (2nd Dept. 2005). However, the plaintiff avers that the defendants not only accepted the plaintiff's services and work product without providing the compensation described in the Agreement, but also profited from the use of the plaintiff's footage in connection with a commercially viable iPad application and materials for a TED Talk given by Rosenbaum. To the extent that the plaintiff claims the defendants unfairly appropriated his services for purposes not contemplated by the Agreement, and were enriched therefrom, the plaintiff's cause of action sounding in unjust enrichment is adequately plead and survives at this stage.

4. Breach of Implied Covenant of Good Faith

"New York law . . . does not recognize a separate cause of action for breach of the implied covenant of good faith and fair dealing when a breach of contract claim, based upon the same facts, is also pled." Harris v Provident Life and Acc. Ins. Co., 310 F3d 73, 81 (2nd Cir 2002); see Berkeley Research Group, LLC v FTI Consulting, Inc., 157 AD3d 486 (1st Dept. 2018); Deadco Petroleum v Trafigura AG, 151 AD3d 547 (1st Dept. 2017); Cambridge Capital Real Estate Investments, LLC v Archstone Enterprise LP, 137 AD3d 593 (1st Dept. 2016); Amcam Holdings, Inc. v Canadian Imperial Bank of Commerce, 70 AD3d 423 (1st Dept. 2010).

The plaintiff's claims here for breach of contract and breach of the implied covenant of good faith and fair dealing are both based on the defendants' failure to provide the plaintiff with "the fruit, or benefit of the [Agreement]," in spite of the defendants' representations that it would do so and its acceptance of the benefits of the plaintiff's performance. As the plaintiff recites, the Agreement obligated the defendants to endeavor to obtain funding for the film's production. Thus, a duty to do the same based in tort would be duplicative of the contractual duty. Moreover, both causes of action appear to seek the same damages. See Netologic, Inc. v Goldman Sachs Group, Inc., 110 AD3d 433 (1st Dept. 2013); Amcam Holdings, Inc. v Canadian Imperial Bank of Commerce, supra. Accordingly, the plaintiff's cause of action sounding in breach of the implied covenant of good faith and fair dealing is dismissed as duplicative of the plaintiff's claim for breach of contract.

5. Breach of Contract

The amended complaint states a cause of action to recover against the defendants for breach of contract, since it alleges the "formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage." Flomenbaum v New York Univ., 71 AD3d 80, 91 (1st Dept. 2009). Specifically, the amended complaint states that the defendants failed to make efforts to raise capital to complete or

promote the film. While the Agreement does not require the defendants the actually secure funding, it does provide that the defendants shall endeavor to raise money for the production of the film. Since the plaintiff has averred that no such endeavor was made, a breach of the Agreement is sufficiently plead.

The defendants' contention that the primary purpose of Rosenbaum's TED Talk was to "raise awareness for the film in hopes of securing financing" merely raises a question of fact that would be more properly addressed to a motion for summary judgment. Similarly, the defendants' argument that the plaintiff is not entitled to compensation because he failed to maintain a log of his working hours, as required under the terms of the Agreement, presents an issue of fact that cannot be resolved on a motion made pursuant to CPLR 3211(a)(7).

B. Motions for Sanctions

The plaintiff seeks sanctions pursuant to 22 NYCRR 130-1.1 against the defendants and Pierce for their failure to participate in mandatory mediation and for Pierce's conduct in relation to the June 14, 2018, status conference.

22 NYCRR 130-1.1(a) provides, in relevant part, that the court, "in its discretion, may award to any party or attorney in any civil action . . . costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's

fees, resulting from frivolous conduct . . . In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct." 22 NYCRR 130-1.1(b) provides that the court, as appropriate, "may make such award of costs or impose such financial sanctions against . . . a party to the litigation." Frivolous conduct includes conduct that is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification, or reversal of existing law, is undertaken primarily to harass or maliciously injure another, or asserts material factual statements that are false. See 22 NYCRR 130-1.1(c). "In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, or should have been apparent, or was brought to the attention of . . . the party." Id. Costs and sanctions for frivolous conduct may be awarded against a pro se litigant. Bell v State of New York, 96 NY2d 811 (2001); Strunk v New York State Bd. of Elections, 126 AD3d 779 (2nd Dept. 2015).

Upon applying this standard, the court concludes that the

conduct of the defendants and their prior counsel, particularly in the context of the mandatory mediation, is concerning, but does not presently merit the imposition of sanctions pursuant to 22 NYCRR 130-1.1. Accordingly, the plaintiff's motions for sanctions are denied without prejudice. The defendants are cautioned that any further failure to comply with court directives, including mediation and discovery orders, in addition to any further failures to appear before the court on time and prepared to participate in scheduled conferences, may result in the imposition of sanctions pursuant to CPLR 3126 or 22 NYCRR 130-1.1, including, but not limited to, striking of the answer or financial sanctions. In addition, the court reminds the defendants that the plaintiff's alleged failure to provide discovery does not justify their refusal to comply with a court order mandating that the parties proceed to mediation.

IV. CONCLUSION

In light of the foregoing, it is

ORDERED that the plaintiff's motions for sanctions pursuant to 22 NYCRR 130-1.1 as against the defendants Steven Rosenbaum and Magnify Media, LLC, and as against Aaron Pierce, Esq., the former attorney for Rosenbaum and Magnify (SEQ 001, SEQ 002) are denied without prejudice; and it is further

ORDERED that the defendants' motion pursuant to CPLR

3211(a)(7) to dismiss the amended complaint in its entirety (SEQ 003), is granted to the extent that the third and fifth causes of action of the complaint are dismissed, and the first cause of action is dismissed except to the extent that it is based on the defendants' alleged misrepresentations of present facts collateral to the parties' written agreement, and the motion is otherwise denied; and it is further,

ORDERED that the surviving causes of action are severed and shall continue; and it is further,

ORDERED that counsel shall appear for a status conference on May 9, 2019, at 9:30 a.m., as previously scheduled.

This constitutes the Decision and Order of the court

Dated: January 25, 2019 ENTER: _____ J.S.C.

HON. NANCY M. BANNON