

Kelly v Kelly
2019 NY Slip Op 30742(U)
February 7, 2019
Supreme Court, Richmond County
Docket Number: 152419/2018
Judge: Jr., Orlando Marrazzo
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND
RONALD KELLY**

DECISION/ORDER

DCM PART 21

HON. ORLANDO MARRAZZO, JR.

Index No.: 152419/2018

Motion No. 1

Plaintiff,

-against-

**JOHN KELLY and COBRA RESTURANT, INC.
d/b/a THE PARLOUR**

Defendant.

The following numbered 1 through 8 were marked submitted on December 11, 2018

Papers
Numbered

Notice of Motion, dated October 12, 2018.....1

Affirmation in Support of Defendants’ Motion to Dismiss, with Exhibits, dated October 12, 2018.....2

Affidavit of John Kelly in Support of Defendants’ Motion to Dismiss, dated October 12, 2018.....3

Affidavit of Aaron O’Reilly in Support of Defendants’ Motion to Dismiss, dated October 12, 2018.....4

Defendants’ Memorandum of Law in Support of Their Motion to Dismiss the Complaint, with Exhibits, dated October 12, 2018.....5

Attorney Affirmation Opposing Defendants’ Motion to Dismiss and In Support of Plaintiff’s Motion for Leave to Amend, with Exhibits, dated November 20, 2018.....6

Stipulation Withdrawing Defendants’ Motion as to Allegations of Improper Service, dated November 19, 2018.....7

Affirmation in Further Support of Defendants’ Motion To Dismiss Plaintiff’s Second, Third, Fourth and Fifth Causes of Action and In Opposition to Plaintiff’s Motion to Amend the Complaint, dated December 6, 2018.....8

Defendants brought a Motion to Dismiss on the grounds of improper service and to dismiss Plaintiff's second, third, fourth and fifth causes of action for failure to state a cause of action. The parties stipulated that Defendants would withdraw the first part of their Motion alleging improper service upon Defendants The Parlour and Cobra. Defendants' Motion to dismiss Plaintiff's third and fifth causes of action is hereby granted and the remainder of Defendants' Motion is hereby denied. The Court hereby permits Plaintiff to file his Proposed Amended Complaint, which he submitted in opposition to the motion, after he strikes the third and fifth causes of action.

Plaintiff claims he entered into an employment contract ("Agreement") with Defendants to work at The Parlour and Defendants breached the Agreement when they failed to pay him 30% of the net profits, consider Plaintiff's increased profit share, or allow him to own part of the business. Defendants argue that the Second Cause of Action for fraudulent inducement to contract fails as it does not satisfy the pleading requirements of CPLR §3016(b). Defendants claim that Plaintiff relies on conclusory statements and provides no details for this claim. Defendants also claim that this claim for fraudulent inducement fails because it is duplicative of Plaintiff's claim for breach of contract and he has failed to allege a legal duty separate from that in the Agreement. According to the Defendants, Plaintiff's conversion claim should be dismissed because in claiming that Defendants converted compensation and wages due to him under the Agreement, Plaintiff relies solely on facts underlying his breach of contract claim. Defendants argue that Plaintiff's accounting cause of action should be dismissed because no confidential or fiduciary relationship exists warranting such relief. Finally, Defendants argue that the unjust enrichment claim should be dismissed since it arises out of his Agreement with the Defendants.

When considering a motion to dismiss under CPLR §3211(a)(7) for failure to state a cause of action, “the complaint must be construed liberally, the factual allegations must be deemed to be true, and the nonmoving party must be given the benefit of all favorable inferences.” *Christ the Rock World Restoration Church Intl., Inc. v Evangelical Christian Credit Union*, 153 A.D.3d 1226, 1229, 62 N.Y.S.3d 396, 400 (App. Div. 2d Dept., 2017). See *Leon v. Martinez*, 84 N.Y.S.2d 83, 87, 638 N.E.2d 511, 614 N.Y.S.2d 972 (1994). As the Second Department noted in *Guido v. Orange Regional Med. Ctr.*, “Whether a plaintiff can ultimately establish its allegations is not part of the calculus.” *Guido v Orange Regional Med. Ctr.*, 102 A.D.3d 828, 832, 958 N.Y.S.2d 195, 199 (App. Div. 2d Dept., 2013) (quoting *Sokol v Leader*, 74 A.D.3d 1180, 1181, 904 N.Y.S.2d 153, 155 (App. Div. 2d Dept., 2010)). The standard to consider when ruling on a motion to dismiss a complaint under CPLR §3211(a)(7) is not whether the proponent of the pleading has a cause of action, but rather whether the pleading states a cause of action. See *Guido v Orange Regional Med. Ctr.*, 102 A.D.3d 828, 831, 958 N.Y.S.2d 195, 199 (App. Div. 2d Dept., 2013).

In this case, Plaintiff submitted an Attorney Affirmation and his own affidavit in opposition to Defendant’s motion. Plaintiff also submitted an Proposed Amended Complaint in an attempt to correct claimed deficiencies with the original Complaint. The Court finds that considering the Proposed Amended Complaint, Plaintiff has sufficiently stated a cause of action with respect to his first, second and fourth causes of action. The Court further holds that Plaintiff has failed to state a cause of action for conversion and unjust enrichment.

Fraud In The Inducement

Defendants claim that Plaintiff has failed to state a cause of action for fraud in the inducement. The elements of claim for fraud are (1) a misrepresentation or a material omission

of fact which was false, (2) knowledge of its falsity, (3) an intent to induce reliance, (4) justifiable reliance by the Plaintiff and (5) damages. *See Swartz v Swartz*, 145 A.D.3d 818, 823, 44 N.Y.S.3d 452, 460-461 (App. Div. 2d Dept., 2016); *Ginsburg Dev. Cos., LLC v. Carbone*, 134 A.D.3d 890, 892, 22 N.Y.S.3d 485 (App. Div. 2d Dept., 2015). Under CPLR §3016(b), a cause of action based on fraud must have the circumstances constituting the wrong stated in detail, including specific dates and items. *See Swartz v Swartz*, 145 A.D.3d 818, 823, 44 N.Y.S.3d 452, 461 (App. Div. 2d Dept., 2016); *Orchid Constr. Corp. v. Gottbetter*, 89 A.D.3d 708, 710, 932 N.Y.S.2d 100 (App. Div. 2d Dept., 2011). Defendants claim that Plaintiff has not sufficiently pleaded a fraud in the inducement claim since the Plaintiff does not detail his alleged damages for all five causes of action, provides no method of calculation for the claimed damages of \$120,000, and has failed to allege a legal duty separate from the Agreement. As the Court of Appeals held in *Lanzi v. Brooks*, under CPLR §3016(b), “the provision requires only that the misconduct complained of be set forth in sufficient detail to clearly inform a defendant with respect to the incidents complained of and is not to be interpreted so strictly as to prevent an otherwise valid cause of action in situations where it may be ‘impossible to state in detail the circumstances constituting a fraud.’” *Lanzi v. Brooks*, 43 N.Y.2d 778, 780, 373 N.E.2d 278, 279, 402 N.Y.S.2d 384, 384-385 (1977) (quoting *Jered v. Contr. Corp. v. New York City Tr. Auth.*, 22 N.Y.2d 187, 194 (1968)).

The Court finds that Plaintiff has met this standard and has sufficiently pleaded a cause of action for fraud to survive Defendants’ Motion to dismiss this cause of action. Plaintiff has pleaded with sufficient detail the misrepresentation that was allegedly false, including representations concerning the managerial authority Plaintiff would have at the Parlour, the 30% share of The Parlour’s profits he would receive, and his future ownership of The Parlour.

Plaintiff alleges that Defendants knew that each of the listed misrepresentations were false at the time they were made and that they were made to induce Plaintiff to execute the Agreement. Plaintiff also sufficiently pleads justifiable reliance and claims damages in the amount of \$120,000. Within such claimed damages, Plaintiff alleges he forwent other profitable business opportunities after justifiably relying on Defendants' false representations. Therefore, the Court finds that based on his Proposed Amended Complaint, Plaintiff sufficiently stated a cause of action for fraud in the inducement and Defendants' Motion to dismiss such claim is denied.

Accounting

The Court finds that based on Plaintiff's Proposed Amended Complaint, Plaintiff has sufficiently plead a cause of action for accounting to survive Defendant's Motion to Dismiss. "The right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest." *Palazzo v. Palazzo*, 121 A.D.2d 261, 265, 503 N.Y.S.2d 381 (1986). The Second Department has further held that "'a fiduciary relationship, 'whether formal or informal,' is one founded upon trust or confidence reposed by one person in the integrity and fidelity of another . . . [and] might be found to exist, in appropriate circumstances, between close friends . . . or even where confidence is based upon prior business dealings.'" *Lawrence v Kennedy*, 95 A.D.3d 955, 958, 944 N.Y.S.2d 577, 580 (App. Div. 2d Dept., 2012) (quoting *AHA Sales, Inc. v. Creative Bath Prods., Inc.*, 58 A.D.3d 6, 21, 867 N.Y.S.2d 169 (App. Div. 2d Dept., 2008)). In Plaintiff's Proposed Amended Complaint, Plaintiff states that he and the Defendant John Kelly share a familial relationship as cousins and based on this familial relationship, he trusted the Defendant and agreed to perform revitalization and rebuilding services to Defendant and The Parlour. According to Plaintiff, he relied on

Defendants to accurately report the revenues and losses, accounts receivable and accounts payable to gauge Plaintiff's performance and determine his financial compensation. The Court finds that Plaintiff has sufficiently pleaded a cause of action for accounting based on the Proposed Amended Complaint and therefore this cause of action survives Defendants' Motion.

Conversion

The Court finds that Plaintiff has failed to sufficiently state a cause of action for conversion. "Two key elements of conversion are the plaintiff's (1) legal ownership or an immediate superior right of possession to a specific identifiable thing, and (2) the defendant's unauthorized dominion over the thing in question or interference with it, to the exclusion of the plaintiff's right." *Nero v Fiore*, 165 A.D.3d 823, 825, 86 N.Y.S.3d 96, 99 (App. Div. 2d Dept., 2018). See *Colavito v. New York Organ Donor Network, Inc.*, 8 N.Y.3d 43, 50, 860 N.E.2d 713, 827 N.Y.S.2d 96 (2006). As held by the Second Department, a claim for conversion cannot be based merely on a breach of contract but "the same conduct which constitutes a breach of a contractual obligation may also constitute the breach of a duty arising out of the contract relationship which is independent of the contract itself." *Hamlet at Willow Cr. Dev. Co., LLC v. Northeast Land Dev. Corp.*, 64 A.D.3d 85, 112-113, 878 N.Y.S.2d 97, 117 (quoting *Dime Sav. Bank of N.Y. v. Skrelja*, 227 A.D.2d 372, 642 N.Y.S.2d 84 (1996)). Where such occurs, "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." *Id* (quoting *North Shore Bottling Co. v. Schmidt & Sons*, 22 N.Y.2d 171, 179, 239 N.E.2d 189, 292 N.Y.S.2d 86 (1968)). Based on Plaintiff's Proposed Amended Complaint, the claim for conversion is based on the same conduct as that of the breach of contract claim and there is no duty separate from such described in the cause of action. Therefore, Plaintiff's conversion cause of action is dismissed.

Unjust Enrichment

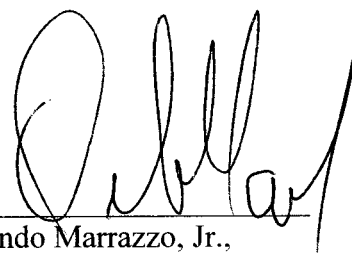
To bring a claim for unjust enrichment, a party must show that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what it is seeking to recover. *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 182, 944 N.E.2d 1104, 1110, 919 N.Y.S.2d 465, 471 (2011). When a valid and enforceable written contract exists that governs a particular subject matter, recovery in quasi contract is typically precluded for events which rise out of the same matter. *See Clark-Fitzpatrick, Inc. v. Long Island R. Co.*, 70 N.Y.2d 382, 388, 516 N.E.2d 190, 193, 521 N.Y.S.2d 653, 656 (1987). *See also IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132, 142, 907 N.E.2d 268, 274, 879 N.Y.S.2d 355, 361 (2009). The Court of Appeals has held that "a 'quasi contract' only applies in the absence of an express agreement, and is not really a contract at all, but rather a legal obligation imposed in order to prevent a party's unjust enrichment." *Clark-Fitzpatrick, Inc. v. Long Island R. Co.*, 70 N.Y.2d 382, 388, 516 N.E.2d 190, 193, 521 N.Y.S.2d 653, 656 (1987). *See Parsa v. State of New York*, 64 N.Y.2d 143, 148 (1984). The Court of Appeals has also held that "an unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim." *Corsello v Verizon N.Y., Inc.*, 18 N.Y.3d 777, 790, 967 N.E.2d 1177, 1185, 944 N.Y.S.2d 732, 740 (2012).

In *Amrusi v. Nwaukoni*, the Second Department found that a cause of action was subject to dismissal on the grounds that it was based on the same facts and sought the same damages as the breach of contract claim and therefore duplicative of such. *See Amrusi v Nwaukoni*, 155 A.D.3d 814, 815-816, 65 N.Y.S.3d 62, 64-65 (App. Div. 2d Dept., 2017). *See also Ochoa v. Montgomery*, 132 A.D.3d 287, 828, 18 N.Y.S.3d 410 (App. Div. 2d Dept., 2015). The Court finds that even with the changes noted in Plaintiff's Proposed Amended Complaint, an express

agreement exists that governs the subject matter of Plaintiff's unjust enrichment claim and is based on the same facts and seeks the same damages as the breach of contract action. Therefore, Defendants' Motion to Dismiss Plaintiff's cause of action for unjust enrichment is hereby granted.

Therefore, Plaintiff's third and fifth causes of action are hereby dismissed and the remainder of Defendants' Motion is denied. Plaintiff may amend his Complaint according to the Proposed Amended Complaint submitted before this Court, with the third and fifth causes of action stricken. This constitutes the final decision and order of this Court.

Dated: February 7, 2019
Staten Island, New York



Orlando Marrazzo, Jr.,
Justice, Supreme Court

Hon. Orlando Marrazzo, Jr.
Acting Supreme Court Justice