

**MET Food Basics Inc. v Key Food Stores Co-op.,  
Inc.**

2019 NY Slip Op 32642(U)

August 8, 2019

Supreme Court, Kings County

Docket Number: 521358/18

Judge: Leon Ruchelsman

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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MET FOOD BASICS INC.,

Plaintiff,

Decision and order

- against -

Index No. 521358/18

KEY FOOD STORES CO-OPERATIVE, INC.,  
PASQUALE CONTE JR., DEAN JANEWAY &  
JOHN DURANTE,

Defendants,

August 8, 2019

*MS # 485*

-----x  
PRESENT: HON. LEON RUCHELSMAN

The defendants have all moved seeking to dismiss the complaint pursuant to CPLR §3211. The plaintiff has opposed the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

The plaintiff is the owner of a supermarket located at 2185 Coyle Street in Kings County. According to the Amended Verified Complaint on November 10, 2017 the plaintiff entered into an asset purchase agreement with Howard Lee wherein Lee agreed to purchase the supermarket for \$3,850,000. The Amended Verified Complaint alleges the defendant Key Food induced Lee to breach that contract. Indeed, five days later Lee informed the plaintiff he would not complete the purchase pursuant to the agreement. According to the Amended Verified Complaint, Lee suggested to the plaintiff that defendant Pasquale Conte Jr. would purchase the supermarket under the same terms as the original agreement. On December 18, 2017 Conte as the president

of an entity called Coyle Seven Seas LLC entered into a purchase agreement with the plaintiff to purchase the supermarket for the same price as Lee. Conte paid a down payment of \$200,000 and the closing was set for December 27, 2017. On January 2, 2018 Conte notified plaintiff he would not close pursuant to the agreement due to breaches allegedly committed by the plaintiff. In May 2018 Conte instituted a lawsuit against the plaintiff seeking a return of the down payment.

The plaintiff initiated the instant lawsuit and has alleged, essentially, that Key Food induced Lee to breach the agreement. That inducement caused the plaintiff's supermarket to experience decline and render them unable to find a successful buyer. The Amended Verified Complaint alleges six causes of action against the defendants. The causes of action include tortious interference with contract, tortious interference with prospective contractual relations, fraudulent inducement by Conte, fraudulent misrepresentation, negligent misrepresentation and promissory estoppel. The defendants have now moved seeking to dismiss the Amended Verified Complaint on the grounds it fails to state any cause of action.

#### Conclusions of Law

"[A] motion to dismiss made pursuant to CPLR §3211(a)[7] will fail if, taking all facts alleged as true and according them

every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law" (see, e.g. AG Capital Funding Partners, LP v. State St. Bank and Trust Co., 5 NY3d 582, 808 NYS2d 573 [2005], Leon v. Martinez, 84 NY2d 83, 614 NYS2d 972, [1994], Hayes v. Wilson, 25 AD3d 586, 807 NYS2d 567 [2d Dept., 2006], Marchionni v. Drexler, 22 AD3d 814, 803 NYS2d 196 [2d Dept., 2005]). Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR §3211 motion to dismiss (see, EBC I, Inc. v. Goldman Sachs & Co., 5 NY3d 11, 799 NYS2d 170 [2005]).

It is well settled, the elements of a cause of action alleging tortious interference with contract are: (1) the existence of a valid contract between the plaintiff and a third party, (2) the defendant's knowledge of that contract, (3) the defendant's intentional procurement of a third-party's breach of that contract without justification, and (4) damages (Anethsia Associates of Mount Kisco, LLP v. Northern Westchester Hospital Center, 59 AD3d 473, 873 NYS2d 679 [2d Dept., 2009]). Further, the plaintiff must specifically allege that 'but for' the defendant's conduct there would have been no breach of the contract (White Knight of Flatbush, LLC v. Deacons of Dutch Congregations of Flatbush, 159 AD3d 939, 72 NYS3d 551 [2d Dept.,

2018])). Thus, to succeed upon these allegations the complaint must allege sufficient facts. Vague or conclusory assertions are insufficient (Washington Ave. Associates Inc., v. Euclid Equipment Inc., 229 AD2d 486, 645 NYS2d 511 [2d Dept., 1996]).

First, the defendants assert the plaintiff has failed to present a fully executed contract and consequently the cause of action alleging tortious interference with a contract cannot be established. The plaintiff counters the Amended Verified Complaint contains three specific instances demonstrating the existence of a contract, namely that Lee signed it (Amended Verified Complaint, ¶ 24), the purchase price (Amended Verified Complaint, ¶ 25), and the closing date (Amended Verified Complaint, ¶ 26). However, there is no representation whether the plaintiff likewise executed the contract. It is well settled that where the parties to a contract intend the contract to be formed only upon execution then the contract is not binding until executed by both parties (United Mobile Technologies LLC v. Pegaso PCS, S.A. de C.V., 509 Fed. Appx. 48 [2d Cir. 2013]). There can be little doubt the parties did not intend the contract to be valid until execution as evidenced by the fact the plaintiff stresses Lee executed it and a contract only executed by one party is surely not binding. The plaintiff notes there is no requirement a copy of an agreement must be presented to establish its existence. The plaintiff cites to First Class

Concrete Corp., v. Rosenblum, 167 AD3d 989, 91 NYS3d 441 [2d Dept., 2018] to support that contention. However, that case dealt with the breach of a contract and the court held, based upon the facts presented in the complaint, the plaintiff had established a cause of action for a breach notwithstanding the production of an actual agreement. In this case, the cause of action alleges tortious interference and the primary element of this tort is the existence of a contract. The plaintiff has failed to establish this necessary element.

Moreover, even if the plaintiff could establish this element it still fails to allege any tortious interference with a contract. The factual allegations supporting this cause of action are first contained within paragraph 14 of the Amended Verified Complaint. That paragraph states that "upon information and belief, without Lee's knowledge, Key Food and the Directors conceived of a 'bait-and-switch' scheme intended to drive the Supermarket out of business" (see, Amended Verified Complaint, ¶ 14). The specific facts that support this cause of action are recited in paragraphs 34 and 35 where it states that "upon information and belief, in order to induce Lee to breach his obligations to Plaintiff under the APA, Key Food and the Directors facilitated a sale to Lee of a different Key Food supermarket" (see, Amended Verified Complaint, ¶ 34). Moreover, "in order to further convince Lee to breach his obligations to

Plaintiff under the APA, Key Food and the Directors advised Lee that Conte would purchase the assets of the Supermarket from Plaintiff, in place of Lee" (see, Amended Verified Complaint, ¶ 35).

Thus, the allegations of tortious interference consists of two specific acts, namely offering to sell Lee another Key Food location and telling Lee that Conte would purchase plaintiff's supermarket. These two acts cannot support an allegation of tortious interference because if true Key Food merely sought to replace Lee with Conte. If true, this particular inducement on the part of Key Food did not result in any damages to the plaintiff. The plaintiff argues that they were "unwittingly lured into that deal by Defendants which, unbeknownst to Plaintiff, Conte never intended to complete" (Memorandum in Opposition, page 10). However, even if that allegation is true, that does not comprise the inducement of the breach committed by Lee. Thus, according to the plaintiff, Key Food engaged in a far fetched scheme where it first promoted Lee to enter into a contract with plaintiff, then induced Lee to breach that contract, then produced Conte to assume that very contract only to induce Conte to breach it as well. However, the Amended Verified Complaint does not allege that Lee was aware that Key Food intended to induce Conte to breach the contract as well. On the contrary, the Amended Verified Complaint explains, as noted,

that Key Food allayed Lee's fears of breaching by informing him that Conte was ready to assume the contractual obligations. Therefore, it is inconsistent to now assert that the second phase of the scheme, whereby Conte would breach as well, can be imputed as part of Key Food's tortious interference with Lee. Therefore, the plaintiff has failed to allege any tortious interference and consequently, the motion seeking to dismiss the first cause of action is granted as to all defendants.

Turning to the fourth cause of action, to state a claim for fraudulent misrepresentation the plaintiff must establish a misrepresentation of fact that was false when made for the purpose of inducing another to rely upon it and they justifiably relied upon it to their detriment (Mandarin Trading Ltd., v. Wildenstein, 16 NY3d 173, 919 NYS2d 465 [2011]). Thus, the misrepresentation must concern a present fact, not a future promise (see, Scialdone v. Stepping Stones Associates L.P., 148 AD3d 953, 50 NYS2d 413 [2d Dept., 2017]). The Amended Verified Complaint in this case does not allege any misrepresentation of any present fact. Rather, it solely concerns itself with promises made to the plaintiff that were allegedly not kept. The only misrepresentation allegedly made by the Key Food defendants is contained in paragraph 19 of the Amended Verified Complaint where it states that "during the walk-through, Janeway stated that he would support Lee in purchasing the Supermarket" (Amended



Verified Complaint, ¶ 19). However, that is not a present misrepresentation of fact which can support a claim of fraudulent misrepresentation. Rather, that statement was allegedly an insincere promise of future performance which does not establish a cause of action for fraudulent misrepresentation (Ullman v. Hillyer, 106 AD3d 579, 965 NYS2d 711 [1<sup>st</sup> Dept., 2013]). The plaintiff counters that when these statements were made they "purported to be their acceptance at that very moment of Lee's transaction" and that the defendant's state of mind "was unquestionably a matter of existing fact" and consequently the misrepresentation is actionable (see, Memorandum of Law in Opposition, page 23). It is true that someone's state of mind is a material fact and thus a misrepresentation of a state of mind can establish fraudulent misrepresentation (Deyo v. Hudson, 225 NY 602 [1919]). However, "it does not follow that every broken promise acted upon is actionable. Mere promissory statements as to what will be done in the future are not actionable" (Adams v. Clark, 239 NY 403 [1925]). Nevertheless, a promise made "with a preconceived and undisclosed intention of not performing it...constitutes a misrepresentation of 'a material existing fact' upon which an action for rescission may be predicated" (Sabo v. Delman, 3 NY2d 155, 164 NYS2d 714 [1957]) and can form the basis of a fraudulent misrepresentation claim. However, any fraudulent misrepresentation derived from a promise made without

any intention to perform can only apply if the promisor was a party to the contract (see, *Promissory Fraud*, New York State Bar Journal, May 2006 by Ian Ayers & Gregory Klass). Janeway was not a party to the contract and his alleged promise to perform a future act cannot serve to support a claim for fraudulent misrepresentation.

Concerning the claim of fraudulent misrepresentation against Conte, who was a party to the second contract, the Amended Verified Complaint alleges that Conte misrepresented construction plans regarding the Supermarket. Specifically, the Amended Verified Complaint states that "upon seeing the construction work underway, Conte stated to Dolah that Plaintiff did not need to finish the work and should halt construction immediately so that Conte could finish the work once he acquired the Supermarket" (Amended Verified Complaint ¶ 55). Further, the Amended Verified Complaint states that "when Conte observed during the walk-through that the meat room was not yet equipped by Plaintiff, Conte stated to Dolah that Plaintiff should refrain from installing any equipment so that Conte could bring in his own equipment and arrange the room in the same fashion as his other stores" (Amended Verified Complaint ¶ 59). The plaintiff argues these statements "sought to induce Plaintiff to wind down its business, leaving the Supermarket unable to recover from Conte's termination of the transaction" (Memorandum of Law in Opposition,

page 23). There are further misrepresentations about the amount of staff required for the supermarket and paving the parking lot Amended Verified Complaint, ¶¶64,66) which again the plaintiff asserts were relied upon to their detriment. However, the Amended Verified Complaint provides no basis to determine Conte never intended to perform those promises. Indeed, the Amended Verified Complaint acknowledges that Conte paid a \$200,000 down payment pursuant to the Purchase Agreement (Amended Verified Complaint, ¶ 70). Thus, at the time the statements were made there can be no reasonable allegation Conte never intended performing them. In any event, those promises were not collateral to the contract, as will be explained presently, and thus cannot sustain a claim for fraudulent misrepresentation. Therefore, the motions seeking to dismiss the fraudulent misrepresentation claim is granted as to all defendants.

The second cause of action is tortious interference with prospective contractual relations. To establish this tort the plaintiff must demonstrate the defendant engaged in culpable conduct which interfered with a prospective contractual relationship between the plaintiff and a third party (see, Lyons v. Menoudakos & Menoudakos P.C., 63 AD3d 801, 880 NYS2d 509 [2d Dept., 2009]). Culpable conduct has been defined as conduct that is a crime or an independent tort and includes physical violence, fraud, misrepresentation and economic pressure (Smith v. Meridian

Technologies Inc., 52 AD3d 685, 861 NYS2d 687 [2d Dept., 2008]).

Since there have been no allegations any of the defendants committed any crimes and there are no viable causes of action for fraud, misrepresentation or economic pressure, the motion seeking to dismiss this cause of action is granted as to all defendants.

Turning to the third cause of action, fraud against Conte, it is true that a misrepresentation of a material fact that is collateral to the contract which induces the other party to enter into the contract is sufficient to sustain an action of fraud and is distinct from any breach of contract claim (Selinger Enterprises Inc., v. Cassuto, 50 AD3d 766, 860 NYS2d 533 [2d Dept., 2008]). However, where the misrepresentation refers only to the intent or ability to perform under the contract then such misrepresentation is duplicative of any breach of contract claim (see, Gorman v. Fowkes, 97 AD3d 726, 949 NYS2d 96 [2d Dept., 2012]). Generally, for a fraud claim to be collateral the misrepresentation must consist of a present fact that is unrelated to the precise terms of the contract itself. Thus, in American Media Inc., v. Bainbridge & Knight Laboratories LLC, 135 AD3d 477, 22 NYS3d 437 [1<sup>st</sup> Dept., 2016] the plaintiff sued defendant for advertisements it placed in various periodicals without receiving payment pursuant to the contract. The court held misrepresentations made by the defendant were not duplicative of the breach of contract claim. Specifically, the

principal of the defendant made statements that he loaned the defendant sufficient funds to cover the advertising expenses thereby inducing the plaintiff to enter into the contract. The court noted those misrepresentations were collateral since they were misrepresentations of present facts, namely that the defendant had sufficient funds. Further, these misrepresentations were collateral to the actual terms of the contract which involved placing advertising in plaintiff's periodicals (see, also, Deerfield Communications Corp., v. Chesebrough Ponds Inc., 68 NY2d 954, 510 NYS2d 88 [1986]). Thus, the critical distinction whether a fraud claim is collateral rests upon the following criteria. The first is whether the misrepresentation concerns a future intent to perform or whether the statement misrepresents present facts (see, Wylie Inc., v. ITT Corp., 130 AD3d 438, 13 NYS3d 375 [1<sup>st</sup> Dept., 2015]). If the misrepresentation concerns present facts it will generally be considered collateral. If the misrepresentation concerns a future intent to perform then it is generally duplicative of a breach of contract claim. This does not mean to imply a fraud claim regarding future conduct can never for the basis of a distinct cause of action. It surely can where the promise is collateral to the contract (see, Fairway Prime Estate Management LLC v. First American International Bank, 99 AD3d 554, 952 NYS2d 524 [1<sup>st</sup> Dept., 2012]). Moreover, even if the misrepresentation

concerns a present statement of facts, those facts must touch a matter that is not the subject of the contract. Therefore, if the promise or misrepresentations "concerned the performance of the contract itself, the fraud claim is subject to dismissal as duplicative of the claim for breach of contract" (HSN Nordbank AG v. UBS AG, 95 AD3d 185, 941 NYS2d 59 [1<sup>st</sup> Dept., 2012]).

In this case, the Amended Verified Complaint alleges that the plaintiff relied upon Conte's promises regarding assorted promises that induced the plaintiff to wind down its operations. However, the winding down of operations was something contemplated in the Purchase Agreement. In fact the Amended Verified Complaint states that "in reliance upon the Purchase Agreement, Plaintiff continued to wind down its operation of the Supermarket in preparation for the sale of the assets relating thereto" (Amended Verified Complaint, ¶ 72). Thus, while Conte's promises may contain present statements of fact, they do not include a matter not already subject to the contract, namely taking over the premises. The defendants argue the misrepresentation, or more accurately the omission that Conte knew about and participated in Lee's breach and failed to disclose that information, was surely extrinsic to the contract. However, that knowledge, even if true, did not have anything to do with Conte's contract with the plaintiff which forms the basis of the fraud claims. Whether or not Conte failed to disclose his

knowledge of an alleged scheme concerning Lee's contract has no bearing upon Conte's contract with the plaintiff. Therefore, the motion seeking to dismiss the third cause of action is granted.

Turning to the cause of action of negligent misrepresentation, it is well settled that the plaintiff must demonstrate the existence of a special relationship imposing a duty upon the defendant to impart correct information, that the information was incorrect and there was reasonable reliance upon the information (Ginsburg Development Companies LLC v. Carbone, 134 AD3d 890, 22 NYS3d 485 [2d Dept., 2015]). A special relationship either means a fiduciary relationship between the parties, a privity-like relationship or a relationship where the plaintiff "emphatically alleges" the defendant had unique or special expertise (see, Alley Sports Bar, LLC v. SimplexGrinnell LP, 58 F.Supp3d 280 [W.D.N.Y., 2014]). The Amended Verified Complaint does not allege any relationship that can be classified as a special relationship. Consequently, the motion seeking to dismiss the negligent misrepresentation claims is granted as to all defendants.

To establish a cause of action for promissory estoppel it must be shown that the defendant made a clear and unambiguous promise upon which the plaintiff reasonably relied to his or her detriment (Skillgames LLC v. Brody, 1 AD3d 247, 767 NYS2d 418 [1<sup>st</sup> Dept., 2003]). The allegations that Janeway would support



Lee in purchasing the Supermarket (Amended Verified Complaint, ¶ 19) was not an unambiguous promise to provide financing and approval upon which plaintiff reasonably relied.

Therefore, the cause of action of promissory estoppel is dismissed as to all defendants.

Thus, the motion of all defendants seeking to dismiss the Amended Verified Complaint is granted.

So ordered.

ENTER



DATED: August 8, 2019  
Brooklyn N.Y.

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Hon. Leon Ruchelsman  
JSC

KINGS COUNTY CLERK  
FILED  
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