

**Weinstein v Levitin**

2019 NY Slip Op 33719(U)

December 16, 2019

Supreme Court, Kings County

Docket Number: 525670/18

Judge: Leon Ruchelsman

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This opinion is uncorrected and not selected for official publication.

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

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HENRY WEINSTEIN & HPHW REALTY CORP., INC.,  
Plaintiffs,

Decision and order

- against -

Index No. 525670/18

JEFFREY LEVITIN, LEVITIN & ASSOCIATES P.C.,  
BORDEAUX CAPITAL LLC, YECHIEL SHIMON SPREI  
a/k/a SAM SPREI, OLDEN EQUITIES CORP.,  
& ROCHELLE FRIEDMAN,  
Defendants,

ms # 1

December 16, 2019

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PRESENT: HON. LEON RUCHELSMAN

The defendant Bordeaux Capital LLC has moved pursuant to CPLR §3211 seeking to dismiss the fourth and fifth causes of action alleging fraud and unjust enrichment respectively. The plaintiff opposes 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 alleges that while he was in the hospital recovering from emergency open heart surgery he was induced to sign loan documents borrowing approximately one and a half million dollars. Specifically, he alleges his attorney Jeffrey Levitin and defendant Sprei presented certain real estate deals wherein Weinstein would borrow money supplied by Bordeaux Capital. According to the Complaint there were specific representations made by Levitin that were relied upon by the plaintiff. The plaintiff initiated the instant lawsuit alleging essentially that Levitin and Sprei stole the money. The plaintiff has asserted

various causes of action including malpractice, replevin, conversion, negligence, fraud and unjust enrichment. Bordeaux has moved seeking to dismiss the fraud and unjust enrichment claims on the grounds the complaint fails to allege they committed any fraud or were unjustly enriched. The plaintiff opposes the motion arguing at this stage of the litigation the complaint is sufficient and the motion should be denied.

#### 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]).

Turning to the claim of fraud, it is well settled that to

succeed upon a claim of fraud it must be demonstrated there was a material misrepresentation of fact, made with knowledge of the falsity, the intent to induce reliance, reliance upon the misrepresentation and damages (Cruciata v. O'Donnell & Mclaughlin, Esqs, 149 AD3d 1034, 53 NYS3d 328 [2d Dept., 2017]). These elements must each be supported by factual allegations containing details constituting the wrong alleged (see, JPMorgan Chase Bank, N.A. v. Hall, 122 AD3d 576, 996 NYS2d 309 [2d Dept., 2014]).

Concerning defendant Bordeaux the Complaint alleges that "Levitin also had a relationship with Bordeaux Capital, LLC, and arranged for the issuance of the aforesaid promissory note which encumbered Weinstein's previously unencumbered property" (see, Verified Complaint ¶ 29). Again in paragraph 33 of the Verified Complaint it is alleged that Bordeaux entered into a promissory note with the plaintiff "without any due diligence on their part, and without seeking any information from Weinstein, and at a time when Weinstein was infirm and could not possessed [sic] of the capacity to enter into an arm's length transaction" (id). The next paragraph of the Verified Complaint states that "Levitin and Bordeaux Capital, LLC secreted and failed to disclose the nature of their relationship with one another to Weinstein" (id at ¶ 34).

Further, the Verified Complaint asserts that "as a result of the secret relationship between Levitin and Bordeaux Capital, Bordeaux Capital entered into the Promissory Note with Weinstein" (id at

¶ 35). The Verified Complaint further alleges that "Bordeaux Capital LLC acted in concert with the Levitin defendants to enter into an unnecessary Promissory Note when Weinstein was in a hospital ICU, at an exorbitant rate of interest..." (id at ¶ 83).

However, these allegations do not support a claim of fraud. Specifically, the Verified Complaint does not allege any misrepresentation made by Bordeaux that was relied upon by the plaintiff. The plaintiff merely alleges in conclusory fashion that fraud took place and that Bordeaux participated thereby, however, the Verified Complaint does not elaborate upon any statements that were made by Bordeaux in any manner at all or any reliance by the plaintiff. Of course, fraud cannot be established by mere innuendo or conjecture (Davidson v. Perls, 42 Misc3d 1205(A), 983 NYS2d 282 [Supreme Court New York County 2013]). Thus, without a specific allegation of a misrepresentation of a material fact, scienter, reliance and injury, no cause of action for fraud can be made (260 Mamaroneck Avenue LLC v. Guaraglia, 172 AD3d 661, 97 NYS3d 521 [2d Dept., 2019]). Therefore, the motion seeking to dismiss the fraud claim is granted.


Turning to the motion seeking to dismiss the cause of action for unjust enrichment, it is well settled that a claim of unjust enrichment is not available when it duplicates or replaces a conventional contract or tort claim (see, Corsello v. Verizon New

York Inc., 18 NY3d 777, 944 NYS2d 732 [2012]). As the court noted "unjust enrichment is not a catchall cause of action to be used when others fail" (id). Moreover, unjust enrichment is usually reserved for cases where though the defendant committed no wrongdoing has received money to which he or she is not entitled (Corsetto, supra) a truism inapplicable in this case. In this case, Bordeaux did not become enriched by the scheme, on the contrary it delivered the sums and none of the sums have been repaid. Thus, the Verified Complaint does not establish a claim for unjust enrichment as to Bordeaux and consequently, Bordeaux's motion dismissing the two causes of action against it is hereby granted.

So ordered.

ENTER:

DATED: December 16, 2019  
Brooklyn N.Y.

  
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Hon. Leon Ruchelsman  
JSC

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 KINGS COUNTY CLERK  
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