

**Apteka RX, Inc. v La Fe Pharm. Corp.**

2021 NY Slip Op 30027(U)

January 6, 2021

Supreme Court, New York County

Docket Number: 652770/2020

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 14

Justice

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INDEX NO. 652770/2020

APTEKA RX. INC., DIN PHARMACY CORP.,

MOTION DATE 12/23/2020

Plaintiff,

MOTION SEQ. NO. 001

- v -

LA FE PHARMACY CORP., RV PHARMACY CORP., JUAN HIDALGO

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19

were read on this motion to/for DISMISS

The motion by defendants to dismiss the third and fourth causes of action in plaintiffs' complaint is granted.

Background

Plaintiffs operate retail pharmacies in Manhattan and allege that defendants (and their sole shareholder, defendant Hidalgo) run pharmacies in the Bronx. They claim that plaintiff Din Pharmacy reached an agreement to purchase the corporate defendants. Plaintiffs allege that prior to reaching an agreement, defendant Hidalgo told a non-party who was negotiating on plaintiffs' behalf that defendant La Fe Pharmacy had been the subject of an audit from CVS Caremark.

Plaintiffs contend that CVS began taking back money that was erroneously sent to La Fe Pharmacy and there was a suspicion that CVS would terminate La Fe Pharmacy's participation in the CVS program. They claim they wanted to hold quick closings for the purchase of the pharmacies prior to CVS' potential termination of its contract with La Fe Pharmacy. However, according to plaintiffs, defendants delayed the closings. Also, La Fe Pharmacy began

experiencing cash flow problems, leading to issues with payroll and the ability to order from suppliers. Plaintiffs allege that in an effort to finalize the closings, plaintiff Apteka made a series of payments to the corporate defendants to help with outstanding debts and to address any cash flow issues. They claim they gave the money to get the transaction done.

However, defendant did not go through with the closing and plaintiffs want the money back. They claim that defendant Hidalgo acknowledged in writing that La Fe Pharmacy owes nearly \$400,000 to Apteka. Plaintiff brings four causes of action against defendants including a breach of contract action against Hidalgo and La Fe Pharmacy, a breach of contract action against Hidalgo and RV Pharmacy, a fraud claim against the defendants and unjust enrichment.

Defendants move to dismiss the fraud and unjust enrichment claims. They claim that the unjust enrichment claim is duplicative of the breach of contract claims and that plaintiff has not pled that there was a fiduciary relationship. With respect to the fraud claim, defendants argue that it essentially amounts to another breach of contract claim and it cannot be based on the failure to perform under a contract. They assert that the actionable conduct is not collateral to the contract itself.

In opposition, plaintiffs argue that their unjust enrichment claim is valid. They insist that they have properly pled the elements of this claim and that they need not elect their remedy at the pleading stage. Plaintiffs contend that defendants have not conceded the validity and enforceability of any contracts. Plaintiffs also insist they have asserted facts collateral to the contract to support their fraud claim. They insist that defendants made multiple representations to induce plaintiffs into making financial payments to facilitate the anticipated closings for the purchase of the defendant pharmacies. Plaintiffs claim these assertions were false and the closing never happened.

In reply, defendants emphasize that the promise to pay back the money advanced by plaintiffs is nothing more than the contractual promise of payment and therefore duplicative of the contract cause of action. They also contend the unjust enrichment claim merely repeats the allegations in the breach of contract claim.

### **Discussion**

“On a CPLR 3211(a)(7) motion to dismiss for failure to state a cause of action, the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true. Further, on such a motion, the complaint is to be construed liberally and all reasonable inferences must be drawn in favor of the plaintiff” (*Alden Global Value Recovery Master Fund L.P. v Key Bank Natl. Assoc.*, 159 AD3d 618, 621-622, 74 NYS3d 559 [1st Dept 2018] [internal quotations and citations omitted]).

### **Unjust Enrichment**

“The basis of a claim for unjust enrichment is that the defendant has obtained a benefit which in ‘equity and good conscience’ should be paid to the plaintiff. In a broad sense, this may be true in many cases, but unjust enrichment is not a catchall cause of action to be used when others fail. It is available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff. Typical cases are those in which the defendant, though guilty of no wrongdoing, has received money to which he or she is not entitled. An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim” (*Corsello v Verizon New York, Inc.*, 18 NY3d 777, 790, 944 NYS2d 732 [2012]).

Here, the Court finds that the unjust enrichment claim is duplicative and is dismissed. The allegations in the complaint for this cause of action merely repeat the previous claims in the

complaint (*see* NYSCEF Doc. No. 2, ¶¶ 74-76). And those allegations assert that defendants promised to repay any money advanced by plaintiffs at the closings. That conduct is clearly covered in the first and second causes of action which seek recovery based on those promises. The Court finds that the unjust enrichment claim is a “catchall cause of action,” which is forbidden under *Corsello*. While the Court recognizes that plaintiffs need not elect their remedies at the pleadings stage, that does not mean this claim survives. It is simply duplicative of the first two causes of action.

### **Fraud**

“[A] fraud claim that arises from the same facts as an accompanying contract claim, seeks identical damages and does not allege a breach of any duty collateral to or independent of the parties' agreements is subject to dismissal as “redundant of the contract claim. . . Thus, where a fraud claim was supported by allegations that the defendants had misrepresented their intentions with respect to the manner in which they would perform their contractual duties, we dismissed the fraud claim as duplicative of the plaintiffs' contract claim because the fraud claim was based on the same facts that underlie the contract cause of action, was not collateral to the contract, and did not seek damages that would not be recoverable under a contract measure of damages” (*Cronos Group Ltd. v XComIP, LLC*, 156 AD3d 54, 62-63, 64 NYS3d 180 [1st Dept 2017] [internal quotations and citations omitted]).

The Court finds that the fraud cause of action is based on the same facts as the contract claims (the first and second causes of action). The fraud cause of action essentially alleges the failure to fulfill the contractual promise to repay the money advanced by plaintiff. Calling the failure intentional does not transform it into a fraud claim. The facts alleged in this case set forth a classic breach of contract scenario. Plaintiffs assert that they had a deal to buy pharmacies,

information was discovered about the lack of financial health of the pharmacies, money was advanced by plaintiffs to hasten the closing and defendants failed to complete the transactions or pay the advanced money back. Nothing in that situation suggests fraud.

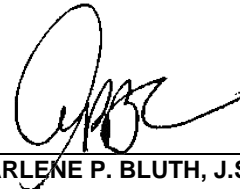
Accordingly, it is hereby

ORDERED that the motion by defendants to dismiss the third (fraud) and fourth (unjust enrichment) causes of action is granted and these claims are severed and dismissed and defendants are directed to answer the remaining portions of the complaint pursuant to the CPLR.

Conference: April 7, 2021.

1/06/2021

DATE



ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE