

<b>Cole v Evans</b>
2021 NY Slip Op 31821(U)
May 27, 2021
Supreme Court, Kings County
Docket Number: 503922/21
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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SAMMIE COLE,

Plaintiff,

Decision and order

- against -

Index No. 503922/21

LORRAINE EVANS,

Defendant,

May 27, 2021

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PRESENT: HON. LEON RUCHELSMAN

The defendant has moved seeking to dismiss the complaint pursuant to CPLR §3211 on the grounds the complaint fails to state any cause of action. 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 complaint alleges the parties maintained a relationship together and that they were domestic partners and that therefore the plaintiff added the defendant to his bank account. The complaint alleges the defendant took over thirty thousand dollars that belonged to the plaintiff. The complaint has asserted causes of action for breach of contract, conversion, unjust enrichment and fraud. The defendant has now moved seeking to dismiss the complaint arguing the complaint does not allege any cause of action.

Conclusions of Law

It is well settled that upon a motion to dismiss the court

must determine, accepting the allegations of the complaint as true, whether the party can succeed upon any reasonable view of those facts ( Davids v. State, 159 AD3d 987, 74 NYS3d 288 [2d Dept., 2018]). Further, all the allegations in the complaint are deemed true and all reasonable inferences may be drawn in favor of the party ( Dunleavy v. Hilton Hall Apartments Co., LLC, 14 AD3d 479, 789 NYS2d 164 [2d Dept., 2005]).

It is further well settled that to succeed upon a claim of breach of contract the plaintiff must establish the existence of a contract, the plaintiff's performance, the defendant's breach and resulting damages ( Harris v. Seward Park Housing Corp., 79 AD3d 425, 913 NYS2d 161 [1<sup>st</sup> Dept., 2010]). Moreover, the existence of an oral agreement is generally a question of fact which cannot be summarily determined on a motion to dismiss ( see, Martin v. Cohen, 17 Misc3d 1116 (A), 851 NYS2d 64 [Supreme Court Suffolk County 2007]).

However, the complaint in this case does not establish the existence of any contract at all. The complaint states that the plaintiff added the defendant's name to his bank account and that she withdrew funds and that "defendant wrongfully and without justification breached an oral contract by refusing to return said monies" (Complaint, ¶13). However, the complaint does not explain the nature of the alleged oral contract. The complaint does not describe the offer, acceptance or the consideration for

such contract. It must be accepted as true that plaintiff added the defendant to his bank account, however, that does not create any contract at all. Therefore, the motion seeking to dismiss the first count is granted.

The second claim is for conversion. It is well settled that to establish a claim for conversion the party must show the legal right to an identifiable item or items and that the other party has exercised unauthorized control and ownership over the items (Florenti v. Central Emergency Physicians, PLLC, 305 AD2d 453, 762 NYS2d 402 [2d Dept., 2003]). Further, a conversion does not occur until the owner makes a demand of a return of the property and the one in possession refuses (Matter of Asch, 164 AD3d 787, 83 NYS3d 307 [2d Dept., 2018]). Paragraph 12 of the Complaint states that "Plaintiff has demanded that defendant return to the plaintiff the said monies mentioned above but she has refused, and continues to refuse, to return the money" (id). The defendant counters that pursuant to the rules for joint accounts she had the authority to withdraw such funds. However, where sufficiently identifiable funds are withdrawn by one co-tenant of a bank account without the other co-tenants consent then a claim for conversion may be proper (Grgurev v. Licul, 229 F.Supp3d 267 [S.D.N.Y. 2017]). There are questions as to the precise nature of the addition of the defendant to the bank account and whether such account was identifiable giving rise to a conversion claim.

Thus, conversion is properly pled and the motion to dismiss this claim is denied.

The next claim is 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). Since the plaintiff has already pled a conversion claim the unjust enrichment claim is duplicative and the motion to dismiss this claim is granted.

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]). First, the allegations are entirely conclusory merely noting that the defendants committed fraud. Thus, the complaint alleges in conclusory fashion that the defendant "exploited the trust that plaintiff had developed to fraudulently induce

plaintiff to place her name on said account" (see, Complaint, ¶42). However, no facts whatsoever are presented detailing the misrepresentations. The complaint does not provide any accompanying information such as the content of the material misrepresentations, when they were made, in what context they were made and how such statements were misrepresentations and how there was reliance upon them. Thus, pursuant to CPLR §3016(b) to plead fraud the complaint must "sufficiently detail the alleged conduct" and contain fact that "are sufficient to permit a reasonable inference of the alleged conduct" (Pludeman v. Northern Leasing Systems Inc., 10 NY3d 486, 860 NYS2d 422 [2010]). The complaint in this case does not contain any facts supporting allegations of fraud. The allegations merely contain conclusions that fraud was committed without explaining, with the detail required, how such fraud occurred. Thus, a complaint that alleges fraud "absent specific and detailed allegations establishing a material misrepresentation of fact, knowledge of falsity or reckless disregard for the truth, scienter, justifiable reliance, and damages proximately caused thereby, is insufficient to state a cause of action for fraud" (Old Republic National Title Insurance Company v. Cardinal Abstract Corp., 14 AD3d 678, 790 NYS2d 143 [2d Dept., 2005]).

However, the complaint does not elaborate upon any material misrepresentation of fact and how any such misrepresentation was

relied upon by the plaintiff. The mere conclusory statement that a fraud was committed is woefully insufficient to allege any fraud.


The fifth cause of action, allegations of fraud by continuing misrepresentations about returning the money taken suffers from the same conclusory and insufficient factual allegations. Specifically, the complaint never explains the nature of the misrepresentations, the precise content of the misrepresentations and how such misrepresentations were relied upon by the plaintiff. The complaint does allege that the defendant committed fraud by "falsely representing that they would promptly return the funds and use the funds for plaintiff's use" (see, Complaint, ¶37). First, that is not a material misrepresentation of fact and cannot give rise to a fraud claim. Even if that statement was a misrepresentation of a fact it lacks the necessary specificity that must accompany all fraud claims. Since as noted the allegation is not specific it does not establish, even at this juncture, any claim of fraud.

Therefore, based on the foregoing, all the causes of action except for conversion are dismissed.

So ordered.

ENTER:

DATED: May 27, 2021  
Brooklyn N.Y.

  
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Hon. Leon Buchelsman  
JSC