Sklarin v Abayev
2021 NY Slip Op 32902(U)
December 23, 2021
Supreme Court, New York County
Docket Number: Index No. 656940/2020
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 42

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DANIEL SKLARIN, DANIEL SKLARIN TRADING CO., INC., and CHRIS MORRIS,

Plaintiffs,

- v -

ALEXANDER ABAYEV, DAVID SUISSA, NEW DIAMOND CONNECTION CORP., and DAJU, INC.,

Defendants.

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INDEX NO.	656940/2020
MOTION DATE	10/11/2021, 10/11/2021
MOTION SEQ. NO.	001 002

DECISION + ORDER ON MOTION

HON. NANCY BANNON:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 18, 20, 21, 22, 23, 24, 25, 26, 27, 36, 39
were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 12, 13, 14, 15, 16, 17, 19, 28, 29, 30, 31, 32, 33, 34, 35, 37, 38, 40
were read on this motion to/for DISMISS.

I. INTRODUCTION

In this action arising from, *inter alia*, the sale of an allegedly stolen diamond, the defendants Alexander Abayev (Abayev) and New Diamond Connection Corp. (New Diamond, and together with Abayev, the Abayev Defendants) move pursuant to CPLR 3211(a)(1), (a)(7), and CPLR 3016(b) to dismiss the amended complaint (SEQ 001). The defendants David Suissa (Suissa) and Daju, Inc. (Daju, and together with Suissa, the Suissa Defendants), separately move pursuant to CPLR 3211(a)(1), (a)(5), (a)(7), and CPLR 3016(b) to dismiss the amended complaint (SEQ 002). The plaintiffs oppose the motions and cross-move on each of them for leave to file a second amended complaint (SEQ 001, 002). Only the Suissa Defendants oppose the plaintiffs' cross-motion.

For the following reasons the defendants' motions are granted in part and the plaintiffs' cross-motions are granted in part.

II. BACKGROUND

The plaintiffs allege in the amended complaint that in January of 2016, the defendants sold a stolen diamond they had previously purchased from nonparty Alexander Ekstra (Ekstra) to the plaintiffs for $146,706.00. The plaintiffs aver that the defendants knew or should have known that the diamond was stolen because the price they paid for it was "too low" and "Ekstra needed cash and offered no explanation as to the source of the diamond." The plaintiffs further contend that the defendants acted in concert with Ekstra to violate New York's anti-money laundering statute. Specifically, the plaintiffs state that Ekstra, who was "known as a jewelry repair person," would remove high value diamonds from expensive pieces of jewelry entrusted to him for repair and replace the diamonds with fake ones. Daju would then pay Ekstra cash for the diamonds and Abayev would "search out other purchasers and resell the stolen merchandise to unsuspecting merchants and customers."

On December 10, 2020, the plaintiffs commenced this action by filing of the summons and complaint. On February 4, 2021, the plaintiffs filed the amended complaint, wherein they assert seven claims based on the foregoing allegations sounding in breach of warranty of title, rescission, fraud, unjust enrichment, breach of contract, breach of implied covenant of good faith and fair dealing, and civil RICO. The defendants subsequently moved to dismiss, arguing, *inter alia*, that the plaintiffs' contractual and quasi-contractual claims are time-barred and that the plaintiffs' fraud and racketeering claims are inadequate as a matter of law. The plaintiffs cross-moved to file a second amended complaint reasserting their claims for fraud and unjust

enrichment and adding new claims sounding in negligent misrepresentation, equitable fraud, and mutual mistake.

III. DISCUSSION

A. Defendants' Motions to Dismiss

As a preliminary matter, in their cross-motions to amend, the plaintiffs effectively seek to withdraw their claims sounding in breach of contract, rescission, breach of warranty of title, breach of implied covenant of good faith and fair dealing, and civil RICO by declining to assert them in the proposed second amended complaint annexed to the plaintiffs' moving papers. Indeed, counsel confirmed that at oral argument. The court permits such claims to be withdrawn without prejudice. The portion of the defendants' motions that seeks dismissal of such claims is therefore denied without prejudice as academic.

However, the plaintiffs do not withdraw their fraud or unjust enrichment claims. On a motion to dismiss for failing to state a cause of action under CPLR 3211(a)(7), the pleading is to be afforded a liberal construction and the court should accept as true the facts alleged in the complaint, accord the pleading the benefit of every reasonable inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory. See Hurrell-Harring v State of New York, 15 NY3d 8 (2010); Leon v Martinez, 84 NY2d 83 (1994).

The defendants correctly contend that the amended complaint fails to state a fraud claim. "The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages.'" Epiphany Community Nursery Sch. v Levey, 171 AD3d 1, 8 (1st Dept. 2019) (quoting Eurycleia Partners, LP v Seward & Kissel, LLP, 12 NY3d 553, 559 [2009]). To adequately plead the knowledge element, a plaintiff must allege more than a "conclusory

statement of intent." See, e.g., Zanett Lombardier, Ltd. v Maslow, 29 AD3d 495, 496 (1st Dept. 2006) (citation omitted). Moreover, "[i]t is well settled that a cause of action for fraud will not arise when the only fraud charged relates to a breach of contract." Gordon v Dino De Laurentiis Corp., 141 AD2d 435, 436 (1st Dept. 1988). "In the context of a contract case, the pleadings must allege misrepresentations of present fact, not merely misrepresentations of future intent to perform under the contract, in order to present a viable claim." Wyle Inc. v ITT Corp., 130 AD3d 438, 439 (1st Dept. 2015).

The amended complaint does not plead a specific misrepresentation of a material fact to the plaintiffs by any of the defendants or justifiable reliance by the plaintiffs on any misrepresentation. Nor do the facts underlying the plaintiffs' fraud claim differ in any material way from the plaintiffs' breach of contract and breach of warranty claims. Moreover, the amended complaint's conclusory assertion that the defendants "are guilty of fraud and deceit" because they "knew or should have known a total lack of regard for the truth [sic] that the subject diamond was stolen" is plainly insufficient to satisfy the statutory pleading requirements imposed by CPLR 3016(b). "Allegations of fraud should be dismissed as insufficient where the claim is unsupported by specific and detailed allegations of fact in the pleadings." Callas v Eisenberg, 192 AD2d 349 (1st Dept. 1993); see CPLR 3016(b).

The defendants also establish that the amended complaint's unjust enrichment claim is subject to dismissal insofar as it is duplicative of the plaintiff's now-withdrawn contractual claims. See Clark-Fitzpatrick v Long Island R. Co., 70 NY2d 382, 388 (1987); Hagman v Swenson, 149 AD3d 1 (1st Dept. 2017). The unjust enrichment claim pleads the same facts, and seeks the damages, as are alleged in support of the plaintiffs' breach of contract and breach of warranty claims.

B. Plaintiffs' Cross-Motions to Amend

Leave to amend pleadings is freely given absent prejudice or surprise. See CPLR 3025 (b); Cherebin v Empress Ambulance Serv., Inc., 43 AD3d 364, 365 (1st Dept 2007). "Nevertheless, a court must examine the merit of the proposed amendment in order to conserve judicial resources." 360 West 11th LLC v ACG Credit Co. II, LLC, 90 AD3d 552, 553 (1st Dept 2011). Therefore, "leave to amend will be denied where the proposed pleading fails to state a cause of action, or is palpably insufficient as a matter of law." Davis & Davis v Morson, 286 AD2d 584, 585 (1st Dept 2001) (internal citations omitted).

The proposed second amended complaint reasserts the plaintiffs' fraud claim as two causes of action and makes supplemental factual allegations regarding the alleged fraud. The proposed pleading specifies that Daju purchased the subject diamond from Ekstra with cash in the sum of $99,000.00, Ekstra provided no bill of sale or receipt, and Daju prepared a "reverse invoice" memorializing the transaction, which the plaintiffs state is "unheard of in the industry." The plaintiffs contend that those facts "demonstrated Ekstra's desire to have no linkage to" the diamond and suggest that the Suissa Defendants would have been aware of the illegal origins of the diamond. The proposed pleading further avers that Abayev, acting as Daju's "agent of sale" in the subsequent transaction with the plaintiffs, told the plaintiffs that the diamond he had to sell "was high value and 'legit,'" and that such representation was also "implicit in the sale." The plaintiffs state that while they "may have sold the subject diamond to a third party" for an undisclosed sum, "they have subsequently had to return a significant portion of said proceeds."

Initially, the proposed pleading identifies a material misrepresentation of fact only with respect Abayev's purported statement to the plaintiffs that the diamond was "legit." The plaintiffs admit they "do[] not allege Suissa himself made any direct statements to [the]

[p]laintiff[s]" but seek to hold the Suissa Defendants liable solely based on their relationship with the Abayev Defendants. Nonetheless, it is well-established that a principal who gives his agent authority to solicit a sale may be held liable for the agent's fraudulent conduct in obtaining the sale. See, e.g., Friedman v New York Tel. Co., 256 NY 392 (1931); 1058 Corp. v Ergas, 174 AD2d 415 (1st Dept. 1991); Angerosa v White Co., 248 AD 425 (4th Dept. 1936). While there is some indication in the parties' moving papers that Abayev merely acted as a broker to the Suissa Defendants, authorized to negotiate the diamond sale but not to actually sell or convey the diamond so as to bind the Suissa Defendants contractually, (see 1058 Corp. v Ergas, supra), such considerations are outside of the corners of the plaintiffs' pleading and inappropriate at this early stage in the proceedings. The proposed pleading sufficiently alleges that the Suissa Defendants are liable for Abayev's alleged misrepresentation because they had a principal-agent relationship with Abayev.

As to Abayev's knowledge that his statement was false, the plaintiffs' allegations are razor thin. Essentially, the plaintiffs contend that Abayev knew the diamond was not, in fact, "legit" because of his relationship with the Suissa Defendants, and that the Suissa Defendants knew they had purchased a stolen diamond because Ekstra asked for cash payment and did not provide a receipt for the transaction. However, at the pre-discovery stage, "actual knowledge need only be pleaded generally," as "a plaintiff lacks access to the very discovery materials which would illuminate a defendant's state of mind." Oster v Kirschner, 77 AD3d 51, 55 (1st Dept. 2010). at 55; see William Doyle Galleries, Inc. v Stettner, 167 AD3d 501 (1st Dept. 2018). The plaintiffs' allegations are sufficient in this regard.

The plaintiffs' allegations with regard to justifiable reliance and damages are also sufficient to support the plaintiffs' fraud claim at the pleading stage. The plaintiffs contend that

they purchased the diamond based on Abayev's representations that it was "legitimate" and had no "issues." While it is not clear what exactly that means or why individuals with decades of industry experience such as the plaintiffs would rely on such seemingly vague assurances, those questions are more appropriately considered after the completion of discovery. Similarly, that the defendants raise doubts about the amount of damages actually incurred by the plaintiffs does not warrant dismissal of the plaintiffs' fraud claim outright.

Finally, the plaintiffs' fraud claim, as pleaded in the proposed second amended complaint, is not duplicative of their contractual claims. The alleged fraud involved a misrepresentation of present fact collateral to the contract, rather than mere misrepresentation of intent to perform in the future. See VXI Lux Holdco, S.A.R.L. v SIC Holdings, LLC, 194 AD3d 628 (1st Dept. 2021); MBIA Ins. Corp. v Countrywide Home Loans, Inc., 87 AD3d 287 (1st Dept. 2011); First Bank of Americas v Motor Car Funding, Inc., 257 AD2d 287 (1st Dept. 1999). Accordingly, the plaintiffs are granted leave to amend insofar as they seek to plead a revised fraud claim.

The proposed second amended complaint also repleads the plaintiffs' unjust enrichment claim with the addition of the assertion that there was no valid contract between the parties. The plaintiffs' assertion is premised on their pleading, in the alternative to their fraud-based claims, that all of the parties were mistaken in their belief that the defendants had a "legal right to sell the subject diamond and pass good title to it to the plaintiffs." Thus, the plaintiffs contend, there "was no meeting of the minds." The plaintiffs' revised unjust enrichment claim is entirely duplicative of their proposed claim for equitable relief based on the doctrine of mutual mistake, discussed in greater detail below. Accordingly, the branch of the plaintiffs' cross-motions that seeks to assert an amended unjust enrichment claim is denied.

The proposed second amended complaint asserts new causes of action sounding in negligent misrepresentation, equitable fraud, and mutual mistake.

"The elements of a claim for negligent misrepresentation are: '(1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information.'" MatlinPatterson ATA Holdings LLC v Federal Express Corp., 87 AD3d 836, 840 (1st Dept. 2011) (quoting JAO Acquisition Corp. v Stavitsky, 8 NY3d 144, 148 [2007]). In a commercial transaction such as the one presented in this action, "liability for negligent misrepresentation has been imposed only on those persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified." Kimmel v Schaefer, 89 NY2d 257, 263 (1996).

The proposed pleading is devoid of any factual allegations that would permit an inference that the defendants were in a special position of confidence and trust with the plaintiffs. Rather, the plaintiffs make clear that they entered into an arms-length commercial transaction for the sale of a diamond with parties of equal sophistication in the diamond industry. This is insufficient to state a claim sounding in negligent misrepresentation. See Sabre Intern. Sec., Ltd. v Vulcan Capital Management, Inc., 95 AD3d 434 (1st Dept. 2012); Parisi v Metroflag Polo, LLC, 51 AD3d 424 (1st Dept. 2008). The branch of the plaintiffs' cross-motions seeking to add a negligent misrepresentation claim is therefore denied.

The plaintiffs' proposed cause of action sounding in "equitable fraud" is mislabeled; it is, in effect, a cause of action for equitable rescission based on fraud. A claim for equitable rescission based on fraud differs from a claim for damages on the same ground inasmuch as

proof of *scienter* and pecuniary loss is not needed. See Board of Mgrs. of the Soundings Condominium v Foerster, 138 AD3d 160 (1st Dept. 2016); D'Angelo v Hastings Oldsmobile, 89 AD2d 785 (4th Dept. 1982). "Even an innocent misrepresentation will support rescission." Board of Mgrs. of the Soundings Condominium v Foerster, supra at 164 (citing Seneca Wire & Mfg. Co. v Leach & Co., 247 NY 1, 8 [1928]). However, the equitable remedy of rescission is not available where there is an adequate legal remedy, and plaintiff does not explain why damages—a legal remedy—would be insufficient." Empire Outlet Builders LLC v Constr. Res. Corp. of New York, 170 AD3d 582, 583 (1st Dept. 2019); see Nelson v Rosenkranz, 166 AD3d 558 (1st Dept. 2018). Moreover, rescission is not appropriate where substantial restoration of the *status quo* is not possible. See Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher, 299 AD 2d 64 (1st Dept. 2002).

The plaintiffs' proposed cause of action sounding in "mutual mistake" similarly seeks, in effect, equitable rescission based on mutual mistake. "Generally, a contract entered into under a mutual mistake of fact is voidable and subject to rescission." Gould v Board of Educ. of Sewanhaka Cent. High School Dist., 81 NY2d 446, 453 (1993) (citations omitted). "The mutual mistake must exist at the time the contract is entered into and must be substantial. The idea is that the agreement as expressed, in some material respect, does not represent a 'meeting of the minds' of the parties." Id.; see Eisenberg v Hall, 147 AD3d 602 (1st Dept. 2017). Again, however, rescission is unavailable where an adequate legal remedy exists and where restoration of the *status quo* is impossible. Moreover, the doctrine of mutual mistake "may not be invoked by a party to avoid the consequences of its own negligence." P.K. Development, Inc. v Elvem Development Corp., 226 AD2d 200, 201 (1996).

The plaintiffs' cross-motions are granted to the extent that the plaintiffs seek to add the foregoing equitable claims to their pleading. The proposed amendments state causes of action and are not "palpably insufficient as a matter of law." Davis & Davis v Morson, 286 AD2d 584, 585 (1st Dept 2001) (internal citations omitted).

The Abayev Defendants do not oppose the plaintiffs' application and therefore raise no objection to the addition of these claims. The Suissa Defendants' objections are limited to their assertions that a "heightened duty" is required to seek fraud-based rescission and that a theory of mutual mistake is inconsistent with the plaintiffs' fraud-based allegations. The Suissa Defendants do not invoke any controlling authority in support of the first assertion. As to the second, "[i]t is well established that a party may plead alternative theories, even on the basis of allegations that contradict each other" at this early stage in the proceedings. Raglan Realty Corp. v Tudor Hotel Corp., 149 AD2d 373, 374 (1st Dept. 1989); see CPLR 3014; Man Advisors, Inc. v Selkoe, 174 AD3d 435 (1st Dept. 2019). While there may be some question as to whether the *status quo* can be restored in light of the plaintiffs' sale of the subject diamond to a third party, no defendant has raised any objection in that regard.

IV. CONCLUSION

Accordingly, it is

ORDERED that the defendants' motions to dismiss the amended complaint are granted to the extent that the plaintiffs' claims sounding in fraud unjust enrichment, as asserted in the amended complaint, are dismissed, and the remainder of the defendants' motions is denied without prejudice as academic; and it is further

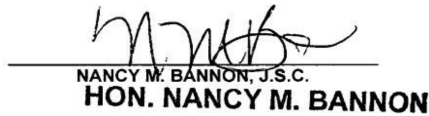
ORDERED that the plaintiffs' cross-motions to file a second amended complaint are granted to the extent that (1) the plaintiffs' claims sounding in breach of contract, rescission, breach of warranty of title, breach of implied covenant of good faith and fair dealing, and civil RICO, as asserted in the amended complaint, are permitted to be withdrawn without prejudice, and (2) the plaintiffs are permitted to add their proposed claims labeled (i) fraud, in the form annexed to the plaintiffs' moving papers as the first and second causes of action of the proposed second amended complaint, (ii) equitable fraud, in the form annexed to the plaintiffs' moving papers as the sixth cause of action of the proposed second amended complaint, and (iii) mistake, in the form annexed to the plaintiffs' moving papers as the third cause of action of the proposed second amended complaint, and the plaintiffs' cross-motions are otherwise denied; and it is further

ORDERED that the plaintiffs shall serve and file their second amended complaint, comporting with this decision and order, within 14 days; and it is further

ORDERED that the defendants shall file answers to the second amended complaint within 30 days of service of the second amended complaint; and it is further

ORDERED that the parties shall appear for a preliminary conference, to be conducted via Microsoft Teams, on March 17, 2022, at 11 a.m.

This constitutes the Decision and Order of the court.



DATED: December 23, 2021

HON. NANCY M. BANNON