

ALP, Inc. v Moskowitz
2022 NY Slip Op 32995(U)
September 6, 2022
Supreme Court, New York County
Docket Number: Index No. 652326/2019
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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ALP, INC., LIBRA MAX,

Plaintiff,

- v -

LAWRENCE MOSKOWITZ, BENDER CICCOTTO &
COMPANY CPA'S, LLP, ROBERT FRANK, ROBERT J.
FRANK, GENE LUNTZ, LAUREN MOSKOWITZ, ADAM
MAX,

Defendant.

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INDEX NO. 652326/2019

MOTION DATE N/A

MOTION SEQ. NO. 012

**DECISION + ORDER ON
MOTION**

HON. NANCY M. BANNON:

The following e-filed documents, listed by NYSCEF document number (Motion 012) 633, 634, 635, 636, 641, 645, 647, 649

were read on this motion to/for DISMISS.

I. INTRODUCTION

In this action wherein the plaintiffs, ALP, Inc. (ALP), and its President, Libra Max (Libra), allege, *inter alia*, causes of action against the defendants sounding in conversion, rescission of certain contracts, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and replevin of approximately 23,300 pieces of valuable art known as “Peter’s Keepers,” which were created by the iconic American painter Peter Max, the defendants Bender Ciccotto & Company CPA’s, LLP (Bender), Robert M. Frank (Frank), and Robert J. Frank (Frank Jr., and together with Bender and Frank, the Bender defendants) move pursuant to CPLR 3211(a)(7) to dismiss the amended complaint as against them for failure to state a cause of action. The plaintiffs oppose the motion. The motion is granted in part.

II. BACKGROUND

A complete recitation of the allegations contained in the amended complaint in this action is contained in this court's order dated October 30, 2020. Briefly, the gravamen of the plaintiffs' claims is that the defendants took control of and conspired to loot ALP beginning in 2012, when Adam Max (Adam), Libra's brother, became ALP's CEO and President. As relevant to the instant motion, Bender was an accounting firm that entered into a consulting agreement with ALP under Adam's leadership on or about May 30, 2012. However, according to the plaintiffs, the consulting agreement was nothing more than a ruse to allow Bender to access ALP's books and records to facilitate a scheme by its managing partner, Frank, to extract millions in payment from ALP for work Bender did not perform and to assist the other defendants in stealing and selling artwork, including the Peter's Keepers, from ALP's warehouses.

The plaintiffs allege that the Bender defendants delivered fraudulent invoices to collect from ALP exorbitant unsubstantiated fees. Bender collected over \$13 million from ALP between 2012 and 2019. The plaintiffs also state that Frank and Bender, working with Lawrence Moskowitz (Moskowitz), were in *de facto* control of ALP, speaking for Adam at meetings with ALP employees and acting far beyond the responsibilities of a consultant or accountant to actually manage ALP and make corporate decisions on its behalf. These decisions included directing fraudulent payments to Moskowitz and Gene Luntz (Luntz), putting Luntz in charge of management of ALP's sales, and facilitating the unauthorized sale of the Peter's Keepers to Park West Galleries, Inc. (Park West). Frank also allegedly threatened and/or fired those at ALP who might oppose him and, with the other defendants, directed payment to Bender and Moskowitz of hundreds of thousands of dollars in abrogation of resolutions adopted by ALP's board. Frank and Bender further aided Moskowitz by making affirmative written and oral statements to

support Moskowitz's entitlement to repayment of a purported \$500,000.00 loan from Moskowitz to ALP and to an assignment of 10% of any insurance proceeds arising from artwork damaged during Hurricane Sandy. Finally, Frank inserted his son, Frank Jr., a Bender employee, as the *de facto* manager of ALP's warehouse where valuable Peter Max artworks were stored. Frank Jr. purportedly used his role to misappropriate artwork and facilitate the sale of the Peter's Keepers to Park West.

The plaintiffs commenced this action on April 19, 2019, interposing causes of action for, among other things, conversion, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, replevin, and civil conspiracy. By decision and order dated October 30, 2020, the court denied the Bender defendants' motion to compel arbitration pursuant to CPLR 7503(a) and consolidated this action with a related action captioned ALP, Inc. v Park West Galleries, Inc., Index No. 153949/2019, for purposes of discovery and trial. The court also granted the motions of defendants Lawrence Moskowitz, Lauren Moskowitz, and Gene Luntz to dismiss the action to the extent that it dismissed the plaintiff's seventh cause of action for recoupment/setoff. The motions to dismiss were otherwise denied. Thereafter, Lawrence Moskowitz, Lauren Moskowitz, and the plaintiffs entered into a settlement agreement resolving all of the plaintiffs' claims against those defendants.

By decision and order dated April 12, 2022, the Appellate Division, First Department modified the court's October 30, 2020, order to the extent that it, *inter alia*, dismissed the plaintiffs' civil conspiracy cause of action, dismissed in part the conversion, breach of fiduciary duty, and fraud claims as against as against Gene Luntz and dismissed the replevin claim in its entirety as against Gene Luntz.

By decision and order dated June 16, 2022, the Appellate Division, First Department, reversed this court's June 14, 2021, decision, which, *inter alia*, denied defendant Adam Max's motion to dismiss the action as against him. Accordingly, the only defendants remaining in the instant action are the Bender defendants and Gene Luntz.

III. LEGAL STANDARD

When assessing the adequacy of a pleading in the context of a motion to dismiss under CPLR 3211(a)(7), the court's role is "to determine whether [the] pleadings state a cause of action." 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 151-152 (2002). To determine whether a claim adequately states a cause of action, the court must "liberally construe" it, accept the facts alleged in it as true, accord it "the benefit of every possible favorable inference" (*id.* at 152: see Romanello v Intesa Sanpaolo, S.p.A., 22 NY3d 881 [2013]; Simkin v Blank, 19 NY3d 46 [2012]), and determine only 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 motion must be denied if from the pleading's four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." 511 W. 232nd Owners Corp. v Jennifer Realty Co., *supra*, at 152 (internal quotation marks omitted); see Leon v Martinez, *supra*; Guggenheimer v Ginzburg, 43 NY2d 268 (1977). Additionally, CPLR 3013 requires that, with regard to claims sounding in fraud, "[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences or series of transactions or occurrences, intended to be proved."

IV. DISCUSSION1. First Cause of Action - Conversion

To plead a cause of action for conversion, a plaintiff must sufficiently allege that a defendant, intentionally and without authority, assumed or exercised control over the property belonging to someone else, thereby interfering with that person's right of possession. See William Doyle Galleries, Inc. v Stettner, 167 AD3d 501 (1st Dept. 2018). The two key elements to establish a cause of action for conversion are "1) the plaintiff's possessory right or interest in the property, and 2) the defendant's dominion over the property or interference with it, in derogation of the plaintiff's rights." Reif v Nagy, 175 AD3d 107, 118 (1st Dept. 2019).

ALP has satisfied these elements with respect to Bender and Frank. The amended complaint sufficiently alleges that Frank and his accounting firm extracted funds from ALP to which they are not entitled, based on fraudulent billing practices, and that the money is properly ALP's. The amended complaint also adequately pleads a cause of action for aiding and abetting conversion against each of the Bender defendants inasmuch as each is alleged to be a knowing co-conspirator in the purported fire-sale of the Peter's Keepers to Park West, and against Frank inasmuch as he is alleged to have aided Moskowitz in supporting his fraudulent claim to repayment of a \$500,000.00 loan to ALP and to a 10% assignment of insurance proceeds with regard to damaged Peter Max artwork. See Leve v Itoh & Co. (Am.), 136 AD2d 477 (1st Dept. 1988); see also Weisman, Celler, Spett & Modlin v Chadbourne & Parke, 253 AD2d 721 (1st Dept. 1998). The first cause of action is sustained as against the Bender defendants to the foregoing extent.

However, the first cause of action must be dismissed insofar as it alleges that Frank Jr. aided and abetted any conversion of ALP's funds or assets other than the Peter's Keepers. The

amended complaint does not allege that Frank Jr. had the requisite knowledge of any other conversion of funds or assets so as to support a claim for aiding and abetting conversion. See ALP, Inc. v Moskowitz, 204 AD3d 454, 460 (1st Dept. 2022).

2. Second Cause of Action Declaratory Judgment and Rescission

The second cause of action seeks a declaration that indemnification agreements and various other contracts and agreements signed by Adam are without effect, and rescission of those agreements based upon the theory of fraudulent inducement. The elements of a claim for fraudulent inducement are: 1) a false representation of material fact 2) known by the utterer to be untrue, 3) made with the intention of inducing reliance and forbearance from further inquiry, 4) that is justifiably relied upon, and 5) results in damages. See Schumaker v Mather, 133 NY 590 (1892). Fraudulent inducement must be pleaded with particularity under CPLR 3016(b).

As the court observed in its October 30, 2020, decision and order, the plaintiffs have alleged that Moskowitz and Frank, acting as Bender's principal, induced Adam to sign, *inter alia*, release/indemnity agreements, dated July 28, 2016, immunizing them from liability for actions undertaken at ALP. Specifically, the amended complaint alleges that Moskowitz and Frank controlled ALP's outside general counsel and that, at Moskowitz and Frank's direction, counsel did not disclose to Adam the serious dangers to ALP of signing the numerous agreements that counsel drafted to benefit Moskowitz and Frank. Such agreements included the release/indemnity agreements.

Thus, the plaintiffs have pleaded 1) a false representation by Frank and Bender through in-house counsel, 2) knowledge of its falsity inasmuch as Frank and Bender knew the release/indemnity agreements were not in ALP or Adam's best interest, 3) the intention to induce reliance and forbearance from further inquiry from Adam, 4) justifiable reliance, as the

agreements were submitted to Adam by ALP's in-house counsel, and 5) damages. Further, the plaintiffs' pleadings are sufficiently particularized. At this early stage of the litigation, "plaintiffs are entitled to the most favorable inferences, including inferences arising from the positions and responsibilities of defendants and plaintiffs need only set forth sufficient information to apprise defendants of the alleged wrongs." DDJ Mgmt., LLC v. Rhone Grp. L.L.C., 78 AD3d 442, 443 (1st Dept. 2010) citing Pludeman v Northern Leasing Sys., Inc., 40 AD3d 366 (1st Dept. 2007); see also Bernstein v Kelso & Co., 231 AD2d 314 (1st Dept. 1997).

The second cause of action is therefore sustained as against Bender and Frank.

3. Third Cause of Action - Breach of Fiduciary Duty and/or Aiding and Abetting Breach of Fiduciary Duty

"The elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct." Rut v Young Adult Inst., Inc., 74 AD3d 776, 777 (2nd Dept. 2010). "A cause of action sounding in breach of fiduciary duty must be pleaded with particularity under CPLR 3016(b)." Swartz v Swartz, 145 AD3d 818, 823 (2nd Dept. 2016).

For the reasons explained in the court's October 30, 2020, decision and order, the amended complaint adequately pleads the existence of a fiduciary relationship running from Frank, Bender, Moskowitz, and Luntz to ALP. See Castellotti v Free, 138 AD3d 198 (1st Dept. 2017); Chasanoff v Perlberg, 19 AD3d 635 (2nd Dept. 2005). The Bender defendants' assertion that there can be no fiduciary duty between an accountant or his accounting firm and the company they serve is without merit, as discussed by the court in the same decision. See Nate B. & Frances Spingold Found. v Wallin, Simon, Black & Co., 184 AD2d 464, 466 (1992).

Moreover, in their roles as *de facto* managers of ALP, Frank and Bender allegedly undertook a series of bad acts previously highlighted by the court, including:

(1) exerting control over Adam and making certain that he did whatever they wanted; (2) inserting family members, such as Frank Jr., as manager of ALP's warehouse where valuable Peter Max artworks were stored, who, in turn, misappropriated artwork, facilitated thefts by Moskowitz, Luntz, and Frank of artwork, and was integral in the theft of the Peter's Keepers; (3) directing payments in the hundreds of thousands of dollars to Moskowitz, who never submitted any invoice or back up of any kind, and was, by his own admission, not licensed for the work he was performing on ALP's behalf; (4) causing Adam to sign agreements that purport to release them from all the bad acts they had committed and provide them with indemnification rights; (5) enabling Luntz to act as the manager of ALP's sales and, once in that role, vastly increase business to Park West in order maximize Park West's profits and his own commissions; (6) causing the Peter's Keepers transaction to occur; and (7) firing those who might oppose them and hiring friendly parties in their stead.

According to the plaintiffs, Frank and Bender also extracted millions of dollars from ALP for work they did not perform based on fraudulent invoices. Thus, the plaintiffs sufficiently plead (1) the existence of a fiduciary relationship between ALP and Frank and Bender, (2) misconduct by Frank and Bender, and (3) damages directly caused by the misconduct.

The plaintiffs also sufficiently plead the elements of a claim for aiding and abetting a breach of fiduciary duty against the Bender defendants. "[A] claim for aiding and abetting a breach of fiduciary duty requires: (1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach." Epiphany Cmty. Nursery Sch. v Levey, 171 AD3d 1, 11 (1st Dept. 2019). Here, the amended complaint alleges that Frank and Bender worked in concert with Moskowitz, Luntz, and Park West to consummate the sale of Peter's Keepers to Park West and to allow Moskowitz to collect millions in unauthorized payments from ALP. The amended complaint also sufficiently pleads that Frank Jr. participated in breaches of fiduciary duty by his

father and the other members of the group the plaintiffs have dubbed the “Gang of Five” by facilitating the wrongful sale of Peter’s Keepers to Park West.

However, the plaintiffs fail to sufficiently allege that Frank Jr. knowingly participated in any alleged breaches of fiduciary duties by his co-defendants other than the sale of the Peter’s Keepers at their direction. Thus, the third cause of action is dismissed to the extent that it alleges that Frank Jr. aided and abetted any breach of fiduciary duty other than with respect to the sale of Peter’s Keepers.

4. Fourth Cause of Action - Actual and Constructive Fraud

To plead a cause of action for fraud, a plaintiff must sufficiently allege that the defendant 1) made a material representation that was false; 2) with knowledge of the falsity and intent to deceive the plaintiff; 3) caused the plaintiff’s justifiable reliance on the representation; and, 4) caused damages to be suffered by the plaintiff as a result of the representation. See New York Univ. v Continental Ins., 87 NY2d 308 (1995); J.A.O. Acquisition Corp. v Stavisky, 18 AD3d 389 (1st Dept. 2005); Cohen v Houseconnect Realty, 289 AD2d 277 (2nd Dept. 2001). To plead a cause of action for constructive fraud, the element of knowledge of the falsity of the representation is replaced by a requirement that that the plaintiff allege the existence of fiduciary relationship between the defendant and the plaintiff. See Schoen v Martin, 187 AD2d 253 (1st Dept. 1992).

The amended complaint alleges, *inter alia*, that Frank and Bender affirmatively misrepresented their entitlement to over \$13 million by sending ALP false invoices for work and disbursements not actually performed or incurred. The amended complaint further states that Frank misrepresented to the plaintiffs that Moskowitz was entitled to loan repayment and a 10% commission from insurance proceeds for Peter Max artwork damaged during Hurricane Sandy,

notwithstanding Frank's awareness that Moskowitz was not so entitled. Finally, the amended complaint pleads that Frank and Bender fraudulently represented to Adam, through in-house counsel controlled by Frank, Bender, and Moskowitz, that signing certain release/indemnity agreements was in ALP's best interests, as discussed above. The plaintiffs aver that they relied on the foregoing misrepresentations to the severe financial detriment of ALP. Moreover, as explained above, the plaintiffs sufficiently state that Frank owed them a fiduciary duty based on their position as *de facto* manager of ALP. Accordingly, at this early stage, the plaintiffs state claims for both fraud and constructive fraud against Frank and Bender.

The plaintiffs do not identify any affirmative misrepresentation by Frank Jr. Instead, they state that Frank Jr. had "a duty to disclose the theft of Peter's Keepers and other artwork to Libra and the board because he had superior knowledge of this." "Absent a duty to speak, nondisclosure does not ordinarily constitute fraud." Jolly King Rest., Inc. v Hershey Chan Realty, Inc., 214 AD2d 422, 422 (1st Dept. 1995). The plaintiffs do not attempt to explain why Frank Jr.'s silence should constitute an exception to this rule. More significantly, they do not allege that the sale of the Peter's Keepers was even hidden from ALP or its then-President, Adam. The fourth cause of action is dismissed to the extent it is alleged as against Frank Jr. and against all of the Bender defendants to the extent it arises from the alleged wrongful sale of Peter's Keepers.

5. Fifth Cause of Action – Civil Conspiracy

The fifth cause of action must be dismissed because, as recognized by the Appellate Division, First Department, in its review of the court's October 30, 2020, decision and order, there is no cause of action for conspiracy to commit a tort. ALP, Inc. v Moskowitz, *supra* at 456.

6. Sixth Cause of Action - Replevin

To plead a cause of action for replevin, a plaintiff must sufficiently allege a superior possessory right to property in the defendant's possession. See Reif v Nagy, supra; Pivar v Graduate School of Figurative Art of N.Y. Academy of Art, 290 AD2d 212 (1st Dept. 2002). . See Nissan Motor Acceptance Corp. v Scialpi, 94 AD3d 1067 (2nd Dept. 2012). Replevin may be invoked to recover a unique chattel. See Boyle v Kelly, 42 NY2d 88 (1977); Schrage v Hatzlacha Cab Corp., 13 AD3d 150 (1st Dept. 2004). However, where a plaintiff seeks only the return of "ordinary currency," no replevin claim lies. ALP, Inc. v Moskowitz, supra at 459; see Equitable Life Assur. Soc. of U.S. v Branch, 32 AD2d 59 (2nd Dept. 1969).

Here, the plaintiffs seek from the Bender defendants only the return of monies paid to them in connection with allegedly false invoices. While the plaintiffs also seek the return of the Peter's Keepers, the amended complaint does not allege that the Bender defendants are in possession of such artwork. Accordingly, the sixth cause of action is dismissed.

7. Eighth Cause of Action – Accounting Malpractice

"A party alleging a claim of accountant malpractice must show that there was a departure from the accepted standards of practice and that the departure was a proximate cause of the injury." KBL, LLP v Community Counseling & Mediation Services, 123 AD3d 488, 488 (1st Dept. 2014); see Herbert H. Post & Co. v Sidney Bitterman, Inc., 219 AD2d 214, 223 (1st Dept. 1996); Alskom Realty, LLC v Baranik, 189 AD3d 745, 747 (2nd Dept. 2020).

The amended complaint alleges that Frank and Bender are liable for malpractice not only due to their fraudulent billing practices, but also because they failed to pay ALP's New York City corporate taxes prior to December 2018 to assure that ALP would benefit from the federal deduction for 2018, failed to file ALP's tax returns for three years, and failed to consistently

apply the “open transaction approach” to expenses related to ALP’s insurance claim arising from Hurricane Sandy. The foregoing is sufficient to raise questions as to whether Frank and Bender’s conduct was a departure from professional accounting standards, which is a question that requires expert evidence for its resolution and should not be decided on a motion to dismiss. See Berg v Eisner LLP, 94 AD3d 496, 496 (1st Dept. 2012). The eighth cause of action is sustained.

8. Individual Liability of Frank Jr.

The Bender defendants contend that all claims should be dismissed as against Frank Jr. in his individual capacity because, at all relevant times, he acted in furtherance of his role as an employee of Bender. However, the plaintiffs have sufficiently alleged a basis for the imposition of individual liability at this early juncture inasmuch as they contend that Frank Jr. wrongfully transferred valuable artwork from ALP’s warehouses at his father’s direction for the personal benefit of his father and himself. Such allegations, if true, would support the plaintiffs’ claims that Frank Jr. personally participated in the commission of the torts alleged in this action. See Espinosa v Rand, 24 AD3d 102 (1st Dept. 2005); American Exp. Travel Related Services Co., Inc. v North Atlantic Resources, Inc., 261 AD2d 310 (1st Dept. 1999).

V. CONCLUSION

Accordingly, it is

ORDERED that the motion of defendants Bender Ciccotto & Company CPA’s, LLP, Robert M. Frank, and Robert J. Frank to dismiss the amended complaint is granted to the extent that (1) the first cause of action is dismissed as against Robert J. Frank to the limited extent that it is premised on the allegation that such defendant aided and abetted any conversion of the funds

or assets of ALP, Inc., other than the Peter's Keepers sold to Park West, Inc., (2) the third cause of action is dismissed as against Robert J. Frank to the limited extent that it is premised on the allegation that such defendant aided and abetted any other defendant's breach of fiduciary duty to ALP, Inc., other than as arises from the sale of Peter's Keepers to Park West, Inc., (3) the fourth cause of action is dismissed as against Robert J. Frank in its entirety and as against Bender Ciccotto & Company CPA's, LLP, and Robert M. Frank to the limited extent that it is premised on the allegation that the sale of Peter's Keepers to Park West, Inc., constituted a legal fraud; (4) the fifth and sixth causes of action are dismissed in their entirety, and the motion is otherwise denied.

This constitutes the Decision and Order of the court.

DATED: September 6, 2022



NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON