

Fiorito v Sarcone

2022 NY Slip Op 33266(U)

September 28, 2022

Supreme Court, New York County

Docket Number: Index No. 651344/2019

Judge: Debra A. James

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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. DEBRA A. JAMES PART 59

Justice

-----X

TERRENCE FIORITO,

Plaintiff,

- v -

JOHN A. SARCONE and THE SARCONE LAW FIRM, PLLC,

Defendants.

-----X

INDEX NO. 651344/2019

MOTION DATE 09/25/2020

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59

were read on this motion to/for JUDGMENT - SUMMARY

ORDER

Upon the foregoing documents, it is

ORDERED that to the extent that it seeks summary judgment dismissing the second cause of action for an accounting and the fourth cause of action for fraudulent inducement of contract of the Amended Complaint against each defendant, the motion of defendants is granted; and it is further

ORDERED that to the extent that it seeks summary judgment dismissing the first cause of action for breach of the Settlement Agreement and the third cause of action for abuse of process of the Amended Complaint as against defendant John A. Sarcone, the motion of defendants is denied; and it is further

ORDERED that to the extent that it seeks summary judgment dismissing the third cause of action for abuse of process of the Amended Complaint against defendant The Sarcone Law Firm, the motion of defendants is granted, but such motion is denied as to the first cause of action for breach of Settlement Agreement as against such defendant; and it is further

ORDERED that counsel are directed to post on NYSCEF a proposed joint preliminary discovery conference order or proposed competing preliminary discovery conference order(s) at least two days before October 27, 2022, on which date counsel shall appear via Microsoft Teams, unless such appearance be waived by the Court.

DECISION

The complaint alleges that the individual defendant and the defendant law firm breached the Settlement Agreement and attaches a copy of such agreement, to which both the individual defendant and the defendant law firm are parties/signatories. The cause of action for breach of the Settlement Agreement is adequately pled as the defendant law firm can only act through its officers, here the individual defendant, as principal and managing member of the law firm. See Michaels v Lispenard Holding Corp, 11 AD2d 12, 14 (1st Dept 1960). In addition, in his opposing affidavit, plaintiff raises issues of fact with respect to such breach by both the individual defendant and by

the defendant law firm, the latter via his acts in failing to perform the promises made of its managing member.

The complaint as to the claim for an accounting is inadequately pled for lack of any assertion of a fiduciary duty owed by either of the defendants to plaintiff. Nor does plaintiff provide any evidence of same. See Royal Warwick SA v Hotel Representative, Inc, 106 AD3d 451, 452 (1st Dept 2013).

The cause of action for abuse of process is adequately pled as against the individual defendant, as the complaint contends that such defendant "(1) . . . issued process [in the form of a criminal complaint], (2) [with] intent to do harm without excuse or justification, and (3) use[d] the process in a perverted manner to obtain a collateral objective." Moreover, in his opposing affidavit, plaintiff comes forward with evidence of same. D'Amico v Correctional Medical Care, Inc, 120 AD3d 956, 960 (4th Dept 2014). However, the claim for abuse of process as against defendant law firm fails because such contentions and/or evidence as to such co-defendant are absent.

The fourth cause of action alleging fraudulent inducement of contract lacks merit as it alleges merely misrepresentations of future intent to perform under the contract, as opposed to misrepresentations of present fact, i.e., misrepresentations of facts in existence at the time the party entered into the contract, which representations are collateral to the contract.

See Wyle Inc v ITT Corp, 130 AD3d 438, 439 (1st Dept 2015). In his opposing affidavit, plaintiff alleges nothing more than mere misrepresentations of future intent to perform by defendants.

Debra A. Jones

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9/28/2022

DATE

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