

Cohen v Moskowitz

2023 NY Slip Op 33841(U)

October 26, 2023

Supreme Court, New York County

Docket Number: Index No. 653874/2022

Judge: Lyle E. Frank

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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. LYLE E. FRANK **PART** **11M**

Justice

-----X

STAN COHEN,

Plaintiff,

- v -

JAMES MOSKOVITZ, JMJ FILMS, INC., JOYCE
MOSKOVITZ, JOY-CPW, INC.

Defendant.

-----X

INDEX NO. 653874/2022

MOTION DATE N/A

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 25, 26, 27, 28, 29, 30, 33, 34, 35, 36, 37

were read on this motion to/for JUDGMENT - DEFAULT.

Upon the foregoing documents Plaintiff's cross-motion to dismiss Defendant's counterclaims is granted in part.¹

This case arises out of an alleged breach of contract based on a retainer agreement. Plaintiff is former counsel to the Defendants and brings this action to recover over \$100,000 in attorney fees, as well as 8% equity interest in the Defendants' corporation pursuant to the retainer agreement. Defendants allege multiple counterclaims including fraudulent inducement, unjust enrichment, and breach of fiduciary duty. Defendants also moved for default judgment based on Plaintiff's failure to respond to the counterclaims, but the Defendants' counsel informed the Court at oral argument that Defendants were no longer seeking such relief.

Plaintiff now moves to dismiss these counterclaims, as well as the five affirmative defenses pled by Defendants. For the foregoing reasons, Plaintiff's cross-motion to dismiss the Defendants' counterclaims and affirmative defenses is granted in part.

¹ The Court would like to thank Eric Chubinsky for his assistance in this matter.

Discussion

“A party shall plead all matters which if not pleaded would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading...” (NY CPLR § 3018(b). “Affirmative defenses, such as those set forth in CPLR 3018(b), as a general rule, would be ‘deemed waived if not raised in the pleadings’”. (Butler v. Catinella, 58 A.D.3d 145, 150 (2008))(citing Surlak v. Surlak, 95 A.D.2d 371, 383 (1983)). Further, under CPLR § 3018(b), “fraud” is included as an example in a non-exhaustive list of affirmative defenses. (NY CPLR § 3018(b)).

Conversely, “[w]hen assessing a motion to dismiss a complaint or counterclaim pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept as true all facts as alleged in the pleading, accord the pleader benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” *V. Groppa Pools, Inc. v. Massello*, 106 A.D.3d 722, 722—23 (2d Dept. 2013). “A counterclaim may be any cause of action in favor of one or more defendants or a person whom a defendant represents against one or more plaintiffs...” (NY CPLR § 3019(a)).

Here, this Court finds that the Defendant’s counterclaims of unjust enrichment and breach are dismissed for failure to state a cause of action. With regards to these claims, the Defendants have not plead with any specificity the affirmative relief that would be granted if Defendants were successful on these counterclaims. Defendants argue that the “claims for unjust enrichment are based in Plaintiff’s overcharging and taking excess funds from Defendants in breach of the retainer agreement” and that the claims “for breach of fiduciary duty [are] for Plaintiff’s unauthorized removal of funds from an escrow account and unauthorized retention of stock certificates.” (Aff. in Opp. to Cross Motion at 3). However, without specifying monetary

damages that the Defendants have suffered, this Court must dismiss these claims for failure to state a cognizable claim for relief.

Regarding Defendant's counterclaim for fraudulent inducement, the Court will deem this an affirmative defense, rather than a counterclaim. Therefore, deeming fraudulent inducement as merely an affirmative defense, the Defendant need not make out a claim for damages on this claim, and Plaintiff's arguments regarding the claim being time-barred are inapplicable.

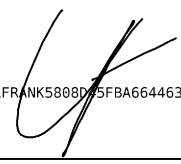
As to the already existing affirmative defenses, the Court agrees with the Plaintiff that the first affirmative defense should be dismissed, as this Court has denied the Defendants' motion to dismiss for failing to state cause of action. Thus, that affirmative defense is no longer proper. The Court also notes that the Defendants fail to contest that the fourth affirmative defense so that will be dismissed. As to the third affirmative defense, the Court agrees with the Defendants that the Court left open the possibility that the defense of statute of limitations could be raised again. As to the second and fifth, the Plaintiff has failed to meet its burden to establish that these affirmative defenses should be dismissed at this time. Based on the foregoing, it is hereby

ORDERED that Defendants' second, third and fourth counterclaims are dismissed, and the first counterclaim is deemed an affirmative defense; and it is further

ORDERED that Defendants' first and fourth affirmative defenses are dismissed; and it is further

ADJUDGED that the motion and cross-motion are otherwise denied.

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10/26/2023

DATE

LYLE E. FRANK, 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