

Vashovsky v Zablocki
2022 NY Slip Op 33828(U)
November 7, 2022
Supreme Court, Kings County
Docket Number: Index No. 507373/21
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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CHANA VASHOVSKY, individually and
derivatively on behalf of
HUDSON VALLEY NY HOLDINGS LLC,

Plaintiffs, Decision and Order

-against-

Index No. 507373/21

YOSEF ZABLOCKI and NATIONAL JEWISH
CONVENTION CENTER,

Defendants,

And

November 7, 2022

HUDSON VALLEY NY HOLDINGS LLC,

Nominal Defendant,

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YOSEF ZABLOCKI and NATIONAL JEWISH
CONVENTION CENTER,

Counterclaim Plaintiffs,

-against-

CHANA VASHOVSKY and EPHRAIM VASHOVSKY,

Counterclaim-Defendants,

-----x
YOSEF ZABLOCKI,

Third-Party Plaintiff,

-against-

ELLIOT ZEMEL, EPHRAIM VASHOVSKY, ZVG @
PALISADES LLC., and VASCO VENTURES LLC,

Third-Party Defendants,

-----x
PRESENT: HON. LEON RUCHELSMAN

The third party defendants have moved pursuant to CPLR §3211 seeking to dismiss the third party complaint. The third party plaintiff has cross-moved seeking to amend the third party complaint. The motions have been opposed respectively. Papers were submitted by the parties and arguments held and after reviewing all the arguments this court now makes the following

determination.

As recorded in prior orders, on April 8, 2019 the plaintiff Chana Vashovsky formed an entity called HVNY which purchased the Hudson Valley Resort, a hotel located in Ulster County in New York State. An agreement was reached with defendant Yosef Zablocki whereby he was given a fifty percent interest in HVNY and became the managing member. Disputes arose between the parties concerning the running of the business. The plaintiff asserted various claims against the defendant and the defendant has asserted various counterclaims. The defendant has now commenced a third party action against defendant Ephraim Vashovsky, another individual and two entities. The third party complaint alleges causes of action including fraud, breach of fiduciary duty, breach of duty of good faith and fair dealing, unjust enrichment, misappropriation, tortious interference with contracts, conversion and injunctive relief. The third party defendants have now moved seeking to dismiss the third party complaint.

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 (Strujan v. Kaufman & Kahn, LLP, 168 AD3d 1114, 93

NYS3d 334 [2d Dept., 2019]). Further, all the allegations in the complaint are deemed true and all reasonable inferences may be drawn in favor of the plaintiff (Weiss v. Lowenberg, 95 AD3d 405, 944 NYS2d 27 [1st Dept., 2012]). Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR §3211 motion to dismiss (see, Moskowitz v. Masliansky, 198 AD3d 637, 155 NYS3d 414 [2021]).

Turning to the fraud claim, 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]). Thus, fraud must be pled with a heightened degree of specificity and detail (Minico Insurance Agency LLC, v. AJP Contracting Corp., 166 AD3d 605, 88 NYS3d 64 [2d Dept., 2018]).

Any allegations of fraud against Ephraim Vashovsky are adequately pled in counterclaims submitted. Thus, the claims contained in this complaint are duplicative and are consequently

dismissed. Concerning the fraud alleged against the other third party defendants, there is hardly any detail alleging the precise fraud that was committed. Indeed, other than introducing the parties, the third party complaint hardly mentions these third party defendants at all. Paragraph 18 of the third party complaint asserts that "Mr. Vashovsky indicated that TPD ELLIOT ZEMEL and the corporation he formed TPD ZVG @PALISADES LLC, were for some reason, financially backing Mr. Vashovsky for his investment in the hotel and he introduced the parties by email" and that Zemel was a silent partner of Vashovsky (see, Verified Third Party Complaint, ¶18 [NYSCEF Doc. No. 260]). The next paragraph asserts that Zemel "laid out the terms of the agreement through emails amongst the parties" (id at ¶19) and that all parties agreed to the terms of the arrangement. The next paragraphs assert that Vashovsky and Zemel would contribute an extra \$350,000 for renovations and that in total Zemel and Vashovsky would contribute the \$350,000 noted plus an additional \$625,000 and that the property would be owned equally by Zablocki and ZVG (id ¶¶20,21). Paragraph 24 asserts that Zemel and ZVG were never joined as investors (id). Paragraph 25 asserts that "the contract from the seller HNA was apparently in the name of TPD VASCO VENTURES and was assigned to Hudson Valley NY Holdings. Further, Mr. Vashovsky executed this transfer by signing on behalf of TPD VASCO (his company), and then somehow signing on behalf of Hudson Valley without authority" (id). The

only other mention of these third party defendants is that Zemel held himself out to third parties that he had authority to install solar panels on the property (§28) and that ZVG filed for bankruptcy (§29).

Even if all those allegations are true they do not adequately plead any fraud at all. They do not describe any misrepresentations that were made that induced Zablocki's reliance thereby. In fact, they do not really allege any improper conduct at all. They are merely informational and provide background to allege frauds committed by Vashovsky. Thus, the motion seeking to dismiss the first cause of action as to all defendants is granted.

The second cause of action alleges a breach of a fiduciary duty. To succeed on a claim for breach of a fiduciary duty, a plaintiff must establish the existence of the following three elements: (1) a fiduciary relationship existed between plaintiff and defendant, (2) misconduct by the defendant, and (3) damages that were directly caused by the defendant's misconduct (Kurtzman v. Bergstol, 40 AD3d 588, 835 NYS2d 644, 646 [2d Dept., 2007], see, Birnbaum v. Birnbaum, 73 NY2d 461, 541 NYS2d 746 [1989]). However, an arms-length business relationship cannot give rise to a fiduciary obligation (WIT Holding Corp., v. Klein, 282 AD2d 527, 724 NYS2d 66 [2d Dept., 2001]). Moreover, New York does not recognize any liability on the part of an attorney to non-client third parties for any injuries sustained as a result of the

attorney's conduct absent fraud, collusion or malicious or tortious acts (see, Michalic by Nakovics v. Klat, 128 AD2d 505, 512 NYS2d 436 [2d Dept., 1987]). Thus, there can be no fiduciary duty on the part of third party defendants Zemel, ZVG and Vasco and the motion to dismiss this cause of action is granted as to them.

It is true that a non-managing member of a corporation does not owe any fiduciary duty to the corporation, except to the extent he or she participates in such management (see, In re FK3, LLC, 2018 WL 5292131 [S.D.N.Y. 2018], see, also, Kalikow v. Shalik, 43 Misc3d 817, 986 NYS2d 762 [Supreme Court Nassau County 2014]). However, a manager, whether or not a member owes a duty to act "in good faith and with that degree of care that an ordinarily prudent person in a like position would use under similar circumstances" (see, 1 N.Y. Prac., New York Limited Liability Companies and Partnerships § 1:8). Moreover, even an employee maintains a fiduciary duty to an employer. As the court noted in Nielson Co. (US) LLC v. Success Systems Inc., 2013 WL 1197857 [S.D.N.Y. 2013] "as a matter of law, an employee owes a fiduciary duty to his employer and is prohibited from acting in any manner inconsistent with his agency or trust and is at all times bound to exercise the utmost faith and loyalty in the performance of his duties" (id). Thus, while no fiduciary duty can be owed by Chana Vashovsky and consequently no breach can exist, there are surely questions of fact whether Ephraim Vashovsky in his role as a representative of

Chana owed it a fiduciary duty. To be sure, the Verified Third Party Complaint does not allege Ephraim was a representative of Chana, however, Paragraph 7 of the third party complaint incorporated all previously filed counterclaims. Thus, the counterclaims contained in response to the first amended complaint allege that Ephraim Vashovsky was at the hotel to observe its operations and took actions and instructed employees in the manner of a employer or manager (see, Counterclaims, ¶¶9, 12 [NYSCEF Doc. No. 71]). Moreover, considering Mr. Vashovsky's involvement in the hotel's welfare and the fact that only Mr. Vashovsky has been vigorously pursuing this lawsuit, there are surely questions as to Vashovsky's role at the hotel that he owed it a fiduciary duty. Thus, there are clearly questions of fact whether Vashovsky, acting as agent to Chana participated in the management of the hotel and thus owed a duty to the hotel and its members. Therefore, the motion seeking to dismiss the breach of fiduciary claim concerning Vashovsky is denied.

Turning to the cause of action for a breach of implied covenant of good faith and fair dealing, it is well settled that cause of action is premised upon parties to a contract exercising good faith while performing the terms of an agreement (Van Valkenburgh Nooger & Neville v. Hayden Publishing Co., 30 NY2d 34, 330 NYS2d 329 [1972]). Admittedly no such contract exists permitting this cause of action against any of the third party

defendants other than Vashovsky as will be explained when discussing the third party plaintiff's cross-motion to amend. The third party plaintiff argues that while there was no contract entered between the parties (other than Vashovsly) a relationship in the nature of a joint venture surely existed. Even if true there can be no cause of action for a breach of the covenant of good faith and fair dealing based upon an unwritten joint venture (see, Ashland Management Inc., v. Janien, 190 AD2d 591, 593 NYS2d 790 [1st Dept., 1993]). Therefore, the motion seeking to dismiss this cause of action is granted as to all parties except Vashovsky.

The next cause of action alleges unjust enrichment. The elements of a cause of action to recover for unjust enrichment are that "(1) the defendant was enriched, (2) at the plaintiff's expense, and (3) that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered" (see, GFRE, Inc., v. U.S. Bank, N.A., 130 AD3d 569, 13 NYS3d 452 [2d Dept., 2015]). Thus, "the essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered" (see, Paramount Film Distributing Corp., 30 NY2d 415, 344 NYS2d 388 [1972]).

The basis of the unjust enrichment claim is that the third party defendants allegedly maintain shares in the hotel without contributing their share concerning the expenses and operation of

the hotel (see, Verified Third Party Complaint, ¶ 55). However, that does not establish the third party defendants were enriched thereby. That allegation merely asserts the third party defendants owe sums representative of their alleged shares of ownership. That allegation thus fails to adequately plead unjust enrichment. Therefore, the motion seeking to dismiss this cause of action is granted.

The next cause of action is labeled misappropriation. Other than misappropriation of trade secrets (see, Integrated Cash Management Services Inc., v. Digital Transactions Inc., 920 F2d 171 [2d Cir. 1990]) not applicable here, there is no cause of action for misappropriation. Thus, the motion seeking to dismiss this cause of action is granted. Again, the crux of this allegation is that the third party defendants owe money to the corporation. While that allegation may have merit it is not misappropriation.

The next cause of action alleges tortious interference with contract. It is well settled that the elements of a cause of action alleging tortious interference with contract are: (1) the existence of a valid contract between the plaintiff and a third party, (2) the defendant's knowledge of that contract, (3) the defendant's intentional procurement of a third-party's breach of that contract without justification, and (4) damages (Anethsia Associates of Mount Kisco, LLP v. Northern Westchester Hospital Center, 59 AD3d 473, 873 NYS2d 679 [2d Dept., 2009]). Further, the

plaintiff must specifically allege that 'but for' the defendant's conduct there would have been no breach of the contract (White Knight of Flatbush, LLC v. Deacons of Dutch Congregations of Flatbush, 159 AD3d 939, 72 NYS3d 551 [2d Dept., 2018]). Thus, to succeed upon these allegations the complaint must allege sufficient facts. Vague or conclusory assertions are insufficient (Washington Ave. Associates Inc., v. Euclid Equipment Inc., 229 AD2d 486, 645 NYS2d 511 [2d Dept., 1996]).

The third party complaint alleges that the third party defendants "engaged in a pattern of conduct designed to divert HVNY guests for another competing hotel for their own account" (§ 63). However, there is no allegation any of those guests maintained any contract with the third party plaintiff of which the third party defendants could have possibly interfered. Although not specifically pled the third party plaintiff argues that the third party defendants should be liable for breaching prospective contracts with potential guests. To establish this tort the third party plaintiff must demonstrate the third party defendants engaged in culpable conduct which interfered with a prospective contractual relationship between the third party plaintiff and a third party (see, Lyons v. Menoudakos & Menoudakos P.C., 63 AD3d 801, 880 NYS2d 509 [2d Dept., 2009]). Culpable conduct has been defined as conduct that is a crime or an independent tort and includes physical violence, fraud, misrepresentation and economic pressure

(Smith v. Meridian Technologies Inc., 52 AD3d 685, 861 NYS2d 687 [2d Dept., 2008]). However, the third party complaint does not allege the third party defendants committed any crimes and there are no viable causes of action for fraud, misrepresentation or economic pressure. Therefore, the motion seeking to dismiss this cause of action is granted as to all defendants.

The next cause of action alleges 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 (Fiorenti v. Central Emergency Physicians, PLLC, 305 AD2d 453, 762 NYS2d 402 [2d Dept., 2003]). As the Court of Appeals explained "a conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession...Two key elements of conversion are (1) plaintiff's possessory right or interest in the property...and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights" (see, Colavito v. New York Organ Donor Network Inc., 8 NY3d 43, 827 NYS2d 96 [2006]). Therefore, where a defendant "interfered with plaintiff's right to possess the property" (Hillcrest Homes, LLC v. Albion Mobile Homes, Inc., 117 AD3d 1434, 984 NYS2d 755 [4th Dept., 2014]) a conversion has occurred.

Paragraph 66 of the third party complaint alleges that "as set forth above" the third party defendants "have improperly and unlawfully secreted and converted company assets and business from the Company for their own account to the exclusion of TPP Zablocki's rights to same" (id). However, the third party complaint nowhere alleges any of the third party defendants stole and funds. The third party complaint does assert that Ephraim Vashovsky caused losses to the hotel by failing to take certain actions (see, ¶30 [refused to execute loan documents], ¶31 [refused to secure government grant funds], ¶34 [diverted potential guests to another hotel], ¶36 [refused to engage in necessary repairs]). However, there is no allegation in the third party complaint that any third party defendant engaged in any conversion at all. Therefore, the motion seeking to dismiss this cause of action is granted as to all defendants.

The last cause of action seeks an injunction. However, an injunction is not an independent cause of action, rather, an injunction is a remedy sought for the legal wrongs alleged in a complaint (see, Budhani v. Monster Energy Company, 527 F.Supp3d 667 [S.D.N.Y. 2021]). Consequently, that cause of action is dismissed.

In conclusion all causes of action are dismissed as to all third party defendants except the breach of fiduciary claim and the breach of the covenant of good faith and fair dealing against Ephraim Vashovsky.

Concerning the third party defendant's motion seeking to amend the third party complaint, it is well settled that a request to amend a pleading shall be freely given unless the proposed amendment would unfairly prejudice or surprise the opposing party, or is palpably insufficient or patently devoid of merit (Adduci v. 1829 Park Place LLC, 176 AD3d 658, 107 NYS3d 690 [2d Dept., 2019]). The decision whether to grant such leave is within the court's sound discretion and such determination will not lightly be set aside (Ravnikar v. Skyline Credit-Ride Inc., 79 AD3d 1118, 913 NYS2d 339 [2d Dept., 2010]). Therefore, when exercising that discretion the court should consider whether the party seeking the amendment was aware of the facts upon which the request is based and whether a reasonable excuse for any delay has been presented and whether any prejudice will result (Cohen v. Ho, 38 AD3d 705, 833 NYS2d 542 [2d Dept., 2007]).

The proposed amended third party complaint only adds two paragraphs of background information. The first paragraph points to an agreement executed between Zablocki and Vashovsky (§12 of the proposed verified third party complaint). The second paragraph alleges the third party defendants substituted Chana Vashovsky as the partner with third party plaintiff and engaged in a kickback scheme for a mortgage brokerage fee (see, Proposed Verified Third Party Complaint [NYSCEF Doc. No. 283]).

Concerning the existence of a contract between Ephraim

Vashovsky and Yossi Zablocki, it is dated April 10, 2020. The third party defendants present three reasons why this document should not be considered. First, they assert it is not a contract, but merely a letter of intent. Second, they argue it was superceded by the HVNY operating agreement and lastly, it was only executed by Vashovsky and none of the other third party defendants.

There are surely questions of fact whether this document is a contract or a letter of intent. On its face, the document does delineate obligations and duties of all parties. Moreover, this document was executed after the operating agreement which was executed sometime in 2019. Even if it was executed prior to the operating agreement there are still questions of fact whether any of its provision survive the execution of the operating agreement. Thus, there are surely questions of fact whether this document represents a binding and enforceable contract against Vashovsky alone. Thus, the motion seeking to amend the third party complaint to insert this paragraph is granted. The existence of this paragraph and the document as well as other allegations contained in the third party complaint adequately alleges a violation of the covenant of good faith and fair dealing against Vashovsky only. Paragraph 27 of the proposed verified amended complaint does not advance any of the dismissed causes of action. Consequently, the motion seeking to add that paragraph is denied.

Therefore, the motion seeking to dismiss the third party

complaint is granted as to all defendants except Vashovsky regarding two causes of action. The motion seeking to amend the complaint is granted to the extent indicated.

So ordered.

ENTER:



DATED: November 7, 2022
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC