

Kyusung Cho v Youn Tae Yoo
2010 NY Slip Op 31456(U)
June 2, 2010
Supreme Court, Nassau County
Docket Number: 009057/2009
Judge: Ira B. Warshawsky
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SHORT FORM ORDER**SUPREME COURT: STATE OF NEW YORK
COUNTY OF NASSAU****P R E S E N T :**

HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 8

KYUSUNG CHO and YOUNG SOOK CHO, a/k/a
YOUNG SOOK YOO,

Plaintiffs,

- against -

INDEX NO.: 009057/2009
MOTION DATE: 03/19/2010
MOTION SEQUENCE: 007
and 008

YOUN TAE YOO, DANIEL LEE, ROOSEVELT AVENUE CORP., GOLDSTONE MANAGEMENT CORP., RICHARD SUN JIN, DO YOUNG KIM, VILLAGE GROUP 30, INC., NEW YORK GROUP, INC., MILLION NEW YORK, INC., MOUNTAIN U.S.A. CORPORATION, MOONSTONE MANAGEMENT CORPORATION, SPEED GROUP, INC., REDSTONE U.S.A. CORPORATION, PINE VILLAGE GROUP CORPORATION, GRAND PACIFIC FINANCE CORP., CHINATRUST BANK U.S.A., "JOHN DOE" and "JANE DOE", said names being fictitious and presently unknown,

Defendants.

The following papers read on this motion:

Notice of Motion, Affirmation, Affidavit & Exhibits Annexed	1
Affidavit in Support of Motion for Partial Summary Judgment and for Leave to Amend the Complaint of Kyusung Cho & Exhibits Annexed	2
Memorandum of Law in Support of Plaintiffs' Motion for Partial Summary Judgment and for Leave to Amend the Complaint	3
Affirmation in Opposition of Thomas Kim & Exhibits Annexed	4
Kim Defendants' Counsel's Affirmation in Opposition to Plaintiffs' Motion to Amend Complaint	5
Affirmation by Attorney for Defendant Youn Tae Yoo in Opposition to Plaintiffs' Motion to Amend Complaint	6

Notice of Cross Motion, Affirmation, Affidavit & Exhibits Annexed	7
Affirmation in Opposition to Lee Defendants' Cross Motion to Dismiss of Steven R. Schlesinger & Exhibits Annexed	8
Reply Memorandum of Law in Further Support of Plaintiffs' Motion for Partial Summary Judgment and for Leave to Amend the Complaint & Appendix A	9
Reply Affirmation of Steven R. Schlesinger in Further Support of Plaintiffs' Motion for Leave to Amend the Complaint against Defendant Youn Tae Yoo	10
Affirmation in Reply of Gail E. Spindler	11
Reply Affirmation of Steven R. Schlesinger in Further Support of Plaintiffs' Motion for Leave to Amend the Complaint against the Kim Defendants & Exhibits Annexed ...	12

PRELIMINARY STATEMENT

Plaintiffs' Motions

Plaintiff seeks summary judgment on their cause of action for breach of contract, or, in the alternative, on their claims for unjust enrichment and promissory estoppel against defendants Daniel Lee ("Lee"), Roosevelt Avenue Corporation ("Roosevelt"), Goldstone Management Corporation ("Goldstone"), Village Group 30, Inc. ("Village Group"), and New York Group, collectively identified as the "Lee Defendants", based upon documentary evidence, and, upon granting the motion for partial summary judgment, permitting plaintiff to amend their complaint against the Kim defendants.

Plaintiff bases its claim upon three promissory notes in the amounts of \$3,000,000, \$3,000,000 and \$150,000. The Lee Defendants contend that there are questions of fact with respect to whether or not payment was actually made by the plaintiffs and, if so in what amount. For example, they contend that the second note in the amount of \$3,000,000 was without consideration and was a replacement for the original \$3,000,000 note.

The motion to amend the complaint is based upon allegedly newly discovered facts including an undisclosed attorney-client relationship between Lee, defendant Do Young Kim ("Mrs. Kim") and defendant Richard Sun Jin, together referred to as "Kim Defendants". Plaintiffs contend that these relationships were used to manipulate Plaintiffs so as to defraud plaintiffs of their investments.

Defendants Cross-Motion

The Lee Defendants seek dismissal of the Second through Tenth, Twelfth and Thirteenth

Causes of Action. The Causes of Action alleged in the Amended Verified Complaint are as follows:

- First: Breach of Contract;
- Second: Fraud in the Factum;
- Third: Fraud in the Inducement;
- Fourth: Negligent Misrepresentation;
- Fifth: Unjust Enrichment;
- Sixth: Promissory Estoppel;
- Seventh: Conversion;
- Eighth: Conspiracy to Commit Conversion;
- Ninth: Aiding and Abetting Conversion;
- Tenth: Constructive Trust;
- Eleventh: Breach of Fiduciary Duty against defendant Yoo;
- Twelfth: Aiding and Abetting Breach of Duty against defendant Lee;
- Thirteenth: Accounting against all defendants.

Defendants contend that the action as alleged is for breach of contract and has improperly been pled as a tort.

BACKGROUND

This action concerns a series of loans which plaintiffs claim to have made to defendant Lee or to corporate entities under his control. These advances, in the total amount of \$6,150,000, were secured by promissory notes. The first loan included \$2,000,000 advanced by Kyusung Cho to Lee, Village Group and Roosevelt in July 2007, followed by an additional \$1,000,000 advance in November. Payment was secured by a Promissory Note dated November 26, 2007 from Village, Roosevelt and Lee to Kyunsung Cho.¹ In January, 2008 Young Sook Cho claims to have advanced \$3,000,000 to Roosevelt and Goldstone an additional \$3,000,000, secured by a Promissory Note dated January 22, 2008.² The third reported loan, was for \$150,000 from Kyu

¹ Exh. "C" to Affirmation in Support of Motion.

² *Id.* at Exh. "E".

Suing Cho to Daniel Lee, New York Group and 3152234 Nova Scotia Company. It is secured by Promissory Note dated June 17, 2008.³

DISCUSSION

Summary Judgment

When presented with a motion for summary judgment, the function of a court is “not to determine credibility or to engage in issue determination, but rather to determine the existence or non-existence of material issues of fact.” (*Quinn v. Krumland*, 179 A.D.2d 448, 449 — 450 [1st Dept. 1992]); See also, (*S.J. Capelin Associates, Inc. v. Globe Mfg. Corp.* 34 N.Y.2d 338, 343, [1974]).

To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented. (*Stillman v. Twentieth Century-Fox Corp.*, 3 N.Y.2d 395, 404 [1957]). It is a drastic remedy, the procedural equivalent of a trial, and will not be granted if there is any doubt as to the existence of a triable issue. (*Moskowitz v. Garlock*, 23 A.D.2d 94 [3d Dept. 1965]); (*Crowley's Milk Co. v. Klein*, 24 A.D.2d 920 [3d Dept. 1965]).

The evidence will be considered in a light most favorable to the opposing party. (*Weill v. Garfield*, 21 A.D.2d 156 [3d Dept. 1964]). The proof submitted in opposition will be accepted as true and all reasonable inferences drawn in favor of the opposing party. (*Tortorello v. Carlin*, 260 A.D.2d 201, 206 [1st Dept. 2003]). On a motion to dismiss, the court must “ ‘ accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory’ ”. (*Braddock v. Braddock*, 2009 WL 23307 [N.Y.A.D. 1st Dept. 2009]), (citing *Leon v. Martinez*, 84 N.Y.2d 83, 87 — 88 [1994]). But this rule will not be applied where the opposition is evasive or indirect. The opposing party is obligated to come forward and bare his proof, by affidavit of an individual with personal knowledge, or with an attorney’s affirmation to which appended material in admissible form, and the failure to do so may lead the Court to believe that there is no triable issue of fact. (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]).

Plaintiffs have established a prima facie case on promissory notes by submitting proof of

³*Id.* at Exh. “G”.

the note and defendants' default. It is then incumbent upon defendants to come forward with evidentiary facts showing the existence of a triable issue with respect to a bona fide defense. (*Colonial Commercial Corp. v. Breskel Associates*, 238 A.D.2d 539 (2d Dept. 1997). In this case they contend that plaintiffs have not established that the funds were actually advanced. To the contrary, there is no outright statement by any defendant that the money was not forwarded. In their Reply Memorandum of Law, plaintiffs point to a series of transmittals from plaintiffs, companies owned or controlled by them, or family members, a goodly portion of which was transmitted through the escrow account of defendant Yoo.

The conclusory allegations that plaintiffs have not adequately established consideration for the promissory notes are insufficient to defeat a motion for summary judgment. The motion for summary judgment on the First Cause of Action for breach of contract is granted.

Defendant contends that the June 17, 2008 note for \$150,000 was not due and payable at the time of demand is without merit. The note was payable upon demand any time after date of execution. Plaintiff annexes a written demand from counsel for plaintiff for payment dated January 8, 2010, and plaintiff avers in his affidavit that there have been multiple demands for payment. What is certain is that payment has not been made.

Amendment of Complaint

The amendment of pleadings is governed by Civil Practice Law and Rules § 3025 of the Civil Practice Law and Rules, which provides as follows:

Rule 3025. Amended and supplemental pleadings

(a) Amendments without leave. A party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it.

(b) Amendments and supplemental pleadings by leave. A party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances.

(c) Amendment to conform to the evidence. The court may

permit pleadings to be amended before or after judgment to conform them to the evidence, upon such terms as may be just including the granting of costs and continuances.

(d) Responses to amended or supplemental pleadings. Except where otherwise prescribed by law or order of the court, there shall be an answer or reply to an amended or supplemental pleading if an answer or reply is required to the pleading being amended or supplemented. Service of such an answer or reply shall be made within twenty days after service of the amended or supplemental pleading to which it responds.

The language of the statute, and cases interpreting it, make it abundantly clear that amendment of pleadings is to be freely granted unless the proposed amendment is “palpably insufficient” to state a cause of action or defense, or it is patently devoid of merit. To the extent that prior decisions led to the conclusion that the movant was under a burden to establish the merit of the amendment, they erroneously stated the standard to be followed. (*Lucido v. Mancuso*, 49 A.D.3d 220, 230 [2d Dept. 2008]).

Plaintiff asserts that there is recently discovered evidence with respect to the attorney-client relationship between defendants Yoo and Lee, the long-standing business relationship between defendants Lee, Kim and Jin, and the use of these relationships to manipulate plaintiffs. Plaintiff has annexed a copy of the proposed amended complaint.⁴ Essentially, the expanded allegations against Kim and Jin are that they participated in an effort to preclude the plaintiffs from enforcing their claim by filing liens against property owned by Lee. Defendants superior to those of plaintiffs.

Counsel for Kim and Jin oppose the application, contending that there are no evidentiary facts substantiating the purportedly newly discovered facts. The Court agrees with their position. It is clear from a review of the record that a significant component of plaintiffs’ complaint, particularly against defendant Yoo, was a failure to adequately securitize the loans by mortgages on premises with sufficient priority. This has been long known by plaintiffs and the fact that

⁴ Schlessinger Affirmation Attached as Exh. “J”.

defendants have recorded mortgages prior in time to theirs, does not contribute to the adequacy for the breach of contract actions against the Lee Defendants or Yoo.⁵

The proposed amendments to the complaint do not add to the action against the defendants with whom plaintiffs have a contractual relationship, and are not based on material facts sufficient to warrant amendment. The motion to amend the complaint is denied.

The Cross Motion

Fraud in the Factum and Fraud in the Inducement

Defendants seek dismissal of the Second — Tenth, Twelfth and Thirteenth Causes of Action. The Second and Third Causes of Action are for Fraud in the Factum and Fraud in the Inducement. In their opposition to the motion, plaintiffs rely upon the claim that the conduct by the Lee defendants was a “Ponzi scheme” and that they never intended to repay the loans. Allegations of lack of intent to perform under the contract are insufficient to set out a cause of action based upon fraud. (*Orix Credit Alliance v. Hable Co.*, 256 A.D.2d 114, 115 [1st Dept. 1998]). The motion to dismiss the Second and Third Causes of Action is granted

Negligent Misrepresentation

The Fourth Cause of Action alleges that defendants, at the least, negligently misrepresented their intention to perform under the terms of the contract. For the same reasons, a claim for negligence with respect to an intent to perform also fails to state a cause of action. The motion to dismiss the Fourth Cause of Action is granted.

Unjust Enrichment

In the Fifth Cause of Action Plaintiff alleges that the “(d)eendants improper, deceitful and wrongful actions and conduct caused Plaintiffs to issue the loans which resulted in the loss of income, profits and property rightfully belonging to Plaintiffs which at the same time unjustly enriched Defendants”. Defendants obligations to make payment pursuant to promissory notes are based in contract. As such, the existence of a valid and enforceable contract precludes relief

⁵ The proposed amended complaint at ¶ E, at p. 11, states that the business relationship between Kim and Lee was known as of September 2008, prior to the initiation of this action.

against the same parties on a quasi-contractual theory. (*Hamlet at Willow Creek Development Co., LLC v. Northeast Land Development Corporation*, 64 A.D.2d 85, 102 [2d Dept. 2009]).

The motion to dismiss the Fifth Cause of Action is granted.

Promissory Estoppel

The Sixth Cause of Action alleges that the “loans and Guarantees” of the defendants constituted an unambiguous promise to pay plaintiffs and that defendant Yoo promised to adequately and timely secure plaintiff the loans and faithfully represent the plaintiffs’ interests, and that defendants are in breach of their promises. These are simply reiterations of the breach of contract claim against defendants.

Promissory estoppel is an equitable remedy whereby a party alleges justifiable reliance upon an unambiguous promise, acts upon the promise, and circumstances are such that it would be unconscionable. It is designed to provide a remedy in the absence of a contractual obligation, based upon reliance on an unambiguous promise. In this case, however, plaintiffs do not point to any promise separate and apart from the obligations under the contract. The claim for promissory estoppel is therefore duplicative of the contract claims. The motion to dismiss the Sixth Cause of Action is granted.

Conversion, Conspiracy to Commit Conversion, Aiding and Abetting Conversion

The foregoing are alleged in the Seventh — Ninth Causes of Action. Conversion is an intentional tort. While plaintiffs may have adequately pleaded the causes of action, they are duplicative of the breach of contract action and must be dismissed. (*Rickhill Information Services, Inc. v. Jupiter Partners*, (30 A.D.3d 288 [1st Dept. 2003]).

In addition, conversion is essentially limited to goods, and to the extent that money may constitute goods, they must be discrete traceable funds, not commingled with other money. It is unlikely that plaintiffs could establish the amounts forwarded as being separately maintained, separate and apart from other fungible funds. (*Independent Discount Corp. v. Bremmer*, 47 A.D.2d 756 [2d Dept. 1975]).

Constructive Trust

In order for a party to recover upon the theory of constructive trust they must establish four factors: (1) a fiduciary or confidential relationship; (2) a promise; (3) a transfer of some asset in reliance upon the promise, and (4) unjust enrichment flowing from the breach of the promise. No fiduciary relationship between plaintiffs and the Lee defendants is alleged. The claim of constructive trust is dismissed as against them. Plaintiffs allege that there was an attorney-client relationship with defendant Yoo, This relationship imports a confidential relationship, but plaintiffs do not allege a transfer to Yoo, or unjust enrichment by him. The Lee Defendants are the parties who are alleged to have taken custody of the plaintiffs funds on the basis of a misrepresentation, but they were not in a fiduciary relationship with plaintiffs.

Plaintiffs have not state a cause of action for conversion against any defendants, and the Tenth Cause of Action is dismissed.

Aiding and Abetting a Breach of Fiduciary Duty against Defendant Lee

Plaintiffs allege that Yoo had a fiduciary relationship with them, which he breached, and that defendant Lee, being aware of the fiduciary obligation, induced Yoo to violate it. “A cause of action [alleging the] aiding and abetting [of a] breach of fiduciary duty merely ‘requires a prima facie showing of a fiduciary duty owed to plaintiff ... a breach of that duty, and defendant's substantial assistance ... in effecting the breach, together with resulting damages' ”. (*Monaghan v. Ford Motor Company*, 71 A.D.3d 848, (2d Dept. 2010)).

Plaintiffs have adequately alleged a fiduciary duty in the nature of an attorney-client relationship, a breach of the obligation, together with substantial assistance by Lee. Reading the pleadings in their most favorable light, the pleadings can be interpreted as alleging inducement and assistance by Lee in Yoo's breach of fiduciary obligations.

The motion to dismiss the Twelfth Cause of Action is denied.

Accounting

Entitlement to this remedy rests upon the existence of a trust or fiduciary relationship with reference to the subject matter of the controversy. (*Chalasani v. State Bank of India, New York Branch*, 235 A.D.2d 449, 450 [2d Dept. 1997]). There being no such relationship with the

[* 10]

Lee Defendants, the motion to dismiss as to them is granted.

This constitutes the Decision and Order of the Court.

Dated: June 2, 2010

J.S.C.
ENTERED
JUN 08 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE