

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

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KEVIN SHIEL,

Plaintiff,

Decision and order

- against -

Index No. 505132/19

DAVID WEISSMAN, LEE WEISSMAN, RENATA  
WEISSMAN and COOLFRAMES, LLC,

Defendants,

May 26, 2020

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has essentially moved seeking to amend the complaint to add causes of action pursuant to CPLR §3025. The defendants have partially opposed the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments, this court now makes the following determination.

In a prior decision the court held that plaintiff Kevin Shiel was not an owner of CoolFrames LLC. Following that decision other issues between the parties still remained as acknowledged within the decision itself. For purposes of judicial economy the court will treat this motion as one to amend and will address the substantive issues presented.

The proposed complaint which will be termed the proposed amended complaint seeks to add causes of action of breach of contract, promissory estoppel, breach of fiduciary duty,

conversion, violation of the Computer Fraud and Abuse Act, violation of the Stored Communications Act and breach of covenant and good faith and fair dealing against David and Lee Weissman, fraudulent misrepresentation, RICO and unjust enrichment against David Weissman, Lee Weissman and Renata Weissman and breach of fiduciary duty against Renata Weissman. The defendants object to the three claims against Renata Weissman and the RICO claim against all defendants. Thus, the court will evaluate those four claims.

According to the proposed amended complaint Shiel entered into an agreement with defendant David Weissman to purchase the domain name Coolframes.com for \$250,000 from Weissman's former partner and that Shiel would become a partner of an entity called CoolFrames. David's wife, defendant Renata Weissman was the transactional attorney who prepared the agreement wherein Shiel purchased the domain name. The claim of fraud is based upon the allegation that David and Lee misrepresented that Shiel's purchase of the domain name would entitle him to ownership interests in the entity. The claim against Renata is that similarly, her representation as Shiel's attorney was part of this fraudulent scheme.

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]).

Preliminarily, the defendants argue that no attorney client relationship existed between Shiel and Renata thus the causes against her are improper. However, whether an attorney client relationship existed depends upon the words and actions of the parties (Kleeberg v. Eber, 2019 WL 2085412 [S.D.N.Y. 2019]). Therefore, an attorney client relationship will exist if the attorney provided legal advice and held herself out as an attorney to the purported client (id). At this stage of the litigation there is certainly sufficient facts from which to allege that an attorney client relationship existed between Shiel and Renata. The defendants assert the relationship was created "for the sole purpose of assisting Plaintiff in a single transaction - the purchase of the [coolframes.com](http://coolframes.com) domain from Michael and the execution of the Purchase Agreement" (see,

Memorandum Of Law In Opposition To Motion For Leave To Amend Complaint, page 12). However, that involved legal advice and admitted legal representation. Thus, there is no basis to deny the validity of the claims on the grounds no such relationship existed.

Concerning misrepresentations made by Renata, the proposed amended complaint asserts that "Plaintiff reasonably relied on David and Lee's misrepresentations not only because he had no reason to believe they were lying to him, but also because they were supported by David's wife, Renata, an experienced attorney who promised she would represent Plaintiff's interests. Renata's promise was false" (see, Proposed Amended Complaint ¶145). Further, the Proposed Amended Complaint states that "Renata misrepresented to Plaintiff that she was acting to further his interests when she was in fact part of the scheme to deprive him of his IP, his interest in the Company and his profits from the business" (see, *id* at ¶148). The plaintiff therefore argues that "the reasonableness of Plaintiff's reliance on David and Lee's false promises was perhaps best captured by the lies David's wife, Renata, told: that she was acting as Plaintiff's attorney, which would lead any reasonable person to believe that his interests were being properly protected and not that his "attorney" knew of and approved the lies David and Lee were telling...Renata's role not only provides

support for Plaintiff's reasonable reliance, but is also independently actionable since Renata made an affirmative misrepresentation that she was acting as Plaintiff's attorney (a misrepresentation he only learned of years later, but that is no less fraudulent), on which Plaintiff clearly relied to his detriment, suffering injury" (see, Memorandum of Law in Support, pages 15,16).

Thus, the independent claims of fraud against Renata are rooted in the fact she represented Shiel in the purchase of the domain name and misrepresented the nature of that attorney representation. According to the proposed amended complaint, Renata agreed to represent Shiel in his transaction for the purchase of the domain name (see, Proposed Amended Complaint ¶24). The proposed amended complaint further alleges that in the final agreement she changed the name of the purchaser from Kevin Shiel to CoolFrames LLC thereby depriving Shiel of ownership rights in the domain name.

While the proposed amended complaint does not allege any specific statements made by Renata which may constitute misrepresentations, her very presence and representation of Shiel can be construed as fraud. Thus, in this situation where Renata, as his attorney, was a fiduciary of Shiel the misrepresentation need not be express but can be implied from the surrounding circumstances. As the Court of Appeals observed

in Gordon v. Bialystoker Center & Bikur Cholim Inc., 45 AD2d 692, 412 NYS2d 593 [1978] “whenever, however, the relations between the contracting parties appear to be of such a character as to render it certain that they do not deal on terms of equality but that either on the one side from superior knowledge of the matter derived from a fiduciary relation, or from an overmastering influence, or on the other from weakness, dependence, or trust justifiably reposed, unfair advantage in a transaction is rendered probable, there the burden is shifted, the transaction is presumed void, and it is incumbent upon the stronger party to show affirmatively that no deception was practiced, no undue influence was used, and that all was fair, open, voluntary and well understood. This doctrine is well settled” (id). Therefore, conduct that is calculated to convey a misleading impression can constitute a misrepresentation and hence fraud (Samuels v. Fradkoff, 38 AD3d 208, 832 NYS2d 499 [1st Dept., 2007]). Thus, in Neckles Builders Inc., v. Turner, 117 AD3d 923, 986 NYS2d 494 [2d Dept., 2014] the court held that a claim sounding in fraud exists where a promisor successfully induced a promisee to enter into a contractual relationship where the promisor had an “undisclosed intention not to perform under the contract” (id). It naturally follows that a material misrepresentation exists when there is a “present intention not to fulfill a promise” which “is generally inferred from

surrounding circumstances, since people do not ordinarily acknowledge that they are lying" (Braddock v Braddock, 60 AD3d 84, 871 NYS2d 68 [1st Dept., 2009]).

In this case, the plaintiff alleges that Renata committed fraud by acting as Shiel's attorney. The very nature of a representation of counsel engenders a certain comfort and security which the proposed amended complaint alleges Renata never intended to fulfill. Considering the surrounding circumstances of the transaction an allegation of fraud has properly been pled. Of course, these allegations will be explored during discovery and Renata will have an opportunity to file any substantive motion upon the completion of all discovery. At this juncture, the motion seeking to strike the fraud claims of the proposed amended complaint is denied.

Turning to the claim for breach of fiduciary duty against Renata, it is well settled that the elements of a breach of fiduciary duty are the existence of a fiduciary duty, misconduct and damages (Litvinoff v. Wright, 150 AD3d 714, 54 NYS3d 22 [2d Dept., 2017]). "A fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation" (EBC I Inc., v. Goldman Sachs & Co., 5 NY3d 11, 799 NYS2d 170 [2005]). Considering the relationship between the parties as outlined above, clearly Renata owed a fiduciary

relationship to Shiel. She had a duty to represent Shiel in ways that placed the interests of Shiel as paramount. There are allegations she breached that crucial duty.

Generally, the statute of limitations for a breach of fiduciary duty is three years where money damages are sought (Weiss v. TD Waterhouse, 45 AD3d 763, 847 NYS2d 94 [2d Dept., 2007]). However, where the breach of fiduciary claim is based upon actual fraud then the six year statute of limitations applies (Carbon Capital Management LLC v. American Express Company, 88 AD3d 933, 932 NYS2d 488 [2d Dept., 2011]). As noted the essential claims against Renata are rooted in fraud. Consequently, the breach of fiduciary claim is timely and the motion seeking to strike this claim from the proposed amended complaint is denied.

Concerning the cause of action seeking unjust enrichment, it is well settled that a claim of unjust enrichment is not available when it duplicates or replaces a conventional contract or tort claim (see, Corsello v. Verizon New York Inc., 18 NY3d 777, 944 NYS2d 732 [2012]). As the court noted "unjust enrichment is not a catchall cause of action to be used when others fail" (id). Since in this case there is a viable claim for fraud, the claim for unjust enrichment is duplicative and the motion seeking to strike this cause of action is granted.



Turning to the RICO claims against all defendants, to succeed on a RICO claim, the moving party must demonstrate three elements: (1) a violation of the RICO statute, 18 U.S.C. §1962; (2) an injury to business or property; and (3) the injury was caused by the violation of section 1962 (Spool v. World Child Int'l Adoption Agency, 520 F.3d 178 [2d. Cir. 2008]). Under 18 U.S.C. §1962(c) it is unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. Racketeering activity is defined as any activity included within 18 USC §1961(1). That statute includes within racketeering activity "wire fraud" (id).

However, in addition, to establishing racketeering, the plaintiff must demonstrate the defendants engaged in an enterprise. A RICO enterprise is "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity" (see, 18 USC §1961(4)). Thus, the 'enterprise' must be an entity "separate and apart from the pattern of activity in which it engages" (United States v. Turkette, 452 US 576, 101 S.Ct 2524 [1981]). Thus, in Goldfine v. Sichenzia, 118 F.Supp2d 392 [S.D.N.Y. 2002] the court held that "in a fraud-based RICO

claim, if the sole purpose of the alleged enterprise is to perpetuate the alleged fraud, there can be no enterprise for RICO purposes" (id). This does not conflict with Second Circuit precedent concerning the definition of an enterprise which does not really address the narrow issue raised here, namely that the sole purpose of the enterprise is to perpetrate the fraud (see, Pavlov v. Bank of New York Co., Inc., 25 Fed. Appx. 70 [2d Cir. 2002], *cf.*, Sands Harbor Marina Corp., v. Wells Fargo Insurance Services of Oregon Inc., 2013 WL 12368689 [E.D.N.Y. 2013]).

In this case the entire purpose of the enterprise was to defraud the plaintiff. There has been no evidence presented the enterprise served a purpose other than to engage in the alleged fraud (Goldfine, supra). Indeed, the proposed amended complaint asserts that "from the beginning of their relationship with Plaintiff, David, Lee and Renata engaged in a pattern of lies, misrepresentation and deceit" (see, Proposed Amended Complaint, ¶¶42). The Complaint proceeds to assert the promises made to the plaintiff were false when made and that the defendants never had any intention of honoring them (see, Proposed Amended Complaint, ¶¶43-46). Further, the Complaint alleges that the defendants "used the formation of the Company as an excuse to steal plaintiff's assets" (Proposed Amended Complaint ¶75). Thus, concerning the agreement wherein plaintiff purchased the domain name from the original owner, numerous drafts of the agreement

were presented and "each of these drafts was fraudulent because, without telling Plaintiff, David and Renata, with the knowledge and approval of Lee, intended to steal Plaintiff's \$250,000 and prevent him from actually purchasing the CoolFrames IP" (see, Proposed Amended Complaint ¶80). Moreover, concerning the formation of the corporation, the 'enterprise', the Complaint alleges that "obviously, had the RICO Defendants told Plaintiff of their true intentions to claim sole ownership of both the IP and the Company, Plaintiff would never have agreed to pay \$250,000 on behalf of a Company that was in the process of being formed and from which he would be excluded as a member, so that the Company could purchase intellectual property to which he would have no claim and could be denied access to at any time, including the day after his purchase. The idea was so preposterous, and the RICO Defendants, including Renata, so thoroughly fraudulently concealed their true intentions, that it never occurred to him that he was not the owner of the CoolFrames IP until the RICO Defendants made this outrageous claim in January 2019 after locking him out of the Company entirely" (see, Proposed Amended Complaint, ¶89).

Thus, according to the Complaint the entire enterprise was created merely to defraud the plaintiff. Upon those representations the plaintiff has failed to demonstrate the existence of an enterprise.

Therefore, the RICO cause of action is improper and is dismissed.

So ordered.

ENTER:

DATED: May 26, 2020  
Brooklyn N.Y.



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Hon. Leon Ruchelsman  
JSC