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

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BROAD ZONE MANAGEMENT LLC,

Plaintiff, Decision and order

- against - Index No. 534678/2023

RESERVE FUNDING GROUP LLC d/b/a RESERVE FUNDING GROUP and BURECH WEINSTOCK a/k/a BARRY WEINSTOCK,

Defendants, April 11, 2024

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PRESENT: HON. LEON RUCHELSMAN Motion Seq. #1

The defendants have moved pursuant to CPLR §3211 seeking to dismiss various causes of action of the complaint for the failure to allege any claims. The plaintiff opposes the motion. Papers were submitted by the parties and arguments were held. After reviewing all the arguments this court now makes the following determination.

According to the verified complaint, on August 2, 2023 the plaintiff and defendant entered into a written agreement whereby plaintiff would provide fifty percent of funds that would be utilized by the defendant in a merchant cash advance to LAI Logistics Division Inc. & Luxury Auto Innovations LLC [hereinafter 'Luxury']. Pursuant to the agreement the plaintiff would own fifty percent of all of vehicles and receivables of Luxury and half the profits as well as half of a Lamborghini. Thus, the plaintiff forwarded $103,000 to the defendants to be utilized to fund a cash advance to Luxury. According to the verified complaint the plaintiff and defendant entered into five

more agreements whereby the plaintiff would fund half the amount to be utilized in five distinct merchant cash advances in exchange for fifty percent of the profits. The verified complaint alleges that the defendants stopped sharing the profits with the plaintiff, failed to sell the Lamborghini as promised and thus breached the agreement. A lawsuit was commenced and the plaintiff has asserted causes of action for breach of contract of the Luxury agreement and the other five agreements, unjust enrichment, conversion, fraud, an accounting, piercing the corporate veil, replevin, payment for an instrument of money an injunction and a declaratory judgement.

The defendants have now moved seeking to dismiss the breach of contract cause of action regarding the five agreements, the unjust enrichment, conversion, fraud, replevin, the injunction and declaratory judgement causes of action. As noted, the plaintiff opposes the motion.

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 (Perez v. Y & M Transportation Corporation, 219 AD3d 1449, 196 NYS3d 145 [2d Dept., 2023]). Further, all the allegations in the complaint are deemed true and all reasonable

inferences may be drawn in favor of the plaintiff (Archival Inc., v. 177 Realty Corp., 220 AD3d 909, 198 NYS2d 567 [2d Dept., 2023]). 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, Lam v. Weiss, 219 AD3d 713, 195 NYS3d 488 [2d Dept., 2023]).

It is well settled that to succeed upon a claim of breach of contract the plaintiff must establish the existence of a contract, the plaintiff's performance, the defendant's breach and resulting damages (Harris v. Seward Park Housing Corp., 79 AD3d 425, 913 NYS2d 161 [1st Dept., 2010]). In order for a valid contract to exist there must be mutual asset, commonly defined as a meeting of the minds (Express Industries and Terminal Corp., v. New York State Department of Transportation, 93 NY2d 584, 693 NYS2d 857 [1999]). Thus, such mutual assent must sufficiently demonstrate that the parties have agreed to all essential terms (id).

The verified complaint asserts a contract was created based upon similar terms and similar benefits and obligations as the Luxury agreement. Indeed, there is no dispute the plaintiff forwarded the amounts outlined in the verified complaint. Surely, at this juncture, the plaintiff has presented sufficient

allegations the parties intended the amounts forwarded to constitute agreements of fifty percent investment and fifty percent profits. Of course, discovery will further narrow these issues, however, these allegations sufficiently allege contracts and breaches of contract. Therefore, the motion seeking to dismiss the second cause of action is denied.

The third cause of action alleges 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). This claim alleges the plaintiff forwarded $503,875 as investments for all the contracts and has not received his fair share of profits earned by the defendants. However, that claim is precisely the same as the breach of contract claims. Therefore, the motion seeking to dismiss the claim for unjust enrichment is granted.

The next cause of action asserts conversion. Where a conversion claim arises from the same circumstances as the breach of contract claim then such conversion claim is duplicative (Connecticut New York Lighting Company v. Manos Business Management Company Inc., 171 AD3d 698, 98 NYS3d 101 [2d Dept., 2019]). "To determine whether a conversion claim is duplicative,

courts look both to the material facts upon which each claim is based and to the alleged injuries for which damages are sought" (Medequa LLC v. O'Neill and Partners LLC, 2022 WL 2916475 [S.D.N.Y. 2022]). In this case the breach of contract regarding the Lamborghini asserts that "Defendants breached the Luxury Auto Agreement by failing to provide Plaintiff with his 50% ownership rights in the Lamborghini" (see, Verified Complaint ¶72 [NYSCEF Doc. No. 1]). Concerning the conversion claim, the verified complaint asserts that "as part of the Luxury Auto Agreement, Plaintiff had his rights to his fair share in the Lamborghini received in connection with the Luxury Auto deal" (see, Verified Complaint ¶91 [NYSCEF Doc. No. 1]). Thus, regardless whether any dominion or possession has been established the claim of conversion is duplicative of the breach of contract claim. Consequently, the motion seeking to dismiss the conversion claim is granted.

Likewise, to establish a claim for replevin "a party must show (1) that it has a superior possessory right to the chattel, and (2) that it made a demand for possession of the chattel from the defendant" (see, Douglas v. Harry N. Abrams Inc., 2018 WL 1406616 [S.D.N.Y. 2018]). However, replevin is also duplicative of a breach of contract cause of action where these claims are based upon contractual violations (see, Sea Tow Services International Inc., v. Tampa Bay Marine Recovery Inc., 2022 WL

5122728 [E.D.N.Y. 2022]). Therefore, the motion seeking to dismiss the replevin cause of action is granted.

The next cause of action alleges fraud. The fraud is based upon the representation that the defendant would quickly sell the Lamborghini and that such representation induced the plaintiff to make the investment.

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]). However, where a claim to recover damages for fraud "is premised upon alleged breach of contractual duties and the supporting allegations do not concern misrepresentations which are collateral or extraneous to the terms of the parties agreement, a cause of action sounding in fraud does not lie" (McKernin v.Fanny Farmer Candy Shops Inc., 176 AD2d 233, 574 NYS2d 58, [2nd Dept., 1991]). The defendants seek to dismiss the fraud claim on the grounds the fraud concerning the Lamborghini is the same as the breach of contract claim. The plaintiff opposes that contention arguing the breach

of contract claim is not duplicative of the fraud claim. The plaintiff argues that "the fraudulent inducement claim is based on Weinstock's lies, including the plans with the Lamborghini, and his "efforts" to get insurance on the vehicle and sell it for profit, which Weinstock deliberately made to Stern to induce Plaintiff to enter into the Luxury Auto Agreement and, thereafter, to string Plaintiff along so that it would continue to provide Defendants with funding for additional agreements" (see, Memorandum in Opposition, page 20 [NYSCEF Doc. No. 12]). A review of the two claims is therefore necessary. The breach of contract claim essentially alleges that the defendant contracted to sell the Lamborghini and failed to do so. Thus, if true, the failure to sell the Lamborghini as promised constituted a breach of contract. The fraud claim alleges the defendant fraudulently induced the plaintiff to enter into an agreement, promising the sale of the Lamborghini. The plaintiff insists the fraud claim is distinct from the breach of contract claim because it "goes beyond" (id) the breaches of the Luxury agreement.

It is true that a misrepresentation of a material fact that is collateral to the contract which induces the other party to enter into the contract is sufficient to sustain an action of fraud and is distinct from the breach of contract claim (Selinger Enterprises Inc., v. Cassuto, 50 AD3d 766, 860 NYS2d 533 [2d Dept., 2008]). However, where the misrepresentation refers only

to the intent or ability to perform under the contract then such misrepresentation is duplicative of the breach of contract claim (see, Gorman v. Fowkes, 97 AD3d 726, 949 NYS2d 96 [2d Dept., 2012]). Generally, for a fraud claim to be collateral to a breach of contract claim the misrepresentation must consist of a present fact that is unrelated to the precise terms of the contract itself. Thus, in American Media Inc., v. Bainbridge & Knight Laboratories LLC, 135 AD3d 477, 22 NYS3d 437 [1st Dept., 2016] the plaintiff sued defendant for advertisements it placed in various periodicals without receiving payment pursuant to the contract. The court held misrepresentations made by the defendant were not duplicative of the breach of contract claim. Specifically, the principal of the defendant made statements that he loaned the defendant sufficient funds to cover the advertising expenses thereby inducing the plaintiff to enter into the contract. The court noted those misrepresentations were collateral since they were misrepresentations of present facts, namely that the defendant had sufficient funds. Further, these misrepresentations were collateral to the actual terms of the contract which involved placing advertising in plaintiff's periodicals (see, also, Deerfield Communications Corp., v. Chesebrough Ponds Inc., 68 NY2d 954, 510 NYS2d 88 [1986]). Thus, the critical distinction whether a fraud claim is distinct from a breach of contract claim rests upon the following criteria. The

first is whether the misrepresentation concerns a future intent to perform or whether the statement misrepresents present facts (see, Wylie Inc., v. ITT Corp., 130 AD3d 438, 13 NYS3d 375 [1st Dept., 2015]). If the misrepresentation concerns present facts it will generally be considered collateral. If the misrepresentation concerns a future intent to perform then it is generally duplicative of a breach of contract claim. This does not mean to imply a fraud claim regarding future conduct can never be distinct from a breach of contract claim. It surely can where the promise is collateral to the contract (see, Fairway Prime Estate Management LLC v. First American International Bank, 99 AD3d 554, 952 NYS2d 524 [1st Dept., 2012]). Moreover, even if the misrepresentation concerns a present statement of facts, those facts must touch a matter that is not the subject of the contract. Therefore, if the promise or misrepresentations "concerned the performance of the contract itself, the fraud claim is subject to dismissal as duplicative of the claim for breach of contract" (HSH Nordbank AG v. UBS AG, 95 AD3d 185, 941 NYS2d 59 [1st Dept., 2012]).

In this case, the alleged fraud concerned a future intent to perform, specifically, to sell the Lamborghini. That representation is exactly the basis of the breach of contract claim, namely the failure to sell the Lamborghini. Therefore, the fraud claim is duplicative of the breach of contract claim

and consequently the motion seeking to dismiss the fraud cause of action is granted.

The next cause of action sought to be dismissed is a claim for a permanent injunction. To obtain a permanent injunction the movant must demonstrate a "violation of a right presently occurring, or threatened and imminent; that the plaintiff has no adequate remedy at law; that serious and irreparable injury will result if the injunction is not granted; and that the equities are balanced in the plaintiff's favor" (see, Elow v. Svenningsen, 58 AD3d 674, 873 NYS2c 319 [2d Dept., 2015]). The cause of action seeks to enjoin the use of the Lamborghini or from doing anything to reduce its value. The plaintiff does not express any interest in the Lamborghini, *per se*, rather, seeks to enjoin its use to insure it can be sold and the plaintiff can receive his share of the proceeds. Thus, where monetary damages are sufficient then a permanent injunction is not warranted (see, Aponte v. Estate of Aponte, 172 AD3d 970, 101 NYS3d 132 [2d Dept., 2019]). As noted, if the plaintiff prevails upon the breach of contract action concerning the Lamborghini then a monetary award will prove sufficient to compensate the plaintiff for any damages sustained. Therefore, the motion seeking to dismiss the injunction cause of action is granted.

The last cause of action sought to be dismissed seeks a declaratory judgement. It is well settled that "a motion to

dismiss the complaint in an action for a declaratory judgment "presents for consideration only the issue of whether a cause of action for declaratory relief is set forth, not the question of whether the plaintiff is entitled to a favorable declaration"" (DiGiorgio v. 1109-1113 Manhattan Avenue Partners LLC, 102 AD3d 725, 958 NYS2d 417 [2d Dept., 2013]). The basis for this cause of action is an allegation the defendants breached the agreements and that the plaintiff is entitled to a determination he is owned his fifty percent share of all the profits following his investment. However, even if true, these allegations are already protected by the breach of contract causes of action (see, Pacella v. Town of Newburgh Volunteer Ambulance Corps. Inc., 164 AD3d 809, 83 NYS3d 246 [2d Dept., 2018]). Thus, the motion seeking to dismiss the declaratory judgement cause of action is granted.

Therefore, the motion seeking to dismiss the various causes of action is granted except for the breach of contract cause of action. Thus, the remaining causes of action are the first two causes of action alleging breach of contract, an accounting, piercing the corporate veil and payment for an instrument of money. The remaining causes of action are dismissed.

So ordered.

ENTER:

DATED: April 11, 2024
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC