

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. GEOFFREY J. O'CONNELL

Justice

TRIAL/IAS, PART 10  
NASSAU COUNTY

SHANTANU MOHAN, as the Assignee of SHIV  
MOHEN a/k/a SHIV MOHAN MUKKAR,

Plaintiff(s),

-against-

INDEX No. 11831/01

MOTION DATE: 3/15/02

KING FREEZE AIR CONDITIONING &  
REFRIGERATION, CORP. And its successors-  
in-interest, CRYSTAL AIR CONDITIONING  
CORP., RIMCO AIR CONDITIONING, CO., INC.,  
And A&A RELTY; and the individual  
defendants, SHAM MALHOTRA a/k/a SHAM LAL  
MALHOTRA, ANNIE MALHOTRA, his wife, and  
MONISH MOHAN,

Defendant(s).

MOTION SEQ. No. 2

The following papers read on this motion:

Notice of Motion/Affidavits/Affirmations/Memorandums of Law/Exhibits

Affidavit in Opposition/Affirmation in Opposition/Exhibits

Reply Affidavit/Reply Memorandum of Law/Affirmation in Further Support/Exhibits

Affidavit of Shiv Mohan/Exhibits A-D

Affidavit of John P. Osborn

Motion by defendants KING FREEZE AIR CONDITIONING & REFRIGERATION, CORP. and its  
successors in interest, CRYSTAL-AIR CONDITIONING CORP., RIMCO AIR CONDITIONING, CO., INC.  
and A & A REALTY, and the individual defendants, SHAM MALHOTRA a/k/a SHAM LAL MALHOTRA

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and ANNIE MALHOTRA, his wife, for an Order pursuant to CPLR § 3211(a)(1), (3), (5), (7) and CPLR § 3212 granting them summary judgment dismissing the Complaint against them is Granted.

In this action, plaintiff SHANTANU MOHAN, as assignee of his father SHIV MOHAN, seeks to recover for, *inter alia*, breach of contract, fraud, conspiracy to defraud, conversion and breach of fiduciary duty. Plaintiff SHANTANU MOHAN alleges that his father SHIV MOHAN had an agreement with defendant SHAM MALHOTRA regarding an interest in KING FREEZE AIR CONDITIONING & REFRIGERATION CORP. ("KING FREEZE"), as well as certain loan agreements, and that through the fraudulent execution of settlement agreements, together defendants deprived plaintiff's father SHIV MOHAN of his interests.

Defendant MONISH MOHAN is the assignor of SHIV MOHAN's son and the plaintiff assignee SHANTANU MOHAN's brother. It was MONISH MOHAN who purported to represent his father SHIV MOHAN in the allegedly fraudulent settlements. At that time, SHIV MOHAN himself was either incarcerated or deported due to a federal conviction. The settlements entailed a non-party, Chapelton, Ltd., which held legal title to the accounts which funded the escrow fund which was disbursed pursuant to the settlement agreement.

In a related action entitled *Shantanu Mohan, as the Assignee of Shiv Mohan a/k/a Shiv Mohan Mukkar v. Jack L. Hollander, Robert L. Rattet, Individually and as members Rattet, Hollander & Pasternack, LLP (now Rattet & Pasternak, LLP), D. Bernard Hoenig, individually and as a member of Hoenig & Hoenig, and Monish Mohan*, (Supreme Court, Nassau Co. [Index No. 11829/01]), plaintiff sought to recover damages from the attorneys/escrow agents who represented some of the individuals in the above settlement agreements, including defendants SHAM MALHOTRA and MONISH MOHAN. By decision dated December 21, 2001, this Court granted the defendants' motion in that action pursuant to CPLR § 3211, dismissing the Complaint against them.

This Court found that, "at all relevant times, the parties to that action acknowledged that defendant MONISH MOHAN had power of attorney for SHIV MOHAN and represented that he was acting on his behalf. . . . Further the August 25, 1995 Agreement contains the notarized signature of SHIV MOHAN. There was no evidence or factual allegations to indicate that his signature was fraudulently produced by these defendants." This Court also dismissed the fraud claims pursuant to CPLR § 3016(b) and consequently, the

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conspiracy to defraud claim as well. The conversion, legal malpractice and tortious interference with contract claims were dismissed as untimely. CPLR § 214.

In the related action the Court concluded, *inter alia*, that the action "must be dismissed for failure to join a necessary party. It is clear from the documents presented that the real party in interest is SHIV MOHAN, the assignor. SHIV MOHAN has necessary and material knowledge of the underlying alleged facts, yet is not subject to the jurisdiction of the Court. There is no indication that the named plaintiff, as assignee, has any first hand knowledge of the transactions in dispute. Further, the monies in question were transferred out of a bank account owned by Chapeltown, also not a party to the action. Chapeltown funded the alleged wrongful transfer, yet is not named by the plaintiff. Any decision in this matter affects the rights of Chapeltown. The failure to join this corporation as a party should also result in its dismissal pursuant to CPLR §1001."

Turning to the instant application, again, necessary parties, *i.e.*, SHIV MOHAN and Chapeltown, are missing. The moving defendants' motion to dismiss the Complaint against them must be granted for that reason alone. Furthermore, the doctrine of collateral estoppel requires this Court to conclude herein that contrary to plaintiff's repeat allegations, the defendant MONISH MOHAN had a valid Power of Attorney for plaintiff's assignor SHIV MOHAN when the Agreements now challenged were executed. On those grounds as well, defendants' motion must be granted and the Complaint dismissed.

Plaintiff argues against the bar by the collateral estoppel doctrine, and has now submitted, albeit quite late, an affidavit of a handwriting expert calling into question the genuineness of his father SHIV MOHAN's signature on the August 25, 1995 agreement and release. No such affidavit was produced in the related action nor is there a credible explanation for its absence.

Even were the Court to permit plaintiff to essentially re-litigate his claims, they would still fail. Plaintiff SHANTANU MOHAN advances ten causes of action in the Complaint.

The first cause of action against defendant SHAM MALHOTRA, his wife ANNIE MALHOTRA and defendant MONISH MOHAN alleges breach of contract. Specifically, plaintiff SHANTANU MOHAN alleges that his father SHIV MOHAN lent defendant SHAM MALHOTRA \$100,000.00 in 1981 for which

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he agreed to give him a 10% ownership in both defendant KING FREEZE and the property on which it was located. Plaintiff alleges that defendant SHAM MALHOTRA, assisted by defendants ANNIE MALHOTRA and MONISH MOHAN, failed to perform in August, 1995, though demanded to do so. The Statute of Limitations for breach of contract is six years. CPLR § 213(2). The statute of limitations for a demand note begins to run upon execution. *Pomaro v Quality Sheet Metal, Inc.*, 2002 N.Y. App. Div. LEXIS 5984 (2<sup>nd</sup> Dept. 2002). The agreement here was alleged to have been entered in 1981. The breach of contract cause of action is untimely.

As for defendant ANNIE MALHOTRA, the Statute of Limitations applicable to tortious interference with contract is three years, which accrued when the injury was sustained in 1995 when the challenged transfers occurred. CPLR § 214[4]. Thus, this cause of action against ANNIE MALHOTRA is untimely as well. *Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94-95 (1993); *American Federal Group, Ltd. v Edelman*, 282 AD2d 279 (1<sup>st</sup> Dept. 2001).

The second cause of action alleges that defendant SHAM MALHOTRA knew when he entered the 1981 agreement that his representations were false and that he was assisted by ANNIE MALHOTRA and MONISH MOHAN in breaching the agreement. The alleged fraud by SHAM MALHOTRA is duplicative of the breach of contract cause of action. “[T]he alleged fraud was not collateral or extraneous to the contract . . . , did not allege any damages, including those for foregone opportunities, that would not be recoverable under a contract measure of damages . . . and failed to plead a duty separate from a breach of contract (citations omitted) . . . .” *Coppola v Applied Electric Corp.*, 288 AD2d 41 (1<sup>st</sup> Dept. 2001).

In any event, fraud requires a misrepresentation of a material fact, falsity, scienter and deception. There is no evidence of any such representation by any of the moving defendants. Insofar as the second cause of action alleges conspiracy to defraud as against ANNIE MALHOTRA, “[a] claim of conspiracy does not constitute a substantive tort and may be alleged only to connect a defendant to an otherwise actionable tort.” *Mansanto v Electronics Data Sys. Corp.*, 141 AD2d 514, 515 (2<sup>nd</sup> Dept. 1988); *Chemical Bank v Ettinger*, 196 AD2d 711 (1<sup>st</sup> Dept. 1993); *Callahan v Gutowski*, 111 AD2d 464 (3<sup>rd</sup> Dept. 1985). Since the fraud claim has been dismissed, so must the conspiracy to defraud. *Pappas v Passias*, 271 AD2d 420 (2<sup>nd</sup> Dept. 2000);

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*Truong v AT&T*, 243 AD2d 278 (1<sup>st</sup> Dept. 1997). Further, there is insufficient evidence of ANNIE MALHOTRA agreeing to cooperate in a fraudulent scheme. *Truong v AT&T, supra*. In addition, the second cause of action as alleged, lacks the requisite specificity. CPLR § 3016(b); *Barclay Arms, Inc. v Barclay Arms Associates*, 74 NY2d 644 (1989).

The third cause of action alleges a breach of fiduciary duty by defendant SHAM MALHOTRA, again assisted by defendants ANNIE MALHOTRA and MOHNISH MOHAN, resulting in unjust enrichment. This cause of action, too, fails for want of specificity. CPLR §3016(b). There is no evidence of a fiduciary relationship, a false representation by any of the moving defendants or their knowledge thereof. *Mobile Oil Corp. v Joshi*, 202 AD2d 318 (1<sup>st</sup> Dept. 1994); *Elganian v Harvey*, 249 AD2d 206 (1<sup>st</sup> Dept. 1998).

The fourth cause of action alleges that defendant SHAM MALHOTRA, with the assistance of ANNIE MALHOTRA and MOHNISH MOHAN failed to deliver a deed conveying a 10% interest in the property on which KING FREEZE was located. This cause of action has been withdrawn. The Court notes it would be barred by the Statute of Limitations as well as the Statute of Frauds. CPLR § 214(4); General Obligations Law §5-703(1).

The fifth cause of action alleges that defendant SHAM MALHOTRA breached the agreement by not delivering stock in defendant KING FREEZE. Again, this cause of action is barred by the Statute of Limitations for contracts. CPLR § 213(2).

The sixth cause of action alleges that in 1986, SHIV MOHAN lent defendant SHAM MALHOTRA three million dollars, repayable upon demand, and that although demanded, the monies have not been repaid. Plaintiff alleges that in 1995, with the assistance of defendants ANNIE MALHOTRA and MOHNISH MOHAN, these defendants breached the loan agreement. This cause of action is also barred by the Statute of Limitations. CPLR § 213(2); *Pomaro v Quality Sheet Metal, Inc., supra*. As for ANNIE MALHOTRA, it is untimely as well. CPLR § 214(4); *Kronos, Inc. v AVX Corp., supra*; *American Federal Group Ltd. v Edelman, supra*.

The seventh cause of action alleges that defendant SHAM MALHOTRA knew when he entered the 1986 loan agreement that his representations were false and that with the assistance of defendants ANNIE MALHOTRA and MONISH MOHAN, he breached the 1986 loan agreement. Again, this cause of action

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fails as all that is alleged in an intent not to perform when the agreement was entered. *Coppola v Applied Electric Corp., supra*. Again, there is no evidence of a fraudulent representation by any of the moving defendants. Insofar as the seventh cause of action alleges conspiracy to defraud as against ANNIE MALHOTRA, it is dismissed for the same reasons that the second cause of action was dismissed as against her. Again, this cause of action lacks the required specificity. CPLR § 3016(b); *Barclay Arms, Inc. v Barclay Arms Associates, supra*.

The eighth cause of action alleges breach of fiduciary duty by defendant SHAM MALHOTRA again assisted by ANNIE MALHOTRA and MONISH MOHAN with respect to the 1986 loan resulting in unjust enrichment. Again, this cause of action fails for want of specificity. CPLR § 3016(b). In any event, there is again no evidence of a fiduciary relationship, a false representation by any of the moving defendants, or their knowledge thereof. *Mobil Oil Corp. v Joshi, supra; Elghanian v Harvey, supra*.

The ninth cause of action alleges that the loan agreements were settled by defendants SHAM MALHOTRA, assisted by ANNIE MALHOTRA and MONISH MOHAN, via forged documents including releases and powers of attorney, as a result of which these defendants were allegedly unjustly enriched. In the tenth cause of action, plaintiff alleges that defendants SHAM MALHOTRA, KING FREEZE and MONISH MOHAN made transfers of SHIV MOHAN's interests without consideration, in violation of his rights. There is no evidence to support these claims. The funds were held by the Chapeltown entity, not plaintiff's assignor SHIV MOHAN. Furthermore, consideration was recited in the agreements and it is evident that defendant SHAM MALHOTRA relinquished certain claims.

In sum, there is absolutely no evidence that any of the moving defendants had any knowledge of the fraudulent conduct alleged, which, if perpetrated at all, was perpetrated by the defendant MONISH MOHAN. Further, none of the corporate defendants had any privity with plaintiff's assignor SHIV MOHAN. There is no basis whatsoever for imposing liability on them. And, assuming, *arguendo*, that defendant KING FREEZE was a proper party, with the exception of CRYSTAL AIR CONDITIONING, there are no grounds for successor liability. Plaintiff's claims against defendant SHAM MALHOTRA's wife ANNIE MALHOTRA fail for similar reasons.

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The Court further notes that the assignment relied on by plaintiff does not afford him anything more than a right to assert claims against defendant SHAM MALHOTRA and the fraud claim is not specifically included.

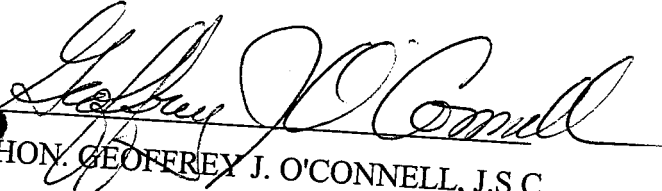
Plaintiff seeks leave to amend his Complaint. In the proposed Amended Complaint, the first and second causes of action are against SHAM and ANNIE MALHOTRA and MONISH MOHAN; plaintiff alleges that these defendants defrauded SHIV MOHAN by not returning two million dollars when demanded and by negotiating settlement agreements depriving SHIV MOHAN of his interests through the use of a forged power of attorney, release and agreements. Defendants are alleged to have knowingly permitted this. The third cause of action alleges unjust enrichment against all defendants. The fourth cause of action alleges that the disbursement of funds to, *inter alia*, some of the defendants was without consideration. The fifth cause of action is against the corporate defendants and SHAM MALHOTRA. Plaintiff alleges a breach by defendant KING FREEZE and SHAM MALHOTRA. He alleges that in 1981, SHIV MOHAN lent defendant KING FREEZE and SHAM MALHOTRA \$100,000.00 for which he was given a 10% interest in defendant KING FREEZE as well as any successors-in-interest. The request to amend was not made in the proper form. CPLR § 2214. In any event, the proposed Complaint lacks merit as it fails to cure deficiencies in the Complaint itself. The application is Denied.

It is, SO ORDERED.

Dated:

June 28, 2002

**ENTERED**

  
HON. GEOFFREY J. O'CONNELL, J.S.C.

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COUNTY CLERK'S OFFICE