State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: March 12, 2026 CV-24-1351

JOHN DOE,
Appellant,
v

TOBIN AND DEMPF, LLP, et al.,
Defendants and Third-Party Plaintiffs-Respondents;

MERSON LAW, PLLC, et al.,
Third-Party Defendants-Appellants.

MEMORANDUM AND ORDER

Calendar Date: January 12, 2026

Before: Garry, P.J., Clark, Pritzker, Powers and Corcoran, JJ.

Hasapidis Law Offices, South Salem (*Annette G. Hasapidis* of counsel), for appellant and third-party defendants-appellants.

Barclay Damon LLP, Syracuse (*Samantha M. McDermott* of counsel), for defendants and third-party plaintiffs-respondents, and *Michael L. Costello*, Albany, defendant and third-party plaintiff-respondent pro se.

Garry, P.J.

Appeal from an order of the Supreme Court (Daniel Lynch, J.), entered July 1, 2024 in Albany County, which, among other things, granted defendants' motion to dismiss the complaint.

In 2019, plaintiff commenced an action against the Roman Catholic Diocese of Albany, among others, pursuant to the Child Victims Act (*see* CPLR 214-g [hereinafter CVA]). During that lawsuit, the Diocese was represented by defendant and third-party plaintiff Tobin and Dempf, LLP – specifically, defendant and third-party plaintiff Michael L. Costello (hereinafter collectively referred to as the Tobin and Dempf defendants). Plaintiff was represented by third-party defendants (hereinafter the Merson Law defendants). The case was actively litigated over the next three years. With trial approaching, the parties agreed to engage in settlement conferences before Supreme Court (Mackey, J.). The court conducted four mediation sessions over the course of about a week, which resulted in settlement on March 1, 2023. Pursuant to the settlement agreement, plaintiff agreed to release all claims against the Diocese and the Diocese agreed to pay plaintiff $375,000 within 21 days of the settlement (*see generally* CPLR 5003-a). On March 15, 2023, before payment was made, the Diocese, aided by different counsel, filed a voluntary petition for reorganization with the US Bankruptcy Court, Northern District of New York, resulting in an automatic stay of plaintiff's CVA lawsuit, including disbursement of the negotiated settlement proceeds. The Merson Law defendants filed a verified proof of claim in Bankruptcy Court on behalf of plaintiff and then further moved to compel the Diocese to assume or reject the settlement agreement as an executory contract. Bankruptcy Court denied the motion.

Plaintiff, represented by the Merson Law defendants, then commenced this action, setting forth claims for fraudulent misrepresentation, fraudulent inducement and aiding and abetting fraud, alleging that the Tobin and Dempf defendants acted with an intent to deceive and/or defraud when they misrepresented the financial condition of the Diocese and thereby caused plaintiff psychological and other injuries.[1] The Tobin and Dempf defendants joined issue, counterclaimed for abuse of process and commenced a third-party action against the Merson Law defendants, also for abuse of process. Plaintiff and the Merson Law defendants filed motions to strike the counterclaim and third-party

[1] Plaintiff has expressly abandoned his remaining claims for breach of contract, intentional and negligent infliction of emotional distress, promissory estoppel and breach of the covenant of good faith and fair dealing.

complaint and for sanctions against the Tobin and Dempf defendants for frivolous claims. The Tobin and Dempf defendants opposed and moved to dismiss the complaint for failure to state a cause of action. Plaintiff thereafter cross-moved to amend the complaint. Supreme Court (D. Lynch, J.) granted the motions to dismiss the complaint and to strike the counterclaim and third-party complaint and denied the motions to amend and for sanctions. Plaintiff and the Merson Law defendants appeal.

On a motion to dismiss for failure to state a cause of action, "[w]e accept the facts as alleged in the complaint as true, accord plaintiff[ ] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *accord Cavosie v Hussain*, 215 AD3d 1080, 1081 [3d Dept 2023]). This favorable treatment, however, is "not limitless" (*Tenney v Hodgson Russ, LLP*, 97 AD3d 1089, 1090 [3d Dept 2012]; *accord Radiation Oncology Servs. of Cent. N.Y., P.C. v Warren*, 224 AD3d 979, 982 [3d Dept 2024], *lv denied* 42 NY3d 902 [2024]). It is well established that "allegations consisting of bare legal conclusions . . . are not entitled to any such consideration" (*Simkin v Blank*, 19 NY3d 46, 52 [2012] [internal quotation marks and citation omitted]; *see Myers v Schneiderman*, 30 NY3d 1, 11 [2017]), and a claim predicated on fraud must be pleaded with sufficient particularity (*see* CPLR 3016 [b]; *Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 491-492 [2008]; *Greschler v Greschler*, 51 NY2d 368, 375 [1980]). Ultimately, "[d]ismissal of [a] complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery" (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017]; *accord He v Apple, Inc.*, 189 AD3d 1984, 1985 [3d Dept 2020]).

Claims premised upon a fraudulent misrepresentation require the pleading of a specific representation of existing material fact (*see Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011]; *see also Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V.*, 17 NY3d 269, 276 [2011]; *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 558-559 [2009]; *State of N.Y. Workers' Compensation Bd. v Wang*, 147 AD3d 104, 120 [3d Dept 2017]). Plaintiff's effort to satisfy this basic requirement rests on a non sequitur. The complaint states that the Tobin and Dempf defendants each "materially misrepresented facts to [p]laintiff, including, but not limited to, the financial condition of its client and how it would need to file for bankruptcy protection if the CVA [l]awsuit did not settle."[2] The statement that a failure to

[2] The speaker is elsewhere identified as Costello.

settle would require bankruptcy does not constitute – either expressly or by fair implication – an assurance that settlement would guarantee future solvency. The alleged representation speaks only to one contingency, not its converse, and this Court may not reasonably supply the missing assurance by inference on these pleaded facts.[3] In the absence of any representation germane to the injury allegedly sustained upon the Diocese's bankruptcy filing, plaintiff's causes of action sounding in fraud are little more than a recitation of their elements (*see He v Apple, Inc.*, 189 AD3d at 1985; *Wells Fargo Bank, N.A. v Wine*, 90 AD3d 1216, 1218 [3d Dept 2011]; *cf. Sutton v Hafner Valuation Group, Inc.*, 115 AD3d 1039, 1041 [3d Dept 2014]).

Nor does the belated allegation in plaintiff's proposed amended complaint – that plaintiff was "also explicitly told that if he did settle the CVA [l]awsuit, that he would be compensated and finally get the closure that he needed to move forward with his life" – establish this necessary element. Even if that generic expectation and/or opinion could be deemed actionable, neither may be reasonably understood as an affirmative representation of the Diocese's present financial condition or future financial viability. Further discovery also would not cure the deficiency with respect to the representation itself, which would be already well known to plaintiff and/or the Merson Law defendants (*see Greschler v Greschler*, 71 AD2d 322, 324-325 [2d Dept 1979], *mod* 51 NY2d 368 [1980]; *see generally* CPLR 3211 [d]). Although affidavits and other proof provided by a plaintiff may be relied upon to remedy inadequacies in a complaint (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Hartshorne v Roman Catholic Diocese of Albany, N.Y.*, 200 AD3d 1427, 1429 [3d Dept 2021]), plaintiff's affidavit only underscores that no representation was made to him with respect to the ongoing possibility of bankruptcy following any settlement.[4] There are a number of other failings with respect to the pleading before us, but the failure to adequately set forth the required material

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[3] Rather than misrepresenting the financial condition of the Diocese, the alleged representation appears, based upon the subsequent events, to have accurately advised plaintiff that a possible bankruptcy was a looming concern.

[4] To the extent that plaintiff is also attempting to proceed on a theory of fraud by omission, no basis for imposing a duty to disclose has been pleaded (*see generally Mandarin Trading Ltd. v Wildenstein*, 16 NY3d at 178-179; *Kelsey v Lenore R.*, 211 AD3d 1361, 1362 [3d Dept 2022], *appeal dismissed* 39 NY3d 1091 [2023]; *Sutton v Hafner Valuation Group, Inc.*, 115 AD3d at 1041; *McDonnell v Bradley*, 109 AD3d 592, 594 [2d Dept 2013]; *Kosowsky v Willard Mtn., Inc.*, 90 AD3d 1127, 1129 [3d Dept 2011]).

representation in the first instance is ultimately fatal to each of the causes of action that sound in fraud (*see* CPLR 3016 [b]). We therefore discern no abuse of discretion in Supreme Court's denial of plaintiff's motion to amend, and the motion to dismiss with respect to plaintiff's fraud causes of action was properly granted.

The parties' remaining contentions have been considered and determined to be without merit.

Clark, Pritzker, Powers and Corcoran, JJ., concur.

ORDERED that the order is affirmed, with costs.

ENTER:

Robert D. Mayberger
Clerk of the Court