

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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CAROLINA GILDRED, an individual,	:	INDEX No. 153554/2017
Plaintiff,	:	
vs.	:	MEMO OF LAW IN SUPPORT OF
MICHAEL D. FOSTER (aka DARREN M.	:	MOTION TO DISMISS VERIFIED
FOSTER, an individual,	:	ANSWER, AFFIRMATIVE DEFENSES
Defendant.	:	AND COUNTERCLAIMS; MOTION TO
	:	DISMISS COUNTERCLAIMS; AND, IN
	:	THE ALTERNATIVE, MOTION TO
	:	CORRECT PLEADINGS

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I. INTRODUCTION

Plaintiff is a married woman living in San Diego, California. Defendant is a resident of New York. Plaintiff’s complaint is a result of Defendant’s sustained campaign of harassment, defamation and infliction of emotional distress against Plaintiff.

Plaintiff was introduced to Defendant as a tango instructor on a trip to New York in May of 2016. Later that year, Defendant persuaded Plaintiff to have him travel to California to provide dance lessons to Plaintiff and a group of her friends. Thereafter, Defendant began to push Plaintiff to open a tango studio in California. He posited that he would be her partner in the studio and that Plaintiff’s husband could put up the money. Plaintiff made clear to Defendant that she did not want to pursue a studio, both verbally and in writing.

Thereafter, Defendant became unhinged. He proceeded to harass, defame and inflict emotional distress upon Plaintiff. This included lying about Plaintiff’s fidelity to her husband, setting up sham websites in the name of Plaintiff and her husband, falsely accusing Plaintiff’s husband of criminal conduct, contacting her husband’s business office personnel with false information regarding her husband, leaving voice mail messages stating that when Plaintiff kisses

her husband her husband is tasting Defendant's "big black dick," threatening Plaintiff and her husband, and seeking to extort money from Plaintiff and her husband.

Plaintiff filed the instant Complaint on April 17, 2017 alleging intentional infliction of emotional distress and defamation.

On May 8, 2017, Defendant's counsel, Brian Figeroux entered an appearance on behalf of Defendant. (ECF Docket, Document # 3). On May 19, 2017, Defendant *himself, not counsel of record*, filed a purportedly Verified Answer, Affirmative Defenses and Counterclaims, along with exhibits. (ECF Docket, Documents # 4 – 9). On May 20, 2017 Defendant *himself, not counsel of record*, filed an amended purportedly Verified Answer, Affirmative Defenses and Counterclaims, along with additional exhibits ("Amended Answer"). (ECF Docket, Documents # 10-13). Neither the original responsive filing, nor the amended responsive filing, is signed by Mr. Figeroux, but instead by Defendant himself. (See ECF Docket, Documents #4, 10).

II. DEFENDANT'S AMENDED ANSWER FAILS TO COMPLY WITH CPLR 3013, 3014, AND 2101(A)

Among other things, CPLR 3014 requires every pleading contain "plain and concise statements," that each paragraph be "consecutively numbered" and that paragraphs contain "as far as practicable, a single allegation." CPLR 3013 requires that in any pleading, "[s]tatements . . . be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." Failure to meet these basic pleading standards warrants dismissal of the pleading. *Panagouloupoulos v. Ortiz*, 38 N.Y.S.3d 807, 808 (N.Y. App Div. 2016).

Defendant's Amended Answer flies in the face of these basic requirements. It is unintelligible and incoherent. Defendant's sentences run on for paragraphs and paragraphs run on for pages. For example, the fourth of five sentences of the paragraph labeled "(y)" reads:

After all during those times leading up to the these proceeding to this lawsuit Defendant only did what he'd best known to do with the tools best accessible to his reach in efforts

earnestly only desirous of a confirmation that Complainant Carolina Gildred was ok, not in harms way and that he'd only wanted to confirm what really went wrong as to why their business partnership was to put of without any apparent reason or excuses whatsoever and that in the Complainant own words all needed to be placed on hold Quote "a Distant 2nd Place" was further allusive and an apparent constructive method to resovely any constitutional right or breach of contract lawsuit from defendant but dither it became intentional to that complainant and spouse was rather correctively asserting defendant a must, to become unhinged or even incriminate himself."

Plaintiff cannot (and cannot reasonably be expected to) discern what this means, let alone determine whether to admit or deny. As review of Defendant's submission demonstrates, this is but one example.

Further, the Amended Answer's paragraphs are not consecutively numbered and at times repeat themselves. For example, there are three different paragraphs numbered "6". (Amended Answer a pp. 14, 15, 22). This is not permitted under CPLR 3014. Moreover, Defendant then purports to incorporate some or all of these paragraphs into later counterclaims. (*See id.* p. 24). Again, this renders an unfair and prejudicial burden upon Plaintiff who absent action from this Court is required to admit or deny such allegations as incorporated into a counterclaim she cannot discern.

Finally, CPLR 2101(a) requires that a party's attorney of record sign the pleading. Defendant's attorney of record, Brian Figeroux (ECF Docket, Document # 3), did not sign the Amended Answer. Further complicating matters, Defendant states at times that he is appearing *pro se*. However, as noted, his attorney filed a notice of appearance, contacted Plaintiff's counsel on Defendant's behalf to obtain an extension of time to answer the complaint, and has not withdrawn from the case. Accordingly, his signature is required on all pleadings per CPLR 2101(a) and the failure to include such signature warrants dismissal.

III. DEFENDANT'S COUNTERCLAIMS SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM

Additionally, all of Defendant counterclaims should be dismissed pursuant to C.P.L.R. 3211(a)(7). Each of the four counterclaims fails to state a claim.

1. Defendant's First Counterclaim Is, At Best, A Private Contract Dispute Not Subject to GBL section 349.

Defendant's first counterclaim against Plaintiff alleges Plaintiff violated New York General Business Law section 349, under which "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful." GBL § 349. To establish a claim pursuant to GBL § 349, (1) the act or practice at issue must be consumer-oriented; (2) the act or practice at issue must be misleading in a material respect; and (3) the plaintiff must be injured as a result of the act or practice at issue. *See, e.g., Spagnola v. Chubb Corp.*, 574 F.3d 64, 74 (2d Cir. 2009); *Rodriguez v. It's Just Lunch, Intern.*, 300 F.R.D. 125, 145 (S.D.N.Y. 2014).

"[A]s a threshold matter, plaintiffs claiming the benefit of section 349 . . . must charge conduct of the defendant that is consumer-oriented." *Oswego Laborers' Local 214 Pension Fund v. Me. Midland Bank, N.A.*, 85 N.Y.2d 20, 25 (1995). A plaintiff must "demonstrate that the acts or practices have a broader impact on consumers at large." *Id.*

Private contract disputes, unique to the parties, however, do not fall within the ambit of the statute. That is, in order to qualify as "consumer-oriented," conduct must be directed toward the consuming public at large or . . . harmful to a general public interest, and not just the individual plaintiff.

Jordan v. Tucker, 2017 BL 168870, 10 (E.D.N.Y. May 19, 2017) (internal quotations and citations omitted).

Defendant's GBL § 349 claim is in fact titled "Breach of Contract" and alleges in vague terms that Plaintiff "misrepresented the terms of the alleged contract in the business of dance as dance partner to Defendant and dance business partner to Defendant, if any, in order to induce the defendant to enter into the agreement. . ." Even assuming this language is sufficient to allege a breach of contract between Plaintiff and Defendant, it does not state a claim pursuant to GBL § 349. "Private contract disputes, unique to the parties, [do] not fall within the ambit of the statute." *Oswego Laborers' Local 214 Pension Fund*, 85 N.Y.2d at 25.

Moreover, Defendant's bare legal conclusions, e.g. that Plaintiff's "deceptive act . . . had a broad impact on Defendant and its consumers at large", is unsupported by any facts anywhere in the pleading, is deficient pursuant to CPLR 3013, and should be dismissed.

2. Defendant Fails To Sufficiently Allege Fraudulent Concealment and Fails To Allege With Particularity.

Plaintiff's second counterclaim alleges fraudulent concealment. (Amended Answer, p. 24). The elements of a fraudulent concealment claim under New York law are: (1) a duty to disclose material facts; (2) knowledge of material facts by a party bound to make such disclosures; (3) failure to discharge a duty to disclose; (4) scienter; (5) reliance; and (5) damages. *Aetna Casualty & Surety Co. v. Aniero Concrete Co., Inc.*, 404 F.3d 566, 582 (2d Cir. 2005) (citing *Congress Fin. Corp. v. John Morrell & Co.*, 790 F. Supp. 459, 472 (S.D.N.Y. 1992).

Defendant's second counterclaim fails to allege the basic elements of fraudulent concealment, including failing to allege (a) knowledge of material facts by a party bound to make such disclosures; (b) failure to discharge a duty to disclose; (c) scienter; and (d) reliance. Amended Answer, p. 24. This failure is fatal to Defendant's claim.

Further, fraud claims must be pled with particularity. CPLR 3016(b). CPLR 3016(b) provides that "[w]here a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail." *See also Ambassador Factors v. Kandel & Co.*, 626 N.Y.S.2d 803, 805-06 (1st Dept 1995) (fraud claims not supported with facts sufficient under CPLR 3016(b) have "consistently been dismissed").

Defendant's conclusory allegations of fraudulent concealment are devoid of any factual support. Defendant purports to incorporate by reference other numbered paragraphs of the Amended Answer; however, as noted above Defendant has not consecutively numbered the paragraphs of the pleading and some numbers appear as many as three times. Even assuming

Defendant intended to incorporate *all* of the number paragraphs that could correspond, the paragraphs incorporated by reference pertain only Defendant's admissions/denials and affirmative defenses to Plaintiff's defamation claim. Thus, the second counterclaim does not satisfy CPLR 3013, let alone rise to the level of particularity required by CPLR 3016.

3. Defendant Fails To Allege Or Support His Unjust Enrichment Claim.

Defendant's third counterclaim alleges unjust enrichment. A plaintiff must show "that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered." *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 182, (2011) (internal quotations omitted).

This counterclaim suffers from the same defects as above. Defendant fails to allege the second element, i.e. that Plaintiff's alleged enrichment was *at the expense of Defendant*. Moreover, the counterclaim again consists of bare legal conclusions devoid of factual support. It purports to incorporate numbered paragraphs by reference that are duplicative and incoherent and, in any event, wholly unrelated to unjust enrichment.

4. Defendant's Fourth Counterclaim Is Not a Claim.

Defendant's fourth counterclaim is not a counterclaim. It appears to allege that Plaintiff engaged in unconscionable conduct of an unspecified nature. It does not state or provide factual support for any specific cause of action or request any damages or other equitable relief. *See* Amended Answer p. 26 (prayer for relief). At best, it appears to be an affirmative defense to Plaintiff's complaint. In any event, it should be dismissed as a counterclaim because it does not state an affirmative claim on which relief may be granted under any set of facts.

IV. ALTERNATIVELY, DEFENDANT SHOULD CORRECT THE AMENDED ANSWER

If the Court denies the motion to dismiss, Plaintiff respectfully requests that the Court grant Plaintiff's Motion to Correct Pleadings pursuant to CPLR 3024(a). Defendant's Amended Answer is "so vague or ambiguous that [Plaintiff] cannot reasonably be required to frame a response."

As set forth above, Defendant's Amended Answer is unintelligible and incoherent. Defendant's sentences run on for paragraphs and paragraphs run on for pages. The paragraphs are not consecutively numbered and the numbers repeat. Defendant then purports to incorporate some or all of these paragraphs into later counterclaims. Plaintiff cannot (and cannot reasonably be expected to) discern what this means, let alone determine whether to admit or deny.

Further, Defendant's Amended Answer purports to be "verified" but it is signed only by Defendant and does not include the requisite affidavit to verify a pleading pursuant to CPLR 3021. As the Court is no doubt aware, the import of a verified pleading under CPLR 3021 is that all subsequent pleadings must be verified as well. Plaintiff respectfully requests the Court require Defendant clarify his Amended Answer to be clear it is not "verified," or else comply with the requirements of verified pleading pursuant to CPLR 3021.

V. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests the court grant Plaintiff's Motion to Dismiss Defendant's Verified Answer, Affirmative Defenses and Counterclaims; or in the alternative, grant Plaintiff's Motion to Correct the same.

Executed at Randolph, New Jersey
Dated: June 9, 2017

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