

Ciao-Di Rest. Corp. v Friedberg
2011 NY Slip Op 31361(U)
May 4, 2011
Supreme Court, New York County
Docket Number: 110911/10
Judge: Paul Wooten
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

WOOTEN
CIAO-DI RESTAURANT CORP.,

Plaintiff,

INDEX NO. 110911/10

MOTION DATE _____

- v -

MOTION SEQ. NO. 001

**ALAN B. FRIEDBERG and PAXTON
350, LLC,**

MOTION CAL. NO. _____

Defendants.

FILED

MAY 24 2011

**NEW YORK
COUNTY CLERK'S OFFICE**

The following papers, numbered 1 to 5 were read on the motion by defendant Alan B. Friedberg to dismiss the complaint as against it and for sanctions against plaintiff.

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1, 2</u>
Answering Affidavits — Exhibits (Memo) _____	<u>3, 4</u>
Replying Affidavits (Reply Memo)	<u>5</u>

Cross-Motion: Yes No

The herein action was brought by plaintiff Ciao-Di Restaurant Corp. ("plaintiff") on a theory of common-law negligence as against defendant Alan B. Friedberg ("Friedberg") individually, or in the alternative, for contribution as against defendant Paxton 350, LLC ("Paxton"). Plaintiff commenced the original action by filing a summons and complaint on defendants on or about August 16, 2010. Friedberg now moves dismiss the complaint pursuant to CPLR § 3211(a)(7), on the grounds that the complaint fails to state a cause of action against him individually, and for sanctions against plaintiff and/or its counsel for frivolous conduct, pursuant to § 130-1.1 of the Rules of the Chief Administrator.

BACKGROUND

Plaintiff and defendant Paxton were members of a joint venture formed to develop property in Greenwich Village located at 88 Washington Place, New York, New York ("88 Washington") and in connection with the joint venture, plaintiff and Paxton filed a joint venture tax return entitled "Paxton Ciao-Di Joint Venture" (Complaint ¶¶ 5, 8). At the time, Friedberg was acting as Paxton's managing member. On August 16, 2007 Paxton was terminated by plaintiff as the Manager of 88 Washington, and this termination resulted in litigation before the Hon. Richard Lowe in New York County Supreme Court (Opposition ¶¶ 4). However, Paxton and Friedberg continued to maintain control of the payment of expenses for the project while the parties litigated their dispute (Opposition ¶¶ 4).

During the ongoing litigation, the joint venture needed to file a joint tax return, and with plaintiff's consent, Friedberg undertook the duty to file the New York City Unincorporated Business Tax ("UBT") for the year 2007, and submit the payment of \$217,647.00 (Complaint ¶¶ 9-10). Plaintiff alleges that Friedberg was negligent because he mailed the UBT form one day late, and as a result New York City assessed a total of \$58,875.20 in late filing penalties and interest (Complaint ¶¶ 11-12). Despite plaintiff's request, defendants allegedly refused to pay any portion of the assessed penalties and interests, and plaintiff was forced to pay the full \$58,875.20 (Opposition ¶ 7).

Friedberg submits in support of his motion, *inter alia*: a copy of the pleadings; and a memorandum of law. Friedberg proffers, and provides supporting case law, that during the subject incident he was acting as "an agent for a disclosed principal" and as a result he cannot be held personally liable for the claims asserted in the complaint, because plaintiff does not allege that he acted in bad faith or was guilty of tortious conduct independent of his principal, Paxton (see *Murtha v Yonkers Child Care Assn.*, 45 NY2d 913 [1978]; Friedberg Memo pg. 4).

Friedberg also argues that plaintiff's allegations against him, for failure to timely file the UBT extension form and payment, sound in breach of contract and not negligence (Reply pgs 3-6). However, if the Court finds that the failure to timely file the UBT form sounds in negligence, Friedberg argues in the alternative, that he is still insulated from personal liability because he was acting in his capacity as Managing Member of Paxton during the alleged negligence.

In opposition, plaintiff submits *inter alia*: an affidavit in opposition and a memorandum of law. Plaintiff opposes the motion on the ground that the "agent for a disclosed principal" limitation on liability is a limitation on contractual liability, and not a limitation on tort liability (Opposition ¶ 10). Plaintiff proffers that if an officer or director commits or participates in the commission of a tort, as Friedberg did here, whether or not it is also by or on behalf of a corporation, he is liable to third persons injured as a result (Plaintiff Memo pg. 3). In support of this argument, plaintiff cites Restatement (Third) of Agency § 7:01 which deals with an agent's liability to third parties and two Second Department cases. In distinguishing the cases cited to by Friedberg, plaintiff claims that those cases all deal with attempts to hold the agent for a disclosed principal liable on a contract, not for the agent's negligence or other commission of a tort (Plaintiff Memo pg. 4).

STANDARD OF LAW

When determining a CPLR 3211(a) motion, "we liberally construe the complaint and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion" (*511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]; *Leon v Martinez*, 84 NY2d 83, 87, [1994]; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, [2001]; *Wieder v Skala*, 80 NY2d 628, [1992]). "We also accord plaintiffs the benefit of every possible favorable inference" (*511 W. 232nd Owners Corp.*, 98 NY2d at 152; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d at 414).

Upon a 3211(a)(7) motion to dismiss for failure to state a cause of action, the "question for us is whether the requisite allegations of any valid cause of action cognizable by the state courts 'can be fairly gathered from all the averments" (*Foley v D'Agostino*, 21 AD2d 60, 65 [1st Dept. 1964], quoting *Condon v Associated Hosp. Serv.*, 287 NY 411, 414 [1942]). In order to defeat a pre-answer motion to dismiss pursuant to CPLR § 3211, the opposing party need only assert facts of an evidentiary nature which fit within any cognizable legal theory. (*Bonnie & Co. Fashions, Inc. v. Bankers Trust Co.*, 262 A.D.2d 188 [1st Dept. 1999]).

DISCUSSION

A. Cause of Action Against Friedberg Individually

Plaintiff's first cause of action alleges that Friedberg was negligent in mailing the UBT tax form a day late (complaint ¶ 11). As this is a pre-answer motion to dismiss it must be taken as true that Friedberg mailed in the UBT extension form one day late. Pursuant to New York Law, "the traditional common-law elements of negligence" are: "duty, breach, damages, causation and foreseeability" (*Hyatt v Metro-North Commuter R.R.*, 16 AD3d 218 [1st Dept 2005]). In regards to Friedberg's alleged negligence, the complaint states that "Friedberg undertook the duty to file an extension tax form for the 2007 UBT tax, along with the payment. Friedberg did not timely file the tax extension form, instead mailing it a day late" (complaint ¶ 10). The complaint further states, "Friedberg acted negligently in mailing the tax form a day late. As a result of Friedberg's negligence, on May 7, 2010 New York City assessed late filing penalties and interest..." (complaint ¶¶ 11, 12).

As joint venturers, a fiduciary relationship existed between plaintiff, a corporation, and Paxton, an LLC (*see Schlesinger v Regenstreif*, 26 Misc2d 604, 608 [1st Dept 1954]). Plaintiff fails to provide any proof to the Court in the form of the joint venture agreement or otherwise, that would establish that the parties intended for Friedberg, individually, to have the duty to mail

in the extension form for the UBT tax or the payment (see *Hernandez v Brookdale Mills, Inc.*, 194 AD 369, 380 [1st Dept 1920]). Moreover the complaint states that “[a]t all times relevant hereto, Friedberg was acting as the Managing Member of Paxton” (complaint ¶ 4). The Court finds that plaintiff’s complaint and opposition papers fail to establish that Friedberg, individually, owed a duty to plaintiff (see e.g. *Fernandez v Otis El. Co.*, 4 AD3d 69, 72 [1st Dept 2004]). Accordingly, we dismiss the common-law negligence claim because it is deficient as a matter of law (see e.g. *Residential Bd. Of Mrgs. Of the Columbia Condo.*, 2010 NY Slip. Op. 32299[U] [2010]; *Pelton v 77 Park Ave. Condominium*, 38 AD3d 1, 5 [1st Dept 2006]; *Fernandez*, 4 AD3d at 72).

C. 22 NYCRR § 130-1.1 Sanctions

Part 130 of the Rules of the Chief Administrator permits courts to sanction attorneys for engaging in frivolous conduct, which includes conduct: (1) “completely without merit in law”; (2) “undertaken primarily to... harass or maliciously injure another”; or (3) “assert[ing] material factual statements that are false” (see 22 NYCRR § 130-1.1[c][1]-[3]; *Tavella v Tavella*, 25 AD3d 523, 524 [1st Dept 2006]). Friedberg moves for sanctions against plaintiff and/or plaintiff’s counsel for bringing the herein action against him individually. The Court finds that plaintiff’s conduct in bringing the herein action was not frivolous within the meaning of 22 NYCRR § 130-1.1 (see *Anonymous* 258 AD2d at 279; *M&A Oasis v MTM Assoc.*, 307 AD2d 872, 875 [1st Dept 2003]).

CONCLUSION

For these reasons and upon the foregoing papers, it is,

ORDERED that the motion of defendant ALAN B. FRIEDBERG to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendant, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further,

ORDERED that the portion of defendant ALAN B. FRIEDBERG'S motion seeking sanctions against plaintiff and/or its counsel, pursuant to 22 NYCRR § 130-1.1 is denied; and it is further,

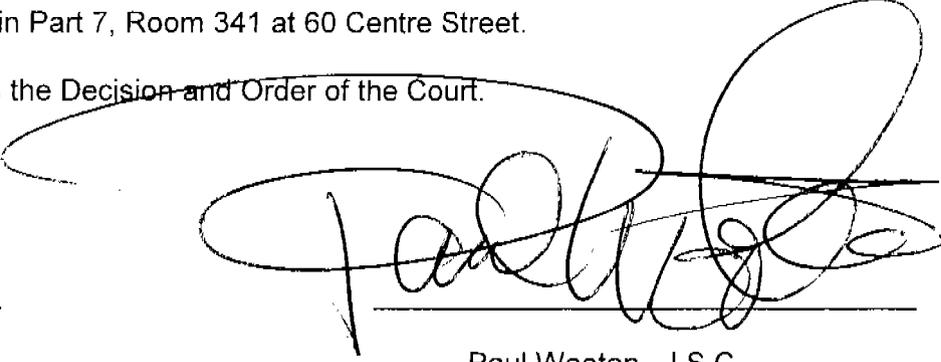
ORDERED that the action is severed and continued against the remaining defendant; and it is further,

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further,

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk and the Clerk of the Trial Support Office, who are directed to mark the court's records to reflect the change in the caption herein; and it is further,

ORDERED that the parties are directed to appear for a preliminary conference on June 1, 2011 at 11:00 a.m., in Part 7, Room 341 at 60 Centre Street.

This constitutes the Decision and Order of the Court.



Paul Wooten J.S.C.

Dated: 5-4-11

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST

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