

Allaham v Allaham

2006 NY Slip Op 30222(U)

May 17, 2006

Supreme Court, New York County

Docket Number: 0602193/2005

Judge: Bernard J. Fried

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

PRESENT: BERNARD J. FRIED
Justice

PART 60

EDDIE ALLAHAM,

INDEX NO. 602193-05

Plaintiff,

MOTION DATE 5/17/06

- v -

MOTION SEQ. NO. #001

JOSEPH ALLAHAM, E & D LLC, d/b/a
THE PRIME GRILL and JA RESTAURANT
MANAGEMENT LLC, d/b/a SOLO,

Defendants.

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

NEW YORK
COUNTY CLERKS OFFICE
MAY 19 2006

FILED

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE
MEMORANDUM DECISION FILED HERewith.

Dated: 5/17/06

Bernard J. Fried
BERNARD J. FRIED c.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 60

-----X

EDDIE ALLAHAM,

Plaintiff,

Index No. 602193/05

-against-

JOSEPH ALLAHAM, E & D LLC, d/b/a
THE PRIME GRILL, and JA RESTAURANT
MANAGEMENT LLC, d/b/a SOLO,

Defendants.

-----X

APPEARANCES:

For Plaintiff:

For Defendants:

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(Robert M. Simon, Esq.)

Straci & Cooper, LP
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New York, New York 10004
(Thomas Rubertone, Jr.)

FRIED, J.:

Defendants Joseph Allaham (Joseph or defendant Allaham), E & D LLC, d/b/a The Prime Grill (E & D or The Prime Grill), and JA Restaurant Management, LLC, d/b/a Solo (JA Restaurant Management or Solo), move, pursuant to CPLR 3211 (a) (7), to dismiss all causes of action against defendants The Prime Grill and Solo, and to dismiss the first cause of action (breach of fiduciary duty), the fourth cause of action (improper diversion of funds and usurpation of business opportunities), the fifth cause of action (fraud) and the sixth cause of action (accounting) against defendant Allaham. Defendant Allaham also

moves for a protective order, pursuant to CPLR 3103.¹

Unfortunately, the case at hand involves brother suing brother. E & D owns and operates The Prime Grill restaurant, and JA Restaurant Management owns and operates Solo restaurant. Plaintiff seeks distribution of profits from The Prime Grill and Solo, allegedly withheld, in violation of written and oral partnership agreements between the two brothers. Plaintiff alleges that he has been shut out of the business affairs of both restaurants by his brother, and deprived of his rightful partnership share of the monies and profits earned by both restaurants.

Plaintiff alleges that he and his brother, defendant Allaham, had agreed to establish a company to own and operate a strictly kosher restaurant in Manhattan, which they decided to call The Prime Grill. The company was established in May 2000. Plaintiff alleges that he and his brother entered into an oral contract in 1998 or 1999 to be partners in the restaurant business. This contract allegedly governed their relationship regarding The Prime Grill, including all business matters, profits and decisions relevant to the company. In 1999 or 2000, plaintiff obtained a loan under his own name to open The Prime Grill, also investing some of his own money. Plaintiff alleges that for two years, his brother worked with him as a partner. The Prime Grill opened on or about December 12, 2000. Plaintiff alleges that, upon information and belief, The Prime Grill grossed between two and four million dollars in sales between December 2000 and December 2002, between three and five million dollars between December 2002 and December 2003 and over seven million dollars between

¹

Plaintiff does not respond to defendant's motion for a protective order, as per the court's instructions at the conference on February 14, 2006.

December 2003 and the present. As partners, plaintiff and defendant Allaham each received a financial distribution every week from E & D. In addition, both brothers charged a substantial amount of money on their respective credit cards to the business, for personal items. Plaintiff also alleges that he and defendant Allaham were co-signatories on all business checks signed on behalf of E & D. On or about December 13, 2004, plaintiff and defendant Allaham, entered into a written contract, which stated that plaintiff was entitled to a 35% share in the profits of The Prime Grill.

After the success of The Prime Grill, plaintiff alleges that he and his brother decided to open a second kosher restaurant, known as Solo, which opened for business on or about June 5, 2004. Plaintiff allegedly borrowed approximately \$100,000 from a friend to finance the opening of the second restaurant. Plaintiff alleges that he and defendant Allaham established a second company to own and operate Solo, to wit, JA Restaurant Management.

During the summer of 2004, the parties' business relationship began to deteriorate. Plaintiff alleges that defendant Allaham no longer treated him as a partner. In April 2005, plaintiff stopped receiving his weekly distribution from The Prime Grill, allegedly based on his brother's arbitrary decision that he should not be paid. Plaintiff was excluded from all decision making for the two restaurants. Since September 2004, defendant Allaham has refused plaintiff access to any financial documents regarding either restaurant, and has refused to give plaintiff an accounting of either restaurant. Plaintiff alleges that defendant Allaham has used proceeds from The Prime Grill to invest in speculative stock ventures and has improperly converted funds of both The Prime Grill and Solo for his own

use. Plaintiff has allegedly not received any financial distribution from either E & D or JA Restaurant Management since April 2005.

Plaintiff's first cause of action is for breach of fiduciary duty against defendant Allaham, his second cause of action is for breach of contract against defendant Allaham, his third cause of action is for specific performance against defendant Allaham to disclose his financial affairs, render an accounting of the two restaurants and distribute to plaintiff his 35% of the monies and profits earned by the two restaurants, his fourth cause of cause is for improper diversion of funds and usurpation of business opportunities against defendant Allaham, his fifth cause of action is for fraud against defendant Allaham, his sixth cause of action is for an accounting against all defendants, and his seventh cause of action is for a declaratory judgment against all defendants, declaring plaintiff's status in the two restaurants.

Plaintiff tethers his claim of entitlement to a 35% partnership share in the profits of The Prime Grill to a written contract, dated December 13, 2004, allegedly signed by both brothers, which states in pertinent part:

This agreement made as of the 13th day of December 2004. ...

1. For ten dollars and other good and valuable consideration ... Joey hereby conveys, pledges and otherwise transfers to Eddie 35% (the "Share") of any and all of Joey's interest ("Interest") in this company only. ... For purposes of this Agreement, Interest shall include any and all of the fees, salaries, profits, income and any other benefits that Joey realizes (directly or indirectly) from the Companies (sic).

ED LLC d/b/a/ The Prime Grill.

2. Joey represents to Eddie that: (I) he is the sole owner of the Interest ...

(complaint, exhibit A).

Defendant Allaham claims that his purported signature on the agreement is a forgery, and that the agreement is, therefore, unenforceable. In any event, defendant Allaham argues that even if the signature were authentic, the plain language of the agreement does not grant any partnership rights to his brother, who, defendant Allaham maintains, was a mere employee at The Prime Grill, whose employment was terminated for forgery, embezzlement, conversion, identity theft, and credit card fraud. Defendant Allaham's contention that the parties never contemplated granting his brother a partnership interest in The Prime Grill is grounded in language in the agreement that requires Joseph "to cause the Companies to pay Eddie the share" (complaint, exhibit A). Defendant Allaham argues that, based on the date of the agreement, he was merely promising to pay his brother a share of his own interest in The Prime Grill, when and if distributed to him, at the end of 2005, plus a prorated share for one-half of December 2004.

Defendant Allaham further argues that there was no oral agreement granting plaintiff any partnership rights in Solo. Defendant Allaham contends that his brother's unsupported statements alleging the existence of such an oral partnership agreement would, in any event, be defeated by the language in the written agreement, which states that Eddie Allaham is being granted rights "in this company only and all future interests that Joey acquires in this company only." Defendant Allaham argues that this exclusionary language precludes the claim that plaintiff was later given any partner's rights in another business entity owned by his brother.

Preliminarily, I decline plaintiff's invitation to convert defendants' motion to dismiss the cause of action for failing to state a cause of action, pursuant to CPLR 3211 (a)

(7), to a motion for summary judgment, pursuant to CPLR 3212 (see CPLR 3211 [c]). Plaintiff contends that the court may choose to cast defendants' motion to dismiss in a summary judgment matrix, since defendants' motion uses language traditionally reserved for summary judgment motions. Conversion of the motion, however, is inappropriate since defendants have not expressly charted a summary judgment course (see Lockheed Martin Corp. v Atlas Commerce Inc., 283 AD2d 801 [3d Dept 2001]). Summary judgment would, in any event, be denied, since issues of fact exist which may not, on this barren record, be resolved at this juncture (see Wilt v Brunswick Plaza LLC, 281 AD2d 840 841 [3d Dept 2001]).

“[O]n a motion to dismiss a pleading for failure to state a cause of action pursuant to CPLR 3211 (a) (7), the pleading is to be liberally construed, accepting all of the facts alleged therein to be true, and according the allegations the benefit of every possible favorable inference” (Maric Piping Inc. v Maric, 271 AD2d 507 [2d Dept 2000]; Ravello v Orofino Realty Co., 40 NY2d 633, 634 [1976]). The standard is not whether the plaintiff has stated a cause of action, but whether the plaintiff has a cause of action (see McGuire v Sterling Doubleday Enters. L.P., 19 AD3d 660 [2d Dept 2005]).

Analyzing the pleadings on CPLR 3211 (a) (7) grounds, I find that based on:

- 1) the written agreement granting plaintiff 35% of the profits of the Prime Grill Restaurant;
- 2) plaintiff's allegations of the existence of an oral partnership agreement between plaintiff and defendant Allaham granting plaintiff a partnership interest in the Prime Grill; and 3)
- 3) plaintiff's allegations of a course of conduct that speaks to a functioning partnership between the brothers for the operation of the restaurant over a period of years, plaintiff has pleaded

the existence of a partnership in The Prime Grill sufficiently to withstand defendant Allaham's CPLR 3211 (a) (7) motion. For purposes of this motion, I will assume that plaintiff's allegation of the signature's authenticity is true (511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144 [2002]).

Moreover, accepting the allegations of the complaint as true and according plaintiff the benefit of every possible favorable inference, I find that plaintiff has sufficiently pleaded the existence of an oral contract for partnership in Solo. It is well settled that a partnership agreement may be oral (see Missan v Schoenfeld, 95 AD2d 198, 208 [1st Dept 1983]). This is particularly true when a plaintiff's past performance unequivocally refers to that oral agreement (Carey & Assoc. v Ernst, 22 AD3d 338, 341 [1st Dept 2005]). An oral agreement for forming a partnership for an indefinite period creates a partnership at will and is not barred by the statute of frauds (Prince v O'Brien, 234 AD2d 12, 12 [1st Dept 1996]; Sterling v Sterling, 21 AD3d 663, 665 [3d Dept 2005]). Defendants' argument, that the written agreement precludes consideration of a later oral agreement, is unpersuasive. The written agreement does not mention Solo restaurant at all, and does not address whether plaintiff has any rights in Solo restaurant. The oral agreement, therefore, does not contradict the terms of the written agreement and does not rule out plaintiff's allegation of the existence of a separate oral agreement with regard to a different restaurant.

Partners are accountable as fiduciaries and owe a duty of good faith and fairness to each other (Partnership Law § 43). "They owe a duty of exercising the utmost good faith, fairness and loyalty to their copartners" (Pace v Perk, 81 AD2d 444, 453 [2d Dept 1981]). Similarly, a covenant of good faith and fair dealing is implicit in a partnership

agreement (see Sterling Fifth Assoc. v Carpentille Corp., 5 AD3d 328 [1st Dept 2004]). Partners are obligated to avoid situations where their self-interests may conflict with the interests of the partnership (see Alizio v Perpignano, 176 AD2d 279, 281 [2d Dept 1991]). “The right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest” (Palazzo v Palazzo, 121 AD2d 261, 265 [2d Dept 1986]). Based on plaintiff’s allegations of partnership in both restaurants, I find that plaintiff has set forth legally cognizable causes of action against defendant Allaham for breach of fiduciary duty, breach of contract, specific performance for an accounting, improper diversion of funds and usurpation of business opportunities.

The cause of action for fraud is premised on plaintiff’s allegations that defendant made false material representations concerning the amount of monies flowing into and out of The Prime Grill and Solo restaurants and that these misrepresentations deprived plaintiff of his rightful share of the profits. Plaintiff further alleges that these false representations formed the basis of certain decisions that plaintiff made, with regard to the two restaurants, that harmed him. To plead a viable cause of action for fraud, plaintiff must allege that defendants made misrepresentations of material existing fact, which were false and known to be false by defendants when made, for the purpose of inducing plaintiff’s reliance, justifiable reliance on the alleged misrepresentation or omission by plaintiff, and injury (see Lama Holding Co. v Smith Barney Inc., 88 NY2d 413 [1996]; Van Kleeck v Hammond, 25 AD3d 941 [3d Dept 2006]). Mere recitation of the elements of fraud is insufficient to state a cause of action (Friedman v Anderson, 23 AD3d 163 [1st Dept 2005]).

In this case, plaintiff does not plead facts with sufficient particularity from which to infer that defendant Allaham knowingly misrepresented facts to plaintiff on which plaintiff relied, to his detriment. Accordingly, the cause of action for fraud is dismissed with leave to replead upon a proper evidentiary showing (see CPLR 3211 [e]; EBC I, Inc., v Goldman Sachs & Co., 7 AD3d 418 [1st Dept 2004], affd as modified 5 NY3d 11 [2005]; Putter v Feldman, 13 AD3d 57 [1st Dept 2004]).

Under the circumstances of this case, there is a justiciable controversy among the parties sufficient to defeat defendants' motion to dismiss the seventh cause of action seeking a declaratory judgment to declare plaintiff's status in the two restaurants (see CPLR 3001). Although a cause of action for a declaratory judgment is unnecessary and inappropriate when the plaintiff has an adequate alternative remedy such as breach of contract (Artech Info. Sys. L.L.C. v Tee, 280 AD2d 117, 125 [1st Dept 2001]), here, plaintiff does not have an adequate alternative remedy. The declaratory judgment claim does not merely seek a determination of the rights and obligations of the parties for alleged breaches of the partnership agreement. It also seeks a declaration that plaintiff is entitled to an accounting of both restaurants, that he has a right to review the books and records of both restaurants, and that he has a right to his share of the profits of both restaurants. Accordingly, this cause of action is sufficient.

Defendants' request for a protective order is denied, without prejudice, in accordance with the court proceedings on February 14, 2006.


Accordingly, it is hereby

ORDERED that defendants' motion is granted solely to the extent that the

fifth cause of action is dismissed with leave to replead upon the filing of a sufficient evidentiary basis, within 20 days after receiving a copy of this order with notice of entry, and is otherwise denied.

Dated: 5/17/06

ENTER



J.S.C.

BERNARD J. FRIED
J.S.C.

FILED
MAY 19 2006
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