

Jerrold v 807 Restaurant Associates Ltd.

2006 NY Slip Op 30329(U)

March 21, 2006

Supreme Court, New York County

Docket Number:

Judge: Karla Moskowitz

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: Hon. KARLA MOSKOWITZ PART 03
Justice

-----x
MICHELE JERROLD AS TRUSTEE FOR ETHAN
JERROLD MARCO TRUST,

INDEX NO 602264/2005

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 001

-against-

MOTION CAL. NO. _____

807 RESTAURANT ASSOCIATES LTD. d/b/a BAR 9,

Defendant.

-----x
807 RESTAURANT ASSOCIATES LTD.,

INDEX NO 590815/2005

MOTION DATE _____

Third Party Plaintiff,

MOTION SEQ. NO. _____

-against-

MOTION CAL. NO. _____

CHARELLE CORP. and MICHELLE JERROLD,

Third Party Defendants.

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

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is

ORDERED that this motion is decided in accordance with the
accompanying Decision and Order.

Dated: March 21, 2006

KARLA MOSKOWITZ

J.S.C.

FILED
MAR 24 2006
COUNTY CLERK'S OFFICE
NEW YORK

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: LAS PART 3

-----X
MICHELE JERROLD AS TRUSTEE FOR ETHAN JERROLD
MARCO TRUST,

Plaintiff,

Index No. 602264/05

-against-

807 RESTAURANT ASSOCIATES LTD. d/b/a BAR 9,

Decision and Order

Defendant.

-----X
807 RESTAURANT ASSOCIATES LTD.,

Third-Party

Index No.: 590815/05

Third Party Plaintiff,

-against-

CHARELLE CORP. and MICHELLE JERROLD,

Third Party Defendants.

-----X
KARLA MOSKOWITZ, J.:

Plaintiff Michele Jerrold (Jerrold as Trustee or plaintiff) for Ethan Jerrold Marco Trust (the Trust) sues defendant 807 Restaurant Associates Ltd. d/b/a Bar 9 (807 Restaurant) for payments defendant owes the Trust pursuant to the terms of a promissory note (the Note). Defendant signed the Note in consideration for the purchase of third-party defendant Charelle Corp.'s (Charelle) restaurant. A matrimonial court ordered the Note payable to the Trust pursuant to a judgment of divorce that Michele Jerrold obtained on June 20, 2000 that ordered the Trust to apply the payments from the sale of the restaurant to child support. (Affidavit of Herbert Silver, dated January 9, 2006, ¶ 12).

807 Restaurant has instituted a third-party action for fraudulent inducement, breach of

contract, fraudulent concealment and rescission of contract against the seller third-party defendant Charelle and third-party defendant Michele Jerrold.

By this initial motion plaintiff Jerrold as Trustee moves for (1) summary judgment on the Note and (2) dismissal of defendant 807 Restaurant's counterclaims alleging fraudulent inducement. The motion also requests dismissal of third-party plaintiff 807 Restaurant's third-party complaint. Third-party plaintiff 807 Restaurant cross-moves for summary judgment on liability on its second cause of action for breach of contract against third-party defendants Charelle and Michele Jerrold.

FACTS

The following facts are undisputed. Third-party defendant Charelle owned and operated a restaurant and bar called Bar 9 (the Restaurant) located at 807 Ninth Avenue in Manhattan for approximately three years. On October 20, 2000, Charelle entered into a Purchase Agreement with 807 Restaurant for the sale of the Restaurant. Michele Jerrold, Charelle's principal, signed the Purchase Agreement on Charelle's behalf. Pursuant to the Purchase Agreement, 807 Restaurant also accepted the sale and assignment of the lease for the Restaurant premises from Charelle.

The Purchase Agreement provided *inter alia* that,

the business sold herein is being conducted in compliance with all laws, ordinances and rules affecting said business, including a public assembly certificate, *if applicable* . . .

(emphasis added) (Aff. of Michele Jerrold, dated October 18, 2005, Exh. A). A public assembly certificate is more commonly referred to as a "public assembly permit."

At the closing on December 20, 2000, 807 Restaurant purchased the Restaurant for

\$900,000, of which 807 Restaurant signed a Note for \$550,000 with interest at the rate of 8% per year, in installments, in 96 equal monthly payments of \$7,775.17. The Note provided that 807 Restaurant was to make all payments to the Trust.

In dispute is whether 807 Restaurant has failed to make regular monthly payments pursuant to the Note's terms. Jerrold as Trustee claims that, from September 2003 to May 2004 and from August 2004 to March 2005, 807 Restaurant made late payments. However, it is undisputed that since April 2005, 807 Restaurant has not made any payments on the Note.

Also in dispute is whether, on April 13, 2005 and May 2, 2005, the attorney for Jerrold as Trustee sent letters to 807 Restaurant notifying 807 Restaurant of its default on the Note for failure to make the payments on the Note.

The First-Party Action

Jerrold as Trustee instituted this action against 807 Restaurant to recover the outstanding balance on the Note for \$295,651.41 because of 807 Restaurant's default. In its answer, 807 Restaurant asserted affirmative defenses of failure to provide notice, estoppel, failure of consideration, fraudulent inducement and fraudulent concealment. 807 Restaurant also asserted counterclaims against Jerrold as Trustee for fraudulent inducement in the execution and delivery of the Purchase Agreement and the Note.

The Third-Party Action

807 Restaurant then instituted a third-party action against Michele Jerrold and Charelle for fraudulent inducement, breach of contract, fraudulent concealment and rescission of the Purchase Agreement. Defendant's third-party complaint alleges that, at the time the parties entered into the Purchase Agreement, the Restaurant "was not being conducted in compliance

with all laws, ordinances and rules affecting said business.” (Third-Party Complaint, ¶ 10). More specifically, 807 Restaurant alleges that the “Restaurant was not being conducted with a public assembly certificate” and that 807 Restaurant cannot obtain one now because of the lack of a secondary means of egress. (Third-Party Complaint, ¶¶ 11, 16-17). 807 Restaurant also alleges that the Restaurant’s ventilation system encroached on the Restaurant’s adjoining property without permission, creating a condition that is not feasible for 807 Restaurant to remedy. 807 Restaurant claims that third-party defendants were aware of these problems and that, but for the third-party defendants’ misrepresentations, 807 Restaurant would not have entered into the Purchase Agreement or signed the Note.

DISCUSSION

On a motion for summary judgment, the court is limited to issue-finding and not issue-determination. *GTE Automatic Electric, Inc. v Martin’s Inc.*, 127 AD2d 545, 546 [1st Dept 1987]). When adjudicating a motion for summary judgment, the court must draw all inferences in favor of the nonmoving party. (*Baez v Rahamatalli*, 24 AD3d 256 [1st Dept 2005]). Summary judgment is appropriate only where there are no disputed issues of fact requiring a trial. (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]).

I. Plaintiff’s Motion for Summary Judgment

Plaintiff Jerrold as Trustee alleges that defendant 807 Restaurant breached its obligation under the Note by failing to make payments due and moves for summary judgment on the Note, late fees and attorneys’ fees. Plaintiff contends that the express terms of the Note make defendant’s obligation to pay unconditional and that defendant’s affirmative defenses, counterclaims and third-party allegations neither justify nonpayment nor raise any genuine issues

* 6]

of material fact in the main action. Defendant argues that its counterclaims, defenses and third-party causes of action are inseparable from the Note. Defendant contends that the Purchase Agreement and the Note are integral parts of the same transaction and, thus, the defenses, counterclaims and third-party action preclude summary judgment on the Note. Finally, defendant argues that fraud is a valid defense to nonpayment because Jerrold as Trustee is not a holder in due course and thus, whether defendant executed the Note as part of a fraudulent scheme creates an issue of fact.

A. Counterclaims and Affirmative Defenses are Not Inextricably Intertwined

“When a viable counterclaim arises from the same underlying transaction as is involved in the main action and is inseparable from or inextricably intertwined with the transaction, summary judgment should be denied.” (*Yo-Lee Realty Corp. v 177th Street Realty Assoc.*, 208 AD2d 185, 189 [1st Dept 1995]; *Regal Limousine v Allison Limousine Serv.*, 136 AD2d 534 [1st Dept 1988]; *GTE Automatic Elec.*, 127 AD2d 545). Further, a court will deny summary judgment on a promissory note where questions of fact exist as to whether the holder of the note procured it fraudulently. (*Coleman v Norton*, 289 AD2d 130 [1st Dept 2001]; *GTE Automatic Elec., Inc.*, 127 AD2d 545).

Necessary elements to fraudulent inducement are “representation of a material existing fact, falsity, scienter, deception and injury.” (*Century 21, Inc. v F.W. Woolworth Co.*, 181 AD2d 620, 625 [1st Dept 1992]). A party must also allege detrimental reliance on the material misrepresentation. (*Id.*; see also *Gelmac Quality Feeds, Inc. v Ronning*, 23 AD3d 1019 [4th Dept 2005]).

Here, while defendant asserts counterclaims for fraudulent inducement and argues they

are inseparable and inextricably linked to the first-party action on the Note, the party against whom defendant asserts the counterclaims, the Trust, did not commit any fraud. Defendant alleges that the Trust misrepresented the Restaurant's compliance with all laws and ordinances, and that 807 Restaurant relied on those misrepresentations. However, the allegations are without merit because the Trust played no role in the transactions leading to the sale of the Restaurant. Therefore, defendant cannot maintain counterclaims for fraudulent inducement against Jerrold as Trustee.

In addition, defendant's contention that the Note, designating the Trust as payee, is a vehicle for fraud, is also without merit. Michele Jerrold and her attorney have sworn that the Honorable Judith Gische ordered the Note payable to the Trust pursuant to a judgment of divorce that Michele Jerrold obtained on June 26, 2000 and that the Trust was to apply the payments from the sale of the Restaurant to child support. (*See Silver Aff.*, ¶12). Defendant's inability to obtain a copy of the order from sealed matrimonial records does not negate the existence of the payment arrangement. Because defendant's counterclaims fail against plaintiff, they are not inseparable and inextricably linked to the first-party action on the Note.

Defendant's counterclaims for fraudulent inducement also allege that Michele Jerrold and Charelle "knew that the Restaurant was not being conducted in compliance with all laws . . ." and they "knowingly made the false representation in the Purchase Agreement that the business sold pursuant thereto was being conducted in compliance with all laws . . . including with a public assembly certificate and a legal ventilation system." (*Verified Answer*, ¶¶ 28, 32). Defendant claims that it executed the Note in reliance on the fraudulent representations that Charelle and Michelle Jerrold made as to the Restaurant's compliance with various laws and ordinances.

(Verified Complaint, ¶ 39). However, Michele Jerrold and Charelle are not plaintiffs in the first-party action. Consequently, 807 Restaurant may not maintain against them these counterclaims.

Defendant's affirmative defenses must also fall against plaintiff. Defendant alleges unclean hands, estoppel, failure to provide notice and failure of consideration as defenses to nonpayment. However, the defenses of unclean hands and estoppel are equitable defenses and are not valid defenses to nonpayment of a Note. (*See e.g. Manshion Joho Center Co., Ltd. v Manshion Joho Center, Inc.*, 24 AD3d 189 [1st Dept 2005]; *Kahn v New York Times Co.*, 122 AD2d 655 [1st Dept 1986]). Further, failure to provide notice of default is also not a valid defense. Plaintiff's attorney Mr. Silver provides a copy of the letter that he sent to 807 Restaurant and its counsel, notifying them of the default. Silver also provides a copy of the certified receipt to prove that he mailed the letter to 807 Restaurant. (*See Silver Aff.*, Exh. E). This is sufficient proof that Jerrold as Trustee complied with the notice requirements pursuant to the Note. Whether 807 Restaurant ever received the second letter is irrelevant because the first letter serves as sufficient notice to 807 Restaurant of its default. Finally, 807 Restaurant's defense of failure of consideration is also without merit because the Restaurant was the consideration for the Note.

As to the affirmative defenses of fraudulent inducement and fraudulent concealment, defendant is correct in its assertion that fraud is a valid defense against a holder and that the defenses available against a holder in due course vary from those available against a mere holder. (*See Uniform Commercial Code*, §3-305 and §3-306). However, here, even if plaintiff is a mere holder, 807 Restaurant cannot raise fraudulent inducement or concealment successfully as defenses. Therefore, whether plaintiff is a holder in due course or a mere holder is irrelevant.

Any alleged fraud that Michele Jerrold or Charelle committed cannot be imputed to plaintiff, as holder of the Note, because the Trust did not make any of the alleged misrepresentations or omissions. Nor did Michelle Jerrold as Trustee. (*See State Bank of Albany v Roarke*, 91 AD2d 1093 [3d Dept 1983]). Therefore, fraud is unavailable to defendant as a defense in the first-party action.

Whether Charelle or Michele Jerrold fraudulently induced 807 Restaurant into purchasing the Restaurant or fraudulently concealed any violations are issues of fact for resolution in 807 Restaurant's third-party action and not in the first-party action for payment on the Note.

Accordingly, defendant's affirmative defenses to nonpayment do not raise any issues of fact to preclude summary judgment on the Note in the first-party action.

B. Third-Party Allegations are Not Inextricably Intertwined

Third-party plaintiff 807 Restaurant argues that the third-party complaint raises issues of fact as to whether Charelle and Michele Jerrold fraudulently induced 807 Restaurant to sign the Note, and, thus, it is premature for the court to grant summary judgment in the first-party action. However, 807 Restaurant names Michele Jerrold and Charelle as third-party defendants, not Michele Jerrold as Trustee of the Trust. Therefore, because the third-party allegations are against different parties as those to the Note, the third-party allegations are separable and not inextricably intertwined with the Note. Thus, the third-party complaint does not present any issues of fact precluding summary judgment on the Note in the first-party action.

C. The Note's Severability from the Purchase Agreement

The general rule is that a claim for breach of a related contract cannot defeat a motion for summary judgment on a promissory note. However, when the contract and the underlying

obligation on the note are intertwined, the court must deny the motion. (*Regal Limousine*, 136 AD2d 534 [1st Dept 1988]; *Vecchio v Colangelo*, 274 AD2d 469 [2d Dept 2000]; *see also Ingalsbe v Mueller*, 257 AD2d 894 [3d Dept 1999]; *A+ Associates Inc. v Naughter*, 236 AD2d 655 [3d Dept 1997]).

Here, 807 Restaurant asserts a third-party cause of action for breach of the Purchase Agreement against third-party defendants and argues that 807 Restaurant's underlying obligation on the Note is intertwined with the parties' contractual obligations in the Purchase Agreement. 807 Restaurant argues that pursuant to the terms of the Purchase Agreement, a significant portion of the consideration that defendant was to receive in exchange for the Note was a restaurant in full compliance with all laws. The Purchase Agreement also refers to the Note as consideration for the Restaurant. (*See Jerrold Aff.*, Exh. A).

However, the Note is not inseparable or inextricably linked with the sale of the Restaurant because the party seeking payment on the Note is different from the party who entered into the Purchase Agreement. The Note designates the Trust as its payee, while the Purchase Agreement is between 807 Restaurant and Charelle Corp. Even though Michelle Jerrold signed the Purchase Agreement, she did so in her capacity as principal of Charelle and not as Trustee for the Trust. Therefore, the Note is severable from the Purchase Agreement and is separately enforceable.

Accordingly, the court grants that part of plaintiff's motion for summary judgment on the Note in the amount sought in the complaint and dismissal of defendant's counterclaims and affirmative defenses.

D. Attorneys' Fees

Plaintiff contends that it is entitled to attorneys' fees pursuant to the Note. Generally,

attorneys' fees are not recoverable as an item of damages in the absence of contractual or statutory liability. (*Tucker v Toia*, 64 AD2d 826 [1st Dept 1978]). However, the Note provides:

if suit is brought by Holder to collect any payment of principal or of interest on this Note which is not paid when due, Holder shall be entitled to recover and the undersigned agrees to pay the expenses of Holder, including but not limited to the reasonable fees of Holder's counsel.

(Jerrold Aff., Exh. B). Thus, there is a contractual basis for the court to award attorneys' fees. Accordingly, the court grants that part of plaintiff's motion for summary judgment for attorneys' fees on liability only. The reasonableness of the fees is severed for an assessment.

II. Third-Party Claims Against Michele Jerrold

Third-party plaintiff asserts causes of action against Michele Jerrold for fraudulent inducement, breach of contract, fraudulent concealment and rescission of the contract. Third-party defendant Michele Jerrold moves to dismiss the third-party complaint. The same attorney represents Michele Jerrold in her capacity as Trustee and individually in the third-party action. Michele Jerrold's attorney does not differentiate on the motions between these two capacities. However, because the third-party action is against Michel Jerrold, individually, the court assumes that is the capacity in which Michele Jerrold is moving to dismiss the claims against her in the third-party action.

A. Fraudulent Inducement (the Purchase Agreement)

Third-party defendant 807 Restaurant alleges that Michele Jerrold knew the Restaurant did not have the proper permits or a legal ventilation system and that she made false representations to 807 Restaurant "with the intention to mislead 807 Restaurant and to induce 807 Restaurant to enter into the Purchase Agreement and 807 Restaurant was misled thereby."

(Third-Party Complaint, ¶¶ 20-22). Michele Jerrold denies making any false representations to 807 Restaurant and argues that the Restaurant complied with all applicable laws and ordinances when Charelle sold the Restaurant. 807 Restaurant does not plead or argue that it may pierce Charelle's corporate veil.

In order to pierce the corporate veil, a party must show that the principal exercised complete domination of the corporation and a failure to adhere to corporate formalities such as inadequate capitalization, use of corporate funds for personal use, overlap in ownership and directorship or common use of office space and equipment. (*Forum Ins. Co. v Texarkoma Transp. Co.*, 229 AD2d 341 [1st Dept 1996]). However, a court may hold an officer of a corporation personally liable for fraudulent acts committed in a corporate capacity if the officer participated in the fraud or had actual knowledge of it. (*See People by Abrams v Apple Health and Sports Clubs, Ltd., Inc.*, 80 NY2d 803, 807 [1992]; *Buxton Manufacturing Co., Inc. v Valiant Moving & Storage, Inc.*, 239 AD2d 452 [2d Dept 1997]). The party asserting the fraud claim must allege it with particularity. (NY CPLR 3016[b]).

Here, the third-party complaint does not allege any grounds or basis to pierce the corporate veil because it does not allege that Michele Jerrold exercised control or complete domination over Charelle through corporate mismanagement or disregard of corporate formalities. (*See Old Republic Nat. Title Ins. Co. v Moskowitz*, 297 AD2d 724 [2d Dept 2002]; *Forum Ins. Co. v Texarkoma Transp. Co.*, 229 AD2d 341 [1st Dept 1996]). Neither does 807 Restaurant allege that Michele Jerrold acted apart from her capacity as Charelle's principal. In fact, 807 Restaurant concedes that Michele Jerrold signed the Purchase Agreement solely as a principal of Charelle. (Third-Party Complaint, ¶ 6).

However, third-party plaintiff alleges that Michele Jerrold participated in the fraud and knew that the Purchase Agreement contained misrepresentations as to the Restaurant's ventilation system and permit compliance. The third-party complaint alleges that Michele Jerrold knowingly made false representations for the purpose of inducing 807 Restaurant's reliance. These allegations support a cause of action for fraudulent inducement against Michele Jerrold. Accordingly, the court denies that part of plaintiff's motion to dismiss the third-party complaint's fourth cause of action against Michele Jerrold.

B. Breach of Contract

In the absence of privity between third-party plaintiff and the individual third-party defendant, a breach of contract claim has no basis. (*Vogel v Lyman*, 246 AD2d 422 [1st Dept 1998]; *Adirondack Combustion Technologies, Inc. v Unicontrol, Inc.*, 17 AD3d 825 [3d Dept 2005]). Further, where a principal of a corporation expressly signs a contract in her capacity as an officer of the corporation, unless she purports to personally bind herself, she will not be personally liable under the contract. (*Maranga v McDonald & T. Corp.*, 8 AD3d 351, 352 [2d Dept 2004]).

Here, there was no privity between Michele Jerrold and 807 Restaurant because Michele Jerrold signed the Purchase Agreement in her capacity as principal of Charelle. There is no evidence to suggest that Michele Jerrold purported to bind herself personally. Nor are there any allegations sufficient to pierce the corporate veil. Accordingly, the court dismisses the third-party complaint's second cause of action against Michele Jerrold.

C. Fraudulent Concealment

The elements of fraudulent concealment are the same as fraudulent inducement, with one

addition element: a duty to disclose the material information. (*Swersky v Dreyer and Traub*, 219 AD2d 321, 326 [1st Dept 1996]). The duty to disclose arises when a fiduciary or confidential relationship exists between the parties. (*Kaufman v Cohen*, 307 AD2d 113 [1st Dept 2003]; *Westchester County v Welton Becket Assoc.*, 102 AD2d 34 [2d Dept 1984]). Whether a duty exists is a question of law to be determined by the court. (*See Industrial Risk Insurers v Ernst*, 224 AD2d 389 [2d Dept 1996]).

No confidential or fiduciary relationship existed between Michele Jerrold and 807 Restaurant that created a duty to disclose information. (*See e.g. George Cohen Agency Inc. v Donald S. Perlman Agency, Inc.*, 114 AD2d 930 [2d Dept 1985]; *Auchincloss v Allen*, 211 AD2d 417 [1st Dept 1995]). Accordingly, the court dismisses the third-party complaint's third cause of action against Michele Jerrold.

D. Fraudulent Inducement (the Note)

For the same reasons as discussed previously, 807 Restaurant alleges facts sufficient to support a cause of action against Michele Jerrold for fraudulent inducement as to the Note. Michele Jerrold may have participated in the fraud or had actual knowledge of the fraud during her participation in the negotiations leading up to the sale of the Restaurant and the issuance of the Note. Accordingly, the court denies that part of plaintiff's motion to dismiss the third-party complaint's fourth cause of action against Michele Jerrold.

E. Rescission of Purchase Agreement

Generally, rescission is available where a party lacks a "complete and adequate remedy at law and where the status quo may be substantially restored." (*Alper v Seavey*, 9 AD3d 263, 264 [1st Dept 2004]). 807 Restaurant's claim for rescission may be a viable remedy in its third-party

action against Charelle, as the seller. However, 807 Restaurant may not seek rescission as a remedy against Michele Jerrold because she was not a party to the Purchase Agreement. Accordingly, the court dismisses the third-party complaint's fifth cause of action against Michele Jerrold.

III. 807 Restaurant's Cross-Motion for Summary Judgment Against Third-Party Defendants

The court now turns to 807 Restaurant's cross-motion for summary judgment on liability for breach of contract against third-party defendants. As discussed previously, the court has dismissed the third-party complaint's second cause of action for breach of contract against Michelle Jerrold so that part of 807 Restaurant's cross-motion as to Michele Jerrold is moot.

807 Restaurant argues that Charelle breached the express terms of the Purchase Agreement that promised the delivery "of a restaurant business complying with all laws, ordinances and rules affecting said business, including a public assembly certificate." (Third-party Complaint, ¶ 27). In addition, 807 Restaurant seeks a default judgment against Charelle because it contends that Charelle failed to answer 807 Restaurant's third-party complaint. At oral argument, Charelle's counsel argued that Charelle was dissolved and therefore 807 Restaurant could not maintain its claims against Charelle.

Business Corporation Law Section 1006(b) provides:

The dissolution of a corporation shall not affect any remedy available to or against such corporation, its directors, officers or shareholders for any right or claim existing or any liability incurred before such dissolution

(NY Business Corporation Law 1006[b]). "Corporate liabilities" include contractual obligations and contingent claims. (*Rodgers v Logan*, 121 AD2d 250, 253 [1st Dept 1986]). Thus, a

corporation continues to exist as a legal entity after dissolution, at least for purposes of actions and proceedings. (*Independent Investor Protective League v Time, Inc.*, 50 NY2d 259, 263 [1980]).

Here, Charelle existed as a corporation at the time the parties entered into the Purchase Agreement and dissolved on June 30, 2004. (*See* Transcript of Hearing, p.9). So, Charelle's dissolution does not operate as a bar to the third-party action.

Further, 807 Restaurant's contention that Charelle has failed to serve an answer or otherwise appear in response to the third-party complaint is incorrect. Silver & Silver LLP served an answer to the third-party complaint on behalf of third-party "defendants" on September 13, 2005. (*See* Jerrold Aff., Exh. K). Charelle is not in default.

As to Charelle's liability for breach of the Purchase Agreement, issues of fact exist that preclude summary judgment at this juncture. First, there is an issue of fact as to whether the law required the Restaurant to have a public assembly permit at the time the parties entered into the Purchase Agreement. 807 Restaurant provides the affidavit of Peter Keogh, shareholder and secretary of 807 Restaurant, to argue that the law required the Restaurant to have a public assembly permit. He states that 807 Restaurant has received numerous violations stemming from conditions that existed at the time 807 Restaurant purchased the Restaurant from Charelle. (Aff. of Peter Keogh, dated December 8, 2005, ¶¶ 2-3). In addition, 807 Restaurant submits the affidavit of architect Kevin Bryne who opines that the law requires a public assembly permit and a second means of egress. (*See* Aff. of Kevin Bryne, dated December 9, 2005; Keogh Aff., Exh. G, Exh. H). Keogh also states that New York City issued violations to 807 Restaurant for the encroaching ventilation system onto the Restaurant's neighboring parcel and that the problems

existed prior to the closing. (*Id.* at ¶¶ 2, 6). 807 Restaurant also contends that it did not know of the ventilation system problems prior to the closing.

To rebut, Michele Jerrold contends that Charelle did not have an assembly permit for the Restaurant because its occupancy never exceeded 75 people. She argues that Charelle never violated any laws or city ordinances because the city never issued any violations to the Restaurant while Charelle operated it. (Jerrold Aff., ¶ 26). Indeed, 807 Restaurant admits that there were no violations issued prior to the closing date. (*See* Transcript of Hearing, dated February 2, 2006, pp.13-14). The affidavit of the Restaurant's former Manager Charles Marco ("Marco"), also supports this contention. Marco states that at the time Charelle sold the Restaurant to defendant, the Restaurant met all code requirements and passed the City's Fire and Building Departments' numerous inspections. (Aff. of Charles Marco, dated January 9, 2006, ¶ 11).

As to the alleged problems with the ventilation system, Marco claims the violations were the result of renovations that 807 Restaurant made after purchasing the Restaurant. Marco states that while Charelle owned the Restaurant, "the ventilation system never encroached upon the neighboring property and was in full compliance with code requirements." (Marco Aff., ¶ 12). Further, Michele Jerrold claims that the problems did not exist prior to the closing because 807 Restaurant did not discover any problems with the Restaurant's ventilation system when it conducted its due diligence.

In sum, these conflicting affidavits present issues of fact as to the public assembly permit's necessity and when the alleged problems with the ventilation system began. Accordingly, the court denies that part of 807 Restaurant's cross-motion for summary judgment

on liability for breach of contract against Charelle.

Accordingly, it is

ORDERED that the court grants that part of plaintiff Michele Jerrold as Trustee for Ethan Jerrold Marco Trust's motion for summary judgment on the promissory note; and it is further

ORDERED that the court grants that part of plaintiff Michele Jerrold as Trustee for Ethan Jerrold Marco Trust's motion for dismissal of defendant 807 Restaurant, Ltd. d/b/a Bar 9's counterclaims and affirmative defenses; and it is further

ORDERED that the court grants that part of plaintiff Michele Jerrold as Trustee for Ethan Jerrold Marco Trust's motion to dismiss third-party plaintiff 807 Restaurant's second, third and fifth causes of action for breach of contract, fraudulent concealment and rescission and the remainder of the motion is otherwise denied; and it is further

ORDERED that the Clerk is directed to enter Judgment in favor of plaintiff Michele Jerrold as Trustee for Ethan Jerrold Marco Trust and against defendant 807 Restaurant, Ltd. d/b/a Bar 9 in the amount of \$295,651.41 as sought in the complaint with interest from April 20, 2005 to be calculated by the Clerk; and it is further

ORDERED that that part of plaintiff Michele Jerrold as Trustee of Ethan Marco Trust's action that seeks recovery of additional amounts, late charges and attorneys' fees is severed and an assessment is directed in Part 03; and it is further

ORDERED that plaintiff shall serve a copy of this Order with Notice of Entry upon the Trial Support Clerk (Room 158), who is directed upon filing of a Note of Issue and a Statement of Readiness and the payment of proper fees, if any, to place this action on the Part 03 calendar for the assessment directed *supra*; and it is further

ORDERED that the court denies third-party plaintiff 807 Restaurant Associates Ltd.'s cross-motion for summary judgment on its second cause of action against third-party defendant Charelle Corp.; and it is further

ORDERED that the Clerk is directed to sever and continue the remainder of the third-party action against Michele Jerrold and Charelle Corp.; and it is further

ORDERED that the remaining parties are directed to appear for a preliminary conference on April 18, 2006 at 10am in courtroom 248 at 60 Centre Street, New York, N.Y.

Dated: March 2, 2006

ENTER:



J.S.C.

FILED
MAR 24 2006
COUNTY CLERK'S OFFICE
NEW YORK