

Ship v King Biscuit Entertainment Group, Inc.
2007 NY Slip Op 31481(U)
May 31, 2007
Supreme Court, New York County
Docket Number: 0601533/2006
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

STEVEN SHIP,
Plaintiff,

Index No.: 601533/06

Motion Date: 01/23/07

- v -

Motion Seq. No.: 03

KING BISCUIT ENTERTAINMENT GROUP, INC.,
BILL GRAHAM ARCHIVES, LLC d/b/a WOLFGANG'S
VAULT, and KEVIN CAIN,
Defendants.

Motion Cal. No.: 101

The following papers, numbered 1 to 6 were read on this motion to dismiss.

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

Answering Affidavits - Exhibits _____

Replying Affidavits - Exhibits _____

PAPERS NUMBERED

1 - 3

4 - 5

6

FILED

JUN 06 2007

**NEW YORK
COUNTY CLERK'S OFFICE**

Cross-Motion: Yes No

Upon the foregoing papers,

Defendant Kevin Cain moves to dismiss the plaintiff's complaint pursuant to CPLR 3211 on the grounds that the plaintiff fails to state a cause of action against him. The arguments made by the parties on this motion mirror those considered by the court on King Biscuit's prior motion to dismiss which was resolved by this Court's Order on Motion Sequence No. 1 dated December 15, 2006. As that Order noted, plaintiff on oral argument discontinued, with prejudice, the fifth cause of action alleging violations of the Labor Law. The court incorporates

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):**

herein the factual recitation in the prior Order and shall only deal with the unique legal issues presented on the current application. ¹

The court shall deny the motion with respect to the first cause of action alleging breach of contract. Paragraph 11 of the complaint alleges the existence of a shareholder agreement with the between the plaintiff and movant. Contrary to the movant's argument, the complaint sufficiently alleges the terms of the agreement insofar as it asserts the parties were to be equal partners in King Biscuit with the implication that benefits were to be derived in proportion thereto. Movant's argument that the parties' agreement is not adequately alleged in the complaint is misdirected. Movant argues that because plaintiff fails to state the nature of the equity interest the claim is deficient. However, the nature of the interest and any impairment to it because of movant's alleged breach of the parties' agreement is an issue of damages, not of liability. Therefore, the complaint adequately, if imperfectly, sets forth a claim for breach of contract against the movant.

Defendant's motion to dismiss the second cause of action for breach of fiduciary duty must be denied for the same reasons

¹ The court in deciding this motion has not considered the post-submission papers transmitted to the court by the parties under letter cover and received March 12, 2007, as no prior permission was granted for such submissions and no good cause to consider the late papers has been shown. See CPLR 2215 (c).

cited by this court in denying King Biscuit dismissal of plaintiff's claim. There is no dispute that King Biscuit was incorporated under Delaware law and that "issues relating to the internal affairs of a corporation are decided in accordance with the law of the state of incorporation." BBS Norwalk One, Inc. v Raccolta, Inc., 60 F Supp2d 123, 129 (SD NY 1999). Under Delaware law, corporate officers, directors and controlling shareholders "owe their corporation and its minority shareholders a fiduciary obligation of honesty loyalty, good faith and fairness." Lama Holding Co. v Smith Barney, Inc., 88 NY2d 413 [1996]). Plaintiff alleges that movant, acting as an officer of King Biscuit, transferred corporate property and opportunities to movant and movant's father in breach of his corporate obligations. Such allegations are sufficient to state a claim for breach of fiduciary duty. See Leviton Mfg. Co., Inc. v Blumberg, 242 AD2d 205, 208 (1st Dept 1997) (dismissal denied where complaint alleges acts by defendants in breach of fiduciary duty to shareholders) and Richbell Information Services, Inc. v. Jupiter Partners, L.P., 309 AD2d 288, 301 -302 (1st Dept 2003) (same). As to the statute of limitations, plaintiff alleges that movant committed these acts in 2002 through 2004 and therefore plaintiff's claims are timely.

Plaintiff's third cause of action for fraud must be dismissed as plaintiff has failed to allege with specificity any

misrepresentation or conduct on the part of the movant upon which plaintiff relied to his detriment. See CPLR 3016 (b); Lama Holding Co. v Smith Barney Inc., 88 NY2d 413, 421 (1996) ("In an action to recover damages for fraud, the plaintiff must prove a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury"). Plaintiff's complaint fails to specify the conduct and or representations of the movant upon which plaintiff relied to his detriment. See Mountain Lion Baseball v Gaiman, 264 AD2d 636 (3d Dept 1999). This lack of detail is fatal to plaintiff's claim of fraud against the movant.

The court shall also deny Kevin Cain's motion with respect to the fourth cause of action for unjust enrichment as sufficient facts, assumed to be true, are alleged to sustain that cause of action. Plaintiff's unjust enrichment claim set forth in the fourth cause of action is based upon the allegation that the company's assets were sold in April 2006 and that the defendants retained the proceeds of the sale thus wrongfully denying the plaintiff his share. Plaintiff's claim is therefore timely based upon the alleged wrongful retention of a benefit by the defendants in April 2006, and adequately sets forth facts that if true state a claim for unjust enrichment. See Carriafiello-Diehl

& Associates, Inc. v D & M Elec. Contracting, Inc., 12 AD3d 478, 479 (2d 2004) ("The essence of unjust enrichment is that one party has received money or a benefit at the expense of another which, in good conscience, ought to be returned.").

Accordingly, it is

ORDERED that the motion of defendant Kevin Cain to dismiss the complaint is GRANTED with respect to plaintiff's third cause of action and fifth cause of action, the former of which is DISMISSED and the latter of which is DISCONTINUED, with prejudice; and it is further

ORDERED that the motion of defendant Kevin Cain to dismiss the complaint is otherwise DENIED; and it is further

ORDERED that the parties are directed to attend the previously scheduled status conference on August 14, 2007, at 2:30 P.M., in IAS Part 59, Room 1254, 111 Centre Street, New York, New York 10013.

This is the decision and order of the court.

Dated: May 31, 2007

ENTER:

FILED
JUN 06 2007
NEW YORK J.S.C.
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DEBRA A. JAMES
J.S.C.