

Jain v Bathija

2009 NY Slip Op 31542(U)

July 7, 2009

Supreme Court, New York County

Docket Number: 012598-08

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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**SANJAY JAIN; MICHAEL DORIS;
DJ SHIRLEY 1, INC.; DJ SHIRLEY 2, INC.;**
and DJ HOLBROOK, INC.;

Plaintiffs,

TRIAL/IAS PART: 25

**Index No: 012598-08
Motion Seq. Nos: 1 & 2
Submission Date: 5/8/09**

-against-

**GOBIND BATHIJA; TRISTATE DONUT GROUP,
INC.; and TRICOUNTY DONUT GROUP, INC.;**

Defendants.

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The following papers having been read on these motions:

- Notice of Motion, Affirmation in Support and Exhibits.....x**
- Notice of Cross Motion.....X**
- Affidavits in Support/Opposition (3).....x**
- Reply Affirmation in Support/Opposition.....x**
- Reply Memorandum of Law.....X**

This matter is before the Court for decision on 1) the motion filed by Defendants Gobind Bathija (“Bathija” or “Individual Defendant”), Tristate Donut Group, Inc. (“Tristate”) and Tricounty Donut Group, Inc. (“Tricounty”) (collectively “Corporate Defendants”) on September 16, 2008, seeking an Order dismissing the five (5) causes of action in the verified complaint (“Complaint”), as well as the sixth, “alternative” cause of action in the Complaint, and 2) the cross motion filed by Plaintiffs Sanjay Jain (“Jain”), Michael Doris (“Doris”) (collectively “Individual Plaintiffs”), DJ Shirley 1, Inc. (“Shirley 1”), DJ Shirley 2, Inc. (“Shirley 2”) and DJ

Holbrook, Inc. (“Holbrook”) (collectively “Corporate Plaintiffs”) on November 21, 2008, seeking to disqualify counsel for Defendants on the basis of an alleged conflict of interest, both of which were submitted on May 8, 2009.¹ For the reasons set forth below, the Court 1) grants Defendants’ motion to dismiss the Complaint; and 2) denies, as moot, Plaintiffs’ motion to disqualify counsel for Defendants.

BACKGROUND

A. Relief Sought

Defendants seek an Order 1) dismissing the first, second, third, fourth and fifth causes of action in the Complaint, as well as the sixth cause of action, titled an “Alternative Cause of Action,” pursuant to CPLR §§ 3211(a)(1) and (7); or, alternatively, 2) dismissing all causes of action against Bathija, pursuant to CPLR §§ 3211(a)(1) and (7), for failure to state a cause of action against him personally; or alternatively, 3) dismissing, pursuant to CPLR §§ 3211(a)(1), (3) and (7), all causes of action asserted on behalf of Plaintiffs Jain and Doris.

Plaintiffs oppose Defendants’ motion, and move for an Order disqualifying counsel for Defendants, based on an alleged conflict of interest.

B. The Parties’ History

On or about August 22, 2007, the Individual Plaintiffs and Corporate Defendants entered into an “Asset Purchase Agreement” (“Agreement”), pursuant to which the Corporate Defendants agreed to convey to the Individual Plaintiffs the assets of three Dunkin’ Donuts franchises for the sum of \$3,100,000.00. Defendant Bathija signed the Agreement on behalf of Tristate and Tricounty. The Agreement refers to Individual Plaintiffs as the “Purchaser” or “Buyer,” to Tristate and Tricounty as the “Seller” and to Dunkin Donuts as the “Franchisor.”

Paragraph 10(b) of the Agreement provides that the Seller shall pay the cost to cure any deficiencies noted in writing by the Franchisor, except for costs related to deficiencies concerning remodeling or refurbishing requirements of the Franchisor, for which the Purchaser is entirely responsible.

Paragraph 12(a) of the Agreement requires the Purchaser to notify the New York State Department of Taxation and Finance (DTF) of the proposed transfer, and reflects Purchaser’s

¹ This Court assumed responsibility for this motion on May 8, 2009.

acknowledgment of receipt of DTF's Notice to Prospective Purchasers of a Business or Business Assets, designated Form TP-153. Paragraph 12(b) of the Agreement requires the Seller to deposit with the Escrow Agent the sum stated in the response from the DTF in Form AU-196.2. The Agreement provides, further, that if DTF did not provide this response prior to the closing, Seller agreed to deposit the sum of \$100,000.00 into the Tax Escrow Fund at the closing.

The Franchisor, who was present at the closing, had previously issued Store Transfer Deficiency Reports dated January 14 and January 16, 2008 with respect to all three franchises. A Store Transfer Deficiency Report identifies deficiencies that must be cured before the closing date to ensure the Franchisor's approval of the transfer.

On February 21, 2008, the parties proceeded to closing. Louis Algios, Esq. ("Algios") of Miller, Rosado & Algios, LLP represented the Seller and Lee M. Albin, Esq. ("Albin") represented the Purchaser. Algios affirms that he has participated in other transactions involving Dunkin' Donuts franchises, and that Albin is an experienced attorney. Algios affirms, further, that at the closing, certain obligations in the Agreement were modified in response to issues that arose between the parties. Specifically, at the closing, the parties executed the following documents:

1) an Assignment, Assumption and Amendment of Asset Purchase Agreement ("Assignment") whereby the Individual Plaintiffs assigned their rights and obligations under the Agreement to the Corporate Plaintiffs,

2) an Amendment of Asset Purchase Agreement ("Amendment"), signed by Jain and Doris individually, by Jain as President of Shirley1, Shirley2 and Holbrook, and by Bathija as President of Tristate and Tricounty, which states at Paragraph 2 that the Buyer waives the requirement in the Agreement that the Escrow Agent hold any sum in escrow relating to sales tax which may be due and owing by Seller, and

3) the Deficiency List Waiver ("Waiver"), signed by the Individual Plaintiffs as principals of the Corporate Plaintiffs, which states as follows:

The undersigned principals of DJ SHIRLEY1 INC., DJ SHIRLEY2 INC. and DJ HOLBROOK INC. waive any and all claims against TRISTATE DONUT GROUP, INC. and TRICOUNTY DONUT GROUP INC. set forth by franchisor at the Dunkin' Donuts locations at 545 William Floyd Parkway, Shirley, New York, 440 William Floyd Parkway, Shirley, New York and

411 Furrows Road, Holbrook, New York, the assets of which are being purchased on the date hereof.

Defendants affirm that, in June 2008, Holbrook received a notice from DTF concerning sales taxes totaling \$80,208.17, allegedly due for time periods prior to the February 21, 2008 closing. Tristate received a similar notice. The DTF Notice stated that the tax assessed “may be challenged through a hearing process by filing a request for a conciliation conference or a petition for a tax appeal hearing by September 7, 2008.” Tristate, through its authorized representative and certified public accountant, Scott Meyer, filed a Request for Conciliation Conference, dated September 4, 2008, to contest the assessment.

In July 2008, Plaintiffs commenced this action. The complaint contains five causes of action and a self-styled “alternative cause of action.” The first cause of action seeks a declaration of the rights and obligations of the parties to cure deficiencies noted by Dunkin’ Donuts, that existed as of February 21, 2008. The second cause of action alleges that Defendants breached the Agreement by failing to cure the deficiencies existing as of the closing date, and seeks money damages in the amount of \$60,000. The third cause of action alleges that Defendants were unjustly enriched by their conduct, and also seeks damages in the sum of \$60,000.

The fourth cause of action seeks reasonable costs and disbursements, including attorney fees, based on the facts alleged in the Complaint, and pursuant to Paragraph 26(h) of the Agreement. Paragraph 26(h) provides:

The parties hereto agree that the Supreme Court for the County of Nassau, State of New York shall have exclusive jurisdiction to determine any claims or disputes arising in connection with this Agreement. The parties each expressly submit and consent in advance to jurisdiction in any case or proceeding commenced in such court. In the event of a dispute or litigation regarding the terms of this agreement, the prevailing party shall be entitled to an award of its costs and expenses including attorneys’ fees.

The fifth cause of action alleges that Defendants failed to comply with their purported obligation to deposit \$100,000.00 into escrow, and seeks damages of \$80,208.17, representing sales and use taxes owed for the three Dunkin’ Donut locations at issue.

The sixth cause of action, titled an “Alternative Cause of Action,” makes reference to the Waiver, but alleges that this Waiver refers only to the waiver of claims against the Corporate

Defendants, which may arise post closing, but not to the Defendants' obligation to cure the deficiencies on the Dunkin Donuts Deficiency List which existed as of the closing date of February 21, 2008. Plaintiffs seek money damages in the amount of \$60,000, the cost of curing the deficiencies.

C. The Parties' Positions

Defendants seek an order dismissing the Complaint pursuant to CPLR §§ 3211(a)(1) and (7), based upon the Waiver that the Plaintiffs signed at the closing.

In opposition to the motion, Plaintiffs argue, first, that Defendants' motion is defective because there is no affidavit submitted by a party Defendant. Plaintiffs do not cite a rule or case in support of this argument, and the Court concludes that Defendants' motion is properly before the Court.

Plaintiffs also dispute Defendants' assertion that Plaintiffs had full knowledge of the Waiver. In support thereof, Plaintiffs provide affidavits of Albin and Jain, dated November 19 and 20, 2008, respectively. In his Affidavit, Albin affirms that 1) he represented Plaintiffs in their purchase of the three Dunkin' Donut franchises; 2) he was present at the closing which took place on February 21, 2008; 3) during the closing, he spent considerable time placing telephone calls to the Franchisor's headquarters, the Purchaser's insurance company and the bank; 3) he was not in the conference room when the Plaintiffs signed the Waiver; and 4) the Waiver was never presented to him prior to Plaintiffs' execution of the Waiver.

In his Affidavit, Jain affirms that, during the closing, Albin spent considerable time on the telephone. Jain affirms, further, that "[t]here were many documents to sign as we were purchasing three...stores, and most of the time, we had no idea what we were signing. Mr. Algios would sometimes give us an abbreviated explanation of the document before we signed it, but most often, he just passed the documents to us for our signature. My partner and I just signed, without question, whatever documents were passed to us for signature." Jain also avers that he "particularly remember[s] signing the [Waiver] because Mr. Algios did break the momentum to advise us that the deficiencies we were waiving were future or post closing deficiencies and NOT the deficiencies already included and acknowledged on the Store Transfer Deficiency Report [emphasis added]." Thus, Plaintiffs submit, the Court must deny Defendants' motion to dismiss because there are issues of fact, *inter alia*, regarding 1) whether the Waiver

was intended to apply to claims regarding pre-closing deficiencies; and 2) whether the Plaintiffs knowingly executed the Waiver.

RULING OF THE COURT

A. General Principles

A complaint may be dismissed based upon documentary evidence pursuant to CPLR § 3211(a)(1) only if the factual allegations contained therein are definitively contradicted by the evidence submitted or a defense is conclusively established thereby. *Yew Prospect, LLC v. Szulman*, 305 A.D.2d 588 (2d Dept. 2003); *Sta-Bright Services, Inc. v Sutton*, 17 A.D.3d 570 (2d Dept. 2005). To succeed on a motion pursuant to CPLR § 3211(a)(1), the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law. *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326 (2002).

It is well-settled that the Court must deny a motion to dismiss the Complaint under CPLR § 3211(a)(7) for failure to state a cause of action if the factual allegations contained in the Complaint constitute a cause of action cognizable at law. *Guggenheimer v Ginzburg*, 43 N.Y.2d 268 (1977); *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 N.Y.2d 144 (2002). When entertaining such an application, the Court must liberally accept the pleading, and accept the facts alleged as true and accord to the Plaintiff every favorable inference which may be drawn therefrom. *Leon v Martinez*, 84 N.Y.2d 83 (1994).

B. Legal Effect of Writings

Whether a contract is ambiguous is a question of law and extrinsic evidence may not be considered unless the document itself is ambiguous. However, when parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms. Thus, where the language is clear, unequivocal and unambiguous, the contract is to be interpreted by its own language. Such an agreement should be read as a whole to ensure that undue emphasis is not placed upon particular words and phrases. Moreover, courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing. *Bailey v. Fish & Neave*, 8 N.Y.3d 523, 528 (2007).

A valid waiver requires no more than the voluntary and intentional abandonment of a

known right which, but for the waiver, would have been enforceable, and it may arise by either an express agreement or by such conduct or a failure to act as to evince an intent not to claim the purported advantage. *Tutt v. Tutt*, 61 A.D.3d 967 (2d Dept. 2009). A waiver is not, however, created by negligence, oversight or thoughtlessness, and cannot be inferred from mere silence. *Golfo v. Kycia Associates, Inc.*, 45 A.D.3d 531 (2d Dept. 2007). Rather, there must be proof that there was a voluntary and intentional relinquishment of a known and otherwise enforceable right. *Peck v. Peck*, 232 A.D.2d 540 (2d Dept. 1996).

Based upon the documentary evidence submitted, the Court concludes that the Defendants are entitled to dismissal of the first, second, third and fourth causes of action. The Waiver at issue is clear and unambiguous and, therefore, enforceable. *See Excel Graphics Technologies, Inc. v. CFG/AGSCB 75 Ninth Avenue, L.L.C.*, 1 A.D.3d 65 (1st Dept. 2003) (2004) (trial court erred in disregarding clear, unambiguous terms of negotiated lease). Moreover, the Waiver contains no language demonstrating the intent to limit its coverage to future, or post-closing Franchisor deficiency claims. In light of the established rules of contract interpretation discussed above, the Court may not add, or read in, the limitation that Plaintiffs seek to support their argument that the Waiver only applies to post-closing deficiencies. *See Signature Realty, Inc. v Tallman*, 2 N.Y.3d 810, 811 (2004) (brokerage commission applicable to renewal period where nothing in lease agreement limited commission to initial lease period).

In addition, to the extent that Plaintiffs contend that they were misled or defrauded into signing the waiver, they cannot demonstrate that any reliance was reasonable. Rather, plaintiffs were obligated to take prudent steps to understand the waiver prior to execution. *Chemical Bank v. Geronimo Auto Parts Corp.*, 225 A.D.2d 461 (1st Dept. 1996). Furthermore, their counsel was present at the closing and thus was readily available to explain the meaning of the waiver. *KNK Enterprises, Inc. v. Harriman Enterprises, Inc.*, 33 A.D.3d 872 (2d Dept. 2006), *lv. app. den.* 8 N.Y.3d 804 (2007).²

²Failure to consult with an attorney does not, of course, preclude enforcement of a clear and unambiguous release. *Skluth v United Merchants & Mfrs., Inc.*, 163 A.D.2d 104 (1st Dept. 1990), *app. granted* 76 N.Y.2d 711 (1990), *app. withdrawn* 79 N.Y.2d 976 (1992).

In view of the foregoing, the clear language of the Waiver warrants dismissal of the first, second, and “alternative” causes of action, and the Court grants Defendants’ motion to dismiss those counts.

With respect to the third cause of action, sounding in unjust enrichment, Plaintiffs do not dispute that the parties entered into an express written agreement. A quasi contract only applies in the absence of an express agreement, and is not really a contract, but rather a legal obligation imposed to prevent a party’s unjust enrichment. *Clark-Fitzpatrick Inc. v. Long Island R.R. Co.*, 70 N.Y.2d 382, 388 (1987). Where, as here, there exists an express agreement between Plaintiffs and Defendants, the contents of which govern the subject matter underlying the claims for unjust enrichment, the Plaintiffs are precluded from maintaining an action in quasi-contract. *Metropolitan Electric Mfg. Co. v. Herbert Constr. Co.*, 183 A.D.2d 758 (2d Dept. 1992). Accordingly, the Court grants that branch of the Defendants’ application which seeks dismissal of the Plaintiffs’ third cause of action sounding in unjust enrichment.

The fourth cause of action is for attorney’s fees pursuant to Paragraph 26(h) of the agreement. In light of the Court’s dismissal of the remaining causes of action in the Complaint, the Court concludes that Plaintiffs are necessarily not “the prevailing party” and, therefore, may not recover counsel fees pursuant to the Agreement. Accordingly, the Court dismisses the fourth cause of action.

Plaintiffs’ opposition papers do not address the fifth cause of action in the Complaint, which alleges that Defendants failed to comply with their purported obligation to deposit \$100,000.00 into escrow and that Defendants are liable for damages in the sum of \$80,208.17, representing sales and use taxes owed for the three Dunkin’ Donut locations at issue. Defendants have conclusively established that the Agreement was amended to delete the requirement that \$100,000.00 be placed in escrow for the payment of sales tax. Accordingly, the Court dismisses the fifth cause of action.

C. Liability of Individual Defendants

Even if the Court had not dismissed all the counts in the Complaint based on the documentary evidence, the Court would be constrained to dismiss the counts against Bathija personally. Under the circumstances, there is no basis to hold Bathija personally liable, particularly where he executed the agreement in his capacity as an officer of the corporation.

Namrod Const. Co., Inc. v. F.V.B. Contracting Corp., 116 A.D.2d 556 (2d Dept. 1986); *Gold v. Royal Cigar Co., Inc.*, 105 A.D.2d 831 (2d Dept. 1984).

D. Standing to Sue

CPLR § 3211(3) permits a party to move for judgment dismissing a cause of action on the ground that the party asserting the cause of action does not have legal capacity to sue. Although the issue is moot in light of the Court's dismissal of the Complaint on other grounds, the Court notes that Jain and Doris are improper plaintiffs in light of their assignment of all of their rights and obligations under the Agreement to the Corporate Plaintiffs.

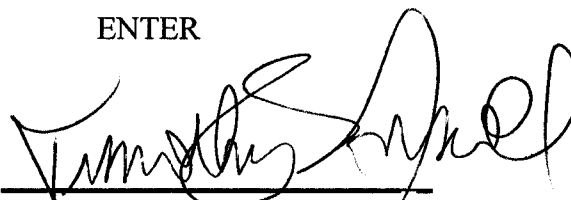
In view of the foregoing, the Court dismisses the Complaint against the Individual Defendant and the Corporate Defendants. In light of that dismissal, the Court denies, as moot, Plaintiffs' cross motion to disqualify counsel for Defendants.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

DATED: Mineola, NY
July 7, 2009

ENTER



HON. TIMOTHY S. DRISCOLL
J.S.C.

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ENTERED

JUL 10 2009

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**