

Zuna v Lliguichuzhca
2009 NY Slip Op 31863(U)
August 18, 2009
Supreme Court, Queens County
Docket Number: 5938/09
Judge: Bernice Daun Siegal
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.

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable Bernice D. Siegal Part 5
Justice

-----X
CARLOS ZUNA,

Plaintiff,
-against-

HECTOR M. LLIGUICHUZHCA,
Defendant.

Index No. 5938/09
Motion Date: 5/13/09
Calendar No. 1
Motion Seq. No. 32

-----X

The following papers numbered 1 to 11 read on this motion

	<u>Papers Numbered</u>
Notice of Motion-Affirmation-Exhibits.....	1-4
Affidavit in Opposition-Exhibits.....	5-7
Reply.....	7-9
Sur-Reply.....	10-11

Upon the foregoing papers, it is ORDERED that this motion is determined as follows:

Plaintiff moves for summary judgment in lieu of complaint pursuant to CPLR § 3213. As more fully set forth below, the motion is denied, and pursuant to CPLR 3213, and upon request of defendant, the moving and answering papers are deemed the complaint and answer. On November 18, 2006, Plaintiff, Defendant, and a third party executed a shareholder agreement, by which Plaintiff transferred one third of his shares in Emociones Bar and Restaurant, Inc. to Defendant and one third of his shares to the third party, each for \$50,000. On November 1, 2007,

Defendant signed a promissory note, payable to Plaintiff for \$40,000, due in full on March 1, 2008.

Plaintiff seeks enforcement of the promissory note and payment of the balance due. Plaintiff argues that Defendant was his "silent partner" and, therefore, must have been aware of the nonexistence of the liquor license before signing the shareholder agreement and promissory note. In reply, he relies on two documents to demonstrate the existence of this partnership: a Notice of Pleading dated 6/20/06 from the Division of Alcoholic Beverage Control and a letter from the landlord of the premises where the business is located, addressing both parties as tenants. Defendant claims misrepresentation of material fact by Plaintiff as a complete defense to enforcement of the shareholder agreement and promissory note. He provides an affidavit by the third party to the shareholder agreement, stating Plaintiff falsely represented that he was transferring the rights to a valid liquor license in addition to the business. Defendant claims that the contract is unenforceable due to failure of consideration on the part of the Plaintiff. Finally, Defendant seeks to file an answer with counterclaim. CPLR 3213 provides that "[I]f the motion is denied the moving and answering papers shall be deemed the complaint and answer, respectively, unless the court orders otherwise."

Misrepresentation, as a defense to the enforcement of a

contract, requires that a party made representations he knew to be false, intending to induce the agreement of the party seeking non-enforcement, that the defrauded party reasonably relied on that misrepresentation, and suffered an injury as a result.

(*Schumaker v. Mather*, 133 N.Y. 590, 595 [1892].) When a party to a contract conceals a material fact, which he is in good faith bound to reveal, such nondisclosure may be treated as the equivalent of a false representation that such a fact does not exist. (*Tahini Invest., Ltd. v. Bobrowsky*, 99 A.D.2d 489, 490 [2d Dep't 1984] citing *Rosenschein v. McNally*, 17 A.D.2d 834 [2d Dep't 1962].)

In the sale of a business, facts regarding the value of such business are material and any dispute regarding misrepresentations of such facts require a trial. (*Epstein v. Scally*, 99 AD2d 713 [1st Dept 1984].) There is no dispute about the execution or nonpayment of the promissory note. There is also no dispute as to the nonexistence of a valid liquor license. The dispute rests solely on the issue of Defendant's knowledge of the status of the liquor license at the time of execution. Clearly, the existence of a valid liquor license directly affects the value of a bar as a business and, Defendant's knowledge of such a fact, therefore, directly affects his consideration in a contract to purchase the business. The issue before the court, then, is whether Defendant was aware of this fact at the time of the execution of the promissory note.

Plaintiff claims Defendant was his "silent partner" at the time the promissory note was executed and, therefore, must have been aware of the status of the liquor license. The party claiming the existence of a partnership has the burden of proving its existence. (*See Ramirez v. Goldberg*, 82 A.D.2d 850, 852 [2d Dep't 1981].) No one characteristic of a business relationship is determinative in finding the existence of a partnership.

Partnership Law § 11. Case law reveals a series of factors to be considered in determining whether or not there is a partnership: (1) sharing of profits, (2) sharing of losses, (3) ownership of partnership assets, (4) joint management and control, (5) joint liability to creditors, (6) intention of the parties, (7) compensation, (8) contribution of capital, and (9) loans to the organization. *Brodsky v. Stadlen*, 138 A.D.2d 662, 663 (2d Dep't 1988). The failure of a party to contribute capital is strongly indicative that no partnership exists. *Id.*

Plaintiff claims that, because they were partners, Defendant was fully-aware of the nonexistence of a valid liquor license upon signing the shareholder agreement and the promissory note, and provides two supporting documents: a letter from the landlord addressing Defendant as a co-tenant and a Notice of Pleading from the Division of Alcoholic Beverage Control. However, joint tenancy or tenancy in common does not, by itself, establish a

partnership. *Partnership Law § 11(3)*. Therefore, the complaints made by the landlord in the letter addressed to both parties are not determinative of the existence of a partnership between them. (*Plaintiff Reply Affidavit Exhibit B*), nor is the mere addition of the defendant's name to the address proof of notice. Additionally, the Notice of Pleading issued by the N.Y.S. Division of Alcoholic Beverage Control names Plaintiff as the Licensee. The notice names Defendant only to illustrate that "the licensee made its license available to a person not specified in the license, in that the licensee permitted [Defendant], a person not authorized by the State Liquor Authority, to avail himself of the license privilege from the inception of the license on 7/1/2005, all cause for revocation, cancellation or suspension of the license in accordance with section 111 of the Alcoholic Beverage Control Law." (*Plaintiff Reply Affidavit Exhibit A*.)

Summary judgment is a drastic remedy and to be granted, must not be granted where there is any doubt as to the existence of material issues of fact. (*Akseizer v. Kramer*, 265 AD2d 356 [1999].) Plaintiff has not provided any evidence to document his disclosure to Defendant of the nonexistence of the liquor license prior to the execution of the shareholder agreement or promissory note. Because the law does not, by itself, resolve the dispute regarding Defendant's knowledge at the time the parties executed the agreement, such knowledge is a question of fact and granting summary judgment would be inappropriate.

Accordingly, Plaintiff's motion for summary judgment in lieu of complaint pursuant to CPLR § 3213 is denied and the moving and answering papers shall be deemed the complaint and answer, respectively.

Dated: August 18, 2009

Bernice D. Siegal, J.S.C.