

**Sweeney v 31 Great Jones Rest. Corp.**

2010 NY Slip Op 31917(U)

June 30, 2010

Supreme Court, New York County

Docket Number: 603775/09

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN  
*Justice*

PART 7

SEAN SWEENEY and JAMES CONROY,

Plaintiffs,

- against -

31 GREAT JONES RESTAURANT CORPORATION, -  
VICTORIA FREEMAN, CHRISTOPHER  
PARASKEVAIDES, MARC MEYER, and  
MAUREEN MEEHAN,

Defendants.

**FILED**  
Index No. 603775/09  
**JUL 12 2010**  
COUNTY CLERK'S OFFICE  
NEW YORK

002

The following papers, numbered 1 to 2 were read on this Motion by plaintiff(s) for an order and judgement pursuant to CPLR § 3211a.

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1</u>
Answering Affidavits — Exhibits (Memo) _____	
Replying Affidavits (Reply Memo) _____	<u>01</u>

Cross-Motion:  Yes  No

Plaintiffs Sean Sweeney and James Conroy allege that defendants wasted corporate assets and damaged the profitability of a restaurant. Defendants move to dismiss the complaint pursuant to CPLR § 3211 (a) (1), based on documentary evidence; (a) (7); based on failure to state a cause of action; and (a) (8), based on lack of personal jurisdiction.

Five Points Restaurant (Five Points) is operated by 31 Great Jones Restaurant Corporation (the Corporation). Five of the six individual parties are shareholders, officers, and directors in the Corporation. Defendant Marc Meyer, the chef, is the exception. Under the shareholders agreement, defendants Victoria Freeman and Maureen Meehan are in charge of Five Points operations. Defendant Christopher Paraskevaides is the restaurant manager.

According to plaintiffs, Five Points opened around 1998 and was profitable during its early years of operation. In the first part of 2005, defendants opened another restaurant, which allegedly caused them to be absent from Five Points for extended periods of time. In September 2006, defendants opened a third restaurant, which also purportedly diverted significant amounts of time and attention from Five Points. Plaintiffs are not investors or owners in the other two restaurants.

Plaintiffs allege that the Corporation's costs increased and that it stopped producing a profit. Plaintiffs demanded financial statements, books, and records, which defendants refused to produce. Plaintiffs commenced an Article 78 proceeding against the Corporation, which was resolved by an August 2007 order that listed the records defendants were to produce. Plaintiffs allege that defendants produced some, but not all, that were requested.

Plaintiffs commenced this action, in which the first cause of action alleges that defendants breached their fiduciary duty by failing to make financial information available, obstructing plaintiffs' efforts to obtain information about the Corporation's performance, refusing plaintiffs online access to the Corporation's bank accounts, failing to dedicate time to the Corporation, failing to hold regular board of directors meetings, paying themselves substantial management fees despite spending a great deal of time at the other restaurants, wasting corporate assets, and allowing profits to steadily decrease until Five Points became unprofitable. The second cause of action alleges breach of the duties of loyalty, honesty, and care.

On a CPLR § 3211 motion, the court affords the pleadings a liberal construction, takes the allegations of the complaint as true, and provides plaintiff the benefit of every possible inference (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). A motion to dismiss for failure to state a cause of action may be granted only where the complaint utterly

fails to state any cognizable cause of action (*Salles v Chase Manhattan Bank*, 300 AD2d 226, 228 [1<sup>st</sup> Dept 2002]). Any evidentiary material submitted by the defendant must show that a fact as claimed by the plaintiff is not a fact at all; otherwise, dismissal will not be granted (*Guggenheimer v Ginzburg*, 43 NY2d 268, 274-275 [1977]). A motion to dismiss on the ground that the action is barred by documentary evidence may be granted "only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen*, 98 NY2d at 326).

Defendants make arguments which can only be resolved by factual determinations, which is not possible in regard to their instant motion. For instance, defendants claim that they gave all the requested information to plaintiffs, but they do not present any evidence of this statement which, in any case, is denied by plaintiffs. Defendants also allege that they did not improperly divert their attention from Five Points and that it was not mismanaged. Defendants submit an affidavit by the Corporation's accountant, along with some financial ledgers, that purports to show that Five Points was profitable. Defendants fail to lay a proper foundation for the documents. In addition, plaintiffs claim that defendants' interpretation of the figures is incorrect. Thus, the evidence on the motion is not conclusive and does not refute any of plaintiffs' allegations. Defendants fail to show that the claims in the complaint should be dismissed.

Turning to the question of service, personal jurisdiction cannot be acquired over a defendant in the absence of proper service. Plaintiffs served defendants by mail, purportedly pursuant to CPLR § 312-a (a) and (b). That statute provides that service may be effected by mailing the summons and complaint to the defendant by first-class mail, with two copies of a statement of service by mail and acknowledgment of receipt, and a prepaid postage return envelope addressed to the sender. For service to be effective, the defendant must complete

the acknowledgment of receipt, and mail or deliver one copy of it to the sender within thirty days from the date of receipt. Service is complete on the date that the signed acknowledgment of receipt is mailed or delivered to the sender. First-class mail service is not complete unless and until the defendant returns the signed acknowledgment form (see *Ananda Capital Partners v. Stav Elec. Sys. (1994)*, 301 AD2d 430, 430 [1<sup>st</sup> Dept 2003]).

Here, plaintiffs employed certified rather than first-class mail. Plaintiffs sent each defendant only one copy of the statement of service by mail and acknowledgment of receipt, and did not send any self-addressed stamped envelopes. Case law indicates that certified mail may be substituted for first class mail; however, the failure to include the correct number of copies of statements of service and acknowledgment, and other documents will be not overlooked (see *Klein v Educational Loan Servicing, LLC*, 71 AD3d 957, 958 [2d Dept 2010]; *Bennett v Acosta*, 68 AD3d 910, 910 [2d Dept 2009]). Proper service was not effected in this case.

Plaintiffs allege that they attempted service a second time using first-class mail and complying with the other requirements in CPLR § 312-a. Plaintiffs are silent as to whether defendants returned the acknowledgments, but this does not matter as to four of five defendants, who subsequently waived the defense of lack of personal jurisdiction and withdrew that part of the instant motion with prejudice. Defendant Meehan did not joint the waiver and there is no evidence that she was properly served. The complaint will be dismissed as to her.

To conclude, it is hereby

ORDERED that the motion to dismiss, made by all the defendants, is denied, except as to defendant Maureen Meehan, as to whom the motion is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment

accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants;  
and it is further

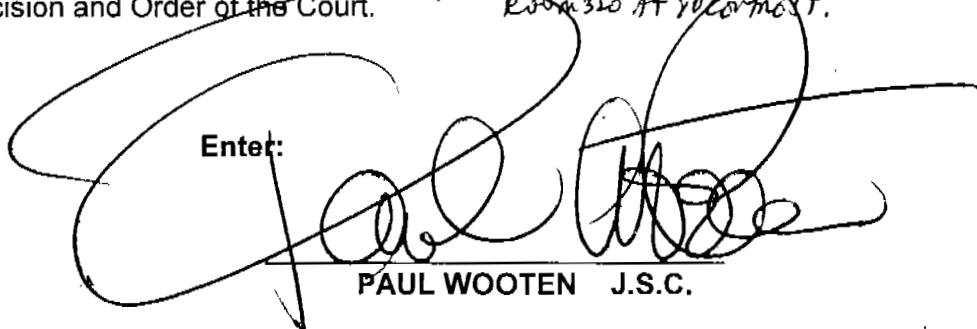
ORDERED that caption be amended to reflect the dismissal of defendant Maureen Meehan and all future papers filed with the court shall bear the amended caption; and it is further

ORDERED that counsel for Maureen Meehan shall serve a copy of this order with notice of entry upon the County Clerk and the Clerk of the Trial Support Office who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that the remaining defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry.

*Counsel shall appear for a preliminary conference on July 28, 2010 at 10:00 AM in Room 320 at FC Courtst.*  
This constitutes the Decision and Order of the Court.

Dated: 6-30-10

Enter:   
PAUL WOOTEN J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check If appropriate: :  DO NOT POST  REFERENCE