

Deriggi v Brady

2011 NY Slip Op 30851(U)

April 7, 2011

Supreme Court, New York County

Docket Number: 104300/2007

Judge: Shirley Werner Kornreich

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

PRESENT: ~~JUSTICE SHIRLEY WERNER KORNREICH~~ PART 54
Justice

Index Number : 104300/2007

DERIGGI, KENNETH

vs.

BRADY, EDWARD

SEQUENCE NUMBER : 009

COMPEL DISCLOSURE

INDEX NO. _____

MOTION DATE 12/1/2010

MOTION SEQ. NO. 009

MOTION CAL. NO. _____

n this motion to/for _____

PAPERS NUMBERED

1-2

3-4

5

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

Answering Affidavits -- Exhibits _____

Replying Affidavits _____
+ Transcript dated 6/24/10

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is denied in accordance with the annexed decision.*

FILED

APR 08 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/7/11

JUSTICE SHIRLEY WERNER KORNREICH

[Signature]

J.S.C.

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):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
KENNETH DERIGGI,

Plaintiff,

-against-

DECISION & ORDER

Index No.: 104300/2007

EDWARD BRADY, 199 BOWERY REST. GROUP,
LLC, d/b/a "BLVD" and d/b/a "CRASH MANSION
@ BLVD," NANCY BRADY, MARK SAAD,
JOHN LUGANO, PASTA & POTATOES, INC.,
d/b/a VILLAGE LANTERN, 52 RESTAURANT
GROUP CORP. d/b/a OPAL BAR AND RESTAURANT
and CAPITAL DILIGENCE, INC.,

Defendants.
-----X

SHIRLEY WERNER KORNREICH, J.

FILED
APR 08 2011
NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff moves (Motion Seq. 009), pursuant to CPLR 3124 and 3126, for summary judgment on liability on the first, second and sixth causes of action in the second amended complaint (SAC) against defendants Edward Brady and Nancy Brady (The Bradys).¹ The Bradys oppose. The Bradys' answer and counterclaims were stricken by order of this court, dated April 1, 2009, due to defendants' willful and contumacious refusal to comply with disclosure orders.

The relevant causes of action against the Bradys are as follows: fraud (first); breach of the covenant of the good faith and fair dealing (second); and breach of an unsigned 199 Bowery

¹Plaintiff withdrew his claims against defendants Mark Saad and John Lugano [Transcript, dated June 24, 2010, pp. 6-7] and agreed that relief against defendant 199 Bowery Restaurant Group, LLC (199 Bowery) was automatically stayed, when it filed for bankruptcy on March 17, 2010 [Reply Affirmation of Frank P. Winston, dated April 23, 2010 (Winston Reply), ¶3]. The Winston Reply recognized that the claims in the third through fifth causes of action against the Bradys required 199 Bowery's presence and limited the motion to the first, second and sixth causes of action against the Bradys. *Id.*

operating agreement (sixth). In his reply papers, plaintiff requests that the court conform the pleadings to the proof at the inquest to characterize the breach of contract claim in the sixth cause of action as a claim for breach of an oral and/or *quasi* contract. Winston Aff, ¶23.

Background

The facts in this action are drawn from the second amended complaint's facts and exhibits, plaintiff's affidavit sworn to on January 31, 2010, documentary evidence, and all favorable inferences that can be drawn from them. Once an answer is stricken, the pleader is deemed to have admitted all traversable allegations of the complaint, including liability. *Rokina Optical Co. v Camera King, Inc.*, 63 NY2d 728 (1984). After the default, the court must still determine whether the plaintiff has a legally cognizable cause of action. *Feffer v Malpeso*, 210 AD2d 60 (1994); *Green v Dolphy Construction Co., Inc.*, 187 AD2d 635 (2d Dept 1992). The legal conclusions to be drawn from the complaint's allegations are determined by the court. *Green v Dolphy, supra*. The court must accept the allegations of the complaint as true and afford them the benefit of every favorable inference. *Cron v Hargro Fabrics*, 91 NY2d 362, 366 (1998). The plaintiff may submit affidavits to remedy defects in the complaint and to preserve inartfully pleaded, but potentially meritorious claims, and such additional submissions also will be given their most favorable intendment. *Id.*

In early 2003, plaintiff was hired by defendants (including the Bradys) to perform significant construction and renovation work to convert space located at 199 Bowery, New York, NY, into a bar and restaurant called BLVD and CRASH MANSION (Restaurant). SAC ¶10. The Restaurant was owned and operated by the corporate defendant 199 Bowery. SAC ¶12. During the course of the work, plaintiff was persuaded by the Bradys to accept a percentage

interest in 199 Bowery in lieu of accepting payment for his work, labor and materials. SAC ¶¶ 11-12. The Bradys are brother and sister. SAC ¶38. The Bradys represented that Nancy Brady had already invested \$2,500,000 in 199 Bowery to induce plaintiff to accept an interest in 199 Broadway in lieu of payment for the construction. SAC ¶¶ 11-12. Plaintiff and the Bradys agreed that plaintiff would get a 10% interest in 199 Bowery in return for his work, his cash payments to subcontractors, and cash plaintiff gave to Edward Brady (First Cash Payment). Plaintiff's investment amounted to a total sum of \$500,000. SAC ¶12.

The Bradys presented plaintiff with an unsigned operating agreement, dated January 1, 2003 (Operating Agreement). SAC ¶13, and Ex 1. Section 2.1 of the Operating Agreement stated that plaintiff was an initial member with a 10% interest and a \$500,000 contribution. SAC ¶16 and Ex1. The other initial members named in the unsigned Operating Agreement were Nancy Brady, who was said to own a 50% interest, Mark Saad who was said to own a 15% interest, John Lugano, who was said to own an 18 % interest and non-parties Julian Alonzo, who was said to own a 2% interest and H&N, LLC, who was said to own a 5% interest. SAC ¶16 and Ex 1. Later, plaintiff invested another \$47,646.23 in cash in 199 Bowery (Second Cash Payment). SAC ¶17. Although the Operating Agreement was never signed, the parties to it repeatedly discussed it, and they agreed that the percentages and representations made therein were accepted by all. SAC ¶19. Giving this allegation the benefit of every favorable inference, the court infers that the Bradys represented that plaintiff had a 10% interest in 199 Bowery and had been credited with an investment of \$500,000.

Plaintiff contends that the Bradys' representations that Nancy Brady invested \$2,500,000, that plaintiff owned 10% of 199 Bowery and that plaintiff was credited with the First Cash

Payment, were false, were made with the intent of securing plaintiff's investment of \$547,646.23 and induced plaintiff to invest \$547,646.23. SAC ¶¶ 41, 85-86 & 91. Plaintiff has received no profits, cash, or property for his investment in 199 Bowery, has not received a K-1, and has been denied access to its financial records. SAC ¶¶ 42-44 and 78.

In the Summer and Fall of 2007, Edward Brady asked plaintiff how much he wanted for a buy out of his interest in 199 Bowery. AC ¶¶ 52-53. Plaintiff asked for \$547,646.23, the amount of his investment, but Edward Brady made no offer. *Id.* On January 10, 2007, Edward Brady told plaintiff that he had borrowed \$750,000 against 199 Bowery, it was in bad financial shape, and it could not repay the loan. Edward Brady offered plaintiff \$170,000 for his interest.

Plaintiff requested financial records from 199 Bowery's attorney and received copies of its tax returns for the years 2004, 2005 and 2006 (Tax Returns). SAC ¶¶ 45 & 56. The Tax Returns falsely stated that Nancy Brady owned 100% of 199 Bowery and that she was entitled to 100% of its profits and losses. SAC ¶¶ 57-68. The Tax Returns reflected no distributions to members. SAC ¶70. The capital account on the Tax Returns reflected that at the end of 2006, 199 Bowery had \$487,837. SAC ¶¶71. The 2006 Tax Return showed that 199 Bowery made a profit which went to Nancy Brady. SAC ¶77. In a March 7, 2007 disclosure statement, filed pursuant to §1102 of the Limited Liability Company Law (1102 Filing), 199 Bowery listed a capital contribution by Nancy Brady of \$3,250,000 and plaintiff's investment as \$250,000. SAC ¶¶ 73-75. It can be inferred from the 1102 Filing that the representation that plaintiff was credited with a \$500,000 investment, was false. Moreover, the inflation of Nancy Brady's capital contribution and the diminution of plaintiff's were false and fraudulent. ¶¶ 95-97.

As damages for fraud and breach of the covenant of good faith and fair dealing (1st and

2nd causes of action), plaintiff asked for damages to be proven at trial, including lost business and opportunities, but at least his capital contribution. As damages for breach of the Operating Agreement, plaintiff asked for the difference between \$547,646.23 and the \$250,000 listed in the 1102 Filing.

Discussion

The elements of a claim for fraudulent inducement are: 1) a false representation of material fact. 2) known by the utterer to be untrue. 3) made with the intention of inducing reliance and forbearance from further inquiry, 4) that is justifiably relied upon, and 5) resulting damages. *Schumaker v Mather*, 133 NY 590, 595 (1892).

Plaintiff is missing the element of reliance for his fraudulent inducement claim against the Bradys for return of all of his initial \$500,000 investment in 199 Bowery. His pleading states that "during the course of the job," he was persuaded to accept a percentage in 199 Bowery in lieu of payment for his work. The element of reliance as to the work already done, is lacking to the extent that he provided the consideration before he was fraudulently induced to invest in 199 Bowery.

However, he does have a claim for fraudulent inducement for the construction that took place afterward, for the unspecified amount of the First Cash Payment and his Second Cash Payment. Plaintiff relied on the misrepresentation about Nancy Brady's investment by making the First Cash Payment and continuing the construction. He relied on all of the misrepresentations in making the Second Cash Payment. The rest can be recovered under a different theory.

Plaintiff has a claim for the work, materials and labor costs that he provided prior to the

fraudulent representations on a theory of either contract implied-in-law or an oral contract, although it was not pleaded. A court may amend a pleading to conform to the proof at any time before or after judgment, even on appeal, in the absence of prejudice. *Murray v City of NY*, 43 NY2d 400, 401 (1977). An amendment may be granted *sua sponte* where the plaintiff's theory was apparent in the record and the opposing party is not misled to its prejudice.

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Here, the facts in the second amended complaint make out a claim for an implied-in-fact contract to pay for personal services.

The basis of a recovery for personal services must, of course, be a contract, and this must either be proven or implied. If the contract be not expressed, it may be implied from the mere rendition and acceptance of the service. The presumption is created that such services are to be compensated, because no one is expected to labor without hire.

Fox v Arctic Placer Min. & Mill. Co., 229 NY 124, 128 (1920); *see also*, *Miller v Schloss*, 218 NY 400, 406-407 (1916) (contract may be implied from parties' conduct where defendant's assent can be fairly inferred). Plaintiff alleges, and it must be accepted as true, that the Bradys hired him to do construction and renovation work, he did the work, supplied the materials and paid the labor costs. It must be presumed from the Bradys' acceptance of the work that they agreed to pay for it. Alternatively, there was an oral contract because the Bradys offered plaintiff a job and he manifested his assent by conduct, i.e., by working.

The court *sua sponte* amends the second amended complaint to assert a causes of action for contract implied-in-fact and oral contract against the Bradys and grants judgment on liability to plaintiff on that those theories for the work, materials and labor costs he provided prior to his investment in 199 Bowery. The Bradys are not misled to their prejudice by the amendment

because it is drawn from facts that must be accepted as true, which the Bradys admitted due to their default. *Rokina Optical Co. v Camera King, Inc., supra*. The legal conclusions to be drawn from the factual allegations are determined by the court. *Green v Dolphy, supra*.

Plaintiff's request to amend the pleadings to allege a theory of *quasi* contract is denied. A *quasi* contract:

is not a contract or promise at all. It is an obligation which the law creates, in the absence of any agreement, when ... the parties ... have placed in the possession of one person money, or its equivalent, under such circumstances that in equity and good conscience he ought not to retain it Duty, and not a promise or agreement or intention of the person sought to be charged, defines it. It is fictitiously deemed contractual in order to fit the cause of action to the contractual remedy

Miller v Schloss, supra at 407-408 [internal citations omitted]. Here, it is 199 Bowery, not the Bradys, who retained the benefit of the construction. Moreover, as previously noted, there was an implied or oral agreement between the Bradys and plaintiff, so *quasi* contract does not lie.

Plaintiff's motion for judgment on his claim for breach of the unsigned Operating Agreement (sixth cause of action) is denied as there is no proof that it was signed by the Bradys. The motion for judgment on the claim for breach of the covenant of good faith and fair dealing (second cause of action) is posited on breach of the unenforceable Operating Agreement and is likewise denied. The second and sixth causes of action against the Bradys are dismissed.

Plaintiff is not entitled to recover punitive damages for this ordinary fraud and breach of contract. *James v Powell*, 19 NY2d 249 (1967). The remaining contentions of the parties have been considered and have been found to be without merit. Accordingly, it is

ORDERED that the motion by plaintiff Kenneth DeRiggi for judgment on liability against defendants Edward Brady, 199 Bowery Rest. Group, I.L.C. d/b/a, "BLVD" and, d/b/a,

“Crash Mansion (@) Blvd.” Nancy Brady, Mark Saad and John Lugano is determined as follows:

1) the motion against Mark Saad and John Lugano is permitted to be withdrawn on consent;

2) the motion against all defendants, except Mark Saad and John Lugano, on the third, fourth and fifth causes of action, and the first cause of action against 199 Bowery Rest. Group, is held in abeyance on plaintiff's consent due to an automatic bankruptcy stay involving 199 Bowery Rest. Group, LLC, d/b/a. “BLVD” and, d/b/a. “Crash Mansion (@) Blvd”;

3) the motion for judgment on liability against Nancy Brady and Edward Brady is granted, jointly and severally, on the first cause of action for fraud for the First Cash Payment and Second Cash Payment as defined in this Decision and as alleged in ¶¶ 12 and 17 of the second amended complaint, and for the work, materials and labor costs plaintiff Kenneth DeRiggi provided after he invested in 199 Bowery, LLC, to construct and renovate the premises occupied by 199 Bowery Rest. Group, LLC d/b/a “BLVD” and d/b/a “Crash Mansion @ Blvd”, located at 199 Bowery, New York, NY, hereinafter referred to as the “Restaurant”;

4) the court *sua sponte* amends the second amended complaint to state a theory of recovery based upon implied-in-fact and/or oral contract and for the work, material and labor costs plaintiff Kenneth DeRiggi provided to construct and renovate the Restaurant before he invested in 199 Bowery Rest. Group, LLC, and grants judgment on liability in said plaintiff's favor on said causes of action against Nancy Brady and Edward Brady, jointly and severally, for said work, materials and labor costs;

5) the motion is denied with respect to the second and sixth causes of action, which are dismissed with prejudice as against Edward Brady and Nancy Brady;

6) plaintiff's request for punitive damages against Edward Brady and Nancy Brady is denied;

7) the causes of action against Nancy Brady and Edward Brady for fraud and oral and/or implied-in-fact contract are hereby severed from the remainder of the action, which shall continue as a separate action; plaintiff shall serve the Clerk of the court and the Clerk of the Trial Support Office (Room 119M) with a copy of this order with notice of entry and said Clerks shall note the severance in their records; and

8) the issue of the damages to which plaintiff is entitled on said severed causes of action is referred to a Special Referee to hear and determine: plaintiff shall serve a copy of this order with notice of entry on the Clerk of the Reference Part (Room 119M) to obtain a date for an inquest for an assessment of damages, and the Clerk shall notify the parties of the time and date of the hearing.

Dated: April 7, 2011

ENTER:

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