

**Rose v Different Twist Pretzel, Inc.**

2011 NY Slip Op 31380(U)

May 23, 2011

Sup Ct, Queens County

Docket Number: 22033/2010

Judge: Sidney F. Strauss

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE SIDNEY F. STRAUSS  
Justice

IA Part 11

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x  
WAYNE ROSE

Index  
Number 22033 2010

Motion  
Date February 16, 2011

-against-

Motion  
Cal. Numbers 27-30

DIFFERENT TWIST PRETZEL, INC., et al.

Motion Seq. Nos. 1-4

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x

The following papers numbered 1 to 38 read on this (1) motion by August Peter Maggio, Different Twist Pretzel and Chapel Banks Investment, Inc., to dismiss the complaint insofar as it alleges breach of contract by Joan Maggio; (2) motion by plaintiff to amend the pleadings to include two additional causes of action; (3) motion by plaintiff to strike the answer of defendant Whitehall Pretzel & Ice Cream, Inc., or alternatively to compel said defendant to comply with plaintiff's 3120 Demand together with the award of cost to plaintiff pursuant to 22 NYCRR 130-1.1; (4) motion by August Peter Maggio, Different Twist Pretzel and Chapel Banks Investment, Inc., to compel plaintiff to accept service of defendants' answer; and (5) cross motion by Reshma Shah, Mohmed Shah, Vincent Kumar, Jeevahan Sivasubramaniam, Suleman Shah, Whitehall Pretzel & Ice Cream, Inc., Ferry Terminal Management Group, Inc. (FTMG), and Saneh to dismiss with prejudice, the allegations in the complaint which allege breach of contract, etc. by Reshma Shah, Mohmed Shah, Vincent Kumar, Jeevahan Sivasubramaniam, Suleman Shah, Whitehall Pretzel & Ice Cream, Inc., Saneh Kapoor as Executor of the Estate of Bwanish Kapoor, Neil Kapoor and FTMG for failure to state a cause of action pursuant to CPLR 3211; to dismiss plaintiff's summons and complaint as against Jeevahan, Suleman, FTMG, Saneh and Neil for lack of personal jurisdiction pursuant to CPLR 3211, or alternatively to direct plaintiff to accept service of answers on behalf of all party defendants setting this matter down for a status conference with the court, and staying discovery pending the status conference.

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Notices of Motions - Affidavits - Exhibits.....	1-20
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Upon the foregoing papers it is ordered that the motions and cross motion are decided as follows:

Plaintiff in this, inter alia, breach of contract action seeks damages based upon the alleged failure of defendants to comply with the terms of a contract. The complaint alleges that in or about June 2005, defendants entered into an agreement giving plaintiff exclusive rights to develop and sell licenses and/or franchises for Different Twist Pretzel Stores, in the State of New York. The agreement was to provide plaintiff with one half of the license and franchise fee(s) charged by Different Twist together with one half of its royalty fee(s), to wit 2.5% of any store's gross sales. Pursuant to the aforesaid agreement, plaintiff's term was contingent upon the opening of defendant Reshma Shah's store in the Staten Island Ferry Terminal, to wit, Whitehall Pretzel & Ice Cream, Inc. The complaint further alleges that certain defendants made representations to plaintiff that they would open a store under the name "Different Twist" in the Staten Island Ferry Terminal. At some point in or about December 2008, plaintiff was hospitalized with cancer and other ailments, and was released in June of 2009. During the period of plaintiff's illness, the complaint alleges, the defendants entered into a new agreement, with and amongst each other, which allegedly overrode the original contract with plaintiff, to open a pretzel store in the Staten Island Ferry Terminal. Plaintiff alleges that, approximately two years later, Reshma Shah opened her store called Whitehall Pretzel & Ice Cream, Inc., at the Staten Island Ferry Terminal and grossed nearly \$1,200,000 per year and failed to give plaintiff a minimum of 2.5% of those monies.

#### Motion to dismiss re: Joan Maggio

The motion to dismiss the complaint insofar as asserted against Joan Maggio is granted. "One of the primary and completely legitimate purposes of incorporating is to limit or eliminate the personal liability of corporate principals" (*Goldman v Chapman*, 44 AD3d 938 [2007]; see *Bartle v Home Owners Coop.*, 309 NY 103 [1955]). Generally, a party seeking to pierce the corporate veil must establish that "(1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in the plaintiff's injury" (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]; see *Old Republic Natl. Tit. Ins. Co. v Moskowitz*,

297 AD2d 724, 725 [2002]; *Hyland Meat Co. v Tsagarakis*, 202 AD2d 552 [1994]). The mere claim that the corporation was completely dominated by the owners, or conclusory assertions that the corporation acted as their “alter ego,” without more, will not suffice to support the equitable relief of piercing the corporate veil (*see Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d at 141-142; *Damianos Realty Group, LLC v Fracchia*, 35 AD3d 344 [2006]). “The decision whether to pierce the corporate veil in a given instance depends on the particular facts and circumstances” (*Damianos Realty Group, LLC v Fracchia*, 35 AD3d at 344 [internal quotation marks omitted]).

Here, although plaintiff submitted evidence tending to demonstrate that Joan Maggio exercised dominion and control over Different Twist, plaintiff failed to establish, prima facie, that Joan Maggio used such dominion and control to commit a fraud or wrong against plaintiff which resulted in injury, or that she failed to observe corporate formalities. There was also no evidence beyond plaintiff’s conclusory assertions that Different Twist and Joan Maggio were alter egos (*see Mistrulli v McFinnigan, Inc.*, 39 AD3d 606 [2007]; *Damianos Realty Group, LLC v Fracchia*, 35 AD3d at 344; *John John, LLC v Exit 63 Dev., LLC*, 35 AD3d 540 [2006]; *Treeline Mineola, LLC v Berg*, 21 AD3d 1028 [2005]; *O’Brien-Kreitzberg & Assoc. v K.P., Inc.*, 218 AD2d 519 [1995]). Accordingly, the motion to dismiss the complaint insofar as asserted against Joan Maggio, is granted.

#### Motion to amend the pleadings

Plaintiff moves to amend the complaint to correct the name of Reshma Shah, (previously RESHMAN), and to add two new causes of action which are for breach of contract against defendants Different Twist, August Peter Maggio and Chapel. The motion to amend the pleadings is granted, as unopposed and otherwise on the merits (CPLR 3025[b]).

#### Motion by plaintiff to strike the answer of Whitehall

While the nature and degree of the penalty to be imposed on a motion pursuant to CPLR 3126 is a matter of discretion with the court, striking an answer is inappropriate absent a clear showing that the failure to comply is willful, contumacious or in bad faith (*Herrera v City of New York*, 238 AD2d 475 [1997]; *Harris v City of New York*, 211 AD2d 663 [1995]), which must be affirmatively established by the moving party (*Pimental v City of New York*, 246 AD2d 467 [1998]), whereupon the burden shifts to the nonmoving party to establish a reasonable excuse, with appropriate findings to be made by the court (*Corner Realty 30/7 v Bernstein Mgt. Corp.*, 249 AD2d 191 [1998]). Only when a party adopts a pattern of non-compliance in violation of court orders thereby delaying the discovery process, may the striking of pleadings be warranted (*Gutierrez v Bernard*,

267 AD2d 65 [1999]; *Helms v Gangemi*, 265 AD2d 203 [1999]). Here, plaintiff served defendants with a demand for certain documents and records and defendants have not responded. Defendants submit that they did not respond to plaintiff's demand for discovery because plaintiff indicated that he would be filing an amended complaint and, in fact, plaintiff attempted to file the same with the court, albeit too late. In view of the single incident of noncompliance, the failure to establish willfulness or bad faith by Whitehall and, moreover, the reasonableness of its excuse, it would be an improvident exercise of discretion to strike Whitehall's answer.

Accordingly, the motion to strike is denied.

#### Motion to compel acceptance of late answer

The motion by defendants August Peter Maggio, Different Twist and Chapel to compel plaintiff to accept their late answer is denied.

To successfully support their cross motion to compel plaintiff to accept the late answer, defendants are required to demonstrate a justifiable excuse for their default and the existence of a potentially meritorious defense to the action (*see* CPLR 5015[a][1]; *May v Hartsdale Manor Owners Corp.*, 73 AD3d 713 [2010]; *Gross v Kail*, 70 AD3d 997 [2010]; *Leifer v Pilgreen Corp.*, 62 AD3d 759 [2009]; *Kouzios v Dery*, 57 AD3d 949 [2008]). Here, defendants merely submitted an affidavit indicating the time frame within which they provided their answer without giving an excuse for the delay. Defendants also failed to provide a potentially meritorious defense to the action. The Appellate Division, Second Department, has consistently held that a defendant who fails to answer the complaint and seeks to compel acceptance of a late answer must provide a reasonable excuse for the default and demonstrate a meritorious defense to the action (*see Juseinoski v Board of Educ. of City of NY*, 15 AD3d 353 [2005]; *see also Ryan v Breezy Point Cooperative, Inc.*, 76 AD3d 523 [2010]; *Roccanova v Aussino (USA) Inc.*, 76 AD3d 522 [2010]). Consequently, as neither a reasonable excuse nor a meritorious defense to the action were demonstrated, the motion, insofar as it was made by these three defendants, to compel plaintiff to accept their late answer is denied (*see Moriano v Provident New York Bancorp*, 71 AD3d 747 [2010]).

#### Cross Motion

The branch of the cross motion which seeks to dismiss the action insofar as asserted against the cross-moving defendants, namely Reshma Shah, Mohmed Shah, Vincent Kumar, Jeevahan Sivasubramaniam, Suleman Shah, Whitehall Pretzel & Ice Cream, Inc. (Whitehall),

Saneh Kapoor as Executor of the Estate of Bwanish Kapoor, Neil Kapoor and FTMG, is granted.

Plaintiff alleges breach of contract between himself and Different Twist Pretzel, Inc. (Different Twist). He alleges that pursuant to the contract with Different Twist, he was authorized to sell Different Twist franchises. He further alleges that the cross-moving defendants “made representations to plaintiff indicating that they would open a store under the name of Different Twist in the Staten Island Ferry Terminal” but that they instead purchased a franchise directly through Different Twist. Plaintiff alleges that, therefore, his contract with Different Twist was “breached and overrode” and requests over \$10,000,000 in damages.

The cross-moving defendants deny ever entering into a contract with plaintiff, either to pay him a commission or other fee, or to purchase a franchise through him. They submit that not one of the cross-moving defendants ever made any promise, verbal or otherwise, to open a Different Twist franchise through plaintiff.

In order to maintain a cause of action alleging breach of contract, the plaintiff must establish (1) the formation of a contract between the plaintiff and the defendant, (2) performance by the plaintiff, (3) the defendant’s failure to perform, and (4) resulting damages (*see JP Morgan Chase v J.H. Elec. of N.Y., Inc.*, 69 AD3d 802 [2010]). Here, there is no evidence of a contract between plaintiff and the cross-moving defendants.

Even assuming arguendo, that there was an existing contract between plaintiff and the cross-moving defendants, the cause of action for breach of contract is barred by the applicable statute of frauds, General Obligations Law § 5-701(a)(10). In relevant part, this enactment renders void any oral agreement “to pay compensation for services rendered in . . . negotiating the purchase . . . of any . . . business opportunity.” (*Snyder v Bronfman*, 57 AD3d 393 [2008]). As is evident, the statute broadly applies to “any” business opportunity. The statute expressly defines the term “negotiating” and does so in the following broad terms: “‘Negotiating’ includes procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction.” (*Id.*) Thus, the statute’s sweep is comprehensive as it covers conduct occurring at the outset, during the course of and at the conclusion of the purchase of a business opportunity. Finally, the statute applies not only to an alleged oral agreement but also “to a contract implied in fact or in law to pay reasonable compensation.” (*Id.*) Thus, where, as here, plaintiff seeks compensation for its role in the acquisition of a business, his claim requires a writing signed by the parties (*Id.*).

Nor do the alleged “representations” support a cause of action for fraud. 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 (*see Lama Holding Co. v Smith Barney, Inc.*, 88 NY2d 413 [1996]; *New York Univ. v Continental Ins. Co.*, 87 NY2d 308 [1995]). There are no allegations to this effect in the complaint.

Also, a cause of action alleging fraud must be pleaded with specificity (*see* CPLR 3016[b]; *Brualdi v IBERIA*, 79 AD3d 959 [2010]; *Dumas v Fiorito*, 13 AD3d 332 [2004]; *107 Realty Corp. v National Petroleum U.S.A.*, 181 AD2d 817 [1992]). Here, plaintiff failed to properly plead the elements of misrepresentation of a material fact or scienter in his complaint with specificity, as the complaint did not contain factual allegations showing that the defendants made representations concerning a material fact which were false and known by the defendants to be false at the time it was made and that the defendants made the representations with the purpose of inducing the plaintiff to rely upon them (*see Nationscredit Fin. Servs. Corp. v Turcios*, 55 AD3d 806 [2008]; *Maisano v Beckoff*, 2 AD3d 412 [2003]).

Moreover, the fraud claim is duplicative of the breach of contract claim. A cause of action alleging fraud does not lie where the only fraud claim relates to a breach of contract” (*Tiffany at Westbury Condominium*, 40 AD3d 1073, 1076 [2007]; *see also Ross v DeLorenzo*, 28 AD3d 631, 636 [2006]; *WIT Holding Corp. v Klein*, 282 AD2d 527, 528 [2001]; *Morgan v Smith Corp.*, 265 AD2d 536, 536 [1999]). Such misrepresentations are not collateral to the contract because they pertain to the exact allegations found in plaintiff’s breach of contract claim.

Accordingly, the branch of the cross motion which seeks to dismiss the fraud cause of action as against the cross-moving defendants is granted.

Plaintiff also has no legally cognizable cause of action against the defendants to recover for mental distress and punitive damages. Mental distress damages are only recoverable in actions for intentional infliction of emotional distress or negligent infliction of emotional distress, i.e., where a defendant breaches a duty owed to the plaintiff endangering plaintiff’s physical safety or causing plaintiff to fear for his own safety (*see e.g. Lancellotti v Howard*, 155 AD2d 588 [1989]). Causes of action for breach of contract and fraud do not support damages for mental or emotional distress (*see Rayklar v Washington Mutual Bank*, 51 AD3d 995 [2008]; *O’Neil v O’Neil*, 264 AD2d 766 [1999]).

The sixth cause of action for punitive damages must be dismissed because plaintiff does not allege any conduct rising to the extreme level of culpability required for punitive damages, i.e., conduct aimed at the public or undertaken with criminal indifference. Furthermore, New York courts have made clear that there is no separate cause of action for punitive damages (*see Horn v New York Times*, 100 NY2d 85 [2003]).

In view of the foregoing, the court need not reach the merits of the remaining contentions of the cross-moving defendants.

### Conclusion

The motion to dismiss the complaint insofar as asserted against Joan Maggio is granted.

The motion to amend the pleadings is granted, as unopposed and otherwise on the merits (CPLR 3025 [b]).

The motion to strike the answer of defendant Whitehall, is denied.

The motion by August Peter Maggio, Different Twist and Chapel to compel plaintiff to accept their late answer is denied.

The cross motion which seeks to dismiss the action insofar as asserted against the cross-moving defendants, namely Reshma Shah, Mohmed Shah, Vincent Kumar, Jeevahan Sivasubramaniam, Suleman Shah, Whitehall Pretzel & Ice Cream, Inc. (Whitehall), Saneh Kapoor as Executor of the Estate of Bwanish Kapoor, Neil Kapoor and FTMG, is granted.

Dated: May 23, 2011

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J.S.C.