

Muttontown Club v Nathel

2011 NY Slip Op 32279(U)

August 16, 2011

Supreme Court, Nassau County

Docket Number: 23005/10

Judge: R. Bruce Cozzens

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SUPREME COURT - STATE OF NEW YORK

PRESENT: HON. R. BRUCE COZZENS, JR.

Justice.

TRIAL/IAS PART 5
NASSAU COUNTY

THE MUTTONTOWN CLUB,

Plaintiff(s),

-against-

IRA NATHEL,

Defendant(s).

MOTION #001
INDEX #23005/10
MOTION DATE:
JUNE 24, 2011

The following papers read on this motion:

Notice of Motion.....	1
Affirmation in Opposition.....	1
Reply Affirmation.....	1

Upon the foregoing papers it is ordered that the motion by defendant, Ira Nathel (“Nathel”), seeking an Order of this Court, pursuant to CPLR §3211(a)(1), (2),(3),(7), CPLR §3013, and CPLR §3016 (b) and (f) dismissing the complaint of plaintiff, The Muttontown Club (“Club”), is determined as hereinafter set forth.

The instant motion arises out of an underlying breach of contract action where the Club alleges that Nathel failed to submit a timely resignation and consequently, he is required to tender his Club dues for the following year, pursuant to the Club By-Laws. Nathel has not paid Club dues since November 2009 and such dues were still outstanding at the time of this motion.

In November 2005, the Club, upon receiving Nathel’s application for membership, accepted Nathel as a Provisional Class A member. According to Nathel, he tendered an oral resignation from Club membership in September, 2009. He submitted a resignation in writing by letter dated October 6, 2009. The letter in relevant part provides: “...I was just informed that the official date to tender my resignation was Oct 1st. I am doing so now.” (see Notice of Motion, Exhibit C).

The Club, by letter dated November 2, 2009, rejected Nathel’s resignation as untimely,

while referencing a section of its By-Laws requiring that resignations must be submitted on or prior to October 1 to be considered. The By-Laws, in relevant part, provide:

“...ARTICLE IV...

SECTION 7. The effective date of any resignation or leave of absence from the Club shall be as follows:

(a) All notices of resignation...must be received on or prior to October 1 of the year in which submitted in order to be considered...

SECTION 8, A resignation...becomes binding on a member upon acceptance by the Board of Governors as of the effective date...” (See Notice of Motion, Exhibit B)

In December, 2010, the Club filed a Summons and Complaint in this Court alleging a breach of contract by Nathel, seeking damages in the amount of \$29, 955.40 for Club dues for the 2010 year, plus the costs of the action,

Nathel contends that he effectively resigned in September, 2009 before Club dues accrued for the following year. His October letter was merely a confirmation of that oral resignation. Further, there is no requirement that resignations have to be submitted in writing. Additionally, other members have resigned after the October 1, deadline and the Club accepted their resignations. The Club also instituted a policy to forgive Club dues and fees if a member resigns for reasons of economic hardship.

Nathel avers that the Club is bringing this action in bad faith as the amount of fees assessed against him cannot be substantiated—the Club assessed fees for the purposes of bringing its action within the monetary threshold required for the matter to be heard in this Court. In addition, Nathel alleges that the Club commenced the underlying action for personal reasons as his recently estranged wife’s brother is on the Club board. Finally, Nathel contends that he was a provisional member and such membership does not arise from any written agreement. As such, the provisions and the procedures set forth in the Club By-Laws do not apply to him.

The Club simply refers to its By-Laws setting forth the terms and conditions for any resignation from Club membership. The resignation must be in writing, as implied by the use of the word “Notice” throughout the language in the By-Laws. Further, Nathel resigned after the October 1 deadline.

Generally, a motion to dismiss pursuant to CPLR §3211(a)(1) will be granted only if the documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim (see *Fontanetta v. Doe*, 73 A.D.3d [2nd Dept 2010], quoting Siegel, Practice Commentaries, McKinney’s Cons. Laws of N.Y., Book 7B, CPLR C3211:10 at 22). In sum, the analysis is two-pronged; the evidence must be documentary and it must resolve all the outstanding factual issues at bar.

For evidence to be considered as documentary, it must be unambiguous, authentic, and

undeniable. The term “documentary evidence” as referred to in CPLR 3211(a)(1) typically means judicial records such as judgments and orders or out-of-court documents such as contracts, deeds, wills, and/or mortgages and includes “[a] paper whose content is essentially undeniable and which, assuming the verity of its contents and the validity of its execution, will itself support the ground on which the motion is based” (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10, at 20, *Teitler v. Max J. Pollack & Sons*, 288 AD2d 302 [2nd Dept 2001]).

On such a motion, if the documentary evidence submitted by the defendant refutes the plaintiff's factual allegations and conclusively establishes a defense to the asserted claims as a matter of law, the motion may be granted (see *Logatto v. City of New York*, 51 AD3d 984 [2 Dept 2008]). Here, the evidence submitted may be documentary but it does not sufficiently refute the allegations in the complaint. Based on Nathel's own evidence, this Court is not convinced that he submitted his October letter to confirm a September resignation. The wording indicates otherwise—that he learned that he had to submit his resignation by a date certain so he is “doing so now”. Additionally, his letter is dated October 6, 2009, which is clearly after October 1, and there is no reference to a September resignation.

As to Nathel's argument that he is a provisional member and exempt from the provisions of the By-Laws, the Court takes note of the following relevant provisions:

“...MEMBERSHIP...Membership shall consist of all those persons admitted to membership in accordance with the By-Laws of the Club....

The Membership of the Club shall be divided in to the following classes:

...Regular members

...Privileged Members

...Continuing Privileged Members

...Special Members

...Significant Others

...Regular Members shall be limited to 250 persons over the age 21 who have been admitted to membership in accordance with Article IV....

ARTICLE IV...

...SECTION 2. The initial approvals by the Membership Committee and the Board of Governors shall be provisional for a period of one year at which time the applicant's name shall be recirculated for comment. Admission to membership shall be granted only upon the approval of the Membership Committee....” (see Notice of Motion, Exhibit B).

The By-Laws also set forth that provisional members, once they become regular members, are issued a membership certificate. However, the Court also notes the following

provision in the By-Laws:

“...ARTICLE IV...

SECTION 1. The Board of Governors shall, from time to time, **in its discretion** (emphasis added) fix and determine the procedure for membership...” (see Notice of Motion, Exhibit B).

The evidence submitted by the Club indicates that Nathel executed his acceptance letter where he agreed to and accepted the terms of the By-Laws, and he agreed to be bound thereby. Implicit in Nathel’s own references to his minimal use of the Club in 2008, is that he enjoyed the use and privileges of the Club since his 2005 provisional acceptance (see Notice of Motion, Exhibit C)..

In light of the foregoing, however, it is not clear as to which membership classification and corresponding fees are applicable to Nathel. Although there appears to be a set procedure by which one transitions from Provisional Class A Membership to Regular Membership, the Club has apparently reserved the right to modify that procedure. As such, the issue regarding exactly what membership Nathel enjoyed and the terms of his membership remains unclear and unresolved. This branch of his motion is therefore denied.

It is well settled that on a motion to dismiss a pleading for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged therein to be true, and according the allegations the benefit of every possible favorable inference to determine whether the facts alleged fit within any cognizable legal theory. The complaint stated a cause of action against Nathel because it alleged that he agreed to the terms and conditions of Club membership and he failed to abide by those terms and conditions (see *Fred Tuck and Co., Inc. v. Bronxville Properties, Inc.*, 267 AD2d 423 [2nd Dept 1999], *Richmond Shop Smart, Inc. v. Kenbar Development Center, LLC*, 32 AD3d 423 [2nd Dept 2006]).

Here, the Club stated a cause of action sounding in breach of contract by alleging that Nathel failed to issue a timely resignation to pursuant to the Club By-Laws by which he agreed to be bound. Further, it alleged that pursuant to those By-Laws, Nathel would continue to be responsible for remitting membership dues for the following year. These allegations were supported by documentary evidence. As such, this branch of Nathel’s motion is dismissed.

Regarding the branch of Nathel’s motion under CPLR §3013, the basic requirement of this statute is that the pleading be “sufficiently particular” to give “notice” to the other side of the “transactions” or “occurrences” as seen by the pleader. As long as the pleading may be said to give such “notice,” in whatever terminology it chooses, this aspect of the CPLR §3013 requirement is satisfied (see CPLR §3013 Practice Commentaries, Patrick M. Connors). In light of the branch of the defendant’s motion under CPLR §3211 (a)(7), the Club has sufficiently set forth the particulars in its pleadings. Therefore, this argument is unavailing.

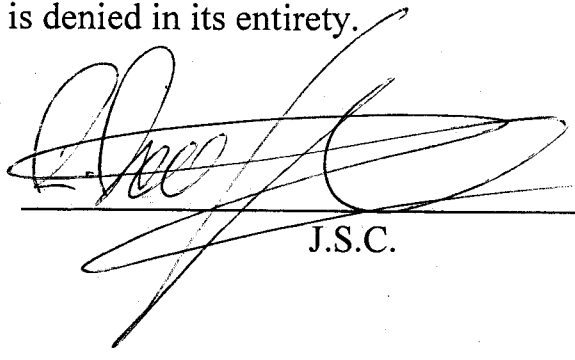
As to Nathel's argument under CPLR §3211(a)(2) and (3), alleging that the Court has no jurisdiction of the subject matter of the cause of action; or the party asserting the cause of action has no legal capacity to sue, this Court has determined that it is also unavailing. Further, Nathel has failed to set forth a cogent reason as to why this argument should even be considered by this Court.

Nathel's motion to dismiss pursuant to CPLR §3016 (b), which provides; "[w]here a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail.", is unavailing and inapplicable to the instant case. The underlying action is based on a breach of contract, which, as previously stated, has been plead in detail (see CPLR §3016 [b]).

The branch of the instant motion under CPLR §3016 (f), requiring that the plaintiff may [emphasis added] set forth and number in his verified complaint the items of his claim and the reasonable value or agreed price of each, is denied in that the Club has set forth a value of the services it provided to Nathel as well as the cost of his obligation. (see CPLR §3016 [f]).

Accordingly the instant motion to dismiss, is denied in its entirety.

Dated: **AUG 16 2011**



J.S.C.

ENTERED
AUG 18 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE