

Rabos v R&R Bagels & Bakery, Inc.

2011 NY Slip Op 33680(U)

July 13, 2011

Sup Ct, Queens County

Docket Number: 3754/2011

Judge: Robert J. McDonald

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

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VASSILIA RABOS,

Index No.: 3754/2011

Plaintiff,

Motion Dates: 4/18/11 &
5/19/11

- against -

Motion No.: 33 & 18

R&R BAGELS & BAKERY, INC., DAVID
RAKHMINOV, LARISA RAKHMINOV, BRIARWOOD
CONSULTING SERVICE, INC., SION AKILOV,
ZALATA AKILOV, SHIRLEY J.W. KOTCHER,
individually, and as a Trustee under
the HARRY A. KOTCHER TESTAMENTARY
TRUST "SAMMY COHEN," a fictitious name
intended to be the Landlord's Manager
and Rental Agent, and S&V RESTAURANT
EQUIPMENT MFG CORP., d/b/a Custom
Cool,

Motion Seq.: 1 and 2

Defendants.

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The following papers numbered 1 to 37 read on this
motion, (No. 33 on the calendar of April 28, 2011, motion sequence
No.1) by defendants David Rakhminov and Larisa Rakhminov for an
order dismissing the complaint on the grounds of documentary
evidence and failure to state a cause of action, pursuant to CPLR
3211(a)(1) and (7). Shirley J.W. Kotcher, individually and as a
Trustee, and Lawrence T. Choy, as Trustee of the Harry A.
Kotcher Testamentary Trust separately move for an order
dismissing the complaint on the grounds of failure to state a
cause of action, pursuant to CPLR 3211(a)(7). Defendant Samir
Kohan, sued herein as Sammy Cohen, cross moves for an order
dismissing the complaint on the grounds of failure to state a
cause of action, pursuant to CPLR 3211(a)(7).

	<u>Papers Numbered</u>
Notice of Motion-Affirmation-Exhibits (A-C)	1-4
Opposing Affirmation-Exhibits (1-4)	5-7
Memorandum of Law	
Reply Memorandum of Law	
Amended Notice of Motion-Affidavit- Affirmation-Exhibits (A-F)	8-11
Opposing Affidavit-Exhibits (1-2)	12-15
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Other Affirmation	19-20
Notice of Cross Motion-Affidavit- Affirmation-Exhibits (1-2)	21-25
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Supplemental Affidavit-Exhibits (5-6)	31-33
Reply Affirmation	34-35
Reply Affirmation	36-37

Upon the foregoing papers it is ordered that these motions and cross motion are consolidated for the purpose of a single decision and order and are determined as follows:

Background:

This action arises out of a failed business venture. Plaintiff Vassilia Rabos commenced the within action on February 15, 2011 and alleges that on June 1, 2010, she and a co-worker, defendant Larisa Rakhminov, orally agreed to start a bagel and bakery business, and they along with Larisa's husband, defendant David Rakhminov, searched for an appropriate site for their business. On August 1, 2010, they agreed to rent the premises located at 73-15 Main Street, Flushing, New York, and to operate the bagel and bakery business. Plaintiff alleges that David Rakhminov agreed to negotiate a corporate lease, and retained Sion Akilov of Briarwood Consulting Service to form a new corporation for the operation of the bagel and bakery business. Plaintiff alleges that in reliance upon David obtaining a corporate lease and forming a corporation, she contacted S & V Restaurant Equipment MFG Corp., d/b/a Custom Cool to purchase and install bakery equipment. Plaintiff alleges that she expended approximately \$51,000.00 to purchase bakery equipment; \$5,291.77 for baking supplies; \$33,000.00 for other supplies; paid a total of \$51,793.68 to the Rakhminovs for business expenses; and that she loaned the corporation R & R Bagels & Bakery Inc. \$5,000.00 to start a business account. Plaintiff alleges in her complaint that David leased the bakery premises in his name alone, rather than that of corporation.

On September 21, 2010, R & R Bagels & Bakery Inc. (R & R Bagels) was formed by filing a certificate of incorporation with the New York Secretary of State. On November 30, 2010, R & R Bagels opened for business in the premises located at 73-15 Main Street, Flushing, New York. Plaintiff alleges that after the lease was entered into, she made numerous requests to see the lease, and that David refused to provide a copy of the lease. She also alleges that David opened a corporate checking account, at "Chase Bank", with signature authority for herself and David.

Plaintiff alleges that within two weeks of its opening, David repeatedly requested that she make further financial contributions. Plaintiff alleges that as David and Larisa did not make any financial contributions, and as David had refused to let her see a copy of the lease, and had not received any records or accounting from the defendants, she refused to contribute any further funds. She alleges that as a result of further disputes with David and Larisa, she was locked out of the bakery's premises in January 2011, and that R & R Bagels closed the business on January 17, 2011.

Plaintiff alleges that R & R Bagels and the Rakhminovs failed to make the final payments to Custom Cool, and that Custom Cool has informed her that if payment was not made, it would remove personal property, fixtures and equipment from the premises. She also alleges that David Rakhminov has threatened to remove said personal property, fixtures and equipment from the premises.

Plaintiff alleges that defendants David and Larisa falsely represented that she would be a 50% owner of R & R Bagels; that David and Larisa falsely represented that they would contribute 50% to the corporation; that these representations were made so that plaintiff would rely upon them and for the "purpose of depriving plaintiff of her rights" and that upon discovery of these false representations, plaintiff made a demand for the money she had invested in the bagel and bakery business.

The complaint alleges a cause of action against R & R Bagels, David Rakhminov and Larisa Rakhminov for breach of contract; a cause of action against David Rakhminov and Larisa Rakhminov for fraud; a cause of action against R & R Bagels, David Rakhminov and Larisa Rakhminov for "loss of business"; a cause of action for negligence and practicing law without a license against Briarwood Consulting Service, Inc., Sion Akilov and Zalata Akilov; a cause of action against Shirley J.W. Kotcher, individually and as a Trustee and Lawrence T. Choy as Trustee under the Harry A.

Kotcher Testamentary Trust and "Sammy Cohen" for breach of contract; a cause of action for a preliminary injunction against defendants David Rakhminov, Larisa Rakhminov, and S & V Restaurant Equipment Mfg. Corp., d/b/a Custom Cool, and a cause of action for corporate dissolution.

Applicable Law:

On a motion to dismiss pursuant to CPLR 3211(a)(7), "the court must afford the pleadings a liberal construction, accept the allegations of the complaint as true and provide plaintiff the benefit of every possible favorable inference" (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005]). The court's "sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail" (*Polonetsky v Better Homes Depot, Inc.*, 97 NY2d 46, 54 [2001], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; see also *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; see also *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Rochdale Village, Inc. v Zimmerman*, 2 AD3d 827 [2003]; *Bovino v Village of Wappingers Falls*, 215 AD2d 619 [1995]). The facts pleaded are to be presumed to be true and are to be accorded every favorable inference, although bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration (see, *Morone v Morone*, 50 NY2d 481 [1980]; *Gertler v Goodgold*, 107 AD2d 481 [1985], *aff'd*, 66 NY2d 946 [1985]).

When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, *supra*). This entails an inquiry into whether or not a material fact claimed by the pleader is a fact at all and whether a significant dispute exists regarding it (see, *id.*; accord, Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:25, at 39)" (*Gershon v Goldberg*, 30 AD3d 372 [2006]; *Hispanic Aids Forum v Estate of Bruno*, 16 AD3d 294, 295 [2005]; *Sesti v N. Bellmore Union Free Sch. Dist.*, 304 AD2d 551, 551-552 [2003]; *Mohan v Hollander*, 303 AD2d 473, 474 [2003]; *Doria v Masucci*, 230 AD2d 764, 765 [1996], *lv. to appeal denied*, 89 NY2d 811 [1997]; *Rattenni v Cerreta*, 285 AD2d 636, 637 [2001]; *Kantrowitz & Goldhamer v Geller*, 265 AD2d 529 [1999]; *Mayer v Sanders*, 264 AD2d 827, 828 [1999]; *Sotomayor v Kaufman, Malchman, Kirby & Squire*, 252 AD2d 554 [1998]).

Where a defendant moves, pursuant to CPLR 3211(a)(1), to dismiss an action asserting the existence of a defense founded upon documentary evidence, the documentary evidence "must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Trade Source v Westchester Wood Works*, 290 AD2d 437 [2002]; see, 511 W. 232nd *Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Berger v Temple Beth-El of Great Neck*, 303 AD2d 346, 347 [2003]; *Allstate Ins. Co. v Raguzin*, 12 AD3d 468 [2004]; *Tougher Indus. v Northern Westchester Joint Water Works*, 304 AD2d 822 [2003]). Affidavits submitted by a defendant in support of the motion, however, do not constitute documentary evidence (*Berger v Temple Beth-El of Great Neck*, 303 AD2d 346, 347, *supra*; see, Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10, at 20)

Defendants David Rakhmirov and Larisa Rakhmirov's motion to dismiss the complaint on the grounds of documentary evidence and the failure to state a cause of action, pursuant to CPLR 3211(a)(1) and (7):

In support of their motion, these defendants have submitted the following documentary evidence:

A copy of the certificate of incorporation which recites that R & R Bagels and Bakery Inc. was incorporated on September 21, 2010 and that the incorporators are David Rakhminov and Vassilia Rabos.

A copy of the regular minutes of the meeting of the directors of R & R Bagels which recites, in pertinent part, that a special meeting was held on September 21, 2010, at 10:00 A.M., that "David Rakhminov has been elected president of the above named corporation [R & R Bagels & Bakery Inc.] with possession of 50% of shares and Vassilia Rabos has been elected as v/president with possession of 50% of shares. They both have right to open and manage bank account and run business in full volume". Said minutes were executed by David Rakhminov and Vassilia Rabos.

In opposition to said motion, plaintiff has submitted the following documents:

A copy of an unexecuted lease dated August 2010 which names Shirley J.W. Kotcher as owner and/or landlord, and David Rakhminov and Vassilia Rabos as tenants.

A copy of an executed lease, dated August 2010, named Shirley J.W. Kotcher as owner and/or landlord and David Rakhminov and

Larisa Rakhminov as tenants of the premises known as 73-15 Main Street, Flushing, New York. Said lease was for a term of four years, commencing September 1, 2010, and was executed by Shirley J. W. Kotcher individually and as Trustee of the Harry Kotcher Testamentary Trust, and by David Rakhminov and Larissa Rakhminov.

Ms. Rabos has submitted a copy of the September 21, 2010 certificate of incorporation, and an affidavit in opposition to the motion. A copy of the Certificate of Insurance dated September 2, 2010, which was obtained by the Rakhminovs, pursuant to the rider to the executed lease, has also been submitted.

The court notes that contrary to plaintiff's counsel's assertions, the moving defendants are not required to include an affidavit of merit on a motion to dismiss pursuant to CPLR 3211(a)(1) and (7). Furthermore, counsel's tortured interpretation of CPLR 3211(e) is rejected. This subdivision provides, in pertinent, part, that "[a]t any time before service of the responsive pleading is required, a party may move on one or more grounds set forth in subdivision (a), and no more than one such motion shall be permitted". Thus, where, as here there are multiple defendants, each defendant is entitled to make a timely motion pursuant to CPLR 3211(a). The statute does not restrict the number of parties who may so move for relief. It only restricts the number of such motions each party may make. Thus, counsel for the Rakhminov defendants were entitled to independently move for relief, and need not agree to await further motion practice by other parties to this action.

That branch of defendants David Rakhminov and Larisa Rakhminov's motion which seeks to dismiss the first cause of action for breach of contract, is granted. (*Furia v Furia*, 116 AD2d 694, [1986]). Generally, a party alleging a breach of contract must "demonstrate the existence of a . . . contract reflecting the terms and conditions of their . . . purported agreement" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011], quoting *American-European Art Assocs., Inc. v Trend Galleries, Inc.*, 227 AD2d 170, 171 [1996]). Here, the complaint only offers conclusory allegations without pleading the pertinent terms of the purported agreement. Moreover, the first cause of action merely alleges that R & R Bagels, David Rakhminov and Larisa Rakhminov breached their agreement with the plaintiff by not making her a 50% equal owner of R & R Bagels. This claim is completely defeated by the documentary evidence which establishes that Vasillia Rabos was acknowledged as a corporate officer and 50% shareholder of R & R Bagels, at the shareholder's meeting held on September 21, 2010. Ms. Rabos executed the minutes of said meeting and does not contest the accuracy of said minutes.

To the extent that plaintiff may have alleged a breach of contract based upon defendant David Rakhminov's becoming a 50% owner of R & R rather than his wife Larisa, any such oral agreement was waived and superceded by her agreement to incorporate R & R Bagels with David Rakhminov, elected him president and herself vice president, and assigned to each other equal ownership of the corporate shares.

To the extent that plaintiff alleges a breach of contract based upon David Rakhminov's failure to obtain a commercial lease in the name of the corporation, plaintiff neither alleges any basis for an award of damages for such a breach, nor has she plead facts from which damages attributable to defendants' conduct might be reasonably inferred. (see *Arcidiacono v Maizes & Maizes, LLP*, 8 AD3d 119, 120 [2004].)

Plaintiff has failed to adequately state a cause of action for fraud. To state a cause of action for fraud, plaintiff must show: (1) that defendants intentionally made a misrepresentation or material omission of fact; (2) that the misrepresentation or material omission of fact was false or known to be false to defendants; (3) plaintiff's reliance; and (4) that the misrepresentation resulted in some injury to plaintiff. (*Held v Kaufman*, 91 NY2d 425, [1998].) General allegations that defendants entered into a contract while lacking the intent to perform it are insufficient to support a cause of action sounding in fraud. (*Rocanova v Equitable Life Assur. Soc. of U.S.*, 83 NY2d 603 [1994]; *Heaven v McGowan*, 40 AD3d 583, 584-585 [2007].) Here, plaintiff alleges in her complaint that defendants R & R Bagels, David Rakhminov and Larisa Rakhminov "willfully, maliciously, unjustly and without provocation made misrepresentations of material facts with the intention to deceive and defraud the plaintiff and to deny the plaintiff her interest as a 50% equal owner in defendant R & R, and the plaintiff relied upon those misrepresentations to her detriment". She further alleges that the alleged acts of these defendants "have been fraudulent and have divested the plaintiff of control and access into defendant R & R". These conclusory allegations are insufficient to state a claim for fraud. Moreover, plaintiff's claim is completely defeated by the documentary evidence which establishes that plaintiff is a 50% owner shareholder of R & R Bagels. Therefore, that branch of defendants David Rakhminov and Larisa Rakhminov's motion which seeks to dismiss the second cause of action for fraud, is granted.

The third cause of action for "loss of business" against R &

R Bagels, David Rakhminov and Larisa Rakhminov alleges that as a result of these defendants wrongful actions and mishandling of corporate funds, R & R was closed for business on January 17, 2011, causing loss of business to plaintiff, in an undetermined sum, but not less than \$1,000,000.00. This claim is devoid of any factual allegations with respect to the alleged mishandling of corporate funds, and in essence is a claim for loss of future profits. A party may not recover damages for lost profits unless they were within the contemplation of the parties at the time the contract was entered into and are capable of measurement with reasonable certainty. (see generally, *Ashland Management v Janien*, 82 NY2d 395, 403 [1993]; *Cornell Holdings, LLC v. Woodland Cr. Assoc., LLC*, 64 AD3d 1020 [2009].) Plaintiff does not allege that at the time R & R Bagels was incorporated, or any time there after, the defendants agreed to be responsible for loss of future profits. Furthermore, as R & R Bagels was incorporated on September 21, 2010, and the bakery only was in operation from November 30, 2010 to January 17, 2011, plaintiff's claim for lost future profits is clearly speculative. Therefore, that branch of defendants' David Rakhminov and Larisa Rakhminov's motion which seeks to dismiss the third cause of action against them is granted.

The sixth cause of action against defendants R & R Bagels, David Rakhminov and Larisa Rakhminov seeks an injunction enjoining these defendants from removing personal property, fixtures and equipment from the premises during this litigation. A preliminary injunction may not be obtained where the irreparable loss claimed is economic (see *Quick v Quick*, 69 AD3d 827 [2010]; *Di Fabio v Omnipoint Communications, Inc.*, 66 AD3d 635, [2009]). Plaintiff in her complaint merely states, in conclusory fashion, that the threat of removal of unidentified personal property, fixtures and equipment from the subject premises, will cause her irreparable harm. However, the complaint also alleges that defendants R & R Bagels, Plaintiff's allegations thus are insufficient, as she has failed to identify with specificity the personal property, fixtures and equipment and does not allege that she will suffer a non-economic loss if these unidentified items are removed from the premises. Therefore, that branch of defendants' David Rakhminov and Larisa Rakhminov's motion which seeks to dismiss the sixth cause of action for injunctive relief, is granted.

To the extent that counsel for the Rakhminov defendants raises the defense of lack of personal jurisdiction in the memorandum of law, this defense is not properly before the court and will not be considered, as it was not raised in the notice of motion and motion, and the Rakhminovs have not submitted

affidavits contesting jurisdiction.

Shirley J.W. Kotcher, individually and as a Trustee, and Lawrence T. Choy, as Trustee of the Harry A. Kotcher Testamentary Trust's motion for an order dismissing the complaint on the grounds of failure to state a cause of action, pursuant to CPLR 3211(a)(7); and defendant Samir Kohan's cross motion for an order dismissing the complaint on the grounds of failure to state a cause of action, pursuant to CPLR 3211(a)(7):

At the outset, as multiple copies of the plaintiff's complaint have been submitted by the parties, defendant Samir Kohan's failure to attach a copy of the complaint to his cross motion does not render it defective. Plaintiff's objections to Mr. Kohan's cross motion based upon CPLR 3211(e) are rejected, for the reasons stated above. The affidavit submitted by Stanfield Sotto, in opposition to said cross motion will not be considered, as Mr. Sotto is not a party to this action, and said affidavit does not constitute documentary evidence.

The fifth cause of action against defendants Shirley J.W. Kotcher, individually and as a Trustee and Lawrence T. Choy as Trustee under the Harry A. Kotcher Testamentary Trust (Kotcher and Choy) and "Sammy Cohen" alleges that plaintiff entered into an agreement with David, Larisa, and "Sammy" as an agent and managing agent of the subject premises, and that she paid "Sammy" the sum of \$2,500.00 to obtain a lease for the subject premises; that "Sammy's conduct constituted an illegal acceptance of the \$2,500.00 with the landlord Kotcher and Choy's knowledge and consent; that Kotcher and Choy entered into a lease with David without providing a copy to the plaintiff, and without providing R & R Bagels as tenant; that "[o]n September 23, 2010, plaintiff cashed a check drawn on Sovereign Bank in the sum of \$5,000.00 of which the cancelled check indicates: 'Gave 2500 to Dave for Construction' 'Gave 2500 to Sammy under the table'; and that "[p]laintiff never received the lease for the subject premises, although requested from defendant Kotcher and defendant Sammy, who failed to recognize the plaintiff."

To establish a cause of action for breach of contract, a plaintiff must demonstrate: 1) the existence of a contract between the plaintiff and defendant, 2) consideration, 3) performance by the plaintiff, 4) breach by the defendant, and 5) damages resulting from the breach. (*Furia v Furia*, supra). Here, plaintiff alleges the breach of an illegal agreement to obtain a lease to the subject premises naming R & R Bagels as tenant, and the failure to provide her with a copy of said lease. These

allegations, even if true, do not state a claim for breach of contract. The complaint is devoid of factual allegations with respect to the claim of illegality. The object of the alleged payment, a commercial lease, was not illegal (see generally *Lardiere v. Choices Womens Med. Ctr., Inc.*, 7 AD3d 676 [2004]). Furthermore, the payment of a sum of money to obtain a commercial lease is not in itself, illegal. Although plaintiff alleges in conclusory fashion that Mr. Kohan was the agent of the landlord, the documentary evidence submitted by plaintiff is insufficient to establish the existence of an agreement to obtain a lease. The check submitted by plaintiff was drawn on her own bank account, was made payable to herself, and was negotiated by the plaintiff. Plaintiff's notations on the face of the check do not constitute evidence of payment to Mr. Kohan, nor do are they sufficient to establish a contract to obtain a lease naming the corporation as the tenant.

The unexecuted lease submitted by the plaintiff, which named her and David Rakhminov as the tenants, does not constitute evidence of an enforceable agreement. The documentary evidence establishes that the lease to the subject premises, naming the Rakhminovs as the tenants, was executed some 22 days prior to the corporate existence of R & R Bagels.

Finally, to the extent that plaintiff alleges a breach of contract based upon the execution of the lease with the Rakhminovs, rather than R & R Bagels, and the failure to provide plaintiff with a copy of said lease, she has failed to allege any basis for an award of damages for such a breach, nor has she plead facts from which damages attributable to defendants' conduct might be reasonably inferred. (see *Arcidiacono v Maizes & Maizes, LLP*, supra.) Accordingly, defendants Kotcher and Choy's motion and defendant Kohan's cross motion to dismiss the fifth cause of action against them granted.

Conclusion:

Defendants David and Laris Rakhminov's motion to dismiss the complaint is granted. The motion by defendants Shirley J.W. Kotcher, individually and as a Trustee and Lawrence T. Choy, as Trustee under the Harry A. Kotcher Testamentary Trust, to dismiss the complaint, is granted, and the cross motion by defendant Samir Kohan, sued herein as Sammy Cohen, to dismiss the complaint is granted.

Dated: Long Island City, N.Y.
July 13, 2011

ROBERT J. MCDONALD
J.S.C.