Scirica v Colantonio
2011 NY Slip Op 33700(U)
November 28, 2011
Supreme Court, New York County
Docket Number: 651699/11
Judge: Melvin Schweitzer
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER PART 45
Justice

D. Scirica, et. al.

INDEX NO. 651699/11

MOTION DATE

- v -

MOTION SEQ. NO. 002

Ciro Colantonio

MOTION CAL. NO.

The following papers, numbered 1 to ______ were read on this motion to/for ______

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion by defendants to dismiss the complaint is GRANTED in part and denied in part per the attached Decision and Order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: November 28, 2011

[signature]
J.S.C.
MELVIN L. SCHWEITZER
J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 45

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DAVID SCIRICA, JENNIFER METALLO, and FLAVOR LOUNGE LLC,

Plaintiffs,

-against-

CIRO COLANTONIO, PATRICK LIMA, 772 NINTH RESTAURANT CORP., CAP RESTAURANT CORP., DPNC RESTAURANT CORP., 166 EAST 82ND BISTRO INC., CORNER 47TH RESTAURANT CORP. and RACHEL ON NINTH CORP.,

Defendants.

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Index No. 651699/11

DECISION AND ORDER

Motion Sequence No. 002

MELVIN L. SCHWEITZER, J.:

In this action for fraud, unjust enrichment, and loss of a business opportunity, defendants Cap Restaurant Corp., DPNC Restaurant Corp., 166 East 82nd Street Bistro Inc., Corner 47th Restaurant Corp. and Rachel on Ninth Corp. (collectively, Restaurants) move, pursuant to CPLR 3211 (a) (1), (3) and (10), to dismiss the complaint on the grounds that there is a defense founded upon documentary evidence, that the party asserting the cause of action does not have legal capacity to sue, and that the court should not proceed in the absence of a person who should be a party.

Background

The following allegations are taken from the complaint. In late September of 2010, plaintiff David Scirica learned of a business opportunity to purchase stock and part ownership in a corporate entity by the name of 772 Ninth Restaurant Corp. (772 Ninth), located at 772 Ninth

Avenue in New York City. 772 Ninth operates a restaurant/lounge at the above stated address. Scirica, along with two of his brothers, met with defendants Ciro Colantonio and Patrick Lima, the two owners of 772 Ninth, to discuss purchasing a 50% interest in the restaurant. Following that meeting, it was agreed that Scirica and Jennifer Metallo, his sister, would become shareholders in the company and respectively hold a position as an officer or director. It was also agreed to add the names of Scirica and Metallo to the restaurant's liquor license. Scirica and Metallo subsequently formed Flavor Lounge LLC (Flavor Lounge) to manage 772 Ninth until the formal terms of the agreement were finalized. These plaintiffs assumed the day-to-day operations of the restaurant. All profits and expenses were to be shared equally between the plaintiffs and defendants Colantonio and Lima. The parties attended a meeting at the end of November of 2010 to review 772 Ninth's expenses, the cost of the operation, and the estimated cost of much needed renovations to the property. After reviewing the spreadsheet that plaintiffs prepared in anticipation of the meeting, defendants declined to provide any further investment in 772 Ninth. They said that the restaurant had not made enough money and thus they refused to fund it as they had promised. Colantonio and Lima demanded that plaintiffs either "buy them out" or "sell the place." The talks were tabled on that date and the parties agreed to reconvene negotiations on December 1, 2010.

Prior to that December meeting, plaintiffs learned that one Carlos Ribiero invested $50,000 in 772 Ninth in exchange for a 10% ownership interest in the restaurant. Ribiero told plaintiffs that Colantonio and Lima frequently accepted money from third-parties in exchange for part ownership in 772 Ninth. Ribiero discovered that a Rogelio Rojas also paid money to Colantonio and Lima in exchange for an ownership interest in the restaurant. On December 1,

2010, plaintiffs confronted Colantonio and Lima with Ribiero's allegations that they had sold stock in the restaurant to other investors without plaintiffs' knowledge. Colantonio and Lima denied the allegations and asked their counsel to present plaintiffs with a draft of their agreement. Plaintiffs declined to sign the document until they had an opportunity to review the terms with their own counsel. In the interim, plaintiffs continued working at the restaurant and making expenditures toward 772 Ninth's day-to-day operations. Plaintiffs made payments for the rent, the renewal of 772 Ninth's liquor license, and renovations of the restaurant's sidewalk café. Plaintiffs also invested an additional $25,000 above the aforementioned amounts. On March 3, 2011, Colantonio and Lima presented plaintiffs with a new version of the agreement which included terms that had not been previously negotiated between the parties. The plaintiffs declined to sign the document without their counsel present. After meeting with their attorney, plaintiffs' counsel encouraged them to cease any further financial investment in the venture. He believed that Colantonio and Lima were defrauding plaintiffs out of monies with promises of ownership interests without taking the necessary legal steps to legitimize the parties' intentions. He cautioned plaintiffs to halt any further transactions until there was a formal written agreement in place. Plaintiffs ceased making rent payments, investments, or repairs at 772 Ninth. At the end of March 2011, the restaurant was closed. By the end of May 2011, Colantonio and Lima changed the locks without notice and demanded that plaintiffs refrain from entering the property.

Plaintiffs contend that Colantonio and Lima fraudulently induced them to expend hundreds of thousands of dollars but failed to give plaintiffs an ownership interest in 772 Ninth. Plaintiffs also contend that Colantonio and Lima used plaintiffs to unilaterally finance and repair 772 Ninth without Colantonio and Lima making comparable contributions. Plaintiffs further

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contend that Colantonio and Lima failed to financially contribute to the cost of 772 Ninth's operations during the time that plaintiffs took over the day-to-day operations of the business and, as a result, are liable to plaintiffs for damages that they incurred in consideration of false promises of a 50% ownership interest in 772 Ninth. Plaintiffs assert that the scheme allowed Colantonio and Lima to fraudulently funnel necessary funds to their other business ventures, the Restaurants, without their knowledge.

Plaintiffs allege that they reasonably relied to their detriment upon the material false representations made by defendants that they would acquire a 50% ownership interest in 772 Ninth, a role as a corporate officer, and that their names would be added to the restaurant's liquor license. As a result, plaintiffs commenced this action asserting claims for: (1) fraud, (2) unjust enrichment, (3) lost business opportunity, and (4) a violation of General Business Law § 349 for defendants' deceptive, misleading, and fraudulent practices. Plaintiffs are seeking damages in the amount of $800,000, plus interest, punitive damages and attorney's fees.

The Restaurants argue that they are entitled to dismissal because: (1) documentary evidence demonstrates that the agreement was not signed, and thus, they cannot be liable for any of plaintiffs' claims, (2) Flavor Lounge lacks the capacity to sue in this matter because it failed to publish its corporate status as required under Limited Liability Law § 206, and (3) plaintiffs failed to join Giralamo Scirica as a necessary party to this action.

Plaintiffs argue that Restaurants are not entitled to dismissal because: (1) the documentary evidence submitted is not dispositive of the entire matter, (2) Flavor Lounge is in good standing with the Department of State and thus, it has legal capacity to sue in this action,

and (3) Giralamo Scirica is not an indispensable party to this action because he suffered no significant monetary harm.

Discussion

A limited liability company is "an unincorporated organization of one or more persons having limited liability for the contractual obligations and other liabilities of the business" (Limited Liability Company Law § 102 [m]). Section 202 of the Limited Liability Company Law confers powers to all limited liability companies, which includes the right to be sued, participate in or defend any action or proceeding, lease real property, make contracts, lend money for any lawful purpose, invest its funds and carry out its operations (Limited Liability Company Law § 202 [a], [b], [c], [d], [e], [f]).

The first issue is whether Flavor Lounge lacks the capacity to sue in this action. Under Limited Liability Company Law § 206 [a], publication for six successive weeks within 120 days after the effectiveness of an LLC's articles of organization is a condition to an LLC's ability to maintain a lawsuit in New York (*see Yassky v Meltzer, Lippe, Goldstein & Schlissel, P.C.*, 36 AD3d 420, 421 [1st Dept 2007]). The publication must be made in two local newspapers designated by the clerk of the county where the LLC has its principal office, followed by filing an affidavit with the Department of State, stating that such publication has been made (*Barklee Realty Co. v Pataki*, 309 AD2d 310, 311 [1st Dept 2003], *lv denied* 2 NY3d 707 [2004]). The statute further provides that the company's failure to file the required proof of publication shall not impair the validity of any of its contracts or impair the right of any other party to maintain any action or proceeding against the company or prevent the company from defending any such action or proceeding (Limited Liability Company Law § 206 [a]).

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Flavor Lounge lacks the capacity to sue because it failed to meet the necessary publication requirement pursuant to Limited Liability Law § 206 (a). The record demonstrates that Flavor Lounge effectuated its articles of organization on October 14, 2010, and is currently a corporation in good standing with the State of New York Department of State (Exhibit C to Affirmation of Edward Weissman, dated August 19, 2011) (Weissman Aff). However, Flavor Lounge failed to meet the necessary "affidavit of publication" as provided under Limited Liability Company Law § 102 (a-1). The statute provides in part:

> "'Affidavit of publication'" means the affidavit of the printer or publisher of a newspaper in which a publication pursuant to sections two hundred six, eight hundred two, one thousand two hundred three, and one thousand three hundred six of this chapter has been made"

(Limited Liability Company Law § 102 [a-1]). Accordingly, the absence of an affidavit of publication deprives Flavor Lounge of its right to sue.

Concerning Restaurants' assertion that it is entitled to dismissal for plaintiffs' failure to name a necessary party to the action, it has not established its entitlement thereto.

CPLR 3211 (a) (10) provides that a "party may move for judgment dismissing one or more causes of action asserted against him on the ground that the court should not proceed in the absence of a person who should be a party." At issue here is whether the litigation cannot fairly proceed in the absence of plaintiffs' brother Giralamo Scirica, who was temporarily involved in the day-to-day operations of Flavor Lounge. Under CPLR 1001, "[p]ersons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or

defendants." Under CPLR 1003, "[n]onjoinder of a party who should be joined under section 1001 is a ground for dismissal of an action without prejudice unless the court allows the action to proceed without that party under the provisions of that section." In determining whether Giralamo Scirica is an indispensable party, the court may consider whether (1) the plaintiff has another effective remedy if the action is dismissed for nonjoinder, (2) the prejudice to the defendant or the person not joined, (3) whether and by whom prejudice might have been avoided, (4) the feasibility of protective orders, and (5) whether an effective judgment may be rendered in the absence of the person not joined (CPLR § 1001 [b]). Restaurants failed to demonstrate that Giralamo Scirica is a necessary party or that Scirica would be inequitably affected by judgment in this action if he were not joined (*Halliwell v Gordon*, 61 AD3d 932, 935 [2d Dept 2009]).

Concerning the Restaurants' contention that its documentary evidence demonstrates that they are not signatories to the agreement, and thus, they are not liable for any of plaintiffs' claims, under CPLR 3211 (a) (1), dismissal of a complaint is warranted where "the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*150 Broadway N.Y. Assoc., L.P. v Bodner*, 14 AD3d 1, 7 [1st Dept 2004]). Contrary to Restaurants' contention, the agreement in this action does not clearly dispose of plaintiffs' claims.

The causes of action against defendants are based upon the alleged fraud and fraudulent misrepresentations made during subsequent oral agreements and negotiations. Plaintiffs seek damages resulting from the alleged fraudulent misrepresentations of defendants and the alleged fraudulent transfer committed by defendants. They are not seeking damages based upon a theory of breach of contract. Thus, the damages herein do not flow from any breach of the agreement,

and therefore the documentary evidence does not utterly refute plaintiffs factual allegations, nor does it conclusively establish a defense as a matter of law (*Board of Mgrs. of Marke Gardens Condominium v 240/242 Franklin Ave., LLC*, 71 AD3d 935, 936 [2d Dept 2010]).

Accordingly, it is

ORDERED that the motion of defendants CAP Restaurant Corp., DPNC Restaurant, Corp., 166 East 82nd Street Bistro Inc., Corner 47th Restaurant Corp., and Rachel on Ninth Corp. to dismiss the complaint herein is granted to the extent of dismissing Flavor Lounge LLC as a party plaintiff, and the Clerk shall enter judgment dismissing Flavor Lounge LLC as a party plaintiff and amending the caption of this action to reflect this, and defendants' motion is otherwise denied and the remainder of this action shall continue; and it is further

ORDERED that, within 30 days of entry, defendants shall serve a copy of this decision and order, together with notice of entry, upon all parties to this action, the New York County Clerk's Office and the Clerk of the Trial Support Office, both of whom are located in 60 Centre Street, New York, New York, and who are directed to amend their records to reflect the above; and it is further

ORDERED that counsel are directed to appear for a Preliminary Conference in Rm. 218, 60 Centre Street, on January 19, 2012, at 11:30 a.m.

Dated: November 28 , 2011

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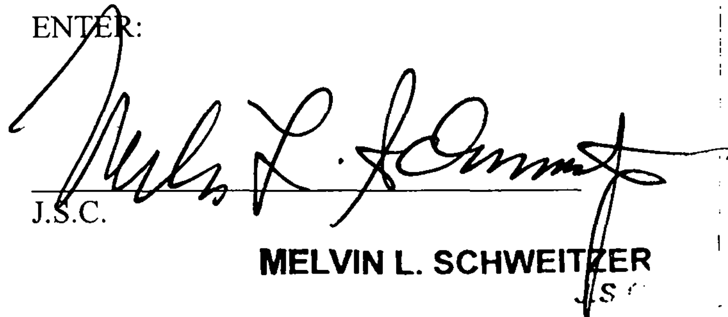

J.S.C.

MELVIN L. SCHWEITZER

J.S.C.