

Priya Hospitality LLC v Patel
2011 NY Slip Op 33776(U)
May 24, 2011
Supreme Court, Queens County
Docket Number: 23475/10
Judge: Orin R. Kitzes
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. ORIN R. KITZES

PART 17

Justice

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PRIYA HOSPITALITY LLC, By and Through its Members, TIC CAPITAL II, LLC, JASMIN PATEL, MUKESH PATEL, NILESH PATEL, and TIC CAPITAL II, LLC, JASMIN PATEL, MUKESH PATEL, and NILESH PATEL, Individually,

Plaintiffs,

-against-

**Index No.: 23475/10
Motion Date: 5/18/11
Motion Cal. No.: 37**

VIPUL PATEL,

Defendants.

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The following papers numbered 1 to 20 read on this motion by defendant **VIPUL PATEL** for an order pursuant to CPLR 3211(7)(a), 3013 and 3026 for an order dismissing all or a portion of the first, third, fourth and seventh causes of action of the complaint and cross-motion by plaintiffs for an order pursuant to CPLR 3214 vacating the automatic stay of discovery, compelling defendant to provide a full and detailed accounting of all of defendant’s actions as sole managing member of Priya Hospitality LLC from February 2007, through June 6, 2010, including immediate access to all of defendant’s paper and electronic records, as well as the dates and circumstances of his destruction of any paper and electronic records.

	<u>PAPERS NUMBERED</u>
Notice of Motion-Affirmation-Exhibits.....	1- 4
Defendant’s Memorandum of Law in Support of Motion To Dismiss Certain Causes of Action	5
Notice of Cross-Motion-Affirmation of Leonard F. Lesser In Opposition To Defendant’ Motion To Dismiss and In Support of Plaintiffs’ Cross Motion-Exhibits.....	6 - 9
Affidavit of Jasmin Patel in Opposition to Defendant’s Motion-Exhibits.....	10 -12
Reply In Support of Defendant’s Motion To Dismiss and In Opposition to Plaintiffs’ Cross- Motion.....	13-14
Reply Affidavit in Further Support of Plaintiff’s Cross-Motion-Exhibits.....	15 -17
Plaintiffs’ Reply Memorandum of Law in Further Support of Their Cross-Motion-Exhibits.....	18 -20

Upon the foregoing papers it is ordered that this motion by defendant **VIPUL PATEL** for an order pursuant to CPLR 3211(7)(a), 3013 and 3026 for an order dismissing all or a portion of the first, third, fourth and seventh causes of action of the complaint and cross-motion by plaintiffs for an order pursuant to CPLR 3214 vacating the automatic stay of discovery, compelling defendant to provide a full and detailed accounting of all of defendant’s actions as sole managing member of Priya Hospitality LLC (“Priya”) from February 2007, through June 6, 2010, including immediate access to all of defendant’s paper and electronic records, as well as

the dates and circumstances of his destruction of any paper and electronic records is decided as follows:

According to the complaint, Plaintiffs collectively own 64.4% of the membership interest in Priya, a New York limited liability company, formed to acquire, develop, manage, finance, lease and otherwise operate hotel property located at 39-34 21st Street and 38-71 13th Street Long Island City, New York 11101 (the "Property"). Priya was formed, and operates pursuant to, an Operating Agreement, dated February 21, 2007 (the "Operating Agreement"), as amended by a First Amendment, dated June 4, 2010, and Second Amendment, dated September 14, 2010. The Operating Agreement appointed defendant to serve as the Managing Member of Priya, and defendant was provided the power and authority to do all things necessary to carry out the business and affairs of the Company in that capacity. In consideration of this appointment, and pursuant to § 7.6 of the Operating Agreement, defendant expressly promised and committed to "refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, fraud, or a knowing violation of the law." The Operating Agreement also obligated defendant, as Managing Member, to provide true and accurate accounting and financial reports, including balance sheets, profit and loss statements, and cash flow statement to the members of Priya. The Operating Agreement further obligated Defendant, as Managing Member, to maintain complete and accurate books and records of Priya, including all operating and transactional records of the company.

In or about May, 2010, after the Best Western Plaza Hotel and Howard Johnson Inn on the Property began operations, and Priya began generating income, plaintiffs became suspicious of several of Defendant's activities and began reviewing the books and records of the company from the pre-construction, construction, and operations phases of the property. Defendant otherwise committed to cooperating with plaintiffs' investigation, and on June 4, 2010, the members of Priya agreed to the First Addendum to the Operating Agreement which amended the Operating Agreement to require at least two Managing Members of the company. The parties further agreed to install three (3) additional Managing Members of Priya in addition to Defendant, including Chandrakant B. Patel (on behalf of Priya's largest member TIC Capital II LLC), Jasmin Patel, and Mukesh Patel.

Thereafter, plaintiffs became even more suspicious when they discovered a document prepared by defendant which reflected misrepresentations to both Priya and The State Bank of Texas ("SBT"), which provided Priya with its construction loan, regarding the actual construction costs of the Properties. This document reflects that Priya's construction contracts with the general contractor, Metal Stone Construction, Inc. ("Metal Stone"), were for \$12,500,000.00, and not the \$14,375,000.00 that Defendant had represented to the members of Priya and to SBT. Based on this misrepresentation, Priya had taken out a larger loan than necessary from the bank to cover the construction costs of both hotels. In this document, which is essentially a ledger kept by defendant, he kept detailed notes on the construction costs he was representing to SBT and Priya, as compared to the actual construction costs. This document tracks Metal Stone's 16th payment application to Priya, and Defendant's corresponding 16th "draw" from Priya's loan with SBT. Based upon this information, the members of Priya believed

that Defendant had engaged in several ongoing schemes during each application for loan funds from SBT in order to fraudulently embezzle and convert no less than \$1,875,000.00, the difference between the actual construction costs and the inflated construction costs reflected in Defendant's "ledger."

On July 20, 2010, the members of Priya confronted defendant with their suspicions. During this meeting, defendant initially admitted to writing fifteen (15) fraudulent checks and taking three (3) fraudulent bank withdrawals, which amounted to a total of \$1,292,246.00. The list of the fraudulent checks and withdrawals Defendant admitted to at the July 20, 2010 meeting was recorded in the meeting minutes. On July 28, 2010, plaintiffs again confronted defendant with his admission, reflected in his "ledger" that the actual construction costs for the Priya Properties were for \$12,500,000.00, and not the \$14,375,000.00 which he had represented to Priya (a difference of \$1,875,000.00), and therefore, the \$1,292,246.00 which he initially admitted as fraudulent at the July 20, 2010 meeting could not possibly be the total amount of money that he embezzled from the company. At this meeting, defendant admitted to twelve (12) more fraudulent checks which totaled \$603,137.90. This brought the total amount of money defendant admitted to embezzling from Priya to \$1,945,385.64. Defendant further admitted that in breach of his obligations as Managing Member of Priya, he did not keep and maintain full operational, transactional, and financial books and records of the company, thereby impeding plaintiffs' efforts to discover the full nature and extent of defendant's misconduct and the amount of monetary damages suffered by plaintiffs.

Since June 4, 2010, plaintiffs have continued their investigation into defendant's misconduct. Plaintiffs' investigation is ongoing as much of Defendant's wrongful conduct is particularly within his own knowledge. This ongoing investigation has uncovered specific and egregious examples of fraud, conversion, and embezzlement on the part of Defendant. Defendant has admitted to six (6) fraudulent checks he wrote to George Hsu ("Hsu"), the owner of Metal Stone, individually. Hsu endorsed these checks and Defendant then deposited the entire amount of each check into a bank account bearing account number 7116003455 in the name of Mukesh Amin, or his daughter Trusha Amin, or his son Ankur Amin. The Amin family lives in London, England and Defendant was given power of attorney over Amin family bank accounts in the United States during this time. The Amins had no idea that Defendant was using their U.S. bank accounts to deposit funds from checks Defendant issued to Priya's general contractor Metal Stone and its owner Hsu. These six (6) checks include: Check No. 1025 dated January 23, 2008 in the amount of \$140,000, Check No. 1154 dated August 8, 2008 in the amount of \$65,049.50, Check No. 1172 dated September 9, 2008 in the amount in \$110,000, Check No. 1194 dated October 7, 2008 in the amount of \$204,795, Check No. 1173 dated March 26, 2010 in the amount of \$118,185.25, Check No. 1174 dated April 16, 2010 in the amount of \$54,279.41. With respect to check numbers 1025, 1154, 1172, and 1194 Defendant falsely reported these four (4) checks to Priya's accountant for preparation of federal and state tax returns as having been written to Metal Stone as opposed to Hsu individually. Defendant has admitted to two (2) fraudulent checks written to Metal Stone whereby Hsu endorsed these checks and Defendant then deposited the entire amount of each check into the Amin family bank account bearing account

number 7116003455 which he controlled. These two (2) checks include Check No. 1034 dated April 9, 2008 in the amount of \$43,105, and Check No. 1040 dated April 22, 2008 in the amount of \$110,000.

According to the amended complaint (“complaint”), defendant has also admitted to three (3) fraudulent bank withdrawals. These three (3) bank withdrawals include: On September 17, 2008 Defendant made two (2) fraudulent bank withdrawals for \$50,000 and \$163,957.50. Defendant represented to the bank on the two withdrawal slips that the funds were being used to pay “King Development Construction Inc.” However, upon investigation into Priya’s books and records maintained by Defendant during this period of time, Priya has found nothing to indicate that Kings Development Construction Inc. performed any work for Priya. On November 7, 2008 Defendant made a fraudulent bank withdrawal for \$223,604.10. Defendant represented to the bank on the withdrawal slip that the funds were being used to pay “Kanav Hospitality.” However, upon investigation into Priya’s books and records maintained by Defendant during this period of time, Priya has found nothing to indicate that Kanav Hospitality performed any work for Priya.

The complaint also claims that defendant has admitted to five (5) fraudulent checks made out to Jing Yin Construction, all of which were below the \$10,000 reporting threshold. Each of these five (5) checks was cashed at a Republic Capital check cashing office in New York City. Plaintiffs have also identified these checks by number, date, and amount. Plaintiffs also make similar allegations regarding fraudulent checks written to Matrix Technologies, and entities for which Priya has no invoices or records and for which Priya did not receive any work. Plaintiff also claims that between September 29, 2009 and October 11, 2009, defendant sold hotel rooms without any recording reflecting such and kept for himself \$20,592.00. This is represented in his cash ledger. This cash ledger was discovered by plaintiffs during their investigation. Plaintiffs have also discovered emails whereby defendant demanded hotel guests to make checks out payable to him personally.

Based upon the above, Plaintiffs commenced the instant action derivatively of Priya to recover monetary damages incurred as a result of defendant’s alleged unlawful and deceptive acts of breach of fiduciary duty, fraud, theft, conversion and embezzlement while serving as Priya’s sole managing member. According to plaintiffs, defendant has admitted to theft and embezzlement of not less than \$2.2 million from Priya which he accomplished through creating false invoices, forging checks, siphoning funds, manipulating Priya’s books and records, and through other deceptive means that have yet to be fully disclosed. Plaintiffs believe that defendant’s misconduct covers not less than 5 million misappropriated from Priya. Plaintiffs therefore also seek equitable relief against defendant for a full accounting of defendant’s wrongful conduct and the imposition of a constructive trust for all funds improperly taken by defendant from Priya.

Defendant now seeks the following: To dismiss the first cause of action for breach of fiduciary duty to the extent it seeks punitive damages, pursuant to CPLR 3211 (a) (7) for failing to state a cause of action; To dismiss the third cause of action for conversion to the extent it is asserted by the Member plaintiffs pursuant to CPLR 3211 (a) (7) for failing to state a cause of action; to dismiss the third cause of action for conversion pursuant to CPLR 3013 for failing to

specifically identify the funds or assets that Plaintiffs assert were converted by Defendant; to dismiss the fourth cause of action for fraud, pursuant to CLR 3016 for failure to plead with requisite particularity; to dismiss the fourth cause of action for fraud to the extent it seeks punitive damages pursuant to CPLR 3211 (a) (7) for failing to state a cause of action; and to dismiss the seventh cause of action for return of a portion of the defendant's capital contribution, pursuant to CPLR 3211 (a) (7) for failing to state a cause of action. Plaintiff opposes this motion.

"It is well-settled that on a motion to dismiss a complaint 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 in the complaint to be true and according the plaintiff the benefit of every possible favorable inference. (Jacobs v Macy's East, Inc., 262 AD2d 607, 608; Leon v Martinez, 84 NY2d 83.) The court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion (see, Stukuls v State of New York, 42 NY2d 272; Jacobs v Macy's East Inc., *supra*), and the court will not examine affidavits submitted on a CPLR 3211(a)(7) motion for the purpose of determining whether there is evidentiary support for the pleading. (See, Rovello v Orofino Realty Co., Inc., 40 NY2d 633.) The plaintiff may submit affidavits and evidentiary material on a CPLR 3211(a)(7) motion for the limited purpose of correcting defects in the complaint. (See, Rovello v Orofino Realty Co., Inc., *supra*; Kenneth R. v Roman Catholic Diocese of Brooklyn, 229 AD2d 159.) In determining a motion brought pursuant to CPLR 3211(a)(7), the court "must afford the complaint a liberal construction, accept as true the allegations contained therein, accord the plaintiff the benefit of every favorable inference and determine only whether the facts alleged fit within any cognizable legal theory ." (1455 Washington Ave. Assocs. v Rose & Kiernan, *supra*, 770-771; Esposito-Hilder v SFX Broadcasting Inc., 236 AD2d 186.)

In pertinent part, the First Cause of Action is for Breach of Fiduciary Duty and is based on the above claims by plaintiffs. Plaintiff also claims that at all times relevant to this Complaint, defendant was, by virtue of his status and conduct as Managing Member of Priya, a fiduciary of Priya and its members and owed Priya and plaintiffs a duty of utmost good faith and undivided loyalty. Defendant breached his fiduciary duties to Priya and plaintiffs by, *inter alia*, falsifying and misrepresenting the actual amount of Priya's construction costs by \$1,875,000.00, falsifying information provided to Priya's accountant for preparation of federal and state tax returns, embezzling more than \$2 million from Priya by admittedly issuing fraudulent checks, issuing numerous other checks at or below the \$10,000 reporting threshold which were then cashed, on Defendant's behalf, at check cashing stores in New York City, making several bank withdrawals from the Priya account and falsifying the nature and purpose of such withdrawals, issuing checks for hundreds of thousands of dollars to entities that defendant claimed performed services for Priya, but where no documents exist in the books and records required to be maintained by Defendant supporting such payments, running a scheme during the hotel operations whereby defendant induced customers to pay cash for their hotel rooms which he pocketed and did not report to Priya, or the hotels' franchisors, and falsified records in an attempt to hide such misconduct, instructing hotel customers to write checks payable to Defendant personally in order to reserve blocks of rooms. Plaintiffs seek compensatory damages for these breaches in an

amount not less than \$5,000,000.

Plaintiffs also claim the actions and conduct of defendant were purposeful and willful, and plaintiffs seek to recover an appropriate punitive damages award against defendant on behalf of Priya in an amount to be determined at trial. It is the punitive damages that defendant seeks to dismiss for failing to state a claim. Plaintiffs' demand for punitive damages has been made as an element of the single total claim for damages under the first cause of action. Fiesel v Nanuet Properties Corp., 125 AD2d 292 (2d Dept 1986.) *See also*, Bader's Residence for Adults v. Telecom Equipment Corp., 90 A.D.2d 764 (2d Dept 1982.) Moreover, punitive damages are recoverable in fraud and deceit cases when (a) the fraud is gross, involves high moral culpability and is aimed at the public generally, or (b) the defendant's conduct evinces a high degree of moral turpitude and demonstrates such wanton dishonesty as to imply criminal indifference to civil obligations. This lawsuit arises from a private transaction and does not involve any allegations that defendants' alleged fraudulent and deceitful behavior was directed toward the public generally. Therefore, plaintiffs' claims for punitive damages are not justified on the basis that a public fraud is involved. However, this lawsuit involve allegations of such a high degree of moral turpitude on the part of defendant as to imply criminal indifference to civil obligations. Accordingly, the allegations of breach of fiduciary duty establish such willful fraud or other morally culpable behavior to a degree sufficient to justify recovery of punitive damages. *See*, Ross v. Louise Wise Servs., Inc., 8 N.Y.3d 478 (2007.) Accordingly, the branch of the motion seeking to dismiss the punitive damages claim in the first cause of action is denied.

The third cause of action is for conversion, and it reads, in pertinent part, that defendant converted and embezzled funds and assets from Priya through the creation of false invoices, forging checks, siphoning funds, manipulating Priya books and records, and through other deceptive means that have yet to be fully disclosed. The specific acts of conversion known at this time are set forth in paragraphs 27 through 35 herein. (These paragraphs were incorporated in this Court's recitation of the complaint's allegations set forth above.) Defendant has admitted to misappropriating and converting at least \$2,200,000 of Priya's funds and assets. These funds belonged to Priya, and despite Priya's demands, Defendant has failed to fully account for all of the funds and assets he misappropriated and converted, and has failed to fully repay these funds to Priya. As a result of Defendant's misconduct, plaintiffs seek to recover compensatory damages on behalf of Priya in an amount to be determined at the trial of this matter, which upon information and belief amounts to not less than \$5,000,000.

Defendant claims that this cause of action should be dismissed with respect to the member plaintiffs since they have failed to allege that any of their respective assets or funds have been converted by defendant. It is clear that this action is a derivative action, brought by Priya by and through the member plaintiffs. As such, defendant's claim on this ground is without merit. Defendant also claims the conversion claim should be dismissed for failure to identify the particular funds or assets alleged to have been converted. As set forth above, the complaint is very specific as to such funds or assets. As such, this claim is without merit as well. Accordingly, the branches of the motion seeking dismissal of the conversion cause of action is denied.

The fourth cause of action is for fraud, and it reads, in pertinent part, that in consideration

of his appointment as Managing Member of Priya, defendant expressly promised and committed to “refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, fraud, or a knowing violation of the law.” He also promised and represented to plaintiffs that he would provide true and accurate accounting and financial reports to plaintiffs, including balance sheets, profit and loss statements, and cash flow statement to the members of Priya., and that he would maintain complete and accurate books and records of Priya, including all operating and transactional records of the company. During and through the acquisition and construction phase of the Property, defendant repeatedly represented to plaintiffs that all expenditures made by defendant on behalf of Priya were proper and legitimate expenditures supported by true and accurate transactional records. However, defendant knew that the statements he made to plaintiffs were materially false and misleading in that Defendant knowingly and intentionally, inter alia, falsified and misrepresented the actual amount of Priya’s construction costs by \$1,875,000.00. Falsified information provided to Priya’s accountant for preparation of federal and state tax returns, embezzled more than \$2 million from Priya by admittedly issuing fraudulent checks, including numerous checks Defendant issued to George Hsu, the owner of Metal Stone, which were then endorsed by Hsu, and the funds deposited into bank accounts controlled by Defendant, issued numerous other checks at or below the \$10,000 reporting threshold which were then cashed, on Defendant’s behalf, at check cashing stores in New York City, made several bank withdrawals from the Priya account and falsified the nature and purpose of such withdrawals, and issued checks for hundreds of thousands of dollars to entities that defendant claimed performed services for Priya, but where no documents exist in the books and records required to be maintained by defendant supporting such payments, and did the other acts as set forth above by the Court. As a result of Defendant’s misconduct, plaintiffs seek to recover compensatory damages on behalf of Priya in an amount to be determined at the trial of this matter, which upon information and belief amounts to not less than \$5,000,000. Plaintiff also seeks to recover an appropriate punitive damages award against Defendant on behalf of Priya in an amount to be determined at trial.

Defendant claims this fourth cause of action should be dismissed for failing to be plead with sufficient particularity, pursuant to CPLR 3016 (b). CPLR 3016(b), provides that the circumstances constituting fraud "shall be stated in detail," which "requires only that the misconduct complained of be set forth in sufficient detail to clearly inform a defendant with respect to the incidents complained of" Lanzi v Brooks, 43 NY2d 778, 780 (1977.) RBE N. Funding, Inc. v Stone Mtn. Holdings, LLC, (2d Dep’t 2010) In the amended complaint here, the plaintiffs alleged the essential elements of a fraud claim and described defendants’ alleged misrepresentations and omissions with sufficient particularity to clearly inform the defendant of the incidents complained of. Id. Accordingly, the plaintiff's assertions were sufficient to support the fourth cause of action alleging fraud and the branch of the motion seeking dismissal of the fraud claim pursuant to CPLR 3016 (b) is denied. The branch of the motion seeking to dismiss the punitive damages sought in the fourth cause of action is denied for the reasons set forth above in this Court’s denial of the branch of the motion seeking dismissal of the punitive damages sought in the first cause of action.

The seventh cause of action is to return a portion of capital contribution, and it states in pertinent part that the Operating Agreement required defendant to purchase his 26.5% ownership interest in Priya for \$1,792,000. Defendant requested, however, that the remaining members of Priya pay for on his behalf, as a “commission,” a portion of his ownership interest. Based upon defendant’s representations and warranties that he would faithfully execute the office of Managing Member, TIC Capital II LLC, Jasmin Patel, Mukesh Patel and Nilesh Patel provided defendant his requested “commissions” amounting to 3.72% of his membership interest in Priya, as follows: (a) TIC Capital II LLC provided Defendant \$155,400; (b) Jasmin Patel provided Defendant \$35,000; (c) Mukesh Patel provided Defendant \$26,250; and (d) Nilesh Patel provided Defendant \$26,500. As a result of Defendant’s breaches of his obligations under the Operating Agreement and other misconduct as alleged above, plaintiffs have incurred and continue to incur substantial damages and seek to recover from defendant, the “commissions” they provided Defendant plus interest, and all other sums permitted by law.

Defendant claims that this cause of action should be dismissed because it fails to set forth a cause of action for breach of contract or rescission based upon fraud. This Court finds that this cause of action sufficiently sets forth a cause for a return of defendants’ capital contribution which was provided by the individual members. The complaint sets forth sufficient allegations to support the claim that defendant failed to perform as Managing Member and thus did not earn the payments toward his capital contribution that were paid by the members. Consequently, the plaintiffs may seek the return of their contribution for defendant and the branch of the motion seeking dismissal of the seventh cause of action is dismissed.

For the reasons set forth above, the motion by defendant is denied in its entirety.

The cross-motion by plaintiffs for an order pursuant to CPLR 3214 vacating the automatic stay of discovery, compelling defendant to provide a full and detailed accounting of all of defendant’s actions as sole managing member of Priya Hospitality LLC from February 2007, through June 6, 2010, including immediate access to all of defendant’s paper and electronic records, as well as the dates and circumstances of his destruction of any paper and electronic records is decided as follows: This case is assigned to the Commercial Division and pursuant to its rules, there is no automatic stay of discovery pending the determination of a dispositive motion. Such stay is available only upon Court Order. As such, there was no basis for the parties to not adhere to their respective discovery obligations. The parties shall commence discovery and defendant shall respond to plaintiff’s demands on or before June 20, 2011.

The parties must appear in Part 17, on June 28, 2011, at 9:30 a.m. for a discovery conference. A copy of this Order is being sent to the parties on May 24, 2011.

Dated: May 24, 2011

ORIN R. KITZES, J.S.C.