

**Theocaropoulos v Tai Corp.**

2011 NY Slip Op 34013(U)

October 3, 2011

Sup Ct, New York County

Docket Number: 603196/09

Judge: Barbara R. Kapnick

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

BARBARA R. KAPNICK

PRESENT: \_\_\_\_\_

PART 39

Index Number : 603196/2009  
THEOCAROPOULOS, ANTHONY N.  
vs  
TAI CORP.,  
Sequence Number : 002  
SUMMARY JUDGMENT

INDEX NO. 603196/09  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 002  
MOTION CAL. NO. \_\_\_\_\_

motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH  
ACCOMPANYING MEMORANDUM DECISION**

Dated: 10/3/11

  
BARBARA R. KAPNICK J.S.C.  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE  
 SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IA PART 39

-----x  
ANTHONY N. THEOCAROPOULOS,

Plaintiff,

-against-

TAI CORP., THREE AMIGOS SJL, INC.,  
CHEETAHS GENTLEMEN'S CLUB INC. and  
LAWRENCE (LARRY) GRIBLER,

Defendants.  
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**BARBARA R. KAPNICK, J.:**

**DECISION/ORDER**

Index No. 603196/09

Motion Seq. No. 002

Plaintiff Anthony N. Theocaropoulos brought this action against Tai Corp. ("Tai"), Three Amigos SJL, Inc. ("Amigos"), Cheetahs Gentlemen's Club Inc. ("Cheetahs") and Lawrence (Larry) Gribler ("Gribler") to recover for allegedly uncompensated work he did and expenses he laid out for renovations at Cheetahs, in addition to personal items he alleges were left in defendants' control or custody. Plaintiff also seeks a 10% interest in Cheetahs.

Background

According to the Complaint, Gribler is the owner, operator and/or manager of Tai, Amigos and Cheetahs. Prior to January 2006, plaintiff alleges he had considerable experience as a chef and manager in the bar and restaurant business. In January 2006, plaintiff alleges that he met with Gribler at which time Gribler represented that he was the owner/operator of Cheetahs and needed

help in "building out" the premises, acquiring a chef, and in the general operation and development of Cheetahs.

At this meeting, Gribler allegedly asked plaintiff if he was interested in working for him and Cheetahs in such an endeavor, expressed his desire to sell Cheetahs at a profit once it was developed, and told plaintiff that if he was interested, he would be compensated both with money and a percentage interest, specifically 10 percent, when Cheetahs was sold. After visiting the premises at a later date, plaintiff accepted Gribler's offer, but nothing was reduced to writing.

Plaintiff allegedly worked at Cheetahs from June 2006<sup>1</sup> to May 2007, working on "building out" the premises, including removing flooring in the kitchen and lounge areas,<sup>2</sup> finishing the kitchen and installing considerable equipment in the kitchen, spending over \$2,800 of his own funds on kitchen equipment and an additional \$4000 on the flooring, in addition to over 3900 hours of his time.

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<sup>1</sup> Although the Complaint alleges that plaintiff began working in January 2006, he acknowledged both at his deposition and in an affidavit that this was an error and that he actually began working on the "building out" of Cheetahs in June 2006.

<sup>2</sup> In plaintiff's deposition and affidavit, he acknowledged that while the Complaint alleges he installed flooring, this was also an error; rather, plaintiff alleges he did work removing and demolishing flooring, preparing for the installation of new flooring.

Plaintiff alleges that he demanded and was promised, but never received, any compensation for any of his work or expenses in "building out" Cheetahs' premises.

In May 2007, when Cheetahs opened, plaintiff was made executive chef and was paid at the rate of \$1000 per week. He continued as executive chef until December 2008. At that point, the Complaint alleges that plaintiff was appointed by Gribler as one of three managers, the sole compensation for which came from tips received from customers. Plaintiff also alleges that Gribler required plaintiff to pay him thirty percent of these tips, and that Gribler refused to reduce the terms of his employment to writing.

In or about the Summer of 2009, plaintiff was told by Gribler that Cheetahs was going to be sold at the end of October 2009 and plaintiff believed he would then be compensated for the work he had performed and the expenses he had incurred. According to the Complaint, Gribler confirmed this and told plaintiff the sale price was expected to be approximately \$7 million.

In August 2009, however, plaintiff appeared for work at Cheetahs' front door and was greeted by an unknown person, who informed plaintiff that he was no longer employed and would not be

allowed in the building. By the end of the month, plaintiff allegedly learned that several of his valuable items of clothing that had been on the premises had been thrown away. Gribler, the Complaint alleges, refused to return any of plaintiff's phone calls.

Plaintiff's complaint seeks, 1) compensation for the "building out" work he performed and from which the defendants benefitted in the amount of \$350,000 (first cause of action); 2) compensation for the \$6,800 of his own monies expended and for which he was not reimbursed, in addition to the value of his personal effects, which he estimates at \$4000 (second cause of action); 3) a ten percent ownership interest in Cheetahs (or the value thereof) pursuant to the parties' oral agreement (third cause of action); and 4) damages for the defendants' fraudulent inducement (fourth cause of action).

#### Motion for Summary Judgment

Defendants Tai and Gribler now move for summary judgment pursuant to CPLR 3212(b) dismissing the Complaint in its entirety. According to Defendants' Rule 19-a Statement of Material Facts and the affidavit of Gribler, Gribler is the owner and operator of Tai and the former owner of Amigos d/b/a Cheetahs.<sup>3</sup>

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<sup>3</sup> According to Gribler, Cheetahs was simply the name under which Amigos was doing business, and is not a separate corporate entity. While no certificates of incorporation or

Defendants deny that plaintiff did any "building out" work at the subject premises or that Gribler or any other agent of defendants asked plaintiff to do such work. According to defendants, when Amigos leased the premises at issue, pursuant to the Lease, all work had to be performed by licensed and insured contractors pursuant to a Permit to Work issued by the New York City Department of Buildings. As such, Amigos contracted several qualified firms to perform and oversee construction at the premises, none of which employed plaintiff.

Plaintiff alleges that he installed kitchen appliances and purchased equipment for the bar, but Defendants submit an agreement and several proposals with Sumela Construction ("Sumela") which included work to "cleanup and refurbish or replace kitchen and bar fixtures through out entire space to working condition."

Defendants also submit a proposal from Carpet Express, dated March 7, 2007, in which Carpet Express offered a quote for the installation of 120 square yards of carpeting to be installed at the premises, and "floor preparation entire ceramic." Gribler alleges that the offer was accepted and that Carpet Express

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other formation documents are submitted in admissible form to demonstrate the relationship between Cheetahs and Amigos, plaintiff did not dispute this characterization either in his papers or at oral argument on May 18, 2011.

demolished and installed flooring in the lounge areas, not plaintiff.

Defendants also point to plaintiff's deposition testimony, in which he admitted that the money alleged to have been spent on flooring supplies in the Complaint was a "mistake" and that it was really for kitchen equipment, paint, rust removal and other items. Gribler states that he was never presented with receipts or invoices seeking reimbursement for anything until this lawsuit was commenced. According to Gribler, the only evidence of any alleged expenses incurred by plaintiff which has been produced are two invoices, dated February 21, 2007 and February 24, 2007, from L&J Restaurant Manufacturing Import Inc., totaling approximately \$412.85, and a receipt for \$402 that do not mention any of the defendants.

Defendants also dispute the allegation that plaintiff's belongings have been disposed of, alleging that the several items that were left behind - a suit jacket and other casual used clothing, not worth close to the \$4000 alleged - were returned to plaintiff.

In addition, defendants deny that plaintiff was ever a "manager" for Amigos/Cheetahs. He was hired, according to Gribler,

as a salaried employee and worked briefly as a chef; thereafter, in 2007, plaintiff worked in the capacity of an independent contractor as one of several "hosts", receiving tips from customers and dancers. Defendants submit plaintiff's W-2 for 2007 (issued by Amigos) and 1099 forms for 2007 and 2008 (issued by Tai).

Moreover, defendants note that the equity stake plaintiff claims he is entitled to is worthless, having been extinguished during the bankruptcy proceeding captioned In re Three Amigos SJL Inc. d/b/a Cheetah's Gentlemen's Club, Index No. 10-10924, still pending in United States Bankruptcy Court for the Southern District of New York. All assets have allegedly been sold pursuant to an "Order Authorizing and Approving Trustee's Sale of Substantially All of Debtor's Business Assets, Including its Interest in its Nonresidential Real Property Lease, Free and Clear of All Liens, Encumbrances and Interests", signed by the Hon. James M. Peck on December 15, 2010, leaving no funds for equity participants.<sup>4</sup>

Gribler further states in his affidavit that Tai was a corporation formed entirely as a conduit for handling credit card transactions at Cheetahs, and did not own any physical assets or

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<sup>4</sup> As stated during oral argument, there is no evidence that any party in this action has sought leave of the Hon. James M. Peck to bring or continue this action. Accordingly, this action is stayed as against Amigos and, presuming it is merely a business alias of Amigos, against Cheetahs as well.

have any interest in the club or the lease to the premises. It is, according to defendants, a "defunct" corporation, since the assets of Amigos were sold in bankruptcy.

Nor is there any allegation that Gribler acted in an individual capacity, so as to make him personally liable to plaintiff, defendants argue.

Defendants also contend that throughout the discovery process in this case, plaintiff has failed to produce any evidence, aside from his unsubstantiated allegations, to support his claims, and that he has failed to do so in opposition to this motion as well. Plaintiff's quasi-contract claims for "build out" work he allegedly performed must fail, defendants argue, because they have submitted evidence showing that the work was performed by other contractors, and because plaintiff cannot present proof of the work he alleges he performed.

Plaintiff's second cause of action, for \$6,800 expended in connection with the "building out" and for his allegedly discarded personal effects, are both unsupported by evidence, defendants argue. Defendants contend that plaintiff was not authorized to make any purchases on their behalf, and also that plaintiff has

produced no evidence to show that the items on the invoices or receipt were actually purchased for defendants.

Plaintiff, in opposition, submits an affidavit from Roey Shamir ("Shamir"), in which Shamir states that he was hired by Gribler to perform music production work at the club. Shamir met plaintiff in the summer of 2006, at which time plaintiff told him that he was going to be the chef when the club opened. For the first two months Shamir states that he went to the club about 2 times a week, then three or four times per week, and eventually every day for about 9 months. He states that he personally observed plaintiff doing physical labor such as scraping floors, removing tiles, shopping for kitchen equipment and utensils, placing shelving, discarding flooring and refurbishing kitchen equipment, and carrying and assembling furniture.

Plaintiff also submits the affidavit of Mario Mosteirín, the owner of an independent insurance brokerage company. He states that he met plaintiff in the fall of 2006, when he went to the club as a patron. Mosteirín states that he met plaintiff outside the club, where plaintiff was disposing of broken, grey floor tiles taken from the premises. Mosteirín states that plaintiff was the only person on the premises that day, and plaintiff explained to him that he was working on the flooring, and had just installed

shelves in the kitchen and refurbished some of the kitchen equipment. Allegedly plaintiff also told Mosteirín that he was to be named as the chef when the club opened.

On a second occasion, in the Spring of 2007, the club had opened only for food service and Mosteirín went to the premises for a meal. He saw plaintiff enter the restaurant dressed as a chef and plaintiff told him about the many renovations he had done, including, "installing some refrigeration in the kitchen, the shelving, the fryer, refurbishing the sink, drilling holes to connect cabinets, acquiring a cutting board, extensive woodwork sanding, priming and painting, etc."

Several months after the club had fully opened, Mosteirín states that Gribler told him, in response to Mosteirín's compliments regarding plaintiff, that he intended to make plaintiff a 10 percent owner of the club.

Plaintiff argues that there are thus numerous material questions of fact raised by the affidavits submitted and the plaintiff's deposition transcript, which serve to defeat this motion for summary judgment.

In reply, defendants point out that plaintiff now alleges that he began work in July 2006, which means that his allegation in the Complaint that he should be compensated for approximately 3900 hours of "building out" work between then and May 2007 would require him to establish that he worked approximately 12 hours a day, every day, for nearly 11 months, which his evidence simply cannot establish.

In addition, Gribler calls Shamir's credibility into question through several accusations regarding the circumstances surrounding the termination of Shamir's employment.

#### Discussion

"[T]he proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986). Once the movant has made such a showing, the burden then shifts to the opposing party to produce evidence in admissible form sufficient to establish the existence of any material issues of fact requiring a trial of the action. *Zuckerman v. City of New York*, 49 NY2d 557 (1980).

Defendant Tai has failed to make a *prima facie* showing of entitlement to judgment as a matter of law. The corporate defendant relies heavily on proposals and invoices submitted to show that licensed contractors were hired to do the work that plaintiff claims he did. However, there are no affidavits or deposition transcripts of individuals with actual knowledge of the work to which these documents refer. That defendants can show that Sumela and Carpet Express performed some work on the premises does not conclusively establish, particularly without sworn statements from these parties, that plaintiff did not also perform the work he alleges he performed for defendants' benefit.

Nor can the lease for the premises be considered dispositive as to the issue of whether plaintiff performed the work he claims to have performed for defendants' benefit. While defendants point out that the lease required only licensed contractors to do renovation work, that provision merely creates a legal obligation on their part, owed to the owner of the premises. While it may be considered some evidence, it does not prove conclusively that they complied with that legal obligation.

Moreover, while counsel for defendants asserted at oral argument that Tai is now a "defunct," although not bankrupt, corporation, there is no evidence of that fact other than Gribler's

affidavit. Further, even if true, it has no bearing on whether plaintiff may, if he can prove his allegations of liability against it at trial, obtain a judgment against Tai; rather, it bears only on whether plaintiff will be likely to enforce such a judgment against Tai.

Defendants also argue that Tai cannot be held liable because it was merely a credit card processing company created for that sole purpose, an assertion again supported only by Gribler's affidavit. However, the defendants themselves submit tax forms evidencing that Tai employed plaintiff during tax years 2007 and 2008 as what defendants describe as a "host." There is no explanation as to why Tai, allegedly existing for the sole purpose of processing credit cards, would be employing "hosts" as independent contractors for Cheetahs.

As such, there are numerous issues of fact and credibility that preclude granting defendant Tai summary judgment at this time.

Gribler also seeks summary judgment in his favor, arguing that there are no allegations in the Complaint or any other evidence that he acted in a personal capacity rather than on behalf of the corporate defendants. At oral argument, counsel for Gribler noted that there was no cause of action to pierce the corporate veil,

which plaintiff's counsel acknowledged, although also disputing the necessity to so plead.

Plaintiff has submitted no evidence that Gribler acted for his personal benefit or that the agreement he alleges existed was made in Gribler's personal capacity. Although plaintiff's counsel argued, at oral argument, that Gribler made no mention of any corporation when the alleged offer was made to plaintiff, that statement is directly contradicted by both plaintiff's own statements and the allegations contained in the Complaint. Accordingly, as plaintiff has not alleged and there is no proof that Gribler acted in his personal capacity or personally benefitted, aside from the benefits allegedly gained by the corporate defendants, from the work plaintiff alleges he performed, the Court must grant Gribler summary judgment.

#### Conclusion


This motion by defendants Tai Corp. and Lawrence (Larry) Gribler for an order dismissing plaintiff's Complaint pursuant to CPLR 3212, is granted solely to the extent of dismissing plaintiff's Complaint as against Lawrence (Larry) Gribler only and is denied as to defendant Tai Corp.

In addition, this action is stayed as to defendants Three Amigos SJL, Inc. and Cheetahs Gentlemen's Club, Inc., in light of the pending bankruptcy proceeding in the United States Bankruptcy Court for the Southern District of New York, In re Three Amigos SJL Inc. d/b/a Cheetah's Gentlemen's Club, Index No. 10-10924.

Counsel for plaintiff and defendant Tai are directed to appear in IA Part 39, 60 Centre Street, Room 208 on November 9, 2011 at 10:00 a.m. to discuss the next step to be taken in this case.

This constitutes the decision and order of this Court.

Dated: <sup>October</sup> September 3, 2011

  
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BARBARA R. KAPNICK  
J.S.C.

**BARBARA R. KAPNICK**  
**J.S.C.**