

<b>Cymerkiewicz v Skalski</b>
2011 NY Slip Op 34194(U)
April 15, 2011
Supreme Court, New York County
Docket Number: 115233/10
Judge: Joan M. Kenney
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 8

-----X  
RAFAL CYMERKIEWICZ and  
OLD ROOSTER INC.,

Plaintiffs,

DECISION & ORDER  
Index No.: 115233/10

-against-

KAZIMIERZ SKALSKI,

Defendant.

-----X  
JOAN M. KENNEY, J.:

Papers considered in review of this motion:

**FILED**

Papers	Numbered
Notice of Motion & Aff (007)	1, 2
Exhibits	3-8
Aff. in Opp. & Exhibits	9-18
Reply Affirmation	19

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Rafal Cymerkiewicz (Cymerkiewicz) and Old Rooster, Inc. (Old Rooster) (together, plaintiffs) move, pursuant to CPLR 3211 (a) (8), to dismiss defendant's counterclaims in their entirety or, in the alternative, pursuant to CPLR 3211 (a) (7), to dismiss defendant's third and fourth counterclaims.

**FACTUAL BACKGROUND**

According to Cymerkiewicz, in 2008 he and defendant entered into discussions about opening a restaurant/bar in the Williamsburg section of Brooklyn, New York. Allegedly, based on these discussions, Cymerkiewicz filed a certificate of incorporation with the New York Secretary of State for Kaz Restaurant, Inc. (Kaz) on May 15, 2008. Subsequently, on or about September 29, 2010, Cymerkiewicz filed an amendment to the certificate of incorporation, changing the name of the restaurant from Kaz to Old

Rooster.

Cymerkiewicz says that during this entire period, defendant indicated a desire to be included in the corporation and, allegedly, agreed to put up fifty percent of the capital necessary to open the restaurant. Cymerkiewicz invested the total start-up capital of \$1,051,710.00, but defendant failed to make any such similar investment.

In support of his contentions, Cymerkiewicz has provided copies of his personal joint checking account (the other depositors being identified as Zbigniew M. Cymerkiewicz and Malgorzata G. Cymerkiewicz) (Motion, Ex. A), the restaurant's bank statements (Motion, Ex. B), and cancelled checks (Motion, Ex. C), which, Cymerkiewicz asserts, demonstrate that he used his own funds to operate Old Rooster. Cymerkiewicz states that, when defendant failed to invest any funds in the venture, he and Old Rooster commenced the present action.

Defendant presents a totally different version of the background of this action.

According to defendant, in May of 2008, he and Cymerkiewicz agreed to be partners in the restaurant business and, to that effect, Kaz, later Old Rooster, was incorporated. Pursuant to this agreement between the parties, defendant entered into a commercial lease as the president of Kaz on May 5, 2008, in order to open the restaurant. Opp., Ex. A. Defendant also applied for a liquor

license for Kaz on May 26, 2008. Opp., Ex. C.

Defendant contends that, in or around August of 2010, Cymerkiewicz attempted to have him sign a promissory note on behalf of Old Rooster to repay to Cymerkiewicz \$1,000,000.00, which Cymerkiewicz alleges is owed to him. Defendant refused to sign the promissory note.

Defendant has asserted the following counterclaims in his answer: (1) conversion; (2) breach of fiduciary duty; (3) fraud and misrepresentation; and (4) unjust enrichment.

Plaintiffs argue that the court lacks jurisdiction over them to entertain these counterclaims because the answer and counterclaims were sent to plaintiffs' attorney by e-mail on January 4, 2011, and never sent a paper copy. Plaintiffs maintain that service by e-mail is not permitted under the CPLR.

In the alternative, plaintiffs contend that defendant has failed to plead his counterclaim for fraud with sufficient particularity to sustain that cause of action, and that a cause of action for unjust enrichment may not be maintained when there is a valid agreement between the parties, which, according to plaintiffs, exists in the case at bar.

In his opposition, defendant argues that plaintiffs were properly served with the answer and counterclaim. In support of this contention, defendant has included a photocopy of the envelope used to serve plaintiffs, said envelope having been returned to

defendant without being delivered for insufficient postage. Defendant states that when the envelope was returned to him, he sent the answer with his counterclaims to plaintiffs' counsel by e-mail, which, he maintains, constitutes proper service.

Defendant also states that his counterclaim for fraud is pled with sufficient particularity to meet the standards of CPLR 3016 (b), and that his cause of action for unjust enrichment is appropriate because the complaint fails to allege the existence of a valid and binding contract between the parties, thereby permitted defendant to assert a counterclaim based on a quasi-contractual theory.

#### DISCUSSION

CPLR 3211 (a), "Motion to dismiss cause of action," states that:

"[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

\* \* \*

(7) the pleading fails to state a cause of action; or  
 (8) the court has not jurisdiction of the person of the defendant ... ."

As stated in *Ladenburg Thalmann & Co., Inc. v Tim's Amusements, Inc.* (275 AD2d 243, 246 [1<sup>st</sup> Dept 2000]),

"the court's task is to determine only whether the facts as alleged, accepting them as true and according plaintiff every possible favorable inference, fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Dismissal pursuant to CPLR 3211 (a) (1) is warranted only if the documentary evidence submitted conclusively establishes a defense to

the asserted claims as a matter of law (*id.*, at 88)."

To defeat a pre-answer motion to dismiss, pursuant to CPLR 3211, the opposing party need only assert facts of an evidentiary nature which fit within any cognizable legal theory. *Bonnie & Co. Fashions, Inc. v Bankers Trust Co.*, 262 AD2d 188 (1<sup>st</sup> Dept 1999). Further, if any question of fact exists with respect to the meaning and intent of the contract in question, based on the documentary evidence supplied to the motion court, a dismissal pursuant to CPLR 3211 is precluded. *Khayyam v Doyle*, 231 AD2d 475 (1<sup>st</sup> Dept 1996).

Plaintiffs' motion to dismiss defendant's counterclaims is granted for lack of personal jurisdiction.

Service by e-mail has only been allowed in very limited circumstances, when the parties have contractually agreed to accept such service or by permission of the court when other methods of service have proved ineffective and/or impractical. *Alfred E. Mann Living Trust v ETIRC Aviation S.A.R.L.*, 78 AD3d 137 (1<sup>st</sup> Dept 2010); *Snyder v Alternative Energy Inc.*, 19 Misc 3d 954 (Civ Ct, NY County 2008). Neither of these circumstances exists in the case at bar.

Furthermore, by defendant's own admission, a hard copy of the answer and counterclaims was never mailed to plaintiffs. A mailing returned to the sender without delivery does not meet the requirements of service pursuant to CPLR 2103.

Having determined that plaintiffs were not properly served with the counterclaims, the court need not address plaintiffs'

requests for alternative relief.

Based on the foregoing, it is hereby

ORDERED that plaintiffs' motion is granted and the counterclaims asserted against them are dismissed; and it is further

ORDERED that defendant is granted leave to reserve his answer and counterclaims within 20 days after service on defendant's counsel of a copy of this order with notice of entry; and it is further

ORDERED that, in the event that defendant fails to serve his answer and counterclaims in conformity herewith within such time, leave to reserve shall be deemed denied, and the Clerk, upon service of a copy of this order with notice of entry and an affirmation/affidavit by plaintiff's counsel attesting to such non-compliance, is directed to enter judgment on behalf of plaintiffs, and it further

ORDERED that, should defendant fail to serve his answer in accordance with this order, judgment be entered on behalf of plaintiffs in this matter, the issue of damages is referred to a Special Referee to hear and determine; and it is further

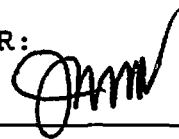
ORDERED that counsel for plaintiffs shall, within 30 days from the date of entry of judgment on their behalf, serve a copy of said judgment with notice of entry, together with a completed

Information Sheet,<sup>1</sup> upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place the matter on the calendar of the Special Referee's Part for the earliest convenient date.

*The parties are to appear for a preliminary conference on 6/23/11 at 9:30 am in Room 304 located at 71 Thomas Street NYC 10013.*

Date: April 15, 2011

ENTER:



Joan M. Kenney, J.S.C.

**FILED**

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<sup>1</sup>Copies are available in Rm. 119M at 60 Centre Street and on the Court's website at [www.nycourts.gov/suptmanh](http://www.nycourts.gov/suptmanh) under the "References" section of the "Courthouse Procedures" link.