

**Patsis v Nicolia**

2012 NY Slip Op 32291(U)

August 21, 2012

Supreme Court, Suffolk County

Docket Number: 11185-2010

Judge: Emily Pines

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Supreme Court - State of New York  
Commercial Division, Part 46, Suffolk County

COPY

*Present:* HON. EMILY PINES  
J. S. C.

Original Motion Date: 01-10-2012; 05-22-12  
Motion Submit Date: 06-12-2012  
Motion Sequence .: 002 MG  
003 MD

[ ] FINAL DISP  
[ X ] NON - FINAL DISP

\_\_\_\_\_  
STEVEN PATSIS,  
  
Plaintiff,  
  
-against-  
  
ROBERT NICOLIA,  
  
Defendant.  
\_\_\_\_\_ X

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**ORDERED** that the plaintiff's motion (002) for partial summary judgment in its favor on the third and fifth causes of action is granted; and it is further

**ORDERED** that the defendant's motion (003) for partial summary judgment dismissing the second, third, and fifth causes of action is denied; and it is further

**ORDERED** that the parties are directed to appear at a pretrial conference on October 23, 2012 to 10:00 a.m.

In this breach of contract action, the plaintiff seeks to recover on a promissory note. The record reveals that on March 14, 2008, by an Assignment of Membership Interest (hereinafter "the Assignment"), the plaintiff assigned his 50% interest in Gatsby

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Dining, LLC which owned a restaurant called The Gatsby located at 712 Main Street, Islip, New York, and his 50% interest in Pan Realty and Consulting, LLC, which held the lease for the premises occupied by the restaurant. The remaining 50% interest in both companies was owned by the defendant's wife, which was subsequently transferred to the defendant. The Assignment provided that the defendant would pay to the plaintiff the sum of \$210,000.00, after paying the balance of a note held by a former member of Gatsby Dining, LLC in the amount of \$90,000.00. The instant action was commenced upon the defendant's failure to pay the balance on the promissory note.

The record further reveals that on or about December 31, 2008, the defendant entered into an Asset Purchase Agreement and sold the business assets of Gatsby Dining, LLC to non-parties Dorothy Geraci and Jack Guarneri for the amount of \$700,000.00. Upon executing the Asset Purchase Agreement, Geraci and Guarneri paid \$25,000.00 to the defendant, totaling a \$50,000.00 down payment. In March, 2009, the defendant entered into a Management Agreement with Geraci which provided that Geraci would run the restaurant business and pay all expenses of the business, which she did until in or about January, 2010.

In a prior order, dated August 24, 2010 (Pines, J.), the Court granted the plaintiff's motion for partial summary judgment on the first cause of action, seeking an accounting of the books and records of Gatsby LLC, and the fourth cause of action, seeking an order to compel the defendant to produce said books and records.

With regard to the remaining causes of action, the complaint alleges in the second cause of action that the defendant breached the Assignment by failing to provide the books and records of Gatsby Dining, LLC, therefore the plaintiff is entitled to the entire balance of the purchase price under the terms of the Assignment. The complaint alleges in the third cause of action that the defendant sold, transferred or conveyed his interest in Gatsby Dining, LLC within the meaning of the Assignment, and seeks payment of the balance of the purchase price. The complaint alleges in the fifth cause of action that the defendant earned profits from his ownership interests under the Assignment, and seeks the payment of any profits earned by the defendant under the Assignment.

The plaintiff now moves for partial summary judgment in his favor on the third and fifth causes of action. The defendant cross-moves for partial summary judgment on the second, third and fifth causes of action.

A party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 (1985); *Zuckerman v New York*, 49 NY2d 557, 427 NYS2d 595 (1980). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue. *Stewart Title Ins. Co. v Equitable Land Servs.*, 207 AD2d 880, 616 NYS2d 650 (2d Dept 1994), Once a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 (1986).

“[I]t is well settled that ‘when parties set down their agreement in a clear, complete document, their writing should . . . be enforced according to its terms.’” *South Rd. Assoc., LLC v IBM*, 4 NY3d 272, 277, 793 NYS2d 835 (2005), quoting *Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475, 775 NYS2d 765 (2004). When interpreting a contract, “the court should arrive at a construction which will give fair meaning to all of the language employed by the parties to reach a practical interpretation of the expressions of the parties so that their reasonable expectation will be realized.” *Herzfeld v Herzfeld*, 50 AD3d 851, 857 NYS2d 170 (2d Dept 2008).

Implicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance. *Dalton v Educ. Testing Serv.*, 87 NY2d 384, 389. Encompassed within the implied obligation of each promisor to exercise good faith are any promises that a reasonable person in the position of the promisee would be justified in understanding were included. *Id.* This embraces a pledge that neither shall do anything that will have the effect of destroying or injuring the right of the other party to

receive the fruits of the contract. *Id.* When, as here, the contract contemplates the exercise of discretion, this pledge includes a promise to exercise such discretion in good faith and not to act arbitrarily or irrationally. *Id.*; *Maddaloni Jewelers, Inc. v Rolex Watch U.S.A., Inc.*, 41 AD3d 269, 270, 838 NYS2d 536 (1st Dept 2007).

Plaintiff has demonstrated his prima facie entitlement to partial summary judgment on the issue of liability as a matter of law by proving that the defendant has not paid the balance of the purchase price of the plaintiff's 50% interest in Gatsby Dining LLC and restaurant business within the meaning of the Assignment. In support of his motion, the plaintiff submits, *inter alia*, the pleadings, a copy of the Assignment, a copy of a Letter of Intent, the defendant's examination before trial, a copy of an Asset Purchase Agreement, copies of checks, a copy of a Management Agreement, and copies of tax returns.

A review of the Assignment, dated December 31, 2007, reveals that the plaintiff assigned his entire right, title, and interest in and to Gatsby Dining, LLC consisting of a 50% interest in the LLC, together with all rights, benefits, obligations, and liabilities relating thereto and to withdraw from any and all involvement with the LLC in consideration of the sum of \$300,000.00. The parties agreed that the defendant would pay the balance of a note held by Angelo Auricchio, a former member of the LLC, in the amount of \$90,000.00, which would be deducted from the purchase price, leaving a balance of \$210,000.00 payable to the plaintiff. The parties agreed that the defendant would pay down the remaining purchase price using profits made each year until the complete purchase price has been paid to the plaintiff, which would be determined by the plaintiff's accountant by examining the defendant's books and records on an annual basis.

The Assignment also provided that the entire balance of the purchase price shall become immediately due and payable upon the sale, transfer, or conveyance of the interest herein. In addition, the Assignment provided that the defendant would file all appropriate documents to effectuate a transfer of the plaintiff's rights under the New

York State Liquor Authority Licence for the LLC within thirty days. The Letter of Intent, dated March 14, 2008, provided that the defendant intended to acquire the assets of Gatsby Dining, LLC and Pan Realty & Consulting, LLC with the following terms and conditions:

the purchase price of \$300,000.00, less the remaining payoff of a note to Angelo Aurrichio of \$90,000.00, for a sum of \$210,000.00 upon the Gatsby turning a profit. In addition Gatsby' books and records are to be turned over to Seller for review on an annual basis. Upon the finding of any gross profit, all gross profits shall be paid to Seller towards the remaining balance of the purchase price. The entire balance shall become immediately due and payable upon any sale, transfer, or conveyance of interest.

In addition, the defendant executed a hold harmless and indemnification agreement in favor of the plaintiff, the defendant would secure an assignment of the current lease, the plaintiff would obtain a written consent of Diane Nicolio to transfer his interest tot he defendant, and the parties would execute all required corporate documents.

The Asset Purchase Agreement, dated December 31, 2008, provided that the defendant was selling certain of the assets relating to the business of Gatsby Dining, LLC to nonparties Geraci and Guarneri in consideration of the sum of \$700,000.00. The sum of \$50,000.00 was paid by Geraci and Guarneri to the defendant as a down payment. The assets that would be transferred were as follows: lease, furniture and fixtures, telephone numbers, goodwill, inventory, and equipment leases. Assets that were excluded from the transfer were the corporate records, cash and accounts receivables prior to the closing, and tax refunds. Both Geraci and Guarneri executed the document. The checks, dated March 18, 2009, each in the amount of \$25,000.00,

are written to the order of Robert and Diane Nicolia by Salvatore Geraci and Jack Guarneri respectively.

At his examination before trial, the defendant stated that he purchased the plaintiff's interest in Gatsby Dining, LLC. In 2009, he acknowledged that he sold the assets to Geraci and Guarneri and executed an Asset Purchase Agreement, which required that the buyers transfer the liquor license, which the buyers failed to do. Thus, the Asset Purchase between Gatsby Dining, LLC and nonparties Geraci and Guarneri did not proceed to closing. In March 2009, the defendant subsequently entered into a Management Agreement with Geraci, giving her complete control over the books and records and the responsibility of paying all the expenses from the income generated from the restaurant, until January 2010 when Geraci left the business. The defendant conceded that he did not require Geraci to produce bank records on a regular basis, nor did he review any financial statements during that period. The defendant stated that in January 2010, he re-entered the restaurant and closed the business. He sold the physical assets of Gatsby Dining, LLC at an auction for the sum of \$40,000.00, and terminated the lease agreement with the landlord. The defendant further stated that it was his understanding that the plaintiff was entitled to payment even after the defendant sold the assets of the Gatsby. The defendant also stated that after selling the only asset of the company, the restaurant's fixtures, that Gatsby Dining LLC didn't own anything else. He conceded that he did not provide the books and records to the plaintiff on an annual basis inasmuch as Geraci had complete control over the books while she was the manager of the restaurant, and he had no access. At the conclusion of the deposition, the defendant's counsel stated that the defendant had recently received the books and records from Geraci which would be forwarded to the plaintiff.

As the plaintiff made a *prima facie* showing of entitlement to summary judgment, the burden shifts to the defendant to demonstrate the existence of a triable issue of fact. See *Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v New York*, *supra*. The defendant failed to raise a triable issue of fact.

The defendant contends that the conditions precedent to payment did not occur, namely, that he never made a profit and that he never sold his interest in the corporation. The defendant also claims that he was unable to pay the purchase price to the plaintiff inasmuch as Geraci and Guarneri breached the Asset Purchase Agreement and Geraci breached the Management Agreement which led to the restaurant's demise. In support, the defendant submits, *inter alia*, his personal affidavit, a copy of the executed Asset Purchase Agreement, a copy of a Promissory Note, dated December 31, 2008 which was not executed, a copy of the Management Agreement, dated March 18, 2009, between Gatsby Dining LLC and Geraci, a Notice to Cure dated November 12, 2009, a letter dated January 13, 2010, a copy of a verified complaint titled Gatsby Dining LLC v Dorothy Geraci, Jack Guarneri and Sal Geraci, Index No. 10-23521, and a 2008 tax return for Gatsby Dining LLC.

The defendant avers in his affidavit, dated April 24, 2012, that his promise to pay the plaintiff was not absolute and the conditions precedent that would trigger his obligation never occurred since the restaurant did not make a profit and he did not sell his interest in the company. The defendant further states that the plaintiff is not entitled to the \$40,000.00 he obtained from a liquidation of the assets and the \$50,000.00 down payment because he used the money to pay creditors and the land lord, and are not considered as profits. The Court finds that this affidavit is in direct contrast to the defendant's earlier deposition testimony, and creates a feigned factual issue designed to avoid the consequences of his earlier testimony that he owed money to the plaintiff after selling the assets of Gatsby Dining, LLC. *Koller v Leone*, 299 AD2d 396, 751 NYS2d 266 (2d Dept 2002). The Court discounts the portions of the defendant's affidavit that contradict his deposition testimony. *Blackmon v Dinstuhl*, 27 AD3d 241, 810 NYS2d (1st Dept 2006).

The Notice to Cure, dated November 12, 2009, reveals that the landlords, John E. Grossman and Edward D. Grossman gave notice to the tenant, Pan Realty and Consulting, LLC, that it failed to pay rent and taxes owed for the months of October and November, 2009 in the amount of \$47,071.89. A second Notice to Cure, dated

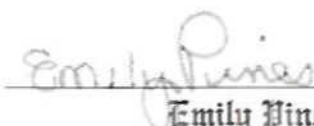
December 15, 2009, reveals that the tenant, Pan Realty and Consulting, LLC, failed to pay rent, taxes, and late fees for October, November and December, 2009, in the amount of \$63,702.18. A third Notice to Cure, dated January 4, 2010, reveals that the tenant, Pan Realty and Consulting, LLC, failed to pay rent, taxes and late fees for the months of October, November and December, 2009 in the amount of \$81,702.18. In a letter dated January 13, 2010, counsel for the defendant wrote to Dorothy Geraci and informed her of her default under the Management Agreement for her failure to pay priority expenses including rent. The letter provided 10 days to cure the default. A copy of the verified complaint titled *Gatsby Dining, LLC v Dorothy Geraci, Jack Guarneri and Sal Geraci*, Index Number 10/23521, reveals that the plaintiff in this matter seeks to recover damages for breach of contract, conversion, an accounting and replevin of the plaintiff's business records.

Turning to the defendant's cross motion, under the circumstances presented, the Court finds that the defendant has failed to show, *prima facie*, that the plaintiff is not entitled to full payment on the promissory note. Although the defendant testified that he paid the balance of the note owed to Aurrichio, he has proffered no proof. The Court also notes that there has been no determination as to whether the defendant made a profit from the time he purchased the restaurant until he surrendered the lease to the landlord. The court further finds that there are triable issues of fact regarding whether the defendant exercised his discretion in bad faith by liquidating the restaurant's assets and surrendering the lease, thereby rendering the business inoperable and unable to make a profit. *Maddaloni Jewelers, Inc. v Rolex Watch U.S.A., Inc.*, *supra*. Therefore, the burden never shifted to the plaintiff. *Alvarez v Prospect Hosp.*, *supra*.

Accordingly, the plaintiff's motion for partial summary judgment on the issue of liability is granted. The defendant's cross motion is denied in its entirety. The matter will proceed to a trial on damages.

The parties are directed to appear at a pre-trial conference on October 23, 2012, before the undersigned.

Dated: August 21, 2012  
Riverhead, New York

  
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Emily Pines  
J. S. C.

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