

Caceres v Santamaria
2012 NY Slip Op 32580(U)
October 5, 2012
Sup Ct, Queens County
Docket Number: 6880/2012
Judge: Allan B. Weiss
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA Part 2
Justice

JAMIE ALVARADO CACERES, x

Index
Number 6880/ 2012

Plaintiff,

-against-

Motion
Date July 11, 2012

ARACELI SANTAMARIA, ISMAEL
SANTAMARIA, OSCAR MONTOYA and
CARNITA RICAS, INC.,

Motion
Cal. Number 6

Defendants.

Motion Seq. No. 1

x

The following papers numbered 1 to 11 read on this motion by defendant Ismael Santamaria pursuant to CPLR 3211(a)(1) , (7) and (8) and dismiss the complaint asserted against him, and pursuant to CPLR 3212 (a) and (b) for summary judgment in his favor against plaintiff in the sum of \$20,000.00 plus costs.

Papers
Numbered

Notice of Motion - Affidavits - Exhibits	1-5
Answering Affidavits - Exhibits	6-9
Reply Affidavits	10-11

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiff commenced this action seeking monetary damages, an accounting, the appointment of a receiver, rescission and dissolution of an alleged partnership.

In his complaint, plaintiff alleges as a first cause of action that he entered into a stock purchase agreement dated October 13, 2009 with defendant Ismael Santamaria whereby defendant Ismael Santamaria agreed to sell plaintiff 45% of the shares of stock in defendant Carnitas Ricas, Inc., a corporation operating a restaurant located at the premises known as 89-24 37th Avenue, Jackson Heights, New York, for the total sum of \$50,000.00, which was payable, by initial payment of the amount of \$30,000.00 on October 15, 2009, and subsequent payment of the amount of \$20,000.00 due on or before February 15, 2010. Plaintiff also alleges he paid defendant Ismael Santamaria the sum of \$30,000.00 on October 15, 2009, paid for various expenses of the business, and worked in the restaurant until June 20, 2010, when he stopped awaiting an accounting “of his share of the restaurant.” Plaintiff further alleges that in December 2010, he learned that the business had been sold to new owners, and he was barred from working at the restaurant. Plaintiff additionally alleges that notwithstanding his demand, defendants have refused to pay him back the monies he contributed to the business. It is alleged by plaintiff that defendants converted his interest in the business to their own use.

As a second cause of action, plaintiff alleges that he and defendants Araceli Santamaria and Oscar Montoya entered into an oral partnership agreement, commencing on October 15, 2009, to operate and share in the profits and losses of the restaurant, but breached the partnership agreement by excluding him from participating in the business, and diverting profits of the business for their own use. Plaintiff also alleges he elected to terminate the partnership agreement, but that defendants have refused to return his money, or account for any profits.

As a third cause of action, plaintiff alleges that defendants fraudulently induced him into purchasing a “45% interest” in the restaurant for \$50,000.00. He alleges that defendants misrepresented the value of the restaurant and advised him he did not need legal counsel in connection with his purchase. Plaintiff also alleges that defendants failed to disclose material information to him and never issued him any stock in defendant corporation.

As a fourth causes of action, plaintiff alleges that defendants have failed to pay him for the reasonable value of his labor and services he provided to them in connection with the operation of the restaurant.

In support of his motion to dismiss the complaint asserted against him, defendant Ismael Santamaria submits, among other things, an affirmation by his counsel, his own affidavit, a copy of the complaint, including the annexed copies of the stock purchase agreement in Spanish and a translation of the agreement into English by plaintiff’s counsel.

To the extent defendant Ismael Santamaria moves pursuant to CPLR 3211(a)(8) to dismiss the complaint asserted against him based upon lack of personal jurisdiction, plaintiff offers the affidavit of service dated April 23, 2012 of Oveimar Otero, indicating that defendant Ismael Santamaria was served by in-hand delivery of a copy of the summons and complaint on April 16, 2012 at 7:30 P.M. at 103rd Street and Roosevelt Avenue, Corona, New York. In the affidavit, Mr. Otero acknowledges that plaintiff was present when the in-hand delivery was made, and states that plaintiff identified defendant Ismael Santamaria to him (Otero). Mr. Otero also indicates that defendant Ismael Santamaria likewise identified himself to Otero. Mr. Otero additionally states that he is not a licensed process server and does not effect “more than five serivces [sic] of process in any one year” (*see* Administrative Code of the City of NY, §§ 20–403 and 404). This affidavit constitutes prima facie evidence of proper service of process (CPLR 308[1]).

In his affidavit, defendant Ismael Santamaria indicates that plaintiff called him on the phone and asked him to meet him in the street. Defendant Ismael Santamaria acknowledges the presence of another person when he met with plaintiff, but states that “it is my recollection that the plaintiff himself handed me the [s]ummons and [c]omplaint.” Such affidavit, however, is insufficient to rebut plaintiff’s prima facie showing of proper service. It is not a sworn denial of Mr. Otero’s averment that he handed the copy of the summons and complaint to defendant Ismael Santamaria so as to create a question of fact on the issue of which person (Mr. Otero or plaintiff) made the delivery to Ismael Santamaria and require a traverse hearing (*see Kurlander v Willie*, 45 AD3d 1006 [2007]).

That branch of the motion by defendant Ismael Santamaria pursuant to CPLR 3211(a)(8) to dismiss the complaint based lack of personal jurisdiction due to improper service of process is denied.

That branch of the motion pursuant to CPLR 3212(a) and (b) by defendant Ismael Santamaria for summary judgment in his favor as against plaintiff is denied (*see Gaskin v Harris*, __ AD3d __, 2012 WL 3971280, 2012 NY App Div LEXIS 6058). “A motion for summary judgment may not be made before issue is joined (CPLR 3212[a]) and the requirement is strictly adhered to” (*City of Rochester v Chiarella*, 65 NY2d 92, 101 [1985]). It is undisputed that defendant Ismael Santamaria has not yet served an answer or counterclaim to the complaint (*see* CPLR 3212[a]).

With respect to that branch of the motion by defendant Ismael Santamaria to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, it is well settled that:

“the court must accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Marom v Anselmo*, 90 AD3d 622, 623 [2011]), and ‘may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint’ (*Leon v Martinez*, 84 NY2d at 88; *see Berman v Christ Apostolic Church Intl. Miracle Ctr., Inc.*, 87 AD3d 1094, 1096–1097 [2011]; *Kopelowitz & Co., Inc. v Mann*, 83 AD3d 793, 797 [2011]). Further, a motion pursuant to CPLR 3211(a)(1) may be granted ‘only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law’ (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d at 326; *see Leon v Martinez*, 84 NY2d at 88; *Robertson v Wells*, 95 AD3d 862, 863 [2012]; *Magnus v Sklover*, 95 AD3d 837, 837 [2012])” (*Gaskin v Harris*, _____ AD3d _____, 2012 WL 3971280, 2012 NY App Div LEXIS 6058).

Applying these principles here, the complaint, as amplified by the affidavit submitted by plaintiff, adequately states a cause of action against defendant Ismael Santamaria to recover damages for breach of contract, and quantum meruit and unjust enrichment. (Plaintiff does not seek specific performance of the stock purchase agreement). It does not, however, state a cause of action against defendant Ismael Santamaria for breach of the alleged oral partnership agreement between plaintiff and defendants Araceli Santamaria and Oscar Montoya, insofar as plaintiff makes no allegation that defendant Ismael Santamaria also was a party to such agreement (*see Jim Longo, Inc. v Rutigliano*, 294 AD2d 541 [2002]). It also does not state a cause of action against defendant Ismael Santamaria for conversion of the stock, because plaintiff and Ismael Santamaria agree that they entered into the written agreement dated October 13, 2009 pursuant to which plaintiff would pay to defendant Ismael Santamaria the total sum of \$50,000, in exchange for shares of stock in defendant corporation. That agreement governs their transaction and thus precludes recovery based on a cause of action for conversion of the stock (*see Wolf v National Council of Young Israel*, 264 AD2d 416, 417 [1999]; *see also Schmidt v Lorenzo*, 70 AD3d 1362 [2010]).

To the extent the complaint alleges defendant Ismael Santamaria represented to him that he did not need legal counsel in relation to his purchasing a share in the business, such representation is not one of a material existing fact, but rather an opinion. Plaintiff, furthermore, makes no claim that defendant Ismael Santamaria is an attorney, or is in any fiduciary relationship with him, and owed him any duty to advise him to consult with an attorney. There is no legal requirement, furthermore, that a purchaser of corporate stock be represented by an attorney in connection with the purchase, and plaintiff does not allege that

defendant Ismael Santamaria interfered with his right to consult with an attorney at anytime, including when he executed the stock purchase agreement.

To the degree defendant Ismael Santamaria represented the restaurant would produce a “good” income, such representation is an expression of opinion of future expectations, which is not actionable and cannot form the basis for a fraud in the inducement claim (*see Bank of New York v Realty Group Consultants*, 186 AD2d 618 [1992]; *Pappas v Harrow Stores*, 140 AD2d 501 [1988]). In addition, the allegation that defendant Ismael Santamaria failed to disclose to plaintiff any of the “corporate” documents or books, without any additional facts, is insufficient to state a cause of action based upon fraudulent inducement (*see Sobel v Ansanelli*, __ AD3d __, 2012 WL 4094932, 2012 NY App Div LEXIS 6135; *Nissan Motor Acceptance Corp. v Scialpi*, 94 AD3d 1067 [2012]).

Nevertheless, to the degree plaintiff alleges in the complaint defendant Ismael Santamaria knowingly misrepresented the value of the restaurant to be at least \$100,000.00, and that he relied upon such representation in purchasing the stock to his detriment, he has stated a cause of action for fraud in the inducement as against defendant Ismael Santamaria (*see Rosenfeld v Rosenblum*, 176 AD2d 645 [1991]).

Although the copy of the stock purchase agreement qualifies as “documentary evidence” within the intendment of CPLR 3211(a)(1), defendant Ismael Santamaria’s affidavit does not (*see Cives Corp. v George A. Fuller Co., Inc.*, 97 AD3d 713 [2012]; *Jones v Rochdale Village, Inc.*, 96 AD3d 1014 [2012]; *Granada Condominium III Assn. v Palomino*, 78 AD3d 996 [2010]).¹ In any event, the agreement does not utterly refute plaintiff’s allegations that defendant Ismael Santamaria knowingly misrepresented the value of the restaurant to be at least \$100,000.00, or that defendant Ismael Santamaria was unjustly enriched by virtue of labor and services rendered by plaintiff in connection with the restaurant for which no compensation was paid, or conclusively establishes a defense as a matter of law. Plaintiff alleges that he was never issued any stock in defendant corporation by defendants. The stock purchase agreement, furthermore, does not specifically address the issue of compensation to be paid to the plaintiff for the alleged labor and services he rendered in connection with the operation of the restaurant.

Under such circumstances, that branch of the motion by defendant Ismael Santamaria to dismiss the complaint asserted against him pursuant to CPLR 3211(a)(1) and (7) is granted

¹

Moreover, defendant Ismael Santamaria, in his affidavit asserts, in effect, that he became divested of his ownership interest in defendant corporation upon payment of the \$30,000.00 by plaintiff on October 15, 2009.

only to the extent of dismissing the causes of action asserted against him based upon conversion, breach of the alleged oral partnership agreement and fraud in the inducement, except insofar as the cause of action for fraud in the inducement is premised upon alleged misrepresentation of the stock's value.

Dated: October 5, 2012

J.S.C.