

LL Lifestyle, Inc. v Vidal
2012 NY Slip Op 33474(U)
February 17, 2012
Sup Ct, NY County
Docket Number: 600970/08
Judge: Bernard J. Fried
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BERNARD J. FRIED PART 60

Justice

LL LIFESTYLE, INC.
Plaintiff,

Index No. #600970/2008

MOTION DATE _____

-against-

MOTION SEQ. NO. #005

ROBERTO VIDAL, et. al.,

MOTION CAL. NO. _____

Defendants.

ROBERTO VIDAL, et.al.,

Counterclaim Plaintiffs,

-against-

LL LIFESTYLE, INC. and DONALD C. CHOI,

Counterclaim Defendants.

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

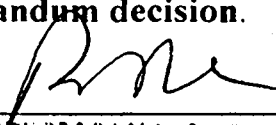
PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

This motion is decided in accordance with the attached memorandum decision.

Dated: 2/17/2012



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: IAS PART 60

-----X
LL LIFESTYLE, INC.,

Plaintiff,

Index No.
600970/08

-against-

ROBERTO VIDAL, GEORGE PASTRANA and VP MARITIME,
LLC,

Defendants.

-----X

ROBERTO VIDAL, in his individual capacity and on behalf of
LL Lifestyle, Inc. as a shareholder of LL Lifestyle, Inc.,
GEORGE PASTRANA, and VP MARITIME, LLC,

Counterclaim Plaintiffs,

-against-

LL LIFESTYLE, INC. and DONALD C. CHOI,

Counterclaim Defendants.

-----X

APPEARANCES:

For Plaintiff/Counterclaim
Defendants:

For Defendants/Counterclaim
Plaintiffs:

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FRIED, J.:

In the instant action, motions sequence 005 and 006 are consolidated for decision.
In motion sequence 005, plaintiff LL Lifestyle, Inc. (Lifestyle) and counterclaim
defendants Lifestyle and Donald C. Choi (Choi) move, pursuant to CPLR 3212, for an

order granting: (a) summary judgment in favor of Lifestyle on the second, fifth, and sixth causes of action in the amended complaint; and (b) summary judgment in favor of Lifestyle and Choi, dismissing the first through sixth counterclaims. Choi is the founder, president, chief executive officer and majority shareholder of Lifestyle, a New York corporation that manages a fleet of powerboats, yachts and fishing boats for use by members who pay a monthly fee. If summary judgment is granted, they request a trial on damages.

In motion sequence 006, defendants and counterclaim plaintiffs George Pastrana (Pastrana) and VP Maritime, LLC (Maritime) move, pursuant to CPLR 3212, for an order granting them summary judgment dismissing the complaint with prejudice as against them.¹

Choi contends that, in November 2006, he, on behalf of Lifestyle, entered into a contract (the First Agreement) with Pastrana and Vidal, pursuant to which Pastrana would pay Lifestyle \$200,000 in exchange for 400,000 shares of Lifestyle Series A Preferred Stock (Stock), and Vidal would to pay Lifestyle \$400,000 in exchange for 800,000 shares of Stock. Choi contends that a key term of the First Agreement was that Pastrana and Vidal would finance and purchase a 62-foot Azimut Yacht (the 62-Foot Yacht) for Lifestyle's exclusive business use, in exchange for which Pastrana and Vidal would receive an additional 214,500 and an additional 435,000 shares of Stock, respectively. According to Choi, pursuant to the First Agreement, Vidal and Pastrana

¹

The instant action has been stayed as against defendant Roberto Vidal (Vidal), who filed for bankruptcy on May 18, 2010.

were entitled to elect one member to Lifestyle's Board of Directors (the Board).

On November 14, 2006, Pastrana paid \$200,000 to Lifestyle. On November 27 and December 15, 2006, Vidal paid a total of \$400,000 to Lifestyle. Choi states that, in accordance with the First Agreement, in November and December of 2006, Lifestyle paid a total of \$191,250 to Marine Max, Inc. (Marine Max) as a down payment for the 62-Foot Yacht. On December 4, 2006, Pastrana received 614,500 shares of Stock, and Vidal received 1,235,000 shares.

Choi contends that he, Pastrana and Vidal attended a Board meeting on February 12, 2007, at which the issuance of Pastrana's and Vidal's shares of Stock was ratified, Vidal was named to the Board, and Pastrana's and Vidal's agreement to finance the purchase of the 62-Foot Yacht was also ratified. Choi submits a written document entitled "Letter Agreement - Investment in LL Lifestyle Inc." (the Letter Agreement), which is signed by Vidal and Choi, but not by Pastrana. According to Choi, it memorializes the terms of the First Agreement, which incorporated Lifestyle's transfer of the additional shares of Stock to Pastrana and Vidal "for services rendered in connection with the financing and purchase of [the 62-Foot Yacht]"

Choi notes that Pastrana and Vidal, as co-applicants, were denied financing for the 62-Foot Yacht. Thereafter, Choi asserts that he, on behalf of Lifestyle, and Pastrana and Vidal entered into a second agreement (the Second Agreement), whereby Lifestyle would transfer the previous \$191,250 deposit paid to Marine Max for the 62-Foot Yacht to a deposit on a less expensive 43-foot Azimut Yacht (the 43-Foot Yacht), in exchange for Pastrana's and Vidal's subsequent financing of the 43-Foot Yacht. The transfer of the deposit with Marine Max occurred on March 27, 2007.

According to Lifestyle, pursuant to the Second Agreement, Pastrana and Vidal formed Maritime, as its sole members, in order to finance the 43-Foot Yacht for Lifestyle's exclusive business use in exchange for Lifestyle's monthly payments. Choi maintains that, after Pastrana and Vidal represented that they had obtained financing, he paid the first month's installment on the 43-Foot Yacht to Marine Max in accordance with the Second Agreement, with the expectation that Lifestyle would use the 43-Foot Yacht to accumulate revenue from members.

Choi asserts that, since the June 18, 2007 closing of title on the 43-Foot Yacht, defendants have refused to make it available to Lifestyle for its business use, and they have instead used the boat for their own personal use and pecuniary gain, including by contracting and leasing it to third parties such as Sailtime. Choi asserts that Lifestyle has not earned any revenue from the 43-Foot Yacht.

Lifestyle argues that it has sustained damages from its lost deposit on the 43-Foot Yacht and lost profits from members who are unable to use the boat as a result of defendants' misappropriation and breaches of contract. Lifestyle contends that Maritime was enriched at its expense by taking exclusive possession of, and using, the 43-Foot Yacht in breach of the Second Agreement. Choi asserts that, as a result of defendants' bad-faith actions, Lifestyle has not received any of the pecuniary gain that it had contracted for, such that it is against equity and good conscience to permit Maritime to retain possession of, and benefit from, the 43-Foot Yacht.

The three causes of action on which Lifestyle seeks summary judgment herein are those brought against Pastrana and Maritime.² They are: (a) the second, brought as against Pastrana, which alleges aiding and abetting breach of fiduciary duty, and seeks damages in excess of \$2 million; (b) the fifth, brought as against Pastrana, alleging breach of contract, and seeking to direct him to deliver to Lifestyle 214,5000 shares of Stock and to authorize Lifestyle to cancel such shares on its books; and (c) the sixth, brought as against Maritime, alleging unjust enrichment, and seeking damages in an amount to be determined at trial.

Pastrana and Maritime oppose motion sequence 005. In motion sequence 006, they move, pursuant to CPLR 3212, for summary judgment dismissing the second, fifth, and sixth causes of action against them. They contend that motion sequence 005 is deficient on many levels, and that its largest problem is that Lifestyle makes several references to a "First Agreement" and a "Second Agreement," yet no such agreements executed by Pastrana or Maritime have been produced by Choi or Lifestyle. Thus, they assert that Lifestyle's motion is premised on agreements that do not exist, and of which there is no proof. They argue that Lifestyle cannot succeed on its breach of contract claim where there is no contract, that the claim against Pastrana for aiding and abetting a breach of fiduciary duty fails, and that judgment must be entered for Maritime on Lifestyle's unjust enrichment claim.

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The first, third, and fourth causes of action, brought as against Vidal alone, are not at issue in the instant motions.

Pastrana and Maritime assert that this case arises from repeated fraudulent conduct by Choi, acting in his personal capacity and in his capacity as Lifestyle's President and CEO. Pastrana and Maritime explain that, at all relevant times, Choi had complete control over Lifestyle's financial statements, bank accounts and operations. They assert that, between September 2006 and February 2007, Choi fraudulently sought to induce Vidal and Pastrana to invest hundreds of thousands of dollars in Lifestyle by misrepresenting its financial condition, including its assets, liabilities, memberships, and projected revenue and profit.

According to Pastrana, he and Vidal lost their \$600,00 investment in Lifestyle due to Choi's misrepresentations, Choi duped them into buying a 43-foot yacht, and they are now left with a \$1,000,000 note which they are liable to pay and a boat they never wanted to own. Pastrana and Maritime assert that Choi filed the instant frivolous action claiming that Lifestyle has a right to the 43-Foot Yacht, as well as damages. They note that Choi and Lifestyle make these claims although they never paid any money for the boat or held title to it.

In their reply, for the first time, Lifestyle and Choi assert that the First Agreement and Second Agreement have not been produced because both were oral agreements, the existence of which is indicated by ample evidence.

In motion sequence 005, Lifestyle and Choi also argue that all six counterclaims brought against them should be dismissed. The first counterclaim, brought by Pastrana and Maritime against Lifestyle, seeks a declaratory judgment that Maritime owns full and clear title to the 43-Foot Yacht. The second counterclaim, brought by Pastrana and Maritime against Lifestyle and Choi, alleges fraudulent inducement of purchase and

financing of the 43-Foot Yacht. The third through sixth counterclaims, all brought by Pastrana against Lifestyle and Choi, allege, respectively: breach of oral escrow agreement, unjust enrichment, money had and received, and fraudulent inducement of investment. Pastrana and Maritime note that, if the court dismisses Lifestyle's claims against them, they will offer to dismiss their counterclaims without prejudice, provided that Lifestyle does not appeal the dismissal of its claims.

The two instant motions seek summary judgment. Under CPLR 3212, a party moving for summary judgment has the burden of making a prima facie showing of entitlement to judgment as a matter of law, providing sufficient evidence to demonstrate the absence of any material issues of fact. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Once this prima facie showing has been made, in order to defeat a motion for summary judgment, the party opposing the motion must set forth the existence of a factual issue requiring a trial of the action. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).

A review of the facts as alleged by the opposing sides to the instant action makes it clear that much of what transpired and what was agreed to among the parties is disputed. There are issues of fact as to the three causes of action, the second, fifth, and sixth, brought by Lifestyle against Pastrana and Maritime. Thus, that part of motion sequence 005 that seeks summary judgment in Lifestyle's favor on those claims is denied. Motion sequence 006, in which Pastrana and Maritime seek dismissal of those three claims, is similarly denied.

As to that part of motion sequence 005 seeking dismissal of the counterclaims, Lifestyle and Choi have not met their burden of establishing that the first counterclaim,

seeking a declaratory judgment as to Maritime's ownership of the 43-Foot Yacht, should be dismissed. Also, there are issues of fact as to the second and sixth counterclaims, both of which sound in fraud. Thus, that part of motion sequence 005 seeking dismissal of the first, second, and sixth counterclaims is denied.

The remaining counterclaims, the third, fourth, and fifth, however, are all based on an alleged escrow agreement that Pastrana entered into with Lifestyle and Choi. Pastrana has not offered any evidence of the existence of such an agreement. In his August 24, 2010 deposition, when asked about the purported escrow agreement, Pastrana testified that he had no knowledge of any such agreement. Thus, the third, fourth, and fifth counterclaims are dismissed, because Lifestyle and Choi submitted evidence supporting their contention that the \$200,000 payment from Pastrana to Lifestyle was not intended to be held in escrow, and Pastrana has offered no evidence to the contrary.

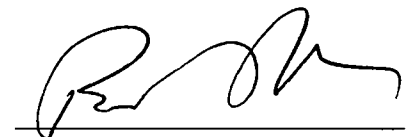
Accordingly, it is

ORDERED that motion sequence 005 is granted in part, to the extent that the third, fourth, and fifth counterclaims are dismissed, and the motion is otherwise denied.; and it is further

ORDERED that motion sequence 006 is denied.

DATED: 2/17/2012

ENTER:



J.S.C.

HON. BERNARD J. FRIED