SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

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ANTHONY KIM d/b/a KIM'S FISH — Index No.: 16631/2012

Plaintiff, — Motion Date: 12/17/12

- against - — Motion No.: 55

Motion Seq.: 1

ARHEESU RESTAURANT, INC. d/b/a KOREANA RESTAURANT & BAR, SUNNY CHIU, JENNIFER CHIU and HAN SIK SHIN a/k/a HAN S. SHIN,

Defendants.

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The following papers numbered 1 to 16 were read on defendants' motion for an order pursuant to CPLR 3211(a)(1)(a), 3211(a)(5) and 3211(a)(7) dismissing the plaintiff's complaint for failure to state a cause of action:

Papers Numbered

Order to Show Cause-Affidavits-Memo Of Law.....1 - 8
Affirmation in Opposition.....9 - 12
Reply Affirmation.....13 - 16

This is an action commenced by the plaintiff on August 9, 2012 for breach of contract and for recission of contract on the ground of economic duress. The complaint also asserts causes of action for account stated, for unjust enrichment and to pierce the corporate veil.

Plaintiff Anthony Kim is the owner of Kim's Fish, a wholesale suppplier of fish and related food to the restaurant

industry. One of the plaintiff's client's was the defendant, Koreana Restaurant, allegedly owned by defendants Sunny Chiu, Jennifer Chiu, and Han Sik Shin. Plaintiff alleges that from January 31, 2008 through June 15, 2012, plaintiff sold and delivered goods to the defendant. Plaintiff claims that as of June 15, 2012 a total balance of $50,158.78 remained due and owing to the plaintiff by defendant Koreana.

Plaintiff contends that it was informed on June 25, 2012 that defendants would be closing their restaurant business. As a result, plaintiff demanded that defendant pay off the remaining balance. The verified complaint asserts that instead of paying off the entire balance, "defendants Sunny Chiu and Han Sik Shin threatened that they would breach the contract by withholding any payments toward the remaining balance unless plaintiff agreed to a reduced settlement amount of $20,000." The complaint also states that "defendants threatened that should plaintiff not agree to their settlement amount, they would deplete any remaining assets of the corporation and dissolve Koreana, rendering any legal collection proceedings through a court issued judgment fruitless and inadequate."

In plaintiff's first cause of action for breach of contract plaintiff alleges that "as a result of the defendant's threats and under economic duress from defendants' wrongful coercion plaintiff acquiesced and accepted the amount of $20,000. In its second cause of action to rescind, the plaintiff states that it agreed to accept $20,000 as a settlement under circumstances constituting economic duress or business compulsion. The complaint states that the plaintiff was forced and coerced into entering into the agreement by means of a wrongful threat precluding the exercise of its free will. In its third and fourth causes of action plaintiff alleges unjust enrichment by accepting goods from the plaintiff and not fully paying for same and seeks an account stated in the amount of $30,158.78, the amount remaining for goods sold to the defendants after deducting the amount of $20,000 which was paid and accepted by the plaintiff. The fourth, fifth, and sixth causes of action seek to pierce the corporate veil and to hold the individual defendants personally liable for the balance owed on the ground that said defendants treated the corporate defendant as their alter egos commingling the assets of the corporation with their personal assets and then sold the inventory equipment and assets of the corporation and converted the monies from these transactions to their own use.

Defendant now moves pursuant to CPLR 3211(a)(1), 3211(a)5 and 321(a)(7) to dismiss the complaint on the ground that this action fails to state a cause of action and may not be maintained

because by written agreement dated July 23, 2012, the plaintiff and defendants settled all claims by plaintiff against the defendants. Defendants contend that they performed their end of the bargain and plaintiff received and accepted the final payment of $20,000. In support of the motion the defendants submit a copy of the settlement agreement which states that, "all unsettling balances shall be paid off by this aforementioned final payment." Counsel for the defendants, Matthew W. Woodruff, Esq., contends that defendants are moving to dismiss based upon case law which has held that a mere threat to breach a contract or to deplete the assets of a corporation or to dissolve the corporation does not constitute economic duress or coercion especially where a plaintiff has an adequate remedy at law such as the instant action for breach of contract (citing Austin Instrument, Inc. v. Loral Corp., 29 NY2d 124 [1971]). Counsel claims, therefore, that as the plaintiff has failed to assert sufficient legal grounds for rescinding or nullifying the settlement agreement, plaintiff's claims are barred by the defenses of payment and release and must be dismissed.

In opposition, Anthony Kim, submits an affidavit stating that in 2008 he entered into a contract with Koreana to sell and deliver fish products to the restaurant. He states that over the course of their business dealings Koreana began to accrue a high balance but as they were making payments on the account he continued to conduct business with them. He states that on June 25, 2012 he was informed by defendants that they would be closing their business and he thereupon demanded the remaining balance of $50,158.78. He states that despite his demands defendant refused to make any additional payments towards its account balance, "instead, defendants Sunny Chiu and Han Sik Shin threatened to breach the contract by withholding any payments toward the remaining balance unless I agreed to a reduced settlement amount of $20,000." He states that, "defendants further threatened that should I not agree to their settlement amount, they would deplete any remaining assets of the corporation and dissolve Koreana, rendering any legal collection proceedings through a Court issued judgment fruitless and inadequate." Therefore, plaintiff states that, "as a result and under economic duress from defendants' wrongful coercion, I acquiesced and accepted the amount of $20,000." Plaintiff states that he therefore seeks to rescind the agreement and to obtain a judgment for the remaining balance due of $30,158.78.

Counsel for plaintiff, E. Peter Shin, Esq., asserts that the complaint does not fail to state a cause of action for economic duress as the complaint sufficiently sets forth that the defendants actions induced the making of the settlement

agreement, that their actions constituted a wrongful and improper threat which precluded the exercise of plaintiff's free will, and that their actions left plaintiff with no reasonable alternative but to accept the defendants' terms (citing Playboy Enters. Intl v. On Line Entm't, Inc., 2004 U.S. Dist. LEXIS 5145 [Eastern Dist. NY 2004]). Counsel states that a contract is voidable on the ground of duress when it is established that a party making the claim was forced to agree to it by means of a wrongful threat precluding the exercise of free will, including the use of wrongful economic compulsion. Counsel asserts that the defendants' threat to deplete their corporate assets forced plaintiff to yield to defendants' demands which in other circumstances it might otherwise have rejected. He states that plaintiff believed that he had no reasonable alternative that would have been adequate to compensate him for the outstanding balance.

On a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action, 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 (Greer v National Grid, 89 AD3d 1059 [2d Dept. 2011]; also see Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314 [2002]; Leon v Martinez, 84 NY2d 83[1994]; Prestige Caterers, Inc. v Siegel, 88 AD3d 679[2d Dept. 2011]; Peery v United Capital Corp., 84 AD3d 1201 [2011]; Sokol v Leader, 74 AD3d 1180 [2d Dept. 2010]).

A complaint must allege the material elements of the cause of action (see Kohler v Ford Motor Company, Inc., 93 AD2d 205 [3d Dept. 1983]; Lewis v Village of Deposit, 40 AD2d 730 [1972]). Generally, the test of the sufficiency of the complaint is whether it gives sufficient notice of the transaction, occurrences, or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from its averments (see JP Morgan Chase v J.H. Elec. of New York, Inc., 69 AD3d 802[2d Dept. 2010]; Moore v Johnson, 147 AD2d 621 [1989]). However, a court may consider evidentiary material submitted by a defendant in support of a motion to dismiss a complaint pursuant to CPLR 3211(a)(7) (see CPLR 3211[c]; Sokol v Leader, 74 AD3d 1180 []). When evidentiary material is considered" on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the criterion is whether the plaintiff has a cause of action, not whether he or she has stated one (see Basile v Wiggs, 98 AD3d 640 [2d Dept. 2012]).

"Settlement agreements are judicially favored and may not be lightly set aside, and plaintiff's allegation that the settlement agreement was procured by duress is unsupported by allegations indicating that defendant's challenged conduct constituted a wrongful threat that effectively precluded plaintiff's ability to exercise its free will" (Philips S. Beach, LLC v ZC Specialty Ins. Co., 55 AD3d 493 [1st Dept. 1978]). Here, it is clear that the parties came to an agreement regarding the unpaid balance and the plaintiff ratified the agreement by accepting $20,000, the sum of money agreed upon to settle the account.

The Court of Appeals held in Austin Instrument v Loral Corp., 29 NY2d 124 [1971], "a mere threat by one party to a contract to breach it by not delivering required items, indeed financial or business pressure of all kinds, even if exerted in the context of unequal bargaining power, does not constitute economic duress. It must also appear that the threatened party could not obtain the goods from another source of supply and that the ordinary remedy of an action for breach of contract would not be adequate." Here, this Court does not find that the defendants' alleged threat to go out of business, which they are legally entitled to do, is not sufficient to show that the plaintiff was compelled to agree to the terms of the agreement by means of a wrongful threat which precluded the exercise of his free will (see Muller Constr. Co. v New York Tel. Co., 40 NY2d 955 [ ]; Sitar v. Sitar, 61 A.D.3d 739 [2d Dept. 2009]; Walbern Press v C.V. Communications, 212 AD2d 460 [ ]). A threat to breach an enforceable contract can constitute duress only if the breach will cause irreparable harm to the threatened party and there are no adequate remedies at law. Dollar Dry Dock Sav. Bank v. Hudson St. Dev. Assocs., 1995 U.S. Dist. LEXIS 9672 (So.Dist NY 1995]; Sosnoff v Carter, 165 AD2d 486, 491, 568 N.Y.S.2d 43 (1st Dept 1991). Here, the defendants informed the plaintiff prior to the negotiations that they were going out of business and did not use that information as a threat to coerce a settlement. Should the plaintiff not have been willing to accept $20,000 to settle the account he had the choice to reject the offer and bring a cause of action for a money judgment for breach of contract as he has done in the instant matter. There was no showing that he would have been irreparably harmed had he not accepted the defendants' offer to settle.

Accordingly, this court finds that the documentary evidence submitted including Plaintiff's affidavit stating that the parties came to a settlement and that he accepted the terms of the settlement based only upon the defendants' alleged threat to go out of business and breach the contract if he did not accept the settlement does not establish economic duress. Further, the

defendants have established the defense of settlement and payment as a matter of law and therefore, it is hereby

ORDERED that the complaint, which alleges breach of contract, account stated, recision of contract, unjust enrichment and piercing the corporate veil must be dismissed in its entirety pursuant to CPLR 3211(a)(1), CPLR 3211(a)(5) and 3211(a)(7).

Dated: February 11, 2013
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C.